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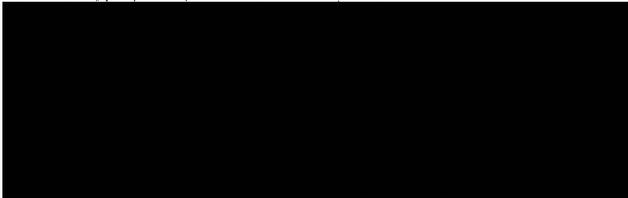
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

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FILE: EAC-03-204-50115 Office: VERMONT SERVICE CENTER Date: NOV 21 2006

IN RE: Petitioner:
Beneficiary:



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:

SELF-REPRESENTED

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 preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be summarily dismissed.

The petitioner is a restaurant. It filed the instant I-140 petition to seek to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. After issuing a request for additional evidence on May 3, 2004, the director issued a Notice of Intent to Deny (NOID) on October 26, 2004.¹ The NOID gave the petitioner thirty days to submit additional information, evidence or arguments to support the petition with warning that failure to respond to this request would result in the denial of the petition. However, no response to the NOID was ever received by the director. Therefore, the director denied the petition on April 12, 2005 because the response was never received.

The regulation at 8 C.F.R. § 103.2(b)(13) states the following: "*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 regulations are clear that failure to respond to a request for evidence *shall* be considered abandonment of the petition and the petition shall be denied accordingly. Thus, the director should have denied the petition as abandoned because of the petitioner's failure to provide a timely response to the director's NOID. A denial due to abandonment may not be appealed. See 8 C.F.R. § 103.2(b)(15).

It is noted that the director gave notice to the petitioner that it could file an appeal in the instant case. Despite this error, however, the AAO is never bound by a decision of a service center or district director. See *Louisiana Philharmonic Orchestra vs. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 2000), *aff'd.*, 248 F. 3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). In this case, the regulations do not provide appeal for denials due to abandonment although counsel argues on appeal that the petitioner has no intention of abandoning this petition.

As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal.

The petitioner here has not specifically addressed the reasons stated in the NOID and denial decision and has not provided any additional evidence to rebut the ground of denial that the petitioner had filed 51 I-140 petitions since 1996 and among them 13 petitions were approved, and therefore, the petitioner failed to establish that it had the ability to pay all proffered wages for the multiple beneficiaries, including the instant beneficiary. The petitioner has not even expressed disagreement with the director's decision. The appeal must therefore be summarily dismissed.

The record of proceeding contains a Form G-28, Notice of Entry of Appearance as Attorney or Representative, signed by [REDACTED] and the petitioner's representative. However, the petitioner will be considered self-represented in these proceedings because [REDACTED] is on USCIS List of Individuals who are NOT Attorneys or Accredited Representatives updated October 24, 2006. Additionally, even if counsel were recognized in these proceedings, he failed to update the record of proceeding with his apparent change of address.

¹ Since the address was not updated, the decision was sent to the address on record and thus correctly issued.

It may be noted that a denial of an I-140 petition is without prejudice to the petitioner submitting a new I-140 based on the same approved ETA 750 labor certification. *Cf.* 8 C.F.R. §§ 103.2 (a)(7)(ii) (new fees will be required with any new petition), 103.2(b)(15) (withdrawal of a petition or denial of a petition due to abandonment does not preclude the filing of a new petition with a new fee). However, any new petition submitted by the petitioner would have to be supported by evidence sufficient to establish the petitioner's ability to pay the proffered wages for all multiple beneficiaries as of the priority dates and continuing until the beneficiaries obtain lawful permanent residence, including the years since the record closed in the instant petition.

ORDER: The appeal is summarily dismissed pursuant to 8 C.F.R. § 103.3(a)(1)(v).