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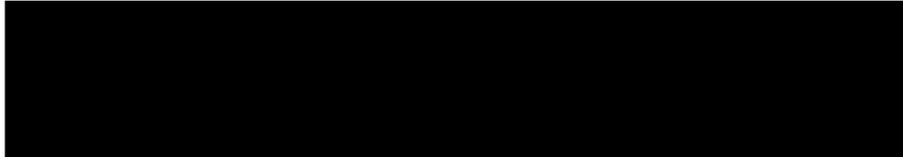
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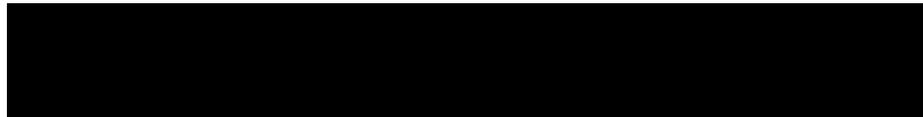
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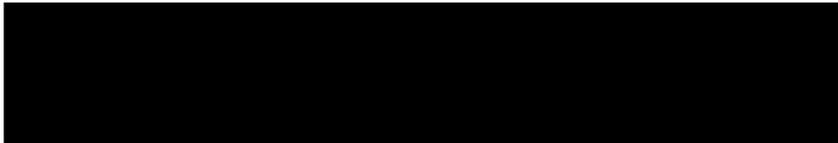
File: LIN 04 168 51581 Office: NEBRASKA SERVICE CENTER Date: NOV 05 2007

IN RE: Petitioner:
Beneficiary:



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)

IN BEHALF OF BENEFICIARY:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska 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 employment authorization for the beneficiary in the position of software/commissioning engineer to be employed at a new office in the United States as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a business entity formed under the laws of the United Kingdom which claims to have a qualifying relationship with the beneficiary's prospective employer, a Michigan corporation.¹

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary has been or will be employed in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has been employed abroad, and will be employed in the United States, in a specialized knowledge capacity. Counsel further argues that the director based his decision on a discrepancy in the record regarding the beneficiary's dates of employment abroad, and she seeks to resolve this inconsistency on appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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(1)(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 (1)(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.

¹It is noted for the record that the petitioner checked "no" to the query "Is the alien coming to the United States to open a new office?" found in the L Classification Supplement to Form I-129. The director, however, applied the "new office" criteria found in 8 C.F.R. § 214.2(1)(3)(vi) to the instant petition. Because the United States operation clearly meets the definition of a "new office" in that it has been "doing business" for less than one year, the director's application of these criteria under the circumstances was not inappropriate. 8 C.F.R. §§ 214.2(1)(1)(ii)(F) and (H). The AAO will similarly apply the "new office" criteria in this matter.

- (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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(vi) states that 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 primary issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a specialized knowledge capacity and whether the beneficiary has specialized knowledge as defined in the Act and the regulations. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

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

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.

Counsel to the petitioner described the beneficiary's job duties in the United Kingdom, his work experience, and his purported specialized knowledge in a letter dated May 19, 2004 as follows:

[The beneficiary] has gained considerable and invaluable experience of [the petitioning organization's] procedures and operations which has been applied successfully to [projects for third party clients]. His work has significantly contributed to [the petitioning organization's] prestige and profits in the national and international markets.

[The beneficiary] is required to execute similar duties [for the United States operation] using his knowledge and experience of the UK Company's procedures and applications. [The beneficiary] has gained most of his engineering work experience from [the foreign employer]. His work is based on the company's procedures and applications which are augmented with in-house training. Applying the skills and knowledge gained through his many years of experience working for the company, he has been instrumental in the company's success with the aforementioned prestigious and reputable companies. This, his employment at the US company at this initial stage is vital to its success.

In addition, [the petitioning organization] has secured a very important contract with Acco Systems in the USA to execute a project that requires knowledge and skill that is not available in the [United States]. The execution of work for this project will last for a year.

Acco Systems in conjunction with General Motors USA developed a data power controls network system used with an SEW movimot motor controls unit as its end user. The product is designed to have significant beneficiary impact in the motor industry.

This type of system has been in use in a very similar type of format both in the UK and across Europe for the past few years[.] [The foreign employer] has gained much experience in this type of system and has been asked by Acco [S]ystems to bring this working knowledge to the USA due to the problems the company has experienced in attempting their first project at General Motors using this system.

[The beneficiary] is one of the engineers employed by [the foreign employer] with extensive working experience and knowledge of the software required for the control system in question. He will be responsible for configuring and testing the Rockwell PLC and HMI software required for this equipment.

[The beneficiary] has engaged in much preparation for this particular project. He has studied the design specifications for the software and attended various in-house training courses and meetings.

He is also required to apply his expertise using [the foreign employer's] procedures and applications for any future projects of [the United States operation].

Counsel also described the beneficiary's proposed duties in the United States as follows:

[The beneficiary] will be responsible for designing, producing, testing and commissioning the software required for control systems. These duties encompass the following:

To interpret the customer requirements received from the software manager into a format that can be easily understood

To follow the company procedures throughout software development, verification, validation and changes

To assist the software manager in the training of locally recruited software/commissioning engineers and instructing them in the company manner of executing the work and procedures

To manage changes within his individual systems

To deliver training to the clients' operatives on the system he has developed and commissioned

To prepare the software element of his individual system for the final handover documentation

To report any issues directly to the software manager that may cause problems to the projects

To attend all meetings where the software manager requires additional support

On May 27, 2004, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's purported specialized knowledge, his job duties, and the method by which he acquired the purported specialized knowledge.

In response, counsel submitted a letter dated July 19, 2004 in which she further describes the beneficiary's purported specialized knowledge as follows:

The beneficiary has worked for [the foreign entity] since February 2004 as a software engineer specialising in the design, testing, installation and commissioning of the software required for systems. Since then he has become extremely proficient in [the foreign organization's] procedures and has had the benefit of working on projects from the most reputable companies in the motor industry. Occasionally, the technical knowledge and skills required for these projects have been developed in Europe and have not been used in other parts of the world including the USA[.]

* * *

The establishment of [the United States entity] was mainly instigated because [the petitioning organization's] UK engineers' specialised knowledge was desperately required for the general

significant benefit of the motor industry in the US. Acco systems and General Motors in the [S]tates (the most reputable companies in their industry) have developed a data power controls network system used with an SEW movimot motor controls unit as its end user. As this equipment has just recently been developed in the USA, other US engineering entities do not have knowledge or experience of it. A similar format has been tested and used successfully in Europe, although the format is still new and the skills to implement them are still not widely available here. [The foreign employer's] engineers and [the beneficiary] (more than any other employee) have extensive experience in this area. **The design, installation, testing and commissioning of a specialised knowledge type of error proofing is a significant and integral part of the alien's duties for this project.**

Counsel also asserts in the letter dated July 19, 2004 that the beneficiary attended training to gain the purported specialized knowledge "in the area of error proof reading." Counsel further asserts that the beneficiary gained his specialized knowledge through a combination of in-house training and work experience.

Finally, the petitioner submitted training certificates for the beneficiary. The certificates indicate, *inter alia*, that the beneficiary attended a 15-day training course concerning "GM-Acco Software" in May 2004 and a 10-day training course concerning "Rockwell Software" in March 2003.

On August 4, 2004, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary has been or will be employed in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has been employed abroad, and will be employed in the United States, in a specialized knowledge capacity. Counsel argues that the director based his decision on a discrepancy in the record regarding the beneficiary's dates of employment abroad, and she seeks to resolve this inconsistency on appeal. Furthermore, counsel argues that the beneficiary's 15-day "GM-Acco Software" training was actually "the conclusion of training which was introduced in December [2003] but commenced in earnest in January 2004." Finally, counsel implies that Citizenship and Immigration Services (CIS) is obligated to approve the instant petition because it previously approved another L-1B petition filed by the petitioner for a different beneficiary.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary has been or will be employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

As a threshold matter and as addressed by the director, the record contains a discrepancy regarding the beneficiary's dates of employment abroad. While the petitioner originally asserted that the beneficiary began working for the foreign employer in 2000, counsel asserted in her letter dated July 19, 2004 that the beneficiary began working in 2004. On appeal, counsel argues that this was a typographical error. Upon review, the AAO agrees that this was more likely than not a typographical error. Consequently, the AAO will not consider counsel's misstatement that the beneficiary began working for the foreign entity in 2004 to be an unresolved inconsistency which undermines the credibility of the petition.

As a further threshold issue, counsel's position that CIS is obligated to approve the instant petition simply because it approved another petition for an allegedly similar beneficiary is without merit. In this matter, the director's decision does not indicate whether he reviewed the approval of the other nonimmigrant petition. Regardless, 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 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 Eng. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Also, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved nonimmigrant petitions on behalf of other beneficiaries, the AAO would not be bound to follow an incorrect decision of a service center. *See 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 this matter, 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(1)(3). The petitioner must submit a detailed job description of the services that were and will be performed sufficient to establish that he has specialized knowledge. In this case, the petitioner failed to establish that the beneficiary has been or will be employed in a specialized knowledge capacity.

Although the petitioner repeatedly asserts that the beneficiary's position abroad and in the United States requires "specialized knowledge" and that the beneficiary had been and will be employed abroad in a "specialized knowledge" capacity, the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced workers employed by the foreign entity or in the industry at large. Going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions 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).

The petitioner describes the beneficiary as having specialized knowledge of designing, producing, testing, commissioning, and error proofing the software required for control systems being used in the Acco Systems/General Motors project in the United States. This software is apparently called Rockwell PLC and HMI. While the petitioner also vaguely describes the beneficiary as having specialized knowledge of the petitioning organization's procedures, operations, and applications as well as having "technical knowledge and skills," the petitioner does not explain whether these areas of purported expertise involve skills other than those related to the Acco Systems/General Motors project and/or working with Rockwell PLC and HMI. Once again, going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

The petitioner also asserts that the beneficiary gained this knowledge of the software in question through a combination of in-house training and work experience. As explained above, the record indicates that the

beneficiary attended approximately 25 days of training related to "GM-Acco Software" and "Rockwell Software." The petitioner did not specifically explain how the beneficiary's work experience also imparted the claimed specialized knowledge to him. Furthermore, counsel's unsubstantiated assertion on appeal that the 15-day training session was actually the conclusion of a much longer training regimen is not persuasive. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Overall, the petitioner relies heavily on its position that the beneficiary's knowledge is uncommon in both Europe and the United States and that this is evidenced by the American companies choosing to hire the petitioning organization as a service provider. However, despite this assertion, the record does not reveal the material difference between the skills and knowledge needed to work with the software in question and the skills and knowledge needed to work with similar types of software generally. The record does not establish that the beneficiary's knowledge is different from the knowledge possessed by similarly experienced software professionals generally throughout the industry or by other employees of the foreign entity. The petitioner must establish that the qualities of the software require employees to have knowledge beyond what is common in the industry.

It is likely that there are certain aspects to this, and all, software projects that are known only by a few employees. Every worker can be described as being "specialized" to a certain extent. However, this does not establish that this knowledge is "specialized" for purposes of this visa classification. The petitioner must establish that the beneficiary's knowledge is specialized because he gained the knowledge through extensive training or experience which could not easily be transferred to another employee without significant economic inconvenience. Memorandum from [REDACTED] Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). In this matter, the petitioner has not established that the beneficiary's knowledge is materially different from that possessed by similar employees with experience with similar products or processes. The fact that other professionals may not have very specific, project specific knowledge regarding the implementation of this particular type of software in this particular setting is not persuasive if this knowledge gap could be closed by the petitioner by simply revealing information to a newly hired, similarly experienced employee after 25 days, or even a few months, of on-the-job instruction. Therefore, the petitioner has not established that the beneficiary was or will be a key employee of crucial importance and that he was or will be employed in a specialized knowledge capacity.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioning organization. However, it is 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)). 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:

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 firm's operation.

Id. at 53.

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 the employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and 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). The decision noted that the 1970 House Report, H.R. REP. 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 further 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*, 18 I&N 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. v. Attorney General*, 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.”)

As alluded to *supra*, a 1994 Immigration and Naturalization Service (now CIS) memorandum written by the then Acting Associate Commissioner also directs 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.” Memo. From James A. Puleo at 3. 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 truly specialized.” *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary’s job duties.

As explained above, the record does not distinguish the beneficiary’s knowledge as more advanced than the knowledge possessed by other people employed by the foreign entity or by software professionals employed elsewhere. As the petitioner has failed to document any materially unique qualities to the beneficiary’s knowledge, the petitioner’s claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a “key” employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced professional or that he has received special training in the company’s methodologies or processes which would separate him from other professionals employed with the foreign entity or elsewhere. It is simply not reasonable to classify this employee as a key employee of crucial importance to the organization.

The legislative history of the term “specialized knowledge” provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the “narrowly drawn” class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary was not employed abroad in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

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

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appeal will be dismissed.

ORDER: The appeal is dismissed.