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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

D7

File: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 01 2005

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)

IN BEHALF OF PETITIONER:

[redacted]

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, initially approved the petition for a nonimmigrant visa. Upon further review, the director determined that the beneficiary was not eligible for the benefit sought. Accordingly, the director properly served the petitioner with notice of her intent to revoke the approval and subsequently ordered that the approval be revoked. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks to employ the beneficiary temporarily in the United States as a nonimmigrant intracompany transferee with specialized knowledge (L-1B) 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 Florida that is a branch of [redacted] (Iberia), an international air carrier established and existing under the laws of Spain. The petitioner serves as the U.S. Headquarters for [redacted]a and seeks to employ the beneficiary as a Captain who will command the airline's Airbus A319, A320, and A321 aircraft.

After properly issuing a notice of intent to revoke, and after reviewing the petitioner's rebuttal to that notice, the director revoked the approval, finding that the approval of the original petition involved gross error in that the beneficiary did not qualify for the classification sought. Specifically, the director determined that the petitioner had not established that the beneficiary possessed specialized knowledge such that the beneficiary could qualify for an L-1B visa, and, more specifically, that the L-1B classification sought was erroneous in light of the existing visa classification for nonimmigrant crewmembers under section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D).

Counsel for the petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion, and forwarded the appeal to the AAO for review. On appeal, counsel submits a brief and additional evidence and asserts that the director's decision was arbitrary and capricious and contrary to law. Specifically, counsel contends that the director: (1) failed to distinguish the inherent differences involved in piloting a state-of-the-art commercial jet airliner and any other aircraft; (2) failed to distinguish between the type of commercial jet aircraft operated by the petitioner and its U.S. competitors; and (3) failed to adhere to the requirements for specialized knowledge as outlined in a 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum. Counsel fails to contest the director's finding that the initial approval of the petition constituted gross error, and further fails to acknowledge the alternative visa classification available to the beneficiary in light of his stated position.

To establish L-1 eligibility, 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) 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 primary issue in this matter is whether the approval of the initial petition constituted gross error. However, before a concise review of this issue can be performed, it is necessary to examine the history of this petition and the circumstances that led to the petition's revocation. As previously stated, the initial petition sought to classify the beneficiary as a nonimmigrant transferee with 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 April 8, 2003, counsel for the petitioner provided an overview of the beneficiary's background and experience. Specifically, counsel explained that the beneficiary had been employed by the petitioner since 1979, and that he had held the position of Captain since 1993. Additionally, a letter from the petitioner dated April 4, 2003 alleged that the training provided by the petitioner to the beneficiary, and all of its pilots, was proprietary because it had "been developed since [the petitioner] was in its infancy," and further stated that such training was unique to the petitioner. The petitioner alleged that the training provided to the beneficiary and the petitioner's other pilots, which consisted of classroom instruction, computerized instruction systems, flight simulators, and actual flight time, provided the pilots with specialized knowledge of the petitioner's commercial activities. Furthermore, the petitioner stated that the beneficiary had served as a flight instructor from 1990 to 1993, where he trained new and experienced pilots in the operation of the petitioner's aircraft series.

With specific reference to the beneficiary, the petitioner stated that pilots that possessed his extensive career and training were the ideal candidates to be transferred to the United States to manage the petitioner's Miami-based flight routes. The petitioner contended that in order to qualify for this United States-based position, the beneficiary was required to have significant flight experience with the petitioner and approximately twenty thousand hours of flight time. The petitioner finally discussed the beneficiary's responsibilities as a Captain of the Airbus series of aircraft, and explained that the beneficiary exercises complete command of the aircraft and flight crews in addition to being completely responsible for the safety and well-being of all passengers aboard the aircraft.

The petitioner further discussed the unique circumstances governing the petitioner's Miami-based flight routes and the requirements to fly such routes. First, it alleged that all pilots must be Spanish nationals licensed by the Spanish government, since the petitioner is based in Spain. Additionally, it asserted that the pilots flying these routes were also subject to European and American licensing requirements under the JAR and FAA. Finally, the petitioner discussed the difference between the Airbus series of aircraft versus the Boeing series, and concluded that only a pilot trained to operate the Airbus series of aircraft by the petitioner would be qualified to pilot aircraft on these routes. Essentially, the petitioner's main assertions were that the beneficiary met the licensing requirements and possessed knowledge of the Airbus series of aircraft which enabled him to perform the duties associated with the petitioner's Miami-based routes. Finally, in concluding that its routes to and from Miami were proprietary in nature, the petitioner concluded that the beneficiary possessed the requisite specialized knowledge to properly qualify for a nonimmigrant visa under this category.

The director agreed with counsel's preliminary assertions, and approved the petition for a three-year period from April 21, 2003 through April 21, 2006. After subsequent review of the file, however, the director issued a notice of intent to revoke the petition on October 14, 2003.

The director determined that the beneficiary's claimed specialized knowledge, obtained during his employment with the petitioner, was more akin to the routinely obtained knowledge and training by all pilots in the profession. Specifically, the director noted that the petitioner had failed to show that the beneficiary's alleged knowledge was unique to the beneficiary, or that the beneficiary was responsible for its existence, as outlined in the December 20, 2002 Memorandum for all Service Center Directors by Fujie Ohata, Associate Commissioner, on the "Interpretation of Specialized Knowledge," which adopts the "Interpretation of Specialized Knowledge" memorandum by [redacted] dated March 9, 1994. Additionally, the director found that the petitioner had failed to corroborate its claims that the beneficiary's specialized knowledge was a direct result of his training and experience with the petitioner.[1]

The petitioner filed a response to the notice of intent to revoke on November 10, 2003. In the response, counsel alleged that the director failed to consider the occupational requirements of pilots as set forth in the

[1] The AAO further notes that the notice of intent to revoke also discussed the beneficiary's ineligibility for the visa classification in the event that the petitioner was seeking approval under a blanket petition granted in 2002. As the petitioner subsequently confirmed that the classification was being sought under the individual petition, it is not necessary to further discuss this issue.

Occupational Outlook Handbook, published by the U.S. Department of Labor, and further disregarded the licensing requirements for pilots operating aircraft under foreign carriers. By disregarding these provisions, counsel alleged that the director failed to acknowledge the unique requirements that must be met by pilots who will operate aircraft in the United States for foreign carriers.

Additionally, the petitioner alleged that the distinction between the Airbus and Boeing series of aircraft was essential to this matter. Specifically, counsel asserted that since the petitioner and only two other carriers operated the Airbus series of aircraft out of Miami, pilots who were qualified to fly the Airbus series of aircraft and who were simultaneously familiar with the Latin America routes associated with the Miami hub were unusual and exceptional, and thus, since the beneficiary was one of these such pilots, he possessed the requisite specialized knowledge.

Finally, counsel contested the director's reliance on the Ohata and Puelo memoranda. Counsel contended that the director's assertion that the beneficiary's knowledge is merely general, and not specialized, was erroneous in that the director ignored the large and voluminous evidence provided with the petition. Counsel claimed that the director's conclusion that no documentary evidence was provided to support the claimed specialized knowledge was flawed, and reasserted that the beneficiary's advanced training and experience equipped him with the specialized knowledge required for the visa classification. In his final summation, counsel requested reconsideration based on the beneficiary's skills and abilities in operating the Airbus series of aircraft, an aircraft which counsel asserted was not widely used by other companies.

The director was not persuaded by counsel's numerous arguments. Consequently, the director issued a notice of revocation on December 3, 2003. In the notice, the director concluded that the occupation of pilot is not an extraordinary occupation reserved for a few elite members. Instead, the director noted that the requirements for obtaining a pilot's license are routinely universal throughout the industry, and although the beneficiary had admittedly learned to fly the Airbus series of aircraft while employed by the beneficiary, the Airbus series is not exclusive to the petitioner. Furthermore, the director found that the petitioner had failed to demonstrate how the training provided to the beneficiary through his course of employment with the petitioner differed from the training and experience he may have gained from a competitor airline.

Finally, and perhaps most importantly, the director noted that the petitioner admitted to spending millions of dollars on training for its pilots. This statement indicates that all of the petitioner's pilots receive similar if not the same training, and although the petitioner submitted documentary evidence which outlined this training, there was no evidence pertaining to the beneficiary's personal training history. The director noted that while the petitioner's stated training and education program for its pilots was certainly extensive, there was no documentation in the record which established that the beneficiary had successfully completed this training. Since the record was devoid of particular documentation which would establish the beneficiary's specific and specialized training in the field, the director found that the petitioner had not satisfied its burden for purposes of this proceeding.

In conclusion, the director noted that the Immigration and Nationality Act clearly specified a nonimmigrant classification that is specifically structured toward pilots. Under Section 101(a)(10) of the Act, 8 U.S.C. § 1101(a)(10), a "crewman" is defined as "a person serving in any capacity on board a vessel or aircraft." The

director concluded that without question, a pilot serves "in a capacity required for normal operation and service on board . . . an aircraft." *Id.* section 101(a)(15)(D)(i) of the Act, 8 U.S.C. §1101(a)(15)(D). The director determined that the beneficiary, as a nonimmigrant pilot, would properly fit under this visa classification and not the classification requiring specialized knowledge, and subsequently revoked the approval of the initial petition.

Counsel submits a lengthy brief on appeal in support of the petitioner's assertions that the beneficiary possesses specialized knowledge. Counsel restates the points raised in the response to the notice of intent to revoke, and continues to assert that the beneficiary possesses specialized knowledge and thus qualifies for the visa classification prescribed under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Counsel, however, fails to address the director's distinction of the D crewman visa classification from the L visa classification, and neglects to address the basis upon which the director revoked the petition.

Upon review of the record of proceeding, the AAO concurs with the director's conclusion that the beneficiary does not possess specialized knowledge. The petitioner failed to distinguish the beneficiary's training and experience from that of his co-workers or from other similarly trained pilots in the industry. Undoubtedly, the petitioner is not the only airline which operates the Airbus series of aircraft. Although the beneficiary's training is impressive and noteworthy, there is nothing in the record that indicates that his ability to operate this aircraft distinguishes him from other equally qualified pilots in the industry. Additionally, the petitioner fails to provide documentation that the beneficiary received training or work assignments focused specifically on the Airbus aircraft. While the petitioner, through counsel, asserts that the beneficiary is virtually an expert with specialized knowledge, the lack of specificity pertaining to the beneficiary's work experience and training, particularly in comparison to others employed by the petitioner and in this industry, fails to distinguish the beneficiary's knowledge as specialized. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).[2]

It is also 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)).[3] As stated by the Commissioner in

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[2] Although counsel refers to numerous exhibits that accompany the appeal brief in support of these contentions, the documentation provided is insufficient to warrant a conclusion that the beneficiary possesses the requisite specialized knowledge required by the regulations. For example, the Basic Manual of Operations, with which it contends its pilots are required to be familiar, is provided in support of counsel's allegation that the beneficiary's knowledge is specialized and proprietary. The voluminous training manuals of the petitioner, however, do not establish that the beneficiary actually completed the required training.

[3] 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

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 provide a specialized service, 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. Looking to the intent of Congress, 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.

Here, the petitioner makes no claim that the beneficiary's knowledge is more advanced than other employees, nor did the petitioner distinguish the beneficiary's knowledge, work experience, or training from the other employees. The lack of evidence in the record makes it impossible to classify the beneficiary's knowledge of the petitioner's commercial operations and of the Airbus series of aircraft specialized, and precludes a finding that the beneficiary's role is "of crucial importance" to the organization. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these

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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.

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)). While it may be correct to say that the beneficiary 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 (Comm. 1982). 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.")

Counsel also alleges that CIS is not following its own guidelines as to the nature of specialized knowledge. Specifically, counsel refers to the December 20, 2002 Memorandum for all Service Center Directors by Fujie Ohata, Associate Commissioner, on the "Interpretation of Specialized Knowledge," which adopts the "Interpretation of Specialized Knowledge" memorandum by [redacted] dated March 9, 1994. Relying on this memorandum, counsel asserts that CIS erroneously imposed a standard of "uniqueness" upon the beneficiary's duties when evaluating the evidence, and contends that an examination of the previously submitted description of the beneficiary's duties and knowledge shows that he has consequently satisfied the definition of specialized knowledge. Furthermore, counsel contends that the beneficiary's knowledge of the petitioner's business practices is specialized and cannot be replicated. While the beneficiary's skills and knowledge may contribute to the successfulness of the petitioning organization, this factor, by itself, does not constitute the possession of specialized knowledge.

The AAO notes that, with regard to counsel's reliance on the 2002 Associate Commissioner's memorandum, the memorandum was intended solely as a guide for employees and will not supersede the plain language of the statute or regulations. Although the memorandum may be useful as a statement of policy and as an aid in interpreting the law, it was intended to serve as guidance and merely reflects the writer's analysis of the issue. Therefore, while the beneficiary's contribution to the economic success of the corporation may be considered, the regulations specifically require that the beneficiary possess an "advanced level of knowledge" of the organization's process and procedures, or a "special knowledge" of the petitioner's product, service, research, equipment, techniques, or management. 8 C.F.R. § 214.2(l)(1)(ii)(D). As determined above, the beneficiary does not satisfy the requirements for possessing specialized knowledge.

In the present matter, the petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's operational procedures and of the Airbus series of aircraft and its application in international markets is more advanced than the knowledge possessed by others employed by the petitioner, or in the industry. It is clear that the petitioner considers the beneficiary to be an important employee of the organization. The AAO, likewise, does not dispute the fact that the beneficiary's knowledge has allowed him to competently perform his job in the foreign entity. However, the successful completion of one's job duties does not distinguish the beneficiary as "key personnel," nor does it establish employment in a specialized knowledge capacity.

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.*, 745 F. Supp. at 16. Based on the evidence presented, it is concluded that the beneficiary does not possess specialized knowledge; nor would the beneficiary be employed in a capacity requiring specialized knowledge.

Since the issue of specialized knowledge in this matter has been thoroughly addressed, the AAO will now examine the basis for the director's revocation of the petition. On appeal from the revocation for nonimmigrant worker, the issue is not, strictly speaking, whether the beneficiary qualifies for the specific nonimmigrant classification. Even if the Service Center mistakenly approved an L-1B petition for an alien who does not qualify for L-1B status, that fact alone would not warrant revocation of the approval. Under 8 C.F.R. § 214.2(l)(9)(iii)(A)(5), only "gross error," and not simple mistake, warrants revocation.[4]

The primary issue in this matter is whether the approval of the initial petition constituted gross error. Under CIS regulations, the approval of an L-1B petition may be revoked on notice under six specific circumstances. 8 C.F.R. § 214.2(l)(9)(iii)(A). To properly revoke the approval of a petition, the director must issue a notice of intent to revoke that contains a detailed statement of the grounds for the revocation and the time period allowed for rebuttal. 8 C.F.R. § 214.2(l)(9)(iii)(B).

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[4] The AAO notes that the "gross error" standard applies to revocation of H, O and P nonimmigrant worker petitions, as well as to L petitions. 8 C.F.R. §§ 214.2(h)(11)(iii)(A)(5), (o)(8)(iii)(A)(5) and (p)(10)(iii)(A)(5).

In the present matter, the director provided a detailed statement of the grounds for the revocation. Referring to the eligibility criteria at 8 C.F.R. § 214.2(l)(3)(ii), the director reviewed the rebuttal evidence and concluded that the petitioner had not established that the beneficiary's position as a pilot, and more specifically titled as a Captain, required specialized knowledge to the extent that it qualified for approval under the L-1B category, particularly in light of the regulations at INA § 101(a)(10) and (15)(D) and 8 U.S.C. § 1101(a)(10) and (15)(D), which are specifically tailored toward nonimmigrant crewmembers, including pilots and captains. The director subsequently revoked the approval on the basis of 8 C.F.R. § 214.2(l)(9)(iii)(A)(5): "Approval of the petition involved gross error."

The term "gross error" is not defined by the regulations or statute. Furthermore, although the term has a juristic ring to it, "gross error" is not a commonly used legal term and has no basis in jurisprudence. *See* Black's Law Dictionary 562, 710 (7th Ed. 1999)(defining the types of legal "error" and legal terms using "gross" without citing "gross error"). The word "gross" is commonly defined first as "unmitigated in any way: UTTER," as in "*gross* negligence." Webster's II New College Dictionary 491 (2001).

As the term "gross error" was created by regulation, it is most instructive to examine the comments that accompanied the publication of the rule in the Federal Register. The term "gross error" was first used in the regulations relating to the revocation of a nonimmigrant L-1 petition. In the 1986 proposed rule, an L-1 revocation would be permitted if the approval had been "improvidently granted." 51 Fed. Reg. 18591, 18598 (May 21, 1986)(Proposed Rule). After receiving comments that expressed concern that the phrase "improvidently granted" might be given a broader interpretation than intended, the agency changed the final rule to use the phrase "gross error." 52 Fed. Reg. 5738, 5749 (Feb. 26, 1987)(Final Rule). As an example of gross error in the L-1 context, the drafter of the regulation stated:

> This provision was intended to correct situations where there was gross error in approval of the petition. For example, after a petition has been approved, it may later be determined that a qualifying relationship did not exist between the United States and the foreign entity which employed the beneficiary abroad.

Id. In the context of the L-1 nonimmigrant classification, the phrase "qualifying relationship" is a fundamental requirement for visa eligibility and is defined by the regulation. *See* 8 C.F.R. § 214.2(l)(1)(ii)(G). However, this element of eligibility is not a simple determination or one where there is always a clear answer. *See 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). As authorized by Congress, CIS is charged with the authority to make this determination based on the implementing regulations. *See generally,* section 214 of the Act, 8 U.S.C. § 1184.

Accordingly, upon review of the regulatory history and the common usage of the term, the AAO interprets the term "gross error" to be an unmitigated or absolute error, such as an approval that was granted contrary to the requirements stated in the statute or regulations. Regardless of whether there can be debate as to the legal determination of eligibility or whether there is a "clear answer," any approval that CIS determines to have been approved contrary to law must be considered an unmitigated error, and therefore a "gross error." This

view of "gross error" is consistent with the example provided in the Federal Register. *See* 52 Fed. Reg. at 5749.

Upon review, the present petition was properly revoked as the prior petition was approved in gross error; the petition was approved contrary to the eligibility requirements provided for in the regulations and because the proffered position requires classification under section 101(a)(15)(D) of the Act.

Although the regulations do not define "gross error," the AAO notes the opinion of Judge Oberdorfer in *Delta Air Lines, Inc. v. U.S. Department of Justice,* No. 98-3050 (LFO) (D.D.C. Filed July 13, 1999). In *Delta Air Lines*, Judge Oberdorfer reversed the AAO's decisions affirming revocation of L-1B approvals for flight attendants, rejecting the AAO's conclusion that the approvals rested on gross error. As a non-precedent decision of a single District Court, his ruling on this point does not bind the AAO in unrelated cases. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Thus, Judge Oberdorfer's holding that there was no "gross error" in the *Delta Air Lines* case does not compel the same result here. [5]

First, the facts of this case make it readily distinguishable from the *Delta Air Lines* case. Delta Air Lines sought to describe the flight attendant duties in such a way as to make them appear different from normal crew duties. *Cf Delta Air Lines,* slip opinion at 6-9. The flight attendants' knowledge of Polish, and of Eastern European customs, according to Delta, distinguished them from flight attendants performing normal crew duties. In particular, Delta claimed that, in addition to normal crew duties, the flight attendants would

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[5] Having examined the regulatory history of section 214.2(l)(9)(iii)(A)(5), as well as the common legal meaning of the term "gross," Judge Oberdorfer concluded that "gross error" is an "immediately obvious or glaringly noticeable mistake." *Delta Air Lines*, slip opinion at 4. Judge Oberdorfer also characterized "gross error" as a mistake that no reasonable person would make, because there would be no reasonable grounds to "debate as to the right answers." *Id.*

Although the AAO defers to the decision of Judge Oberdorfer as it applies to the *Delta Air Lines* litigation, the AAO respectfully disagrees with the Court's interpretation of "gross error." By imposing a "reasonable person" standard on the interpretation of gross error, the Court's interpretation strips CIS of its authority to make eligibility determinations by applying its expertise as the agency charge with enforcing this section of law. *See generally*, section 214 of the Act, 8 U.S.C. § 1184. Furthermore, the Court's "reasonable person" interpretation denies the agency its essential authority to correct erroneously approved petitions. Finally, the "reasonable person" standard imposed by the Court would have CIS let stand a petition that was approved contrary to law, as long as there is debate as to the "right answer," despite the statutory requirements and the public policy established by Congress. Respectfully, 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).

The AAO notes that, when the issue came before Judge Oberdorfer again in a case not involving the "gross error" standard, he affirmed the AAO's conclusion that the flight attendants did not actually qualify as L-1B nonimmigrants. *Delta Air Lines, Inc. v. U.S. Department of Justice,* No. 00-2977 (LFO) (D.D.C. April 6, 2001). The D.C. Circuit affirmed this judgment summarily. 2001 WL 1488616 (D.C.Cir. 2001).

participate in training other flight attendants in skills specially suited to serving Eastern European clients. Judge Oberdorfer concluded that a reasonable person could have found that the job duties, as described, qualified the beneficiaries as L-1B nonimmigrants. *Id.* slip opinion at 9-10. In the current case, by contrast, the petitioner claims that it is the beneficiary's specific duties as pilot that makes him eligible for L-1B classification. More specifically, the petitioner contends that the beneficiary's extensive training, and more particularly his ability to operate the Airbus series of aircraft, qualifies him for this classification.

Second, and more fundamentally, the petitioner's argument ignores the basic structure of the INA as it relates to alien crewmembers. Congress has provided a specific nonimmigrant visa classification for these aliens. INA § 101(a)(10) and (15)(D), 8 U.S.C. § 1101(a)(10) and (15)(D). Crewmembers are subject to special restrictions. These restrictions reflect the fiction that an alien crewmember is "one of the agencies which brought the ship in, rather than an alien brought in by the ship." *Osaka Shosen Line v. United States*, 300 U.S. 98, 103 (1937). Although counsel for the petitioner failed to address or acknowledge this issue on appeal, the AAO finds it crucial to the outcome in this matter.

The first distinction between crewmembers and other aliens who arrive on a vessel or aircraft is that the crewmembers are not even subject to inspection, if they are not actually going to leave the vessel or aircraft. *Matter of SS Greystoke Castle and M/V Western Queen*, 6 I&N Dec. 112, 122 (BIA 1954; A.G. 1954). If the crewmember will remain aboard, no visa is required. *Id.* If the crewmember is supposed to remain on board, the carrier is subject to fine if the carrier fails to prevent the crewmember from leaving the vessel or aircraft. INA § 254(a), 8 U.S.C. § 1284(a).

Second, if the crewmember is permitted to land, the crewmember is subject to more exacting restrictions than other nonimmigrants. A crewmember who seeks to land, like other nonimmigrants, is subject to inspection, and must have the appropriate visa. INA §§ 212(a)(7)(B) and 235(a)(3), 8 U.s.c. §§ 1182(a)(7)(B) and 1225(a)(3). But if the crewmember is permitted to land, the crewmember must leave the United States on the same vessel or aircraft on which the crewmember arrived, unless the immigration inspector permits the crewmember to leave on a different vessel or aircraft. INA § 252(a). 8 U.S.C. § 1282. In no case may a crewmember remain in the United States more than 29 days. *Id.* The carrier may not discharge the crewmember from employment while the crewmember is in the United States without permission of the immigration authorities. *Id.* § 256, 8 U.S.C. § 1286.

If a crewmember absconds, but is apprehended before the vessel or aircraft leaves, the immigration authorities may expel the crewmember summarily, without having to resort to immigration court procedures. *Id.* § 252(b), 8 U.S.C. § 1282(b). If an alien crewmember is placed in removal proceedings, the alien crewmember is ineligible for cancellation of removal. *Id.* §240A(c)(1), 8 U.S.C. § 1229b(c)(1). A crewmember is not eligible for adjustment of status, *id.* § 245(c)(2), 8 U.S.C. § 1225(c)(2), nor for a change of nonimmigrant status, *id.* § 248(1), 1258(1).[6]

[6] Provided the underlying visa petition was timely filed, an alien crewmember can obtain relief from the adjustment ineligibility if the alien pays the $1000 fee under INA § 245(i), 8 U.S.C. § 1255(i).

This comprehensive statutory framework shows that Congress intended for aliens who are serving as crewmembers aboard international air or sea carriers to be subject to strict controls. By definition, these restrictions apply to an alien serving in "***any*** capacity on board a vessel or aircraft." INA § 101(a)(10), 8 U.S.C. § 1101(a)(10)(emphasis added). Approving an L-1B petition based on ordinary crewmember duties would thwart this statutory framework for the regulation of nonimmigrant crewmembers. In this case, the beneficiary, as pilot and more specifically as "captain," is merely operating in a capacity that is required for normal operation and service on board the aircraft. *See* Section 101(a)(15)(D)(i), 8 U.S.C. § 1101(a)(15)(D). For this reason, the AAO concludes that approving a petition for a nonimmigrant worker on behalf of an alien who is going to perform ordinary crewmember duties would involve "an immediately obvious or glaringly noticeable mistake." *Delta Air Lines*, slip opinion at 4. The Texas Service Center director correctly concluded that her approval of the L-1B petition involved gross error, and should be revoked.

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.