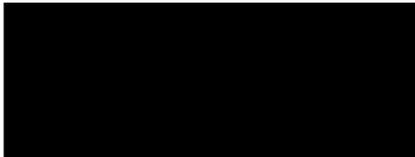




U.S. Citizenship
and Immigration
Services

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prevent clearly unwarranted
invasion of personal privacy

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Date: **JUL 29 2011** Office: VERMONT SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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:

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 service center director denied the nonimmigrant visa petition as abandoned by the petitioner. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be rejected because denial of a petition on the basis of abandonment is not subject to appeal.

In a request for evidence (RFE) dated April 7, 2010, the service center requested, *inter alia*:

[Evidence],

- (1) that 365 days or more have passed since the filing of any application for labor certification that is required or used by the alien to obtain status as an employment[-]based immigrant, OR
- (2) That 365 days or more have passed since the filing of an employment[-]based immigrant petition.

The petitioner did not respond to that request.

The regulation at 8 C.F.R. § 103.2(b)(13) states, in pertinent part:

Effect of failure to respond to a request for evidence or a notice of intent to deny or to appear for interview or biometrics capture--(i) Failure to submit evidence or respond to a notice of intent to deny. If the petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the application or petition may be summarily denied as abandoned, denied based on the record, or denied for both reasons. If other requested material necessary to the processing and approval of a case, such as photographs, are not submitted by the required date, the application may be summarily denied as abandoned.

The director found that the petitioner had abandoned the visa petition and denied it on June 25, 2010. In denying the petition as abandoned due to the petitioner's failure to respond to a request for additional evidence, the director noted that no appeal shall lie from a denial based on abandonment, but that limited motion rights exist.

The petitioner clearly marked the Form I-290B submitted in this matter as an appeal by checking Box B in Part 2.

The instant visa petition was denied for abandonment. The pertinent part of the regulation at 8 C.F.R. § 103.2(b)(15) states that a denial due to abandonment may not be appealed. As such a denial is the subject of the appeal, the appeal must be rejected.

The AAO further notes that, even if the appeal were construed as a motion, it would not succeed. The right to file a motion pertinent to a denial based on abandonment is described in 8 C.F.R. § 103.5(a)(2), which states, in pertinent part:

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 [USCIS], in writing, of a change of address or change of representation subsequent to filing and before the [USCIS's] request was sent, and the request did not go to the new address..

Counsel's statement on the Form I-290B reads, in its entirety: "The Petitioner did file a Labor Certification which is currently pending. Due to various computer and system malfunctions evidence is still not forthcoming. Sample letter attached."

Counsel does not claim that the evidence requested is immaterial, that the evidence requested was previously provided, or that the request for evidence in this case was misaddressed. No motion on any other basis is permitted in the case of a petition dismissed for abandonment. Even if construed as a motion, the Form I-290B submitted would be rejected.

ORDER: The appeal is rejected.