

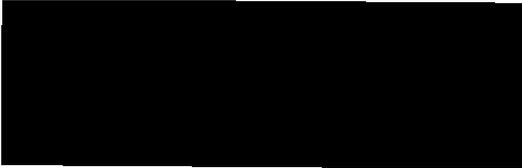
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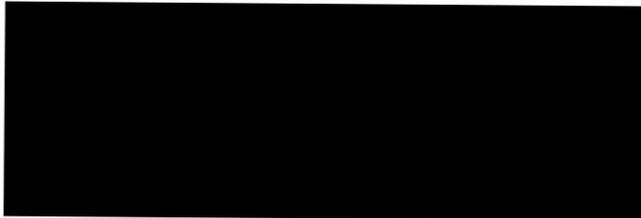


D7

File: WAC 07 171 54598 Office: CALIFORNIA SERVICE CENTER Date:

NOV 03

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 amend a previous approved petition (EAC 07 019 51539) having validity dates of November 1, 2006 through October 31, 2008. The petitioner seeks to employ the beneficiary as a "test lead" 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, an information technology service provider, claims to be acquiring the beneficiary's foreign employer and its subsidiary in the United States, RelQ, and now seeks permission to employ the beneficiary based on this newly formed qualifying relationship.

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.¹ Specifically, the director concluded that the beneficiary, who will be stationed primarily at a worksite of an unaffiliated employer, will not be 100% supervised by the petitioner, and that he will be employed in a position which is essentially an arrangement to provide labor for hire for the unaffiliated employer, Shopzilla.com (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.

On appeal, counsel argues that the director used an improper standard to conclude that the beneficiary "may not be 100% supervised by the petitioner," leading to the determination that the beneficiary is ineligible for

¹ 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 contrast with the H-1B visa classification, the L-1B visa classification does not contain any provisions to protect U.S. workers. *See generally*, 8 C.F.R. § 214.2(h). 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, by filing under the L-1B classification, an employer avoids paying the \$1,500 fee required for each new H-1B petition which funds job training and low-income scholarships for U.S. workers. Section 214(c)(9) of the Immigration and Nationality Act.

the benefit sought pursuant to the L-1 Visa Reform Act. Consequently, counsel argues that the petitioner established that the beneficiary will be principally supervised by the petitioner, and not by the unaffiliated employer. Furthermore, counsel asserts that the director relied on evidence outside of the record in concluding that the beneficiary does not have specialized knowledge of a product or service specific to the petitioner. Finally, counsel argues that the record establishes that the beneficiary has specialized knowledge of the petitioner's tools, methodologies, and technologies, i.e., Project Monitoring System, Test Professional, Automate Q, and Professional Q, which are used in the petitioner's provision of services to the unaffiliated employer.

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.
- (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.

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.

Finally, 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). As explained above, 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 June 3, 2008).

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.

I. Control and Supervision of Beneficiary

The first issue in this matter is whether the petitioner has established that the beneficiary, who will be stationed primarily at the worksite of the unaffiliated employer, will be controlled and supervised principally by the petitioner. Section 214(c)(2)(F)(i) of the Act.

The petitioner claims in the Form I-129 that the beneficiary will be stationed primarily offsite and that the beneficiary "will be supervised on a daily basis by [REDACTED] who is the Test Manager."

On May 29, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary will be controlled and supervised principally by the petitioner; information regarding the location where the beneficiary will work; evidence that the beneficiary's placement at the client's worksite is not merely labor for hire; copies of contracts, statements of work, work orders, or service agreements between the petitioner and the unaffiliated employer for the services to be provided; and a copy of the pertinent parts of the petitioner's milestone plan showing beginning and ending dates for the service to be provided by the petitioner with projected work completion dates shown in weekly increments.

In response, counsel submitted a letter dated August 20, 2007 in which counsel describes the beneficiary's employment at the worksite of the unaffiliated employer as follows:

The beneficiary is stationed with [the unaffiliated employer] in Los Angeles, California as a Test Lead. Although he is not stationed at a facility belonging to the petitioner, [the petitioner] retains ultimate authority over the beneficiary as he engages in the above responsibilities. The beneficiary is required to report on a daily basis to his direct manager, [REDACTED], Delivery Manager at [the petitioner]. The process of all activities at the client worksite is controlled by [the petitioner]. [The petitioner], and more specifically [REDACTED], supervises the beneficiary's work, delegates tasks at the worksite, manages day-to-day functions that the beneficiary engages in, and determines the length of time spent at the worksite and the tests as well as procedures that are conducted there. [The petitioner] also supervises the preparation of test plans and test cases before they are installed at the client worksite; reviews weekly status reports to ensure all work is performed within a set budget and on a set schedule; and oversee any technical challenges that arise during the project execution.

Although the beneficiary is stationed outside the L organization, that fact alone does not establish ineligibility for L classification. In order for the ground of ineligibility to apply "control and supervision" of the beneficiary at the nonaffiliated worksite must be "principally by the unaffiliated employer." This is not the case for [the beneficiary] as his work is controlled and supervised first and foremost by [the petitioner]. [The beneficiary] is required to report the results of regression testing and the execution of automation scripts to Mr. [REDACTED]. Mr. [REDACTED] reviews each Test Plan that is to be conducted for [the unaffiliated employer], helps solve any technical challenges that arrive at the worksite and manages any training that is required prior to executing the tests. [The petitioner] reviews weekly status reports of the beneficiary. The beneficiary's testing schedule is coordinated on a weekly basis

by [the petitioner] and his day-to-day activities are monitored and directed by [the petitioner's] management.

Although [the unaffiliated employer] exercises some control over the work performed such as monitoring the status of the project and daily work progress, ultimate control over the beneficiary's work is by his direct manager [REDACTED]. The beneficiary receives all direction and instruction from his supervisor within the L organization. [The unaffiliated employer] does not control the work or the day-to-day tasks of the beneficiary in the sense of directing responsibilities or activities.

Counsel also submits two documents titled "Master Services Agreement" which pertain to the petitioner's provision of services to the unaffiliated employer. These documents indicate that the petitioner, through its "authorized representatives," is an independent contractor who has been engaged to provide software testing services. However, these documents do not address the control or supervision of the authorized representatives, other than in paragraph 13 which indicates that representatives must "observe the working hours, working rules and security procedures established" by the unaffiliated employer. Furthermore, while the agreements are both for one-year terms, the unaffiliated employer reserves the right to terminate the petitioner's services at any time upon 30 days notice. However, the agreements do not specifically address a projected completion date for the project. Likewise, the remainder of the record is devoid of evidence addressing the progress and overall completion of the project.

On or about September 2, 2007, an adjudications officer at the California Service Center telephoned counsel and left a message with a staff member requesting further information pertaining to the ownership of the software being tested at the unaffiliated employer's worksite.² Counsel replied by facsimile on September 7, 2007.

On or about September 7, 2007, the director once again requested additional evidence. The director requested, *inter alia*, information pertaining to the ownership of the software being tested at the unaffiliated employer's worksite and a list of all foreign nationals working at the same location as the beneficiary.

In response, counsel submitted a letter dated October 22, 2007 in which she indicates that "the beneficiary is the sole employee stationed at the [unaffiliated employer's] worksite working in L-1B status."

² The officer's telephone call was an impermissible *ex parte* or "off record" communication. The Administrative Procedure Act (APA) specifically prohibits *ex parte* communications: "no member of the body comprising the agency . . . who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding." 5 U.S.C. 557(d)(1)(B). As defined by the APA, an "ex parte communication" is "an oral or written communication not on the public record." 5 U.S.C. 551(14). While a telephone call or other communication may help an officer expedite a decision, the contents of the communication must be recorded for the record of proceeding. Otherwise, the record will be incomplete and the agency decision may not be given deference in court. Additionally, an *ex parte* communication may give an appearance of impropriety if an officer approves a petition based on communications or evidence that is not contained in the record.

On November 6, 2007, the director denied the petition. The director concluded as follows:

In order to establish the first requirement of the L-1 Visa Reform Act, the petitioner states the following:

[The beneficiary] will be supervised on a daily basis by [REDACTED] who is the Test Manager.

The petitioner indicates that there are no other foreign national employees stationed at the [unaffiliated employer's] worksite. Therefore, it appears that the beneficiary may not be 100% supervised by the petitioner.

On appeal, counsel argues that the director used an improper standard in concluding that the beneficiary "may not be 100% supervised by the petitioner" and asserts that the beneficiary is eligible for the benefit sought. Counsel argues that the L-1 Visa Reform Act only obligates the petitioner to establish that the beneficiary will be "controlled and supervised principally" by the petitioner, and that this language does not require a demonstration that the beneficiary will be supervised by the petitioner off-site 100% of the time. *See* section 214(c)(2)(F) of the Act. Counsel also claims that the record establishes that the beneficiary will be principally supervised by the petitioner, and not by the unaffiliated employer.

Upon review, while the AAO agrees that the director applied an improper standard, the petitioner nevertheless failed to establish that the beneficiary, who will be employed at a worksite of an unaffiliated employer, will be controlled and supervised principally by the petitioner. Accordingly, the director's decision will be withdrawn in part, and the appeal will be dismissed.

As a threshold matter, it is noted that the director's determination that "it appears that the beneficiary may not be 100% supervised by the petitioner" is an incorrect standard under the L-1 Visa Reform Act, and this determination shall be withdrawn. As accurately indicated by counsel, the L-1 Visa Reform Act requires that the petitioner establish that the alien will be controlled and supervised "principally" by the petitioner. The AAO agrees that the term "principally" does not require that the petitioner establish that the beneficiary will be supervised and controlled by the petitioner 100% of the time. Citizenship and Immigration Services (CIS) must interpret the term "principally" in accordance with its common usage. According to *Webster's New College Dictionary*, the word "principal" means "first, highest, or foremost in importance, rank, worth, or degree." p. 899 (3rd Ed. 2008). As an adverb, the terms "chiefly" and "mainly" are appropriate synonyms. Thus, even if the non-affiliated entity exercises some control or supervision over the work performed, the ground of ineligibility does not apply as long as such control and supervision lies first and foremost with the petitioning employer and the employer retains ultimate authority over the worker.

That being said, the petitioner in this matter failed to establish that it is more likely than not that the beneficiary will be principally controlled and supervised by the petitioner. The record is entirely devoid of evidence addressing this issue other than the petitioner's uncorroborated claim in the Form I-129 that the beneficiary "will be supervised on a daily basis by [REDACTED] who is the Test Manager." 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)). In response to the Request for Evidence, counsel submitted only her uncorroborated letter dated August 20, 2007. Consequently, the petitioner did not submit any evidence responsive to the director's request pertaining to the beneficiary's supervision and control. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). It is again emphasized that the petitioner bears the burden of proof in these proceedings. Section 291 of the Act; *see also* 8 C.F.R. § 103.2(b)(1).³

Accordingly, as the petitioner failed to establish that the beneficiary, who will be employed at the worksite of an unaffiliated employer, will be principally controlled and supervised by the petitioner, the petition may not be approved, and the appeal is dismissed.

II. Specialized Knowledge

The second issue in this matter is whether the petitioner has established that the beneficiary has specialized knowledge of a product or service specific to the petitioner and, thus, will not be employed in a position which is essentially an arrangement to provide labor for hire for an unaffiliated employer. 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 May 15, 2007 as follows:

In this position as a Test Lead [the beneficiary] will perform the following job duties:

- Prepare project's planning documents – Test approach, Test Plan, CM Plan;
- Establishing project's specific process based on RMS and project requirements;
- Ensuring generation of test case documents, reviewing them for completeness and accuracy;
- Ensuring the project is executed as per project's plans and processes;

³ Even considering counsel's uncorroborated assertions in her August 20, 2007 letter, this description fails to credibly establish that the beneficiary will be principally supervised and controlled by the petitioner. As noted by the director, the beneficiary will be the only employee of the petitioner stationed at the worksite of the unaffiliated employer. According to the service agreements, the beneficiary will need to abide by the same rules and procedures imposed by the unaffiliated employer on its own workers. Although counsel claims that the beneficiary will be supervised on a daily basis by a test manager, the record does not indicate where, exactly, this test manager is located or how he will "supervise" or "control" the beneficiary without having some personal interaction with him. Once again, 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.

- Test execution and reporting;
- Reporting the project status to the Test Manager;
- Communication with the customer's project manager or designated representative;
- Resolving any customer complaints and ensuring customer satisfaction;
- Conducting test-design and test-procedure walk through and inspections;
- Ensuring that test-product documentation is complete;
- Provide project artifacts to the project office for archival and knowledge management.

To perform the duties described above, [the beneficiary] has attained advanced knowledge and training of the RelQ's software products, tools, methodologies and management systems. This knowledge can only be gained through prior experience with RelQ and is a critical part of RelQ's competitive advantage.

[The beneficiary] has the specialized knowledge and experience with proprietary tools such as RelQ Test Professional™ (RTP), RelQ Project Monitoring System™ (PMS), BancQ™, AutomatedQ™ (test automation), PerformanceQ™ (performance testing), SecureQ™ (security testing) and configuration management tools such as RevQ™, TestQ™ and EstimQ™. These tools are a requirement for this position. Providing independent testing and quality assurance [the beneficiary] uses his knowledge for these RelQ proprietary tools and software engineering principles, project auditing, metrics-based management and root cause analysis models developed by RelQ.

On May 29, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and is not generally known by practitioners in the beneficiary's field of endeavor; evidence setting the beneficiary's knowledge apart from elementary or basic knowledge; and copies of contracts, statements or work, work orders, or service agreements pertaining to the petitioner's provision of services to the unaffiliated employer.

In response, counsel submitted a letter dated August 20, 2007 in which she claims that the beneficiary "will be using his knowledge of several proprietary tools and procedures as part of his job duties as Test Lead while stationed at the client worksite." Specifically, counsel claims that the beneficiary has specialized knowledge of RelQ Test Professional (RTP), RelQ Project Monitoring System (PMS), AutomateQ, and PerformanceQ. Counsel also claims that these tools "were patented so as to protect the uniqueness of these processes," that they "have not been recreated by competitors in the industry," and that the beneficiary's knowledge of these tools could only have been gained through prior employment and training with the petitioning organization. Counsel further explains:

The petitioner submits that it has been demonstrated, through the petition and supporting documents previously submitted and in this instant brief, that the beneficiary's knowledge is unique and apart from the elementary or basic knowledge possessed by others, both within [the petitioner] and within the information technology industry. The beneficiary possesses more than nine years of experience using the [petitioner's] proprietary tools and software, and he has been specifically trained on the [petitioner's] technology and methodology necessary for this critical project. In order to meet each one of his daily job duties, the [b]eneficiary

will have to utilize [the petitioner's] proprietary and unique procedures, tools and processes learned abroad. The knowledge of these processes and products is of a highly sophisticated nature that can only be gained through prior experience with [the petitioner] and is a critical part of [the petitioner's] competitive advantage. Furthermore, the [b]eneficiary has knowledge of [the petitioner's] business procedures or methods of operation to the extent that is not general knowledge held commonly throughout the industry but that it is truly specializes.

The beneficiary gained knowledge of the above-mentioned proprietary tools and procedures while employed by [the petitioning organization] (formerly RelQ) from August 1998 until present. During this time, the beneficiary received highly specialized training on the projects and tests he is currently conducting at the client worksite. Specifically, the beneficiary has received extensive training and gained experience using the following systems that are utilized specific to the project he is engaged in at [the unaffiliated employer]:

1. E-Moneyger – Sessions on the Functionality by SMBC Business Team. This included regular interactive sessions on the requirements and purpose of the new system being organized by the business team. Sessions were scheduled during the system study phase and whenever there were any new releases. The desired functionalities of the new E-Moneyger system were explained using prototypes and videoconference.
2. Verification and Validation Training – This training provided the beneficiary with an in depth understanding of all the verification and validation techniques for Software testing. It also covered the practical and theoretical aspects of Fagan's review process. The duration of this training was one month and conducted in Software Private Limited's training department and with guest lectures from experienced managers within [the petitioning organization].
3. Training on Quality Management System – This training on Quality Management System covered all the quality processes of [the petitioning organization] and taught how to effectively use the Quality processes for achieving the project goals.

The above-mentioned proprietary tools, procedures and product are ones that are not available elsewhere and the [b]eneficiary is familiar with the various procedures involved in such manufacture, use or service of these products. The knowledge needed to conduct the job duties on a daily basis could have only been gained through prior experience with [the petitioning organization]. These proprietary tools are unique to RelQ and are not the type to normally be found in the industry. The products used are ones that are not used by other businesses and is [sic] different from other products to the extent the U.S. firm would experience significant interruption of business in order to train a new worker to assume the duties to be assigned to the applicant. The [b]eneficiary has been using his knowledge of the above tools and procedures as Test Lead for various clients, including [the unaffiliated employer], for the last seven years. [The beneficiary's] advanced knowledge of [the petitioning organization's] processes and procedures cannot be easily duplicated, and it is not possible to easily or quickly train an U.S. worker to undertake the proposed job duties in the United States.

Counsel also submits two documents titled "Master Services Agreement" which pertain to the petitioner's provision of services to the unaffiliated employer. The agreements indicate in paragraph 7 that the unaffiliated employer will own all work product produced by the petitioner.

Counsel further argues that the prior L-1B approvals for the beneficiary should be given deference in the instant matter because there has not been a significant change in his employment and there was not a material error in the prior approvals. *See* Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004).

On or about September 2, 2007, an adjudications officer at the California Service Center telephoned counsel and left a message with a staff member requesting further information pertaining to the ownership of the software being tested at the unaffiliated employer's worksite. Counsel replied by facsimile on September 7, 2007 with a letter substantively identical to the letter submitted in response to the September 7, 2007 Request for Evidence (*see infra*).

On or about September 7, 2007, the director once again requested additional evidence. This written request appears to have been substantively identical to the adjudication officer's earlier telephonic request. The director requested, *inter alia*, information pertaining to the ownership of the software being tested at the unaffiliated employer's worksite. Specifically, the director queried whether the beneficiary will be engaged in working with products designed, developed, produced, or sold by RelQ or the petitioning organization.

In response, counsel submitted a letter dated October 22, 2007 in which she reiterates that the beneficiary has specialized knowledge of the petitioning organization's "proprietary tools and procedures." Consequently, it appears that the beneficiary will not be engaged in working with products designed, developed, produced, or sold by RelQ or the petitioning organization to the unaffiliated employer. To the contrary, the beneficiary will be using his purported specialized knowledge of the petitioner's tools and procedures to provide services to the unaffiliated employer with regards to software or products not originally developed by the petitioning organization.

On November 6, 2007, 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. The director concluded in part:

The petitioner states that the client project is specialized in nature because it involves expertise with the petitioner's IT project management tools, procedures, and methodologies. The beneficiary will utilize his knowledge of Project Management System (PMS), Test Professional, Automate Q, and Professional Q as well as the petitioner's procedures, and methodologies to ensure the successful completion of the proposed Information Technology (IT) project. Project Monitoring System (PMS), Test Professional, Automate Q, and Professional Q appear to be important, complex tools, absent the likes of which competitors in the petitioner's chosen field of endeavor probably could not succeed. Each of the

petitioner's competitors appears to have similar tools, or combinations and modifications thereof, intended to facilitate and enhance the probability of a successful IT project and result. Additionally, it appears that each of the petitioner's competitors also "promulgates" a unique name and/or acronym for these essential elements of IT project management, claiming proprietary ownership and, therefore, specialized knowledge.

On appeal, counsel argues that the record establishes that the beneficiary has specialized knowledge of the petitioning organization's tools, methodologies and management systems. Counsel further argues that the director erred in considering evidence outside of the record by comparing the petitioner's tools to unnamed tools and methodologies used by unnamed competitors in concluding that the beneficiary's knowledge is not specialized.

Upon review, while the AAO agrees that the director improperly relied on evidence outside of the record, the petitioner nevertheless failed to establish that the beneficiary, who will be employed at a worksite of an unaffiliated employer, has specialized knowledge of a product or service specific to the petitioner and, thus, will not be employed in a position which is essentially an arrangement to provide labor for hire for an unaffiliated employer. The petitioner has failed to establish that his knowledge is specialized as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D). Accordingly, the director's decision will be withdrawn in part, and the appeal will be dismissed.

As correctly noted by counsel, the regulations prohibit the rendering of an adverse decision on the basis of evidence outside of the record without first permitting the petitioner to have an opportunity to inspect and rebut this evidence. 8 C.F.R. § 214.2(l)(8)(i). In this matter, the AAO agrees that the director improperly alluded to her apparent knowledge of tools or methodologies utilized by the petitioner's "competitors" in explaining her basis for denying the petition without first permitting the petitioner to inspect and rebut this "evidence." Upon review, the AAO agrees that this allusion was improper, and the decision will be withdrawn in part. However, because the petitioner nevertheless failed to establish that the beneficiary has "specialized knowledge," the petition may not be approved and the appeal will be dismissed.

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 and its counsel repeatedly assert that the beneficiary's position in the United States requires "specialized knowledge," the petitioner and its counsel have 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 test lead or software workers. 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. 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). Moreover, the petitioner failed to submit evidence in

response to the director's Request for Evidence concerning the specialized qualities of the beneficiary's knowledge. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The only "evidence" submitted by the petitioner is an uncorroborated letter written by the petitioner's counsel purporting to explain the specialized qualities of the beneficiary's knowledge. However, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Laureano*, 19 I&N Dec. 1; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at 506. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. It is again emphasized that the petitioner bears the burden of proof in these proceedings. Section 291 of the Act.

Even accepting counsel's uncorroborated description of the beneficiary's purported specialized knowledge, the record is not persuasive in establishing that the beneficiary's knowledge of RelQ's software products, tools, methodologies, and management systems, 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 these tools and methodologies and the knowledge possessed by similarly experienced test leads and software workers in the industry in general or employed by the petitioner's organization. Without producing evidence that the petitioner's tools or methodologies are different in some material way from software test tools or methodologies in general, 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.

The AAO does not discount the likelihood that the beneficiary is a skilled and experienced software worker 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 specialized knowledge.

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.”).

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 by the petitioner’s organization or in

the industry generally. As the petitioner has failed to document any materially unique qualities to the petitioner's tools and methodologies, the petitioner's claims are not persuasive in establishing that the beneficiary, while highly skilled, would be a specialized knowledge employee. There is no indication that the beneficiary has knowledge that exceeds that of any software worker with experience with testing systems, or that he has received special training in the company's methodologies or processes which would separate him from any other persons employed with the petitioner's organization or in the industry at large. Although counsel refers to three training sessions, the petitioner fails to explain how long these sessions lasted, with the exception of the one-month "verification and validation training," or to explain how, exactly, this training instilled in the beneficiary "special" or "advanced" knowledge. The petitioner also failed to explain whether other employees received similar training.

Finally, a review of the facts of this petition reveal that this is exactly the type of employment relationship the L-1 Visa Reform Act of 2004 was adopted to prohibit. As explained above, this legislation was proposed to primarily prevent the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software. In this matter, the petitioner has indicated that the project on which the beneficiary has been working in the United States involves the testing of products not produced or sold by the petitioning organization. The petitioner has been hired to provide employees to test this software at the unaffiliated employer's worksite. Importantly, the petitioner is not providing these implementation services in connection with the sale of any technology products, and the beneficiary's purported specialized knowledge has not been established to be related to the petitioner's provision of a service other than the provision of labor.

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 will not be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.⁴

⁴ It is noted that counsel relies on three CIS memoranda in arguing that the petitioner has established that the beneficiary will be employed in the United States in a specialized knowledge capacity. Memo. From William R. Yates, Associate Director for Operations, to Service Center Directors, *The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity* (April 23, 2004); Memo. From James A. Puleo, Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge* (March 9, 1994); Memo. From William R. Yates, Associate Director for Operations, to Regional Directors et al., *Changes to the L Nonimmigrant Classification made by the L-1 Reform Act of 2004* (July 28, 2005).

However, it is noted that these 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.*

The initial approval of an L-1B petition does not preclude CIS from denying an extension of the original visa, or an amended petition, 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 appeal will be dismissed.

ORDER: The appeal is dismissed.

Trominski, 231 F.3d 984, 989 (5th Cir. 2000) (quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memoranda 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).

Upon review, the director did not contravene any of the cited policy memoranda and did not commit any prejudicial error. Counsel's reliance on these memoranda as legally binding, to the exclusion of existing legacy Immigration and Naturalization Service precedent, is misplaced.