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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

PUBLIC COPY
[Redacted]

16 DEC 2002

File: WAC-99-245-50306 Office: California Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

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:

[Redacted]

**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 that 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 that 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 that 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 nonimmigrant visa petition was denied by the director. A subsequent appeal was dismissed by the Associate Commissioner for Examinations. The matter is now before the Associate Commissioner on a motion to reopen and reconsider. The motion will be granted and the previous decisions of the director and the Associate Commissioner will be affirmed.

The petitioner is a food service company operating sushi bars in supermarkets with 90 employees and a stated gross annual income of \$80 million. It seeks to employ the beneficiary as a regional manager for a period of just under two years. The director determined the petitioner had not established that the proffered position is a specialty occupation.

On appeal, counsel argued that the proffered position is a specialty occupation because it requires a bachelor's degree in a related field. Counsel asserted that the petitioner has always imposed such an employment requirement by hiring only individuals possessing a bachelor's degree in a related field for the offered job.

The Associate Commissioner dismissed the appeal reasoning that the petitioner had not established that the proffered position is a specialty occupation because it had not demonstrated that a baccalaureate degree in a specialized area was required for employment in this position.

On motion, counsel argues that the Service erred in dismissing the appeal because the pertinent regulations at 8 C.F.R. 214.2(h)(4)(iii), do not indicate that a baccalaureate degree in specialized area is required for a position to be considered a specialty occupation.

8 C.F.R. 214.2(h)(4)(ii) 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.

Counsel's statements on motion are not persuasive. The regulation cited in the previous paragraph, which defines the term "specialty occupation," clearly lists a requirement 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 addition, section 214(i)(1) of the Immigration and Nationality 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. Therefore, it must be concluded that the Service possesses the statutory and regulatory authority to find that a baccalaureate degree in specific area of study or a related field is required for a position to be considered a specialty occupation. In Defensor v. Meissner, 201 F.3d 384, 357 (5th Cir. 2000), the Fifth Circuit Court of Appeals observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." The critical evaluation is not the title of the position, but whether the position qualifies as a specialty occupation under the statutory definition at section 214(i)(1) of the Act, 8 U.S.C. 1184(i)(1).

The Service does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that the Service considers. In a letter which accompanied the initial I-129 petition, the petitioner described the duties of the offered position as follows:

Direct and coordinate our U.S. operations to obtain optimum use of facilities and personnel in accordance with established administrative and operational policies and procedures-, direct activities of sales staff, hire and promote staff as necessary; conduct training sessions to present sales techniques; establish sales territories amongst staff, direct the company's record-keeping activities with respect to leasing agreements, contracts, and sales; direct the preparation of financial statements and report on the status of properties for presentation to the President of the company for review; review and analyze regional expenditures.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

1. A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

2. The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
3. The employer normally requires a degree or its equivalent for the position; or
4. The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

The petitioner has not met any of the above requirements to classify the offered position as a specialty occupation.

In these proceedings, the duties of the position are dispositive and not the job title. The proffered position appears to be that of a top executive such as a general manager. A review of the Department of Labor's (DOL) Occupational Outlook Handbook (Handbook), 2002-2003 edition, at pages 86-89, finds no requirement of a baccalaureate or higher degree in a specific specialty for employment in a top executive position such as a general manager. Degrees in business and in liberal arts fields appear equally welcome. In addition, certain personal qualities and participation in in-house training programs are often considered as important as a specific formal academic background. Thus, the petitioner has not shown that a bachelor's degree in a specialized area or its equivalent is required for the position being offered to the beneficiary.

The petitioner has not submitted any evidence to establish that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specialized area for the offered position. The petitioner did not present any documentary evidence that businesses similar to the petitioner in their type of operations, number of employees, and amount of gross annual income, require the services of individuals in parallel positions. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree in any particular field of study.

The petitioner has failed to establish that any of the four factors enumerated above are present in this proceeding. Accordingly, it is concluded that the petitioner has not demonstrated that the offered

position is a specialty occupation within the meaning of the regulations.

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 previous decision dated April 5, 2001, by the Associate Commissioner dismissing the appeal is affirmed.