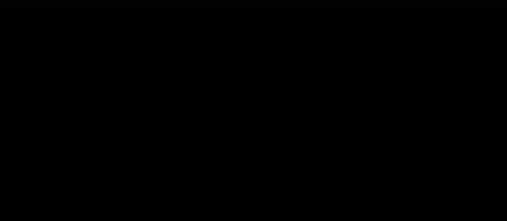




U.S. Citizenship
and Immigration
Services

B6



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: JAN 14 2003

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

PETITION: Immigrant Petition for Alien Worker as an Other, Unskilled Worker Pursuant to § 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



PUBLIC COPY

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, Director
Administrative Appeals Office

**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The Director, California Service Center, denied the preference visa petition. The petitioner concurrently addressed a motion to reconsider (MTR) to the director and appealed to the Administrative Appeals Office (AAO). The director dismissed the MTR. On the appeal, the AAO remanded the proceedings to determine the petitioner's living expenses and ordered that the director certify any decision that is adverse to the petitioner to the AAO. The director issued a related request for evidence, dated February 18, 2004 (2004 RFE), and the petitioner did not respond. Consequently, the director denied the petition due to abandonment and certified that decision to the AAO. The director's denial, as certified, will be affirmed, and the petition will be denied.

The petitioner is a garment manufacturer. It seeks to employ the beneficiary permanently in the United States as a multi-needle chain-stitch operator. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to other qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

Eligibility in this matter turns on one aspect of the ability to pay the proffered wage, viz., the living expenses of the petitioner, who is a sole proprietor. If the petitioner's adjusted gross income (AGI) is equal to, or greater than, the total of the proffered wage plus the sole proprietor's living expenses, it has demonstrated the ability to pay the proffered wage for the particular year.¹ The petitioner must show the ability to pay the wage offered from the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The petition's priority date in this instance is July 27, 1998. The beneficiary's salary as stated on the labor certification is \$6.41 per hour or \$13,332.80 per year.

The director certified the Notice of Decision, dated June 16, 2004 (the certified decision), to the AAO for review, as ordered. The 2004 RFE exacted an account of the sole proprietor's monthly expenses and clearly related to the subject matter of the remand from AAO.

Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Since the petitioner did not respond to the 2004 RFE, the director, in the certified decision, necessarily concluded that the petition must be denied due to abandonment.

Provisions of 8 C.F.R. § 103.2(b) state that:

- (13) *Effect of failure to respond to a request for evidence or appearance.* If all requested initial evidence and requested additional evidence is not submitted by the required date, the application or petition shall be considered abandoned and, accordingly, shall be denied.

¹ The petitioner, as a sole proprietor, reports AGI on Form 1040, U.S. Individual Income Tax Return. No evidence pertained, however, to the sole proprietor's living expenses.

No appeal lies from a denial for abandonment, but a motion to reopen does.² Terms of 8 C.F.R. §§ 103.5(a)(2)(i-iii), however, specially restrict the grounds of a motion to reopen a denial for abandonment. The certified decision aptly delineated them.

In the absence of a motion to reopen complying with the regulations, the petitioner, *a fortiori*, has not established any ground for a motion to reopen pursuant to 8 C.F.R. §§ 103.5(a)(2)(i-iii). Consequently, the petitioner has not overcome the certified decision of denial due to abandonment.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The certified decision is affirmed, and the petition is denied.

² See 8 C.F.R. § 103.2(b)(15).