U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. A3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

D7

File: LIN 05 209 52101 Office: NEBRASKA SERVICE CENTER Date: DEC 01 2006

IN RE: Petitioner: [redacted]
Beneficiary:

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

IN BEHALF OF BENEFICIARY:

[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, Chief
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 technical manager 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 manufacturer of precision metal cutting equipment and tool data management software and claims a qualifying relationship with TDM Systems GmbH of Germany. The petitioner seeks to employ the beneficiary for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the position offered requires an employee with specialized knowledge or that the beneficiary has such knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has specialized knowledge. Specifically, counsel asserts that the beneficiary has specialized knowledge of the petitioner's proprietary software product and line of tools, which is only attainable through prior experience with these products and through specialized training.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The 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.

At issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a capacity which involves specialized knowledge.

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

> 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 June 24, 2005 appended to the initial petition, the petitioner described the beneficiary's job duties as "technical service and training specialist" with the foreign entity, and the purported specialized knowledge, as follows:

> In this specialized knowledge capacity, [the beneficiary] has been responsible for the following: installation, training and service of the proprietary software product TDM (tools and data management); design and programming of interfaces between TDM and other software products; providing technical expertise to customers and company personnel regarding the product; creation and maintenance of specific training materials related to TDM; training customers; initiation and completion of TDM sales; conducting performance testing of each installation and ensuring that the installations were continuously improved in order to meet and exceed the expectations of the customers; providing technical consulting to the company's customers aiming to achieve the best economic results; and analyzing technical complaints relating to the software.

The petitioner further described the beneficiary's proposed job in the United States as "technical manager" as follows:

> In his capacity as Technical Manager, [the beneficiary] will be the contact person for TDM customers. He will provide technical expertise regarding all aspects of TDM, including the functionality of the software with all of its modules; assist the sales force in all technical questions of the usage of Tool Data Management Software with all of its modules: planning module, tool crib module, ordering module, presetting module, shop control module, preemptive maintenance module, fixture module, gauging module; utilize his expertise in

> interfacing TDM to CAD/CAM Systems UG-NX, CATIA, ProE, EXPRIT, MASTERCAM, ALPHACAM; perform Standard Installations of TDM; perform installations of Oracle, Microsoft SGL-Server and Sybase Databases; design customer specific interfaces between TDM and other software packages; utilize his knowledge in purchasing processes of large companies with sophisticated ERP-Systems; utilize his knowledge of [the petitioner's] metal cutting tools; interface 3 D Simulation Systems VERICUT and Virtual Machine; write programs in code PRG and SCR and to adapt exiting programs; perform TDM training at customers' sites; interact with customers on special interfaces and program additions; and test and debug software. In addition, [the beneficiary] will continue to be responsible for applying his expertise in the proprietary TDM software product when responding to RFPs and RFIs to ensure that the customers' needs are mapped to the TDM software solutions.

Finally, the petitioner explained in the letter that the beneficiary commenced employment with the foreign entity on May 1, 2004, approximately 14 months prior to the filing of the petition, and that he is a 2003 graduate of the International Business School in Lippstadt, Germany.

On July 13, 2005, the director requested additional evidence establishing that the beneficiary's knowledge is indeed specialized. The director requested, *inter alia*, evidence regarding the beneficiary's training and when, exactly, the beneficiary first obtained his specialized knowledge.

In response, counsel to the petitioner provided a letter dated August 3, 2005. In that letter, counsel provided further detail regarding the beneficiary's purported specialized knowledge as follows:

> We submit that [the beneficiary's] knowledge is specialized because:
>
> (a) [The beneficiary] has received extensive in-house training on the proprietary TDM Systems software and [the petitioner's] line of tools and products that are integrated into the software;
> (b) [The beneficiary] was involved in the development of the latest version of TDM Systems software;
> (c) [The beneficiary's] education is consistent with that of a member of the professions; and
> (d) His training, experience, and specialized knowledge of TDM Systems' software are critical to both [the foreign entity] and [the petitioner's] success in the United States.
>
> * * *
>
> [The beneficiary] clearly qualifies for designation as a specialized knowledge worker for the reasons set forth in detail below. Specifically, he has obtained specialized knowledge that can only be gained through prior experience and training with [the foreign entity]. In order to perform the duties of his current position with [the foreign entity] in Germany as well as the duties of his offered position with [the petitioner] (the transferee company and affiliate company of [the foreign entity]), [the beneficiary] must have an advanced level of knowledge of the proprietary TDM System software, procedures, and technologies. A sophisticated

> understanding of our technologies is only available through training and experience with [the foreign entity].

Counsel also explained in the letter dated August 3, 2005 that the beneficiary received over 85 days of "extensive and progressive formal training" with the foreign entity's proprietary software and technologies and asserts that this training is only available through employment with the foreign entity. Counsel further explained the beneficiary's progression as follows:

> From May 2004 until March 2005, 10 months after he initiated employment and training with [the foreign entity], [the beneficiary] began installing and integrating [the foreign entity's] proprietary software system at client facilities without assistance or supervision. In addition, also in March 2005, [the beneficiary] began training clients at client facilities on his own without the need for supervision or assistance from other [foreign entity] experts. **Accordingly, [the beneficiary] obtained the specialized knowledge required for the position in March 2005.**

(Emphasis added).

Finally, counsel specifically described the beneficiary's specialized knowledge as follows:

> The proprietary software system of TDM provides a complete software system for tool use, planning, and production. [The foreign entity] provides the software system and data for organizing and managing cutting tools, jigs and fixtures, inspection equipment, machine set-up and chucking devices. Furthermore, the system is complemented by electronic tool data catalogs and internet-based tool organization systems. [The beneficiary] has obtained specialized knowledge in (i) the code of [the foreign entity's] tool data management software, (ii) integration of the proprietary software to clients' existing tools and systems, (iii) the full line of [the petitioner's] tools that are integrated into the software, (iv) trouble-shooting involved with the software, and (v) training clients on the usage of the system.

On August 8, 2005, the director denied the petition concluding that the petitioner failed to establish that beneficiary would be employed in a specialized knowledge capacity or that the beneficiary possesses specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has specialized knowledge. Specifically, counsel asserts that the beneficiary has specialized knowledge of the petitioner's proprietary software product and line of tools, which is only attainable through prior experience with these products and through specialized training.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary will be employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

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 job description of the services to be performed sufficient to establish specialized knowledge. In this case, while the beneficiary's job description adequately describes his duties as a software employee, the petitioner fails to establish that this position requires an employee with specialized knowledge or, even if it does, that the beneficiary had been employed in a specialized knowledge capacity for the requisite one year abroad.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States requires "specialized knowledge," the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other software employees employed by the petitioner or in the industry at large. Going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

Counsel asserts that the beneficiary possesses "uncommon" specialized knowledge of the petitioner's proprietary software product, as well as the metal cutting industry, as one of eight individuals in the world who possesses such knowledge. In support of this argument, the petitioner relies heavily on its position that the software is unique and proprietary and that knowledge of the software, and how it relates to the relevant industry, can only be gained through experience and training with the foreign entity. However, despite this assertion, the record does not reveal the material difference between the skills and knowledge needed to work with the petitioner's proprietary software product and similar software products on the market, or software in general. While the petitioner asserts repeatedly that the beneficiary gained his knowledge of the software through extensive training and experience, the record does not establish that the beneficiary's knowledge is different from the knowledge of software possessed by software employees generally throughout the industry or by other employees of the petitioner. In fact, the record reveals that at least seven other employees of the foreign entity possess the same knowledge as the beneficiary, if not greater. The proprietary or unique qualities of the petitioner's software do not establish that any knowledge of these products is "specialized." Rather, the petitioner must establish that qualities of the unique or proprietary product require employees to have knowledge beyond what is common in the industry.

The petitioner argues that its software is proprietary and that certain knowledge of this software could only be gained by working for the owner of the software. Like any well-kept secret, it is likely that there are certain aspects to this, and all, proprietary software products which are known only by certain employees. However, this does not establish that this knowledge is "specialized" for purposes of this visa classification. The petitioner cannot manufacture specialized knowledge by refusing to share information with others. Rather, the petitioner must establish that the beneficiary's knowledge is specialized because he gained the knowledge through extensive training or experience which could not easily be transferred to another employee. In this matter, the petitioner has not proven that the beneficiary's knowledge of the software is materially different from that possessed by employees with experience with similar software products. The fact that other software professionals may not have very specific, proprietary knowledge regarding the petitioner's software

product is not relevant to these proceedings if this knowledge gap could be closed by the petitioner by simply revealing the information to a newly hired employee.

Finally, while the petitioner did present evidence that the beneficiary received 85 days training while employed with the foreign entity, the petitioner did not establish that this "extensive and progressive formal training" vested the beneficiary with specialized knowledge. First, despite counsel's assertions to the contrary, the training schedule provided by the petitioner in response to the Request for Evidence appears to include introductory and general training similar to what would be provided to any new software employee in almost any industry. For example, from June 7, 2004 until June 11, 2004, over one month after the beneficiary's first day of employment with the foreign entity, the beneficiary received "his first introduction" to the relevant product line. Also, from August 4, 2004 until August 9, 2004, the beneficiary received training in customer interaction.

Second, the petitioner did not establish that any of the training received by the beneficiary concerned specialized knowledge by distinguishing the knowledge imparted from knowledge generally known in the industry by other software professionals. As explained above, the inclusion of easily imparted tidbits of proprietary information in the training does not establish the employee's knowledge has become specialized for purposes of the Act. Rather, the petitioner must establish that the employee has received training imparting knowledge to the employee which would cause the petitioner to experience a significant interruption of business in order to train a United States worker to assume those duties. The petitioner has not established that the beneficiary has received such training.

Third, the record reveals that the beneficiary had been employed by the petitioner for just over 14 months prior to the filing of the petition and that, for 85 days of this time, he was being trained. Simply put, the petitioner has not established that this relatively new graduate who it has employed for about 14 months, and has trained for less than 3 months, has become a key employee of crucial importance who could not easily be replaced by another new graduate after a short introductory training stint. It is highly unlikely that providing a new employee with a few months training in any field will establish that that employee has gained "specialized knowledge."

The AAO does not dispute the likelihood that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, 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)). 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 for

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

Id. at 53.

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. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). 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 the 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 (Comm. 1982). The decision noted that the 1970 House Report, H.R. REP. 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* than an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized 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. v. Attorney General,* 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to "key personnel" and "executives.")

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum written by the then Acting Associate Commissioner also directs 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 James A. Puleo, 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 truly specialized." *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

As explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioner or by software professionals employed elsewhere. As the petitioner has failed to document any materially unique qualities to the software, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "key" employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other software employee or that he has received special training in the company's methodologies or processes which would separate him from any other software professional employed with the foreign entity or elsewhere. As one of eight similarly trained employees, it is simply not reasonable to classify this relatively new employee as a key employee of crucial importance to the organization.

The legislative history of 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, supra at 16.* Based on the evidence presented, it is concluded that the beneficiary would not be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been employed abroad in a specialized knowledge capacity for the requisite one-year period. *See* 8 C.F.R. § 214.2(l)(3)(iv). The petitioner failed to establish that the beneficiary possesses the requisite overseas employment for two reasons.

First, for the same reasons articulated above, the petitioner has not established that the beneficiary was employed in a specialized knowledge capacity or that he possessed specialized knowledge. As explained previously, the petitioner has failed to establish that the beneficiary's knowledge of the foreign entity's proprietary software, and the relevant industry, constitutes a specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other software employees employed by the foreign entity or in the industry at large.

Second, even if the knowledge described by the petitioner could be classified as "specialized," the record clearly establishes that the beneficiary has not been employed in a specialized knowledge capacity for the requisite one-year period. *See* 8 C.F.R. § 214.2(l)(3)(iv). The record indicates that the beneficiary commenced his employment on May 1, 2004. The current petition was filed on July 5, 2005. The record also establishes that the beneficiary received approximately 85 days of "extensive and progressive formal training" upon which the petitioner relies in asserting that the beneficiary has acquired specialized knowledge. Since there are less than 85 days separating the beneficiary's first day of employment (May 1, 2004) and the commencement of the one-year period of employment prior to the filing of the current petition (July 5, 2004), the beneficiary could not have been employed in a specialized knowledge capacity for at least one year prior to the filing of the petition.

Apparently acknowledging this determinative flaw, the director requested additional evidence on July 13, 2005 requesting that the petitioner "submit evidence as to when the beneficiary first obtained his specialized knowledge." As explained above, counsel to the petitioner acknowledged in his letter of August 3, 2005 that the beneficiary first obtained his specialized knowledge in March 2005. Therefore, given the initial training period and counsel's admission, it is clear that the beneficiary was not employed abroad for the requisite one-year period abroad in a specialized knowledge capacity.

Accordingly, the petitioner has not established that the beneficiary has been employed abroad in a specialized knowledge capacity for the requisite one-year period as required by 8 C.F.R. § 214.2(l)(3)(iv), and the petition may not be approved for this additional reason.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.