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U.S. Citizenship  
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Services

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FILE: WAC 07 145 54181 Office: CALIFORNIA SERVICE CENTER Date: **MAR 03 2009**

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.

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 retail gas station. It seeks to employ the beneficiary as a market 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 May 2, 2007; (3) the petitioner's response to the director's RFE dated July 23, 2007; (3) the director's denial letter dated August 21, 2007; and (4) Form I-290B with counsel's brief and a statement from the petitioner's director. 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 also 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.

United States Citizenship and Immigration Services (USCIS) 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, 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 included an undated document entitled “Job Description” with the initial petition. The petitioner listed the beneficiary’s tasks and responsibilities as follows:

- 30% Gather, organize and analyze statistical data and research available on past sales in order to forecast possible future sales trends. In this way, identify greatest potential consumer target groups within gas station industry, and their locations. This involves establishing preferences and buying habits for each demographic sub-group by location and purchases via primary and secondary research.
- 30% Examine and analyze our organization’s existing marketing efforts and strategies, ascertaining their effectiveness, making recommendations to Director for improvement, including for new services and products offered by our company. This involves formulating reports and ideas for expanding or intensifying certain marketing strategies and vice versa as well as offering recommendations regarding branching out into different niches in the United States.
- 15% Compose and conduct frequent surveys of clients and other franchise owners to extrapolate information regarding percentages on satisfaction, ideas for renovation, areas of improvement, and potential market opportunities.
- 10% Create profitability reports to provide advice on our company’s position in the industry and where improvement is needed. This will support development and investment opportunities with a view towards improving strategies to increase sales and overall marketing share.
- 10% Attend retail gas station/convenience store industry conferences on behalf of [the petitioner] in order to stay on top of industry standards, methods, products, and innovations.

- 5% Collect information on competitor's campaigns and consumer offerings to compare price availabilities and promotions.

To make its determination whether the employment just described 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 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 analyst. As discussed below, the AAO concurs in the director's findings.

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:

[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>1</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

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<sup>1</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos013.htm](http://www.bls.gov/oco/ocos013.htm).

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, more importantly, whether it requires the theoretical and practical application of a body of highly specialized knowledge that can only be obtained through 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. 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.

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*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>2</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.

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<sup>2</sup> *Occupational Outlook Handbook*, 2008-2009 Edition, at [www.bls.gov/oco/ocos020.htm](http://www.bls.gov/oco/ocos020.htm).

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>3</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, counsel contends that the director erred by drawing conclusions not based on facts. The petitioner is a retail gas station that simultaneously operates a convenience store and delicatessen. The director found that the petitioner's station, which employs only six employees, did not possess the organizational complexity to warrant the hiring of a market analyst. The director noted that gas stations such as that operated by the petitioner, which are part of a franchise, normally receive marketing services from corporate headquarters. Moreover, the director noted that the petitioner's gas station catered only to a local area, or at best a specific metropolitan area, and therefore did not possess the organizational complexity to warrant the hiring of a market research analyst.

On appeal, counsel and the petitioner both assert that the petitioner's gas stations, and all gas stations in the Marathon corporate franchise, are independently owned by the franchisee. Therefore, the petitioner concluded, it was responsible for local marketing and promotion, although it conceded that the corporate franchisor provided national marketing services. Based on this conclusion, the petitioner claimed it had an immediate need for a market research analyst to promote its business locally.

The petitioner is a retail gas station that is part of a franchise that currently employs six persons. 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. Moreover, the petitioner has failed to provide documentary evidence to support its immediate need for a market analyst, and makes no claims of immediate plans for expansion or acquisition of other businesses. It admits that its general marketing is done by the corporate franchise. Therefore, absent additional evidence, the AAO concurs with the director's finding that the petitioner's business does not possess the organizational complexity to warrant the hiring of a market analyst.

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<sup>3</sup>Occupational Outlook Handbook, 2008-2009 Edition, at [www.bls.gov/oco/ocos020.htm](http://www.bls.gov/oco/ocos020.htm).

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. The petitioner has submitted no evidence to establish its degree requirement as an industry norm, such as job advertisements for employment related to market research analysis in other retail gas stations or convenience stores. 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 it has not imposed a degree requirement on its five other employees, as they occupied non-professional positions. Moreover, it provided no evidence to show that it had a history of hiring individuals with a bachelor's degree to fill the proffered position of the beneficiary. The fact that the petitioner has no history of hiring a market research analyst cannot establish that the petitioner's normal hiring practice is to require the minimum of a baccalaureate degree for the proffered position. Therefore, the petitioner has failed to establish the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

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 – the identification of industry trends and consumer behavior based on complex market data and the development of marketing strategies to target consumers – would require the beneficiary to conduct economic research, statistical analyses and estimations, budgeting and forecasting, and econometric techniques. Such knowledge, it contends, comes only from a baccalaureate degree in economics 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.