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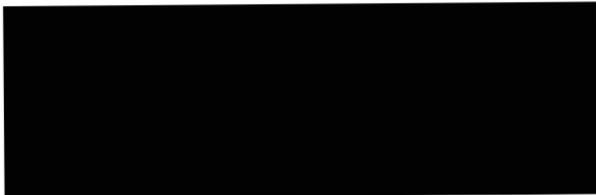
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



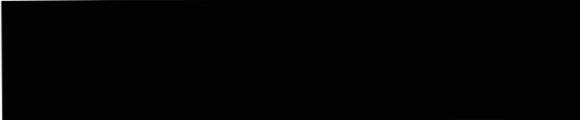
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File: EAC 09 058 51530 Office: VERMONT SERVICE CENTER Date: **MAR 17 2010**

IN RE: Petitioner: 
 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)

ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).



Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont 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 visa petition seeking to employ the beneficiary as an L-1B 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 Delaware corporation, claims to be a subsidiary of the beneficiary's foreign employer located in India. The petitioner states that it is an information technology solutions and services provider with clients in the avionics, defense, telecommunications and multimedia industries. The petitioner seeks to employ the beneficiary in the position of electro-mechanical software engineer for a period of three years, and indicates that he will be assigned to work on a project for the petitioner's client, [REDACTED] (hereinafter the "unaffiliated employer").

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been or will be employed in a capacity involving specialized knowledge. The director further found: (1) that the petitioner failed to establish that the beneficiary would be principally supervised and controlled by the petitioning company while assigned to the unaffiliated employer's worksite; and (2) that the beneficiary's assignment to the worksite of an unaffiliated employer would be an impermissible arrangement to provide labor for hire under provisions of section 214(c)(2)(F) of the Act, as created by the L-1 Visa Reform Act of 2004. In denying the petition, the director determined that the claimed specialized knowledge is not specific to the petitioning organization.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner asserts that the director failed to acknowledge that the skills, processes and methodologies required to execute the assigned client project are proprietary to the petitioning organization, Counsel further asserts that the beneficiary's training is "more extensive than was acknowledged in the denial notice." Finally counsel asserts that the petitioner submitted sufficient evidence to establish that the beneficiary will be controlled by the petitioning company and not be the unaffiliated employer, including a letter from the client confirming this fact. Counsel submits a brief, but no additional evidence, in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

I. Relevant Law

Under section 101(a)(15)(L) of the Act, an alien is eligible for classification as a nonimmigrant if the alien, among other things, will be rendering services to the petitioning employer "in a capacity that is managerial, executive, or involves specialized knowledge." Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

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.

Section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (the "L-1 Visa Reform Act"), in turn, provides:

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if—

- (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
- (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated

employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Section 214(c)(2)(F) of the Act is applicable to all L-1B petitions filed after June 6, 2005, including petition extensions and amendments for individuals that are currently in L-1B status. *See* Pub. L. No. 108-447, Div. I, Title IV, § 412, 118 Stat. 2809, 3352 (Dec. 8, 2004).

Due to the nature of the L-1 Visa Reform Act, the two issues raised by the director – whether the petitioner has established that the beneficiary possesses the requisite "specialized knowledge" and whether the requirements of the L-1 Visa Reform Act have been satisfied – are independent but legally intertwined. Prior to evaluating whether the L-1 Visa Reform Act applies, an adjudicator must determine whether the beneficiary is employed in a specialized knowledge capacity. If the beneficiary is not employed in this capacity, the petition may be denied on this basis and there is no need to address the requirements of the L-1 Visa Reform Act. Because the director reviewed both issues, the AAO will nevertheless discuss both specialized knowledge and the elements of the L-1 Visa Reform Act. Upon review, the AAO concurs with the director's decision to deny the petition.

II. Specialized Knowledge

The primary issue in this proceeding is whether the petitioner has established that the beneficiary has been or will be employed in a specialized knowledge capacity and whether the beneficiary possesses specialized knowledge. 8 C.F.R. §§ 214.2(l)(3)(ii) and (iv).

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on December 17, 2008. The petitioner indicated on Form I-129 that the beneficiary will be employed in the position of electro-mechanical engineer.

In a letter dated September 12, 2008, the foreign entity stated that the beneficiary has been employed by the petitioner's Indian parent company since July 2004 and currently holds the position of software engineer with the following duties:

- Tester – Writing test specification and stub, Unit testing of modules with LDRA tool, documenting results
- Reviewing
- Debugging problems that arise during testing for other members.
- Allocating work, tracking progress, performing configuration, interacting with client and making deliveries, in absence of team leader.

The foreign entity stated that the beneficiary will continue to "work on projects . . . for our U.S. based clients" and "work on Projects conforming to the guidelines of our Specific Standards and provide deliveries to the Clients before deadlines."

The foreign entity further described the beneficiary's experience and technical skill set as follows:

[The beneficiary] is working as a Software Engineer with [the foreign entity], with a total experience of 4 years. He has been a part of 5 projects and has worked with software like C++, LDRA tool with Tasking C-166, GCC, GHS compiler C, LDRA tool with CAD-UL compiler RTRT testing tool, TI Code Composer Studio, DOORS (CM tool), Avionic testing equipment and simulators.

The petitioner also provided a letter dated October 31, 2008 from its client, a supplier of systems and services to the aerospace, defense and homeland security markets. The unaffiliated employer explained that it contracted with the petitioner to provide technical support for a variety of commercial programs. The client indicated that the beneficiary specifically "would be providing technical support for the A330-200 MRTT [Multi Role Tanker Transport] program to provide new systems that are implemented in software."

On December 23, 2008, the director requested additional evidence, including, *inter alia*, a more detailed description of any proprietary procedures used by the beneficiary, accompanied by documentary evidence to support the petitioner's claims. The director requested that the petitioner use specific terminology and examples in explaining how the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry. The director further instructed the petitioner to explain in more detail exactly what is the equipment, system, product, technique, research, or service of which the beneficiary has specialized knowledge, and how the beneficiary's knowledge will be used on the proposed project.

The director also requested evidence pertaining to any pertinent training courses the beneficiary has completed during his employment with the organization, including evidence of the types of courses taken, the duration of the courses, the number of hours spent taking the courses each day and certificates of completion for the courses. The director requested that the petitioner identify the minimum amount of time required to train an employee to fill the proffered position, and to specify the number of similarly employed workers within the organization, the number of workers who have received similar training, and the number of employees deemed to qualify as "specialized knowledge" workers. Finally, the director requested a copy of the contract for services between the petitioner and the unaffiliated employer.

In response, the foreign entity's managing director, [REDACTED], submitted a letter dated February 2, 2009, in which he stated that the purpose of the beneficiary's assignment is as follows:

Our current requirement in the USA is to service requirements from [the unaffiliated employer] located in Vergennes, of quite a few components of the new aircraft being developed by Boeing (B787). Having built experience and expertise in these systems over the last 3 years in India whilst working on the system rigs provided by Boeing, it has now become imperative for us to deliver further services on the B787 systems at [the unaffiliated employer].

. . . From a list of more than a dozen companies, [the petitioner] was chosen by [the unaffiliated employer] as a partner mainly due to [the petitioner's] capabilities and its demonstration of integrating with technologies in [the unaffiliated employer] quickly.

[REDACTED] submitted a second letter dated February 2, 2009 in which he further described the nature and objectives of the project to which the beneficiary will be assigned. Specifically, he stated:

[The beneficiary] will be working on ARC (Air Refueling Computer) project for A330-200 (Multi Role Tanker Transport) that provides new systems to perform state of the art Air-Air refueling.

The system being built powers air refueling technologies long-term technology project system specifications/requirements necessary for interfacing with D-Six simulation environment. At its completion, the system is to allow air-refueling operator to use remote computer imagery rather than direct line-of-sight to connect to the aircraft receivers. The system is to provide high-definition stereoscopic imagery to the aircraft's boom operator. This advanced technology will give aircrew's wingtip-to-wingtip visibility behind their aircraft.

* * *

The complexity of these technologies requires multidimensional testing capability that enables multiple tests to be run concurrently, combine multiple types of test, conduct simultaneous testing, change tests in real-time, etc. Only a few global leaders are engaged in this business and there are just a very negligible number of persons who have this expertise not only in our corporation but in the world. Air-Air refueling system is pioneered by only by very few players like Boeing, Airbus and [the petitioner] being one of the long-time supplier of systems we have developed unique skill set that are required to carry out such complex system development and validation.

With respect to the beneficiary's specific involvement with the project, [REDACTED] stated:

[The beneficiary] has been involved in MRTT and ARC for the past two years working on this system for our client using ADA 95, Vision Click, McCabe, LabView, Raven Power PC Suite, Windriver Debugger and cutting-edge Vision ICE set up, BDI Abatron Emulator, NI CAN Analyzer, Oscilloscope, Mil STD-1553 Bus Analyzer, ARINC 429 Bus Analyzer, Processor MPC 555 and DO-178B Standard. Since [the beneficiary] has been a member of this project team for over 2 years, he has extensive understanding about the business and the processes of our client. Additionally he has been working with [the foreign entity] for more than 4 years and understands all other internal processes quite superbly. Moreover, he possesses a unique skill combination of system testing of MRTT and ARC, V&V of Integral Display units software for Eurocopter, IDS response to IDU Key panels and Display Mode Selector for setting parameters and determining operating modes, Hawk MFD and DMC, etc. His knowledge of our methodologies and processes for handling critical aircraft systems is rare and uncommon.

He will be required to be in our new corporate office and work under the direct supervision of [REDACTED] who is based in India. Having acquired strong aircraft system knowledge and experience of more than 4 years that is directly beneficiary to our key clients, [the beneficiary] is a natural employee to be in this position. [The beneficiary] is a highly competent technical professional with advanced skills who has gone on to gain vast and advanced business knowledge of the client and domain (especially in aircraft systems) knowledge. He has demonstrated acute capability of gathering and understanding the business

requirements and converting them into technical requirements. He also has advanced technical knowledge and skills necessary to resolve aircraft issues related to application environments, which can be handled only in the USA. . . . [The beneficiary] is one of only very few persons on the team capable of handling all the responsibilities proficiently. In a practical sense, he will be a functional manager.

Out of over 300 IT professionals at [the foreign entity], [the beneficiary] is one of only 10 professionals who is knowledgeable and proficient in this technology and methodologies and their use in our business. [The beneficiary] does possess knowledge and experience that is not common and readily available in the U.S. market and this knowledge and experience is valuable to [the petitioner's] competitiveness in the marketplace.

██████████ further emphasized that the beneficiary's combination of technical skills, experience in the "processes, procedures and methodologies of [the petitioner's] product and service delivery to clients," and years of experience in working on the project make the beneficiary a "key employee" who has enhanced the company's image, financial position, competitiveness and productivity. He further stated that the beneficiary holds knowledge that is "complex, sophisticated and obtainable after a lengthy training and experience using same." ██████████ also indicated it would be "difficult, if not impossible, to gain this knowledge without considerable experience at our operations."

With respect to the company's internal processes and methodologies, ██████████ explained as follows:

[The beneficiary] is very well versed in our design and architecture, testing concepts and processes, [the company's] Quality Management System Awareness, Avionics considering different fuel systems in use, various components of aircraft fuel systems and their interface with other aircraft systems, RBT techniques, etc. and [the company's] strategy and methodology. Our ability to implement successful programs helps companies increase efficiency, productivity and profitability by identifying trends and delivering solutions contained within their reservoir of data. The interoperability of this integrative technology is critical in the aviation industry. This methodology, designed and developed by [the foreign entity], is so powerful and diversified in its data and reporting capabilities that users from different locations can use it accurately with timely data, easy access, virtual location capabilities and, above all, the security of the information that is accessed. This makes this tool and methodology of [the petitioning organization] very valuable (and in high demand) to the present and emerging aircraft refueling industry. The knowledge of [the beneficiary] is rare but that is not the only reason it is specialized. He is one of very few professionals who know the combination of technologies, methodology in aircraft refueling. [The petitioner] design[s] and develops solutions for these companies using its home grown distinctive specialized variation and knowledge of these technologies and methodologies.

In addition, ██████████ explained that the beneficiary has helped the company define the technology, and "played a key role in the design, development and implementation of the process." He noted that the beneficiary's "pioneering effort and excellence with this technology led to her [sic] recognition and promotion to the role of

Senior Software Engineer at our facility in India," and that his "prototype development efforts" have elevated the company's standing.

██████████ further stated that the expertise the beneficiary gained "in the process of developing, modifying and integrating these technologies, methodologies and portals (as modified by [the petitioner]) is not available in the U.S. job market and involves our peculiar methodologies." Finally, with respect to the beneficiary's training, ██████████ stated:

Please note that eligible trainees on our MRTT and ARC technologies and methodologies typically have 2 or more years of industry experience with a good fundamental understanding of the application of cutting-edge technologies to the aviation industry. Graduates from this program are required to effectively and efficiently interact with end users and decision makers to understand their needs of the particular business, devise robust solutions that will aid the decision making process and provide insight into current operations. This training program rounds out the individual by exposing them to business communications and customer etiquette. At the conclusion of the training program at which the applicant must have demonstrated a thorough understanding of the technology, strategy and methodologies, they are assigned to work on a project. Since the technology and methodology are peculiar to [the petitioning organization], candidates who have not worked at [the petitioner's group of companies] are not able to perform the duties of the job offered.

The petitioner submitted a separate letter from ██████████ dated January 21, 2009, in which he further outlined the petitioner's requirements for the position and the beneficiary's qualifications as follows:

For any skilled worker in the industry to work on [the MRTT and related projects], it requires at least 2 years of verification / development experience in safety critical domain, and it would take 1 – 1.5 years of further training on system verification and technical tools (e.g. ADS2, HMPTT, TechSAT DataLoader etc.)

[The beneficiary] has been working on Airbus 330 – MRTT (Multi Role Tanker Transport) project for the past 2 years. As he is associated with this project for so long he has gained a lot of knowledge during the course of time. System verification is a complex activity and the skill levels needed are high-end. He is chosen for this project as he possesses the system verification skills and he is highly competent with his ability to work on technical tools like Raven Power PC Suite, Windriver Debugger, McCabe Code Coverage Suite. He has knowledge on processor MPC 555, Test set up – Vision ICE set-up, BDI Abatron Emulator, NI CAN Analyser, Oscilloscope, MIL STD-1553 Bus analyzer, ARINC 429 bus analyzer.

Since this project is an ITAR (International Traffic in Arms Regulations) controlled, defense oriented, work has to be performed at clients place (US), and cannot be executed outside US.

In a separate statement, the petitioner indicated that the beneficiary's daily duties in the United States will be:

- Develop System Verification Test cases, test Procedures, scenarios for verifying Boeing 787 fuel systems for compliance against SRS and SRU. Provide technical consultancy to the team and the project.
- Discuss with the customers on technical issues coming from both [the unaffiliated employer] and Boeing.
- Ensuring software requirement and structural coverage (through documentation which includes Test case document and Scenario and dry run using Raven Power PC Suite, Windriver Debugger, McCabe Code Coverage Suite, GSIS – MRTT Test set, Vision ICE set-up, BDI Abatron Emulator, NI CAN analyzer, Oscilloscope, Mill STD 1553 Bus analyzer and ARINC 429 analyzer) leading to serve ready Mile stone.

In addition to the above he will have to perform additional test on both LRU and Low Level and demonstrate compliance in front of DER/FAA in USA.

The petitioner submitted a copy of the beneficiary's Time Log System updates to establish that he has been assigned to the Airbus A330 MRTT project since January 2007. The petitioner also provided a copy of the beneficiary's resume, which indicates that his contribution to the Airbus A330 MRTT project has included: "System Testing – Create scenario from requirement, write scripts, execute using Labview simulator, write test procedures, provide traceability, perform low level tests." According to the beneficiary's resume, he previously performed software testing duties for the EH-101 Integral Display Units for Eurocopter, and for the Hawk DMC and MFD (Multi-Function Display System).

The petitioner attached explanations of some of the technologies required to perform the beneficiary's duties, including TechSAT Data Loader, Code Composer, RTRT 6.15, McCabe Code Coverage Suite, Windriver Debugger, HMPTT, and Avionics Development System 2nd Generation (ASD2) Tool, all of which are testing and debugging tools and environments.

Finally, the petitioner submitted a chart outlining the classroom and on-the-job training the beneficiary has undertaken since joining the foreign entity in 2004. His classroom-based, instructor-led training included: Software Engineering, Testing Concepts & Procedures; [Company] Software Quality Management System Awareness; C++ and C++ Programming; Testing Concepts; UML Analysis and Design; Sample Project Artifacts; Overview of Safety Critical Domain; Safety Standards; LDRA Tool; Flow Chart Procedure, Soft Skills; Code Scrutiny; Appraisal Training, and Introduction to Project Management. The petitioner indicated that these courses were taken in June, July and August of 2004, but did not indicate the duration of any specific course. The beneficiary later attended courses in TLS and Programming in Ada in 2005. The chart indicates that, in 2007, the beneficiary received on-the-job training in Avionics Domain – Introduction; Aircraft Fuel System – An Overview; Requirements-based Testing; and Traceability Concepts and DOORs. Finally, the chart indicates that the unaffiliated employer provided the beneficiary with on-the-job training in McCabe Code Coverage Suite, Windriver Debugger and Raven Power PC Suite.

With respect to the unaffiliated employer's project, the petitioner submitted a supply agreement between the foreign entity and the unaffiliated employer. Schedule 1 of the agreement indicates that the petitioner "is to provide design, development and testing services to [the unaffiliated employer] of real-time software projects which are principally embedded safety critical software projects." The agreement indicates that elements of work

will be grouped together into packages, with each package having a separate quotation and agreed delivery date set forth on Schedule 4. The petitioner did not, however, submit the Schedule 4, for the MRTT project. Instead, the petitioner submitted a blank Schedule 4 "Work Package Agreement," which does not identify the description/scope of work, the deliverables required from the unaffiliated employer, or any other project details.

The director denied the petition on February 12, 2009, concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a specialized knowledge capacity. The director acknowledged that the beneficiary may be required to utilize the petitioner's proprietary tools and methodologies to carry out his duties, but determined that the beneficiary has been and will be primarily engaged in work on the unaffiliated employer's systems and not on products that are specific to the petitioning company.

The director acknowledged the training summary provided for the beneficiary, but noted that the petitioner failed to identify the duration of the courses or provide certificates of completion, and thus it could not be concluded that he underwent an extensive training program. Rather, the director noted that the beneficiary appears to be well versed in various computer hardware and software systems that are likely common among engineers in his industry, and has no more than three to four months of pertinent in-house training. The director further noted that the fact that the beneficiary has specific project experience is not sufficient to establish that he possesses specialized knowledge, as most employees within the petitioner's organization would possess knowledge that is peculiar to their specific project assignments.

On appeal, the petitioner asserts that it believes that "there was a fundamental error from the onset about the nature of our business which may have influenced this negative outcome." The petitioner emphasizes that it is "not just a software company," but rather "provides a range of original electronic products including verification and validation systems and control units." The petitioner emphasizes that he beneficiary's job is to develop real time safety critical systems, a field that has "zero tolerance for errors." The petitioner asserts that "the expertise needed to successfully execute projects such as the beneficiary is involved in are not common."

The petitioner further states:

The skills needed for the design, development, verification and validation of Real Time Safety Critical Systems cannot be perfected only by training alone. One must be immersed in the projects that are verified and validated numerous times to fully understand the processes, procedures and technologies.

KT1 and SAGEM are integral part of the Integrated Standby Systems. These are the earliest [company] projects that permitted the beneficiary to understand a lot low level verification and validation and adherence to the DO-178B standards. It was when he perfected this level of proprietary skills that he was embedded into the different lifecycles phases of developing Avionics systems. That was the EH101 system which covered the Integrated Display Units present in the cockpit which involved performing verification and validation on simulated environment, 100% Code Coverage Analysis . . . to ensure a Level A critical system. The KT1, SAGEM and EH101 systems dealt with various aircraft systems. The unique expertise of the beneficiary in these systems was deployed in the current EBAC system. EBAC is the Electric

Brake System for the dreamliner aircraft. This is the first time an Electric Brake was being used for a commercial aircraft. Given the severity of the system, it was assigned criticality level 'A.'

The Avionics domain itself is very niche domain and very few companies align themselves in this vertical i.e., Real Time Safety Critical. Because there are very few companies in this niche market, there are very few specialists who are involved in this very challenging work.

The petitioner goes on to further discuss the beneficiary's role in the "EBAC development and implementation project for which we need him in the United States," and states that, if the beneficiary is unable to come to the United States, "the schedule for B787 will be affected and so will Boeing's clients worldwide." All other evidence in the record, except for the description of the beneficiary's proposed "daily duties" in the United States, indicates that the beneficiary has been and would be working on the Airbus A330 MRTT project. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner emphasizes that "eligible trainees on our critical embedded safety technologies typically have 2 or more years of industry experience with a good fundamental understanding of technical and electro-mechanical functionalities and software experience on various platforms." The petitioner states that, because the technology and processes used in its project assignments are proprietary to the company, candidates who have not worked within the organization are not able to perform the duties of the job offered. The petitioner further states that not more than 20 individuals within its organization have the beneficiary's "unique skills set."

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

The Standard for Specialized Knowledge

Looking to the language of the statutory definition, Congress has provided USCIS with an ambiguous definition of specialized knowledge. In this regard, one Federal district court explained the infeasibility of applying a bright-line test to define what constitutes specialized knowledge:

This ambiguity is not merely the result of an unfortunate choice of dictionaries. It reflects the relativistic nature of the concept special. An item is special only in the sense that it is not ordinary; to define special one must first define what is ordinary. . . . There is no logical or principled way to determine which baseline of ordinary knowledge is a more appropriate reading of the statute, and there are countless other baselines which are equally plausible. Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning. *Cf. Westen, The Empty Idea of Equality*, 95 Harv.L.Rev. 537 (1982).

1756, Inc. v. Attorney General, 745 F.Supp. 9, 14-15 (D.D.C., 1990).¹

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the principles of statutory interpretation provide some clue as to the intended scope of the L-1B specialized knowledge category. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)).

First, the AAO must look to the language of section 214(c)(2)(B) itself, that is, the terms "special" and "advanced." Like the courts, the AAO customarily turns to dictionaries for help in determining whether a word in a statute has a plain or common meaning. See, e.g., *In re A.H. Robins Co.*, 109 F.3d 965, 967-68 (4th Cir. 1997) (using *Webster's Dictionary* for "therefore"). According to *Webster's New College Dictionary*, the word "special" is commonly found to mean "surpassing the usual" or "exceptional." *Webster's New College Dictionary*, 1084 (3rd Ed. 2008). The dictionary defines the word "advanced" as "highly developed or complex" or "at a higher level than others." *Id.* at 17.

Second, looking at the term's placement within the text of section 101(a)(15)(L) of the Act, the AAO notes that specialized knowledge is used to describe the nature of a person's employment and that the term is listed among the higher levels of the employment hierarchy together with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO therefore would expect a specialized knowledge employee to occupy an elevated position within a company that rises above that of an ordinary or average employee. See *1756, Inc. v. Attorney General*, 745 F.Supp. at 14.

Third, a review of the legislative history for both the original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L) of the Act intended that the class of persons eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. See generally H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." *Id.* In addition, the Congressional record specifically states that the L-1 category was intended for "key personnel." See generally, *id.* The term "key personnel" denotes a position within the petitioning company that is "[o]f crucial importance." *Webster's New College Dictionary* 620 (3rd ed., Houghton Mifflin Harcourt Publishing Co. 2008). Moreover, 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." See 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 (Nov. 12, 1969).

¹ Although *1756, Inc. v. Attorney General* was decided prior to enactment of the statutory definition of specialized knowledge by the Immigration Act of 1990, the court's discussion of the ambiguity in the legacy Immigration and Naturalization Service (INS) definition is equally illuminating when applied to the definition created by Congress.

Neither in 1970 nor in 1990 did Congress provide a controlling, unambiguous definition of "specialized knowledge," and a narrow interpretation is consistent with so much of the legislative intent as it is possible to determine. H. Rep. No. 91-851 at 6, 1970 U.S.C.C.A.N. at 2754. This interpretation is consistent with legislative history, which has been largely supportive of a narrow reading of the definition of specialized knowledge and the L-1 visa classification in general. See *1756, Inc. v. Attorney General*, 745 F.Supp. at 15-16; *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at *4 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006); *Fibermaster, Ltd. v. I.N.S.*, Not Reported in F.Supp., 1990 WL 99327 (D.D.C., 1990); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001)(on file with AAO).

Further, although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge" in section 214(c)(2) of the Act, the definition did not generally expand the class of persons eligible for L-1B specialized knowledge visas. Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Instead, the legislative history indicates that Congress created the statutory definition of specialized knowledge for the express purpose of clarifying a previously undefined term from the Immigration Act of 1970. H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 ("One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem."). While the 1990 Act declined to codify the "proprietary knowledge" and "United States labor market" references that had existed in the previous agency definition found at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988), there is no indication that Congress intended to liberalize its own 1970 definition of the L-1 visa classification.

If any conclusion can be drawn from the enactment of the statutory definition of specialized knowledge in section 214(c)(2)(B), it would be based on the nature of the Congressional clarification itself. By not including any strict criterion in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave the INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. Cf. *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (quoting *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988)).

To determine what is special or advanced, USCIS must first determine the baseline of ordinary. As a baseline, the terms "special" or "advanced" must mean more than simply "skilled" or "experienced." By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." See *Matter of Penner*, 18 I&N Dec. 49, 53 (Comm. 1982). 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. In other words, specialized knowledge generally requires more than a short period of experience; otherwise special or advanced knowledge would include every employee in an organization with the exception of trainees and entry-level staff. If everyone in an organization is specialized, then no one can be considered truly specialized. Such an interpretation strips the statutory language of any efficacy and cannot have been what Congress intended.

Considering the definition of specialized knowledge, it is the petitioner's, not USCIS's, burden to articulate and establish by a preponderance of the evidence that the beneficiary possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. A petitioner's assertion that the beneficiary possesses advanced knowledge of the processes and procedures of the company must be supported by evidence describing and distinguishing that knowledge from the elementary or basic knowledge possessed by others. Because "special" and "advanced" are comparative terms, the petitioner should provide evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's specific industry.

Analysis

Upon review, the petitioner has not demonstrated that the beneficiary possesses knowledge that may be deemed "special" or "advanced" under the statutory definition at section 214(c)(2)(B) of the Act. The decision of the director will be affirmed as it relates to this issue and the appeal will be dismissed.

In examining the specialized knowledge 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 job description of the services to be performed sufficient to establish specialized knowledge. *Id.* At a minimum, the petitioner must articulate with specificity the nature of the claimed specialized knowledge.

The petitioner in this case has failed to establish either that the beneficiary's position in the United States or abroad requires an employee with specialized knowledge or that the beneficiary has specialized knowledge. Although the petitioner repeatedly asserts that the beneficiary has been and will be employed in a "specialized knowledge" capacity, 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 other similarly experienced software engineers working with safety-critical embedded systems employed by the petitioning organization or in the avionics industry at-large. While the AAO acknowledges that the petitioner's field of expertise is much narrower than general "software consulting," the fact that the company's services are highly specialized, "safety critical," or targeted at a certain industry or industries, without more, is insufficient to establish that any individual employee within the company possesses or is required to utilize specialized knowledge. Other engineers working with developing or testing embedded software for aircraft systems would be expected to possess the same knowledge of aircraft systems and industry standards. The foreign entity has acknowledged that as many as ten companies in India "have built an expertise in the field of software development and system testing in the avionics domain, particularly in the safety-critical arena." The foreign entity further indicated that "more than a dozen" Indian companies were considered as potential contractors for the unaffiliated employer's aviation industry projects.

Furthermore, although the director found that certain tools used by the beneficiary to carry out his duties, including TechSat DataLoader, Code Composer, RTRT 6.15, McCabe Code Coverage Suite, and Windriver Debugger are proprietary to the petitioning company, this finding was incorrect. These technologies are described in an attachment to the beneficiary's resume, and, based on the descriptions provided, are testing and debugging tools and environments developed by other companies and used industry-wide by testing engineers. In fact, the beneficiary's training records indicate that he received on-the-job training in McCabe Code Coverage Suite, Windriver Debugger and Raven Power PC Suite directly from the unaffiliated employer, and not from the petitioning company. The beneficiary's technical skills, as listed in his resume, are in technologies which are common in his specific software development field, and have not been shown to involve any systems or technologies that are specific to the petitioner's group of companies. An experienced software engineer with a background in developing and testing avionics systems would be expected to possess a similar skill set. Counsel and the petitioner assert, however, that the position requires project-specific knowledge that the beneficiary gained in India, as well as experience with the petitioner's processes and procedures, and therefore could not be performed by the typical skilled engineer.

Specifically, the petitioner has stated that the skills, processes and methodologies required to execute the assigned client project are proprietary to the petitioning organization, but it has neither further elaborated upon nor documented the petitioner's own internal methodologies or unique processes. For example, the petitioner stated that the beneficiary "is very well versed in our design and architecture, testing concepts and processes, [company] Software Quality Management System Awareness . . . and [the company's] strategy and methodologies." The petitioner offered no explanatory information regarding its design and architecture, testing processes or quality management system or other methodologies sufficient to establish that mere familiarity with these internal procedures, systems and standards would rise to the level of specialized knowledge. 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).

Moreover, the petitioner did not attempt to explain how its processes and methodologies differ significantly from those utilized by other companies that offer similar services, nor has it established that the beneficiary has received extensive training in the company's tools, methodologies and procedures. Therefore, it cannot be concluded that the petitioner's processes are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an experienced avionics software engineer who had no prior experience with the petitioner's family of companies. The record shows that the beneficiary completed a training course in the company's Software Quality Management System in July 2004, but the petitioner has failed to provide any information regarding the content or duration of such training or information regarding the Quality Management System itself. The majority of the beneficiary's training appears to have involved general domain knowledge and technical skills pertinent to software development and testing, rather than indoctrination of any specific methodologies or processes specific to the petitioner's group of companies. All engineering consulting firms develop internal tools, methodologies, procedures and best practices for documenting project management and software quality

assurance activities. The petitioner cannot establish that the beneficiary possesses specialized knowledge by relying on his experience with unidentified and undocumented internal processes and methodologies. The petitioner has not demonstrated that its "proprietary" methodologies and tools, while highly effective and valuable to the petitioner, are more than customized versions of standard practices used in the industry.

Furthermore, the petitioner has not clearly specified the amount or type of training its technical staff members receive in the company's internal tools, methodologies and procedures, and therefore, it cannot be concluded that its processes are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an experienced engineer who had no prior experience with the petitioner's group of companies. The petitioner refers to a "training program" that employees must undergo before they can work on the MRTT project, but does not identify the specific components of the program, the amount of time it takes to complete it, or the number of employees who have received the training. Going on record without supporting 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

Moreover, although the petitioner states that it offers a training program specific to the "MRTT and ARC technologies and methodologies," it states elsewhere that "[f]or any skilled worker in the industry to work on [the MRTT and related projects], it requires at least 2 years of verification / development experience in safety critical domain, and it would take 1 – 1.5 years of further training on system verification and technical tools (e.g ASD2, HMPTT, TechSAT Dataloader etc.)." This statement implies that there is no company-specific training requirement for the proffered position and that "any skilled worker" with the required system verification experience and technical skills would be qualified for the position.

Overall, the minimal evidence submitted suggests that the petitioner's employees are not required to undergo any extensive training in the company's processes and methodologies. The petitioner indicates that the beneficiary completed 21 classroom-based courses, the majority of which do not appear to be clearly associated with the petitioner's claimed internal or proprietary tools and processes. The petitioner has not provided certificates of completion or other evidence indicating the content and length of his classroom training, so it cannot be concluded that such training imparted him with specialized knowledge. Again, going on record without supporting 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. However, it is evident that courses in C++ programming, UML analysis and design, LDRA tool, soft skills, programming in Ada, and TLS did not constitute training in the petitioning company's processes and procedures.

The petitioner argues that the most important component of the beneficiary's purported specialized knowledge is his existing knowledge of the unaffiliated employer's MRTT project gained over a period of two years, and his "extensive understanding about the business and the processes of our client." Generally, a beneficiary's familiarity with the unaffiliated employer's systems and requirements, while valuable to the petitioner, cannot be considered knowledge specific to the petitioning organization and cannot form the basis of a determination that he possesses specialized knowledge. While the petitioner suggests on appeal that the ARC technology itself is proprietary to the petitioning organization, the AAO finds insufficient evidence to support that claim. As noted above, the petitioner has submitted a copy of its general supply agreement with the unaffiliated employer, but has failed to provide the specific Schedule 4/Work Package Agreement, specific to the MRTT

project. According to a letter from the unaffiliated employer, it has contracted with the petitioner "to provide technical support" for MRTT and other programs. A review of the detailed duties described in the beneficiary's resume suggests that he has been involved in testing activities for the A330 MRTT system, rather than developing the system or system components. [REDACTED] letter dated January 21, 2009 further confirms this conclusion, as he stated that the beneficiary "is chosen for this project as he possesses the system verification skills" and is "highly competent" in working with various testing tools.

The petitioner has not clearly identified the project deliverable or the services to be provided to the unaffiliated employer, and thus has not supported a conclusion that the contract requires it to provide a product or service that involves the petitioner's own internally-developed technologies or systems. In fact, according to the terms of the supply agreement, "all original works of authorship and all other items, including any source code, in any form, prepared by [the petitioning organization) . . . pursuant to this Agreement are works that have been specifically ordered and commissioned by [the unaffiliated employer]" and all intellectual property rights are owned by the unaffiliated employer. The omission of the actual work package agreement for the contract to which the beneficiary is assigned makes it impossible to affirmatively determine whether the services to be provided require the application of specialized knowledge specific to the petitioning organization. Again, going on record without supporting 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

All software engineers within the petitioning organization would reasonably be familiar with its proprietary internal processes and methodologies for carrying out client projects. Similarly, most employees would also possess project-specific knowledge relative to one or more international clients, which the petitioner would equate to specialized knowledge. The fact that the beneficiary possesses very specific experience with a particular international client project does not establish that the beneficiary's knowledge is indeed special or advanced. Any experienced software engineer within the petitioning organization would reasonably be familiar with its internal processes and methodologies for carrying out client projects. Similarly, most employees would also possess project-specific knowledge relative to one or more international clients and the client's products or systems.

All employees can be said to possess unique skill or experience to some degree. Moreover, the proprietary qualities of the petitioner's process or product do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique process or product require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter. The fact that other workers may not have the same level of experience with the petitioner's methodologies as applied to one component of a specific client project is not enough to establish the beneficiary as an employee possessing specialized knowledge.

It is appropriate for USCIS 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. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of LeBlanc*, 13 I&N Dec. at 816). 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 AAO acknowledges that the specialized knowledge need not be narrowly held within the organization in order to be considered "advanced." However, it is equally true to state that knowledge will not be considered "special" or "advanced" if it is universally or even widely held throughout a company. If all similarly employed workers within the petitioner's organization receive essentially the same training, then mere possession of knowledge of the petitioner's processes and methodologies does not rise to the level of specialized knowledge. The L-1B visa category was not created in order to allow the transfer of all employees with any degree of knowledge of a company's processes. If all employees are deemed to possess "special" or "advanced" knowledge, then that knowledge would necessarily be ordinary and commonplace.

The petitioner states that the beneficiary is one of only 10 or 20 IT professionals within its organization "who is knowledgeable and proficient in this technology and methodologies and their use in our business." Given that the petitioner provides services to clients in several different industries, and has six or more different ongoing projects for the unaffiliated employer alone, it is unsurprising that the number of employees assigned to the MRTT contract or similar contracts is limited to 10 to 20 employees. However, as noted above, the petitioner's attempts to distinguish the beneficiary's knowledge as advanced relative to a specific client project are unpersuasive. Again, all of the foreign entity's technical employees would reasonably have project-specific knowledge in addition to knowledge of the company's proprietary tools and processes for implementing projects. By this logic, any of them would qualify for L-1B classification if offered a position working on the same project in the United States. All employees can be said to possess uncommon and unique skill sets to some degree; however, a skill set that can be easily imparted to another similarly educated and similarly experienced software engineer is not "specialized knowledge." While the AAO acknowledges that there will be exceptions based on the facts of individual cases, an argument that an alien is unique among a small subset of workers, (i.e., one of only ten software engineers assigned to a small client project team) will not be deemed facially persuasive if a petitioner's definition of specialized knowledge is so broad that it would include the majority of its workforce. The petitioner must establish that qualities of the processes, procedures, and technologies require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter.

The AAO does not dispute the possibility that the beneficiary is a skilled employee who has been, and would be, an asset to the petitioner. However, 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 petitioning organization or by workers employed elsewhere. The beneficiary's duties and technical skills demonstrate that he possesses knowledge that is common among software engineers in the avionics industry. Furthermore, it is not clear that the performance of the beneficiary's duties would require more than basic proficiency with the company's internal processes and methodologies. The petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's processes is more advanced than the knowledge possessed by others employed by the petitioner, or that the processes used by the petitioner are substantially different from those used by other engineering services providers in the petitioner's industry. The petitioner has failed to demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. *See Matter of Penner*, 18 I&N Dec. at 52.

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. The record does not establish that the beneficiary has specialized knowledge or that the position offered with the United States entity requires specialized knowledge.

Based on the evidence presented and applying the statute, regulations, and binding precedents, the petitioner has not established that the beneficiary has specialized knowledge or that he has been or would be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

III. L-1A Visa Reform Act

The remaining issue addressed by the director is whether the petitioner has satisfied the requirements of the L-1 Visa Reform Act prohibiting placement of L-1B beneficiaries at the worksites of unaffiliated employers.

One of the main purposes of the L-1 Visa Reform Act amendment was to prohibit the outsourcing of L-1B intracompany transferees to unaffiliated employers to work with “widely available” computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003); *see also* Sen. Jud. Comm., Sub. on Immigration, Statement for Chairman Senator Saxby Chambliss, July 29, 2003, available at <http://judiciary.senate.gov/member_statement.cfm?id=878&wit_id=3355> (accessed on September 5, 2008).

If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the beneficiary will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel or the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaigbena*, 19 I&N Dec. at 534.

If the petitioner fails to establish *both* of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee. As with all nonimmigrant petitions, the petitioner bears the burden of proving eligibility. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1).

A. Threshold Question: Worksite of Beneficiary

As a threshold question in the analysis, USCIS must examine whether the beneficiary will be stationed primarily at the worksite of the client/unaffiliated company. Section 214(c)(2)(F) of the Act. The petitioner indicated on the Form I-129 petition that the beneficiary will be employed at its own offices located in Edison, New Jersey. In response to Question 13 on the Form I-129 Supplement L, the petitioner answered “No” when asked: “Will the beneficiary be stationed primarily offsite (at the worksite of an employer other

than the petitioner or its affiliate, subsidiary, or parent)?"

However, the documentary evidence in the records supports a finding that the beneficiary will be stationed at the unaffiliated employer's worksite located in Vergennes, Vermont. The record contains a letter of deputation from the foreign entity addressed to the beneficiary, which indicates that his assignment is to the unaffiliated employer in Vergennes for a period of one year to work on the MRTT project. The petitioner also submitted a letter from the unaffiliated employer inviting the beneficiary "to visit our [company] facility in Vergennes, VT to continue his work on the MRTT project, which may take an additional 6-8 months to complete."

The director determined that the beneficiary will be stationed primarily at the worksite of the client/unaffiliated employer and therefore the provisions of Section 214(c)(2)(F) are applicable. The petitioner has made no objection to this determination.

The petitioner therefore must establish both: (1) that the beneficiary will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act.

B. Control and Supervision of Beneficiary

Under section 214(c)(2)(F)(i) of the Act, the petitioner must establish that the beneficiary will be controlled and supervised principally by the petitioner, and not by the unaffiliated employer.

At the time of filing, the petitioner submitted a letter dated October 31, 2008 from [REDACTED] Subcontracts Administrator of the unaffiliated employer, who stated that [REDACTED] is Head of Projects and in charge of the operation of the petitioner's U.S. office. [REDACTED] stated that [REDACTED] "delegates the staff to the project according to their skills set and monitors the progress and delivery of the project according to the needs of [the unaffiliated employer]."

In the request for evidence issued on December 23, 2008, the director requested that the petitioner submit a copy of the contract for services between the petitioner and the employer where the beneficiary will be primarily stationed. The director advised that, if the contract does not contain information specific to the terms and conditions of the alien's employment, the petitioner should submit an addendum to the contract, signed by representatives of the petitioner and the unaffiliated employer, which establishes the following: (1) who retains authority to hire and fire the person performing the duties of the position; who is responsible for administering the alien's time and pay; (3) to what degree the beneficiary will be controlled and supervised by the offsite employer compared to the petitioner; and (4) the number of the petitioner's employers currently at the unaffiliated employer's worksite and a description of the supervision and management structure for such employees; and (5) the means by which the company will supervise and control the beneficiary and his work at the unaffiliated employer's worksite.

In response, counsel for the petitioner stated that "the beneficiary will be supervised and controlled 100 per cent by the employer and not the client" and that "the employer retains authority to hire, fire, control and

direct the work of the beneficiary." Counsel stated that "[the unaffiliated employer] has also confirmed this." [REDACTED] noted that the company does not currently have any employees at the client's worksite.

With respect to the beneficiary's supervision, [REDACTED] stated:

[The beneficiary] will report to his [REDACTED], who is based in India. [REDACTED] will monitor the progress of the project and the daily work/duties of [the beneficiary] through the Daily reports and weekly reports he receives from [the beneficiary]. For this reason, [REDACTED] will work in our India office matching operational times of our US office. The Onsite manager for our U.S. office, [REDACTED], will travel to US office to monitor the work of the employees and liaise with our client. . . regarding any issues, updates and progress.

The petitioner submitted a project organizational chart indicating that [REDACTED] serves as a project manager responsible for three projects undertaken for the unaffiliated employer, including FQMS, EBAC and MRTT.

The petitioner also submitted the supply agreement between the unaffiliated employer and the foreign entity. Section 3 of the agreement addresses staffing and indicates that the foreign entity "shall assign appropriately qualified Staff to perform the Service," while the unaffiliated employer has the option, upon notice "to specify appropriate qualifications required of [the foreign entity's] staff to perform the Service," and "to approve the assignment of any Staff to perform the Service." The foreign entity may make employee substitutions and withdrawals; however the foreign entity cannot make substitutions or withdrawals of key individuals over the valid objections of the unaffiliated employer. The foreign entity may also employ subcontractors for the execution of the agreement if it seeks and obtains prior written approval from the unaffiliated employer.

According to the terms of the agreement, the foreign entity's employees are expected to comply with the unaffiliated employer's security requirements, codes of practice and rules while on-site, and the unaffiliated employer "shall be empowered to remove any [petitioning company] representative from [the unaffiliated employer's] site without recourse or explanation."

In addition, the petitioner attached an addendum to the agreement, dated January 20, 2009, which is signed by both the foreign entity and a representative of the unaffiliated employer. According to the addendum, the foreign entity's head of human resources is the person authorized to recruit or terminate the services of an employee engaged in a project for the unaffiliated employer, while R. Palanivel is authorized to administer time and pay, and to assign and monitor employees' duties. The agreement further indicates that the project manager receives the project requirements from the unaffiliated employer, communicates the requirements to the petitioner's staff, receives reports from staff, and provides the unaffiliated employer with the status of the project.

The director denied the petition determining that the supply agreement submitted does not demonstrate that the beneficiary would be supervised and controlled principally by the petitioning company. The director emphasized that the agreement allows the unaffiliated employer to determine the necessary qualifications of the petitioner's employees assigned to the project, to approve the removal or replacement of any employee,

and to remove employees at will.

On appeal, counsel for the petitioner asserts that the employer has shown the beneficiary will be controlled by his employer and not by the client, and that the client has equally acknowledged this fact in a separate document already submitted.

In its letter submitted on appeal, the petitioner further states:

Although we have to work closely with [the unaffiliated employer] . . . to develop these critical technologies over the years, they have never had to control our employees. They cannot control our employees because they do not have the technology and do not know the products that we deploy to develop the critical systems. If they had the technologies, they will not need our services. If they do not know the technologies, it is clearly evident that they cannot control what our employees do.

Upon review, the petitioner's assertions are not persuasive.

The major deficiency in the evidence submitted is the lack of a "scope of work" specific to the services the beneficiary will be performing for the client in the United States. As noted above, the general Supply Agreement signed by the petitioner and the unaffiliated employer in 2006 specifically states that individual Work Package Agreements will be prepared for projects and that the scope of work applicable to each project will be set forth therein. Without this critical information, the AAO cannot determine whether the petitioner had any separate agreements in place pertaining to the work to be performed by the petitioner's employees while at the client's worksite. Furthermore, the petitioner's claim that the unaffiliated employer does not have the technical knowledge to oversee the petitioner's employees is unsupported by the record absent the formal description of the actual services to be provided under the agreement. Going on record without supporting 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)).

Based on the foregoing, the petitioner has failed to meet its burden of establishing that the beneficiary would be controlled and supervised principally by the petitioning company and has not satisfied the requirements of section 214(c)(2)(F)(i) of the Act. For this additional reason, the petition must be denied.

C. Necessity of Specialized Knowledge Specific to the Petitioning Employer

The second issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act. As discussed below, the petition also fails to meet the requirements of this section of the Act.

In denying the petition, the director concluded that the placement of the beneficiary at the worksite of the unaffiliated employer is to work on and maintain the client's systems, and not primarily to work "on processes that are specific to your company." The director observed that the "beneficiary's value to the client project appears directly and primarily related to his continuing to gain knowledge of [the unaffiliated employer's]

internal processes and methodologies," and that "a majority of the beneficiary's purported specialized knowledge hinges upon his acquired knowledge of [the unaffiliated employer's] internal processes."

The petitioner's arguments with reference to the beneficiary's specialized knowledge have been discussed at length above and will not be repeated here.

The petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary's placement at the unaffiliated employer's worksite is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

The petitioner must demonstrate in the first instance that the beneficiary's offsite employment is connected with the provision of the petitioner's product or service which necessitates specialized knowledge that is *specific to the petitioning employer*. If the petitioner fails to prove this element, the beneficiary's employment will be deemed an impermissible arrangement to provide "labor for hire" under the terms of the L-1 Visa Reform Act.

As discussed above, the petitioner has not submitted a copy of the Statement of Work governing the services to be provided by the beneficiary at the unaffiliated employer's worksite. The information contained in the record indicates that the petitioner is providing "technical support" for the MRTT system being developed by the unaffiliated employer for Airbus, and that such support includes ongoing testing and verification of the system. There is insufficient evidence to establish that the client contracted with the petitioner to implement any system, product, processes, or tools of the petitioning company within the scope of the services to be performed at the client's worksite. While it may be common in the petitioner's industry for multiple companies to work on different aspects of a specialized product, component or system, it has not been established in this case that the client chose to contract the petitioning company specifically to provide a product or service that is not available elsewhere. The foreign entity indicated that it was chosen by the unaffiliated employer as the subcontractor for several projects among a dozen or so Indian companies with similar capabilities.

While it is possible that the beneficiary here possesses knowledge that is directly related to both the petitioner and the unaffiliated employer's product or service, it is incumbent upon the petitioner to establish that the position for which the beneficiary's services are sought is one that requires knowledge specific to the petitioner. Here, the petitioner has failed to provide corroborating evidence demonstrating that the beneficiary's placement with the unaffiliated employer is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. For this additional reason, the petition cannot be approved.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.

ORDER: The appeal is dismissed.