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20 Massachusetts Ave., N.W., Rm. A3042
Washington, DC 20529

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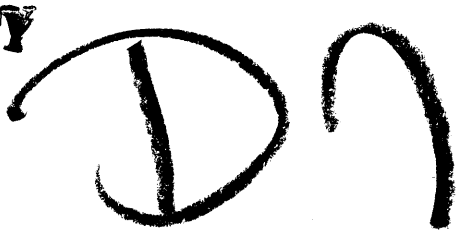

JAN 27 2005

FILE: LIN 04 018 54958 Office: NEBRASKA SERVICE CENTER Date:

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)

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 consultant 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 advanced within the petitioning organization or throughout the relevant industry.

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 appeal for a different beneficiary was sustained. The petitioner also submitted a number of letters and other additional 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 October 21, 2003, submitted with the petition, the petitioner 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 and continuously perfected by [the petitioner], which enable her to quickly develop and optimize performance of systems developed using LINC on different hardware platforms." 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 her 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 December 9, 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 her field, it cannot be concluded that the beneficiary possesses specialized knowledge. The director acknowledged that the beneficiary may possess advanced knowledge of the company's processes and procedures, but stated that the petitioner must submit evidence to distinguish the beneficiary's knowledge from that of others within the organization and the industry at large.

In response, the petitioner submitted a letter, dated February 29, 2004, in which the petitioner provided the following percentage breakdowns of the beneficiary's proposed duties in the United States and her current duties abroad:

Proposed Job Duties:

- Consulting (20%) – review operational procedures and potential new systems, recommend new procedures and replacement systems,

- Analysis (20%) – work with end users to define new requirements, identify potential new software applications to improve business operations, identify system performance problems and recommend technical approaches to improve system performance

- Design (20%) – analyze requirements, develop high level and detailed design specification documents; develop system prototypes and review with end users

- Development (20%) – develop enhancements to systems and custom reports in LINC; develop user and system documentation; write LINC code; unit test code modules; write technical system documentation

- Testing (10%) – develop test plans, test scripts and test data; run functional and system tests and report errors perform functional testing with real data; assist clients in developing automated software testing capability

- Support (10%) – diagnose reported software and systems problems; determine and correct faults in LINC code, data errors; help resolve configuration and network related problems

Current Job Duties Abroad:

- Analysis (20%) – work with end users to define business requirements; develop requirements and functional specification documents

- Design (20%) – develop high level design specifications, detailed technical design documents; develop application system prototypes

- Coding (10%) – write LINC code specifications; unit test code modules

- Teaching/Mentoring (20%) – train employees on BTG proprietary tools, techniques, processes, and procedures; manage and guide development teams on initial development projects

- Project Management (15%) – manage design and development teams working on client or internal development projects; communicate with client business and technical managers

- Documentation (5%) – write system documentation and user manuals

- Testing (5%) – develop test plans, test scripts and test data; run functional and system tests and report errors according to defined reporting procedures

- Support (5%) – fix errors in code found during testing, provide technical support to end users of software applications, improve performance and maintainability of production software application systems.

The petitioner also resubmitted the support letters dated October 15, 2003, October 17, 2003, and October 21, 2003. The first letter, written by the foreign entity's director, stated that the beneficiary worked under the leadership of senior managers and received training on design and development techniques and processes. The director further stated that the beneficiary "was involved in the design and development of several of BTG's proprietary software tools," which were used by LINC developers. However, there is no explanation as to the software tools that the beneficiary purportedly had a role in creating.

The second letter, written by [redacted] director of development and training for the foreign entity, stated 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.

The third letter, written by the U.S. entity's vice president, [redacted] discussed the beneficiary's proficiency in using LINC fourth generation language and related software tools to work on clients' business information systems.

The petitioner also stated that its purpose in submitting a copy of a prior AAO sustain of an appeal previously filed by the same petitioner was to show that the AAO had previously ruled in the petitioner's favor based on a similar set of facts as those found in the instant case.

Nevertheless, on April 1, 2004, the director denied the petition concluding that the petitioner failed to establish that the beneficiary has been employed abroad and would be employed in the United States in a specialized knowledge capacity. The director noted that the petitioner failed to submit evidence to substantiate any of the claims made in the above support letters, which discussed the petitioner's proprietary tools, techniques, processes, and procedures.

On appeal, the petitioner submits a brief, dated May 1, 2004, pointing out the apparent inconsistency perpetuated by CIS when the AAO sustains an appeal while the director continues to issue denials for petitions filed by the same petitioner. However, if the previous nonimmigrant petition was approved based on the same unsupported assertions that are contained in the current record, the approval 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. Furthermore, despite the AAO's prior sustain of an appeal filed by the same petitioner, the case is not a published precedent decision and, therefore, has no weight in the outcome of this matter. *See* 8 C.F.R. § 103.3(c).

The petitioner also resubmitted the three letters, discussed above, maintaining the assertion that the letters cumulatively establish the beneficiary's specialized knowledge for her current position abroad and for her proposed position in the United States. The petitioner has repeatedly asserted 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 her LINC programming skills with her proprietary knowledge distinguish her from other LINC programmers in the industry. The petitioner also states 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

[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.* TheAAO

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."

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

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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.

(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.