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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

D7

FILE: WAC 05 226 50183 Office: CALIFORNIA SERVICE CENTER Date: APR 03 2008

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the Administrative Appeals Office (AAO) for affirmation or withdrawal pursuant to 8 C.F.R. § 103.4(a). Upon review, the decision of the director will be affirmed, and the petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a technical analyst/ programmer 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 information technology consulting firm that "provides product development and consulting services in all aspects of systems and software engineering to companies throughout the world." The petitioner seeks to employ the beneficiary as a technical analyst/programmer for a period of three years. [1]

Citing to the anti "job shop" provisions of the L-1 Visa Reform Act of 2004, the director denied the petition as an impermissible arrangement to provide labor for hire.[2] Specifically, the director concluded that the beneficiary, who will be stationed primarily at a worksite of an unaffiliated employer, will be

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[1] The AAO notes that Citizenship and Immigration Services (CIS) records indicate that the petitioner has filed a total of 16,429 L-1B petitions, with more than 3,979 petitions filed during fiscal year 2006.

[2]The term "job shop" is commonly used to describe a firm that petitions for aliens in L-1B status to contract their services to other companies, often at wages that undercut the salaries paid to U.S. workers. Upon introducing the L-1 Visa Reform Act, Senator Saxby Chambliss described the abuse as follows:

> The situation in question arises when a company with both foreign and U.S.-based operations obtains an L-1 visa to transfer a foreign employee who has "specialized knowledge" of the company's product or processes. The problem occurs only when an employee with specialized knowledge is placed offsite at the business location of a third party company. In this context, if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee. Outsourcing an L-1 worker in this way has resulted in American workers being displaced at the third party company.

149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003).

In general, the L-1B visa classification does not currently include the same U.S. worker protection provisions as the H-1B visa classification. *See generally*, 8 C.F.R. §§ 214.2(h) and (l). The L-1B visa classification is not subject to a numerical cap, does not require the employer to certify that the alien will be paid the "prevailing wage," and does not require the employer to pay for the return transportation costs if the alien is dismissed from employment. Additionally, an employer who files a petition to classify an alien as an L-1B nonimmigrant would not pay the $1,500 fee that is currently required for each new H-1B petition and which funds job training and low-income scholarships for U.S. workers. *See* Section 214(c)(9) of the Act.

employed in a position which is essentially an arrangement to provide labor for hire for the unaffiliated employer, Bank of America (hereinafter "the unaffiliated employer"). The director further determined that the beneficiary does not have specialized knowledge of a product or service specific to the petitioner.

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) further states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
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> (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.
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> (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.
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> (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.

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.

I. L-1 Visa Reform Act

As amended by the L-1 Visa Reform Act of 2004, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F), provides:

> An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) if –
>
> (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
>
> (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Section 214(c)(2)(F) of the Act was created by the L-1 Visa Reform Act of 2004 and is applicable to all L-1B petitions filed after June 6, 2005, including extensions and amendments involving individuals currently in L-1 status. *See* Pub. L. No. 108-447, Div. I, Title IV, 118 Stat. 2809 (Dec. 8, 2004). The primary purpose of the L-1 Visa Reform Act amendment was to prohibit the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003); *see also* Sen. Jud. Comm., Sub. on Immigration, Statement for Chairman Senator Saxby Chambliss, July 29, 2003, available at <http://judiciary.senate.gov/member_statement.cfm?id =878&wit_id=3355> (accessed on July 16, 2007).

In evaluating a petition subject to the terms of the L-1 Visa Reform Act, the AAO must emphasize that the petitioner bears the burden of proof. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1). If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the alien will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel or the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). If the petitioner fails to establish both of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee.

A. Threshold Question: Worksite of Beneficiary

As a threshold question in the analysis, CIS must examine whether the beneficiary will be stationed primarily at the worksite of the unaffiliated company. Section 214(c)(2)(F) of the Act.

As noted on page 3 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated that the work location for the beneficiary will be at the unaffiliated employer located in Concord, California. The petitioner also stated in its letter of support, dated August 5, 2005, that it wishes for the beneficiary to enter the United States for a period of three years as a technical analyst/programmer for a project at the unaffiliated employer. Accordingly, the AAO concludes that the beneficiary will be primarily employed as an analyst programmer at the worksite of the unaffiliated employer.

Therefore, under the terms of the L-1 Visa Reform Act, the petitioner must establish both: (1) that the alien will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act.

B. Control and Supervision of Beneficiary

The first issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the alien will be controlled and supervised principally by the petitioner, and not by the unaffiliated employer. Section 214(c)(2)(F)(i) of the Act.

Notwithstanding the director's finding to the contrary, the petitioner has not satisfied this prong of the L-1 Visa Reform Act test. The petitioner asserted on the Form I-129 that the beneficiary will be supervised by the Business Relationship Manager, an employee of the petitioner. The petitioner further explained that the beneficiary will be supervised through "regular in-person meetings to resolve functional and technical issues and status reports for tracking the overall progress of the project." However, no evidence was submitted in support of this statement. The petitioner does not provide evidence to document how, exactly, the beneficiary will be managed and controlled while offsite at the unaffiliated employer's workplace. Going on record without supporting evidence will not satisfy the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, despite the director's specific request for evidence, the petitioner did not provide sufficient documentation to establish whether the beneficiary will be controlled and supervised principally by the petitioner. On August 18, 2005, the director requested copies of contracts, statements of work, work orders, and service agreements between the petitioner and the unaffiliated employer, describing specifically the services to be provided by the beneficiary. In response, the petitioner submitted a document titled "Statement of Work," (hereinafter "Statement of Work") between the petitioner and the unaffiliated company.

The AAO notes that the Statement of Work provides for a project led by the unaffiliated employer using the petitioner's personnel from May 1, 2005 until December 31, 2005. According to section 10 of the Statement of Work, it stated that the "'onshore personnel' will be billed at US$56.00 per hour." In addition, section 11 of the statement of work states that the "[the petitioner] shall submit invoices no later

than 60 days from the end of the month in which the expenses were incurred or work was performed." Thus, the petitioner is responsible for managing projects that are assigned by the unaffiliated employer and also obligated to commit personnel to projects led or managed by the unaffiliated employer. This provision of the statement of work raises unanswered questions as to which entity manages and controls the personnel that are committed to projects led by the unaffiliated employer.

The Statement of Work raises additional questions. As concluded by the director, the beneficiary appears to be serving as a "programmer for hire" who will, at most, make changes to the unaffiliated employer's existing systems and software. According to section 3 of the Statement of Work submitted by the petitioner, a project schedule/deliverables outlines the resources the petitioner shall provide to the unaffiliated employer. Since the beneficiary will primarily provide support and maintenance of the unaffiliated employer's systems, the AAO cannot determine who actually supervises and controls the beneficiary.

In reviewing the statement of work submitted by the petitioner, it states that this document is "entered into pursuant to that certain Master Software Development and Services Agreement, Reference Number 23999-001-001 ("Agreement") executed as of February 1, 2002," between the petitioner and the unaffiliated employer. The petitioner failed to submit a copy of the master agreement referenced in the statement of work. Going on record without supporting 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Finally, despite the director's request for documents relating to the specific services to be provided by the beneficiary, the documentation provided by the petitioner in response to the director's request fails to provide evidence of the beneficiary's specific work assignment and services the beneficiary will provide to the unaffiliated employer. The statement of work fails to provide evidence of the beneficiary's specific work assignment and services the beneficiary will provide to the unaffiliated employer. The statement of work does not address the beneficiary's assignment or duties. Although the petitioner provides a brief description of the proposed job duties, it does not address the beneficiary's assignment or duties in detail. The petitioner did not submit any documents that list the beneficiary as a key personnel assigned to this project. In addition, the statement of work indicates that the project will commence on May 1, 2005 and terminate on December 31, 2005. The petitioner requested three years of L-1B status, until September 2008, on behalf of the beneficiary. The petitioner also failed to submit a contract, work order or purchase order between the petitioner and the unaffiliated employer. Absent such information, the petitioner has not established that it will principally control and supervise the alien beneficiary or even that the beneficiary will be employed at the claimed worksite.

Accordingly, the petitioner's failure to fully respond to the director's request for evidence is fatal to its claimed eligibility. The petitioner's failure to submit the requested evidence precluded a material line of inquiry and shall be grounds for denying this petition. 8 C.F.R. § 103.2(b)(14).

Moreover, as the petitioner has not established that the beneficiary will be controlled and supervised by the petitioner during his employment at the unaffiliated employer's workplace, the petition may not be approved for this additional reason.

C. Necessity of Specialized Knowledge Specific to the Petitioning Employer

The second issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

The petitioner described the beneficiary's job duties and purported specialized knowledge in a letter dated August 5, 2005 as follows (with emphasis deleted):

> The [unaffiliated employer's] project is specialized in nature because it involves expertise with [the petitioner's] banking industry practice group tools, procedures, and methodologies. Internet, wireless technology and global straight-through processing have created a paradigm shift in the banking industry, from brick-and-mortar banks to banking virtually across time zones, geographical locations, access points and delivery channels. [The petitioner] has a comprehensive array of products, project implementation skills, and expertise in implementing third-party solutions that cover the entire logistics of the banking industry. We have worked with some of the best banks worldwide, providing them mission-critical solutions and services for more than two decades.
>
> [The unaffiliated employer's] Integrated Monetary Processing and Control System (IMPACS) is designed to process checking, savings, and money market accounts for all [the unaffiliated employer's] states that operate the Model Banking Process. The IMPACS system offers a wide range of features and functions to support [the unaffiliated employer's] Demand Deposit (DDA) products and services. The project includes analyzing IMPACS from the business and functional perspective. The analysis and development of the regression analysis and quality processes will be carried out along with a review of the code specifications for the enhancements. The enhanced IMPACS will be performance tuned after repairing bugs. The efficient development, support, and maintenance of [the unaffiliated employer's] applications require specialized knowledge of [the petitioner's] proprietary tools including Automated Standard Analyzer (ASA), Test Coverage Analyzer (TCA), Data Clean, Integrated Relationship Information System (IRIS), and Process Assets Library (PAL), as well as advanced knowledge of [the unaffiliated employer's] applications. ASA is used for standardizing the COBOL program as per the requirements. TCA is used to find the percentage of codes tested and the flows that are not covered. Data Clean consolidates a database, based on record matching. It takes multiple customer lists, cleans, and standardizes the names and addresses and then uses a special algorithm to match the name and addresses and weeds out duplicate customers. IRIS facilitates the tracking of project status. This tool assists in reduction of defects and improvement of productivity. PAL is used to maintain procedures, manuals, standards and guidelines, templates, SPI documents, and training material at the organization level. It is also used to create and maintain a similar repository for the client.
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> [The beneficiary] will utilize his specialized knowledge of ASA, TCA, Data Clean, IRIS,

> and PAL, as well as [the petitioner's] banking industry practice group tools, procedures, and methodologies to ensure the successful completion of the proposed project.

As previously noted, the director requested additional evidence on August 18, 2005. The director requested, *inter alia*, further evidence establishing that the beneficiary has specialized knowledge; evidence that he will be controlled and supervised by the petitioner; a description of where the beneficiary will work; and evidence that the placement of the beneficiary at the unaffiliated employer's worksite is not an arrangement to provide labor for hire. The director specifically requested copies of contracts, statements of work, work orders, and service agreements between the petitioner and the unaffiliated employer for the services to be provided by the beneficiary. The director also requested copies of the petitioner's human resource records that would provide the beneficiary's job description and worksite location.

In response, the petitioner submitted a letter from the project manager of the petitioner's offshore office, a print out of the beneficiary's employment status with the petitioner; and, a copy of the statement of work, dated April 2005, between the petitioner and the unaffiliated employer.

On November 10, 2005, the director denied the petition. The director concluded that the beneficiary, who will be stationed primarily at a worksite of an unaffiliated employer, will be employed in a position which is essentially an arrangement to provide labor for hire for the unaffiliated employer. The director further determined that the beneficiary does not have specialized knowledge of a product or service specific to the petitioner. Specifically, the director concluded as follows:

> It appears from the record that the placement of the beneficiary outside the Petitioning organization is essentially an arrangement to provide labor for hire rather than the placement in connection with the provision of a product or service. The service the petitioner is providing is, essentially, programmers for hire to change the petitioner['s] client's already existing system and/or software rather than developing their own software. The specialized knowledge the beneficiary possesses is that of the petitioner's tools, procedures, and methodologies to be applied to the client's existing program. As stated in the Description of Services above, the product that the beneficiary will be working in is only unique to the client and not to the petitioner. Therefore, the beneficiary's knowledge is only tangentially related to the performance of the proposed offsite activity.
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> In essence, the beneficiary will be working on a product that is used to conform with the client's specification and needs, rather than a product unique to the specifications and needs of the petitioner. In this case, the specialized knowledge is not specific to the petitioner.
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> As such, the petitioner has not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire.

Reviewing the petitioner's claims, it asserts that the beneficiary has specialized knowledge of the petitioner's processes and procedures. In particular, the petitioner stated in its response to the director's

request for evidence that the beneficiary has specialized knowledge of the petitioner's proprietary tools including the ASA, TCA, Data Clean, IRIS, and PAL. Further, the petitioner asserted that the beneficiary will use his specialized knowledge of these tools in his capacity as an employee of the petitioner, which has been hired by the unaffiliated employer to implement the tools and redesign the organization's systems.

Overall, the petitioner described the beneficiary as having knowledge "of [the petitioner's] proprietary development procedures, methodologies, and tools" that will be integral components used for the project with the unaffiliated employer. The petitioner further explained that the beneficiary has been working on the same project abroad and that the beneficiary's specialized knowledge of the unaffiliated employer's requirements permits him to work more efficiently. The petitioner stated that with "over 40,000 employees to choose from," the beneficiary was identified as the ideal candidate based on his work abroad where he gained experience with the petitioner's tools.

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act. To the contrary, the petitioner has described the beneficiary as having knowledge of the processes and procedures of the unaffiliated employer.

As previously noted, the Statement of Work provides for a project led by the unaffiliated employer using the petitioner's personnel from May 1, 2005 until December 31, 2005. According to section 10 of the Statement of Work, it stated that the "onshore personnel will be billed at US$56.00 per hour." In addition, section 11 of the statement of work states that the "supplier [the petitioner] shall submit invoices no later than 60 days from the end of the month in which the expenses were incurred or work was performed." Thus, the petitioner is responsible for managing projects that are assigned by the unaffiliated employer and also obligated to commit personnel to projects led or managed by the unaffiliated employer.

The Statement of Work raises additional questions. As concluded by the director, the beneficiary appears to be serving as a "programmer for hire" who will, at most, make changes to the unaffiliated employer's existing systems and software. According to section 3 of the Statement of Work submitted by the petitioner, a project schedule/deliverables outlines the resources the petitioner shall provide to the unaffiliated employer. In addition, in Section 2 Description of Services, of the statement of work, it states that the APO applications that will be updated by the petitioner is "unique to California, [the unaffiliated employer]. Thus, the beneficiary will primarily provide support and maintenance of the unaffiliated employer's systems.

In reviewing the statement of work submitted by the petitioner, it states that this document is "entered into pursuant to that certain Master Software Development and Services Agreement, Reference Number 23999-001-001 ("Agreement") executes as of February 1, 2002," between the petitioner and the unaffiliated employer. This document references the master agreement; however, the petitioner failed to submit a copy of the master agreement. Going on record without supporting 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Finally, despite the director's request for documents relating to the specific services to be provided by the beneficiary, the documentation provided by the petitioner in response to the director's request fails to provide evidence of the beneficiary's specific work assignment and services the beneficiary will provide to the unaffiliated employer. The statement of work fails to provide evidence of the beneficiary's specific work assignment and services the beneficiary will provide to the unaffiliated employer. The statement of work also fails to address the beneficiary's assignment or duties. Although the petitioner provides a brief description of the proposed job duties, it does not address the beneficiary's assignment or duties in detail. The petitioner did not submit any documents that list the beneficiary as a key personnel assigned to this project. In addition, the statement of work indicates that the project will commence on May 1, 2005 and terminate on December 31, 2005. The petitioner requested three years of L-1B status, until September 2008, on behalf of the beneficiary. The petitioner also failed to submit a contract, work order or purchase order between the petitioner and the unaffiliated employer. As such, the AAO cannot determine whether his placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

CIS must examine the ultimate employment of the alien to determine whether the position requires specialized knowledge specific to the petitioning employer. *Cf. Defensor v. Meissner*, 201 F.3d 384, 388 (5th Cir. 2000)(determining that the final employer of contract nurses was the "more relevant employer" for purposes of determining immigration eligibility). In the present matter, the petitioner has failed to submit evidence of the alien's ultimate employment at the worksite of the unaffiliated employer. Going on record without supporting 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.

Accordingly, the beneficiary is ineligible under section 214(c)(2)(F)(ii) for classification as an L-1B intracompany transferee having specialized knowledge specific to the petitioning employer. In order for an offsite specialized knowledge worker to be eligible for L-1B classification, the petitioner must establish that the beneficiary is not being employed as "labor for hire" for the unaffiliated employer.

Finally, the petitioner asserts that the beneficiary was selected for this project because he has worked on the same project abroad and because the beneficiary has specialized knowledge of the unaffiliated employer's requirements. Although the petitioner repeatedly asserts that the beneficiary has specialized knowledge of the petitioner's proprietary tools, the petitioner notes that these tools are utilized to monitor, test, and improve the quality of the unaffiliated employer's existing systems. In this matter, as the petitioner has asserted that the beneficiary's knowledge is related to the unaffiliated employer's processes and procedures, the beneficiary falls squarely within the prohibition imposed by the L-1 Visa Reform Act of 2004 on the "outsourcing" of L-1B nonimmigrants who do not have specialized knowledge related to the provision of a product or service specific to a petitioner.

Accordingly, the petitioner failed to establish that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary, and the petition may not be approved for that reason.[3]

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[3] It is noted that, as the beneficiary is not required to possess knowledge of proprietary products or processes in order to be deemed to have specialized knowledge, the director's use of the word "unique" may not be entirely appropriate. At the same time and as noted above, when the petitioner claims that the

II. Specialized Knowledge

Beyond the decision of the director, and contrary to the conclusion reached by the director, even if the beneficiary's knowledge were proven to be specific to the petitioning employer, the petitioner has also failed to establish that this knowledge is specialized as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D) and that the beneficiary has been or will be employed 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) and (iv). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. In this case, the petitioner fails to establish that the beneficiary's position in the United States requires an employee with specialized knowledge or that the beneficiary has specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States will require "specialized knowledge," the petitioner has not adequately articulated any basis to support this claim. The petitioner has provided a detailed description of the beneficiary's proposed responsibilities as a technical analyst/programmer; however, the description does not mention the application of any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other technical analyst/programmers employed by the petitioner or the information technology or banking 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Based upon the lack of supporting evidence, the AAO cannot determine whether the U.S. position requires someone who possesses knowledge that rises to the level of specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

The petitioner has repeatedly asserted that the beneficiary will be utilizing the petitioner's proprietary tools including ASA, TCA, Data Clean, Integration Relationship Information System, and Process Assets Library; however, the petitioner did not submit evidence to demonstrate that the petitioning company is the only company, or one of the few, that utilize these tools or similar tools. There is no evidence in the record that the beneficiary actually participated in the development of such methodologies and processes that might lead to the conclusion that his level of knowledge is comparatively "advanced." Although there is no requirement that the beneficiary must develop the internal methodologies and processes, this may be evidence of an advanced knowledge of the petitioner's internal processes that will demonstrate that the beneficiary possesses a specialized knowledge. Furthermore, according to the beneficiary's resume, it appears that the beneficiary began working with the above-mentioned tools immediately after commencing his employment with the

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beneficiary has experience with a proprietary product or procedure, this does not serve as prima facie evidence that the beneficiary possesses specialized knowledge. As such, when the petitioner asserts, as it has in this matter, that a beneficiary has experience with proprietary products or procedures, CIS must carefully evaluate the claimed knowledge and the depth of the beneficiary's experience in order to determine whether it rises to the level of specialized knowledge as contemplated by 8 C.F.R. § 214.2(l)(1)(ii)(D). Regardless, given that the director's decision does not clearly address this issue, the director's use of the word "unique" and his decision to deny the petition on this basis is withdrawn to the extent that any proprietary knowledge requirement was imposed.

petitioner abroad as a team member. Thus, there is no evidence on record to suggest that the processes and technology pertaining to the technical analyst/ programmer positions for the petitioner are different from those applied by other companies providing software consulting services to the banking industry. While individual companies will develop a computer system tailored to its own needs and internal quality processes, it has not been established that there would be substantial differences such that knowledge of the petitioning company's processes and quality standards would amount to "specialized knowledge."

Despite the petitioner's assertions, the petitioner has not established that the beneficiary's knowledge of programming for the banking and financial services industry, either in the context of the ongoing project being performed for the unaffiliated employer or in connection with his employment with the petitioner, constitutes "specialized knowledge." The record does not reveal the material difference between the beneficiary's knowledge of the banking programming tools and the ongoing implementation project and the knowledge possessed by similarly experienced programmers in the industry or in the petitioner's own organization. Without producing evidence that the petitioner's programming services are different in some material way from similar services offered on the market by similarly experienced software professionals, the petitioner cannot establish that the beneficiary's knowledge 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.

In addition, the petitioner did not submit any documentation to evidence that the beneficiary received additional training that was not provided to other technical analysts/programmers employed by the foreign company. The petitioner did note that it has over 40,000 employees and that the project managers have the "opportunity to select a candidate that fulfills the requisite skills set." The petitioner also explained that the beneficiary worked abroad on a similar assignment for the unaffiliated employer. Knowledge related to a specific clients' project cannot be considered "specialized knowledge" specific to the petitioning company. The beneficiary's familiarity with the U.S. clients' project requirements is undoubtedly valuable to the petitioner, but this knowledge alone is insufficient to establish employment in a specialized knowledge capacity. If the AAO were to follow the petitioner's logic, any technical analyst/programmer who had worked on a banking and customization client project team within the petitioner's organization would be considered to possess "specialized knowledge."

The AAO does not discount the likelihood that the beneficiary is a skilled and experienced technical analyst/programmer who has been, and would be, a valuable asset to the petitioner's organization and to the unaffiliated employer. 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 sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner, 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 CIS) memorandum written by the then Acting Executive 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 Executive 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 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.

The record does not distinguish the beneficiary's knowledge as more special or advanced than the knowledge possessed by other technical analyst/programmers within the petitioning company or within the information technology industry. As noted above, based on the fact that the beneficiary immediately began working on assignments with the petitioning company utilizing its banking products, it appears that any individual with similar experience in the information technology industry may work with the petitioner's products and learn its specific requirements fairly quickly. Thus, it appears that the petitioner's products are based on information technology systems that are common in the industry. In addition, the petitioner stated that the beneficiary completed a comprehensive training program; however, the petitioner did not explain in detail the training provided to the beneficiary and if all technical analyst/programmers completed the same training program. Since the petitioner did not indicate a specific training program or the minimum requirements to fill the position of technical analyst/programmer, the petitioner failed to demonstrate that the beneficiary's knowledge is any different than the knowledge held by a trained technician or a skilled worker. *See Matter of Penner,* 18 I&N Dec. at 52. If the AAO were to follow the petitioner's reasoning, then any employee who has worked with the petitioning company possesses specialized knowledge. However, based on the intent of Congress in its creation of the L-1B visa category, as discussed in *Matter of Penner*, the petitioner should also submit evidence to show that the beneficiary is being transferred to the United States as a crucial key employee.
As explained above, the record does not distinguish the beneficiary's knowledge as more special or advanced than the knowledge possessed by other similarly experienced persons employed by the petitioner's organization or in the industry generally. As the petitioner has failed to document any materially special or advanced qualities to the petitioner's product, processes or procedures, 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 other analyst programmers with experience with banking programming tools and implementation, or that he has received special training in the company's methodologies or processes which would separate him from other persons employed with the petitioner's organization or in the industry at large.

Furthermore, counsel's extensive reliance on the Puleo memorandum is misplaced. It is noted that the memorandum was intended solely as a guide for employees and will not supersede the plain language of the statute or regulations. Therefore, by itself, counsel's assertion that the beneficiary's qualifications are analogous to the examples outlined in the memorandum is insufficient to establish the beneficiary's qualification for classification as a specialized knowledge professional. While the factors discussed in the memorandum may be considered, the regulations specifically require that the beneficiary possess an "advanced level of knowledge" of the organization's processes and procedures, or a "special knowledge" of the petitioner's product, service, research, equipment, techniques or management. 8 C.F.R. § 214.2(l)(1)(ii)(D). As discussed above, the petitioner has not established that the beneficiary's knowledge rises to the level of specialized knowledge contemplated by the statute or the regulations.

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 additional reason, the petition will be denied.

The initial approval of an L-1B petition does not preclude CIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *See Texas A&M Univ.*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Despite any number of previously approved petitions, CIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act, 8 U.S.C. § 1361.

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 director's decision will be affirmed, and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.