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

(b)(6)

[redacted]

DATE: MAR 2 7 2014 OFFICE: VERMONT SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Michael T. Kelly
for Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The director's decision will be withdrawn in part and affirmed in part. The appeal will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a restaurant and catering business established in 2010. In order to employ the beneficiary in what it designates as a culinary apprentice position for a period of 21 months, the petitioner seeks to classify her as a nonimmigrant alien trainee pursuant to section 101(a)(15)(H)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(iii).

The director denied the petition, concluding that the evidence of record failed to: (1) contain a statement describing the type of training and supervision to be given, and the structure of the training program; (2) establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; (3) demonstrate that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; (4) establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (5) demonstrate that the beneficiary will not engage in productive employment beyond that incidental and necessary to the training; (6) establish that the training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; (7) demonstrate that the proposed training is not available in the alien's own country; and (8) establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training.

The record of proceeding before the AAO contains the following: (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the director's decision denying the petition; and (5) the Form I-290B and supporting documentation.

As will be discussed below, the AAO finds that the evidence of record overcomes the director's findings that the evidence of record fails to: (1) demonstrate that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; (2) establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (3) demonstrate that the beneficiary will not engage in productive employment beyond that incidental and necessary to the training; (4) establish that the training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; and (5) establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training. Accordingly, the AAO withdraws those particular findings.

However, the evidence of record does not overcome the director's remaining three grounds for denying the petition, namely, her findings that the evidence of record fails to: (1) contain a statement describing the type of training and supervision to be given, and the structure of the training program; (2) establish that the proposed training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and (3) demonstrate that the proposed training is not

available in the beneficiary's own country. Consequently, the appeal will be dismissed, and the petition will be denied.

I. Standard of Review

In the exercise of its administrative review in this matter, as in all matters that come within its purview, the AAO follows the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies. In pertinent part, that decision states the following:

> Except where a different standard is specified by law, a petitioner or applicant in administrative immigration proceedings must prove by a preponderance of evidence that he or she is eligible for the benefit sought.
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> The "preponderance of the evidence" of "truth" is made based on the factual circumstances of each individual case.
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> * * *
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> Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.
>
> Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "more likely than not" or "probably" true, the applicant or petitioner has satisfied the standard of proof. *See INS v. Cardoza-Foncesca*, 480 U.S. 421, 431 (1987) (discussing "more likely than not" as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Id.

The AAO conducts its review of service center decisions on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). In doing so, the AAO applies the preponderance of the evidence standard as outlined in *Matter of Chawathe*. Upon its review of the present matter pursuant to that standard, however, the AAO finds that the evidence in the record of proceeding does not support counsel's contentions that the evidence of record requires that the petition at issue be approved. Applying the preponderance of the evidence standard as stated in *Matter of Chawathe*, the AAO

finds that the director's determination that the petitioner did not establish its eligibility for the benefit sought was correct. Upon its review of the entire record of proceeding, and with close attention and due regard to all of the evidence submitted in support of this petition, both separately and in the aggregate, the AAO finds that the evidence of record does not establish that the petitioner's claim that the proposed training program meets the requirements of the H-3 program is "more likely than not" or "probably" true. In other words, as the evidentiary analysis of this decision will reflect, the petitioner has not submitted relevant, probative, and credible evidence that leads the AAO to believe that the petitioner's claim is "more likely than not" or "probably" true.

II. Law

Section 101(a)(15)(H)(iii) of the Act, 8 U.S.C. § 1101(a)(15)(H)(iii), provides classification for an alien having a residence in a foreign country, which he or she has no intention of abandoning, who is coming temporarily to the United States as a trainee, other than to receive graduate medical education or training, in a training program that is not designed primarily to provide productive employment.

The regulation at 8 C.F.R. § 214.2(h)(1)(ii)(E) states, in pertinent part, the following:

> An H-3 classification applies to an alien who is coming temporarily to the United States:
>
> *(1)* As a trainee, other than to receive graduate medical education or training, or training provided primarily at or by an academic or vocational institution. . . .

The regulation at 8 C.F.R. § 214.2(h)(7) states, in pertinent part, the following:

> (i) *Alien trainee.* The H-3 trainee is a nonimmigrant who seeks to enter the United States at the invitation of an organization or individual for the purpose of receiving training in any field of endeavor, such as agriculture, commerce, communications, finance, government, transportation, or the professions, as well as training in a purely industrial establishment. This category shall not apply to physicians, who are statutorily ineligible to use H-3 classification in order to receive any type of graduate medical education or training.
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> * * *
>
> (ii) *Evidence required for petition involving alien trainee—*
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> (A) *Conditions.* The petitioner is required to demonstrate that:
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> *(1)* The proposed training is not available in the alien's own country;

(2) The beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed;

(3) The beneficiary will not engage in productive employment unless such employment is incidental and necessary to the training; and

(4) The training will benefit the beneficiary in pursuing a career outside the United States.

(B) *Description of training program.* Each petition for a trainee must include a statement which:

(1) Describes the type of training and supervision to be given, and the structure of the training program;

(2) Sets forth the proportion of time that will be devoted to productive employment;

(3) Shows the number of hours that will be spent, respectively, in classroom instruction and in on-the-job training;

(4) Describes the career abroad for which the training will prepare the alien;

(5) Indicates the reasons why such training cannot be obtained in the alien's country and why it is necessary for the alien to be trained in the United States; and

(6) Indicates the source of any remuneration received by the trainee and any benefit, which will accrue to the petitioner for providing the training.

(iii) *Restrictions on training program for alien trainee.* A training program may not be approved which:

(A) Deals in generalities with no fixed schedule, objectives, or means of evaluation;

(B) Is incompatible with the nature of the petitioner's business or enterprise;

(C) Is on behalf of a beneficiary who already possesses substantial training and expertise in the proposed field of training;

(D) Is in a field in which it is unlikely that the knowledge or skill will be used outside the United States;

(E) Will result in productive employment beyond that which is incidental and necessary to the training;

(F) Is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States;

(G) Does not establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified; or

(H) Is designed to extend the total allowable period of practical training previously authorized a nonimmigrant student.

III. The Petitioner

In the undated training program outline it submitted when it filed the petition, the petitioner described itself as follows:

> [The petitioner] was founded and created by [redacted] in October of 2010. [redacted] and her "tribe" create a multiple-course menu paired with wines, to be enjoyed privately by up to 24 guests, Friday through Wednesday or by individual reservations on Thursdays – and as of Mid-February 2013, on Saturdays. The concept of constituting itself as an "atelier" rather than a restaurant is that it is a culinary workshop involved in [the] chef's table dinners. An "atelier" is a workshop, or the equivalent of a studio – where work and practice take place to create a body of work and deepening of understanding of a technique, medium and craft – in the case of [the petitioner], the work is in the kitchen.
>
> With the idea of having a more intimate dining experience with more balance and attention to be given to the meal [sic]. Vitally important to this concept is the idea of promoting mindful living not only through good food, good wine and good company but also through the running and maintenance of the restaurant. Mindful living means being present in the moment, when your attention and energy [are] focused and geared to the task at hand, allowing for careful and respectful practice and execution - or optimal engagement with the people around you. [redacted] food is well known for breaking the bounds of geography and ethnicity while keeping true to traditional techniques and local and seasonal ingredients. [redacted] concept is unique because it is known to transcend nationalism and ethnicity, is balanced and elegant, and goes against the trend to over-indulge. . . .

In the undated letter submitted in response to the director's RFE, the petitioner further described itself as follows:

> [The petitioner] is unlike any other restaurant or business in the food service industry. Mainstream restaurants seat dozens or hundreds of small parties in private tables for separate dining experiences, at any time during a prescribed "dinner service" period. In contrast, [the petitioner] has one communal table and one seating only; guests secure invitations to [the petitioner] only two nights per week: Thursdays or Saturdays. Instead of mainstream restaurants, where guests choose one dish off of a menu that is devoted to one single type of cuisine, at [the petitioner], a maximum of 24 guests, many of whom are strangers, enjoy a communal dining experience with a 7-course set menu, complete with wine pairings, which together gives guests a completely unique experience – a culinary journey through wine, cuisine, and the pleasures of good company.
>
> When guests first arrive at [the petitioner], they enter into a reception of sparkling wines and hors d'oeuvres and are introduced to one another; most of them are perfect strangers. During the reception, guests check their cell phones and web-devices at the door, so they may truly enjoy the moment and savor one another's company. . . .

IV. The Proposed Training Program

In the undated letter submitted in response to the director's RFE, the petitioner described the training program as follows:

> Because [the petitioner's] vision and mission are so unique, we aim to provide our trainee with the one-of-a-kind education that she will be unable to experience anywhere else in the world. The [petitioner's] tribe has banded together to create an extensive and exhausting training on each and every aspect of operating a culinary atelier like [the petitioner], from development and maintenance of the physical studio space, to constantly innovating new and exciting culinary concepts, to providing guests with the highest quality product, seasonally sourced from local growers and farmers with honest and reputable business practices. For our trainee, as for our guests, [the petitioner] is a classroom – it is an education not only in cuisine and wine, but in returning to a simpler time when we could focus on one-another and on beauty in the present moment.

The petitioner explained that that training program would consist of five rotations: (1) Beginning with the Basics: Sanitation and Service; (2) Sourcing/Purveying/Foraging and Cost Control; (3) In the Kitchen with ; (4) The Wonders of Wine; and (5) Marketing, Public Relations, and Social Media.

The petitioner stated that the first rotation, "Beginning with the Basics: Sanitation and Service," would last for three months. According to the petitioner, during this rotation the beneficiary would "study the multi-faceted and complicated process of preparing a culinary atelier for proper service to guests." The petitioner claimed that during this rotation the beneficiary would spend 75 percent of her time in classroom instruction and 25 percent of her time in supervised on-the-job training.

The petitioner stated that the second rotation, "Sourcing/Purveying/Foraging and Cost Control," would last "3-4 months." According to the petitioner, during this rotation the beneficiary would "accompany and her staff to visit and interact with our local food producers." The petitioner claimed that during this rotation the beneficiary would spend all of her time in classroom instruction.

The petitioner stated that the third rotation, "In the Kitchen with ' would last for ten months. According to the petitioner, during this rotation the beneficiary would "gain insight into the unique culinary style of ' through hands-on experience and observation. The petitioner claimed that during this rotation the beneficiary would spend 75 percent of her time in classroom instruction and 25 percent of her time in supervised on-the-job training.

The petitioner stated that the fourth rotation, "The Wonders of Wine," would last for three months. According to the petitioner, during this rotation the beneficiary would "immerse herself in the application of wine and food pairings in practice." The petitioner claimed that during this rotation the beneficiary would spend 88 percent of her time in classroom instruction and 12 percent of her time in supervised on-the-job training.

Finally, the petitioner stated that the fifth rotation, "Marketing, Public Relations, and Social Media," would also last for three months. According to the petitioner, during this rotation the beneficiary would learn to develop and maintain the petitioner's brand and concept association via social media, social interaction, reporting, and hash-tag usage. The petitioner claimed that during this rotation the beneficiary would spend 88 percent of her time in classroom instruction and 12 percent of her time in supervised on-the-job training.

The petitioner also submitted a letter from In her April 20, 2013 letter, stated that she had coordinated with the petitioner to provide the beneficiary with classroom instruction "on cutting-edge developments in the field of culinary arts, specifically on the relationship between human health, social well-being, the diverse methods and practices of cooking, and the way we eat."

V. Statement Describing the Type of Training and Supervision to be Given, and the Structure of the Training Program; Generalities with No Fixed Schedule, Objectives, or Means of Evaluation

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) requires the petitioner to submit a statement describing the type of training and supervision to be given, and the structure of the training program, and 8 C.F.R. § 214.2(h)(7)(iii)(A) forbids approval of a training program which "[d]eals in generalities with no fixed schedule, objectives, or means of evaluation."

In making her determination that the petitioner had failed to establish eligibility under these criteria, the director referenced the "vague information provided in the training program," and found that the evidence of record did not establish the existence of "a well-established training program with your company." The AAO agrees with the director that the evidence of record satisfies neither 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) nor 8 C.F.R. § 214.2(h)(7)(iii)(A).

In reaching this conclusion, the AAO turns first to the petitioner's statements with regard to the length of the proposed training program. Both counsel and the petitioner claim that the training program would last a total of 21 months. However, the statements made by the petitioner in the training program outlines submitted when the petition was filed and again in response to the director's RFE conflict with those assertions.

As noted, the petitioner claims in those training-program outlines that the first rotation of the training program would last three months, that the second rotation would last three to four months, the third rotation would last ten months, the fourth would last three months, and the fifth would last three months. Thus, according to the petitioner, the training program would last a total of either 22 or 23 months, rather than 21 months as asserted elsewhere in the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* This inconsistency alone renders the petitioner's statement describing the structure of the training program deficient, and precludes approval of the petition pursuant to 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*). It also precludes approval of the petition pursuant to 8 C.F.R. § 214.2(h)(7)(iii)(A), as this inconsistency is not indicative of a training program with a fixed schedule.

The AAO also highlights the petitioner's statement that the second rotation of the training program would last "3-4 months." Similar to above, this uncertainly is not indicative of a training program with a fixed schedule, and 8 C.F.R. § 214.2(h)(7)(iii)(A) mandates denial of a petition in which the petitioner fails to establish that its proposed training has a fixed schedule.

Nor has the petitioner made clear the amount of time that the beneficiary would spend participating in courses offered by For example, the petitioner has not stated how many courses the beneficiary would take, how often she would take them, and where such coursework would fit into the framework set forth in the training program outlines it submitted. The evidence of record provides no indication as to the approximate percentage of time that the beneficiary will be participating in coursework. It is not clear how central of a role the training provided by the will be. For this additional reason, the petitioner's statement describing the structure of the training program is deficient, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) precludes approval of the petition. Such generality is also prohibited under 8 C.F.R. § 214.2(h)(7)(iii)(A).

Nor does the evidence of record clarify the beneficiary's reading materials. The AAO acknowledges counsel's statement that "[f]or each rotation, there is a list of required reading and/or viewing." However, the evidence of record of record does not support counsel's assertion. In the training program description, the petitioner provides a list of reading materials. However, the petitioner did not state that the beneficiary is required to read any of them. To the contrary, the petitioner entitled each list "Required readings may include (but are not limited to)," and did not list a single required reading material for the beneficiary. While a list of materials that the beneficiary

might read is relevant, it does not ultimately permit the AAO to gain an understanding of how the beneficiary will actually be spending her time while preparing for class or on-the-job training. The petitioner's statement describing the structure of the training program is therefore deficient, and 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*) precludes approval of the petition. Such generality is also prohibited under 8 C.F.R. § 214.2(h)(7)(iii)(A).

For all of these reasons, the statements of record setting forth the structure of the training program do not satisfy 8 C.F.R. § 214.2(h)(7)(ii)(B)(*1*), and the AAO agrees with the director's decision to deny the petition on that ground. For the reasons discussed above, the AAO also agrees with the director's determination that 8 C.F.R. § 214.2(h)(7)(iii)(A) mandates denial of this petition. Accordingly, the appeal will be dismissed and the petition denied on these bases.

VI. Unavailability of Similar Training in the Beneficiary's Own Country

The regulation at 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*) forbids approval of a petition in which the petitioner fails to establish that similar training is unavailable in the beneficiary's own country. The beneficiary of the instant petition is a citizen of Venezuela.

As discussed above, the evidence of record does not make clear the amount of time that the beneficiary would spend participating in courses offered by and her company, the . For example, the petitioner has not stated how many courses the beneficiary would take, how often she would take them, and where such coursework would fit into the framework set forth in the training program outlines it submitted. Nor does the evidence of record provide any indication as to the approximate percentage of time that the beneficiary will be participating in coursework. While the evidence of record regarding the unique nature of the petitioner's business model is acknowledged, these questions regarding the role of and the remain unanswered. Given that the record of proceeding contains no evidence regarding the availability of the coursework offered by the in Venezuela, the petitioner has not satisfied 8 C.F.R. § 214.2(h)(7)(ii)(A)(*1*). Accordingly, the appeal will be dismissed and the petition denied on this basis.

VII. Remaining Grounds for Denial

As indicated above, the AAO finds the evidence of record sufficient to: (1) demonstrate that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; (2) establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (3) demonstrate that the beneficiary will not engage in productive employment beyond that incidental and necessary to the training; (4) establish that the training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; and (5) establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training. The director's contrary determinations, therefore, are hereby withdrawn.

VIII. Conclusion and Order

The evidence of record overcomes the director's findings that the evidence of record fails to: (1) demonstrate that the beneficiary will not be placed in a position which is in the normal operation of the business and in which citizens and resident workers are regularly employed; (2) establish that the petitioner has the physical plant and sufficiently trained manpower to provide the training specified in the petition; (3) demonstrate that the beneficiary will not engage in productive employment beyond that incidental and necessary to the training; (4) establish that the training program is designed to recruit and train aliens for the ultimate staffing of domestic operations in the United States; and (5) establish that the beneficiary does not already possess substantial training and expertise in the proposed field of training. However, the evidence of record does not overcome the director's remaining grounds for denying the petition.

Consequently, the appeal will be dismissed and the petition will be denied.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.