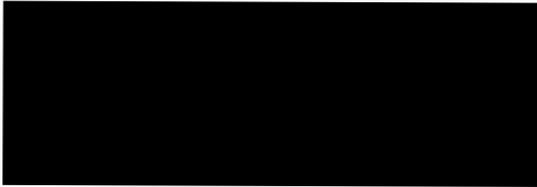




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FILE: EAC 03 161 52376 Office: VERMONT SERVICE CENTER Date: SEP 13 2006

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 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 The previous denial of the director based on abandonment and dated September 29, 2004 will be withdrawn, as will the director's denial of the petitioner's motion to reopen the proceedings dated February 15, 2005. The petition will be sent on remand to the director for an examination of the merits of the petition.

The petitioner is auto body repair shop. It seeks to employ the beneficiary permanently in the United States as an auto body frame specialist. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. On February 16, 2005, 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.

Former counsel, on motion to reopen, stated that it had responded to both of the director's two requests for further evidence dated March 9, 2004 and May 24, 2004, respectively. Former counsel states and the record reflects that the director's two requests for further evidence asked for the same evidence. In addition, the record contains a letter dated April 22, 2004 submitted by the petitioner that contains the evidence requested by the director in his first request for further evidence, namely, the petitioner's Form 1040, U.S. Individual Income Tax Form for tax year 2001 and the beneficiary's W-2 forms. Furthermore, when former counsel responded to the director's second request for further evidence on August 18, 2004, he submitted U.S. Postal Service documentation as to the receipt of the initial requested additional documentation at the Vermont Service Center on April 24, 2004. Former counsel also resubmitted the requested documentation in his response to the director's second request for evidence.

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).

Upon review of the record, the petitioner did respond in a timely manner twice to the director's requests for further evidence, and thus, the director should not have denied the petition based on abandonment. The director's decision dated September 29, 2004 with regard to the abandonment of the petition shall be withdrawn as well as the director's denial of the petitioner's motion to reopen the petition. The petition shall be remanded to the director for a consideration of the merits of the instant petition.

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 met that burden with regard to establishing that it responded in a timely manner to both of the director's request for further evidence. The matter will be remanded to the director for a consideration of the merits of the petition.

ORDER: The appeal is remanded to the director.