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U.S. Citizenship
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Services

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File: WAC 08 126 50988 Office: CALIFORNIA SERVICE CENTER Date: NOV 03 2008

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

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, a manufacturer and supplier of advanced automotive lighting and electronics components, filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1B 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 director denied the petition concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the beneficiary has been and will be employed in a capacity that requires specialized knowledge.

On appeal, counsel asserts that the director erred and that the petitioner established that the beneficiary has specialized knowledge and that he has been and will be employed in a specialized knowledge capacity. Counsel argues that the director, by relying on pre-1990 precedent decisions, ignores Citizenship and Immigration Services (CIS) procedures on the interpretation of specialized knowledge as set forth in a 1994 memorandum. Memo. from James A. Puleo, Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge* (Mar. 9, 1994) (hereinafter "Puleo Memorandum").

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

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

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.

In this matter, the petitioner describes the beneficiary's duties abroad and in the United States in a letter dated March 19, 2008 as follows:

- Designing, engineering and releasing components and assemblies to meet customers and internal targets for design, manufacturing, cost, quality and timing within project team environment.
- Providing engineering direction for product design.
- Supporting product engineering activities with customers (external and internal) and suppliers.
- Participating in product reviews.
- Implementing and maintaining [the petitioning organization's] engineering standards and guidelines.
- Providing liaison support to project team in Germany, Mexico and USA.

The petitioner described the beneficiary's purported specialized knowledge in the March 19, 2008 letter as follows:

The knowledge possessed by [the beneficiary] of original [petitioning organization] lighting products and the correlating manufacturing, production and quality processes will be incorporated into our U.S. operations in order to support the continual growth and development of our vehicle lighting product segments and our unique technology in U.S. market. [The beneficiary] has superior knowledge of, and experience with, the original manufacturing, production, and equipment requirements for [the petitioning organization's] lighting products.

On April 7, 2008, the director requested additional evidence. The director requested, *inter alia*, further evidence pertaining to the staffing and organization of both the United States and foreign employers. The director also noted that the petitioner "has not furnished evidence sufficient to demonstrate that the beneficiary's duties involve knowledge or expertise beyond what is commonly held in the field."

In response, the petitioner submitted a letter dated April 15, 2008 in which it further describes the beneficiary's purported specialized knowledge as follows:

[The foreign employer] currently employs 6,073 individuals in Germany. Of these, 25 employees hold the same job title as [the beneficiary]. However, while [the foreign employer] employs a total of 25 Concept Designers, each is specialized in a different product line.

As the organizational chart illustrates, even within the Front Lighting Development Department, there are several sub-groups, each responsible for a different product line tailored specifically to a particular client or project. The ES-1 Group is responsible for designing front lighting products for Chrysler, ES-2 for BMW, ES-3 for VW and Audi, etc. As such, [the foreign employer's] 25 Concept Designers can each be distinguished by the product line (front light, rear lights, interior lights, etc.) and further by the specific client or product (BMW, Ford, GM, etc.) Consequently,

each Concept Designer has unique specialized knowledge about the product line and the specific products for which he/she is responsible.

The petitioner also claims that the beneficiary will be one of six design engineers in the United States and that the other engineers are less experienced than the beneficiary.

On April 30, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the beneficiary has been and will be employed in a capacity that requires specialized knowledge.

On appeal, counsel asserts that the director erred and that the petitioner established that the beneficiary has specialized knowledge and that he has been and will be employed in a specialized knowledge capacity. Specifically, counsel argues that the beneficiary has specialized knowledge of the "design and conceptualization of front lighting OEM products" of the petitioning organization. Furthermore, counsel argues that the director, by relying on pre-1990 precedent decisions, ignores CIS procedures on the interpretation of specialized knowledge as set forth in the Puleo Memorandum. Accordingly, counsel implies that the pre-1990 precedents cited by the director have been superceded by the Puleo Memorandum. *See Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988).

Upon review, counsel's assertions are not persuasive.

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *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. *Id.* In this case, the petitioner fails to establish that the beneficiary's position abroad or in the United States requires an employee with specialized knowledge or that the beneficiary has specialized knowledge.

Although the petitioner and its counsel repeatedly assert that the beneficiary's positions require "specialized knowledge," the petitioner and its counsel have not adequately articulated any basis to support this claim. More specifically, 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 design or concept engineers employed by the petitioning organization or in the industry in general. 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 claims that the beneficiary has specialized knowledge of the "design and conceptualization of front lighting OEM products" of the petitioning organization as well as "the correlating manufacturing,

production and quality processes." The petitioner also claims that the beneficiary is one of only very few workers, both abroad and in the United States, to possess specialized "design" knowledge and, further, that each of these design workers possess "unique" knowledge specific to his or her product line. Accordingly, the petitioner claims that the beneficiary possesses unique, specialized knowledge of the design of one or more of the petitioning organization's product lines which separates him from both the other workers and the other design and concept engineers.

However, despite these claims, the record is devoid of evidence setting apart the beneficiary's purported specialized knowledge from the common or average knowledge possessed by others employed by the petitioning organization or in the industry in general. Simply alleging that a beneficiary has "unique" knowledge which is not shared by other highly focused workers within the organization does not establish that this *knowledge* is "special" or "advanced" for purposes of this visa category. Otherwise, a petitioner could artificially manufacture specialized knowledge by failing to cross-train its workforce. If the beneficiary's knowledge of the design of certain products made by the petitioning organization could easily be imparted to other engineers employed by the petitioning organization or elsewhere, then this knowledge would not constitute "special" or "advanced" knowledge. Because "special" and "advanced" are comparative terms, the petitioner must provide evidence that allows CIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's industry. This includes evidence that the beneficiary's knowledge can be set apart from the common or average knowledge possessed by others. However, this does not mean that a petitioning organization can manufacture "special" or "advanced" knowledge by simply focusing its engineers on individual products. Rather, knowledge is "special" or "advanced" because the knowledge itself, by virtue of its characteristics, hinders its reasonable dissemination to other similarly educated engineers.

In this matter, the record is devoid of evidence establishing that the beneficiary's claimed knowledge is not now shared, or could not be shared should the organization choose to facilitate it, by other similarly educated design or concept engineers employed by the petitioning organization or in the industry in general. The petitioner has not established that the beneficiary has received training or specialized experience which imparted to him the purported advanced or special knowledge. Overall, the record is not persuasive in establishing that the beneficiary possesses knowledge that is special or advanced and which can be set apart from the common knowledge possessed by other design or concept engineers employed by the petitioning organization or in the industry in general. 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 AAO does not discount the likelihood that the beneficiary is a skilled and experienced engineer. However, there is no indication that the beneficiary has any knowledge that materially exceeds that of any experienced design or concept engineer, or that he has received special training or experience in the company's methodologies or processes which would separate him from any other workers employed within the petitioner's organization. By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." See *Matter of Penner*, 18 I&N Dec. at 53. Specialized knowledge requires more than a short period of experience, otherwise special or advanced knowledge would include every employee in an organization with the exception of trainees and entry-level staff. If everyone in an organization is specialized, then no one can be considered truly specialized. The petitioner has failed to

demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. *Id.* at 52.

The AAO will also address counsel's misplaced reliance on the Puleo Memorandum and her argument that the director's reliance on pre-1990 precedent decisions is inconsistent with the guidance provided in that memorandum.

The L-1 intracompany transferee visa classification was created by Congress through the Immigration Act of 1970. Pub.L. 91-225, § 3, 84 Stat. 117 (Apr. 7, 1970). Congress created the L-1 visa classification after concluding that "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade." *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). To address the problem, Congress created the L-1 visa and noted that the "amendment would help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." *See generally id.*

Congress did not define "specialized knowledge" in the Immigration Act of 1970, nor was it a term of art drawn from case law or from another statute. *1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C., 1990).

The legislative history of the Immigration Act of 1970 does not elaborate on the nature of a specialized knowledge employee; instead the House Report references executives, managers and "key personnel." Regarding the intended scope of the L-1 visa program, the House Report indicates:

Evidence submitted to the committee established that the number of temporary admissions under the proposed 'L' category will not be large. The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service.

H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. at 2754.

After the creation of the L-1B nonimmigrant classification, legacy INS developed a body of binding precedent decisions which attempted to clarify the meaning of "specialized knowledge," in the absence of a statutory definition.¹ *See Matter of Raulin*, 13 I&N Dec. 618 (Reg. Comm. 1970); *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of*

¹ Contrary to the assertions of counsel, the administrative precedent decisions were not decided by the U.S. Department of Justice's immigration appellate authority, the Board of Immigration Appeals (BIA). Instead, the precedents were issued by the legacy INS regional commissioners and the INS Administrative Appeals Unit, the predecessor office of the AAO. While the distinction is a technical one, the AAO observes that the precedent decisions deserve scrutiny because they represent the long experience of the agency in administering the visa category. Additionally, as will be discussed, the precedent decisions discuss recurring themes in the agency's administration of the L-1B visa program that remain relevant today.

Michelin Tire Corp., 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988).

As it gained administrative experience with the visa classification, the INS promulgated two successive definitions of the term by regulation. First, in 1983, the INS published a final rule adopting the following definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(C) (1984):

"Specialized knowledge" means knowledge possessed by an individual which relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the petitioner not readily available in the job market. The knowledge must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the market place.

48 Fed. Reg. 41142, 41146 (September 14, 1983).

In 1987, less than four years later, the INS provided a modified definition at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988) to "better articulate case law" relating to the term:

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

52 Fed. Reg. 5738, 5752 (February 26, 1987).

On May 20, 1988, only 18 months after publication of the latest regulation, the INS Commissioner designated a precedent decision discussing the bright-line "proprietary knowledge" element in the definition of "specialized knowledge." *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988). In that decision, the INS adopted a highly rigid approach to evaluating the "proprietary knowledge" component of the regulatory definition:

A petitioner's ownership of patented products and processes or copyrighted works, in and of itself, does not establish that a particular employee has specialized knowledge. In order to qualify, the beneficiary must be a key person with materially different knowledge and expertise which are critical for performance of the job duties; which are critical to, and relate exclusively to, the petitioner's proprietary interest; and which are protected from disclosure through patent, copyright, or company policy.

Id. at 667-8.

Adding to the confusion, Richard Norton, an Associate Commissioner of the INS, issued a memorandum stating that since the new specialized knowledge regulations had been implemented, the INS had often used "a too literal definition of the term 'proprietary knowledge' wherein the knowledge must relate exclusively to or be unique to the employer's business operation." See Memo. of Richard Norton, *Interpretation of Specialized Knowledge Under the L Classification*, (Oct. 27, 1988), reproduced in 65 Interpreter Releases 1170, 1194 (November 7, 1988). The memorandum explained the Associate Commissioner's view that possession of proprietary knowledge is an indicator of specialized knowledge capacity, but that it is not a necessary condition. Issued only six months after the *Matter of Sandoz Crop Protection Corp.* decision, the memorandum produced considerable uncertainty among immigration attorneys. [REDACTED] chairman of the American Immigration Lawyers Association's committee on intracompany transferees, rejected the view that the memo was a liberalization, concluding instead that "[a]t best this throws more verbiage into an already confusing semantic mess; at worst it could create further restrictions." 65 Interpreter Releases at 1171.

In 1990, Congress acted to end the agency's varying interpretations of the term "specialized knowledge." Through the Immigration Act of 1990, Congress provided a statutory definition of the term by adopting in part and modifying the 1987 INS regulatory definition. Immigration Act of 1990, Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Congress adopted the "advanced knowledge" component of the INS definition but deleted the bright-line "proprietary knowledge" element and the requirement that the knowledge be of a type "not readily available in the United States labor market." In enacting these changes, Congress did not otherwise attempt to modify the agency's interpretation as to what constitutes specialized knowledge. In its effort to clarify the term specialized knowledge, Congress did, however, add an ambiguous and circular component to the definition by stating that an alien is considered to be serving in a "capacity involving specialized knowledge" if the alien has a "special knowledge" of a petitioner's product.

Specifically, Congress enacted the following definition:

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.

Section 214(c)(2)(B) of the Act, as created by Pub.L. No. 101-649, § 206(b)(2).

Regarding the new statutory definition, the legislative history indicates that Congress found the L-1 visa had allowed "multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures" and that it had been "a valuable asset in furthering relations with other countries." In light of this experience, the House Committee stated that the category should be "broadened" by making four enumerated changes: first, Congress allowed accounting firms to have access to the intracompany visa even though their ownership structure had previously precluded them from the classification; second, Congress incorporated the "blanket petition" available under current regulations into the statute for maximum use by corporations; third, Congress changed the overseas employment requirement from a one-year period immediately prior to admission to one year within the three years prior to

admission; and fourth, Congress expanded the period of admission for managers and executives to seven years to provide greater continuity for employees. *H.R. Rep. 101-723(I) (1990)*, reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 (Leg. Hist.).

In a separate paragraph, outside of the previous paragraph discussing the enumerated provisions that "broadened" the L-1 classification, the House Report discussed the new definition of "specialized knowledge." The paragraph stated in its entirety:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company. The time limit for admission of an alien with specialized knowledge is five years, approximately the same as under current regulations.

Id.

In 1991, the INS proposed and adopted "a more liberal interpretation of specialized knowledge" based on the new statutory definition. Closely following the definition provided by Congress, 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.

See 56 Fed. Reg. 61111 (December 2, 1991)(Final Rule).

Since Congress enacted the statutory definition of "specialized knowledge," the agency has issued a number of internal agency memoranda discussing the term specialized knowledge, such as the Puleo Memorandum. *See also* Memo. from Fujie Ohata, Assoc. Comm., Service Center Operations, INS, *Interpretation of Specialized Knowledge* (Dec. 20, 2002); Memo. from Fujie Ohata, Director, Service Center Operations, USCIS, *Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status* (Sept. 9, 2004).

As noted by counsel, the Puleo Memorandum of 1994 is often cited as the key agency document relating to the adjudication of L-1B specialized knowledge visa petitions. Addressed to the various directors of the INS operational components, the internal agency memorandum noted that the 1990 Act statutory definition was a "lesser, but still high, standard" compared to the previous regulatory definition and declared that the memorandum was issued to provide guidance on the proper interpretation of the new statutory definition.

The memorandum advised INS officers to apply the common dictionary definition of the terms "special" and "advanced," since the statute and legislative history did not provide insight as to the interpretation of

specialized knowledge. Looking to two different versions of Webster's Dictionary, the memorandum defined the term "special" as "surpassing the usual; distinct among others of a kind" or "distinguished by some unusual quality; uncommon; noteworthy." Puleo Memorandum at p.1. The memorandum relied on the same dictionaries to define "advanced" as "highly developed or complex; at a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage." *Id.* at p.2.

The Puleo Memorandum provided various scenarios, hypothetical examples, and a list of six "possible characteristics" of aliens that would possess specialized knowledge. Adding a gloss beyond the plain language of the statute or the definitions of "special" and "advanced," the memorandum surmised that specialized knowledge "would be difficult to impart to another individual without significant economic inconvenience." *Id.* at p.3. The memorandum also stressed that the "examples and scenarios are presented as general guidelines for officers" and that the examples are not "all inclusive." *Id.* at pp. 3-4.

The Puleo Memorandum concluded with a note about the burden of proof and evidentiary requirements for the classification:

From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

Id. at p.4.

The Puleo Memorandum closes by noting that the document was "designed solely as a guide" and that specialized knowledge can apply to any industry and any type of position.

As noted above, counsel specifically relies on the Puleo Memorandum as a proper guide in determining whether knowledge is advanced or special. However, the Puleo Memorandum is not legally binding on the agency. CIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind CIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); see also *Prokopenko v. Ashcroft*, 372 F.3d

941, 944 (8th Cir. 2004).

In contrast to agency memoranda, a legacy INS or CIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c). The INS precedent decisions relating to L-1B specialized knowledge are considered "interpretive rules" under the APA. See *Spencer Enterprises, Inc. v. U.S.*, 229 F.Supp.2d 1025, 1044 (E.D.Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); see also *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014 (D.Hawaii 2000).

Accordingly, counsel's reliance on the Puleo Memorandum as a binding legal standard, to the exclusion of existing legacy INS precedent, is misplaced. The Puleo Memorandum was not intended to advise the public of the agency's interpretation of specialized knowledge. Instead it was an internal agency memorandum addressed to the INS District Directors, Officers in Charge, Service Center Directors, the Director of the Administrative Appeals Unit, and the Office of Operations. Additionally, the memorandum was never published in the Federal Register and the memorandum closed by stating that it was "designed solely as a guide." The AAO recognizes that the memorandum received wide mention in the immigration press. However, even where an agency memorandum or General Counsel opinion is publicized and discussed in a widely circulated immigration periodical, the document will not be considered as a rulemaking that a petitioner may rely on. See *R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d at 1022.

As an unpublished, internal policy memorandum, the Puleo Memorandum is not binding as a matter of law and therefore should not be cited in a CIS denial. The legacy INS precedent decisions, on the other hand, continue to serve as binding agency precedent decisions and may be cited, when applicable. See 8 C.F.R. § 103.3(c). It would have been inappropriate for the director to have relied on an internal agency memorandum as the legal authority for her decision.²

Although the precedents cited by the director pre-date the current 1990 Act, the AAO finds them instructive. While the underlying definitions of specialized knowledge that were discussed in the decisions are now superseded by the statutory definition, the general issues and the case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. CIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized knowledge workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. See 18 I&N Dec. at 50-53 (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers). Accordingly, the director's citation of precedents that predate Immigration Act 1990 is not objectionable, as long as the director's decision is narrowly tailored to address issues that were not directly superseded by the statutory definition. If the director were to apply the precedent decisions in support of a "proprietary knowledge" requirement or a reference to

² By contrast, it is entirely appropriate for the director to rely on the law and legal analysis from an internal agency memorandum or letter as the basis for a decision. However, if a memorandum goes beyond interpreting existing law to suggest new analytical criteria, the memorandum may impermissibly stray beyond the limits of an interpretive memorandum and enter the realm of "legislative rulemaking" – which requires notice-and-comment – by imposing new rights or obligations. See 5 U.S.C. § 553(b).

"knowledge not available on the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.

Therefore, based on the evidence presented and applying the statute, regulations, and binding precedents, the petitioner has not established that the beneficiary has specialized knowledge or that he has been or would be employed in the United States 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 appeal will be dismissed.

ORDER: The appeal is dismissed.