



U.S. Citizenship
and Immigration
Services

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[Redacted]

FILE: SRC 03 021 51456 Office: TEXAS SERVICE CENTER Date:

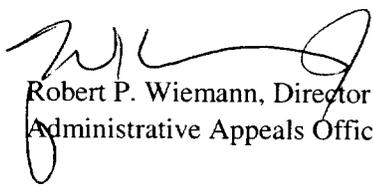
IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that operates retail stores. The petitioner claims that it is the affiliate of the beneficiary's foreign employer, located in Mumbai, India. The petitioner now seeks to employ the beneficiary as its controller for three years.

The director denied the petition concluding that the petitioner has not established that: (1) the position on controller requires specialized knowledge; (2) the beneficiary possesses specialized knowledge of the Indian affiliate; and (3) the beneficiary's knowledge is not generally available in the United States.

On appeal, counsel states that the beneficiary, who is a "key employee" in the foreign entity, possesses knowledge that can only be gained through employment with the foreign organization, and which is essential to the petitioner's competitiveness in the United States. Counsel claims that the beneficiary's advanced knowledge of both the petitioner's financial plans and the foreign entity's financial goals and objectives for the petitioning organization qualify him for the L-1B classification. Counsel submits a brief and a letter from the petitioner in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to the regulation at 8 C.F.R. § 214.2(l)(3)(vi), if the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and
- (C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

The issue in the present proceeding is whether the beneficiary would be employed by the U.S. entity in a specialized knowledge capacity.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the following:

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines “specialized knowledge” as:

[S]pecial knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.

The petitioner stated in an undated letter accompanying the nonimmigrant petition that the beneficiary would be employed by the U.S. entity as a controller, and would perform the following job duties:

[D]irecting financial activities of the firm, including preparation of profit and loss statements and balance sheet; preparation of budgets by compiling data based on statistical [sic] and analyses of past and current years; summarizing and forecasting company’s business activities and financial position based on past, present, and expected operations; arranging for auditing of accounts; directing financial planning; directing determination of depreciation rates; and establishing major economic objectives and policies.

In a request for evidence, dated December 12, 2002, the director asked the petitioner to specifically explain why the beneficiary should be considered to possess specialized knowledge. In a response dated February 7, 2003, counsel again described the previously stated job duties for the beneficiary. Counsel provided the following explanation as to the importance of the beneficiary’s employment in the United States:

In order to establish major economic objectives and policies and advise the Petitioner in financial planning, the Petitioner requires services of a professional who has [an] advanced

level of knowledge and expertise in [the] Petitioner and its affiliates['] financial objectives and goals. The Beneficiary is intimately familiar with the financial position and strategies, as well as the decision making process of the Petitioner's Affiliate abroad. The Beneficiary possesses financial knowledge of the Petitioner's Affiliate in India that is very valuable for the Petitioners [sic] competitiveness in the market place, and the Beneficiary is uniquely qualified to contribute to the Petitioner's knowledge of its Affiliate in India operations [sic]. Furthermore, the Beneficiary was the key employee in [the] Petitioner's Affiliate abroad that handled all the financial planning and records and the Beneficiary possesses knowledge which could have only been obtained through intensive prior experience with the Petitioner's Affiliate in India.

Counsel also explained that the accounting system in India is different from that used in the United States. Counsel stated that it would therefore be impossible to find an accountant in the United States who is familiar with foreign company's accounting system.

In her decision, dated April 16, 2003, the director stated that the record does not demonstrate how the beneficiary possesses knowledge of the foreign entity's financial objectives, goals, knowledge, and decision-making process, and does not explain why the beneficiary's knowledge would not be available in the United States. The director determined that "[t]he record does not state specifically why so much knowledge of the Indian company would be required to run the U.S. business." The director further concluded that the evidence in the record does not establish that the beneficiary possesses "a sufficient level and amount of specialized knowledge of the petitioning organization – or even the Indian company – to qualify for L-1B status." The director, therefore, denied the petition.

In an appeal filed April 19, 2003, counsel submits a letter again explaining the proposed job duties of the beneficiary in the United States. Counsel explains that in order to successfully perform as a controller, the beneficiary must have "advanced and specific knowledge" of the foreign entity, knowledge which counsel claims the beneficiary gained while working abroad. Counsel further contends that this knowledge is "different and uncommon than knowledge available to an average U.S. worker," and states the following:

In the performance of his duties in India, the Beneficiary has acquired an advanced level of expertise and proprietary knowledge about the Petitioner's affiliate's business practices and finances, including, but not limited to future business plans and financial objectives of [the] Petitioner's affiliate in India as well as the affiliate's plans for the Petitioner in the [United States]. The Beneficiary will be utilizing his expertise and proprietary knowledge to advise the Petitioner in the United States in achieving the Petitioner's financial objectives.

Furthermore, the Beneficiary's employment with the Petitioner's affiliate abroad has enabled the Beneficiary to possess knowledge that is valuable to the employer's competitiveness in the market place and to uniquely contribute to the Petitioner's knowledge of its affiliate's operation [sic] conditions. The Beneficiary has been utilized as a key employee by the Petitioner's affiliate abroad and has been given significant business and financial assignments to reduce costs and increase profits, which have enhanced the company's productivity, competitiveness, image, and financial position. The Beneficiary possesses knowledge, which can be gained only through extensive prior experience with the Petitioner's affiliate abroad.

Therefore, the Petitioner is not able to find a U.S. worker or seek a worker in the United States that may possess the above-referenced abilities.

Counsel also refers to a 1994 INS (now Citizenship and Immigration Services (CIS)) memorandum as a guide for interpreting the statutory definition of specialized knowledge. Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). Counsel states that the memorandum substantiates his claim that the beneficiary has advanced knowledge of the foreign entity's financial position, as well as advanced knowledge of the financial goals for the U.S. entity.

On review, the record as presently constituted is not persuasive in demonstrating that the beneficiary would be employed by the U.S. entity in a position requiring specialized knowledge. When examining the specialized knowledge capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii).

The beneficiary's proposed job duties do not identify services to be performed by the beneficiary in a specialized knowledge capacity. For example, the beneficiary's responsibilities of preparing financial statements and budgets, analyzing financial data, forecasting the petitioner's financial position and economic objectives, and auditing accounts are merely routine tasks for one employed in the accounting field. The record is devoid of any evidence that the beneficiary's position involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests as required in the regulations. Simply asserting on appeal that the beneficiary possesses knowledge of the accounting system used by the foreign entity, which counsel claims is different from that in the United States, is not sufficient. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Additionally, the petitioner has not submitted any evidence of the knowledge and expertise required for the proffered position that would differentiate the beneficiary from other controllers employed by the foreign or U.S. entities or working for other employers within the industry. It is noted that the statutory definition requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). The term "specialized knowledge" is relative and cannot be plainly defined. The Congressional record specifically states that the L-1 category was intended for "key personnel." *See generally*, H.R. REP. No. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." *Webster's II New College Dictionary* 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's workforce. Here, the petitioner has indicated that the beneficiary possesses specialized knowledge as a result of his employment abroad, during which the beneficiary completed assignments that increased the foreign entity's financial position, gained specific knowledge of the foreign entity's financial policies and objectives, and learned of the financial plans developed by the foreign entity for the petitioner. As the petitioner indicates that anyone with

knowledge of the foreign entity's or petitioner's financial objectives possesses "special knowledge" or an "advanced level of knowledge," the AAO must conclude that, while it may be correct to say that the beneficiary is a productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). Although the definition of "specialized knowledge" in effect at the time of *Matter of Penner* was superseded by the 1990 Act to the extent that the former definition required a showing of "proprietary" knowledge, the reasoning behind *Matter of Penner* remains applicable to the current matter. The decision noted that the 1970 House Report, H.R. No. 91-851, was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner*, supra at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)). Reviewing the congressional record, the Commissioner concluded that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. For the same reasoning, the AAO cannot accept the proposition that any skilled worker is necessarily a specialized knowledge worker.

Finally, counsel's reliance on the 1994 memorandum is misplaced. It is noted that the memorandum was intended solely as a guide for employees and will not supercede the plain language of the statute or the regulations. Although the memorandum may be useful as a statement of policy and as an aid in interpreting the law, it was intended to serve as guidance and merely reflects the writer's analysis of the issue. Therefore, by itself, counsel's assertion that the beneficiary's qualifications are analogous to the examples outlined in the memorandum is insufficient to establish the beneficiary's qualification for classification as a specialized knowledge professional. Specifics are clearly an important indication of whether a beneficiary's duties encompass specialized knowledge; otherwise meeting the definition would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). As discussed, the petitioner has not submitted probative evidence to establish that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known in the alien's field of endeavor.

Based on the foregoing, the AAO cannot conclude that the beneficiary would be employed by the U.S. entity in a specialized knowledge capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the record is not persuasive in demonstrating that the beneficiary was employed abroad by the foreign entity in a claimed specialized knowledge capacity. The petitioner stated that the beneficiary was also employed abroad as a controller, and outlined job duties similar to those associated with the proffered position. The petitioner has not provided any evidence that the beneficiary's position abroad involved special knowledge of the foreign entity's product, service, research, equipment, techniques, management, or processes and procedures as required in the regulations. *See* 8 C.F.R. § 214.2(l)(1)(ii)(D). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Absent specific information documenting the beneficiary's advanced knowledge, the AAO cannot

conclude that the beneficiary was employed abroad in a qualifying capacity. For this additional reason the appeal will be dismissed.

An additional issue not addressed by the director is whether the requisite qualifying relationship exists between the foreign and U.S. entities as required in the regulation at 8 C.F.R. § 214.2(l)(3)(vi)(B). The regulations and case law further confirm that the key factors for establishing a qualifying relationship between the U.S. and foreign entities are ownership and control. *Matter of Siemens Medical Systems, Inc.* 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982); *see also Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct and indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International, supra* at 595.

In the present matter, the petitioner stated that the beneficiary's foreign employer and the petitioning organization are affiliates. The sole piece of documentation submitted as evidence of the qualifying relationship is what appears to be a translated stock certificate dated February 7, 2003, which indicates that the beneficiary's foreign employer is the owner of 1,000 shares of the petitioner's common stock. As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. Moreover, the translated "stock certificate" is dated four months after the filing of the petition. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. 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). If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The petitioner has not demonstrated that a qualifying relationship exists between the beneficiary's foreign employer and the petitioning entity. The appeal will be dismissed for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.