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U.S. Citizenship and Immigration Services

[redacted]

D7

File: LIN 05 232 51351 Office: NEBRASKA SERVICE CENTER Date: MAR 06 2007

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 principal consultant to be employed at a new office in the United States 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 Delaware corporation and is engaged in the business of information technology consulting. The petitioner claims a qualifying relationship with the foreign entity, [redacted], of the United Kingdom, as a subsidiary.

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 processes relating to Microsoft BizTalk and the petitioner's consulting methodologies as these relate to developing and delivering integration solutions on the Microsoft platform. In support of the appeal, counsel provided a brief and offered 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) 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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(vi) states that if the petition indicates that the beneficiary is coming to the United States in a specialized knowledge capacity to open or to be employed in a new office, the petitioner shall submit evidence that:

(A) Sufficient physical premises to house the new office have been secured;

(B) The business entity in the United States is or will be a qualifying organization as defined in paragraph (l)(1)(ii)(G) of this section; and

(C) The petitioner has the financial ability to remunerate the beneficiary and to commence doing business in the United States.

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 he possesses 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 July 28, 2005 attached to the initial petition, the petitioner describes its proposed business operation in the United States as follows:

> [The petitioner] will offer the U.S. marketplace the same Information Technology consulting services that it currently offers clients throughout Europe, i.e., assisting customers in creating business processes and integration solutions based upon the Microsoft technology platform. The brand equity of [the foreign entity] will be leveraged to maximum effort in order to build upon [the foreign entity's] worldwide reputation.
>
> As the Company already has seen in Europe, there are no other companies currently operating in the Mid-West that has the same focus on Microsoft BizTalk as [the petitioner]. Discussions with senior Microsoft personnel in the region confirm that while Microsoft has partners that can do BizTalk, they have no "go to" partners that have the in-depth knowledge

> and experience possessed by [the petitioner] and our team of highly skilled Consultants.

The petitioner also provided job descriptions for the beneficiary for both the position abroad and for the proffered position in the United States. As these descriptions are clearly delineated in the petitioner's letter dated July 28, 2005, they will not be repeated here.

On August 4, 2005, the director requested additional evidence establishing that the beneficiary's knowledge is indeed specialized. The director requested, *inter alia*, a description and evidence distinguishing the beneficiary's knowledge from the knowledge possessed by other similarly employed persons and evidence regarding any training provided to the beneficiary through which he acquired the purported specialized knowledge.

In response, counsel to the petitioner provided a letter dated September 15, 2005 in which the beneficiary's specialized knowledge was described as follows:

> The Company chose [the beneficiary] for temporary transfer to the United States to assist with the development of the new Mid-West office as a direct result of his employment with the sending entity since March 2000, during which time he has developed **uncommon** skill and expertise in setting architecture for all high-profile and high-risk projects undertaken by the Company, that is not otherwise available in the general labor market nor within the remainder of the Petitioner's own workforce.

Counsel further described the beneficiary as the foreign entity's only "subject-matter expert charged with setting architecture for all high-profile and high-risk projects undertaken by the Company to ensure success" and explained that the beneficiary "received extensive training and education with respect to BizTalk." Counsel, however, failed to provide any details regarding this purported training. Counsel also admitted that an "individual can obtain BizTalk certification outside of employment with [the foreign entity]," but that the foreign entity's application of this training in deploying BizTalk is "unique."

Finally, counsel provided a combined job description for the beneficiary's position abroad as well as for the proffered United States position. This description, which is part of the record and which will not be repeated here, prominently includes the application of the beneficiary's purported specialized knowledge, i.e., managing and directing high-risk and high-profile installations.

On September 21, 2005, 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 processes relating to Microsoft BizTalk and the petitioner's consulting methodologies as these relate to developing and delivering integration solutions on the Microsoft platform. In support of the appeal, counsel provided a brief and offered additional evidence regarding the beneficiary's training and his purported specialized knowledge.

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) or that he has specialized knowledge.

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 principal consultant, the petitioner fails to establish that the position in the United States requires an employee with specialized knowledge or that he has specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States requires "specialized knowledge" and that the beneficiary possesses such "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 BizTalk proficient professionals employed by the petitioner, the foreign entity, 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).

The petitioner asserts that the beneficiary possesses uncommon and unique specialized knowledge of setting architecture for all high-profile and high-risk projects undertaken by the Company. In support of this assertion, the petitioner relies heavily on the uniqueness of the petitioner's service to its customers and the beneficiary's extensive training and experience. The petitioner also alleges that the beneficiary is the only person employed by the foreign entity in possession of such substantial experience in setting architecture for all high-profile and high-risk projects undertaken by the Company. However, despite these assertions, the record does not reveal the material difference between the beneficiary's knowledge and the knowledge possessed by other experienced and/or certified software employees proficient in BizTalk solutions employed by the foreign entity, the petitioner, or in the industry at large. As admitted by counsel, BizTalk certification and experience is available to, and possessed by, people who are not employed by the foreign entity. The petitioner also admits that Microsoft works with other partners in the United States "that can do BizTalk." While the petitioner purports that its employees, and the beneficiary, are more highly skilled than these other providers, the petitioner never distinguishes the beneficiary's knowledge from that possessed by the foreign entity's other employees or in the industry at large. Absent evidence to the contrary, the beneficiary's knowledge does not appear to be advanced, noteworthy, or uncommon.

Also, while the petitioner repeatedly points to the beneficiary's "extensive training and education with respect to BizTalk" in asserting that his knowledge is specialized, the petitioner provided virtually no information regarding this purported training. Again, 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.[1]

The AAO does not dispute the likelihood that the beneficiary is a skilled and experienced software professional who has been, and would likely 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. 49, 52 (Comm. 1982). 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

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[1]It is noted that, on appeal, counsel to the petitioner offered an affidavit providing further information regarding the beneficiary's purported specialized knowledge and materials describing his training and experience. However, 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 director specifically requested information describing and distinguishing the beneficiary's specialized knowledge and evidence concerning the beneficiary's training and experience. The petitioner failed to submit the requested evidence and now submits it on appeal. 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). Moreover, a petitioner may not make material changes to a petition, or the beneficiary's job description, in an effort to make a deficient petition conform to Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). Therefore, the appeal will be adjudicated based on the record of proceeding before the director.

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* 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 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 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 experienced software professionals with a background in BizTalk solutions. As the petitioner has failed to document any advanced or uncommon qualities to the beneficiary's knowledge of BizTalk or the processes surrounding its application, the petitioner's 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 knowledge that exceeds that of any experienced and/or certified BizTalk proficient professional, 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 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.*

Accordingly, it is concluded that the beneficiary would not be employed in the United States in a capacity involving specialized knowledge and that he does not possess specialized knowledge. For this reason, the appeal will be dismissed.

Beyond the decision of the director, a related matter is whether the petitioner has established that the beneficiary's prior year of employment abroad involved specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(iv).

As explained above, the petitioner has failed to establish that the beneficiary's knowledge is specialized as defined by the statute and regulations or that the beneficiary will be employed in the United States in a specialized knowledge capacity. Likewise, the petitioner has failed to establish that the beneficiary has been employed abroad in a specialized knowledge capacity. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other BizTalk proficient professionals employed by the foreign entity 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. at 165 (Comm. 1998). The petitioner has not established that the beneficiary's knowledge as applied abroad was noteworthy, uncommon, or advanced. For this additional reason, the petition may not be approved.

Beyond the decision of the director, the petitioner did not establish that sufficient physical premises to house the new office have been secured as required by 8 C.F.R. § 214.2(l)(3)(vi)(A).

Along with the initial petition, the petitioner attached a copy of a "REGUS Business Centre Service Agreement" as evidence that it has secured sufficient physical premises to house the new office. This Agreement appears to give the petitioner the use of one "workstation" in the business center. This Agreement

does not appear to be a lease for physical premises, does not include a description of the "workstation," does not reveal its duration, and omits most of the attached Terms of Business which have been incorporated into the Agreement. Importantly, Term #18 does appear at the bottom of the Agreement in very fine print and states in pertinent part the following:

> Your Agreement is the commercial equivalent of an Agreement for accommodation in a hotel. The whole of the business center remains our property and in our possession and control. You acknowledge that your Agreement creates no tenancy interest, leasehold estate or other real property interest in your favor with respect to the accommodation. We are giving you just the right to share with us the use of the business center so that we can provide the services to you.

In view of the above, the record establishes that the petitioner has not secured sufficient physical premises to house the new office. First, the petitioner has not secured "physical" premises. Although the record establishes that the petitioner has acquired some right to use a workstation in a business center, it is clear that this right does not include the right to possession of any physical space. Therefore, the petitioner is ineligible for the benefit sought for this reason.

Second, even assuming that the petitioner has acquired physical premises, the record establishes that these premises will not be sufficient for the new office. As explained in the letter dated October 20, 2005, the petitioner intends to staff its "Chicago office" with six individuals. However, as the Agreement only covers one "workstation," it is unclear how this single workstation could serve six software professionals. Therefore, the petitioner is also ineligible for the benefit sought for this reason.

Accordingly, the petitioner has not established that it has secured sufficient physical premises to house the new office, and the petition may not be approved for this additional reason.

Beyond the decision of the director, the petitioner did not establish that it has a qualifying relationship with the foreign entity, [redacted]

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a 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.

8 C.F.R. § 214.2(i)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section." A "subsidiary" is defined, in part, as a legal entity which "a parent owns, directly or indirectly, more than half of the entity and controls the entity."

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *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). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the initial petition, the petitioner asserts that it is 100% owned by the foreign entity. In support of this assertion, the petitioner provides a copy of its articles of incorporation and registration to do business in Illinois. However, the petitioner provided no evidence of ownership or control of the United States operation. The petitioner did not provide copies of stock certificates, stock ledgers, shareholder agreements, or any other evidence of the ownership or control of the petitioner. Therefore, as the petitioner has not provided any evidence of its ownership and control, the petitioner has not established that it has a qualifying relationship with the foreign entity, 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.