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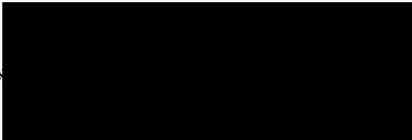
FEB 28 2005

FILE: SRC 03 254 50264 Office: TEXAS SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

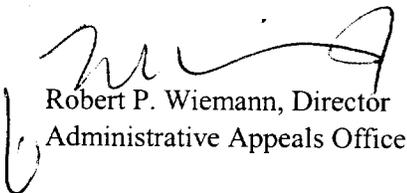
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



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, Texas 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 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 is a corporation organized in the State of Texas that is operating as an importer and manufacturer of commercial ovens. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Mexico City, Mexico. The petitioner now seeks to employ the beneficiary as its bakery machine supervisor for two years.

The director denied the petition concluding that the petitioner did not establish that the beneficiary would be employed by the United States entity in a specialized knowledge capacity. The director noted that the beneficiary's knowledge of the foreign entity's machines, which are to be sold by the petitioner, is not limited to a restricted number of individuals in the baking field, and is not "sufficiently esoteric and difficult to obtain to merit the bestowal of L-1B classification."

On appeal, counsel submits a brief and explains that the beneficiary possesses specialized knowledge of the foreign entity's equipment, techniques, and procedures, which the beneficiary acquired during his three years of work experience with the foreign entity. Counsel clarifies evidence previously submitted, stating that an explanation of the beneficiary's work experience prior to his employment with the foreign entity was provided to illustrate the beneficiary's background in the industry, not as evidence that the beneficiary's specialized knowledge could be acquired at an employer other than the foreign entity. Counsel submits a brief in support of the appeal.

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. 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) 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 issue in this proceeding is whether the beneficiary would be employed by the United States entity in a specialized knowledge capacity.

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.

The petitioner submitted the nonimmigrant petition on September 19, 2003. In an attached "Support Declaration," the petitioner provided the following explanation for the beneficiary's proposed employment in the United States:

The purpose of the request of the L-1B visa is to place [the beneficiary] in the position to train, supervise and coordinate bakers who will operate bakery machines and our specialized bakery ovens. In addition, he will provide the specific know-how in the use of [the petitioner's] ovens for the production of a variety of Mexican and European bread style, baguettes and pastries that are commercialized in the United States. [The beneficiary] will be employed by the U.S. company to apply his technical knowledge and experience in the implementation of training programs for the future bakers who will use the oven for the production of Mexican and European bread style, baguettes and pastries.

The petitioner outlined the following job duties for the beneficiary's proposed position:

- Supervising [the] operation of [the petitioner's] ovens to ensure conformance to specifications;
- Developing and implementing programs to train [the] company's personnel in the elaboration of baguettes, Mexican and European bread style and pastries with [the petitioner's] ovens;
- Providing assistance to the clientele who requires [sic] technical and maintenance services in the operation of [the petitioner's] ovens; and

- Providing specialized techniques to produce Mexican and European bread style, baguettes and pastries with [the petitioning organization].

The petitioner explained that the beneficiary is qualified for the position of bakery machine supervisor as a result of his eight years of employment experience as a baker and bakery machine supervisor in various bakeries in Mexico. The petitioner stated that the beneficiary possesses "skilled knowledge" in the following: (1) preparing a variety of Mexican and European breads and pastries; (2) installing and operating sophisticated bakery ovens manufactured by the foreign company; (3) training personnel in the operation of bakery ovens; and (4) supervising personnel in the application of the petitioner's baking techniques.

The director issued a request for evidence dated September 30, 2003, noting that the record did not demonstrate that the beneficiary possesses specialized knowledge. The director referenced a 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum as providing guidance in establishing that an alien possessed specialized knowledge, and noted that the beneficiary's knowledge must be shown to be different and advanced from the knowledge generally held within the industry. Memorandum from [REDACTED] Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). The director requested that the petitioner submit "evidence that the beneficiary's knowledge is uncommon, noteworthy or distinguished by some unusual quality and not generally known by practitioners in the field." The director also noted that the beneficiary's knowledge of the petitioner's processes and procedures must be more than the basic or elementary knowledge possessed by others in the field.

Counsel responded in a letter dated October 8, 2003, explaining that the purpose of the beneficiary's transfer to the United States is to apply his technical knowledge and experience to the implementation of training programs for bakers who will use the petitioner's specialized ovens. Counsel stated:

[The beneficiary] will provide the specific technical know-how in the use of [the petitioner's] ovens for the production of a variety of Mexican and European style bread, baguettes and pastries that are commercialized in the United States. The clients of [the petitioner] who purchase the company's specialized commercial ovens are hotels, Mexican bakeries and restaurants. Moreover, [the beneficiary] will present technical seminars to the bakers and to baker machine supervisors in reference to the operation and maintenance of [the petitioner's] ovens, and the production of Mexican and European style bread, baguettes and pastries utilizing [the petitioner's] commercial ovens.

Counsel also made the following claims with regard to the beneficiary's specialized knowledge: (1) the beneficiary is highly skilled in the operation of the petitioner's commercial ovens, and possesses knowledge that is valuable to the petitioner's competitiveness in the marketplace; (2) the beneficiary is a key employee of the foreign entity as a result of his special knowledge; (3) while employed by the foreign entity, the beneficiary enhanced the company's productivity, competitiveness, image, and financial position; (4) the beneficiary has substantial experience as a baker and bakery machine supervisor; and (5) the beneficiary acquired his specialized knowledge of the product manufacturing process through his training and employment with the foreign entity.

Counsel explained that the beneficiary is needed in the petitioning organization as a result of the petitioner's failed attempts to hire a qualified United States employee as a baker-supervisor. Counsel stated that without

the beneficiary, the petitioner would experience a significant interruption in its business while training another employee for the position. Counsel also claimed that the lack of persons in the United States qualified for the position justifies the beneficiary's transfer.

In support of the beneficiary's classification as a specialized knowledge employee, counsel also stated that no other corporation manufactures the commercial ovens used by the petitioner, and noted that the beneficiary has knowledge of "the operation of commercial ovens and the ability to adjust Mexican and European recipes into an automatic process without changing the end product (quality of the bread), which is of a sophisticated nature, although not unique to the foreign firm."

Counsel further contended that CIS is misapplying the guidelines from the 1994 memorandum. Counsel stated that when determining specialized knowledge, there is no requirement that the beneficiary's knowledge be unique, proprietary, or not commonly found in the United States labor market.

In a decision dated October 22, 2003, the director determined that the petitioner did not establish that the beneficiary has "a sufficient level and amount of specialized knowledge of the petitioning organization/industry to qualify for L-1B status." The director stated that the record does not demonstrate that the beneficiary's specific knowledge is limited to the petitioning organization or foreign entity, or to a narrow group of individuals in the baking field. The director also stated that the fact that the beneficiary acquired his knowledge through his work in several bakeries in Mexico indicates that the beneficiary's training and experience can be gained through employment with companies other than the foreign entity. The director further notes that the petitioner's inability to recruit a specialized baker-supervisor in the United States "does not in and of itself mean the beneficiary possesses specialized knowledge." Consequently, the director denied the petition.

Counsel filed an appeal on November 20, 2003 stating that the beneficiary possesses specialized knowledge as a result of his three years of work experience with the foreign company, during which he acquired knowledge of the organization's specialized products, equipment and techniques. Counsel claims that the beneficiary's specialized knowledge consists of the following: (1) installing and operating the "sophisticated bakery ovens" manufactured by the foreign company; (2) training the employees who would operate the ovens; and (3) supervising personnel in the preparation of Mexican and European-style breads. Counsel also states that during the beneficiary's three years of employment with the foreign entity, the beneficiary has gained experience in the operation and techniques related to the foreign company's commercial ovens, specifically in the "free-hand elaboration of the product utilizing the sophisticated ovens of the petitioner."

Counsel contends that the director incorrectly concluded that the beneficiary acquired his specialized knowledge through his work in other bakeries in Mexico, rather than solely in the foreign organization. Counsel claims that the beneficiary acquired his specialized knowledge during his employment with the foreign company only. Counsel states that a description of the beneficiary's prior eight years of work experience as a baker and bakery machine supervisor "was submitted to establish that the beneficiary had a background in the industry which prepares him with the foundation to be properly trained to operate the petitioner's product, equipment and techniques."

Upon review, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a specialized knowledge capacity.

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). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.*

Here, although the petitioner has provided a list of job duties to be performed by the beneficiary in the position of bakery machine supervisor, the petitioner has not documented that the beneficiary's claimed specialized knowledge. The petitioner stated that the beneficiary would be employed for his "skilled knowledge" in preparing Mexican breads, installing and operating ovens manufactured by the foreign entity, and training and supervising personnel on the use of the ovens. The petitioner also stated in its "support declaration" submitted with the petition that the beneficiary was qualified for the position as a result of his three years of employment with the foreign entity, during which he "contributed significantly in the training of bakers and profitability and expansion of the business." The petitioner submitted *untranslated* letters, certificates, and recognitions from the National Industry Chamber of Bread in Mexico as evidence of the beneficiary's experience as a baker and in support of his specialized knowledge. Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. *See* 8 C.F.R. § 103.2(b)(3). Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding. Consequently, the record is devoid of evidence establishing the beneficiary's claimed specialized knowledge in the field of baking. Moreover, even if the petitioner had submitted translated documents, counsel recognized in his October 8, 2003 letter that the documentation related to work performed by the beneficiary during his eight years in the baking field. Therefore, the beneficiary's employment certificates are not specific to the foreign entity and do not establish specialized knowledge of the foreign entity's product. Furthermore, there is no evidence supporting the petitioner's claim that the beneficiary "contributed significantly" to the training of the foreign entity's bakers, or why the beneficiary's knowledge would be characterized as specialized if he provided the claimed training. 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).

The petitioner has also failed to differentiate the beneficiary from one who is merely skilled in baking from an individual who possesses specialized knowledge of the company's product, equipment, or techniques. When analyzing whether a beneficiary's knowledge rises to the level of specialized, 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*, 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. at 52. 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

¹ Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. As will be discussed, other than deleting the former requirement that specialized knowledge had to be "proprietary," IMMACT 1990 did not significantly alter the definition of "specialized knowledge" from the prior INS interpretation of the term.

for his ability to carry out a key process or function which is important or essential to the business' operation.

Id. at 53.

The instant record supports a finding that the beneficiary would be employed in the United States for his ability to produce a product through his knowledge and skills in baking. In two separate letters submitted by the petitioner, dated September 28, 2003 and October 2, 2003, the general director of the company explained that the beneficiary, as an "expert in dough development and equipment production," would provide training to American bakeries that have not adopted an automatic system of preparing breads and would identify the financial benefits of this system. The general director stated that the beneficiary's presence in the United States was necessary as there are no American workers capable of using the petitioner's automatic equipment to prepare Mexican breads. Additionally, the petitioner noted that as a result of the beneficiary's experience with the equipment used by the foreign entity, he is capable of adjusting recipes for Mexican breads for use in automatic processes without changing the quality of the product. It would appear from these descriptions that the beneficiary would not necessarily be employed for his knowledge of the petitioning organization's product or equipment, but rather for his ability "to produce a product through . . . skilled labor." *Id.* at 53. In other words, the beneficiary would not be employed in the United States for his knowledge of the actual machines used by the foreign and United States entities, which would be essential to establishing specialized knowledge, but rather as a baker who has trained in Mexico for eight years and is merely experienced in altering recipes for use in the machines manufactured by the foreign entity. The petitioner has not documented whether the beneficiary's ability to manipulate recipes for use in the automatic bread process is a result of his "special knowledge" of the machinery used by the petitioner or the foreign entity. Moreover, the petitioner conceded in documentation submitted with the petition that the beneficiary possesses "skilled knowledge," which, as previously explained, has been differentiated by the courts from "specialized knowledge." While the beneficiary may be considered a skilled baker, the petitioner has not demonstrated that he possesses specialized knowledge of the particular equipment used by either company.

The record is also inconsistent in establishing whether the beneficiary's knowledge is specific to his employment in the foreign entity and likewise, to the equipment or products used by the petitioning organization, or whether the beneficiary merely possesses skills as a result of his eight years of work experience as a baker in Mexico. Counsel explains on appeal that the beneficiary's eight years of work experience as a baker and a bakery machine supervisor prior to his employment with the foreign entity offered him a *foundation* for his employment in the foreign company, but that the beneficiary's specialized knowledge was acquired *after* he joined the foreign entity in 1999. Counsel, however does not reconcile this claim with the acknowledgment in his October 8, 2003 letter. In his letter, counsel noted the requirement that the beneficiary possess knowledge which can normally be gained only through prior experience with that employer, yet stated that the beneficiary's "substantial experience" as a baker and bakery machine supervisor "was acquired . . . from his work in K Mart, Sam's Club, Aurrera and with [the foreign entity] in Mexico." Counsel further recognizes that the beneficiary "has knowledge of a process or a product . . . which is of a sophisticated nature, *although not unique to the foreign firm*, which is not generally known in the United States." The AAO recognizes counsel's attempt on appeal to clarify the record by stating that the beneficiary's specialized knowledge was obtained after the beneficiary was hired by the petitioner and not as a result of his eight years of work experience in other Mexican bakeries. Yet, counsel does not submit evidence that the beneficiary's knowledge is specific to the petitioner's product or equipment. Moreover, counsel concedes that

the process and products used by both the foreign entity and the petitioning organization are not unique to the foreign entity, thereby implying that the beneficiary could obtain this knowledge from another employer.

This conclusion is further supported by the petitioner's attempt to establish the beneficiary's specialized knowledge by submitting letters and certificates obtained by the beneficiary during his eight years as a baker prior to employment with the foreign entity. The fact that these documents relate to the beneficiary's employment with companies other than the foreign entity casts doubt on the petitioner's claim that the beneficiary gained specialized knowledge solely from his experience with the foreign employer. 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).

The record is also devoid of evidence pertaining to the personnel in the foreign entity, which would distinguish the beneficiary's knowledge as more advanced or distinct among other bakers employed by the foreign entity. 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. 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.

The 1994 Immigration and Naturalization Service memorandum referenced previously also allows CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from [REDACTED] Acting Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." *Id.* The analysis for specialized knowledge therefore requires an examination of the knowledge in context of the foreign and United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

Here, while the petitioner provided documentation of its attempts to locate qualified personnel in the United States, the petitioner has not submitted any evidence that the beneficiary possesses knowledge that rises above

the general knowledge held commonly throughout the foreign entity or within the baking industry. Counsel's blanket assertion in his October 8, 2003 letter that the beneficiary acquired skills and specialized knowledge of the operation of the petitioner's commercial ovens, which "is not general knowledge held commonly through out the industry" is not sufficient to establish the "special" nature of the beneficiary's knowledge. Absent information regarding the skills and knowledge of the personnel in the foreign entity, there is no basis in which to compare the beneficiary's knowledge. Counsel offers no distinction between the beneficiary's knowledge and that of other bakers in Mexico or bakers employed by the foreign entity. 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. at 193. Accordingly, the beneficiary may not be considered "key personnel."

Based on the above discussion, the petitioner has not demonstrated that the beneficiary would be employed by the petitioning organization in a specialized knowledge capacity. The AAO recognizes the petitioner's current inability to locate a qualified employee from the United States to assume the position of bakery machine supervisor. However, the lack of qualified candidates does not by itself establish the specialized nature of an individual's knowledge. The petitioner has not established through documentary evidence that the beneficiary possesses the claimed specialized knowledge in the equipment used by the petitioner and foreign entity, or that the beneficiary is a key employee of the foreign organization. Rather, the record supports a finding that the beneficiary is a skilled baker employed for his ability to produce the petitioner's product through skilled labor. Accordingly, 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.