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U.S. Department of Homeland Security
Citizenship and Immigration Services

DA

ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
425 Eye Street, N.W.
Washington, DC 20536



FILE: WAC-01-297-54752 OFFICE: CALIFORNIA SERVICE CENTER

DATE: NOV 05 2003

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:

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 Citizenship and Immigration Services (CIS) 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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the director of the California Service Center and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a convenience store that employs seven persons and has a gross annual income of \$1,446,673. It seeks to employ the beneficiary as a Food Service Manager. The director denied the petition because the position is not a specialty occupation.

On appeal, counsel submits a brief and excerpts from the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*. Counsel states, in part, that the position should be characterized as a senior level manager and is a specialty occupation.

The issue to be discussed in this proceeding is whether the position offered to the beneficiary qualifies as a specialty occupation.

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 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 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.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) 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.

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 asserts that the food services manager position is a specialty occupation. Citizenship and Immigration Services (CIS) does not simply rely on a position's title 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 CIS considers. The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a

¹ The court in *Defensor v. Meissner* 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 be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." See *id.* at 387.

petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

In its initial petition filing, the petitioner described the duties of the position as: "Coordinates food service activities of the [REDACTED] food store. Estimates food and beverage retail prices. Orders stores [sic] inventory. Investigates and resolves food service complaints. Checks for food quality compliance. Monitors store budget. Directs personnel assignments."

Accompanying its initial petition filing, the petitioner also described the duties of the position in its support letter as follows:

[C]oordinate food service activities of our fast pace, 24 hour, 7 day per week operation. The Food Service Manager must have the ability to determine the exact needs of our customers, order the entire store inventory and estimate food and beverage retail prices. The qualified individual must be able to investigate and resolve all food service complaints as well as direct hiring and assignment of store employees. The Food Service Manager is responsible for determining and monitoring store's compliance with State and Federal government food quality regulations. In addition, the qualified individual must be able to monitor store's budget, review financial records and store expenditures. The Food Service Manager is responsible for the overall smooth and efficient store operation.

The Food Service Manager must have a strong background in the food store, restaurant, hotel or any other food related business management. . . .

[T]he professional position of Food Service Manager requires applicant to have earned at least a Bachelor's degree, or its equivalent, in Restaurant/Hotel Management, Public/Business Administration, Management, Marketing or a related field.

Subsequent to the filing of the petition, the director issued a notice of intent to deny based on the following reasons: (1) the position is more accurately characterized as a convenience store manager because food service managers are typically employed in restaurants or other venues offering food preparation and

services, and (2) there is no evidence that the nature of the duties of the proffered position, managing a convenience store with seven employees, are so specialized and complex to require a baccalaureate or higher degree or its equivalent.

In response to the notice of intent to deny, the petitioner provided the following additional evidence:

Selected pages from the [REDACTED] Inc. Inventory Control Manual; the petitioner's Monthly Sales Calendar Reports for September and October 2001; the petitioner's Store Staff Weekly and Monthly Tasks internal worksheet; the petitioner's Shift and Daily Store Staff Task List; the petitioner's Inventory Report and Auditor's Checklist; the petitioner's Lottery Audit Worksheet; the petitioner's Inventory Control Sheets; the petitioner's Cash Register Activity Worksheet; the petitioner's By Store Merchandise Sales Summary Report for September 2001; the petitioner's Multi Store Income Expense Summary; the petitioner's Franchise Weekly Management Schedule; the petitioner's seller's permits and business licenses of three additional, mutually owned, business locations; the petitioner's complete Inventory List and Order Guides; and excerpted pages from the Department of Labor's O*Net system and Dictionary of Occupational Titles discussing Food Service Managers, Administrative Service Managers, Operations Managers and General Managers.

The petitioner also presented a written statement in response to the director's notice of intent to deny. The petitioner stated that, while deciding what it should call the proffered position for nonimmigrant visa petition filing purposes, it could not identify a suitable occupational title and category from the Department of Labor's (DOL) online wage library so it chose to call the proffered position a Food Service Manager. In response to the director's notice that the educational requirements for a Food Service Manager do not qualify the position as a specialty occupation, the petitioner elaborated upon the duties of the position as follows:

In addition, the individual we are seeking for this position must be able to effectively perform all of the supportive services associated with running our round-the-clock operation. These tasks were mentioned to you earlier in our September 13, 2001 employer letter: *'...the qualified individual must be able to monitor store's budget, review financial records and store expenditures.'* The person we are seeking to fill

this position must be able to plan, manage, coordinate and track our: projected and actual sales activities, complete store inventory, all payroll records, time and financial budget, outgoing and incoming deliveries and mail, employee's work schedules and assignments, lottery records, and cash registers [sic] reports. In addition, the qualified individual must be able to effectively work within his/her set budget, conduct periodic store audits, create audit reports, and present income and expense summaries to the store owners.

(Emphasis in the original). The petitioner stated that based on the elaborated duties, the proffered position could better be characterized as an Administrative Service Manager as described in the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.

Subsequent to suggesting the position should be considered an administrative services manager, the petitioner continued to expand the duties of the proffered position as follows:

The required duties of the offered position also involve: supervising the activities of three shift supervisors, implementing store policies, safekeeping company funds and inventory, and ensuring proper operation of our electronic and data processing equipment, including cash registers, scanners, credit card machines and computer terminals. He/she must be able to adequately handle customer inquiries and complaints, personnel grievances and ensure store's compliance with safety and environmental codes. He/she will also have the power to negotiate with vendors and enter into binding contracts for merchandize [sic].

In fact, the job duties of this position are too diverse and general to be categorized under any specific job title. This job description comprises of [sic] the following tasks: formulation and implementation of policies, management of daily operations, marketing, accounting, purchasing, inventory control, sales, as well as personnel management and training.

The petitioner concluded by asserting that the position could also be characterized as an Operations Manager or General Manager according to the DOL's *Dictionary of Occupational Titles* because the proffered position involves responsibility for the success or failure of the business operation and coordination with three other mutually owned stores.

The director denied the nonimmigrant visa petition because: (1) the position is more accurately characterized as a convenience store manager because food service managers are typically employed in restaurants or other venues offering food preparation and services, and (2) there is no evidence that the nature of the duties of the proffered position, managing a convenience store with seven employees, are so specialized and complex to require a baccalaureate or higher degree or its equivalent.

On appeal, counsel reiterates past discussions and references the petitioner's job duties as elaborated upon in response to the director's notice of intent to deny to characterize the position as a "professional upper level managerial job." Counsel offers to amend the petition and labor condition application to reflect an operations manager or general manager position. However, a petitioner may not make a material change to a petition that has already been filed in an effort to make an apparently deficient petition conform to CIS requirements. The instant petition has been analyzed on the basis of the original documents and any revisions that corrected the original inconsistencies. See *Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm. 1998).

Counsel asserts that the proffered position is a specialty occupation because it has been assigned a specific SVP rating in The Department of Labor's *Dictionary of Occupational Titles (DOT)* (4th Ed., Rev. 1991). However, the *DOT* is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation.

The Department of Labor has replaced the *DOT* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training and experience required to perform the duties of that occupation. The Department of Labor's *Occupational Outlook Handbook (Handbook)* provides a more comprehensive description of the nature of a particular occupation and the education, training and experience normally required to enter into an occupation and advance within that occupation. For this reason, CIS is not persuaded by a claim that the proffered position is a specialty occupation simply because the Department of Labor has assigned it a specific SVP rating in the *DOT*.

CIS utilizes the Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)* when determining whether a baccalaureate or higher degree, or its equivalent, is normally the minimum

requirement for entry into a particular position. Contrary to counsel's assertion, the position is not an operations manager or general manager position. Even assuming, *arguendo*, that the petitioner's proffered position is a general or operations management position, the position would still not qualify as a specialty occupation. The *Handbook*, 2002-2003 edition, on pages 86-87, states the following with regard to "Top Executives":

In smaller organizations, such as independent retail stores or small manufacturers, a partner, owner, or general manager often is responsible for purchasing, hiring, training, quality control, and day-to-day supervisory duties.

. . . .

General and operations managers plan, direct, or coordinate the operations of companies or public and private sector organizations. The duties include formulating policies, managing daily operations, and planning the use of materials and human resources, but are too diverse and general in nature to be classified in any one area of management or administration, such as personnel, purchasing, or administrative services.

(Emphasis in the original). With regard to the educational and training for top executives, on page 87, the *Handbook* states the following:

The formal education and experience of top executives varies as widely as the nature of their responsibilities. Many top executives have a bachelor's or higher degree in business administration or liberal arts.

. . . .

Since many top executive positions are filled by promoting experienced, lower level managers when an opening occurs, many are promoted within the organization. In industries such as retail trade or transportation, for instance, it is possible for individuals without a college degree to work their way up within the company and become managers. Many companies prefer, however, that their top executives have specialized backgrounds and hire individuals who are managers in other organizations.

Utilizing the "Top Executives" section of the *Handbook*, no specific training or educational requirements are listed for a

general or operations manager position. The *Handbook* illustrates that it is possible for an individual without a degree to become a high-level manager or top executive.

Under the "Top Executives" section of the *Handbook*, it is notable that a distinction is made between large and small employers. The petitioner is a small employer so its manager would have broader duties. However, the proposed salary for the proffered position is modest and not reflective of a top manager. The *Handbook* points out that top managers are among the highest paid workers and the median earnings of general and operations managers in 2000 were \$61,160 with the middle percent earning a minimum of \$40,880. On its Form I-129, the petitioner indicates it would pay the beneficiary \$37,000 per year. This proffered remuneration is not reflective of a high level general or operations manager.

Contrary to the petitioner's alternative characterization of the proffered position, the position is not an administrative services manager position. The *Handbook*, on page 24, states the following about administrative services managers:

Administrative services managers perform a broad range of duties in virtually every sector of the economy. They coordinate and direct support services to organizations as diverse as insurance companies, computer manufacturers, and government offices. These workers manage the many services that allow organizations to operate efficiently, such as secretarial and reception, administration, payroll, conference planning and travel, information and data processing, mail, materials scheduling and distribution, printing and reproduction, records management, telecommunications management, security, parking, and personal property procurement, supply, and disposal.

An administrative services manager position is for occupations handling office personnel and services, not convenience store services.

The AAO affirms the director's decision that the proffered position is not a food service manager position. The *Handbook*, on page 55, states the following about food service manager positions:

In addition to the traditional duties of selecting and pricing menu items, using food and other supplies efficiently, and achieving quality in food preparation and service, managers now are responsible for a growing

number of administrative and human resource tasks. . . .

In most large establishments, as well as in many smaller ones, the management team consists of a *general manager*, one or more *assistant managers*, and an *executive chef*. The executive chef is responsible for the operation of the kitchen, while the assistant managers oversee service in the dining room and other areas. In smaller restaurants, the executive chef also may be the general manager, and sometimes an owner. In fast-food restaurants and other food service facilities open for long hours.—often 7 days a week—several assistant managers, each of whom supervises a shift of workers, aid the manager. . . .

Managers or executive chefs select menu items, taking into account the likely number of customers and the past popularity of dishes. Other issues taken into consideration when planning a menu include unserved food left over from prior meals that should not be wasted, the need for variety, and the seasonal availability of foods. Managers or executive chefs analyze the recipes of the dishes to determine food, labor, and overhead costs, and to assign prices to various dishes. Menus must be developed far enough in advance that supplies can be ordered and received in time.

(Emphasis in the original). The *Handbook's* description of food service managers does not reflect the petitioner's proffered position. The *Handbook*, on page 56, indicates that most food service managers "work in restaurants or for contract institutional food service companies, while a smaller number are employed by educational institutions, hospitals, nursing and personal care facilities, and civic, social, and fraternal organizations." The *Handbook* makes no mention of convenience stores as employment sites for food service managers.

Even assuming, arguendo, that the petitioner's proffered position is a food service manager position, the *Handbook*, at page 56, states that most employers of food service managers recruit from "2- and 4- year college hospitality management programs." An individual with a two-year post-secondary education could assume an entry level position as a food service manager and a baccalaureate degree or higher or its equivalent is not required. Thus, a food service manager position is not a specialty occupation.

The position of convenience store manager is most similar to the

Handbook's discussion on sales worker supervisor positions. The *Handbook*, at page 371, provides the following information about sales worker supervisor positions:

Sales worker supervisors oversee the work of sales and related workers such as retail Salespersons, cashiers, customer service representatives, stock clerks and order fillers, sales engineers, and wholesale and manufacturing sales representatives. They are responsible for interviewing, hiring, and training employees, as well as preparing work schedules and assigning workers to specific duties. . . .

In retail establishments, sales worker supervisors ensure that customers receive satisfactory service and quality goods. They also answer customers' inquiries and deal with complaints, and may handle purchasing, budgeting, and accounting. Their responsibilities vary, depending on the size and type of establishment. . . .

They supervise employees who price and ticket goods and place them on display; clean and organize shelves, displays, and inventory in stockrooms; and inspect merchandise to ensure that nothing is outdated. Sales worker supervisors also review inventory and sales records, develop merchandising techniques, coordinate sales promotions, and may greet and assist customers and promote sales and good public relations.

The *Handbook*, at page 372, also states that most sales worker supervisors "are found in grocery and department stores, motor vehicle dealerships, and clothing and accessory stores, and in services such as advertising or other business services." The petitioner provides grocery store items in a rapid service setting. The *Handbook's* description of duties and employment sites for sales worker supervisor positions most resemble the petitioner's proffered position.

The *Handbook*, at page 372, provides the following information concerning the educational requirements needed for a sales worker supervisor to assume such a position:

Sales worker supervisors usually acquire knowledge of management principles and practices—an essential requirement for a supervisory or managerial position in retail trade—through work experience. Many supervisors begin their careers on the sales floor as salespersons, cashiers, or customer service representatives. In these

positions, they learn merchandising, customer service, and the basic policies and procedures of the company.

Thus, the *Handbook* clearly states that no degree is required to assume a sales worker supervisor position. The nature of the petitioner's business is a convenience store and the position is a convenience store manager. The proffered position would entail inventory oversight and procurement, personnel oversight and coordination, bookkeeping, customer service, and other low-level administrative duties for a small convenience store, such as a sales worker supervisor. The knowledge, skills, and abilities required to manage a small 7-11 store do not require the theoretical and practical application of a body of highly specialized knowledge. Thus, the petitioner has not established that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position as required under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

There is no evidence that a degree requirement is common to the industry in parallel positions among similar organizations. Factors often considered by CIS when determining the industry standard include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Min. 1999) (quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)). According to the *Handbook*, sales worker supervisors, and managers and executives generally, are typically promoted into these types of positions based on their training and experience, not based on a degree. The record does not contain any evidence concerning an industry professional association or expert affidavits. Thus, the petitioner has failed to prove that a degree requirement is common to the industry in parallel positions among similar organizations as required under 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Additionally, there is no evidence that the petitioner normally requires a degree or its equivalent for the position. Aside from counsel's statement on appeal that the petitioner only hires individuals with bachelor's degrees into its management positions at other store locations, the petitioner offered no evidence concerning its past hiring practices for the proffered position at the stated worksite location. The assertions of counsel do not constitute evidence. See *Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Additionally, simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Matter of Treasure*

Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). To date, any information as to any previous management positions has not been placed on the record. For example, the record contains no evidence concerning the names of the petitioner's employees assuming such positions, the title and description of duties of the positions held by them, as well as copies of their resumes and academic credentials. Thus, the petitioner has not established the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, there is no evidence to support that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties are usually associated with the attainment of a baccalaureate or higher degree. As noted above, the duties of the proffered position focus primarily on stocking inventory, personnel, bookkeeping, and administrative duties. These are not complex duties requiring the application of a body of highly specialized knowledge. Thus, the petitioner has not established the criterion found at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

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. The petition is denied.