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U.S. Citizenship and Immigration Services

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[redacted]

File: LIN 05 175 51082 Office: NEBRASKA SERVICE CENTER Date: DEC 07 2006

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 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 laser technician 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, a corporation organized under the laws of the State of Indiana, is engaged in the development and sale of laser survey equipment and service to railroads. The petitioner claims that it is an affiliate of the beneficiary's foreign employer [redacted] of Sweden.

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

On appeal, the petitioner asserts that it has satisfied the criteria for establishing that the beneficiary has specialized knowledge. Specifically, the petitioner asserts that the beneficiary has specialized knowledge of the petitioner's unique [redacted] Clearance Laser System and the processing of data files for input into its primary customer's mainframe clearance system. **The beneficiary allegedly acquired his specialized** knowledge through a combination or experience and 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 or that the beneficiary possesses such 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 February 23, 2005 appended to the initial petition, the petitioner describes its business as selling and renting its "hi-tech laser systems" to railroad companies primarily for surveying purposes. The petitioner employs five people in the United States while the foreign entity employs nine people in Sweden. According to the petitioner, it performs surveying projects on three continents and maintains the 25 laser systems it has worldwide. The petitioner attached technical information regarding its laser system. Finally, the petitioner described the beneficiary's purported specialized knowledge as follows:

> [The beneficiary] has worked for over five years for [the foreign entity], and worked on the systems all over the world. Recently, due to the increase in our US customer base, it has become necessary for him to travel more frequently to the United States, thus we are seeking to transfer [the beneficiary's] employment to the US based company and payroll following approval of this Visa Application. Due to the extremely specialized nature of our laser systems we require an individual with extensive knowledge of our systems and our US customers which [the beneficiary] possesses as well as the willingness to travel to our many customer sites for short term projects.

On May 23, 2005, the director requested additional evidence. The director requested, *inter alia*, evidence that the beneficiary's knowledge is indeed specialized.

In response, the foreign entity provided a letter dated August 4, 2005 which further describes the beneficiary's duties and purported specialized knowledge as follows:

> The duties to be performed by [the beneficiary] are as follows:

1) Administration, calibration of [redacted] Clearance Laser Systems (60%)
2) Communication with the software staff and the processing staff in Sweden
3) Maintenance of [redacted] [sic] Clearance Laser Systems and accessories (10%)
4) Processing of laser data files produced during field operations (30%)

[The foreign entity] hereby [certifies] that [the beneficiary] is a highly competent technician who has an extensive knowledge of the [redacted] Clearance Laser System. [The beneficiary] possesses a unique and advanced knowledge of the process, procedures and equipment connected to the [redacted] Clearance Laser System. [The beneficiary's] knowledge is very specialized as we have only 25 units of the unique [redacted] Clearance Laser System worldwide (6 in the United States). The skills needed are not generally known and requires [sic] a very long training to achieve.

The Laser System uses advanced software produced by a specialised software company, 3-COMP in Växjö, Sweden. It's crucial that [the beneficiary] can communicate with the programmers concerning U.S. customer requested changes and improvements in our software. It's a very helpful skill to have knowledge of the Swedish language in this communication. As mentioned above [the beneficiary] is also responsible for the communication between the field crew and processing staff in Sweden.

[The petitioner's] main account in the United States is the BNSF Railroad Company. BNSF uses a very special and complicated mainframe clearance system, call Enclog, to store and process clearance data (load simulations together with train orders). As far as we know this special system is used by no other railroad company in the world. Administering the Enclog system during the field work requires a specific education given by [the foreign entity and the petitioner] and also a long "hands on" experience. We have given [the beneficiary] that specific education and through his long practical experience he has gradually built up his excellent knowledge of this very special system.

Processing data files for the input to the BNSF mainframe also requires a specialized education and training. [The beneficiary] has this knowledge and has over 5 years of successful operation behind him. We have many United States customers very pleased with our operation and [the beneficiary] is an essential piece of this success.

[The beneficiary] continuously received company specific education is:

- the BNSF Enclog system
- general date processing procedures for U.S. Railroads
- special software training for [redacted] laser programs and ClearLoad simulation programs.

[The foreign entity] hereby [certifies] that [the beneficiary] has received this education through [the foreign entity]. As the education has been given continuously the exact

> dates for the education [are] difficult to mention but the education can be estimated to at least four weeks each year from 2001 and ahead.

The petitioner also provided copies of internet job postings which do not require employees to have the knowledge similar to the beneficiary's in an attempt to establish that his knowledge is indeed specialized.

On August 18, 2006, the director denied the petition concluding that the petitioner failed to establish that the beneficiary would be employed in a specialized knowledge capacity or that he has specialized knowledge. The director concluded 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.'"

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has specialized knowledge.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary will be employed in a specialized knowledge capacity, or possesses specialized knowledge, 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 an experienced technician with knowledge of laser surveying equipment, the petitioner fails to establish that this position requires an employee with specialized knowledge.

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 special or advanced body of knowledge which would distinguish the beneficiary's role from that of petitioner's other experienced employees 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).

In support of its assertion that the beneficiary's knowledge of the [redacted] Clearance Laser System and the processing of data files for input into BNSF Railroad Company's mainframe clearance system constitutes "specialized knowledge," the petitioner relies heavily on its position that the laser system and mainframe are both so unique, specialized, and complicated that beneficiary's knowledge in this field constitutes "specialized knowledge." The petitioner further asserts that the beneficiary gained this specialized knowledge through years of experience working for the overseas entity and through specialized, ongoing training programs.

The petitioner has not established that the beneficiary's knowledge of the [redacted] Clearance Laser System or the BNSF Railroad Company's mainframe clearance system constitutes "specialized knowledge." The record does not reveal the *material difference* between the petitioner's laser system and other similar systems on the market. Likewise, the record does not reveal the *material difference* between the BNSF Railroad Company's mainframe and similar mainframes. Without producing evidence that the petitioner's product or service is different in some way from similar products or services offered on the market, the petitioner cannot establish that the beneficiary's knowledge of the use or maintenance of the petitioner's product is noteworthy, uncommon, or distinguished by some unusual quality that is not generally known by similarly experienced personnel engaged within the beneficiary's field of endeavor. Simply asserting that the petitioner's product is "unique" or "proprietary" is not sufficient to establish that knowledge of the product is indeed "specialized." Again, simply 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. at 165.

Similarly, the petitioner has not established that beneficiary has received training or has experience which would distinguish the beneficiary's role from that of the petitioner's other experienced employees or in the industry at large. While the petitioner asserts that the beneficiary continuously received training in the areas of his purported specialized knowledge while employed with the foreign entity, the petitioner provided no details regarding the duration or content of such training, other than a roughly estimated four week period, and failed to specify whether other employees received similar training. Again, simply going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* However, even a highly trained employee will not be deemed to have specialized knowledge unless, as explained above, the petitioner also establishes that this knowledge is noteworthy, uncommon, or distinguished by demonstrating that the knowledge of the petitioner's product or process differs in some material way from the knowledge possessed by other experienced personnel working in the beneficiary's field of endeavor.[1]

Moreover, while the petitioner provides copies of internet job postings, which fail to list knowledge of the petitioner's product, its customer's mainframe, or railroad surveying as job requirements, this does not establish that the beneficiary's job requires "specialized knowledge." First, there is no evidence that this search was exhaustive or that the petitioner attempted to recruit employees with the appropriate knowledge or experience base. Second, absent evidence that the petitioner's product or service is materially different from other products or services on the market, a job posting's failure to specifically list knowledge of the petitioner's product is not persuasive in establishing that such knowledge is specialized. Third, the mere fact that employers are not seeking employees with skills similar to those possessed by the beneficiary does not

[1]It must be noted that, on appeal, the petitioner introduces a letter dated October 9, 2005 from the foreign employer providing more details regarding the beneficiary's experience and training. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence in response to the director's Request for Evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.

prove that these skills are uncommon. In fact, such evidence could just as easily establish the opposite, i.e., that there are so many potential employees possessing skill sets similar to the beneficiary's that employers either do not need to recruit such employees or there are currently no jobs available. Fourth, and most important, the unavailability of workers to perform the beneficiary's proposed job is not relevant in this proceeding. Rather, as explained below, the test is whether the knowledge in question is possessed in the United States labor market and not whether workers are available to perform the job.

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum written by the then Acting Associate Commissioner 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.

The AAO does not dispute the likelihood that the beneficiary is a skilled and experienced worker 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.")

As explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other employees experienced in using similar equipment. The petitioner notes that

the beneficiary is highly experienced in using the laser system and its customer's mainframe. However, as the petitioner has failed to document any materially unique qualities to this equipment which distinguish it from other similar equipment on the market, these claims are not persuasive in establishing that the beneficiary, while highly skilled, would be a "key" employee. There is no indication that the beneficiary has any knowledge that exceeds that of any employee with experience, or that he has received special training in the company's methodologies or processes which would separate him from any other employee employed with the petitioner or with the foreign entity.

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 did not establish that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(iv). As explained above, the petitioner has not established that the beneficiary possesses specialized knowledge or that he will be employed in a position in the United States which requires specialized knowledge. For identical reasons, the petitioner has not established that the beneficiary has been employed abroad in a specialized knowledge capacity. Also, as the petitioner does not assert that the beneficiary has been employed abroad in a managerial or executive capacity, the record also does not establish that the beneficiary may be so classified. Therefore, the petitioner may also not be approved for this 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.