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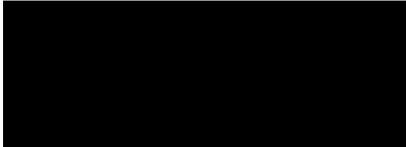
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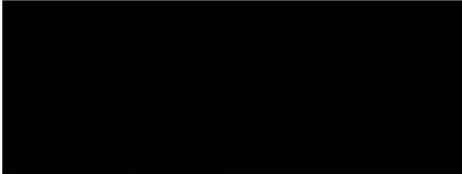
File: WAC 04 115 53666 Office: CALIFORNIA SERVICE CENTER Date: OCT 02 2007

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 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, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its "purchaser/evaluator buyer" 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, a corporation organized under the laws of the State of California, claims to be a diamond manufacturer.

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

On appeal, counsel for the petitioner asserts that the petitioner has established that the beneficiary has been and will be employed in a specialized knowledge capacity as a diamond expert. Counsel also argues that the beneficiary will be employed in a primarily managerial or executive capacity and that he could also be classified as an L-1A nonimmigrant intracompany transferee.

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(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.

At issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a capacity which involves specialized knowledge.

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.

The petitioner described the beneficiary's duties and purported specialized knowledge in a letter dated February 24, 2004 as follows:

[The beneficiary] is well qualified for the position of a Purchaser/Evaluator Buyer. As a purchaser/evaluator buyer, he learned to examine diamonds with [a] magnifying glass to detect defects in color, quality and physical structure. He was trained to select diamonds according to type and size, to sort stones according to quality and type using a loupe. He also learned to determine size of stone, using measuring gauge/sizing plate and weigh stones using diamond weight scale to verify weight. He studied the diamond trade, production, distribution and marketing of diamonds. He has wide knowledge in estimating the value of all kinds of diamonds.

In 2000, [the beneficiary] was employed at The Israel Diamond Exchange Ltd[.] as a diamond broker. In January 2001 he was employed at [REDACTED] Manufacture Ltd[.] as a diamond broker.

Since December 2002 [the beneficiary] is employed in a position as a Purchaser/Evaluator Buyer in our Israeli corporation. He is responsible for international diamond trade, production, distribution and marketing of diamonds. He also coordinates international activities in accordance with policies of the company as well as the development of effective use of materials. He selects diamonds according to type and size, sorts stones according to quality and type, using magnifying glass or loupe. [The beneficiary] determines size of stone, using measuring gauge/sizing plate a [sic] weighs stones using diamond weight scale to verify weight.

U.S. Position Held by the Transferee

[The beneficiary] is highly qualified for the position of Purchaser/Evaluator Buyer. In this position he will be in charge of the international diamond trade. He will select diamonds according to the type and size. He will make day[-]to[-]day decision regarding acquisition of diamonds. He will weigh and evaluate the precious stones and determine their quality and marketability.

The Qualification of the Transferee

[The beneficiary] is an expert in the diamond field. After being trained in the International Gemological Center Ltd. [i]n Israel [the beneficiary] received his certificate as a Diamond Grader. He obtained his special expertise as a purchaser/evaluator in our offices in Israel, where he gained some special knowledge, particularly with matching pairs of diamonds in fancy shapes like trapeze shaped, half moon shapes, triangle shapes and shield shape.

On March 26, 2004, the director requested additional evidence. The director requested, *inter alia*, further evidence regarding the beneficiary's training, experience, and skills.

In response, the petitioner submitted a letter dated June 8, 2004 in which the beneficiary's duties and knowledge were further described as follows:

[The beneficiary] will perform special duties in the U.S.A. He will manage purchasing and evaluation of high[-]end (certified and potentially certified) diamonds. He will need to apply special skills to determine [the] color and clarity of each diamond – which could be studied in Gemology course, but specifically will have to assess and estimate the potential of the diamonds to be purchased and how much it will be worth in the marketplace. That skills [sic] is applied with respect to raw diamond and polished diamonds. The ability to make these decisions cannot be learned in school. Only lifetime experience taught to the alien by the president and CEO of our Israeli company in Israel. That specialized skill is crucial for our business. The profit margin in the diamond industry is 3%-4%, and therefore wrong decisions in purchasing the diamond could have devastating consequences to any business given the high cost of each diamond, and the usage of trade to purchase diamonds in packets containing many diamonds. Therefore these special skills are so important, because their existence is the maker or breaker of a successful business. On the other hand, a person with specialized knowledge such as [the beneficiary] can increase the profit margin by 2%. Therefore we consider [the beneficiary] as vital for our business.

* * *

It is not the instruments that he uses in order to do his job which makes it a special knowledge as some of that technical skills could be taught in a course: what he possesses that no one can match is that skill of knowing the international market in and out, knowing which diamond

will get the best price in the Middle East, India or the U.S. and Canadian markets: it is a crucial decision whether to evaluate, purchase or sell our product to Japan – or to Morocco this knowledge cannot be acquired if you were not trained by people with lifetime experience and a proven success in international diamond trade.

On June 29, 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 which involves specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has established that the beneficiary has been and will be employed in a specialized knowledge capacity as a diamond expert. Counsel also argues that the beneficiary will be employed in a primarily managerial or executive capacity and that he could also be classified as an L-1A nonimmigrant intracompany transferee.

Upon review, the petitioner's assertions are not persuasive.

As a threshold matter, it must be noted that counsel's argument on appeal that the beneficiary could, in the alternative, be classified as an L-1A nonimmigrant intracompany transferee employed in a primarily managerial or executive capacity is without merit. The petitioner clearly requested in the Form I-129 that the beneficiary be classified as an L-1B nonimmigrant intracompany transferee having specialized knowledge. The petitioner may not now materially change its petition by seeking a managerial or executive classification for the beneficiary. A beneficiary may not be classified as both a specialized knowledge worker and a manager for purposes of this visa classification. 8 U.S.C. § 1101(a)(15)(L). An intracompany transferee must render his or her services in a "capacity that is managerial, executive, *or* involves specialized knowledge." *Id.*; 8 C.F.R. § 214.2(l)(1)(ii)(A) (emphasis added). Therefore, the petitioner needed to choose one classification, and it chose specialized knowledge. Moreover, it is noted for the record that counsel's request to amend the petition on appeal and to alternatively consider it as a petition for L-1A classification is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1A classification is, therefore, rejected. If the petitioner now wants to seek a managerial or executive classification for the beneficiary, it needs to file a new petition.

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 job description of the services to be performed sufficient to establish specialized knowledge. In this case, while the beneficiary's job description describes his duties as a diamond "purchaser/evaluator buyer," the petitioner

failed to establish that this position required, or will require, an employee with specialized knowledge or that the beneficiary has specialized knowledge.

Although the petitioner asserts that the beneficiary's proposed position abroad and in the United States requires "specialized knowledge," the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced buyers and product evaluators in the diamond 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).

In support of its assertion that the beneficiary has specialized knowledge of purchasing and evaluating diamonds, the petitioner states that only "lifetime experience taught to the alien by the president and CEO of our Israeli company in Israel" could impart this specialized knowledge to the beneficiary. However, despite counsel's assertions, the petitioner has not established that the beneficiary's knowledge of the petitioner's diamonds or diamond purchasing constitutes "specialized knowledge." The record does not distinguish the petitioner's diamonds, or the beneficiary's knowledge of the purchase and evaluation of these diamonds, from the purchase and evaluation of diamonds in the industry at large. Without producing evidence that the petitioner's product or service is different in some material way from similar products or services offered on the market which would make the beneficiary's knowledge economically burdensome to impart to a similarly experienced person, the petitioner cannot establish that the beneficiary's knowledge of the selection and purchase of the employing organization's diamonds is noteworthy, uncommon, or distinguished by some unusual quality that is not generally known by similarly experienced personnel engaged within the beneficiary's field of endeavor. 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.

Furthermore, it must be noted that the record indicates that the beneficiary commenced working for the foreign entity in December 2002. The instant petition was filed approximately 15 months later in March 2004. It is simply not credible that the beneficiary, after a total of 15 months, acquired "specialized knowledge" through three months of work experience and thereafter worked in a "specialized knowledge" capacity for at least one year before the filing of the instant petition. While a beneficiary need not be subjected to a specific type of on-the-job training program for any specific length of time, the petitioner nevertheless must establish that the knowledge in question "would be difficult to impart to another individual without significant economic inconvenience" to the petitioner or the foreign employer. Memorandum from James A. Puleo, Acting Associate Commissioner, Immigration and Naturalization Service, Interpretation of Specialized Knowledge, CO 214L-P (March 9, 1994). In this matter, if the purported "specialized knowledge" could be imparted to an employee with a similar education and with a similar work history after approximately three months of on-the-job experience, then the petitioner has not established that this knowledge is indeed specialized since it could be imparted to another individual without significant economic

inconvenience. 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 AAO does not discount the likelihood that the beneficiary is a skilled and experienced diamond purchaser and evaluator who has been, and would be, a valuable asset to the petitioner's 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. 49, 52 (Comm. 1982). 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, 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. 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.”)

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (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.” Memorandum from [REDACTED], 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 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 similarly experienced persons employed in the industry generally. As the petitioner has failed to document any materially unique qualities to the petitioner’s diamonds, the petitioner’s claims are not persuasive in establishing that the beneficiary, while highly skilled, would be a “key” employee. There is no indication that the beneficiary has knowledge that exceeds that of any experienced

diamond purchaser and evaluator, or that he has received special training in the employing organization's methodologies or processes which would separate him from any other similarly employed persons.

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 has not been employed abroad, and would not be employed in the United States, in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

Beyond the decision of the director, a related matter is whether the petitioner established that it has a qualifying relationship with the foreign entity.

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:

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.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "[i]s or will be doing business." An "affiliate" is defined, in part, as "[o]ne of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity." 8 C.F.R. § 214.2(l)(1)(ii)(L)(2). "Doing business" is defined in pertinent part as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization."

In this matter, the petitioner asserts that both it and the foreign employer are owned and controlled by the same two individuals. However, the record is devoid of evidence establishing the ownership and control of the foreign entity. Furthermore, the record is devoid of evidence establishing that the foreign entity is currently engaged in doing business. 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. Going on record without 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.

Accordingly, as the petitioner has failed to establish that it has a qualifying relationship with a foreign employer, the petition may not be approved for this additional reason.

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

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.