U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

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DATE: NOV 2 7 2012 OFFICE: CALFORNIA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(b)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Michael T. Kelley
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition and the Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is again before the AAO on a motion to reconsider. The motion will be dismissed. The petition is denied, although the matter is moot due to the passage of time.

On the Form I-129 visa petition, the petitioner describes itself as a hotel and resort established in 2004. In order to employ the beneficiary in what it designates as a chef position from October 1, 2011 until September 30, 2012, the petitioner seeks to classify him as a temporary nonagricultural worker pursuant to section 101(a)(15)(H)(ii)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(ii)(b).

As the relevant facts and procedural history of this case were set forth adequately in the AAO's prior decision, the AAO will here only repeat such facts and procedural history as necessary.

The director denied the petition on March 19, 2012, on the basis of her determination that the petitioner had failed to satisfy either alternative criterion set forth at 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*) for establishing that its need for the services of the beneficiary is temporary and based upon a one-time occurrence.[1] The director found further that the petitioner had also failed to establish that its temporary need for the services of the beneficiary "will end in the near, definable future," as required by 8 C.F.R. § 214.2(h)(6)(ii)(B). The AAO dismissed the petitioner's subsequent appeal on June 29, 2012.

The petitioner, through counsel, filed the instant motion to reconsider on July 30, 2012. On motion, counsel submits a brief, seven-sentence argument made on the Form I-290B. Counsel states that the petitioner established that it has never before employed a Korean chef and, with regard to the regulatory requirement for the petitioner to establish that its temporary need for the beneficiary's services will end in the near, definable future, counsel states that "it is difficult to establish an end point for the temporary need for a Chef who is highly skilled[.]" Counsel notes further, as he did on appeal, that the regulation allows for a period of approval of up to three years, and contends that because the petitioner only desires the services of the beneficiary through March 2013,[2] the petitioner's "temporary need for the specialty Chef is for a short duration of [time]."

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[1] To establish that the nature of its temporary need is a one-time occurrence pursuant to 8 C.F.R. § 214.2(h)(6)(ii)(B)(*1*), the petitioner must demonstrate either: (1) that it has not employed workers to perform the services or labor in the past and that it will not need workers to perform the services or labor in the future; or (2) that it has an employment situation that is otherwise permanent, but a temporary event of short duration has created the need for a temporary worker.

[2] Counsel appears to be requesting that the petition be approved through March 2013. However, it is noted that the Guam Department of Labor issued a temporary labor certification to the petitioner covering the period October 1, 2011 through September 30, 2012, and the petitioner requested the same period of approved employment on the Form I-129. As such, even if it were found that the petitioner had overcome the grounds of the AAO's June 29, 2012 decision (which it has not), the petition could still not be approved, as the period of requested employment has passed. U.S. Citizenship and Immigration Services (USCIS) can only grant approval for the period of time granted in the temporary labor certification. It is for this reason that the AAO noted the introductory paragraph of this decision that "the matter is moot due to the passage of time."

Counsel's submission does not meet the requirements of a motion to reconsider, and the regulation at 8 C.F.R. § 103.5(a)(4) mandates the dismissal of a motion that does not meet the applicable requirements.

A motion to reconsider must state the reasons for reconsideration and be supported by citations to pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or U.S. Citizenship and Immigration Services (USCIS) policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. *See* 8 C.F.R. § 103.5(a)(3) (requirements for a motion to reconsider) and the instructions for motions to reconsider at Part 3 of the Form I-290B.[3] Also, the regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that motions be "[a]ccompanied by a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding."

Although counsel argues that the decision to deny the petition was incorrect, he did not support his assertions with citations to any pertinent statutes, regulations, and/or precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. Nor does counsel's submission contain the statement mandated by 8 C.F.R. § 103.5(a)(1)(iii)(C) with regard to whether the unfavorable decision has been, or is, the subject of any judicial proceeding. Counsel's submission, therefore, does not meet the requirements of a motion to reconsider as set forth at 8 C.F.R. §§ 103.5(a)(3), 103.5(a)(1)(iii)(C), and it must be dismissed pursuant to 8 C.F.R. § 103.5(a)(4).[4]

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[3] The regulation at 8 C.F.R. § 103.5(a)(3) states the following:

> *Requirements for motion to reconsider.* A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The regulation at 8 C.F.R. § 103.2(a)(1) states, in pertinent part, the following:

> [E]very application, petition, appeal, motion, request, or other document submitted on the form prescribed by this chapter shall be executed and filed in accordance with the instructions on the form, such instructions . . . being hereby incorporated into the particular section of the regulations requiring its submission.

At Page 2, Part 3, the Form I-290B states the following with regard to motions for reconsideration:

> **Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions.

[4] It must be noted that even if counsel's submission met the requirements of a motion to reconsider contained at 8 C.F.R. §§ 103.5(a)(3) and 103.5(a)(1)(iii)(C), and the AAO granted counsel's motion to reconsider, the AAO would still affirm its June 29, 2012 decision because the arguments advanced by counsel on motion establish no error in that decision. The arguments that counsel makes on motion are the ones he made on

It should be noted for the record that, unless U.S. Citizenship and Immigration Services directs otherwise, the filing of a motion to reopen does not stay the execution of any decision in a case or extend a previously set departure date. 8 C.F.R. § 103.5(a)(1)(iv).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. As such, the petitioner's motion will be dismissed, the proceedings will not be reconsidered, and the prior decisions of the director and the AAO will not be disturbed.

ORDER: The motion to reconsider is dismissed. The petition is denied.

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appeal, which the AAO addressed fully in its June 29, 2012 decision, and the AAO finds them no more persuasive on motion than when they were made on appeal.