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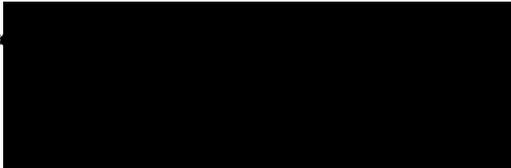


U.S. Citizenship
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FILE: EAC 03 142 53175 Office: VERMONT SERVICE CENTER Date: **AUG 30 2005**

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

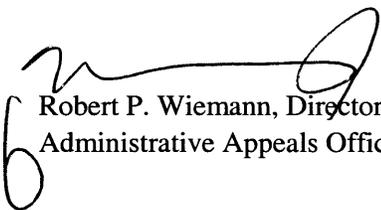
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

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 nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

According to the documentary evidence contained in the record, the petitioner was established in 1965 and claims to be a software services company. It claims to be the parent company with a branch office, [REDACTED] located in Noida, India. It seeks to employ the beneficiary temporarily in the United States as a software engineer consultant for three years. The director determined that the beneficiary did not possess specialized knowledge and had not been employed in a position that involved specialized knowledge. The director also determined that the position being offered by the U.S. entity did not require the services of an individual possessing specialized knowledge.

On appeal, the petitioner disagrees with the director's decision and asserts that the evidence submitted was sufficient to demonstrate that the beneficiary qualifies in the specialized knowledge category.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization, and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer, or a subsidiary or affiliate thereof, in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii) states, in part:

Intracompany transferee means an alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate, or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

The first issue in this proceeding is whether the petitioner has established that the beneficiary possesses specialized knowledge and has been employed by the foreign 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.

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 the petition that the beneficiary's past duties while employed by the foreign entity included: “software professional-design, development and support of business applications using formal software engineering and project management methodologies. Worked on team using offshore/onsite business model communicating with client, gathering systems requirements for maintenance and enhancements.”

In a letter dated April 7, 2003, the petitioner stated that the beneficiary had been employed by the foreign entity continuously since June 19, 2001, as a software engineer consultant. The petitioner noted that the beneficiary received five days of mandatory training on Quality Management System, was awarded a Bachelor of Engineering Degree in 2000, has been certified by Brainbench in JavaScript, and has attended in-house computer training sessions. The petitioner stated that the in-house training sessions included: Visual Studio.Net Seminar, Wan Infrastructure & Network Connectivity, Peer Review, Java Training, AS-400, Net Training, Visual Basic/ASP, Mainframe, CMM, and ISO 9000:2001 training. The petitioner stated that the beneficiary has been a team member in designing the training management system for the foreign entity in that he was responsible for coding, review, crating the test plan, testing the integration and performance, and evaluating and resolving errors. The petitioner also stated that the beneficiary had been involved as a team member on an offshore/onsite project for 16 months. The petitioner noted that the work was done using Keane’s Knowledge Acquisition Process in conjunction with Quality Assurance. The petitioner stated that the beneficiary had been instrumental in working on the DCI Donor Services project. The petitioner asserts that the combination of the beneficiary’s education, in-house training, and 22 months of work experience have provided him with unique specialized technical knowledge.

The petitioner submitted as evidence copies of the beneficiary’s training details, educational documents, resume, Keane’s Knowledge Acquisition Process, Keane India’s training details, and Keane India’s achievement of ISO9001: 2000 Certification, and SEI CMM level 5 information. The petitioner submitted a list of computer training sessions attended by the beneficiary in 2001 and 2002. The petitioner also submitted

a copy of the beneficiary's Bachelor's Degree in Engineering and transcripts received from the Dr. Babasaheb Ambedkar Marathwada University in May of 2001.

In a request for evidence, dated April 11, 2003, the director requested that the petitioner submit evidence establishing that:

- (1) The beneficiary's specialized knowledge of the foreign entity's development procedures, methodologies, and tools is different from every other programmer that the entity employs;
- (2) The beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the beneficiary's field of endeavor;
- (3) The beneficiary's advanced level of knowledge of the processes and procedures of the foreign entity distinguish him from those with only elementary or basic knowledge;
- (4) The knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly special or advanced;
- (5) The beneficiary possesses knowledge that is valuable to the employer's competitiveness in the market place;
- (6) The beneficiary is qualified to contribute to the U.S. entity's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;
- (7) The beneficiary has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- (8) The beneficiary possesses knowledge, which normally can be gained only through prior experience with the employer; and
- (9) The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual.

The director also requested that the petitioner submit evidence identifying the manner in which the beneficiary has gained his specialized knowledge, including the total length of any classroom or on-the-job-training received. The director also requested that the petitioner submit evidence describing its Knowledge Acquisition Process in more detail, and the number of company software engineers who are trained in the process and the length of such training.

In response to the director's request for evidence, the petitioner asserted that the beneficiary's specialized knowledge of the petitioner's development procedures, methodologies, and tools is different from every other programmer that the entity employs in that he is considered a senior-level employee and a subject matter expert in the design and analysis of technical specifications and web development. The petitioner asserted that the beneficiary, as a software engineer consultant, holds a senior-level position within the foreign entity. The petitioner also asserted that the beneficiary's in-house training, educational background, nearly two years of work experience, and his expertise in Dot Net, MS SQL Server 2000 differentiates him from other low - level programmers who have not completed the in-house training. The petitioner stated that the beneficiary's knowledge is not general knowledge held commonly throughout the industry but is truly special or advanced in that he possesses a Bachelor's Degree in Engineering, has approximately two years of work experience, and has been assigned to develop and maintain software applications being executed offshore. The petitioner also stated that the beneficiary's responsibilities at the foreign entity include extensive onsite interaction with the technical team to assist them in understanding the project requirements and development of the application. The petitioner described the company's training processes in detail and further stated "Keane India has had 210 senior level software engineers in India put through this training in 2002." The petitioner noted that it

would take approximately 12 to 18 months of training before an individual would be eligible for a senior-level position. The petitioner further noted that the beneficiary had received approximately 35 days of in-house technical training and that the CMM and ISO quality standard training was ongoing. The petitioner asserted that every "resource" of the foreign entity needed to undergo a minimum of five days of training on Quality Management System. The petitioner concluded by stating that the beneficiary has used the "Keane's Knowledge Acquisition" process while working on the onshore and offshore DCI Donor Services project and the foreign entity's "Training Management System" project.

The director determined that the position of software engineer consultant did not require someone with specialized knowledge. The director noted that the petitioner failed to demonstrate that the beneficiary's knowledge or experience was different from that found within the petitioning company or that found commonly throughout the industry. The director also noted that because of the variety of projects, each software engineer acquires a unique combination of experiences; but that the computer language, routines, processes, and procedures used do not differ greatly within the industry. The director stated that although the petitioner and other companies within the industry have their own way of doing things, the minor differences do not constitute specialized knowledge because the skill sets can be easily taught to other qualified software engineers. The director also stated that the in-house training received by the beneficiary was not proprietary or related to any special processes, software, or practices developed by the petitioning company. The director noted that although the petitioner's "Knowledge Acquisition Process" appeared to differ from training offered by other computer consulting companies, the petitioner had failed to describe, the process, the percentage of employees trained in the process, or the amount of training required.

On appeal, the petitioner argues that the beneficiary has gained experience working with clients using Keane's proprietary "Knowledge Access Process (KAP)." The petitioner notes that there is no formal classroom training for Keane's "Knowledge Access Acquisition Process," but that the beneficiary gained his experience as a member of professional technical teams who have worked on numerous client projects using KAP. The petitioner reiterates a description of the beneficiary's job duties, education, and experience acquired while employed by the foreign entity.

Although the petitioner asserts that the beneficiary's position requires specialized knowledge, the petitioner has not articulated any basis to the claim that the beneficiary is employed in a capacity requiring specialized knowledge. Other than submitting a general description of the beneficiary's job duties, the petitioner has not identified any aspect of the beneficiary's position which involves special knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests. The petitioner has not submitted any evidence of the knowledge and expertise required for the beneficiary's position that would differentiate that employment from the position of software engineer at other employers within the industry. Furthermore, the petitioner stated that in 2002, the foreign entity trained 210 other software engineers as it had trained the beneficiary. The petitioner has failed to submit sufficient evidence to establish that the beneficiary possesses specialized knowledge, or that he was employed by the foreign entity in a specialized knowledge capacity.

The second issue to be addressed is whether the petitioner has submitted sufficient evidence to establish that the beneficiary will be employed by the U.S. entity in a specialized knowledge capacity.

The petitioner described the beneficiary's proposed duties as: "Will work with outside team gathering client requirements using Keane's Knowledge Acquisition Process to design, develop and support business

applications using project management methodologies. Will communicate with offshore technical team in India for maintenance of developed systems.”

In a letter dated April 7, 2003, the petitioner stated that the beneficiary’s proposed duties would consist of working with the on-site team in the United States to coordinate a seamless transmission of developed software solutions to the offshore team in India that will meet client objectives. The petitioner stated that the beneficiary would perform a variety of system design and analysis duties necessary to implement and maintain software applications. The petitioner also asserted that the beneficiary would develop practical and workable solutions to clients’ technical and business problems; work on projects independently and on multiple phases of projects; test a variety of programs and systems errors; and perform a variety of system design and analysis duties necessary to implement and maintain software applications.

The petitioner further described the beneficiary’s proposed duties by stating that he would be a team leader or team member on projects initiated in the United States and transmitted to India for system maintenance and enhancements. The petitioner asserted that the beneficiary would be responsible for insuring enhancements to systems based upon existing systems developed in the United States and transferred to offshore teams in India. The petitioner also asserted that the beneficiary would be responsible for communication and coordination of development efforts with the foreign entity’s software development teams who will be working on international and global client projects.

In response to the director’s request for evidence on the subject, the petitioner stated that the beneficiary would not be working on the DCI Donor Service project in the United States, but rather would be assigned to working on a Retiree Medical System project for Mercer Human Resource Consulting company. The petitioner further asserted that the beneficiary would design and analyze the technical specifications, web-enable the existing application, and support and develop the project on MS platform on Dot.Net Technology using Keane’s Knowledge Acquisition Process. The petitioner identified the amount of time required to train a person to work as a software engineering consultant for the U.S. entity by stating that the person should possess a Bachelor of Science degree or equivalent with two or more years of relevant experience in software.

The director stated that it appeared the beneficiary could be assigned to any of a number of projects in the United States depending on the needs of the U.S. entity. The director also stated that since the beneficiary had not been working on an assignment abroad to which he would be assigned in the United States, he would not be bringing any advanced prior knowledge or understanding regarding a particular project with him. The director noted that the petitioner had failed to establish that the software engineer consultants employed by the U.S. entity were not interchangeable. The director concluded by noting that all the U.S. entity’s other software engineer consultants qualify to work on the same projects as the beneficiary, and that other software engineer consultants outside the company could work on similar projects with limited training.

On appeal, the petitioner argues that a software engineer needs to have been employed by the foreign entity to be able to use its Knowledge Acquisition Process in order to participate in projects in the United States. The petitioner also argues that the beneficiary will be able to effectively perform his job duties in the United States as a result of being well versed in the foreign entity’s operating procedures, products, release process, and requirements. The petitioner concludes by asserting that the beneficiary possesses an in-depth and specialized knowledge of Keane’s competitiveness in the market place, and that this knowledge of the company’s methodologies and procedures gained through work experience qualifies him for the position.

The record does not establish that the proposed position with the U.S. entity requires specialized knowledge or that the beneficiary will be employed in a specialized knowledge capacity. It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. 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 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 economic 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 qualifies in a specialized knowledge capacity based upon his in-house training; educational background; two years of work experience; expertise in Dot Net, MS SQL Server 2000; a working knowledge of the Keane's Knowledge Acquisition process; and experience working on the DCI Donor Service project. As the petitioner infers that anyone with the beneficiary's training and experience 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 highly skilled employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

The petitioner's interpretation of the specialized knowledge provision would allow virtually any skilled or experienced employee to enter the United States as a specialized knowledge worker. 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 a skilled worker is necessarily a specialized knowledge worker. There has been insufficient evidence submitted to establish that the beneficiary has been or will be employed in a specialized knowledge capacity and that the U.S. entity's position requires specialized knowledge. For these reasons, the petition may not be approved.

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. The petitioner has not sustained that burden.

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ORDER: The appeal is dismissed