**U.S. Department of Homeland Security**
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U.S. Citizenship
and Immigration
Services

[redacted]

D7

JAN 27 2005

FILE: LIN 03 066 50246 Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED

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, Director
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary in the position of LINC software specialist as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to § 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is engaged in consulting and software development. The petitioner's breakdown of ownership of the foreign and U.S. entities indicates that the petitioner and the foreign entity are affiliates. The record indicates that the foreign entity is located in Latvia. The petitioner seeks to employ the beneficiary for a period of three years.

The director denied the petition, concluding that the petitioner failed to submit sufficient evidence to establish that the beneficiary's knowledge is special or that any proprietary knowledge is involved in the beneficiary's duties.

On appeal, the petitioner disputes the director's conclusion and submits a copy of an AAO decision from 1999 in which one of the petitioner's appeals, filed on behalf of a different beneficiary, was sustained. The petitioner also submitted a number of letters and other evidence discussing the beneficiary's duties in the context of the petitioner's organization.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

The key issue in the instant matter is whether the beneficiary possesses specialized knowledge.

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

> 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 a letter, dated December 18, 2002, submitted with the petition, [redacted] the petitioner's vice president, stated that the beneficiary "is very proficient in the use of Unisys' LINC fourth generation language and related software tools to design and implement efficient business information systems, and possesses specialized knowledge of the advanced tools, techniques, processes, and procedures developed by BTG, which enable[s] him to quickly develop and optimize performance of systems in LINC." The petitioner further stated that the beneficiary's knowledge of LINC software is complex and not readily available in the marketplace. The petitioner claimed that the beneficiary would use his proprietary knowledge of software technologies to assist with clients' information systems applications. The petitioner provided the following list of duties for the beneficiary's proposed position as senior LINC consultant:

- [C]onsulting, design, programming, testing, maintaining and enhancing our clients' information systems applications.

- [W]orking with Western banking consultants to further enhance and add to various software functions of our proprietary banking software in accordance with international banking principles and standards.

- [C]ontinuing development of our software information systems, including SBS, into comprehensive, easy to use systems which address unique banking and commercial requirements and provide a strong, flexible foundation for future growth and evolving requirements.

On February 14, 2003, the director issued a notice requesting additional information to establish that the beneficiary possesses specialized knowledge as claimed in the petition. The director notified the petitioner that even though the record clearly suggests that the beneficiary is a professional in his field, it cannot be concluded that he possesses specialized knowledge. The director further stated that in order to be considered proprietary, the beneficiary's particular knowledge must be something that exclusively relates to the petitioner's business and the beneficiary's employment must be critical to the petitioner's proprietary interests. The director stated that evidence must include the beneficiary's job description, which establishes that the beneficiary's knowledge is uncommon and noteworthy, and not easily transferable to others in the same professional field.

In response, the petitioner submitted a letter, dated May 1, 2003, in which the petitioner stated that all of its prospective employees are required to successfully complete a LINC programming class and to then complete a software development project using LINC in order to demonstrate their ability to apply the knowledge gained through training. The petitioner stated that after a candidate is hired that new employee is trained in the company's proprietary techniques, processes and procedures. The petitioner did not specify the actual techniques, process and procedures referred to in the record.

The petitioner also provided the following percentage breakdowns of the beneficiary's proposed duties:

- Consulting (10%) – review operational procedures and potential new systems, recommend new procedures and replacement systems,
- Analysis (20%) – work with end users to define new requirements
- Design (20%) – develop prototypes, review with end users
- Development (30%) – develop enhancements to systems and custom reports in LINC; develop user and system documentation
- Testing (10%) – unit test new modules, system test with real data
- Support (10%) – handle support calls from end users; diagnose problems; determine and correct faults in LINC code, data errors, configuration and network problems

The petitioner also resubmitted the December 18, 2002 support letter from Mr. [redacted] discussing the beneficiary's proficiency in using LINC fourth generation language and related software tools to work on clients' business information systems.

On July 25, 2003 the director denied the petition concluding that the beneficiary's proficiency in programming using a tool that is commercially available to others in the field suggests that the beneficiary's is not specialized and is not of a proprietary nature. The director further noted that adapting software to a particular project is not specialized knowledge, but rather is knowledge that is general and possessed by others in a similar field. The director also disputed the petitioner's reference to a prior AAO decision, citing 8 C.F.R. § 103.3(c) to support his claim that unpublished decisions have no precedent effect.

On appeal, the petitioner submits a brief, dated August 25, 2003, pointing out that the AAO's prior decision was submitted not for its precedent effect, but for the purpose of showing that the AAO had previously established that the petitioner's "unique, proprietary techniques, processes, and procedures for using LINC meet the INS criteria for specialized knowledge." Regardless of the petitioner's motive in its reference to a prior AAO decision, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval (or sustained appeal, as in the instant case) would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). It would be absurd to suggest that CIS or any agency must treat acknowledged errors as

binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Based on this reasoning, any other appeals filed by the petitioner and subsequently sustained by the AAO, if based on evidence similar to that found in the instant record of proceeding, would also be deemed to have been made in gross error. The AAO will not remedy its prior error by perpetuating such gross error in sustaining the appeal in the instant case where the petitioner has not established the necessary factors of eligibility.

The petitioner also resubmitted Mr. [redacted] support letter, as well as a letter dated June 25, 2001 from [redacted] director of development and training for the foreign entity, stating that the "specialized knowledge of unique LINC development techniques, processes, and procedure" is imparted on all of the company's employees by virtue of intense training and hands-on experience. In addition, the petitioner submitted another letter, dated December 18, 2002, written by [redacted] the U.S. entity's president. Ms. [redacted] reiterated the petitioner's need for "people with a high level of expertise in Unisys' LINC 4th generation design and development tools" and hands-on experience tailoring their knowledge to the specific needs of the petitioner's clientele. The petitioner repeatedly asserts that the beneficiary has proprietary knowledge of the techniques and processes that are unique to the petitioner and its foreign affiliate. The petitioner claims that the beneficiary's ability to combine his LINC programming skills with his proprietary knowledge distinguish him from other LINC programmers in the industry. The petitioner has also stated that it has "unique LINC techniques and processes," which include LINC-related system structure standards and templates, code standards, system testing processes, migration processes and conversion utilities, coding techniques, templates, and various libraries. While this list suggests that the petitioner has developed its own LINC techniques and processes, it falls short of defining any specific techniques and processes that are proprietary and unique to the petitioning organization.

The AAO does not dispute the likelihood that the beneficiary is a highly skilled individual who understands LINC programming and is able to apply it within the context of the petitioner's specific environment. However, there is no evidence that the beneficiary's employment is critical to the petitioner's proprietary interests. Although the petitioner repeatedly points out the unique features of LINC software design and development tools, this cannot be deemed the petitioner's proprietary interest, as there are other LINC programmers in the industry that are not employed by the petitioner or its affiliate. Furthermore, as pointed out by the director, the petitioning entity "is simply one of many Unisys authorized vendors using Unisys products." The petitioner has not provided any specifics regarding the beneficiary's alleged proprietary knowledge that is unique to the petitioner. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the regulations does not satisfy the petitioner's burden of proof. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). The petitioner's numerous references to the beneficiary's proprietary knowledge have not been corroborated with any supporting evidence. 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 Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

Furthermore, 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)).[1] As stated by the Commissioner in *Matter of Penner*, 18 I&N Dec. 49, 52 (Comm. 1982), 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." 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' operation.

*Id.* at 53. In the present matter, the evidence of record demonstrates that the beneficiary is more akin to an employee whose skills and experience enable him to produce a specialized product, rather than an employee who has unusual duties, skills, or knowledge beyond that of a skilled worker.

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.*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. at 15. 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 that employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

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[1] Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. Other than deleting the former requirement that specialized knowledge had to be "proprietary," the 1990 Act did not significantly alter the definition of "specialized knowledge" from the prior INS interpretation of the term. The 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying [*i.e.*, not specifically incorrect] interpretations by INS," H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, the cited cases, as well as *Matter of Penner,* remain useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49. The decision noted that the 1970 House Report, H.R. No. 91-851, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service." *Id.* at 51. The decision further noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner*, *id.* at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., *Immigration Act of 1970: Hearings on H.R. 445*, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that 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.*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend all employees with specialized knowledge, but rather to "key personnel" and "executives.")

Thus, based on the intent of Congress in its creation of the L-1B visa category, as discussed in *Matter of Penner*, even showing that a beneficiary possesses specialized knowledge does not necessarily establish eligibility for the L-1B intracompany transferee status. The petitioner should also submit evidence to show that the beneficiary is being transferred to the United States as a crucial employee. This has not been successfully demonstrated in the instant case, where the beneficiary appears to be one among a large number of the petitioner's employees who possesses similar training and knowledge and who the record shows is also one of many other beneficiaries on whose behalf the same petitioner has filed a significant number of L-1B petitions.

The legislative history for 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*, 745 F. Supp. at 16. Based on the evidence presented, it is concluded that the beneficiary has not been employed abroad and would not be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

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

**ORDER:** The appeal is dismissed.