



U.S. Citizenship
and Immigration
Services

32

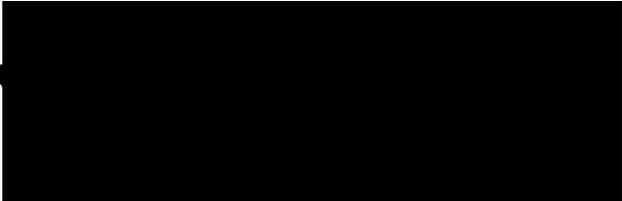


FILE: WAC 00 112 52336 Office: CALIFORNIA SERVICE CENTER Date:

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition in December 18, 2000 on the basis of abandonment because the petitioner had not submitted all of the evidence requested in the director's request for further evidence. Counsel at the time of the initial denial submitted a Form I-290B Appeal notice that stated the petitioner had submitted additional evidence in a timely manner and provided certification of its shipment of additional materials to the service center, as well as a copy of the additional evidence submitted. The service center reopened the petition and issued a second request for further evidence on September 23, 2003. The director indicated that the petitioner had twelve weeks, or until December 16, 2003, to submit further evidence. The second request for further evidence did not ask for the same materials as the first request for further evidence, but rather asked for other materials that either had not been received in the first request for further evidence, or that needed to be updated, for example, a newly certified Labor Condition Application (LCA) as the previous one had expired, and the beneficiary's current immigration status. On December 15, 2003, the new counsel for the petitioner submitted a G-28 and requested an additional 45 days to respond to the director's request for further evidence. On January 14, 2004, the director denied the nonimmigrant visa petition for the second time for reasons of abandonment. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

Counsel submitted a timely Form I-290B on February 17, 2004, and indicated that a brief and/or evidence would be submitted to the AAO within 30 days. As of this date, however, the AAO has not received any additional evidence into the record. Therefore, the record is complete. On the Form I-290B, counsel states that the 2004 decision was the second erroneous denial by the director. Counsel also states that the information requested in the director's request for further evidence is in the record.

The regulation at 8 C.F.R. § 103.2(b)(15) states, in pertinent part: "*Effect of withdrawal or denial due to abandonment. . . . A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under § 103.5.*" Pursuant to 8 C.F.R. § 103.5(a)(2), a motion to reopen an application or petition denied due to abandonment must be filed with evidence that the decision was in error because:

- (i) The requested evidence was not material to the issue of eligibility;
- (ii) The required initial evidence was submitted with the application or petition, or the request for initial evidence or additional information or appearance was complied with during the allotted period; or
- (iii) The request for additional information or appearance was sent to an address other than that on the application, petition, or notice of representation, or that the applicant or petitioner advised the Service, in writing, of a change of address or change of representation subsequent to filing and before the Service's request was sent, and the request did not go to the new address.

The regulation at 8 C.F.R. § 103.5(a)(1)(ii), states that the official having jurisdiction on such a motion is the official who made the latest decision in the proceeding unless the affected party moves to a new jurisdiction. In the instant petition, the service center director retains jurisdiction to review the motion to reopen. The regulation cited above with regard to abandoned petitions precludes the AAO from considering the appeal.

ORDER: The appeal is rejected.