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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC-04-177-52994 Office: CALIFORNIA SERVICE CENTER Date: JUL 11 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 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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 qualify the employment of its retail recycling specialist as an L-1B nonimmigrant intracompany transferee 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 under the laws of the State of California and is engaged in retail recycling services. The petitioner claims that it is the affiliate of [redacted] de Mexico, located in Tijuana, Mexico.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in the United States in a specialized knowledge capacity.

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 for the petitioner asserts that the precedents cited by Citizenship and Immigration Services (CIS) were misapplied and that the position in the United States qualifies as a specialized knowledge position. In support of this assertion, the petitioner submits additional evidence.

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) states that an individual petition filed on Form I-129 shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

> services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be discussed in the present matter is whether the petitioner has established that the beneficiary's position in the United States will involve specialized knowledge as required by the regulation at 8 C.F.R. § 214.2(l)(3)(ii), and whether the beneficiary was employed abroad in a capacity that utilized such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(ii).

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 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 or procedures.

In the initial petition, the petitioner described the beneficiary's job duties as follows:

> The [r]etail [r]ecycling [s]pecialist is responsible for inspecting and training the employees of retail stores and recycling centers regarding [petitioner's] specific mechanical systems and processes, as well as ensuring compliance with recycling law and regulations. He must also register and train beverage manufacturers and distributors on program aspects and monitor their program-related transactions.
>
> He will conduct regular audits of client recycling activities, map the locations of convenience zones and recyclers, and conduct research studies, analyzing data and developing reports to determine various recycling rates, aid enforcement efforts, and improving [the petitioner's] program refinement. The [r]etail [r]ecycling [s]pecialist is also responsible for utilizing his specialized expertise to expand [the petitioner's] market for recycled content products.

On June 10, 2004, the director requested additional evidence. Specifically the director requested copies of organizational charts, lists of foreign national employees and their immigration status, as well as a more detailed articulation of how the beneficiary's duties abroad are different from other employees within the petitioner and within this particular industry.

In response, counsel submitted a letter and additional documents. The petitioner resubmitted the initial description and added the following description to the beneficiary's duties:

> The duties performed abroad and in the U.S. by [beneficiary] have been and will be unique and more advanced due to the complex combination of knowledge required to implement [the petitioner's] policies and procedures concerning implementation/integration of its recycling systems/processes into large client locations (e.g. Home Depot).

On July 7, 2004, the director denied the petition. The director determined that the position did not require a person with specialized knowledge.

The petitioner subsequently appealed. On appeal, counsel for the petitioner asserts that the director misapplied precedent and that the beneficiary's position requires specialized knowledge.

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish specialized knowledge. *Id.* It is also appropriate for the AAO to then 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. A specific occupation will not inherently qualify a beneficiary as possessing specialized knowledge. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981)(citing *Matter of Raulin*, 13 I&N Dec. 618 (R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)).[1]

In making a determination as to whether or not knowledge possessed by a beneficiary is special or advanced the AAO relies on the statute and regulations, prior precedent decisions, and legislative history. This yields a multiple pronged analysis to determine whether the petitioner has employed and will employ the beneficiary in a specialized knowledge capacity. In examining whether an alien has "special knowledge" of the petitioner's product and its application in international markets or an "advanced level" of knowledge of its processes and procedures, the AAO will consider whether the beneficiary: 1) is part of the petitioner's "key personnel" (*See generally*, H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. 2750); 2) is more than a specialist or a skilled employee (*Matter of Penner*, 18 I&N Dec. 49, 50 (Comm. 1982)); 3) has knowledge that qualifies as "special" under the plain meaning of the term; 4) performs a key process or function for the petitioner (*See Matter of Penner*, *id.*); and 5) possesses certain characteristics that have been deemed to be illustrative of

[1] Although the cited precedents pre-date the current statutory definition of "specialized knowledge," the AAO finds them instructive. Other than deleting the former requirement that specialized knowledge had to be "proprietary," the 1990 Act did not significantly alter the definition of "specialized knowledge" from the prior INS regulation or precedent decisions interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying [i.e., not specifically incorrect] interpretations by INS," H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that the cited cases, as well as *Matter of Penner*, remain useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.

specialized knowledge (*see* Memo, James A. Puleo, Acting Executive Associate Commissioner, *Interpretation of Specialized Knowledge*, March 9, 1994).

The alien should possess a type of special or advanced knowledge that is different from that generally found in the particular industry. Where the alien has special knowledge of the company product, the knowledge must be noteworthy or uncommon. Where the alien has knowledge of company processes and procedures, the knowledge must be advanced. The petitioner must also establish that the alien has such specific knowledge of the employer's product or processes that it would be burdensome, or counterproductive to the petitioner's business plan to hire someone other than the alien to fill this position in the United States. *See generally*, Memorandum of Fujie Ohata, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status" (September 9, 2004).

An important characteristic of a beneficiary with specialized knowledge is that they are more than skilled employees. In *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. at 49. The decision noted that the 1970 House Report, H.R. No. 91-851, stated that the number of admissions under the L-1 classification "will not be large" and that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn." *Id.* at 51. 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)).

Although counsel refers to the beneficiary as an expert by virtue of the beneficiary's experience with the petitioner's business procedures and products, the petitioner has not established that the beneficiary is more than a skilled or experienced employee. In order to receive this classification, the claimed specialized knowledge has to be examined in the context of those in the particular industry and within the petitioning entity itself to such a degree that the employee would qualify as key or crucial with an uncommon or noteworthy knowledge.[2] The petitioner has asserted that the beneficiary has worked for an affiliate of the

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[2] 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 an 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 such that the beneficiary's knowledge is relative to the petition at bar. *See 1756, Inc. v. Attorney General*, 745 F. Supp. 9, 15 (D.D.C. 1990)(concluding that specialized knowledge is a relative determination).

petitioner since 1999, and has an advanced knowledge of their processes and procedures. In attempting to ascertain any distinction among this petitioner's processes and procedures with others within the industry the only relevant articulation in the record is an assertion by the petitioner in response to the director's RFE which states:

> [The petitioner] is an international industrial recycling company, specializing in turn key programs for all solid non hazardous by-products . . . The company's primary market is in large industrial operations. . . . This involves a different approach for the services provided.

Thus, it cannot be determined what the petitioner does which is different from routine industry procedure, and why the beneficiary's knowledge of this procedure could be considered specialized. Without such a distinction it cannot be determined that the beneficiary's position here in the United States requires more than a skilled employee. The position itself has not been distinguished such that it would require more than just a similarly situated employee within the industry. The AAO can take judicial notice of the fact that the petitioner is not the only company processing or recycling industrial waste, but without a distinction as to why this particularly beneficiary's knowledge of the petitioner's processes or procedures rises above the basic knowledge that any similarly situated employee would have, it cannot be determined that his knowledge is advanced.

Based on the petitioner's description of the beneficiary's duties, and the failure to distinguish those duties among other employees in the petitioner and within the particular industry, the AAO must conclude that the beneficiary has been performing functions that are common and routine in the retail recycling industry and thus not advanced. The sales materials submitted by the petitioner are not probative as to the why this beneficiary's knowledge rises above the skill typically found in the industry at this level. Nor is such sales material or the beneficiary's resume demonstrative of the beneficiary's status as a "high-level" worker or "expert," as claimed by counsel. While the petitioner has submitted sales documentation which explains the type of service offered, retail recycling, it does not articulate how or why this petitioner's method of operation is significantly different from procedures used by other businesses within the retail recycling industry. Without an articulation of the beneficiary's particular skill, or this petitioner's particular method of operation, relative to the petitioners' other employees or to the market as a whole, the AAO can not determine whether the beneficiary's knowledge of the petitioner's processes is "an advanced level of knowledge of processes and procedures of the company." *See* section 214(c)(2)(B) of the Act.

At the heart of this petitioner's failure to demonstrate eligibility is the failure to adequately articulate and support a distinction between the duties that will be performed by the beneficiary with those which would be performed by similarly situated employees throughout the industry. On appeal counsel for petitioner has cited an internal CIS memo and asserts that it supercedes established precedent. Counsel asserts that the director's referral to established precedent as a misapplication of law because the in the cases cited the petitions were approved. Each individual petition is a separate record of proceeding which is required to meet its own burden of proof. Thus, the holding in particular precedent decision may not be as relevant to a petition at bar as its reasoning which was used in reaching that decision. *See 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that specialized knowledge is relative determination). Barring a similarity of fact patterns the reasoning of a precedent decision serves to inform current CIS policy with regard to this classification more

than whether that particular decision was approved or denied. In addition, internal memos are for guidance only. These memos have not been through the notice and comment procedure required for establishing regulations, and thus do not supercede statute, regulation or established precedent decisions. They are not intended to create any right, substantive or procedural, in any form or manner.

Counsel's assertions that the director misapplied precedent is not probative of whether the position in the United States involves the application of specialized knowledge. The petitioner asserts that the beneficiary's experience abroad has given the beneficiary a specialized knowledge which will be applied in the U.S. position. This is not the same, however, as saying that the position itself requires specialized knowledge, and without an articulation of why the foreign organization's processes and procedures are significantly different this assertion relies on a presumption which is not supported by the record. Moreover, while counsel asserts that the cited precedent decisions in fact support the instant petition, counsel's conclusion appears to be based solely on the final determination in each case, i.e., approval of the classification sought. Regardless, for counsel to make such a claim, the burden remains on counsel to furnish evidence that the facts of the instant petition are analogous to those in the precedent decisions. Here, counsel has not met that burden.

Another characteristic of a beneficiary with specialized knowledge is that they possess knowledge that meets the plain meaning of special. Special is defined as "surpassing the usual; distinct among others of a kind; peculiar to a specific person or thing." Webster's II New College Dictionary, 2001, Houghton Mifflin. *See also* Webster's Third New International Dictionary, 2001 (defining special as "distinguished by some unusual quality; uncommon; noteworthy"). In this case the petitioner is asserting that the beneficiary has an advanced knowledge of the company's process or procedure such that the knowledge is specialized and required for the U.S. position.

An additional characteristic of a beneficiary with specialized knowledge is that he or she typically carries out key processes or functions. As stated by the Commissioner in *Matter of Penner*, 18 I&N Dec. at 52, the beneficiaries were considered to have specialized knowledge if they had 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.

On appeal counsel for petitioner has asserted that the beneficiary will be performing a key process or function, but the record does not support this assertion. In a letter dated June 25, 2004, counsel for petitioner asserts that the beneficiary will have "full responsibility for the company's retail recycling program," a position heretofore unfilled by one person, and claims that because these duties are necessary for the petitioner's operation they are a key process or function. This confuses the basic economic rationale for hiring an employee – the need to fill a position – with the ability of an intracompany transferee to perform a key process or function. Counsel stated that until now other employees of the petitioner have been

performing this function in an ad hoc manner, but this nonetheless indicates that the ability to perform the duties of the position are not peculiar to this beneficiary. In addition, a distinction can be made between a person who can perform duties through physical or skilled labor, and a person who is employed in a position because of uncommon or noteworthy skills peculiar to them.

The record falls short of supporting eligibility on this issue because the petitioner has failed to indicate why the processes or procedures employed by the petitioner are significantly distinguishable such that the beneficiary's knowledge of them are uncommon or noteworthy and peculiar to him. The failure of the petitioner to articulate and support any distinction in its procedures, and the failure of the petitioner to persuasively assert that this beneficiary is being hired to specifically to perform a key process or function, as opposed to filling a new position generated by the expansion of business, tips the weight of the evidence in the record so that it appears more likely than not the position which the beneficiary is to fill does not require specialized knowledge. The petitioner has not persuasively asserted that this beneficiary's knowledge is advanced in relation to other employees working for the petitioner. *See 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that specialized knowledge is relative determination).

Moreover, in what appears to be part of a claim that the beneficiary applies specialized knowledge in international markets, the petitioner states that "the beneficiary ensures "compliance with recycling laws and regulations." Counsel on appeal further claims that the beneficiary is "thoroughly familiar with Mexican and U.S. recycling laws and regulations" and indicates that this knowledge was gained through "managing a number of high profile international accounts in Mexico, including Samsung and Coca-Cola." Counsel and the petitioner fail to explain with any specificity, however , whether the beneficiary was dealing solely with the operations of these components in Mexico or whether he was responsible for recycling operations of these companies in the United States as well. Regardless, these claims have not been supported in any way through corroborating evidence. Therefore, it appears more likely that the beneficiary only handled recycling operations for these companies in Mexico and, as such, the claim that the beneficiary possesses specialized knowledge of U.S. recycling laws and regulations is not credible. If CIS fails to believe that a fact stated in the petition is true, CIS may reject that fact. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir.1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C.1988); *Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). Furthermore, even assuming *arguendo* that the U.S. position was considered a specialized knowledge position, lacking knowledge of U.S. recycling laws and regulations, which appears to be central to the proffered position, the beneficiary does not possess the necessary knowledge to fill the position. For this additional reason, the petition may not be approved.

Finally, the agency has interpreted "specialized knowledge" to find that a qualified beneficiary should possess certain characteristics. In a 1994 memo written by James A. Puleo, Acting Executive Associate Commissioner, on the subject of "Interpretation of Specialized Knowledge," the legacy INS offered the following possible characteristics of an alien who possesses specialized knowledge:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place;

- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;

- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;

- Possesses knowledge which, normally, can be gained only through prior experience with that employer;

- Possesses knowledge of a product or process, which cannot be easily transferred or taught to another individual.

The Associate Commissioner also stated:

> From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor.

Id. In a subsequent memorandum, the Associate Commissioner later added that "[a]ll companies are different, and it can generally be expected that no two companies will employ the same procedures. Standing alone, however, an alien's knowledge of minor variations in style or manner of operations cannot be considered specialized." Legacy INS memo, HQSCOPS, 70/6.1, "Interpretation of Specialized Knowledge" (December 20, 2002).

In this case the petitioner has asserted that the beneficiary meets several of these criteria. However, the AAO is not persuaded by the petitioner's assertions because the petitioner has not articulated any significant distinction in the foreign organization's procedures, nor has it articulated why the particular processes and procedures utilized abroad are even relevant to this particular industry within the United States. In the context of the commissioner's interpretation of specialized knowledge the beneficiary's experience or familiarity with the foreign organization's manner of operations does not, standing alone, establish his knowledge is specialized or an advance knowledge of the petitioner's product or service. Further, without an articulated and supported distinction of significant differences in the petitioner's service from others within this particular industry, the record is not clear as to why this beneficiary's knowledge of foreign operating conditions is relevant here in the United States.

Overall, the mere fact that counsel for the petitioner states again and again that the beneficiary possesses special and advanced knowledge does not make it so. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Here, the petitioner and counsel fail to explain with specificity and corroborating evidence how the knowledge of the beneficiary is special or advanced and how the proffered position requires such specialized knowledge.

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary was not employed abroad, and will not be employed in the future, in a specialized knowledge capacity. Nor has it been established that the beneficiary's knowledge of the petitioner's business procedures is advanced, despite the fact that only two other employees have received the training that serves as the basis of a distinction from other employees of the petitioner.

On review, counsel has not demonstrated that the beneficiary possesses "specialized knowledge" as defined in section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), and the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D), nor has counsel demonstrated that beneficiary would be employed in a capacity utilizing any such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(ii).

In visa 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 denied.