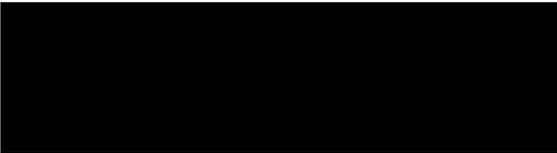




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FILE: EAC 02 147 50179 Office: VERMONT SERVICE CENTER Date: JUN 28 2005

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

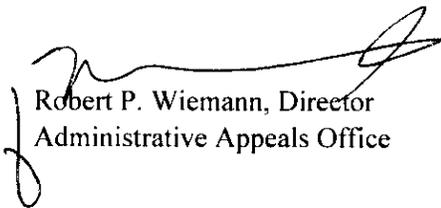
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Vermont 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 extend the employment of its applications software analyst/programmer 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 claims that it is a branch of the beneficiary's foreign employer, located in Mumbai, Maharashtra, India, and is operating in the United States as an information technology consulting firm. The petitioner now seeks to extend the beneficiary's stay for three years.

The director determined that the petitioner had failed to demonstrate that the beneficiary would be employed by the United States entity in a specialized knowledge capacity. The director noted that the record did not show that the knowledge possessed by the beneficiary is unusual for an individual employed as an applications software analyst/programmer. The director accordingly denied the petition.

On appeal, counsel contends that Citizenship and Immigration Services (CIS) improperly applied the appropriate statute and regulation to the evidence in its denial of the petition. Counsel also claims that CIS's decision contradicts prior guidance for interpreting the statutory definition of specialized knowledge. Counsel states that the beneficiary's knowledge should be deemed specialized because he possesses knowledge of the petitioner's Software Engineering Institute's Capability Maturity Model (SEI-CMM) Level 5 software process, which counsel states is "an optimized, formal, managed software process" that is indispensable to the organization's competitiveness in the marketplace. Counsel further states that the beneficiary's 3.5 years of work experience with the petitioner's SEI-CMM Level 5 process demonstrates that the beneficiary's knowledge "is obviously 'beyond the elementary or introductory,'" "greatly developed beyond the initial stage," highly developed," "complex," and "advanced." Counsel submits a comprehensive brief 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.

The issue is whether the beneficiary would be employed by the United States 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.

A specialized knowledge professional is further defined at 8 C.F.R. § 214.2(l)(1)(ii)(E) as:

[A]n individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the Immigration and Nationality Act.

The petitioner filed the instant nonimmigrant petition on March 28, 2002, indicating that the beneficiary would be employed in the United States as an "Applications Software Analyst/Programmer." In a March 22, 2002 letter submitted with the petition, the petitioner stated that the foreign organization is a worldwide information technology consulting firm that internally develops its own "company-confidential" software development tools used in the analysis, design and testing of its systems. The petitioner explained that in order for the foreign corporation to maintain its quality assurance and competitiveness, it utilizes an internally developed SEI-CMM assessed Level 5 software development and maintenance process, and stated that the beneficiary's current on-site project in the United States for the American International Group, Inc. (AIG) requires specialized knowledge of this process. The petitioner provided the following outline of the beneficiary's job responsibilities in the United States:

- Use tools such as TCS' PAL, BAL, IPMS to customize the company's SEI-CMM Level 5 software development and maintenance process to meet project operational and quality parameters
- Conduct Software Configuration Management activities as per TCS' SCM Plan
- Perform changes to all configurable items as per TCS' Change Control Procedure

- Ensure that all testing design, development, and implementation, activities are done as per guidelines established in TCS' Quality Management System
- Ensure that all work (analysis, design, coding, testing, deployment, maintenance, migration, etc.) meets project operational process requirements and Software Project Plan established using Project Planning Guidelines, Project Plan Template, Software Development Life Cycle Models document, Guidelines for Software Estimation, quality manual, etc., which are all available via TCS' PAL, BAL, IPMS, etc. web-based systems
- Participate in Final Inspections, which are conducted before software works items are released to client
- Prepare specifications for offshore development
- Upload specifications for offshore development
- Provide technical guidance to offshore resources as required
- Participate in Defects Prevention Activities: Peer Reviews, Causal Analyses Sessions, Inspections, etc., as per IPMS, DP Checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore
- Participate in Quantitative Process Management as per QPM Plan
- Participate in fortnightly Defects Prevention meetings, as well as on a need basis as required
- As may be required, participate with team to develop software process improvements for areas of concern

The petitioner stated that in order to successfully perform these job duties, the foreign corporation requires, at minimum, a baccalaureate degree in computer science or a relevant engineering discipline. The petitioner noted that this degree requirement is consistent with industry standards and is mandated by the theoretical complexity of the computer systems. The petitioner explained that the beneficiary satisfies the educational requirements as he earned a bachelor's degree in Electronics and Electrical Engineering from a university in India, and provided:

Moreover, since completing his training from TCS' dedicated AIG offshore development center in Chennai (Ambattur), India, [the beneficiary] has been utilized in a specialized knowledge capacity on assignments involving the migration, enhancement, maintenance, and support of AIG's Mainframe software application systems. On these significant assignments, [the beneficiary] gained tremendous exposure to and significant, advanced practical knowledge of TCS' internally developed, SEI-CMM Level 5 software development and maintenance process as it is customized to meet the quality and operational requirements of assignments involving the development and maintenance of this particular client's Mainframe application systems. Together with his training in the company's SEI-CMM Level 5 software development and maintenance process and his operational and quality requirements of assignments involving the development and maintenance of AIG's Mainframe software application systems, [the beneficiary] also acquired substantive knowledge of the technical and functional specifications (business logic, programming logic, system architecture, and the documentation for the databases, human and machine procedures, and all inputs, processing and output details of each data entry, query, update and report program in these systems). This combination of highly specialized knowledge is not readily transferable to another individual and is invaluable to the continued success of the assignments outlined herein. [The beneficiary] is highly qualified to contribute to TCS' U.S. operations as a result of specialized

knowledge acquired through training in and subsequent significant project-specific experience utilizing the company's SEI-CMM Level 5 software development and maintenance process, which is not commonly known or utilized in the software development and maintenance industry around the world including the United States.

The petitioner submitted a resume, college transcripts, college degree, and an earnings statement with the accompanying evidence. It appears, however, that the petitioner incorrectly provided documentation for another employee, as none of the additional evidence references the beneficiary.

The director issued a request for additional evidence on April 28, 2002, stating that the record does not show that the beneficiary possesses specialized knowledge. The director asked that the petitioner submit the following: (1) evidence verifying that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and is not generally known by others in the beneficiary's field or in the industry; (2) evidence that the beneficiary's advanced level of knowledge of the company's processes and procedures distinguishes him from those with elementary or basic knowledge; (3) evidence that the beneficiary possesses knowledge that is valuable to the employer's competitiveness in the marketplace, and that he is qualified to contribute to the petitioner's knowledge of foreign operating conditions; (4) confirmation that the beneficiary has been utilized abroad on significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position, and that the knowledge possessed by the beneficiary can only be gained through prior experience with the foreign employer; (5) verification that the beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual; and (6) evidence that the petitioning organization would experience a significant interruption in business in order to train a replacement employee for the beneficiary.

The petitioner responded in a letter dated June 3, 2002, stating that the beneficiary's current project in the United States requires specialized knowledge of the petitioner's SEI-CMM Level 5 assessed software development and maintenance process, as the process is customized to meet the operational requirements of individual projects. The petitioner explained that a level 5 assessment of the SEI-CMM "is the highest and most sought after quality assurance standard in the information technology industry worldwide, and TCS is one of very few firms to have achieved it." The petitioner further explained that the beneficiary is one of approximately half of the foreign company's over 19,000 information technology professionals to have received training in the following "Key Process Areas" of the petitioner's SEI-CMM Level 5 software development and maintenance process:

- Defects Prevention (Software Reviews, Inspections, and Walkthroughs)
- Peer Reviews
- Software Quality Management Procedures
- Software Project Planning and Oversight
- Requirements Management
- Software Product Engineering
- Software Metrics and Measurement
- Software Maintenance Management
- Software Configuration Management
- Software Testing
- Software Process Assessment and Improvement
- Software Estimation

- Software Quality Assurance
- Inter-group Coordination
- Quantitative Process Management

The petitioner also provided the following description of the beneficiary's knowledge:

[The beneficiary's] knowledge is different from that ordinarily encountered in the field by virtue of the fact that he has been specifically trained in the processes and procedures that TCS wishes to be employed in each of its projects, consistent with its SEI-CMM Level 5 quality assurance methodologies. In his tenure with TCS, he has acquired well over two and a half years of practical, advanced, highly specialized knowledge of TCS' SEI-CMM Level 5 software development and maintenance process as it [is] customized to meet the quality and operational requirements of assignments involving the development and maintenance of Mainframe systems for AIG, TCS' international client. [The beneficiary] also has significant knowledge of TCS' onsite-offshore software development process, which utilizes a variety of dedicated communications links including high-speed satellite data links, as well as voice and video communications that enable the company's resources to collaborate on projects in the international marketplace. He also has highly particularized knowledge of the programming, networking, batch, online transaction processing, database, operating systems, and various other environments within which AIG's systems are developed. [The beneficiary] also has substantive knowledge of AIG's business and processes. He also holds substantive knowledge of the insurance application domain. This particular combination of skills, experience, and expertise, which this beneficiary possesses, constitutes a body of highly specialized knowledge that is not readily transferable to another individual.

The petitioner also outlined the following additional job duties of the beneficiary's assignment in the United States:

- Utilize proprietary IPMS, PAL, BAL (Quality and Knowledge management Systems) to customize the company's internally developed, SEI-CMM assessed (level 5) software development and maintenance process to meet project operational process requirements
- Develop detailed plans to effectively transition the development and support of AIG's Mainframe systems to TCS' AIG offshore development center in India
- Use Project Planning Guidelines, Project Plan Template, Software Development Life Cycle Models document, Guidelines for Software Estimation, etc. (all available in IPMS, PAL, BAL) to develop Software Project Plan
- Establish Software Project Tracking and Oversight as per outlines in TCS' Quality Manual
- Track and review software accomplishments and results against documented estimates and adjust plans based on actual accomplishments and results
- Implement and Coordinate Software Configuration Management (SCM) activities as outlined in TCS' Quality Manual
- Analyze, design, code, test, and deploy application enhancements and maintenance requests
- Migrate Data using hummingbird's GENIO Suite
- Develop and maintain code for new migrations
- Develop Remote Call Procedures (RPC)

- Develop and maintain Batch Programs
- Provide development and maintenance support for Backend Programs
- Ensure that changes to all configurable items are done as per TCS' Change Control Procedure
- Establish and Monitor Software Quality Assurance (SQA) Plan as per guidelines in TCS' Quality Manual
- Conduct Final Inspections to ensure compliance with the project's SQA Plan
- Prepare specifications for offshore development
- Identify and allocate work for offshore development
- Provide technical guidance to offshore resources as required
- Review Defect Prevention activities fortnightly
- Review and Monitor Defects Prevention activities: Peer Reviews, Code Walkthroughs, Causal Analyses Sessions, Inspections, etc., as per IPMS, DP Checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore
- Ensure that software work products are handed over to client within established parameters

The petitioner stated that these "high level" responsibilities distinguish the beneficiary from a "typical Applications Software Analyst/Programmer." The petitioner contended that the beneficiary's training and experience gained while working in the foreign corporation separate his knowledge from the general knowledge possessed by all applications software analysts/programmers and claimed that it demonstrates the beneficiary's advanced and specialized knowledge.

The petitioner further stated that legislative history indicates that Congress intended the L-1B classification to be broader than CIS' interpretations prior to the Immigration Act of 1990. The petitioner also referred to a 1994 Immigration and Naturalization (now CIS) memorandum, which the petitioner stated indicates that the availability of United States workers able to perform the duties requiring specialized knowledge is not relevant to determining whether a beneficiary possesses specialized knowledge.

In a decision dated April 23, 2003, the director determined that the petitioner did not demonstrate that the beneficiary would be employed under the extended petition in a specialized knowledge capacity. The director stated that the petitioner's description of the beneficiary's job duties does not distinguish the tasks performed by the beneficiary as significantly different from those of other applications software analysts/programmers, and concluded that the beneficiary's position does not warrant the expertise of someone possessing specialized knowledge. The director acknowledged the petitioner's claim that the beneficiary's position requires an individual to possess an in-depth knowledge of the corporation's SEI-CMM Level 5 quality assurance methodology, but stated that the petitioner failed to demonstrate that the SEI-CMM procedure is significantly different from the procedures used in other technology consulting companies. The director also stated that the petitioner did not establish how the beneficiary's knowledge of the SEI-CMM process constitutes specialized knowledge. Lastly, the director noted that the petitioner did not show that the beneficiary's knowledge would be difficult to impart on a substitute worker, or that the petitioner would incur an economic inconvenience while training a replacement for the beneficiary. The director concluded that the record did not establish that the beneficiary would be employed in specialized knowledge capacity, and accordingly denied the petition.

In an appeal filed on May 1, 2002, counsel claims that CIS improperly applied the applicable statute and regulation governing the instant matter and incorrectly examined the record. Counsel also contends that CIS' denial of the petition contradicts prior CIS guidance for interpreting the statute defining specialized knowledge.

Counsel states on appeal that the beneficiary's knowledge of the petitioner's SEI-CMM Level 5 software process is special and advanced because such knowledge is uncommon in the United States and in the international software sector. Counsel explains that SEI-CMM is the most sought after assessment of the maturity of an organization's software process capability, and states that presently, seventy-four software development and maintenance organizations worldwide have had their software processes assessed at a level 5, the highest level available. Counsel further states that of the organizations conducting and reporting the Capability Maturity Model for Software results to the Software Engineering Institute, 48% employ 100 software workers, and 0.9% have more than 2000 software personnel. Counsel states that "[t]his is certainly an indicator that the total number of software personnel in the industry is indeed quite small, and this fact further supports the position that knowledge of SEI-CMM Level 5 compliant processes is uncommon in the industry." Counsel references several articles as evidence "that the majority of organizations involved in software development and/or maintenance lack mature software processes (a mature software process is one that is clearly defined, measure, managed, controlled, and effective)." Counsel states that these articles also demonstrate that "the Petitioner's SEI-CMM Level 5 compliant software process is indispensable to the organization's competitiveness in the marketplace."

With regard to the level of knowledge possessed by the beneficiary, counsel challenges CIS' request that the petitioner demonstrate that the beneficiary's knowledge of the petitioner's processes and procedures is "substantially" different, exclusive, restricted, or narrowly held. Counsel states that no such constraint on the beneficiary's knowledge is imposed by the statute, regulations, legislative history or CIS' policy history. Counsel also refers to the 1994 CIS memorandum, which advises CIS from imposing a requirement that advanced knowledge be narrowly held throughout a company. Counsel asserts the following in support of the beneficiary's possession of specialized knowledge:

Nevertheless, that the beneficiary's knowledge is clearly advanced, i.e. 'at a higher level than others,' in comparison to that of similarly employed software personnel in the industry is readily apparent when it is considered that a significant number of organizations involved in software development and/or software maintenance have no formal software process much less an optimized, formal, managed software process such as the Petitioner's SEI-CMM Level 5 software process. Furthermore, he also has also [sic] acquired over 3.5 years of practical experience and expertise working with the Petitioner's SEI-CMM Level 5 compliant processes. Certainly, with this level of practical experience, the Beneficiary's knowledge of the process is obviously 'beyond the elementary or introductory;' 'greatly developed beyond the initial stage;' 'highly developed;' 'complex;' in other words, advanced. The Beneficiary's knowledge of the Petitioner's software process is also clearly special, for such knowledge is 'uncommon,' 'noteworthy,' 'distinct among others in a kind,' i.e. distinct among a large number of the class of software personnel in the industry, as the very uncommonness of the process suggests. As has been shown, the Petitioner's software process is of a sophisticated nature; it is not common in the industry; and it is of critical importance to the Petitioner's ability to deliver software on time and within budget - the very fundamental nature of the Petitioner's business.

On review, the petitioner has not demonstrated that the beneficiary would be employed in the United States organization in a specialized knowledge capacity. In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.*

Although the petitioner adequately described the position of "Applications Software Analyst/Programmer" and the tasks that this position entails, the petitioner has not documented the beneficiary's claimed specialized knowledge. Both counsel and the petitioner repeatedly assert throughout the record that the beneficiary was trained in the SEI-CMM Level 5 software development and maintenance process. However, there is no documentation, such as a course certification, training records, or a confirmation from a corporate director, in the record that the beneficiary received the claimed SEI-CMM training or that the beneficiary is familiar with the petitioner's internally developed SEI-CMM process. Additionally, the comprehensive resume submitted as part of the record belongs to another employee. There is no reference the beneficiary's completed training courses or work experience. This information is particularly relevant as counsel and the petitioner base their claims of the beneficiary's specialized knowledge on his completion of training involving the SEI-CMM Level 5 process and its application to the beneficiary's work both abroad and in the United States. Absent documentary evidence demonstrating the beneficiary's SEI-CMM level 5 process training, the beneficiary is considered to possess the ordinary knowledge of a skilled worker. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). For this reason alone, the petition may not be approved.

It is also appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981) (citing *Matter of Raulin*, 13 I&N Dec. 618 (R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)).<sup>1</sup> As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

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<sup>1</sup> Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. Other than deleting the former requirement that specialized knowledge had to be "proprietary," the 1990 Act did not significantly alter the definition of "specialized knowledge" from the prior INS interpretation of the term. The 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying [*i.e.*, not specifically incorrect] interpretations by INS," H.R. Rep. No. 101-723(1), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that the cited cases remain useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification. The AAO supports its use of *Matter of Penner*, as well in offering guidance interpreting "specialized knowledge." Again, the Committee Report does not reject the interpretation of specialized knowledge offered in *Matter of Penner*.

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business' operation.

*Id.* at 53.

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). As noted previously, 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 AAO finds that 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, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service." *Id.* at 51. The decision noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the subcommittee 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*, *id.* 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 in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, "[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees." 18 I&N Dec. at 119. According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. 18 I&N Dec. at 53; *see also*, *1756, Inc.*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to "key personnel" and "executives.")

The beneficiary's job description does not distinguish his knowledge as more advanced or distinct among other applications software analysts/programmers employed by the foreign or U.S. entities or by other unrelated companies. 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).<sup>2</sup> The Congressional record specifically states that the L-1 category was

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<sup>2</sup> Again, Congress' 1990 amendments to the Act did not specifically overrule *1756, Inc.* nor any other administrative precedent decision, nor did the 1990 amendments otherwise mandate a less restrictive

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.

A 1994 Immigration and Naturalization Service (now CIS) memorandum written by the Acting Associate Commissioner also allows CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but, as noted by the petitioner in its June 2002 letter, does not consider whether workers are available in the United States to perform the beneficiary's job duties.

The record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other applications support analysts/programmers. The petitioner stated in its June 3, 2002 response that "[the beneficiary's] knowledge is different from that ordinarily encountered in the field by virtue of the fact that he has been specifically trained in the processes and procedures that TCS wishes to be employed in each of its projects, consistent with its SEI-CMM Level 5 quality assurance methods." The petitioner further noted that the beneficiary's training and work experience in the foreign corporation separate this knowledge from the general knowledge possessed by other applications software analysts/programmers. As the petitioner failed to document the beneficiary's SEI-CMM training these claims have little value. However, despite the

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interpretation of the term "specialized knowledge." The House Report, which accompanied the 1990 amendments, stated:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

lack of documentation, the petitioner failed to demonstrate that the beneficiary's knowledge is more than the knowledge held by a skilled worker. *See Matter of Penner*, 18 I&N Dec. at 52.

Although the petitioner asserted in its June 2002 letter that the beneficiary's "high level responsibilities" differ from those of a typical applications software analyst/programmer, the petitioner offered no description of the tasks performed by a typical applications software analyst/programmer. Absent this documentation, there is no way to determine the legitimacy of the petitioner's claim. 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). Additionally, the petitioner does not reconcile this claim with its previous statement in the March 2002 letter that the beneficiary possesses the minimum educational degree required to perform in this position, which is consistent with industry standards. The petitioner's statement implies that no additional education or training is necessary to successfully perform the job responsibilities of an applications software analyst/programmer, and therefore, that the beneficiary's knowledge is equal to other workers employed by the petitioner in this field.

This conclusion is further strengthened by counsel's summary on appeal of an article from Computerworld, in which the author explains the lack of formal software processes by United States software organizations and its impact on software quality. The author states that the reason behind the offshore development companies' ability to boast SEI-CMM levels of four or five is because "[they have] figured out that in order to scale their organizations into veritable software manufacturing factories, they have to follow processes that don't depend on the genius of a few creative [individuals]." Counsel provides the following summary of the author's statement:

In simple terms, the development and/or maintenance of software within offshore organizations such as the Petitioner's is strictly process driven, i.e. driven by managed, predictable, repeatable, optimized processes. In the United States, however, improvised, ad hoc processes and the competence, or what [the author] calls the 'genius,' of a few talented individuals seemingly drive software development projects.

Counsel's claim that the petitioner's development and maintenance of software is a predictable, repeatable, and optimized process, which is not driven by a few talented individuals supports a finding that the beneficiary possesses knowledge comparable to the foreign entity's 9,500 skilled information technology workers employed by the petitioner and can not be considered a key employee.

Moreover, the rarity of a Level 5 SEI-CMM assessment, while significant to the image of a software development and maintenance organization, is not an indicator of the level of knowledge possessed by the beneficiary. The Software Engineering Institute is a research and development center that offers, among other things, education and training classes organized to aid companies in determining their ability to develop and maintain software. *See* SEI Education and Training, Introduction to the Software CMM, <http://www.sei.cmu.edu/products/courses/info/intro.cmm.html>, (last updated Nov. 4, 2003). Because SEI is a voluntary training facility, any software company can purchase a report on how to perform software process assessments and train its employees in order to receive a Level 5 rating. It is therefore incorrect to rely on a company's rating from a voluntary training institute as a factor in establishing specialized knowledge. Because the assessment ratings are attributed to specific companies and not their employees the company itself possesses an advanced level of software processes. Additionally, as participation in the Institute is not mandatory, counsel's claim that "of thousands of organizations engaged in software development and/or

maintenance around the world, only 74 have software processes that have been assessed at SEI-CMM Level 5” is not given any evidentiary weight. The record offers no indication as to the number of organizations that have chosen to receive the SEI-CMM training.

Furthermore, the petitioner’s claim that the beneficiary can be categorized as “senior level personnel” rather than a typical applications software analyst/programmer is questionable. The petitioner stated in its June 2002 letter that the beneficiary qualifies as senior level personnel because he received training and extensive experience abroad with the petitioner’s processes and procedures. However, despite the beneficiary’s undocumented training, the beneficiary’s actual length of employment abroad is not clarified by the record. The petitioner’s inconsistent statements that the beneficiary has been employed by the foreign entity for 2.5 years and for 3.5 years raises doubt as to the legitimacy of the beneficiary’s employment abroad. While the AAO does not doubt that the beneficiary has been employed by the foreign entity, it does not seem that the beneficiary’s two or three years of work experience would amount to the level of senior personnel. Again, 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).

Lastly, counsel claims that the legislative history of the L-1B classification indicates that Congress’ intention “was to acknowledge the growing scope of international business and the need to allow the free transfer of key personnel to the United States in order to facilitate and promote business objectives of multinational organizations.” The legislative history for the term “specialized knowledge” provides ample support for a restrictive interpretation of the term. In *1756, Inc. v. Attorney General*, 745 F. Supp. 9 (D.D.C. 1990), the court upheld the denial of an L-1 petition for a chef, where the petitioner claimed that the chef possessed specialized knowledge. The court noted that the legislative history demonstrated a concern that the L-1 category would become too large: “The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service.” *Id.* at 16 (citing H.R. REP. NO. 91-851, 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815). The court stated, “[I]n light of Congress’ intent that the L-1 category should be limited, it was reasonable for the INS to conclude that specialized knowledge capacity should not extend to all employees with specialized knowledge. On this score, the legislative history provides some guidance: Congress referred to ‘key personnel’ and executives.” *1756, Inc.*, 745 F. Supp. at 16.

Similarly, in *Matter of Penner*, the Commissioner emphasized that the specialized knowledge worker classification was not intended for “all employees with any level of specialized knowledge.” 18 I&N Dec. 49 (Comm. 1982). According to *Matter of Penner*, “[s]uch a conclusion would permit extremely large numbers of persons to qualify for the ‘L-1’ visa” rather than the “key personnel” that Congress specifically intended. *Id.* at 53. In accordance with the statute and the legislative history, it would be inappropriate to expand the visa category to allow the entry of any personnel who already had knowledge of a petitioner’s operations.<sup>3</sup>

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<sup>3</sup> *Matter of Penner* pre-dates the 1990 amendment to the definition of “specialized knowledge.” Other than deleting the former requirement that specialized knowledge had to be “proprietary,” however, the 1990 amendment did not greatly alter the definition of the term. In particular, the 1990 Committee Report does not even support the claim that Congress “rejected” the INS interpretation of “specialized knowledge.” The 1990 Committee Report does not criticize, and does not even refer to, any specific INS regulation or precedent decision interpreting the term. All the Committee Report says is that the Committee was recommending a statutory definition because of “[v]arying,” [i.e., not specifically incorrect], “interpretations

If the AAO were to follow counsel's reasoning, then any employee would qualify for a specialized knowledge visa if that employee had experience working for a company with special accreditation, such as SEI-CMM Level 5. The evidence presented indicates that seventy-four software engineering firms have attained SEI-CMM Level 5 certification. To assert that any employee of these firms should qualify for an L-1B visa would fundamentally alter the nature of the visa classification. Such an expansion of the term "specialized knowledge" would transform the visa classification from one for aliens with specialized knowledge to one for any employee working for an enterprise at the forefront of its field. In short, counsel's interpretation of the regulations improperly emphasizes a firm's accreditation rather than an employee's specialized knowledge.

Furthermore, it should be noted that Congress' 1990 amendments to the Act did not specifically overrule *1756, Inc.*, nor any administrative precedent decision, nor did the 1990 amendments otherwise mandate a less restrictive interpretation of the term "specialized knowledge." The House Report, which accompanied the 1990 amendments, stated:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

H.R. REP. No. 101-723(1), 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418. As previously noted, the statutory definition states, "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." 8 U.S.C. § 1184(c)(2)(B).

Prior to the Immigration Act of 1990, the statute did not provide a definition for the term specialized knowledge. Instead, the regulations defined the term as follows:

"Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

8 C.F.R. § 214.2(1)(1)(ii)(D)(1990).

Although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge," Congress did not give any indication that it intended to expand the field of aliens that qualify as possessing

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by INS." H. Rep. No. 101-723(1), *supra*, at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became § 214(c)(2)(B). *Id.* AAO concludes, therefore, that *Matter of Penner* remains useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

specialized knowledge. Although the statute omitted the term "proprietary knowledge" that was contained in the regulations, the statutory definition still calls for "special knowledge" or an "advanced level of knowledge," similar to the original regulation. Neither the 1990 House Report nor the amendments to the statute indicate that Congress intended to expand the visa category beyond the "key personnel" that were originally mentioned in the 1970 House Report. Considered in light of the original 1970 statute and the 1990 amendments, it is clear that Congress intended for the class of nonimmigrant L-1 aliens to be narrowly drawn and carefully regulated, and to this end provided a specific statutory definition of the term "specialized knowledge" through the Immigration Act of 1990.<sup>4</sup>

In the present case, an evaluation of the record reveals that other software companies have achieved an SEI-CMM Level 5 rating, that the claimed specialized knowledge is itself widely available, and that other organizations, although not assessed at a SEI-CMM Level 5, may employ workers with knowledge equivalent to that of the beneficiary. It is further noted that the petitioner claims that the beneficiary is one of approximately 9,500 information technology professionals to have received the SEI-CMM Level 5 training, thereby raising doubts that the beneficiary should be considered "key personnel." Finally, and most importantly, the petitioner has failed to document that the beneficiary has actually received the petitioner's SEI-CMM Level 5 training, the basis for the beneficiary's claim to specialized knowledge. Thus, as the petitioner has not established that the beneficiary possesses a special knowledge of the petitioner's product or an advanced level of knowledge of the company's processes or procedures, the director rationally determined that the beneficiary does not qualify as a specialized knowledge worker.

It is noted that the current petition is for an extension of a L-1B petition that was previously approved by the director. If the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval would constitute clear and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church*

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<sup>4</sup> In addition, a review of the 1970 House Report indicates that Congress assumed that the nonimmigrant intracompany transferees would not compete with United States citizens for employment. When discussing airline personnel, for example, the Chairman noted that flight attendants on international flights would not enter the United States under an L-1 nonimmigrant classification but could enter on an international flight under a different nonimmigrant classification. The Chairman observed that the entry of flight attendants was regulated to prevent them from competing with United States citizen flight attendants. Regarding the L-1 classification, the Chairman stated that "the international personnel would not be competing, in my opinion at least, with an American worker which I think is a significant differentiation." H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 222 (November 12, 1969).

Just as flight attendants do not normally enter under the L-1 classification, *Delta Airlines, Inc. v. USDOJ*, Civ. No. 00-2977 LFO (D.D.C. Filed April 6, 2001), *summarily affirmed Delta Airlines, Inc., v. USDOJ*, No. 01-5186, 2001 WL 1488616 (D.C.Cir. 2001), computer programmers typically enter the United States as nonimmigrant workers under the H-1B classification, which is also regulated to prevent them from unfairly competing with United States workers. *See generally* 8 C.F.R. § 214.2(h). Although not a determining factor in the present case, the beneficiary's current salary appears to be lower than the prevailing wage earned by a computer programmer employed in California, the state in which the beneficiary is presently working. *See* U.S. Dept. of Labor, Employment & Training Administration, <http://www.flcdatabase.com/owl.asp> (last updated Jan. 6, 2004).

*Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987); *cert denied* 485 U.S. 1008 (1988).

Furthermore, the AAO's authority over the service centers is comparable to the relationship between the court of appeals and the district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd* 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

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.

**ORDER:** The appeal is dismissed.