

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

D5

DATE: DEC 13 2012

OFFICE: CALIFORNIA SERVICE CENTER FILE: [REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

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 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. Kelly
Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The service center director (the director) denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal and then affirmed its decision dismissing the appeal in response to two subsequent motions to reconsider. The matter is again before the AAO on a third motion to reconsider. The motion will be dismissed. The petition will be denied.

On the Form I-129 visa petition, the petitioner describes itself as a hotel franchise established in 2006. In order to employ the beneficiary in what it designates as a hotel franchisee trainee position for a period of 16 months,¹ the petitioner seeks to classify him as a nonimmigrant 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 applicable law, facts, and procedural history of this case were fully discussed in the AAO's prior decisions and it will only repeat certain law and facts here as necessary. The petitioner filed the instant petition on February 19, 2009 and the director denied it on June 5, 2009.² The AAO dismissed a subsequent appeal on June 30, 2010. In response to counsel's subsequent motion to reconsider, on September 22, 2011 the AAO affirmed its decision dismissing the appeal.

In response to a second motion to reconsider, on June 21, 2012 the AAO again affirmed its decision dismissing the appeal. In that decision the AAO found that the brief submitted by counsel did not support her argument that the petitioner had met its burden of proof by establishing its eligibility by a preponderance of the evidence.³ As the AAO explained, counsel did not elaborate upon her claim or otherwise specifically explain how the AAO erred in its application of the standard of proof. Counsel's simple assertion that the AAO had applied the standard of proof incorrectly was not sufficient; counsel is required to specifically explain *how* the AAO erred, as mere disagreement with a prior decision is not a sufficient basis upon which to satisfy the petitioner's burden. As such, counsel had failed to establish any error in the AAO's prior decisions, and did not establish the beneficiary's eligibility for nonimmigrant classification under section 101(a)(15)(H)(iii) of the Act.

¹ The AAO noted in each of its three prior decisions that although the petitioner claimed that the proposed training plan would last 16 months on the Form I-129, the supporting documentation stated that it would last for 14 months. On motion to reconsider the petitioner opts once more to leave this inconsistency unaddressed. 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). For this reason alone, the petition could not be approved, even if the petitioner had overcome the director's grounds for denying this petition (which it has not).

² The director denied the petition on the basis of her determination that the petitioner had failed to demonstrate: (1) that similar training is unavailable in the beneficiary's own country; (2) that the training program does not deal in generalities with no fixed schedule, objectives, or means of evaluation; and (3) that it has sufficiently trained manpower to provide the training specified in the petition.

³ In that brief counsel cited *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010), and stated correctly that the applicable standard of proof requires the petitioner to meet its burden by a "preponderance of the evidence."

Counsel filed the instant motion to reconsider on July 19, 2012. Counsel again cites *Matter of Chawathe*,⁴ and argues once again that the AAO incorrectly applied the applicable standard of proof in its prior decisions when it determined that the petitioner had failed to meet its burden of proof.

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.⁵ 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."

The scope of the AAO's review in the present matter is limited to the narrow issue of whether the petitioner has documented sufficient reasons, supported by pertinent precedent decisions, to warrant the reconsideration of the AAO's decision issued on June 21, 2012. Counsel has failed to document sufficient reason to warrant reconsideration of that decision. In that decision the AAO found that although counsel had cited a pertinent precedent decision, *Matter of Chawathe*, she had nonetheless

⁴ Counsel refers to *Matter of Chawathe* as a USCIS adopted decision and cites to it as such. While counsel is correct that *Matter of Chawathe* was made an adopted decision on January 11, 2006, it was designated as a precedent decision under 8 C.F.R. § 1003.1(i) on October 20, 2010. *Matter of Chawathe*, 25 I&N Dec. at 369. The AAO will therefore refer to and cite *Matter of Chawathe* as a precedent decision.

⁵ 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.

still failed to elaborate upon her claim or otherwise specifically explain how the AAO had erred in its application of the standard of proof set forth in that decision. The AAO found that, absent such elaboration, the mere claim of misapplication of the applicable standard of proof was not sufficient to warrant withdrawal of the decision denying the petition.⁶

As was the case with her previous motion to reconsider, counsel's arguments submitted on motion are overwhelmingly verbatim repetitions of the ones she made in support of her first and second motions to reconsider, which the AAO found unpersuasive. Because the AAO fully addressed those arguments in its prior decisions, they will not be addressed again. The only new arguments advanced by counsel in her most recent submission center on evidentiary matters (e.g., the AAO did not grant sufficient evidentiary weight to certain evidence). However, such evidentiary matters were not a part of the AAO's June 21, 2012 decision. As indicated, in that decision the AAO was addressing counsel's argument that the AAO had misapplied the applicable standard of proof in its September 22, 2011 decision. As counsel did not elaborate upon her argument or otherwise specifically explain how the AAO had erred in its September 22, 2011 application of the standard of proof, the AAO found that counsel had failed to establish any error in the AAO's September 22, 2011 decision. Counsel does not address this issue directly in the present matter. She does not argue that the AAO should have accepted unsupported arguments, let alone cite any pertinent statutes, regulations, and/or precedent decisions that would support such an argument. Instead, she simply restates her earlier arguments with regard to evidence that she believes was afforded inappropriate evidentiary weight, and was not addressed by the AAO in its June 21, 2012 decision.⁷ Accordingly, she fails to document sufficient reasons, supported by pertinent precedent decisions, to warrant the reconsideration of the AAO's on June 21, 2012 decision. As such, counsel's submission does not meet the requirements of a motion to reconsider.

Nor does counsel's instant 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. For this additional reason, it does not meet the requirements of a motion to reconsider.

⁶ It is noted that counsel makes the following statement in the brief submitted in support of the instant matter:

We are thus baffled as to [the AAO's] statement in the [June 21, 2012] Decision that we simply asserted that [the AAO] applied the standard of proof incorrectly and [that] we should have explained how [the AAO] erred. Isn't it sufficient to say that the Service Center should have accepted the submitted evidence? Does it not sufficient [sic] say how the Decision erred in denying the Petition?

The answer to counsel's question is "no." It is indeed insufficient to simply "say that the Service Center should have accepted the submitted evidence." Simply asserting that a decision was made incorrectly does not even address the reasoning behind the decisions the petitioner seeks to have reversed, let alone establish that such reasoning was incorrect.

⁷ It is for this reason that counsel cites to *Matter of Chawathe* in the instant matter. She does not cite this case in support of an argument that the AAO should have accepted her unsupported arguments in its June 21, 2012 decision. As such, her citation to *Matter of Chawathe* does not address the narrow scope of the AAO's review in this matter.

For all of these reasons, counsel's submission 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).

It should be noted for the record that, unless USCIS directs otherwise, the filing of a motion to reopen or reconsider 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.