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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Date:

JUL 16 2001



Public Copy

File: SRC 01 012 53740

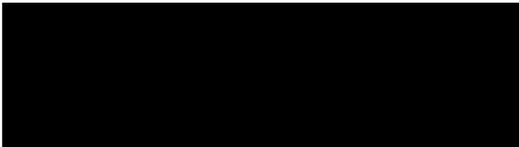
Office: TEXAS SERVICE CENTER

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)

IN BEHALF OF PETITIONER:



Identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

for Robert P. Wiemann, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and the matter is now before the Associate Commissioner for Examinations on appeal. The petition will be remanded to the director for further action consistent with this decision.

The petitioner is an importer/exporter with a projected staff of 3 employees and a projected gross annual income of \$250,000. It seeks to employ the beneficiary as a warehouse operations manager on a part-time basis for a three-year period.

Based upon the initial evidence submitted by the petitioner, the director determined that the petitioner had not established that (1) the offered position was a specialty occupation, (2) the beneficiary was qualified to work in a specialty occupation, or (3) the petitioner had received certification from the Department of Labor that it had filed a labor condition application (LCA). Accordingly, on December 29, 2000, the director issued to the petitioner and counsel at their addresses of record, a request for additional evidence (RFE). The director outlined his reasons for seeking to deny the petition and provided the petitioner 12 weeks in which to submit evidence or an argument in rebuttal. On January 29, 2001, the director denied the petition because, according to the director, the petitioner only submitted a certified LCA and failed to submit information pertaining to the proposed job or to the beneficiary's qualifications.

On appeal, counsel claims that the director denied the petition prematurely. According to counsel, the petitioner submitted the certified LCA on December 18, 2000, not January 21, 2001 as claimed by the director in his denial. Counsel maintains that the director erred in determining that the LCA was the only evidence that the petitioner submitted in response to the RFE, and requests that the petitioner be given the opportunity to submit evidence in rebuttal to the director's conclusions that the proposed employment is not a specialty occupation or that the beneficiary is not qualified to perform the duties of a specialty occupation.

Counsel presents a compelling argument on appeal. The record contains the certified LCA and the envelope in which counsel mailed the LCA. The envelope was postmarked by the postal service on December 20, 2000; however, neither the LCA nor the envelope were date-stamped by the Service. Therefore, this office is unable to concur with the director that the LCA was submitted on January 12, 2001 and was the sole piece of evidence that the petitioner submitted in response to the director's RFE.

As this office is unable to conclude with any degree of certainty that the LCA was the only evidence submitted in response to the director's RFE, this case will be remanded to the director so that the petitioner may have the opportunity to submit evidence in

response to the director's RFE. The director may request any additional evidence deemed necessary to assist him with his determination. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361.

ORDER: The petition is remanded to the director for entry of a new decision in accordance with the foregoing.