

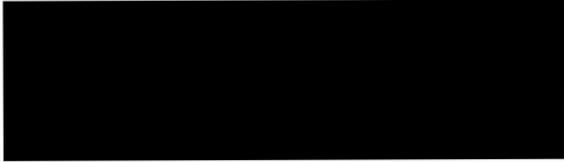


U.S. Citizenship  
and Immigration  
Services

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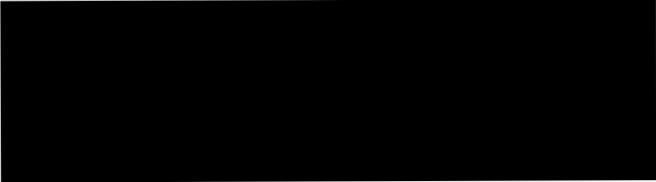
FILE: WAC 03 068 54017 Office: CALIFORNIA SERVICE CENTER Date: MAR 22 2006

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 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, 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 used car dealership with fifteen employees that seeks to employ the beneficiary as a marketing analyst. The petitioner, therefore, endeavors to classify the beneficiary as a nonimmigrant worker in a specialty occupation pursuant to 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).

The director denied the petition on the basis that the petitioner had failed to establish that the proposed position qualifies for classification as a specialty occupation. In his denial, the director cited two reasons for his arrival at this conclusion. First, the director found that while some of the duties of the proposed position mirror those of typical market research analysts, the majority of the duties are not those of market research analysts, and do not require a degree for their performance. Second, the director found that the petitioner's operations lack the complexity to require the services of a management analyst and that its business was not of the type in which management analysts would normally be employed.

The record of proceeding before the AAO contains (1) the Form I-129 and supporting documentation; (2) the director's request for additional evidence; (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) the Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

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 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:

[A]n 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 criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed 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 proposed 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 (5<sup>th</sup> 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.

In its October 21, 2002 letter of support, the petitioner set forth the specific duties of the proposed position as follows:

- Develop and implement marketing strategies and plans designed to achieve the facility’s census and mix goals. Review quarterly, making appropriate changes to meet current market conditions.
- Maintain regular, ongoing contact with referral sources through personal visits, telephone calls, brochures, and any other means which significantly attract potential customers.
- Develop and implement events and functions to attract prospective customers and/or referral sources.
- Provide appropriate trend and activity reports.
- Monitor marketing trends and competition to ensure marketing strategies and plans meet marketing conditions.
- Develop and prepare press releases, advertisements, brochures, flyers and other collateral materials which are appropriate for our sales efforts.
- Train and coordinate staff members to serve as back up in responding to customer inquiries to ensure all inquiries are handles timely and appropriately.

The director denied the petition, finding that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation.

In determining whether a proposed position qualifies as a specialty occupation, CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty, as the minimum for entry into the occupation as required by the Act. The AAO routinely consults the Department of Labor’s *Occupational Outlook Handbook* (the *Handbook*) for its information about the duties and educational requirements of particular occupations.

Counsel and the petitioner contend that duties of the proposed position correspond to those of a market research analyst, as that position is described in the *Handbook*.

In his denial, the director, relying on the 2004-2005 edition of the *Handbook*, found many of the duties of the proposed position to reflect the employment of a market research analyst, but concluded that the record failed to establish that the petitioner's business was of the type or complexity to require a market research analyst. He ultimately determined the proposed position to be that of a marketing manager, employment that does not impose a degree requirement on the beneficiary. While, as discussed below, the AAO concurs in the director's finding that the proposed position is closely aligned to the employment of a marketing manager, it does not agree with the reasoning that led him to his conclusion.

The AAO finds the director to have erred in concluding that the petitioner does not have the organizational complexity or operate the type of business that would require a marketing research analyst. The *Handbook* indicates that the work of market research analysts is applicable to many industries and that they are employed throughout the economy. In that market researchers are concerned with the potential sales of products or services and provide a company's management with the information needed to make decisions on the promotion, distribution, design and pricing of products or services, the petitioner's need for marketing research may not be discounted based on a lack of organizational complexity or its type of business. The fact that the petitioner is a used car dealership does not preclude it from engaging in the type of market research activities described by the *Handbook* as a means of identifying business opportunities. Therefore, the AAO withdraws the director's findings in this regard.

The duties of the proposed position do not describe the work of market research analysts. The employment of market researchers, as discussed in the 2006-2007 edition of the *Handbook*, is characterized by their responsibility for designing and conducting the research they need to predict future sales of a product or service. Such responsibilities are not specifically listed among the duties of the proposed position. While the petitioner did state that the beneficiary would design surveys and questionnaires, the main thrust of the proposed duties, as they were set forth in the petitioner's letter of support, were focused largely toward marketing functions. When setting forth the specific duties of the position, the petitioner stated that the beneficiary would be developing marketing strategies and then implementing those strategies, maintaining contacts with referral sources, planning events and writing press releases to attract customers, monitoring marketing trends, and training staff members to answer questions from customers. These duties do not describe the duties of a market research analyst, and the AAO does not agree with counsel and the petitioner that the position proposed here is really that a market research analyst.

On appeal, counsel attempts to alter the duties of the proposed position, stating the following:

Unlike a Marketing Manager, [the beneficiary] will not actively develop marketing or pricing strategies. Moreover, [the beneficiary] will not monitor trends or oversee product development. These duties are reserved for the organization's management and as Market Research Analyst, [the beneficiary] will research and analyze the data that will inform management's decision.

However, this passage directly conflicts with the petitioner's October 21, 2002 letter of support. As noted previously, the petitioner in that letter stated that the duties of proposed position would require the beneficiary to "[d]evelop and implement marketing strategies" and "[m]onitor marketing trends." A petitioner cannot offer a new position to the beneficiary on appeal or materially change the proposed position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. *Matter of Michelin Tire*

*Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Accordingly, the AAO will review the duties of the proposed position as they were set forth in the petitioner's initial letter of support.

As described by the petitioner at the time of filing and in response to the director's request for evidence, the proposed position's duties appear to reflect the work of marketing managers who develop business strategies for the companies that employ them. Such employment is discussed by the *Handbook*, within the occupation of advertising, marketing, promotions, public relations and sales managers:

The objective of any firm is to market and sell its products or services profitably . . . . Advertising, marketing, promotions, public relations, and sales managers coordinate the market research, marketing strategy, sales, advertising, promotion, pricing, product development, and public relations activities.

*Marketing managers* develop the firm's marketing strategy in detail. With the help of subordinates, including *product development managers* and *market research managers*, they estimate the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets—for example, business firms, wholesalers, retailers, government, or the general public. Marketing managers develop pricing strategy to help firms maximize profits and market share while ensuring that the firm's customers are satisfied. In collaboration with sales, product development, and other managers, they monitor trends that indicate the need for new products and services and oversee product development. Marketing managers work with advertising and promotion managers to promote the firm's products and services and to attract potential users.

The *Handbook* states the following with regard to the educational qualifications required for marketing managers:

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. A bachelor's degree in sociology, psychology, literature, journalism, or philosophy, among other subjects, is acceptable. However, requirements vary, depending upon the particular job.

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. Courses in business law, economics, accounting, finance, mathematics, and statistics are advantageous. . . .

Most advertising, marketing, promotions, public relations, and sales management positions are filled by promoting experienced staff or related professional personnel. For example, many managers are former sales representatives, purchasing agents, buyers, or product, advertising, promotions, or public relations specialists. . . .

Thus, the proposed position does not qualify for classification as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), which requires a showing that a baccalaureate or higher degree in a specific specialty or its equivalent is normally the minimum requirement for entry into the type of position being proffered. The *Handbook* indicates that most marketing manager positions are filled on the basis of experience (most positions “are filled by promoting experienced staff or related professional personnel”). Moreover, the fact that some employers “prefer” a degree or that individuals possessing degrees “should have the best job opportunities” does not rise to this criterion’s standard of employers normally requiring at least a bachelor’s degree in a specific specialty. As such, marketing managers do not qualify as specialty occupations under the first criterion.

Nor does the proposed position qualify as a specialty occupation under either alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The first prong of this regulation requires a showing that a specific degree requirement is common to the industry in parallel positions among similar organizations.

The AAO has reviewed the job postings submitted by counsel. Counsel, however, has failed to consider the specific requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) for establishing a baccalaureate or higher degree as an industry norm. To meet the burden of proof imposed by the regulatory language, a petitioner must establish that its degree requirement exists in parallel positions among organizations similar to the petitioner. The petitioner must also establish that the degree commonly required is in a specific specialty.

There is no evidence in the record to establish that any of the job postings are from companies similar in size and scope of operations to the petitioner, a used car dealership with fifteen employees. Synovate is a global market intelligence company, Honda R & D Americas, Inc. is the research and development division of an automobile (and other forms of machinery) manufacturer, Karmaloop, LLC is an online retail clothing company, AAA is listed as a “hospitality/tourism” company, NetZerio is an internet service provider, and Archstone-Smith owns, operates, develops, and acquires apartments across the United States. No evidence has been submitted to demonstrate that the petitioner and any of these companies are “similar organizations.”

Accordingly, the proposed position does not qualify as a specialty occupation under the first prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The second prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) requires the petitioner to prove that the duties of the proposed position are so complex or unique that only an individual with a degree can perform them. The nature of the duties of the proposed position as set forth in the petition does not support such a finding, as they are similar to those of marketing managers as discussed in the *Handbook*, which do not require a degree. The record contains no documentation to support a finding that the proposed position is more complex or unique than marketing manager positions at other, similar organizations. The record offers no evidence that the proposed position may be distinguished from similar non-degreed employment based on its unique nature or complexity.

Therefore, the petitioner has not established that the proposed position qualifies as a specialty occupation under either prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Nor does the proposed position qualify as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(3), which requires a showing that the petitioner normally requires a degree or its equivalent for the proposed position. To determine a petitioner’s ability to meet this criterion, the AAO normally reviews the petitioner’s past employment practices, as well as the histories, including names and dates of employment, of those employees with degrees who previously held the position, and copies of those employees’ diplomas. No evidence has been submitted, nor has the petitioner contended, that the position qualifies as a specialty occupation under this criterion.

Finally, the AAO turns to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which requires a demonstration 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 baccalaureate or higher degree.

To the extent that they are depicted in the record, the duties of the proposed position do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. There is no information in the record to support a finding that the proposed position is more specialized and complex than the general range of marketing manager positions for which the *Handbook* indicates no requirement for the highly specialized knowledge associated with at least a bachelor's degree in a specific specialty. The duties as described by the petitioner do not reflect a higher degree of knowledge and skill than would normally be required of marketing managers who routinely work in highly complex and competitive environments. Therefore, the evidence does not establish that the proposed position is a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The petitioner has failed to establish that the position qualifies for classification as a specialty occupation under any of the criteria set forth at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(1), (2), (3), and (4). As the proposed position is not a specialty occupation, the beneficiary's qualifications to perform its duties are immaterial. Accordingly, the AAO will not disturb the director's denial of the petition.

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.