LEGAL OPTIONS TO SOLVING RESTAURANT STAFFING SHORTAGES

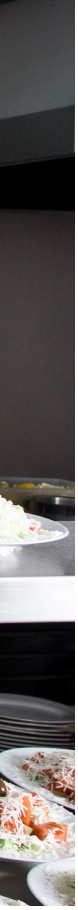
BY RAJAN O. DHUNGANA, ESQ.

Las Vegas' culinary scene is one of the best in the country, with many of the world's top chefs owning restaurants on the Las Vegas Strip and surrounding areas. As of June 4, 2021, Las Vegas is now at 100 percent capacity. Despite the city's reopening, there has been a shortage of workers, especially in the service industry where immigrant workers continue to be more likely than native-born workers to be employed.

The restaurant industry is undoubtedly one of the main drivers of Nevada's economy. In 2018, Nevada had approximately 5,980 eating and drinking establishments.[1] That same year, the restaurant and food industry had 219,200 jobs, or 15 percent of the state's employment. *Id.* According to the National Restaurant Association and the Bureau of Labor Statistics, every dollar spent in the table-service segment contributes $1.70 to the state economy, and every dollar spent in the limited-service segment contributes $1.48 to the state economy. *Id.* In 2017, Nevada's service industry was 40.6 percent foreign-born (or "immigrant"), compared to just 24.6 percent foreign-born nationwide.[2]

Unfortunately, restaurant jobs remain below pre-pandemic levels in nearly every state, and employers are facing a major labor shortage. Similar to our agriculture, construction, and factory industries, our restaurants depend on immigrant employees. To no surprise, the economic downturn resulting from the pandemic disproportionately affected the foreign-born labor force.[3] In 2020, the labor force declined by 2.8 million, with the foreign-born labor force accounting for 1.1 million of this decline, or 38.4 percent. *Id.*

Many factors contribute to this shortage. In part, the decline of eligible immigrant workers is because of pandemic-related border closures worldwide. Specifically, in the U.S., this stopped the flow of migrants seeking temporary or seasonal work. Relatedly, the decline is attributed to the massive pandemic-related backlog of work authorization applications (Form I-765) at the U.S. Citizenship & Immigration



Services (USCIS), the government agency of the U.S. Department of Homeland Security that oversees the country's naturalization and immigration system.

In addition, a final rule under the Trump Administration disproportionately affected and is affecting recent asylum seekers with pending applications.[4] The rule nearly doubled the waiting period for asylum seekers' eligibility for work authorization, requiring them to wait one year from the time they file their asylum application before they can apply for an initial work authorization permit. Among other hurdles, the rule also removed a provision that required USCIS to adjudicate work applications within 30 days from receipt of an application.

Currently, the only way an asylee can bypass these extreme rules is to become a member of Casa de Maryland (CASA) or Asylum Seeker Advocacy Project (ASAP). CASA, ASAP, and other advocacy organizations challenged the final rule in a federal court. On September 11, 2020, a federal judge preliminary enjoined enforcement of the regulations to CASA and ASAP members. Therefore, those asylees who are not members of CASA or ASAP must wait an entire year before they can enter the labor force.

However, there is another option to address the restaurant shortage, the O-1 nonimmigrant visa. The O-1 visa is available to foreign nationals who work in the culinary industry. Namely, established executive chefs, pastry chefs, and maître d's. Generally, the O-1 nonimmigrant visa is for individuals who possess extraordinary ability in the sciences, arts, education, business, or athletics, or who have demonstrated extraordinary achievement in the motion picture or television industry. The O-1B is a common choice for chefs because the law includes culinary arts in its definition of "arts."[5]

As restaurants struggle to find employees to meet culinary consumers' post-pandemic demands, the O-1B visa is a good option to bring in foreign talent to fill the void. Once restaurants are operating at full capacity again, Nevada's economy can begin to recover.

An O-1 visa is usually filed by the culinary professional's prospective U.S. employer (Petitioner).[6] As such, a foreign culinary professional (Beneficiary) may not petition for themselves. The forms to be filed with USCIS include Form I-129 and an O Supplement.

The O-1 visa usually lasts three years; however, applicants can keep applying for one-year extensions with no time limit. Notably, O-1 visas do not have an annual quota or require a college degree – or equivalent of work experience – like the more traditional H1-B visa that allows employers to temporarily employ foreign workers in specialty occupations, usually occupations that require a college degree. Many chefs may be self-trained or learned their trade by apprenticing with other top chefs and would lack the formal degrees required for other employment-based visa categories.

There are multiple ways that a culinary professional can demonstrate "extraordinary ability" for the purpose of an O-1B visa. The first, and probably hardest, way a culinary professional can meet the O-1B requirements is by providing evidence that they have "been nominated for, or have been the recipient of, significant national or international awards or prizes in the particular field."[7] For instance, a culinary professional who has been a team member at a Michelin Award-winning establishment would probably meet this definition.

The second, and most common, way a culinary professional can meet the O-1B requirements is by demonstrating, with documentary evidence, three of the six evidentiary criteria described in 8 CFR § 214.2(o)(3)(iv)(B). They include (1) lead in distinguished productions or events; (2) recognition for achievements; (3) lead for distinguished organization and establishments; (4) record of major commercial or critically acclaimed successes; (5) significant recognition for achievements from experts; and (6) high salary or substantial remuneration.

The third, and least common, way to qualify for an O visa is if the criteria does "not readily apply to the beneficiary's occupation" the petitioner may submit comparable evidence in order to establish the beneficiary's eligibility."[8]

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ENDNOTES:

1. https://www.restaurant.org/downloads/pdfs/state-statistics/nevada.pdf
2. https://www.livestories.com/statistics/immigration-citizenship/nevada/immigrant-employment
3. But few businesses have felt the impact of the government notices more than restaurants, which have long relied on undocumented labor and struggled with high turnover.
4. https://www.federalregister.gov/documents/2020/06/26/2020-13544/asylum-application-interview-and-employment-authorization-for-applicants
5. 8 CFR § 214.2(o)(3)(ii).
6. 8 CFR 214.2(o)(2)(i).
7. 8 CFR 214.2(o)(3)(iv).
8. 8 CFR § 214.2 (o)(3)(iii)(C).

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