

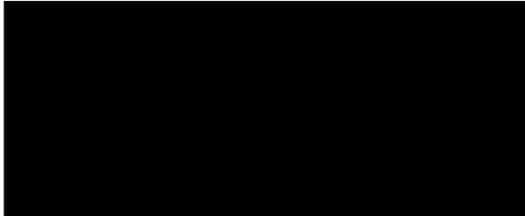
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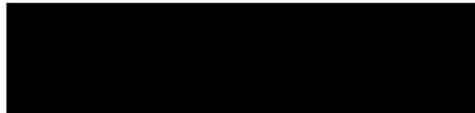
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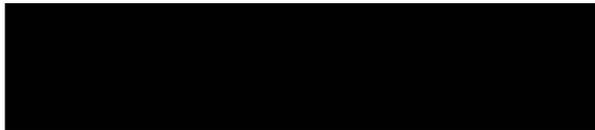
Date: OCT 01 2008

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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The petition for a nonimmigrant visa was approved by the U.S. Consulate in Manila, Philippines. Upon further review, the Director, Vermont Service Center, determined that the approval may have been issued in error and subsequently issued a notice of intent to revoke. The director ultimately revoked the approval. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as its administrative manager/comptroller 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 petitioner is an Illinois corporation engaged in the production and distribution of cigars. The petitioner seeks to employ the beneficiary from February 1, 2007 until January 31, 2010.

The director revoked the approval of the nonimmigrant visa petition based on the determination that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that she has been and would be employed in a specialized knowledge capacity.

On appeal, counsel disputes the director's findings, asserting that the petitioner had previously responded to Citizenship and Immigration Services' (CIS) request for additional evidence (RFE) and that the approval was based on CIS's comprehensive review, which included the petitioner's RFE response.

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 employer filed the nonimmigrant visa petition on January 22, 2007. In a letter dated November 16, 2006, the petitioner stated that the applicant was employed abroad as an office manager/controller for the foreign entity since 1998 and that her duties included the following: banking, transfer of funds, money changing; approving payroll; approving accounts payable; interpreting Tagalog; supervising and managing the office; purchasing supplies; performing quality control duties; obtaining shipping quotes and tracking shipments; and performing various tasks associated with human resources. The petitioner claimed that the beneficiary "has unique insider's knowledge of the tobacco industry" and is therefore able to "guide with the packaging and marketing of [the petitioner's] finished product." The petitioner asked that the beneficiary be allowed to come to the United States in order to "assist in the daily warehouse operations and act as [the president's] [p]rofessional [a]ssistant and [c]ontroller." The petitioner stated that the beneficiary's U.S. job duties would be the same as those she currently performs in the Philippines and added that the beneficiary would also supervise production in the United States.

The key issues addressed by the director are whether the beneficiary possesses specialized knowledge and whether the beneficiary was employed abroad and will be employed by the petitioner in a capacity that requires specialized knowledge.

As enacted by the Immigration Act of 1990, 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 revoking the petition, the director concluded that the petitioner had failed to establish that the beneficiary possesses specialized knowledge or that she has been and would be employed in a capacity requiring specialized knowledge. The director determined that the duties the beneficiary performed while employed at the foreign entity and would perform for the U.S. entity do not require specialized and complex knowledge. The director further found that training others in the company's patented processes does not involve specialized knowledge. Lastly, the director noted that the job descriptions submitted in response to the RFE were significantly different from the job descriptions submitted initially in support of the petition, indicating that this discrepancy gives CIS reason to doubt which duties the beneficiary would actually perform.

In a brief dated February 28, 2008, counsel for the petitioner asserts that the beneficiary has specialized knowledge of the company's patented processes and relies heavily on the fact that existing patents restrict other companies in the industry from using similar procedures.

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary possesses specialized knowledge or that the beneficiary was employed abroad and would be employed in the United States in a capacity requiring specialized knowledge.

#### **A. Standard for Specialized Knowledge**

The L-1B specialized knowledge classification requires USCIS to distinguish between those employees that possess specialized knowledge from those that do not possess such knowledge. Exactly where USCIS should draw that line is the question before the AAO. On one end of the spectrum, one may find an employee with the minimum one year of experience and the basic job-related skill or knowledge that was acquired through that employment. Such a person would not be deemed to possess specialized knowledge under section 101(a)(15)(L) of the Act. On the other end of the spectrum, one may find an employee with ten years of experience and advanced training who developed a proprietary process that is limited to a few people within the company. That individual would clearly meet the statutory standard for specialized knowledge. In between these two extremes would fall, however, a whole range of experience and knowledge.

Looking to the plain language of the statutory definition, Congress has provided USCIS with an ambiguous definition of specialized knowledge. Although *1756, Inc. v. Attorney General* was decided prior to enactment of the Immigration Act of 1990, the court's discussion of the ambiguity in the former INS definition is equally illuminating when applied to the definition created by Congress:

This ambiguity is not merely the result of an unfortunate choice of dictionaries. It reflects the relativistic nature of the concept special. An item is special only in the sense that it is not ordinary; to define special one must first define what is ordinary. . . . There is no logical or principled way to determine which baseline of ordinary knowledge is a more appropriate reading of the statute, and there are countless other baselines which are equally plausible. Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning. *Cf. Westen, The Empty Idea of Equality*, 95 Harv.L.Rev. 537 (1982).

745 F.Supp. 9, 14-15 (D.D.C., 1990).

In effect, Congress has charged the agency with making a comparison based on a relative idea that has no plain meaning. To determine what is special, USCIS must first determine the baseline of ordinary.

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the canons of statutory interpretation provide some clue as to the intended scope of the L-1B specialized knowledge category. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)).

First, it is instructive to look at the common dictionary definitions of the terms "special" and "advanced." According to Webster's New World College Dictionary, the word "special" is commonly found to mean "of a kind different from others; distinctive, peculiar, or unique." *Webster's New World College Dictionary*, 1376 (4th Ed. 2008). The dictionary defines the word "advanced" as "ahead or beyond others in progress, complexity, etc." *Id.* at 20.

Second, looking at the term's placement within the text of section 101(a)(15)(L), the AAO notes that specialized knowledge is used to describe the nature of a person's employment and that the term is listed among the higher levels of the employment hierarchy with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO would expect a specialized knowledge employee to be an elevated class of workers within a company and not an ordinary or average employee. *See 1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C., 1990).

Third, the legislative history indicates that the original drafters intended the class of aliens eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." *Id.* This legislative history has been widely viewed as supporting a narrow reading of the definition of specialized knowledge and the L-1 visa classification in general. *See 1756, Inc. v. Attorney General*, 745 F.Supp.

at 15-16; *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at \*4 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006); *American Auto. Ass'n v. Attorney General*, Not Reported in F.Supp., 1991 WL 222420 (D.D.C. 1991); *Fibermaster, Ltd. v. I.N.S.*, Not Reported in F.Supp., 1990 WL 99327 (D.D.C., 1990); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001)(on file with AAO).

Although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge," the definition did not expand the class of persons eligible for L-1B specialized knowledge visas. Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Instead, the legislative history indicates that Congress created the statutory definition of specialized knowledge for the express purpose of clarifying a previously undefined term from the Immigration Act of 1970. H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 ("One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem."). While the 1990 Act declined to extend the "proprietary knowledge" and "United States labor market" references that had existed in the existing agency definition, there is no indication that Congress intended to liberalize the L-1B visa classification.

If any conclusion can be drawn from the ultimate statutory definition of specialized knowledge and the changes made to the legacy INS regulatory definition, the point would be based on the nature of the Congressional clarification itself. Prior to the 1990 Act, legacy INS pursued a bright-line test of specialized knowledge by including a "proprietary knowledge" element in the regulatory definition. See 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988). By deleting this element in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave legacy INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. Cf. *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (quoting *Baires v. INS*, 856 F.2d 89, 91 (9th Cir.1988)).

Accordingly, as a baseline, the terms "special" or "advanced" must mean more than simply skilled or experienced. By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." *Matter of Penner*, 18 I&N Dec. 49, 53 (Comm. 1982). 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.

Considering the definition of specialized knowledge, it is the petitioner's fundamental burden to articulate and prove that an alien possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

After articulating the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. 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. Because "special" and "advanced" are comparative terms, the petitioner should provide evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce and, if necessary to establish its claim, relative to similarly employed workers in the petitioner's industry.

## **B. Analysis**

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 performed and to be performed sufficient to establish specialized knowledge. In this case, the petitioner fails to establish that the beneficiary's foreign and U.S. positions require an employee with specialized knowledge or that the beneficiary has specialized knowledge. In the present matter, the petitioner's descriptions of the beneficiary's foreign and prospective job duties are deficient.

The job description submitted initially in the petitioner's November 16, 2006 support letter vaguely enumerated office management tasks, which could be applied to any office setting in a variety of retail-based operations. Although the petitioner claimed that the beneficiary acquired "insider's knowledge" of the tobacco industry through training and work experience, there was little indication that her knowledge reached a level at which it could be deemed specialized.

After CIS issued its RFE on February 2, 2007, the petitioner claimed that the beneficiary has been and would be charged with quality control responsibilities, which call for oversight of the petitioner's patented cigar manufacturing process. However, the petitioner failed to enumerate the specific job duties that were and would be entailed in such oversight. Simply stating that the beneficiary would oversee the manufacturing process does not convey a meaningful understanding of how the beneficiary has and would continue to carry out this broad job responsibility. Precedent case law has clearly established that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The AAO can only assume that the office duties previously attributed to the beneficiary's position have and would continue to enable the beneficiary to carry out her oversight responsibilities. However, the petitioner failed to explain how such duties qualify the beneficiary as a specialized knowledge employee. Thus, even if the AAO were to find that there were no inconsistencies between the beneficiary's initial and subsequent job descriptions, neither job description establishes that the beneficiary possesses specialized knowledge, which was and would continue to be required for her foreign and U.S. positions, respectively.

The petitioner was given another opportunity to supplement the record with more detailed information regarding the beneficiary's job duties. Specifically, on December 6, 2007, the director issued a notice of intent to revoke (NOIR) approval of the nonimmigrant petition. The notice expressly instructed the petitioner to describe the beneficiary's typical work week and to assign a specific percentage of time to each of the beneficiary's job duties such that it would allow the director to make a proper assessment as to whether a

significant portion of the beneficiary's time is spent performing job duties that require specialized knowledge (assuming, *arguendo*, that the beneficiary possesses such specialized knowledge). Again, the petitioner's response was vague, indicating that 40% of the beneficiary's time is attributed to overseeing the manufacturing of cigars; 30% of her time is attributed to training other employees in the company's patented processes; 10% is attributed to communicating with the foreign affiliate in the Philippines; and the remaining 10% is attributed to sharing her knowledge with the research and development branch of the U.S. entity. Again, the petitioner failed to cite specific job duties that would be involved in carrying out these broad job responsibilities.

That being said, the petitioner has described and documented the cigar manufacturing process, which has been patented. However, the AAO does not find that this process is specialized such that understanding, overseeing, and training others with regard to this process requires specialized knowledge. While the AAO does not dispute that the petitioner's process for manufacturing cigars is unique in comparison to other processes in the industry, the petitioner still fails to establish that the beneficiary's knowledge of this process and/or product is special or advanced, especially as compared to other similarly employed persons within the cigar industry. Moreover, the beneficiary's knowledge of this process is not specialized when compared to other employees within the same entity, particularly those who carry out the process in manufacturing the petitioner's product. As such, the petitioner has also failed to explain how the beneficiary's knowledge of the petitioner's unique process is special or advanced as compare to others within the same entity. Therefore, it cannot be concluded that the beneficiary's knowledge of the petitioner's cigar manufacturing process imparts a knowledge that can be deemed special or advanced. As previously stated, knowledge of a firm's technically complex products will not equal "special knowledge." *Matter of Penner*, 18 I&N Dec. at 53.

Furthermore, the record does not support a finding of eligibility based on at least one additional ground that was not previously addressed in the director's decision. Namely, 8 C.F.R. § 214.2(l)(3)(i) states that an individual petition filed on Form I-129 shall be accompanied by evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the present matter, section 1, item 10 of the Form I-129 **Supplement L** indicates that the petitioner and the beneficiary's foreign employer are both wholly owned by [REDACTED]. The regulatory definition found in 8 C.F.R. § 214.2(l)(1)(ii)(L) identifies this type of common ownership as an affiliate relationship.<sup>1</sup> Despite the petitioner's claim and its submission of the U.S. entity's State of Illinois Articles of Incorporation, the

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<sup>1</sup> It is noted for the record that the petitioner erroneously checked the box for "parent" in section 1, item 10 of the Form I-129 Supplement L to describe its relationship with the beneficiary's foreign employer. While this error is noted for the record, it has no bearing on the AAO's finding in the present matter.

petitioner has provided no documentation to establish either company's ownership. It is noted that 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

As the petitioner has not presented corroborating evidence establishing that [REDACTED] owns the U.S. entity and the beneficiary's foreign employer, as claimed, the AAO cannot determine whether the two entities have a qualifying relationship.

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). Therefore, based on the additional ground for ineligibility addressed in the above paragraphs, this petition must be revoked.

The approval of the petition will be revoked for the above stated reasons, with each considered as an independent and alternative basis for the revocation. When the AAO revokes approval of a petition based 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. 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

**ORDER:** The appeal is dismissed.