

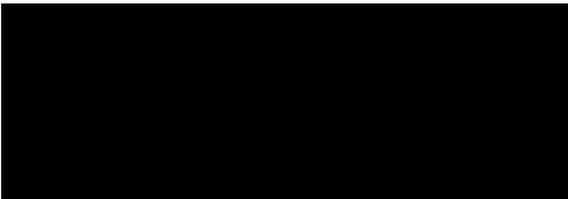
**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**



**U.S. Citizenship
and Immigration
Services**

PUBLIC COPY

Dz



FILE: [Redacted] Office: CALIFORNIA SERVICE CENTER Date: DEC 05 2005

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The director of the service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner is a provider of private duty nursing care and seeks to employ the beneficiary as a market research analyst. The director denied the petition based on his determination that the petitioner had failed to establish that its proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence; (3) counsel's response to the director's request for evidence; (3) the director's denial letter; and (4) Form I-290B, with counsel's brief. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, a petitioner must establish that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one 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.

Citizenship and Immigration Services (CIS) interprets the term “degree” in the above criteria to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.

To determine whether a particular job qualifies as a specialty occupation, CIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. 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 nor 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.

The petitioner states that it is seeking the beneficiary’s services as a market research analyst. Evidence of the beneficiary’s duties includes: the Form I-129; a December 12, 2002 letter of support from the petitioner; and the petitioner’s response to the director’s request for evidence.

At the time of filing, the petitioner stated that the duties of the proffered position entail: analyzing sales and financial state; implementing promotional strategies and managing marketing campaigns; devising methods to increase profitability, managing expenses and reducing overhead; analyzing the marketing conditions in local and regional areas to identify approaches to increase interest in the petitioner as well as to generate exposure; evaluating the petitioner’s services to determine what could be added to increase desirability of its properties as opposed to competitors; establishing methodologies and design formats for data gathering, such as surveys and development of questionnaires; examining and analyzing data forecast methods of marketing and public relations; identification of new market sources as well as expansion and retention of existing customer bases; collection of market data, customer preferences and selection habits; and implementation of structured strategic approach to ensure optimum market penetration with minimal expenditures; maintaining regular, ongoing contact with referral sources through personal visits, telephone calls, brochures, and any other means which significantly attract potential clients; developing and implementing events and functions to attract prospective customers and/or referral sources; providing appropriate trend and activity reports; monitoring marketing trends and competition to ensure marketing strategies and plans meet marketing conditions; developing and preparing press releases, advertisements, brochures, flyers and other collateral material which are appropriate; training and coordinating staff members to serve as back-up in responding to customer inquiries to ensure all inquiries are handled timely and appropriately. The petitioner asserted that the duties of the position are fully professional in that they require the application of a general body of knowledge normally obtained in an academically recognized course of study leading to a Bachelor’s degree or its equivalent in business, marketing or commerce or a related field.

The director requested additional information about the proffered position, specifically, a more detailed description of the day-to-day work done, including specific job duties, the percentage of time spent on each duty, level of responsibility, and hours per week of work. The director requested evidence that the beneficiary is qualified to perform the duties of a specialty occupation such as a foreign educational credential evaluation. The director requested additional information about the petitioner such as a detailed description of the petitioner’s organization, business and facility licenses, copies of federal income taxes, a copy of the petitioner’s organizational chart, and copies of approval notices issued to the petitioner’s H or L nonimmigrant employees.

In response to the director's request the petitioner provided additional details about the proffered position's duties. The petitioner asserts that the beneficiary has the equivalent of a master of arts in marketing and submitted a foreign credentials evaluation. The petitioner explained that it is a large company that offers a wide range of services and is seeking to expand its client base. The petitioner stated that the beneficiary would be in charge of the marketing analysis of a particular geographic region. The petitioner asserted that the position of a marketing analyst requires the services of a person with a baccalaureate degree or an equivalent in the occupational field. The petitioner asserted that it normally requires a degree or its equivalent for the position and currently employs two people in the position of market research analyst. The petitioner submitted a list of four persons that it had hired as a market research analyst which indicated that the employees had the following degrees: BS Tourism; BSC Marketing; BA Commerce; and a BS Biological Science. The petitioner submitted a letter from the beneficiary's prior employer as evidence of the beneficiary's progressively responsible positions directly related to the specialty.

The petitioner submitted a copy of its 1120S Federal Income Tax Return for tax year 2001 which indicated \$3,668,150 in gross receipts or sales. The petitioner provided brochures describing the services it offers.

In his denial, the director noted that some of the duties of the position appear to reflect many of those performed by market research analysts as listed under market and survey researchers in the Department of Labor's *Occupational Outlook Handbook* (the *Handbook*.) Additionally, the director found that many of the duties appeared to reflect the duties of a marketing manager. The director noted that a market research analyst researches, compiles, analyzes market data, and advises management and that the duties do not include acting on that data. The director found that although the proffered position may require some market analysis, the duties described are more similar to those of a marketing manager. Furthermore, the director found that the evidence failed to establish that the petitioner engages in the type of business for which a market research analyst would typically be required on a full or part-time basis. The director found that the evidence failed to establish that the petitioner had a sales staff to implement advertising or sales campaigns as a result of the research performed and recommendations made by a market research analyst. The director found that the record failed to establish that the petitioner has a staff or a marketing specialist to gather market data for analysis by a market research analyst.

The director referred to the *Handbook* which reveals that marketing managers develop the firm's marketing strategy and determine the demand for products and services offered by the firm and its competitors as well as identify potential markets. The director noted that the *Handbook* states that a wide range of backgrounds is suitable for entry into marketing manager positions and that marketing managers do not qualify as a specialty occupation.

Due to the size and nature of the petitioner's business and the nature of the duties of a market research analyst, the director had concerns about whether the beneficiary would be able to perform the services of a market research analyst. The director found that the petitioner failed to establish that the proffered position was a specialty occupation.

The AAO shares the director's concerns regarding the employment that has been described by the petitioner.

The *Handbook*, at page 173, states the following with regard to the employment of marketing research analysts:

Market, or marketing, research analysts are concerned with the potential sales of a product or service. They analyze statistical data on past sales to predict future sales. They gather data on competitors and analyze prices, sales, and methods of marketing and distribution. Market research analysts devise methods and procedures for obtaining the data they need. They often design telephone, mail, or Internet surveys to assess consumer preferences. Some surveys are conducted as personal interviews by going door-to-door, leading focus group discussion, or setting up booths in public places such as shopping malls. Trained interviewers, under the market research analyst's direction, usually conduct the surveys.

After compiling the data, market research analysts evaluate them and make recommendations to their client or employer based upon their findings. They provide a company's management with information needed to make decisions on the promotion, distribution, design, and pricing of products or services. The information may also be used to determine the advisability of adding new lines of merchandise, opening new branches, or otherwise diversifying the company's operations. Market research analysts might also develop advertising brochures and commercials, sales plans, and product promotions such as rebates and giveaways

Because of the applicability of market research to many industries, market research analysts are employed in most industries....

The occupation of a market research analyst is a specialty occupation, normally requiring those seeking entry-level employment to have a master's degree in a related field. However, while the petitioner has identified its position as that of a market research analyst, its description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention.

At the time of filing, the petitioner offered a description of the beneficiary's duties, one that appeared to describe the occupation of marketing manager with duties such as implementing promotional strategies and managing marketing campaigns; ongoing contact with referral sources through personal visits, telephone calls, brochures, and any other means which significantly attract potential clients; developing and implementing events and functions to attract prospective customers and/or referral sources; developing and preparing press releases, advertisements, brochures, flyers and other collateral material which are appropriate; training and coordinating staff members to serve as back-up in responding to customer inquiries to ensure all inquiries are handled timely and appropriately.

In response to the director's request for evidence, the petitioner submitted a description of job duties very similar to the duties listing in the *Handbook* for market research analysts. Its only references to the beneficiary's role within the petitioner's business were phrased in general terms, e.g., "establish[ing] methodologies and design formats for data gathering, such as surveys and development of questionnaires. He will examine and analyze data forecast methods of marketing and public relations." The information provided by the petitioner does not explain the duties of the position in the context of the petitioner's ongoing business.

On appeal, counsel asserts that since the petitioner's job description, the description in the *Handbook* and the description of a market research analyst discussed in a California U.S. District Court decision are virtually indistinguishable, the position in the instant petition is that of a market research analyst and thus qualifies as a specialty occupation. Counsel also asserts theoretically that if the position does not fit under the occupation of market research analyst, it does fit under marketing manager, and that CIS erred when determining that marketing managers do not require a baccalaureate level of training. Counsel contends that the position of

marketing manager requires a degree and that employers prefer that the degree be in certain related fields. Counsel refers to Internet job postings to support the petitioner's contention that the degree is common to the industry. Counsel contends that the petitioner normally requires a degree or its equivalent in the position. Additionally, counsel asserts that 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 bachelor's degree.

On appeal, counsel asserts that CIS abused its discretion in determining that the petitioner's industry does not have a need for a market analyst. Counsel asserts that as the petitioner has undertaken the time and expense to seek to employ the beneficiary, it is evident that in the petitioner's business judgment, the petitioner believes that a market research analyst is required for the company to flourish.

As discussed above, the specific duties of the proffered position, combined with the nature of the petitioning entity's business operations, are factors to be considered. 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).

A petitioner cannot establish its employment as a specialty occupation by describing the duties of that employment in the same general terms as those used by the *Handbook* in discussing an occupational title, e.g., a market research analyst establishes research methodologies or performs market analyses. This type of generalized description is necessary when defining the range of duties that may be performed within an occupation, but cannot be relied upon by a petitioner when discussing the duties attached to specific employment. In establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in relation to its particular business interests.

The petitioner has offered no description of the duties of its proffered position beyond the generalized description it provided in response to the director's request for evidence. It cannot, therefore, establish that the position meets any of the requirements for a specialty occupation set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A). The petitioner has not provided examples of the marketing strategies the beneficiary has already produced for the petitioner. The petitioner's generalized statements about the duties to be performed cannot substitute for a description of the specific duties to be performed by the beneficiary. As previously noted, CIS must examine the actual employment of an alien, i.e., the specific tasks to be performed by that alien, to determine whether a position qualifies as a specialty occupation. The petitioner has not provided information about the number of customers it serves or the types of information the market research analyst will analyze. Additionally, the petitioner has not adequately described its business in order for the AAO to understand how the market research analyst will fulfill its duties. The petitioner provides private duty nurses and currently employs two market research analysts. The petitioner's description of the duties of its position is so generic that it is not possible to identify those tasks and, therefore, whether the position is that of a market research analyst. Further, without a reliable description of the position's duties, the AAO is unable to determine whether the performance of those duties meets the statutory definition of a specialty occupation -- employment requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. As a result, the AAO finds the petitioner has failed to establish that it has a specialty occupation for which it is seeking the beneficiary's services.

Based on the record of proceeding, the AAO has determined that the proffered position is most similar to that of a marketing manager in the *Handbook*. According to the *Handbook*, marketing managers develop the firm's detailed marketing strategy. With the help of subordinates, marketing managers determine the demand

for products and services offered by the firm and its competitors. In addition, they identify potential markets. As revealed in the *Handbook*, marketing managers develop pricing strategy with an eye towards maximizing the firm's share of the market and its profits while ensuring that the firm's customers are satisfied.

With respect to the educational requirements for marketing managers, the *Handbook* states:

A wide range of educational backgrounds is suitable for entry into advertising, marketing, promotions, public relations, and sales managerial jobs, but many employers prefer those with experience in related occupations plus a broad liberal arts background. For marketing, sales and promotions management positions, some employers prefer a bachelor's or master's degree in business administration with an emphasis on marketing.

Consequently, there is insufficient evidence in the record to establish that a baccalaureate or higher degree or its equivalent in a specific specialty is the normal minimum requirement for entry into the marketing manager position.

The petitioner fails to establish the second criterion - that a specific degree requirement is common to the industry in parallel positions among similar organizations. The petitioner submitted internet postings for market research analyst positions. The internet job posting are for companies that are dissimilar to the petitioner such as Synovate, a company specializing in global market intelligence; and Blue Cross Blue Shield of Minnesota, an insurance and benefits provider. Additionally, as discussed above, the proffered position is not that of a market research analyst.

No evidence is in the record that would show the proffered position is so complex or unique that it can be performed only by an individual with a degree in a specific specialty. Again, the *Handbook* reveals that the duties of the proffered position would be performed by a marketing manager, an occupation that does not require a specific baccalaureate degree.

Nor is there evidence in the record to establish the third criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A): that the petitioner normally requires a specific degree or its equivalent for the position. The petitioner asserts that it normally requires a degree for the position. The petitioner submitted a list of four persons that it had hired as a market research analyst which indicated that the employees had the following degrees: BS Tourism; BSC Marketing; BA Commerce; and BS Biological Science. The record establishes that the petitioner does not require a degree in a specialty related to the occupation.

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires that the petitioner establish that the nature of the specific 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. Once again, the *Handbook* portrays the duties of the proffered position as performed by a marketing manager, an occupation that does not require a specific baccalaureate degree. The petitioner therefore fails to establish the fourth criterion.

Therefore, for the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

WAC 03 066 52189

Page 8

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.