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U.S. Citizenship
and Immigration
Services

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FILE: [REDACTED]
SRC-03-022-51083

Office: NEBRASKA SERVICE CENTER

Date: JUL 21 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant 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)

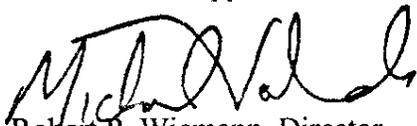
ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office (AAO) 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.

DISCUSSION: The visa petition was denied by the Director, Nebraska Service Center. The matter is now before the AAO on appeal. On July 1, 2005, the petitioner requested that the appeal be withdrawn. The withdrawal may not be retracted. 8 C.F.R. § 103.2(b)(6).

ORDER: The appeal is dismissed based on its withdrawal by the petitioner.


Robert P. Wiemann, Director
Administrative Appeals Office



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FILE: [REDACTED]
LIN-01-145-55371

Office: NEBRASKA SERVICE CENTER

Date: JUL 21 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

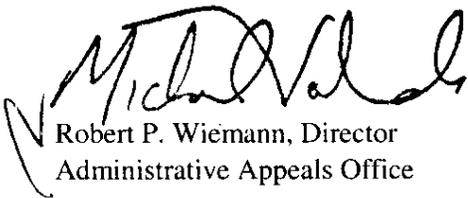
PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



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

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and came before the Administrative Appeals Office (AAO) on appeal. The appeal was rejected and the case was remanded to the director with instructions to treat the notice of appeal as a motion to reopen.

Following the remand of the case to the director, the Nebraska Service Center again returned the case to the AAO, accompanied by a memorandum to the AAO dated June 6, 2003 requesting further review by the AAO. The case will again be remanded to the director with instructions to treat the notice of appeal as a motion to reopen.

The petitioner is a hospital and health care provider. It seeks to employ the beneficiary permanently in the United States as a registered nurse.

The petitioner asserts that the beneficiary qualifies for certification pursuant to 20 C.F.R. § 656.10, Schedule A, Group I. The petitioner submitted the Application for Alien Employment Certification (ETA 750) with the Immigrant Petition for Alien Worker (I-140).

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

Eligibility in this matter hinges on the qualifications of the beneficiary for the position at the priority date. Employment-based petitions depend on priority dates. The priority date for Schedule A occupations is established when the I-140 is properly filed with Citizenship and Immigration Services (CIS), (formerly the Service or the INS). 8 C.F.R. § 204.5(d). The petition must be accompanied by the documents required by the particular section of the regulations under which it is submitted. 8 C.F.R. § 103.2(b)(1). The priority date of the petition in this case is April 4, 2001.

The petitioner initially submitted insufficient evidence of the beneficiary's qualifications for the position. In a request for evidence (RFE) dated May 23, 2001, the director required a full and unrestricted license to practice professional nursing in the State of intended employment or the certificate that the beneficiary had passed the Commission on Graduates of Foreign Nursing Schools (CGFNS) examination. *See* 20 C.F.R. § 656.10, Schedule A, Group I. The RFE stated that the petitioner's response must be received by August 15, 2001.

In response, counsel submitted a letter dated August 14, 2001 stating that the beneficiary had taken the CGFNS examination and had passed, but had not yet received the licensure. Counsel requested a twelve-week extension to respond to the RFE.

In his decision the director summarized the procedural history of the petition and summarized the contents of the RFE. The director then stated that the petitioner had "failed to fully comply with the regulatory requirements regarding the submission of proper documents to support the petition." The director further stated, "In the absence of proper documents to support the petition, the petition may not be approved." The director gave no further explanation of his reasoning and denied the petition.

The director's decision did not acknowledge having received counsel's letter in response to the RFE, nor did the director's decision address the request for extension of time contained in that letter.

On appeal counsel submitted a brief and additional evidence, consisting of a printout of an Internet Web page from the Colorado Division of Registrations showing a nursing license first issued to the beneficiary on

September 26, 2001, and a photocopy of the beneficiary's Colorado nursing license issued September 26, 2001.

Counsel on appeal stated that the beneficiary did not receive documentation from the Colorado Board of Nursing until after the response date for the RFE.

On appeal, the AAO treated the director's decision as finding that the petitioner had abandoned the petition. The AAO issued a decision dated July 8, 2002 rejecting the appeal, on the grounds that the regulation at 8 C.F.R. § 103.2(15) provides that a denial due to abandonment may not be appealed. The case was then remanded to the director, with instructions to treat the notice of appeal as a motion to reopen, as provided for in that regulation.

Following the remand of the case to the director, the Nebraska Service Center again returned the case to the AAO, accompanied by a memorandum to the AAO dated June 6, 2003. The memorandum is unsigned, and the author is identified only as "NSC," the abbreviation for the Nebraska Service Center. The memorandum states as follows:

This case was remanded to this Service by your office on July 8, 2002. However, this case was not a denial due to a abandonment [sic] as stated by your office. Instead it was denied because the petitioner did not submit the beneficiary's CGFNS or state license. Please review denial. In addition, the state license submitted by the petitioner on appeal was issued on a date subsequent to the petition's filing date. This case is being returned to you for further review.

No regulation provides for the resubmission of a case to the AAO by the director for further review after the AAO has already issued its decision. Nonetheless, the AAO will address the memorandum's assertion that the decision of the director of October 1, 2001 was not a denial due to abandonment.

The RFE gave three options to the petitioner, tracking the language of 8 C.F.R. § 103.2(b)(8). The RFE said that within the period allowed by the RFE the petitioner could

- (i) Submit all the requested initial or additional evidence;
- (ii) Submit some or none of the requested additional evidence and ask for a decision based on the record; or
- (iii) Withdraw the application or petition.

The petitioner did none of these things, but instead responded with a letter from counsel dated August 14, 2001 requesting an additional twelve weeks of time. However, no extension of was permitted under the applicable regulation. 8 C.F.R. § 103.2(b)(8).

The regulation at 8 C.F.R. § 103.2(b)(13) states in pertinent part as follows:

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. . . .

The director issued his decision denying the petition on October 1, 2001. As noted above, the decision did not clearly state the specific basis for the denial. The director stated that the petitioner "failed to **fully comply** with the regulatory requirements regarding the submission of proper documents to support the petition." (emphasis added). But that phrasing is ambiguous, and suggests that the petitioner did comply partially, in some unspecified way. The decision also did not specify what the director meant in stating that "in the absence of proper documents, the petition may not be approved." Nor did the director cite to any specific regulation or statutory provision supporting a denial on this ground.

The June 6, 2003 memorandum from the Nebraska Service Center states that the director's decision of October 1, 2001 was not a denial due to abandonment. However, the regulation at 8 C.F.R. § 103.2(b)(13) gives the director no discretion when all requested initial evidence and requested additional evidence are not submitted by the required date. In such cases the petition "**shall be considered abandoned**, and accordingly, shall be denied." *Id.* (emphasis added).

In the instant case the requested additional evidence was not submitted by the required date. Therefore the petition must be considered abandoned. Denials due to abandonment may not be appealed. 8 C.F.R. § 103.2(15). For the foregoing reasons, the decision of the AAO dated July 8, 2002 rejecting the appeal is reaffirmed.

The case is again remanded to the director for a decision pursuant to the regulations governing motions to reopen, as stated in our decision of July 8, 2002.

ORDER: The case is remanded to the director for further action in accordance with the foregoing.