

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

PUBLIC COPY

U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3000
Washington, DC 20529



U.S. Citizenship
and Immigration
Services

B6

FILE:

Office: VERMONT SERVICE CENTER

Date:

SEP 07 2006

EAC 03 250 52045

IN RE:

Petitioner:

Beneficiary:

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

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 service center director denied the employment-based visa petition due to abandonment. The petitioner filed a timely motion that was subsequently dismissed. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is a private household. It seeks to employ the beneficiary permanently in the United States as a child monitor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not responded to a request for further evidence within the allotted period of 12 weeks of time, and denied the petitioner due to abandonment. The petitioner, on motion to reopen, submitted a statement from the beneficiary that stated the beneficiary had furnished her new address to Citizenship and Immigration Services (CIS), and that CIS sent previous correspondence to the beneficiary's former address. The beneficiary also stated that she wished to port to a new employer. The director found that the petitioner's evidence did not overcome the grounds for the denial of the petition, and denied the motion.

The regulation at 8 C.F.R. 103.2 (b)(13). 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." Further, as correctly noted by the director in his initial decision, denials for abandonment cannot be appealed. 8 C.F.R. § 103.2(b)(15).

It is noted that although the director did not clarify this issue in his decision on the petitioner's motion, CIS correspondence with regard to any matter concerning I-140 petitions is sent to the petitioner, not to the beneficiary. CIS does this because the beneficiary of a visa petition is not a recognized party in the I-140 proceedings. *See* 8 C.F.R. § 103.2(a)(3). Therefore the question of whether the beneficiary had correctly submitted a change of address to CIS is moot. Furthermore, the record does not reflect any change in the petitioner's address from the priority year 2001 to the present time.

It is further noted that the director's request for further evidence requested the petitioner's tax returns, with accompanying schedules and attachments for 2001 and other years. The petitioner in the petition had only submitted the first page of her Form 1040 for tax year 2001, and no information as to the availability of any other income tax returns. It is the petitioner's, not the beneficiary's, burden of proof to establish its ability to pay the proffered wage as of the priority year and continuing to the present.

Finally, pursuant to 8 C.F.R. 103.2(b)(15), withdrawal or denial of a petition due to abandonment does not preclude the filing of a new application or petition with a new fee. However, the priority or processing date of a withdrawn or abandoned application or petition may not be applied to a later application or petition. Withdrawal or denial due to abandonment shall not itself affect the new proceeding, but the facts and circumstances surrounding the prior application or petition shall otherwise be material to the new application or petition. Furthermore, the instant petitioner cannot petition anew for the beneficiary if the petitioner does not have a full-time, permanent position for the beneficiary, while another petitioner for whom the beneficiary presently works fulltime, can file a new petition based on an approved labor certification (Form ETA 9089) for that job. Thus, the appeal is rejected. The instant petition is denied.

ORDER: The appeal is rejected.