U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

Dr

FILE: WAC 06 178 50895 Office: CALIFORNIA SERVICE CENTER Date: DEC 20 2007

IN RE: Petitioner: [redacted]
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:

[redacted]

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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner sells products including wireless phones, wireless accessories, pagers, and television satellites and the activation of those devices. It was established in 2005, claims to employ four personnel, and claims to have $500,000 in gross annual income when the petition was filed. It seeks to employ the beneficiary as a market research analyst. Accordingly the petitioner endeavors to classify the beneficiary as a nonimmigrant 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 record of proceeding includes: (1) the Form I-129 filed May 8, 2006 and supporting documents; (2) the director's June 19, 2006 request for further evidence (RFE); (3) counsel's August 28, 2006 response to the RFE; (4) the director's September 12, 2006 denial decision; and (5) the Form I-290B and counsel's brief in support of the appeal. The AAO reviewed the record in its entirety before issuing this decision.

On September 12, 2006, the director denied the petition determining that the petitioner had not established the proffered position as a specialty occupation. On appeal, counsel for the petitioner submits a brief asserting that the director's decision was fundamentally flawed and that the petition should be approved.

The issue before the AAO is whether the petitioner has established that the job it is offering to the beneficiary meets the following statutory and regulatory requirements.

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

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

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

(2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the position; or

(4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

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 stated in its April 28, 2006 letter in support of the position that the beneficiary would assume the position of market research analyst and that the duties of the position included:

> Researching the telecommunication and wireless industry market conditions to determine potential sales of services; Establishing research methodology and designing format for data gathering, such as surveys, opinion polls, or questionnaires; Analyzing statistical data to forecast future market trends; Gathering data on competitors and analyzing prices, sales, and methods of marketing services; Gathering data on client preferences and habits; Preparing reports and graphic illustrations of findings.

In an August 28, 2006 response to the director's RFE, counsel for the petitioner referenced the Department of Labor's *Dictionary of Occupational Titles* (*DOT*) and asserted that a market research analyst commands a Specific Vocational Preparation (SVP) rating of 7, indicating that such a position usually demands a bachelor's or master's degree. Counsel asserted that the beneficiary's position qualified as a specialty occupation because the nature of the specific duties are so specialized and complex that knowledge required to perform those duties is associated with attainment of at least a baccalaureate degree and because the

petitioner's particular position is so complex or unique that it can be performed only by an individual with a degree.

Counsel also submitted Internet job announcements from various industries for positions labeled market research analyst. Most of the 12 advertisements indicated that a college or bachelor's degree was required; some of the advertisements identified a preference for a specific discipline of study and some indicated a master's of business administration degree was preferred. The record also includes the petitioner's Internal Revenue Service (IRS) Form 941, Employer's Quarterly Federal Tax Return for the second quarter of 2006. The Form 941 shows the petitioner employed two personnel in May 2006, the month the petition was filed.

Counsel also included a copy of the petitioner's business plan outlining the petitioner's plan to grow with T-Mobile and to open two stores per quarter for the first two years of operations with a baseline goal of 100 activations per site per month. The record also contains a copy of a financial forecast for 2007, 2008, and 2009 that is dated August 21, 2006 and is based on historical information of the previous year.

Based on the information in the record, the director observed that the petitioner's business did not extend beyond the local metropolitan community and thus the petitioner's business lacked an extensive or complex consumer base to require the services of a market research analyst. The director also noted that the petitioner did not have a marketing division or any marketing specialists and thus did not appear to have the organizational complexity to require the services of a market research analyst. The director also referenced the Department of Labor's *Occupational Outlook Handbook's* (*Handbook*) discussion of market research analysts and surmised that the *Handbook* implied that market research analyst positions would be found within large firms or corporations; thus as the petitioner did not engage in the type of business that would typically require the services of a market research analyst, the petitioner's proffered position was not that of a market research analyst. Upon analyzing the duties of the proffered position, the director determined that the proffered position more closely resembled that of a marketing manager. The director concluded that the petitioner had not provided sufficient documentary evidence to establish any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

On appeal, counsel for the petitioner asserts that the director improperly labeled the proffered position as a marketing manager. Counsel contends that the bulk of the beneficiary's duties will fall within the capacity of a market research analyst and that the director improperly took notice of the size of the petitioner when determining that the petitioner was not sufficiently complex organizationally to require the services of a market research analyst. Counsel takes issue with the director's boilerplate request for evidence and claims that the issuance of such an RFE denies proper adjudication of an approvable petition. Counsel asserts that the director did not apply the appropriate standard of proof. Counsel notes that the beneficiary was previously approved for H-1B classification for a different petitioner and asserts that without a material change in circumstances, the beneficiary's eligibility for H-1B classification has been established.

While, as discussed below, the AAO does not find that the petitioner has established that the proffered position is that of a market research analyst, it has reached its conclusions on grounds other than those relied upon by the director. The director's statements regarding the extent of the petitioner's business and his interpretation of the *Handbook* as regards the types of firms or organizations that typically employ market

research analysts are withdrawn. However, the director has properly determined that the position as described is insufficient to qualify as a specialty occupation.

The record in this matter contains a brief description of the duties of the proffered position, a description that essentially paraphrases elements of the *Handbook's* report on market research analysts. The *Handbook* 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. Gathering statistical data on competitors and examining prices, sales, and methods of marketing and distribution, they analyze statistical data on past sales to predict future sales. Market research analysts devise methods and procedures for obtaining the data they need. Often, they design telephone, mail, or Internet surveys to assess consumer preferences. They conduct some surveys as personal interviews, going door-to-door, leading focus group discussions, or setting up booths in public places such as shopping malls. Trained interviewers usually conduct the surveys under the market research analyst's direction.
>
> After compiling and evaluating the data, market research analysts make recommendations to their client or employer on the basis of 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 also might 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 throughout the economy....

The AAO acknowledges that the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs. However, the petitioner's description of the beneficiary's duties lacks the specificity and detail necessary to support the petitioner's contention that it is offering the position of a market research analyst.

At the time of filing, the petitioner offered a generic description of the beneficiary's market research duties, one that appeared to describe the occupation of market research analyst rather than the proffered position. 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 gathers statistical data on competitors and examines prices, sales, and methods of marketing and distribution. Neither can the petitioner establish its employment as a specialty occupation by making conclusory statements regarding the position, rather than defining the activities associated with the position, for example, describing how the beneficiary assesses the market conditions for the petitioner. 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)). A 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, the petitioner must describe the specific duties and responsibilities to be performed by the beneficiary in relation to its particular business interests.

In this matter, the petitioner has relied upon a title and statements regarding an occupation rather than providing a detailed description of the beneficiary's actual duties substantiated by documentary evidence. 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. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The petitioner's description of the duties of its position is so generic that it is not possible to identify the actual daily duties required of the position and, therefore, whether the position in this matter meets the statutory definition of a specialty occupation. It is not possible to discern whether the proffered position incorporates the duties of a market research analyst or that of a marketing manager, an occupation that is not considered a specialty occupation. As the description does not contain information regarding the daily duties of the position as those duties relate in particular to the petitioner's business operations, the AAO finds that the petitioner has failed to establish that the proffered position is a specialty occupation under any of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO acknowledges counsel's reference to the *DOT* and the SVP level of 7 for a market research analyst. However, the AAO does not consider the *DOT* to be a persuasive source of information as to whether a job requires the attainment of a baccalaureate or higher degree (or its equivalent) in a specific specialty. The *DOT* provides only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. An SVP rating is meant to indicate only the total number of years of vocational preparation required for a particular occupation. It does not describe how those years are to be divided among training, formal education, and experience and it does not specify the particular type of degree, if any, that a position would require. Further, as observed above, the record in this matter contains only a general description of the duties of the position, a description that does not allow CIS to discern whether the actual duties of the position comprise the duties of a market research analyst.

The AAO has also examined the job announcements the petitioner provided to establish that the petitioner's degree requirement is the norm within its industry. However, the job announcements submitted do not show that the advertising businesses are similar to the petitioner in size, number of employees, or level of business, nor can the job descriptions provided by these listings be established as parallel to the nonspecific job description provided for the proffered position. Moreover, as the record does not establish the actual duties of the position as it relates to the petitioner's business, it precludes the petitioner from demonstrating that the proffered position is parallel to any degreed position within similar organizations in its industry. A review of the totality of the job announcements, the job descriptions contained therein, and the type of organizational entities advertising the positions, does not demonstrate that the proffered position is parallel to positions offered by organizations similar to the petitioner, which require a bachelor's degree in a specific specialty.

The AAO also finds that the prior approval of a petition filed by a different petitioner does not establish that the petitioner in this matter has offered the beneficiary a specialty occupation position. This record of proceeding does not contain the supporting documentation submitted to the CIS in that prior matter. Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). In addition, the AAO finds that a petition filed by a different petitioner is a material change in the circumstances and is not evidence that the petitioner's position is a specialty occupation.

Without a meaningful job description, the petitioner: has not established that a baccalaureate or higher degree is normally the minimum requirement for entry into the position; has not established that the position's duties are parallel to any degreed positions within similar organizations in its industry; has not distinguished the position as more complex or unique than similar, but non-degreed, employment; has not established that it previously employed only degreed individuals to perform the duties of the position; and has not distinguished the proffered position based on the specialized and complex nature of its duties. The petitioner has not established that the proffered position is a specialty occupation. Upon review of the totality of the evidence submitted in support of the petition, the petitioner failed to establish that the proffered position is a specialty occupation.

The AAO notes counsel's concern regarding the director's RFE and assertion that the director did not apply the appropriate standard of proof. However, the regulation states that the petitioner shall submit additional evidence as the director, in his or her discretion may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). In this matter, the initial description of duties coupled with the imprecise information regarding the petitioner's business operations required the issuance of an RFE to determine whether the proffered position incorporated the duties of a specialty occupation. The initial petition and supporting letter did not present an approvable petition. As determined above the information submitted in response to the director's RFE, although providing more information regarding the petitioner did not establish that the proffered position as a specialty occupation. Regarding the standard of proof in this matter, the AAO observes in visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965). In this matter the petitioner's generic information regarding the proffered position is insufficient to establish the proffered position as a specialty occupation.

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.