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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

[redacted]

FILE: SRC 01 070 51633 OFFICE: TEXAS SERVICE CENTER DATE: JAN 22 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 USC 110(a)(15)(H)(i)(b)

IN BEHALF OF PETITIONER: [redacted]

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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the nonimmigrant visa petition and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is an oriental food market with 30 employees and a gross annual income of $4,763,662.97. It seeks to employ the beneficiary as its general manager for three years.

The director denied the petition because he found that the petitioner had failed to demonstrate that the proffered position is a specialty occupation and because the petitioner had failed to submit a properly certified Labor Condition Application.

On appeal, counsel submits a brief and additional evidence.

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 the classification of qualified nonimmigrant 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 the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical knowledge application of a body of highly specialized knowledge, and
>
> (B) 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. 214.2(h)(4)(ii) further defines the term "specialty occupation" as:

> an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

In a letter submitted with the initial petition, the petitioner stated that the duties of the proffered position are to manage all aspects of the supermarket. The petitioner stated that the position requires at least a bachelor's degree in business, economics, or marketing. The petitioner emphasized that the

beneficiary received a bachelor's degree in economics from Sunkyunkwan University in Seoul, Republic of Korea, but submitted no evidence of the beneficiary's college education or degree.

Counsel also submitted a letter with the petition. In that letter, counsel quoted the U.S. Department of Labor's (DOL) Occupational Outlook Handbook (Handbook) for the proposition that managers are required to have a baccalaureate degree prior to employment, and cited section 101(a)(32) of the Act for the proposition that the Service recognizes managers as professionals. Counsel also stated that a Labor Condition Application (LCA) had been filed with the Department of Labor, and that the approved application would be provided upon request.

The director requested the petitioner to submit additional evidence pertinent to the proffered position. Specifically, the director requested that the petitioner specifically state why someone without a bachelor's degree in business, economics, or marketing would be incapable of holding the proffered position.

The director also requested that the petitioner list the workers the beneficiary would supervise in the proffered position, and submit an LCA certified by the Department of Labor.

In response, counsel for the petitioner reiterated that the beneficiary would manage all aspects of the petitioner's business, and cited the Handbook for the proposition that general managers are required to have a bachelor's degree.

As to the workers whom the beneficiary would supervise, counsel stated that the four department managers, (meat manager, fish manager, grocery manager, and gift manager) would report directly to the beneficiary as the general manager.

Counsel stated that, after an exhaustive search of his files, he believed that his firm had not received a certified LCA from the Department of Labor, and requested an additional 30 days to submit the certified LCA.

The director denied the petition on the bases that the petitioner did not establish that the proffered position is a specialty occupation and because the petitioner failed to submit a certified LCA.

On appeal, counsel reasserts that the proffered position is a specialty occupation. In support of that assertion, counsel again cites the Handbook section pertinent to general managers. Counsel states that the proffered position oversees the work of eight managers (seafood manager, general merchandise manager, bakery manager, international purchasing director, ethnic food manager, produce manager, food preparation manager, and meat manager), five

of whom have undergraduate degrees in business. Counsel further states that the petitioner requires a minimum of a bachelor's degree for the proffered position, and that the nature of the duties of the position, managing a supermarket, are so complex that they mandate the degree.

Also on appeal, counsel submits an LCA, certified by the Department of Labor on August 27, 2001. Counsel asserts that the previous LCA was submitted to the Department of Labor, but that no certification was then received. Counsel states that the Department of Labor is unable to locate the original LCA, and declined to retroactively certify the new LCA.

8 C.F.R. 214.2(h)(4)(i)(B)(1) states:

> *General requirements for petitions involving a specialty occupation.* Before filing a petitioner for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

Although counsel argues that the failure to obtain the certified LCA prior to filing the petition was not due to any failure on petitioner's part, the governing regulation does not appear to make an exception for this situation. The petition was filed on January 4, 2001. The LCA was certified on August 27, 2001, a date subsequent to the date on which the petition was filed. Counsel has not demonstrated that the petition was filed in conformity with the regulations, and the petition may not be approved.

In view of the finding pertinent to the failure of the petitioner to obtain a certified LCA prior to filing the petition in this matter, the remaining issue, whether the proffered position is a specialty occupation, need not be addressed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.