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U.S. Department of Homeland Security
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U.S. Citizenship
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Services

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FILE: EAC 03 030 53722 Office: VERMONT SERVICE CENTER

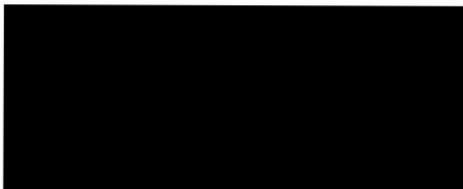
Date: SEP 30 2008

IN RE: Petitioner:
Beneficiary:



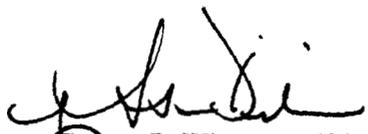
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequently filed appeal. The matter is now before the AAO on a motion to reopen and reconsider. The motion will be denied. The previous decision will be affirmed and the petition will be denied.

The petitioner claims that it provides food service and food service management and was established in 1998. It seeks to employ the beneficiary as a food service manager pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition determining that the petitioner failed to establish that the proffered position qualifies for classification as a specialty occupation. On December 14, 2007, the AAO affirmed the director's decision.

On January 15, 2008, the AAO received a motion to reopen or to reconsider its prior decision in its offices. The AAO returned the motion to counsel indicating that the AAO did not accept fees at our offices. The AAO directed counsel to file the motion with fee at the Vermont Service Center. The Vermont Service Center received the motion and fee on January 21, 2008, or 38 days after the AAO had issued its decision. Counsel for the petitioner requests that the petition be approved on a *nunc pro tunc* basis and that counsel be allowed to present oral argument.

Preliminarily, the AAO will accept the filing of the motion in this instance at its office as timely. The AAO denies counsel's request for oral argument. The regulations provide that the requesting party must explain in writing why oral argument is necessary. Citizenship and Immigration Services has the sole authority to grant or deny a request for oral argument and will grant argument only in cases involving unique factors or issues of law that cannot be adequately addressed in writing. *See* 8 C.F.R. § 103.3(b). In this instance, counsel identified no unique factors or issues of law to be resolved. In fact, counsel set forth no specific reasons why oral argument should be held. Consequently, the request for oral argument is denied.

On motion, counsel for the petitioner indicates that he has attached copies of the petitioner's website and relevant fiscal documents to remove any misunderstanding regarding the company's financial standing and the nature of the business. A review of the record on motion does not reveal copies of the petitioner's website. The record on motion does include a copy of a 2006 Internal Revenue Service (IRS) Form 1120S, U.S. Income Tax Return for an S Corporation; however, the 2006 IRS Form 1120S does not address or otherwise resolve the inconsistencies regarding the nature of the petitioner's organizational structure raised in the AAO's December 14, 2007 decision.

On motion, counsel disagrees with the AAO's interpretation of the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) report on food service managers. Counsel also cites unpublished decisions; provides a list of published decisions; indicates that 160 colleges and universities in the United States offer bachelor or higher degrees in hotel and/or restaurant management; restates the description of the duties of the position; references the Department of Labor's *Dictionary of Occupational Titles* (*DOT*) for the position of an operations director (hotel and restaurant); and asserts that the proper standard of review is the "more likely than not" standard.

The regulation at 8 C.F.R. § 103.5(a)(2) states, in pertinent part: "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

The regulation at 8 C.F.R. § 103.5(a)(3) states, in pertinent part:

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.

In this matter, counsel has not submitted any new documents that clarify or otherwise resolve the inconsistencies and deficiencies noted in the AAO's December 14, 2007 decision. The record on motion does not contain any new facts that are supported by affidavits or other documentary evidence. Counsel instead has repeated assertions and submitted the same arguments initially submitted on appeal; arguments and assertions that have been addressed by the AAO in its December 14, 2007 decision. Counsel's disagreement with the AAO's interpretation of the *Handbook's* report on food service managers, the pertinence of colleges and universities offering four-year degrees; and the *DOT*, do not include any new facts and are not substantiated by anything other than counsel's assertions. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). Again, counsel's statements and assertions do not include any new facts but provide the same argument initially submitted on appeal and already addressed by the AAO. Counsel has not met the requirements of a motion to reopen.

Counsel's references to unpublished decisions are insufficient to meet the requirements of a motion to reconsider. **Unpublished decisions are not precedent decisions.** Moreover, counsel has not furnished evidence establishing that the facts of the instant petition are analogous to those in the unpublished decisions. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Counsel's list of published decisions is also insufficient to meet the requirements of a motion to reconsider. Counsel has not attached copies of the decisions, has not explained how these particular decisions support his contention that the proffered position is a specialty occupation; and has not offered analysis establishing that the published decisions demonstrate that the AAO's decision was based on an incorrect application of law or Service policy. Counsel fails to establish that the AAO's decision was a result of an incorrect application of the law or that the AAO misinterpreted the evidence of record.

The AAO notes that in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*,

21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this matter, the petitioner has not met that burden.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The regulation at 8 C.F.R. § 103.5(a)(4) states: "[a] motion that does not meet applicable requirements shall be dismissed." Accordingly, the motion will be dismissed, the proceedings will not be reopened, and the previous decision of the AAO will be affirmed.

ORDER: The decision of the AAO is affirmed. The petition is denied.