

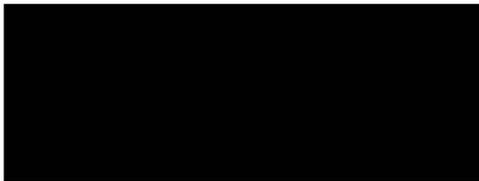


U.S. Citizenship
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FILE: WAC 03 028 55243 Office: CALIFORNIA SERVICE CENTER

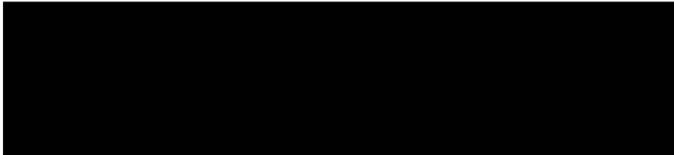
Date MAR 15 2007

IN RE: Petitioner:
Beneficiary:



PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker 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 preference visa petition was denied by the Director, California Service Center. The petitioner appealed the director's decision. The Administrative Appeals Office (AAO) remanded the petition for further investigation and entry of a new decision. The director issued a request for evidence to the petitioner. The director erroneously found that the petition was abandoned according to the regulation at 8 CFR § 103.2(b)(13). Counsel for the petitioner transmitted a response to the request for evidence that had been received on June 29, 2005. The director certified the case for review to the AAO on November 29, 2005.¹ The previous decision of the director dated November 29, 2005 will be withdrawn. The appeal will be remanded to the director to evaluate the case on its merits.

The petitioner is a residential care facility. It seeks to employ the beneficiary permanently in the United States as a caregiver. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. In the last substantive decision issued in this case, the director determined that the petitioner had not established that the beneficiary is qualified to perform the duties of the proffered position with three months of qualifying employment experience or satisfied the terms of the offered position as set forth on the labor certification. The director denied the petition accordingly on September 12, 2003.

The regulation at 8 C.F.R. § 103.5(A)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence.

The regulation at 8 C.F.R. § 103.5(A)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The instant motion qualifies as a motion to reopen because counsel provided new evidence. It is also a motion to reconsider since the director erroneously found that the petition was abandoned but in fact timely evidence was submitted in response to the director's request for evidence. Therefore, we withdraw the decision of the director dated November 29, 2005, that erroneously found that the petition had been abandoned for failure to respond to the request for evidence dated April 6, 2005, when in fact a timely response was made by the petitioner.

¹ Recounting the chronological progression of this matter: the director's issued on September 12, 2003, a decision denying the petition; the petitioner filed an appeal on October 14, 2003; the AAO remanded the petition for further investigation and entry of a new decision on February 28, 2005; the director issued a request for evidence to the petitioner on April 6, 2005; counsel for the petitioner responded to the request for evidence on June 24, 2005; the director issued a decision dated November 29, 2005, erroneously finding that the petition had been abandoned according to the regulation cited; and, lastly, the director certified the matter to the AAO on November 29, 2005.

Pursuant to 8 C.F.R. § 103.2(b)(15), no appeal shall lie from a denial of a petition based upon abandonment. However, because the petitioner established that it timely responded to the request for evidence, it has overcome the sole reason for denial. The Form I-290B should have been treated as a motion to reopen and the petition adjudicated on the merits.

ORDER: The decision of the director is withdrawn. The matter is remanded for further action and consideration.