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U.S. Department of Justice

Immigration and Naturalization Service

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



File: EAC-00-087-50942 Office: Vermont Service Center

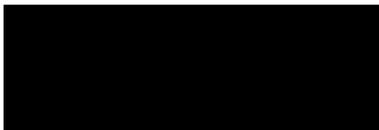
Date: 15 FEB 2002

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:



PUBLIC COPY

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

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

FEB1502-36A2101

DISCUSSION: The nonimmigrant visa petition was denied by the director and is now before the Associate Commissioner for Examinations on appeal. The director's decision will be withdrawn and the matter will be remanded to him for consideration of the appeal as a motion.

The petitioner is a freight transportation business with 1600 employees and an approximate gross annual income of \$414,833,806. It seeks to employ the beneficiary as an office manager for a period of three years. The director determined the petitioner had not established that the beneficiary is qualified to perform the duties of a specialty occupation.

On appeal, counsel submits a brief.

Section 101(a) (15) (H) (i) (b) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a) (15) (H) (i) (b), provides in part for nonimmigrant classification to qualified aliens who are coming temporarily to the United States to perform services in a specialty occupation. Section 214(i) (1) of the Act, 8 U.S.C. 1184(i) (1), defines a "specialty occupation" as an occupation that requires theoretical and practical application of a body of highly specialized knowledge, and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 C.F.R. 103.3(a) (2) (i) states:

Filing appeal. The affected party shall file an appeal on Form I-290B. Except as otherwise provided in this chapter, the affected party must pay the fee required by section 103.7 of this part. The affected party shall file the complete appeal including any supporting brief with the office where the unfavorable decision was made within 30 days after service of the decision.

8 C.F.R. 103.3(a) (2) (v) (B) states:

Untimely appeal--(1) Rejection without refund of filing fee. An appeal which is not filed within the time allowed must be rejected as improperly filed. In such a case, any filing fee the Service has accepted will not be refunded.

(2) Untimely appeal treated as motion. If an untimely appeal meets the requirements of a motion to reopen as described in section 103.5(a) (2) of this part or a motion to reconsider as described in section 103.5(a) (3) of this part, the appeal must be treated as a motion, and a decision must be made on the merits of the case.

The record indicates that the petition was denied on December 6, 2000. The record further indicates that the petitioner subsequently submitted an untimely appeal. On March 9, 2001, the director notified the petitioner that because the appeal was not filed timely, it would be accepted as a motion to reopen. The director further granted the petitioner an additional 30 days to submit a brief or additional evidence in support of the motion. The record indicates that on March 11, 2001, the petitioner submitted a second appeal. The record, however, contains no evidence that the petitioner's motion to reopen was adjudicated. The Associate Commissioner lacks jurisdiction over a motion to reopen. Any jurisdiction here rests with the director, Vermont Service Center. 8 C.F.R. 103.5(a)(1)(ii). Therefore, this case will be remanded to the director to adjudicate the motion to reopen.

ORDER: The petition is remanded to the director in accordance with the foregoing.