

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy

**PUBLIC COPY**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

**PUBLIC COPY**



D<sub>2</sub>

FILE: WAC 07 149 52638 Office: CALIFORNIA SERVICE CENTER Date: APR 02 2009

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, California 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 nursing home. It seeks to employ the beneficiary as a marketing analyst 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 because he determined that the position was not 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 (RFE) dated June 22, 2007; (3) the petitioner's response to the director's RFE dated September 14, 2007; (3) the director's denial letter dated October 2, 2007; and (4) Form I-290B, with counsel's brief and additional evidence. The AAO reviewed the record in its entirety before reaching its decision.

The issue before the AAO is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment 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.

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. U.S. Citizenship and Immigration Services (USCIS) 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 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.<sup>1</sup> To interpret the regulations any other way would lead to absurd results: if USCIS were limited to reviewing a 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.

To determine whether a particular job qualifies as a specialty occupation, USCIS 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. USCIS 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.

The petitioner's letter of support, dated March 23, 2007, indicates the proffered position had the following requirements:

The Analyst will analyze existing data, inventory, statistics and reports to identify opportunities for increasing sales and decreasing marketing costs. She will draft comprehensive marketing plans to target each segment of [the petitioner's] potential client base. The Analyst will draft budgets for marketing campaigns with extensive analysis of costs and potential revenue to implement the most effective and cost-efficient channels to reach potential new customers. She will gather and interpret data on [the petitioner's] existing and potential clients utilizing client surveys, opinion polls, and questionnaires, and monitor client needs utilizing mathematical analysis, statistics, graphs and drawings. The Analyst will gather data on competitors by analyzing pricing, technology used and methods of marketing and servicing clients. She will examine and analyze statistical data to forecast future marketing trends. The Analyst will make recommendations to tailor [the petitioner's] campaigns to meet company needs. The Analyst will analyze and evaluate the success of each marketing campaign.

---

<sup>1</sup> 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.

The Analyst will draft detailed flowcharts, content and general technical parameters for [the petitioner's] Web Developer's and Software Engineers to allow for the implementation of direct e-mail marketing campaigns aimed at encouraging new business. She will work with management to implement conventional and Internet marketing strategies. The Analyst will create and effectuate procedures to ensure that targeted dates are met. She will confer with management to present findings, discuss and analyze concepts, budgeting and testing methodology. In order to perform these duties the Analyst should possess at least a Bachelor's degree (or its equivalent) in marketing, business administration or a closely related field.

On June 22, 2007, the director issued a request for evidence. The director requested the petitioner to submit evidence to demonstrate that the position of market research analyst was a common position required by a similarly sized office with similar annual incomes. In addition, the director requested evidence, such as job listings or documentation of past employment practices, to support the petitioner's contention that the degree requirement was common to the industry in parallel positions or in its own hiring practices. Finally, the director requested additional evidence pertaining to the nature and complexity of the petitioner's business.

In a response dated September 14, 2007, the petitioner responded to the director's query. The petitioner submitted copies of seven job postings<sup>2</sup> from various Internet websites, as well as two letters from two of the petitioner's competitors in the Chicago area discussing the need for a marketing analyst in their businesses. Finally, the petitioner submitted an organizational chart as well as various tax papers addressing the scope of its business.

To make its determination whether the employment described above qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement is common to the industry in parallel positions among similar organizations or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports 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." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

In his denial, the director, relying on the 2006-2007 edition of the DOL *Handbook*, concluded both that the duties of the proffered position were not those of a market research analyst and that the record failed to establish that the petitioner's business was of the type or complexity and scope to require a market research analyst. As discussed below, the AAO concurs in the director's finding that the proffered position is not that of a market research analyst.

In reaching its own conclusions regarding the nature of the proffered position, the AAO has reviewed the discussion of market or marketing research analysts, as described by the 2008-2009 edition of the *Handbook*. It has taken particular note of the following section of that discussion:

---

<sup>2</sup> Although counsel contends in his September 14, 2007 letter that eight job postings are submitted, the AAO counts only seven.

[M]arket 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 discussions, 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.<sup>3</sup>

The AAO finds that it is market research analysts' work in the design, development and supervision of original market research that sets this occupation apart from what might otherwise be characterized as marketing or sales manager positions, employment that also requires the incumbents to perform marketing research as they seek to identify and expand business opportunities for their employers. Although the petitioner indicated that the beneficiary would be heavily involved in research related to expanding its business, the analysis of its sales and marketing records, the compilation of research on its competitors, the compilation of market data and the survey of customer buying habits, the beneficiary's market research responsibilities do not make her a marketing research analyst. The issue is not whether the proffered position requires the beneficiary to do market research, which it does, but whether it is that of a marketing research analyst and requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through a master's degree in business administration, marketing, statistics, communications, or other related field. As the petitioner does not indicate that the proffered position would require the beneficiary to design and conduct the type of original market research performed by market research analysts, the proffered position is not that of a marketing research analyst.

Instead, like the director, the AAO finds the proffered position's duties to be more closely related to the work of marketing managers, who also use marketing research and financial analysis to develop business strategies. As discussed in 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.

\* \* \*

---

<sup>3</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos013.htm](http://www.bls.gov/oco/ocos013.htm).

*Marketing managers* develop the firm's detailed marketing strategy. With the help of subordinates, including product development managers and market research managers, they determine the demand for products and services offered by the firm and its competitors. In addition, they identify potential markets . . . . 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. 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 . . . .<sup>4</sup>

Having found the duties of the proffered position to be those of a marketing manager, the AAO now turns to the *Handbook* for its discussion of the educational requirements imposed on individuals who seek employment within this profession:

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.

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 . . . .<sup>5</sup>

As the *Handbook* indicates no specific degree requirement for employment as a marketing manager, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a related field.

The director also examined the complexity of the petitioner's organization in rendering the decision and, on appeal, newly-retained counsel contends that the director failed to understand the nature and responsibilities of the prospective job. The AAO notes that the petitioner's organizational chart indicates that there is a "marketing department" with one position identified as "market research analyst," presumably that of the petitioner. While the AAO notes that the chart does in fact indicate that the beneficiary would in fact work in

---

<sup>4</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos020.htm](http://www.bls.gov/oco/ocos020.htm).

<sup>5</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos020.htm](http://www.bls.gov/oco/ocos020.htm).

the marketing department, the fact remains that, at the time of filing, there were no other sales associates or marketing personnel on staff at the petitioning entity. Therefore, the AAO concurs with the director's finding that the petitioner does not have the staffing to implement marketing or sales campaigns based on the research which would allegedly be performed by the beneficiary. While counsel on appeal contends that a marketing staff is not necessary to implement marketing campaigns, and that members of the petitioner's management team or administration could implement the beneficiary's research into feasible campaigns or strategies, this claim is not supported by documentary evidence. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Accordingly, the AAO finds that the petitioner is unable to establish its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

To establish its proffered position as a specialty occupation under the second criterion, a petitioner must prove that a specific degree requirement is common to the industry in parallel positions among similar organizations, or that the proffered position is so complex or unique that it can be performed only by an individual with a degree in the specific specialty. In support of this premise, the petitioner has submitted four job postings from [www.monster.com](http://www.monster.com) and three job postings from [www.careerbuilder.com](http://www.careerbuilder.com). Upon review, each of the job listings can be distinguished from the proffered position in this matter.

The first job posting is for a *Director* of Marketing Operations at HealthSouth, a rehabilitation hospital in Florida. By virtue of the title alone, this position is distinguishable from that of marketing manager. The second posting is for a Healthcare Sales Rep. / Marketer for Vistacare, Inc., in San Antonio, Texas. This position is likewise distinguishable since it is a sales position and embodies the very tasks normally attributed to a sales representative who engages first-hand with customers, not a marketing research analyst. Four additional positions, namely, "Director Business Development Home Health/Hospice," "Director of Marketing and Admissions," "Marketing Director," and "Community Relations Director," attributed once again the title of director to the position, and indicate that the candidate will manage marketing and sales teams among other duties. As stated above, the proffered position is the only marketing position within the petitioner's industry, and it is clear that the beneficiary would not be managing or directing teams similar to those described in these job postings. Finally, the posting for "Senior Planning and Market Research Analyst" again attributes supervisory authority to the position, as well as additional planning duties. Consequently, the AAO concludes that none of the job postings submitted sufficiently represent a specific degree requirement in similar parallel positions. Accordingly, the petitioner has failed to satisfy the second criterion's condition that a petitioner establish its degree requirement is common in parallel positions among similar organizations.

The AAO next considers the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(3) and (4): the employer normally requires a degree or its equivalent for the position; and 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 determine a petitioner's ability to meet the third criterion, USCIS often reviews the position's employment history, including the names and dates of employment of those employees with degrees who previously held

the position, as well as the petitioner's hiring practices with regard to similar positions. In response to the director's request for evidence, the petitioner asserted that it has always had an in-house Marketing Director/Market Research Analyst and that the persons filling these positions have always had a bachelor's degree. However, the petitioner has submitted no evidence, such as resumes or employment histories, to corroborate this claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The petitioner has asserted that the duties of its proffered position – analyzing existing data, inventory, statistics and reports to identify opportunities for increasing sales and decreasing market costs – would require the beneficiary to create and effectuate procedures to ensure targeted dates, among other tasks. Such knowledge, it contends, comes only from a baccalaureate degree in marketing, business administration, or a closely related field. The AAO does not agree.

Upon review of the duties of the proffered position, the AAO has concluded that the position is closely aligned to that of a marketing manager. It does not find these duties, as described by the petitioner, to reflect a higher degree of knowledge and skill than would normally be required of marketing managers whose business responsibilities require them to survey and analyze industry trends and consumer behavior. Nor do they represent an amalgam of jobs that would require the beneficiary to possess skills and qualifications beyond those of a marketing manager. The AAO, therefore, concludes that the proffered position cannot be established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO shall 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.