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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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Date: **JUL 20 2011** Office: NEBRASKA SERVICE CENTER FILE:

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,
Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (NSC), denied the preference visa petition based upon its abandonment. The petitioner appealed the denial of the petition on January 8, 2009. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected.

The petitioner is an elderly care home. It seeks to classify the beneficiary pursuant to Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), as an unskilled worker. The director determined that the petitioner had abandoned the petition by failing to submit a response to a Request for Evidence (RFE) issued on October 15, 2008. Therefore, the director denied the petition based upon its abandonment in a Notice of Denial (NOD) issued on December 9, 2008.

The regulation at 8 C.F.R. § 103.2(b)(15) provides: "A denial due to abandonment may not be appealed, but an applicant or petitioner may file a motion to reopen under § 103.5." Rather, 8 C.F.R. § 103.5(a)(2) provides that denials due to abandonment may be challenged in a motion to reopen before the office that rendered the decision based on limited arguments.

The record shows that the petitioner's counsel filed a Form I-290B, Notice of Appeal or Motion, on January 8, 2009, as an appeal by checking the box at part 2.A., of the Form I-290B, which specifically states "I am filing an appeal. My brief and/or additional evidence is attached." Nevertheless, as the denial of the petition was originally based upon its abandonment and such a denial may not be appealed pursuant to 8 C.F.R. § 103.2(b)(15), the AAO has no jurisdiction over the instant appeal and the appeal must be rejected on this basis. A decision on a motion may only be appealed to the AAO if the original decision was appealable to the AAO. 8 C.F.R. § 103.5(a)(6).¹

Therefore, as the appeal was not properly filed, it will be rejected.

ORDER: The appeal is rejected.

¹ It is noted that the Director of the Nebraska Service Center (NSC) treated the petitioner's appeal as a motion and rendered a second decision on February 17, 2009. However, as the director did not grant favorable relief, he did not have jurisdiction to treat the appeal as a motion. 8 C.F.R. § 103.3(a)(2)(iii). Instead, the director should have forwarded the appeal to the AAO. 8 C.F.R. § 103.3(a)(2)(iv). Accordingly, the director's February 17, 2009 decision is withdrawn.