



U.S. Citizenship  
and Immigration  
Services



B6

FILE: [Redacted]  
SRC-03-211-53731

Office: TEXAS SERVICE CENTER Date:

JAN 11 2005

IN RE: Petitioner: [Redacted]  
Beneficiary: [Redacted]

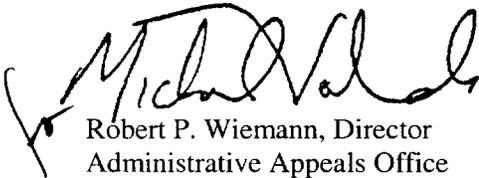
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

INSTRUCTIONS:

**PUBLIC COPY**

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, Director  
Administrative Appeals Office

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prevent identity, unauthorized  
invasion of personal privacy

**DISCUSSION:** The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be rejected.

The petitioner is a hospital which seeks to employ the beneficiary as a clinical nurse.

In the proceedings below the director issued a request for evidence (RFE) dated November 14, 2003 requesting evidence of the beneficiary's qualifications for designation under Schedule A, Group I and evidence of the petitioner's posting of a notice of job availability for the proposed position. Following the failure of the petitioner to respond to the RFE the director issued a decision dated March 23, 2004 finding that under the regulation at 8 C.F.R. § 103.2(b)(13) the petition must be considered abandoned. The director accordingly denied the I-140 petition.

In a second decision issued on that same date of March 23, 2004, the director denied the beneficiary's I-485 Application to Register Permanent Resident or Adjust Status which had been filed concurrently with the I-140 petition. The reason for the denial of the I-485 application was that it was based on an I-140 petition which had now been denied.

The Form I-290B notice of appeal in the instant appeal is captioned as an appeal of the denial of a "Form I-485, Application to Adjust to Permanent Resident Status." Nonetheless, in substance the notice of appeal is an appeal of the denial of the I-140 petition, since the notice of appeal alleges that the RFE issued by the director concerning the I-140 petition was not received by the petitioner or by the beneficiary and requests a reissue of the RFE. The notice of appeal also states that an online check of the status of the I-140 petition showed that the I-140 had not been denied.

The notice of appeal is signed by counsel, who states on the notice of appeal that he represents the beneficiary. The record contains only one Form G-28 Notice of Entry of Appearance by Attorney or Representative, showing counsel entering an appearance on behalf of the beneficiary.

The regulation at 8 C.F.R. § 103.3(a)(1)(iii) states, in pertinent part:

(B) Meaning of affected party. For purposes of this section and sections 103.4 and 103.5 of this part, affected party (in addition to the Service) means the person or entity with legal standing in a proceeding. It does not include the beneficiary of a visa petition.

The regulation at 8 C.F.R. § 103.3(a)(2)(v) states:

Improperly filed appeal -- (A) Appeal filed by person or entity not entitled to file it -- (1) Rejection without refund of filing fee. An appeal filed by a person or entity not entitled to file it must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

The references to "the Service" in the above-quoted provisions now refer to CIS.

In the instant case, the appeal has not been filed by the petitioner, nor by any entity with legal standing in the proceeding, but rather by the beneficiary. Therefore, the appeal has not been properly filed, and must be rejected.

Even if the I-290B had been filed by the petitioner the instant appeal would still be rejected, because the decision of the director to deny the I-140 petition was based on a finding of abandonment. The regulation at 8 C.F.R. § 103.2(b)(15) states in pertinent part, "A denial due to abandonment may not be appealed, but an applicant or

petitioner may file a motion to reopen under § 103.5.” That regulation therefore would require a rejection of the instant appeal even if the notice of appeal had been filed by the petitioner.

If may be noted that even if the notice of appeal were construed as an appeal of the beneficiary’s I-485 application to adjust status, the appeal would still be rejected.

The authority to adjudicate appeals is delegated to the AAO by the Secretary of the Department of Homeland Security (DHS) pursuant to the authority vested in him through the Homeland Security Act of 2002, Pub. L. 107-296. See DHS Delegation Number 0150.1 (effective March 1, 2003); see also 8 C.F.R. § 2.1 (2003). The AAO exercises appellate jurisdiction over the matters described at 8 C.F.R. § 103.1(f)(3)(E)(iii) (as in effect on February 28, 2003). Under that regulation, denials of I-485 applications to adjust status to permanent residence are appealable to the AAO only “when denied solely because the applicant failed to establish eligibility for the bona fide marriage exemption contained in section 245(e) of the Act.” 8 C.F.R. § 103.1(f)(3)(E)(iii)(JJ) (as in effect on February 28, 2003). In the instant petition, the denial of the I-485 application had nothing to do with a bona fide marriage exemption. Rather, the I-485 application was denied because the underlying I-140 petition had been denied. Therefore the AAO would have no authority to adjudicate an appeal of the denial of the I-485 application.

**ORDER:** The appeal is rejected.