identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

PUBLIC COPY

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

D7

DATE: OCT 03 2011 Office: VERMONT SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

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

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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 $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

for Perry Rhew
Chief, Administrative Appeals Office

OUTLINE AND INDEX

DISCUSSION: The Director, Vermont Service Center, initially denied the nonimmigrant visa petition. The Vermont Service Center subsequently reopened the proceeding *sua sponte* pursuant to 8 C.F.R. § 103.5(a)(5)(ii).[1] Upon review of the petitioner's response to the notice of the service motion to reopen, the director affirmed the denial of the petition and certified the decision to the Administrative Appeals Office (AAO) in accordance with 8 C.F.R. § 103.4(a)(1). The director's decision will be affirmed and the petition will be denied.

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 is engaged in the development and operation of Brazilian [redacted] restaurants, with 16 locations in the United States as of the date of filing. It states that it is the parent company of the beneficiary's foreign employer [redacted], located in Brazil. The petitioner seeks to employ the beneficiary in the position of [redacted] chef for a period of three years.[2]

The director originally denied the petition after concluding that the petitioner failed to establish that the beneficiary has been or would be employed in a specialized knowledge capacity. After reopening the matter on service motion, the director entered a new decision denying the petition on the same grounds. The director has certified this decision to the AAO for review. *See generally* 8 C.F.R. § 103.4(a).

On certification, counsel contends that the director's decision: (1) ignores the petitioner's extensive legal arguments on motion and applies a specialized knowledge standard that violates the Immigration Act of 1990, the implementing regulations and the agency's internal policy memoranda; (2) avoids a critical legal question by declining to speculate whether Congress confirmed in Public Law 111-230 "that the Service's recent 'narrow' and 'restrictive' approach to 'specialized knowledge' is illegal"; and (3) ignored critical evidence demonstrating that the beneficiary possesses numerous skills that are essential to the *churrasqueiro* position and for which locally-hired U.S. workers simply could not be trained. Counsel asserts that the beneficiary meets all requirements for specialized knowledge as set forth in the regulatory definition of the term at 8 C.F.R. § 214.2(l)(1)(ii)(D) and in a

---

[1] The petitioner filed a complaint for declaratory and injunctive relief in the United States District Court, [redacted]. *U.S. Department of Homeland Security, et al,* 10-cv-01024 (filed June 17, 2010). On March 25, 2011, the parties filed a joint motion to stay the court proceedings pending the Vermont Service Center's adjudication of this and one other nonimmigrant visa petition involving a *churrasqueiro* chef position. The District Court granted the motion and ordered the proceedings stayed and administratively closed.

[2] A *churrasqueiro* or gaucho chef specializes in *churrasco*, a traditional method of preparing and serving meat that descended from the gauchos or cowboys of the Rio Grande do Sul region of southern Brazil. *See Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at *1 (N.D.Tex., 2005). The *churrasqueiros* prepare and serve meat in Brazilian-style steakhouse restaurants called *churrascarias*. *Id.*

2004 USCIS policy memorandum from [redacted] Director, Service Center Operations, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks Seeking L-1B Status." Counsel has supplemented the record with a 53-page legal brief on certification and a 54-page legal brief and additional documentary evidence on motion.

The issue to be addressed is whether the petitioner established that the beneficiary possesses specialized knowledge and whether he has been and would be employed in a specialized knowledge capacity. Upon review, and for the reasons discussed herein, the AAO will affirm the director's decision and deny the petition to classify the beneficiary as an intracompany transferee with specialized knowledge.

The evidence of record establishes that the beneficiary possesses general knowledge of his native culture and culinary traditions of the Rio Grande do Sul region of Brazil that would make him an asset to any Brazilian *churrascaria* restaurant. The petitioner has not established that the beneficiary's knowledge, either with respect to the culinary traditions of southern Brazil, or with respect to the petitioner's processes and procedures for conveying that culture in its restaurants, is substantially different from that generally found in the petitioner's industry, such that the knowledge could be considered specialized. Nor has the petitioner established that the beneficiary possesses an advanced level of knowledge of the processes and procedures of the company in comparison to others who possess an elementary or basic knowledge of such processes and procedures.

I. THE LAW AND POLICY

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. 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.

As previously stated, the petitioner seeks to classify the beneficiary as a nonimmigrant transferee with specialized knowledge.

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

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has 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, based on the statutory definition, the legacy Immigration and Naturalization Service (INS) promulgated the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) to interpret "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.

Legacy INS and USCIS have also interpreted specialized knowledge through historical precedent decisions and numerous internal policy memoranda. *See, e.g., Matter of Penner*, 18 I&N Dec. 49 (Comm'r 1982); Memorandum of James A. Puleo, Executive Assoc. Comm'r, INS, *Interpretation of Special Knowledge*, (March 9, 1994) ("Puleo Memorandum"); Memorandum of Fujie Ohata, Director, Service Center Operations, USCIS, *Interpretation of Specialized Knowledge for Chefs and Specialty Cooks Seeking L-1B Status*, (September 9, 2004) ("Ohata Memorandum").

The memoranda include the 2004 Ohata Memorandum, which specifically addresses the interpretation of specialized knowledge in L-1B cases involving chefs and specialty cooks. In that memorandum, the Director clarified that chefs and specialty cooks are presumptively not specialized knowledge positions: "Chefs or Specialty Cooks generally are not considered to have 'specialized knowledge' for L-1B purposes, even though they may have knowledge of a restaurant's special recipe or food preparation technique." Ohata Memorandum at 1.

After reviewing a series of examples where alien chefs and specialty cooks were deemed to not possess specialized knowledge, the memorandum concluded by emphasizing three points:

> To summarize, the fact that a petitioner alleges that an alien's knowledge is somehow different from that of others in the same field does not, in and of itself, establish that the alien possesses specialized knowledge. It is important to consider how the alien's knowledge relates to the specific U.S. entity seeking to employ the alien and the impact, if any, on the U.S. or foreign entity, were the petitioner required to fill the position with someone other than the alien. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge of a product or process is: (a) uncommon or not generally shared by practitioners in the alien's field of endeavor; (b) not easily or rapidly acquired, but is gained from significant experience or in-house training, and (c) is necessary and relevant to the successful conduct of the employer's operations.

Id. at 4.

The memorandum is not outcome determinative for individual adjudications and it is not marked with a "P" designating it as official USCIS policy. The memorandum was directed to the USCIS Service Center directors, however, so the contents instruct all subordinate service center officers within the chain of command in the adjudication of L-1B chef and specialty cook petitions. *Broadgate Inc. v. USCIS*, 730 F.Supp.2d 240, 246 (D.D.C., 2010); *see also* USCIS Adjudicator's Field Manual 3.4(a), "Adherence To Policy" (2010) (noting that memoranda not bearing the "P" designation may nevertheless direct specific actions even though they do not constitute policy).

Finally, as will be discussed, the Fifth Circuit Court of Appeals has previously affirmed the USCIS decision to deny L-1B petitions filed on behalf of *churrasqueiros* based on the petitioner's inability to establish that Brazilian cooking is sufficiently specialized to merit L-1B status. *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006) (hereinafter *Boi Na Braza*).

II. PROCEDURAL HISTORY

A. The Initial Petition

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on February 4, 2010. In a letter dated January 21, 2010, the petitioner explained that it owns and operates a chain of upscale Brazilian churrascaria restaurants, including six restaurants in [redacted] and 16 restaurants in the United States. The petitioner's operations began in [redacted] in 1979, and since that time, its business concept has been centered on conveying a "true gaucho experience" by "combining the traditional gaucho way of preparing meat, with the rapid, continuous service style known as 'espeto corrido' ('continuous service') and the ambience of a gracious ranch ('estancia') on the pampas of Brazil long ago." The petitioner states that the success of its restaurants in

the United States and Brazil "relies on the southern-Brazilian native 'gauchos' or 'churrasqueiros' who cook, prepare and present the meal in a fashion consistent with an authentic gaucho experience."

The petitioner emphasized that the gaucho culture is "special and distinctive, even in Brazil." The petitioner explained that gauchos originate almost exclusively from the rural regions of the Brazilian state of [redacted], "where they are raised and immersed in the distinctive gaucho culture, lifestyle and churrasco cooking methods." The petitioner noted that only approximately 4% of Brazilian natives have authentic knowledge of the gaucho lifestyle and *churrasco* cooking methods, and that it selects its candidates for the *churrasqueiro* position from this small population. The petitioner submitted historical and cultural information regarding [redacted] as well as Brazilian population statistics, in support of its assertions that the gaucho culture is distinctive and native to a relatively small segment of the Brazilian population. The petitioner further explained that it has developed its own systems, processes and procedures to ensure a consistent gaucho experience, and then brought this business model to the United States in 1997.

With respect to the beneficiary, the petitioner indicated that he has been employed as a *churrasqueiro* chef by its [redacted] since May 1, 2007, and worked for other Brazilian restaurants, in different capacities, from April 2001 through February 2007. The petitioner noted that the position requires the beneficiary to "utilize his rural southern Brazilian experience since childhood and his subsequent extensive training in [company] processes and procedures, to convey the authentic gaucho experience" by performing the following duties:

- Butchering selected meats (14-15 varieties, some of which are not served outside of Brazilian churrascarias) in an atypical style into skewer portions that are specifically adapted to [the petitioner's] churrascarias;

- Roasting, spit fire management, and control of all assigned meats, which require different fire/coal management techniques to achieve correct temperatures;

- Determining doneness of assigned meats to specific internal temperatures and correlation to customer preferences by sight alone . . . .;

- Leaving his position in the roasting/cooking area on a continuous basis – while his meats are roasting on the fire – to circulate through the dining room to carve skewered meats to the specific temperature requested by each guest while still hot – and anticipate required return to the roasting area to tend to roasting meats;

- Anticipating the amount of meats to continue to roast throughout the meal period to ensure the availability of all meats at all temperatures are available without delay. . . .;

- Presenting and custom carving skewered meats to each guest's preference and desired temperature to all guests in the entire restaurant (up to 80 tables and 350 guests at any one time);

- Acting in the role of a 19th century gaucho, expressing the traditional culture and values of southern Brazil, and engaging guests regarding their specialty meat and cooking style;

- Training of non-Brazilian Churrasqueiro Chefs in the proper methods of conveying the authentic gaucho experience in U.S. restaurants.

The petitioner indicated that the position requires, and the beneficiary possesses, special knowledge of the company's products and services, and that such knowledge allows the company to remain competitive in the United States. The petitioner further stated that such knowledge includes: "(i) first-hand, personal knowledge and upbringing in the gaucho lifestyle of [redacted] and (ii) successful completion of an extensive training program by [the company's] tenured, experienced Churrasqueiro Chefs." The petitioner stated that the beneficiary was selected for training through its screening process because he already possessed special knowledge of "the [redacted] and cooking methods," and has since been trained "to the company's high standards at its training and development program in Brazil."

The petitioner emphasized that the combination of "inherited culinary skills" and completion of the company's training program distinguishes its *churrasqueiro* chefs from any other chefs in the industry. The petitioner noted that the meat carving skills possessed by its chefs are not taught in the United States outside of *churrascarias* like the petitioner, but rather such skills are passed within families from generation to generation in the gaucho culture in the [redacted]. The petitioner considers its authentic *churrasqueiro* chefs to be the primary driver of its business concept, and indicates that it "must maintain strict adherence to the original [redacted] and culture of its food preparation, production and presentation, and its business model by employing authentic and fully trained Churrasqueiro Chefs such as [the beneficiary]."

The petitioner also claimed that the beneficiary was selected for transfer to the United States based on his "advanced knowledge of [the petitioner's] system for producing an authentic experience of the gaucho culture of southern Brazil." The petitioner stated that he possesses this knowledge because he was "raised and fully immersed in the [redacted] traditional method of cooking from a young age" and because he has a highly developed level of knowledge of the petitioner's business concept, methods and procedures for consistently creating an authentic gaucho experience which is "clearly at a higher level than others in the restaurant industry."

After setting forth the beneficiary's qualifications, the petitioner sought to distinguish the facts of this matter from those presented in the Fifth Circuit decision, *Boi Na Braza.* 2005 WL 2372846. The petitioner acknowledged that *Boi Na Braza* operates in the same restaurant industry, but emphasized that the instant

petition is entirely distinct from the facts presented in *Boi Na Braza* because the petitioner in that case did not submit expert authority, did not explain how its business model differs from industry competitors, did not provide sufficient evidence regarding the beneficiary's qualifications, and did not demonstrate that the beneficiary worked in a specialized knowledge capacity overseas. The petitioner asserts that none of these deficiencies are present in the instant petition, and asserts that *Boi Na Braza* is limited in that it "did not construe the 'specialized knowledge' definition itself, nor did it approve any generic approaches by USCIS to the L-1B category or its key definitions."

The petitioner's initial filing included a total of sixteen exhibits, which included: (1) its company brochure and menu; (2) [redacted] historical and cultural information obtained from an internet resource, *Wikipedia*; (3) Brazilian population statistics obtained from *Wikipedia;* (4) a statement regarding the petitioner's two-year training program for the *churrasqueiro* position; (5) a copy of the company's Training and Development Program overview; (6) three expert opinion letters; and (7) copies of the beneficiary's paychecks from the petitioner's Brazilian subsidiary for a twelve-month period, indicating his position title as "*garcon churras*."

1. The Petitioner's Training and Development Program

In a separate letter dated January 21, 2010, the petitioner stated that it requires its *churrasqueiro* chefs to have two years of training prior to transferring to the United States. The petitioner indicated that a chef needs to master all meat service including the knowledge and skills relative to mozzarella, pork sausage, chicken, heart, ribs, loin, chops, top sirloin, filet mignon, beef tenderloin, bottom sirloin, ribs and choice top sirloin. The petitioner noted that the time period estimated for the acquisition of competency in customer service with respect to the various meats is fifteen months. The petitioner emphasized that its training program "is clearly above and beyond what a chef or member of a wait staff would receive at any restaurant," and claimed that its training program is "necessary, required and is unique in the industry."

The petitioner submitted a copy of its "Training and Development Program for Churrasqueiro/Chef" dated May 2007. This 22-page document outlines the objectives, methodologies, and teaching resources used in the program, and provides an overview of the program's four modules. The timeline provided in the program indicates that a newly-hired trainee will devote one semester to "basic" skills, two semesters to "intermediate skills" and one semester to "advanced skills." The training consists of seminars and courses in which the students learn theoretical components in the classroom, and on-the-job training in which the instructor demonstrates routines and techniques for trainees and then supervises practical work activities in the workplace. The program is divided into the following modules:

- General, which includes topics common to all of the foreign entity's workers.
- Specialist, which is comprised of specific training to improve skills and become an expert in the function of *churrasqueiro*/chef.
- Cultural, the training module covering cultural topics.

- Language, which is the English language skills training component.

The topics of the training and development program include:

1. Integration of New Workers
2. Operation of [redacted] (meat delivery, storage, hygiene and handling techniques, preparation, grilling, and planning and organization).
3. Product Knowledge (meats, seasoning, marinade, authentic gaucho dishes, side dishes, salad bar and dressings, desserts, drinks, wine).
4. [The petitioner's] Customer Service standards (verbal communication and body language, appropriate meat serving techniques, customer service rules, greeting, personalized service, perception of guest needs, meat service, closure of interaction with guests, safety rules).
5. [redacted] Cleanliness and Food Safety (hygiene, microbiology and food contamination, methods of food conservation, food safety).
6. Personal Development (communication processes, team work, motivation, skill level).
7. Work safety (fire extinguisher training, fire prevention, basic emergency procedures related to churrasqueira, accident prevention, first aid).
8. Gaucho Culture (History of [redacted] Culture, Culinary, Attire, Tools and utensils, dances and literature).
9. General Culture and Current Events (History of employment city, places of interest, general current events, novelties in gastronomy).
10. English Course

The training and development program outline goes on to describe the first five modules in more detail. According to the program description, course materials include training manuals, technical books on the English language and the gaucho culture, films, slide projection, work equipment and utensils, and products and merchandise.

2. Expert Opinion Letters

In support of its contention that the position of *churrasqueiro* chef involves specialized knowledge, counsel submitted three opinion letters. The first opinion was prepared by [redacted] President of Concept Management, Inc. In a letter dated October 14, 2009, [redacted] a restaurant industry consultant with 34 years of experience, indicates he was engaged to "provide a third party review and analysis of [the petitioner's] Business/Concept Model and Employment Model – and the unique specialized knowledge position of churrasqueiro chef – as they pertain to the company's competitive advantage/differential in the marketplace."

[redacted] stated that his review and analysis of the petitioner's operations was based, in part, on observation and assessment of six competitor *churrascaria* restaurants in the United States. He also indicated

that he met with and interviewed the petitioner's senior executives, regional and restaurant level management, Brazilian and locally-hired *churrasqueiro* chefs and other restaurant employees; analyzed the petitioner's employee selection, training and development documents; observed operations at four of the petitioner's restaurants; and relied on his experience and observations as an expert in the restaurant industry.

[redacted] commented that the petitioner's expansion efforts in the United States are reliant upon being able to secure sufficient numbers of qualified *churrasqueiro* chefs from Brazil to set up each restaurant and to train and support locally-hired *churrasqueiro* chefs. With regard to the petitioner's business model, [redacted] states:

> [The petitioner's] concept model and business success are dependent on achieving an authentic, unique and differentiated Brazilian style Churrascaria experience for each guest. To achieve this, [the petitioner] must maintain strict adherence to the original Southern Brazilian Churrascaria traditions and culture of its food preparation, production and presentation, and its business model. Without this commitment to authenticity, [the petitioner's] competitive differentiation will be materially diminished, if not lost.

In comparing the petitioner to its competitors in the U.S. *churrascaria* market, [redacted] states that the petitioner is "unique and differentiated" and became the recognized industry leader "because of its focus on authenticity – due in large part to its authentic, Brazilian churrasqueiro chefs." Specifically, [redacted] observed that the petitioner's competitors "did not deliver a comparable, authentic, entertaining dining experience," but rather an imitation or "Americanized" version of a true Brazilian *churrascaria* experience that relies on "less skilled, costumed employees playing the role of churrasqueiros or gauchos." He opines that "guests clearly recognize this difference and it is likely a large contributor to the fact that competing churrascarias achieve only half of [the petitioner's] sales volumes." [redacted] states that "the quality, experience and authenticity of its Brazilian churrasqueiro chefs" distinguishes the petitioner from its competitors.

With regard to the proposed position of *churrasqueiro* chef, [redacted] states that: "Churrasqueiros chefs are the primary driver of [the petitioner's] Business/Concept Model." He finds *churrasqueiro* chefs to be unique in the United States restaurant industry and states that they possess uncommon knowledge and specialized skills that clearly distinguish them from others in the industry.

Specifically, [redacted] notes that the role includes an atypical style of butchering unique to *churrascarias*; roasting, spit fire management and control involving unusual duties such as anticipating how much meat will be needed, continuously leaving the roasting station, visually judging the doneness of meat; and table side service/guest interaction and service. [redacted] states that "these skills originate in the gaucho lifestyle of rural southern Brazil, and are passed on from generation to generation." He notes that "in the United States, these skills can only be learned in churrascaria restaurants, and only after extensive personal training by tenured, experienced churrasqueiro chefs." With respect to the training process, he states that carefully selected gauchos must complete two years of training before being certified or promoted to the *churrasqueiro* chef position, and that training is ongoing even after the two-year period is complete. [redacted] states that each U.S. restaurant

should ideally be staffed by at least 40-50% (8-10 per restaurant) veteran, Brazilian *churrasqueiro* chefs from the southern rural Brazilian states to ensure that it has a sufficient number of authentic gauchos to train the remaining locally-hired staff.

In addition, [redacted] addresses the petitioner's efforts to recruit and train U.S. workers to perform the *churrasqueiro* chef position, noting that the petitioner has found that prior restaurant chef/kitchen experience does not translate to success as a *churrasqueiro* chef. He notes that, among those locally-hired employees who become *churrasqueiros,* the annual turnover is nearly 70% with an average tenure of less than 1.3 years. Finally, he explains that, because of the high rate of turnover, the petitioner must engage in continuous selection and training efforts, leading to a need for each restaurant to employ sufficient numbers of Brazilian chefs to train local hires for the position.

The second expert opinion submitted is a declaration prepared by [redacted], founder of the First Center for Traditions of [redacted] In a statement dated August 26, 2004, he comments on the proposed position and its cultural relevance, as set forth in the excerpts below:

> [The petitioner] is structured to present the traditional barbeque of [redacted] (grill of meats over fire of live coal) in authentic environment and forms, using the method of *Grill over fire of live coal* used by the people of [redacted] since the 19th Century in pastoral activities.
>
> * * *
>
> I am amazed to observe that the structure and the very success of [the petitioner] is directed to the barbeque chefs that are instructed to serve meats to the guests in the best traditional way of [redacted] They are trained to wear the traditional clothing of the State; talk to the guests about songs and poetry; talk to them, answering the most varied questions. In general, the barbeque chefs explain questions not only regarding to [*sic*] the meats served; the method for cutting, seasoning and grilling, further providing an historical overview of their clothing, boots, and equipment, of our customs and of the location from where they came and now represent. . . . According to my observations, the sharing of cultural elements of [redacted] is a special element in the development and integration of the business of [the petitioner]. The authenticity of [the petitioner] is a constant search for the history, culture and cuisine of [redacted] this is a part detached from the training and the employment of each one of the barbecue chefs of its staff. It is pleasant to see that [the petitioner] has expanded the culture of Rio Grande do Sul throughout the globe, and its employees will certainly show the North American people the traditions, customs, gastronomy, and values of [redacted]

Finally, the petitioner submitted a letter dated August 14, 2008 from [redacted] Associate Dean for Culinary Arts at the Culinary Institute of America. [redacted] indicates that he has been engaged by the

petitioner to review the position and specialized knowledge training of the petitioner's *churrasqueiros* and to compare the position to the U.S. culinary education model. He indicates that he attended various meetings and conference calls with the petitioner's management, conducted on-site observations of preparation, cooking and dinner service at one of the petitioner's restaurants, interviewed *churrasqueiro* chefs and a Meat Service Manager, and reviewed all training and development materials for *churrasqueiro*/chef and meat service managers.

[redacted] analysis includes a comparison between the petitioner's *churrasqueiro* chef training program and the Meat Fabrication curriculum offered at the Culinary Institute of America. He notes that the Culinary Institute's seven-day Meat Fabrication class introduces students to 36 to 40 different cuts of meat, while the petitioner's concentration is on only six to eight sub-primal cuts. [redacted] finds that "there is simply no comparison between the Culinary Institute of America's Meat Fabrication class and [the petitioner's] comprehensive Churrasqueiro training program." He opines that graduates of the Culinary Institute of America course "would only be familiar in identifying sub-primal cuts of meat, but would have limited dexterity with a knife and therefore lacking with regard to speed and accuracy as compared with [the petitioner's] training graduates."

[redacted] further states that petitioner's *churrasqueiros'* fabrication techniques with respect to certain cuts of meat are unique and that they possess advanced skills that are specifically adapted to the style of cooking executed in their restaurants. [redacted] concludes that the training program completed by *churrasqueiros* gives them an advantage over culinary school graduates with respect to the particular style of cooking.

[redacted] also observes that the petitioner's training program "has no equals amongst its competitors in the 'Steak House' niche," noting that such traditional American steakhouses rely on prior industry experience and have training programs that require only weeks to complete. He also notes that to his knowledge there are no programs operating in the United States that focus on Brazilian *churrasco* methods of meat cutting. Also, [redacted] observes that "a Churrasqueiro's specialized talents are not only a result of the training he receives but a direct reflection of his lifetime of exposure with this style of cooking (churrasco)." [redacted] states that someone with "a good work ethic and prior industry experience" may be able to perform the same duties, but notes that they would need to complete the petitioner's extensive training program. Finally, he emphasizes that the Brazilian *churrasqueiros* have an inherent understanding and appreciation of the regional culinary traditions of Southern Brazil which provide the petitioner's customers with an authentic dining experience.

B. Request for Evidence

The director issued a request for additional evidence ("RFE") on February 9, 2010, in which he requested information pertaining to the beneficiary's knowledge and training, the number of similarly employed workers within the U.S. and foreign entities, and additional information that would differentiate the petitioner's products and the beneficiary's knowledge from what is common in the petitioner's industry.

In response to the RFE, counsel submitted a 19-page letter dated May 5, 2010. Counsel contended that the RFE ignored most of the evidence submitted in support of the petition, and asserted that such evidence was sufficient to establish by a preponderance of the evidence that the beneficiary is eligible for L-1B classification. Counsel emphasized that the original submission established that the beneficiary has "a lifetime of inherited culinary and cultural expertise" that is valuable to the employer's competitiveness in the marketplace. Counsel stated that the beneficiary is "uniquely qualified to share the [redacted] traditional method of cooking with U.S. diners," stressed that its *churrasqueiro* chefs are key employees, and indicated that the beneficiary in particular "exemplifies the skills and experience of the petitioner's Churrasqueiro chefs that sets [the petitioner] apart from its competitors."

Finally, counsel asserted that the beneficiary possesses knowledge which can only be gained through extensive prior experience with the petitioning organization in Brazil. In this regard, counsel emphasized that the petitioner "only employs Churrasqueiro Chefs in Brazil who have extensive experience in the rural southern Brazilian 'gaucho lifestyle,' and who have then received intensive training at a [company] restaurant in Brazil."

Counsel indicated that, as stated in the initial petition, each of the petitioner's restaurants employs 10 to 12 *churrasqueiro* chefs, so clearly there are "other employees at the company's U.S. location who perform the duties stated in the beneficiary's proposed position." Counsel indicated that all of the petitioner's *churrasqueiro* chefs have been either "(i) born in Brazil and raised in the [redacted] region and culture. . . , or (ii) have received extensive, rigorous training by [the petitioner's] Churrasqueiro Chefs at a [company] restaurant location in the United States."

In response to the director's request for additional information regarding the petitioner's training program, counsel stated that the director overlooked the petitioner's training and development program and the expert opinion letters o[redacted] and [redacted] and referred the director to excerpts from these letters. Finally, counsel emphasized that USCIS has approved more than 200 L-1B petitions filed by the petitioner for *churrasqueiro* chefs based on facts that are similar to the instant petition.

C. Denial

The director denied the petition on May 20, 2010, concluding that the petitioner failed to establish that the beneficiary has been or will be employed in a specialized knowledge capacity. In denying the petition, the director referred to the petitioner's organizational chart provided in response to the RFE, noting that "the beneficiary is at the same level as kitchen staff, bartenders, servers, hostess, cashier and bussers." The director observed that the beneficiary does not "appear to have an advanced level of knowledge above and beyond ordinary."

The director further found that "the training received by churrasqueiros is no different than other food preparation training and is in no way advanced." The director stated that "cooking techniques that can be learned by a chef through exposure to the cooking techniques for a brief or moderate period of time generally do not constitute

specialized knowledge." The director acknowledged the petitioner's claim that the skills required for the position require an individual with experience in the gaucho lifestyle of rural southern Brazil, but determined that the skills are "not so uncommon or complex that other chefs in the industry could not master them within a reasonable period of time."

D. Service Motion to Reopen and Response

On October 25, 2010, the director notified the petitioner that USCIS was reopening the petition on its own motion pursuant to 8 C.F.R. § 103.5(a)(5), and advised the petitioner that it had 30 days to file a brief in support of the petition. Counsel for the petitioner responded with a 53-page legal brief and supplemental evidence on motion, which included a 9-page affidavit from the petitioner's chief executive officer.

At this point in the procedural history, the petitioner and counsel introduced a new argument intended to distinguish the company's Brazilian *churrasqueiros* from their locally-hired peers working in the same position. In this regard, counsel asserted that "churrasqueiros simultaneously perform and integrate seventeen distinct duties involving preparation, serving, entertaining, as well as certain 'team' duties altogether forming the *sine qua non* of authentic gaucho *churrasco*." Counsel stated that the petitioner's "genuine gauchos" are able to perform all of these churrasqueiro duties "100% to [the petitioner's] standards and specifications as the result of a gaucho childhood spent preparing, cooking, and serving *churrasco* in large gatherings." Counsel asserted that, while the petitioner attempts to train its locally-hired *churrasqueiros* to similarly perform all of the *churrasqueiro* duties, it is unable to teach certain duties within a reasonable period of time, while some *churrasqueiro* duties simply cannot be taught at all.

Counsel emphasized that for this reason, the petitioner requires "a cadre of genuine gauchos" at each U.S. restaurant to perform those duties that the locally hired *churrasqueiros* cannot perform, and to ensure the authenticity of the dining experience. Counsel noted that USCIS approved over 200 of its L-1B petitions for Brazilian *churrasqueiros* between 1997 and 2007, and has only recently determined that the position is not one requiring specialized knowledge.

Counsel discussed the legislative history of the L-1B visa classification from the creation of the category through the 1970 amendments to the Immigration and Nationality Act of June 27, 1952, to the Immigration Act of 1990, and subsequent agency interpretations of the term "specialized knowledge."

Counsel asserted that the 1990 Act rejected the 1970 Act's "narrow" and "restrictive" approach to interpreting the term, and included a more liberal interpretation of specialized knowledge that was confirmed through subsequent policy memoranda and "a favorable disposition to L-1B adjudications" prevalent until around 2006.

In addition, counsel asserted that Public Law 111-230, enacted on August 13, 2010, "explicitly confirms that the majority – even all – of a single firm's employees may qualify for L-1 'specialized knowledge' visas." Public Law 111-230 made emergency supplemental appropriations of $700 million for the Department of Homeland Security

and other agencies for 2010 border security. Specifically, counsel emphasized that Public Law 111-230 recognizes that a petitioner may employ more than 50% L-1B staff as it imposes a new filing fee and fraud prevention and detection fee increase of $2,250 for L-1 visa petitions for those petitioners that employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees are nonimmigrant workers admitted pursuant to section 101(a)(15)(H)(i)(b) or section 101(a)(15)(L) of the Act. Pub. L. 111-230, § 402(a). Counsel generally criticized USCIS' "restrictive" approach to adjudicating L-1B petitions over the past five years and described Public Law 111-230 as "an explicit and emphatic rejection of the Service's assertion that 'specialized knowledge' should be interpreted in a restrictive manner." Finally, counsel asserted that "the plain language of the new Public Law supersedes the 1970 Act legislative history."

Counsel asserted that, consistent with the regulatory definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D), the beneficiary "gained 'special knowledge' of [the petitioner's] 'product, service, . . . [and] techniques,' as a boy growing up in the gaucho culture of Rio Grande do Sul." Counsel further contended that the beneficiary's skills and knowledge constitute "special knowledge" because only "genuine gauchos" can fully perform all *churrasqueiro* duties according to company standards.

In addition, counsel contended that the beneficiary has been trained to apply his "special knowledge" in international markets, consistent with the regulatory definition of the term "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D). Counsel emphasized that even those who are hired with substantial preexisting skills in preparing *churrasco* must still undergo up to 24 months of training in the petitioner's corporate standards to ensure that the company presents a uniform product in all of its restaurants.

Moving beyond the regulatory definition, counsel asserted that the beneficiary possesses specialized knowledge as interpreted by the 2004 Ohata Memorandum applicable to chefs and specialty cooks. In this regard, counsel argued that the beneficiary possesses knowledge of authentic gaucho culinary traditions that is "uncommon" and "not generally shared by others" in the United States or even in Brazil, and that such knowledge is "not easily or rapidly acquired." Counsel argued that the beneficiary is able to fully perform the duties of a *churrasqueiro* because he "literally grew up performing essentially the same roles and duties as the [petitioner's] *churrasqueiro* position requires." Counsel further claimed that the beneficiary satisfies the requirements for classification as an L-1B specialty chef because his knowledge is "necessary and relevant to the successful conduct of [the petitioner's] operations," and because he must perform duties "ancillary to cooking."

The petitioner provided a chart comparing the capabilities of [redacted] *churrasqueiros* in terms of performing a list of 17 tasks required of the *churrasqueiro* position. According to the chart, locally-hired "non-Gaucho" chefs are able to fully perform the tasks of selecting meats, properly placing meat on the skewer, seasoning meats for grilling, serving customers throughout the restaurant, and determining the correct serving order in the dining room, after completing training.

The chart indicates that the "non-Gaucho" personnel can also be trained to at least competently perform the duties of visually determining a meat's doneness level and trimming and preparing cooked meat. The petitioner

indicates that a "non-Gaucho" cannot, however, be trained within a reasonable period of time to simultaneously grill 5 to 6 skewers of meat while leaving the grill to perform serving duties, to monitor demand for additional meat based on volume of customers and reservations, to educate new customers on *churrascaria* dining, or to carve and serve all 15 cuts of meat. Finally, the chart indicates that it is not possible to train a non-gaucho to: convey the sense of gaucho-style hospitality present at family events in rural southern Brazil; to educate customers about unique meat cuts and the gaucho culinary and cultural traditions; to provide a "proud but non-intrusive presentation of the skewer/meat tableside"; to set the overall pace of the cooking and serving rhythm in the dining room; to monitor the quality of the overall presentation by the team to ensure authenticity; to train and coach local hires regarding the role and duties of an authentic *churrasqueiro*, or to provide the petitioner with the ability to state in new local markets that its gauchos are "authentic."

The petitioner also supplemented the record with additional facts regarding the beneficiary. Counsel indicated that the beneficiary is "a genuine gaucho, born and raised in the Rio Grande do Sul region," where he learned to prepare, grill and serve *churrasco* at large, extended family and community gatherings. The petitioner submitted a copy of the beneficiary's curriculum vitae and biography, which indicates that the beneficiary "feels as if he 'was born smelling the smoke of the churrasco.'" The biographical information indicates that the beneficiary learned to prepare *churrasco* for weekly community festivities as an adolescent, and became familiar with the various cuts of meat and tableside service for large groups of diners. According to the beneficiary's employment history, he worked from April 2001 until June 2006 at [redacted] Brazil as a kitchen helper and waiter, and worked at the petitioner's subsidiary in [redacted] from June 2006 until February 2007 as a *churrasqueiro* waiter. The beneficiary was hired for the same position at the petitioner's Sao Paulo subsidiary in May 2007.

The petitioner submitted a letter from [redacted] a nutritionist who is described by counsel as "an expert on Brazilian regional cuisine and culture." [redacted] indicates that she personally interviewed the beneficiary on April 12, 2011, and also reviewed the beneficiary's curriculum vitae, the petitioner's position description for the *churrasqueiro* position, and the expert opinion letters of [redacted] concludes that the beneficiary "indeed possesses the cultural background and restaurant skills necessary to fulfill the position of Churrasqueiro at [the petitioning organization]."

The petitioner's submission on motion included a lengthy affidavit from its Chief Executive Officer, [redacted] who provides background on the company's business model and emphasizes the foreign entity's practice of hiring exclusively genuine gauchos who "learned, as boys, the traditional role that men play preparing and cooking churrasco and simultaneously serving and entertaining at large extended-family and community gatherings characteristic of the rural pampas region of Southern Brazil." [redacted] asserted that candidates are only considered for transfer to the United States "following training and at least two years experience in [the petitioners] Brazilian restaurants."

The petitioner also submitted a letter from [redacted] a human resources consultant for the petitioner's operations in Brazil. [redacted] provides statistics regarding the selection process for *churrasqueiros* in

Brazil, and emphasizes the importance placed on selecting candidates who are "true representatives of the gaucho culture."

In addition, the petitioner submitted an affidavit from [redacted] who serves as the company's corporate manager responsible for marketing, advertising, promotion and media for all U.S. restaurants. [redacted] states that the petitioner's brand is "most often defined by its authenticity" and that "in virtually all of its marketing, advertising, promotional and media-related materials, [the petitioner's] authenticity is the key theme." He submitted examples of company marketing, media and promotional materials in support of his assertions.

Finally, the petitioner submitted an affidavit from [redacted] Regional General Manager for the petitioner's Western U.S. region. [redacted] explains that it is critical that each restaurant is sufficiently staffed so that several authentic gaucho *churrasqueiros* are always on the restaurant floor to ensure that the restaurant adheres to the tradition, and to train and coach the *churrasqueiros* who did not grow up with the gaucho experience. He indicates that gaucho *churrasqueiros,* when hired, are already knowledgeable and experienced in the gaucho culture, preparing the fire, selecting the meat, grilling to temperature, skewering, carving and hosting *churrasco* events, and simply need to learn the company's service standards. [redacted] emphasizes that restaurant customers consistently request service from authentic gauchos and that such gauchos are essential to continue to attract and retain customers who are interested in an authentic culinary experience.

E. The Director's Decision on Motion

On June 16, 2011, the director affirmed the denial of the petition after conducting a full review of the entire record. In denying the petition, the director stated that "USCIS cannot conclude that being raised in the Brazilian gaucho culture, or learning about the culture and cooking methods through training, equates to having specialized knowledge." The director found that the petitioner failed to establish how its training program imparts specialized knowledge specific to the company or how its training, cooking and serving processes differ in any significant way from those of any other Brazilian *churrascaria* restaurants operating in the United States.

In his discussion, the director emphasized that the petitioner's evidence and an Internet search confirm that Brazilian *churrascarias* have been gaining in popularity and presence in the United States. The director observed that even the petitioner's own expert, Mr. Hornbeck, acknowledged that the petitioner's most successful local hires "come from other churrascaria restaurants." The director concluded that, while the position may have at one time required a skill set that was relatively rare, "the proliferation of U.S. *churrascarias* has significantly diminished that scarcity." The director further concluded that a *churrasqueiro* trained by one of the petitioner's competitors could plausibly be trained to learn the petitioner's methods "relatively quickly and inexpensively."

With respect to the beneficiary, the director observed that the petitioner submitted little evidence with the initial filing to establish his qualifications, other than pay statements for all 12 months of 2009 indicating that he worked for one of the petitioner's Brazilian subsidiaries in the position of "*garcon churras*" or waiter. The director noted that the petitioner claimed that the beneficiary was a *churrasqueiro chef* during his entire period of employment

and did not submit evidence to demonstrate that a "*garcon churras*" performs duties that are substantially similar to a *churrasqueiro* chef or that the beneficiary has been employed in a *churrasqueiro* chef position. The director further observed that the petitioner's initial submission did not included corroborating evidence to support its assertions that the beneficiary had actually completed the foreign entity's two-year training program. As such, the director determined that USCIS cannot conclude whether the beneficiary possesses the claimed specialized knowledge.

The director noted that the regulatory definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D) refers to "special knowledge possessed by an individual," while the petitioner's claim is that *all* of its Brazilian *churrasqueiros* possess specialized knowledge. The director emphasized that the regulations apply on a case-by-case basis to individual beneficiaries to determine each person's eligibility for the classification, and do not contemplate the use of a position description to establish the eligibility of a class of employees or all employees with the same job title. The director observed that the fact that all *churrasqueiros* complete specialized training is insufficient to establish that any individual churrasqueiro possesses specialized knowledge. The director cited *Matter of Colley* 18 I&N Dec. 117 (Comm'r 1981), *Matter of Penner*, 18 I&N Dec. 49 (Comm'r 1982), and *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm'r 1988), noting that not all employees with specialized knowledge or performing technical duties are eligible for L-1B classification, and drawing a distinction between skilled workers and those who perform services in a specialized knowledge capacity.

The director acknowledged the petitioner's submission of expert testimony from [redacted], and the petitioner's assertion that the letters demonstrate that the *churrasqueiro* chef position is a specialized knowledge position as contemplated by the Act and the regulations. The director observed that none of these individuals interviewed the beneficiary or even reviewed his resume. Rather, the letters address the position of *churrasqueiro* chef, and reach a conclusion that all of the petitioner's *churrasqueiros* possess specialized knowledge. The director discussed the letters at some length and questioned the factual support for some of the conclusions reached by their authors. The director noted that the evidence demonstrates that non-gauchos can and do successfully act as *churrasqueiros*, as the petitioner claims to have only 41 L-1B workers and at least 160 *churrasqueiro* positions in the United States. The director noted that the petitioner's experts did not distinguish between the native Brazilian and locally-hired *churrasqueiros*.

The director acknowledged the petitioner's assertion that Public Law 111-230 was intended to permit expansive use of the L-1B visa, thereby implying that specialized knowledge can be widely held within a firm. The director emphasized that Public Law 111-230 made emergency supplemental appropriations of $700 million for the Department of Homeland Security and other agencies for 2010 border security and immigration purposes. The director observed that the Congressional record contained no references to the L-1B visa program or specialized knowledge, and "declined to speculate as to whether Congress was using Public Law 111-230 to suggest expanding the definition of specialized knowledge." The director concluded that "in the absence of a clearly articulated legislative revision of the definition of specialized knowledge, USCIS will not deviate from settled construction."

Ultimately, the director found that the beneficiary's restaurant skills and cultural heritage "do not combine to constitute specialized knowledge." The director certified his decision to the AAO seeking clarification on the application of the regulations to the fact pattern presented by the petitioner in its L-1B petitions for the position of *churrasqueiro* chef and for the instant beneficiary in particular.

F. Certification

In a 53-page brief submitted on certification, counsel for the petitioner asserts that the director's decision: (1) ignores the petitioner's extensive legal brief and applies a specialized knowledge standard that violates the Immigration Act of 1990, the implementing regulations, and internal agency policy memoranda; (2) avoids a critical legal question by declining to speculate whether Congress confirmed in PL 111-230 "that the Service's recent 'narrow' and 'restrictive' approach to 'specialized knowledge' is illegal"; and (3) ignored critical evidence demonstrating that the beneficiary possesses numerous skills that are essential to the *churrasqueiro* chef position and for which U.S.-based workers simply could not be trained.

Moreover, counsel contends that the decision is in error as it imposes a "proprietary knowledge" test and a "key employee" standard; erroneously requires that the beneficiary possess more expertise than other c*hurrasqueiro* chefs within the petitioning company as well as in comparison to *churrasqueiro* chefs employed at other *churrascarias*; and fails to explain USCIS' departure from more than 250 prior approvals of L-1B petitions based on similar facts.

Counsel contends that the director failed to acknowledge counsel's 13-page discussion of the evolution of the definition of specialized knowledge, including the "liberalization" of the definition through the Immigration Act of 1990, and emphasizes that "the new Public Law cannot be fairly evaluated without considering the legal argument set forth in those pages." Counsel suggests that "the very enactment of the Public Law . . . confirms Congress's expansive view of 'specialized knowledge," and "makes it clear that there was no support for a 'narrow' or 'restrictive' interpretation" of the term.

In addition, counsel asserts that the director's decision "mischaracterizes the purpose of [the petitioner's] training program as an independent source of specialized knowledge." Counsel asserts that the petitioner made clear that:

> genuine gauchos chosen by [the company's] rigorous screening program begin . . . with substantial preexisting skills in *churrasco* (as a result of their gaucho backgrounds and [the company's] selection process), but nevertheless still undergo the training program that sets [the company's] own corporate standards for the preparation and presentation of its churrasco product.

Counsel claims that the training program enables the company to apply the Brazilian *churrasqueiros'* specialized knowledge in international markets, but "the training is not itself an independent source of specialized knowledge."

Counsel once again emphasizes that the petitioner's locally-hired U.S. *churrasqueiros* can "barely perform" seven of the 17 duties that are fully performed by their Brazilian-born counterparts, even after completing two or more years of training. Counsel rejects the director's finding that the knowledge held by the petitioner's *churrasqueiros,* while perhaps once specialized within the U.S. market, has become commonplace in light of the popularity of *churrascarias*. Counsel asserts that the director's conclusion "erroneously assumes that all *churrascarias* are the same with respect to the duties of the *churrasqueiros*," and provided no evidence or foundation for its finding that all *churrasqueiros* perform the 17 distinct duties performed by the petitioner's authentic Brazilian gauchos.

Counsel contends that the director's decision cites case law from the 1980s, all of which was rendered partially or completely invalid by the Immigration Act of 1990 and does not inform the current standard. Counsel reiterates that the beneficiary satisfies all specialized knowledge criteria as set forth in the regulatory definition at 8 C.F.R. § 214.2(l)(i)(2)(D) and under the 2004 Ohata Memorandum analysis applicable to L-1B chefs and specialty cooks. Counsel also claims that the facts of this case satisfy the interpretation of specialized knowledge set forth in the 1994 Puleo Memorandum based on: (1) the small percentage of people in Brazil with knowledge of gaucho culture make such knowledge "distinguished by some unusual quality," and also "uncommon"; and (ii) this knowledge of Brazilian gaucho culture "cannot be easily transferred or taught to another individual" because it relates specifically to a unique life experience that either one possesses (as does [the beneficiary]), or one does not."

In addition, counsel asserts that the fact that the beneficiary gained his specialized knowledge prior to joining the foreign entity is irrelevant to the specialized knowledge determination. Counsel asserts that there is no requirement that the beneficiary's specialized knowledge be proprietary to or solely imparted by the company. Counsel emphasizes that the Puleo Memorandum states that knowledge gained outside of employment with the petitioning employer may still qualify as specialized knowledge if it is "unknown in the United States." Counsel concludes by stating that the instant petition satisfies the "specialized knowledge" standard using USCIS' own framework.

This certification raises several different issues for consideration: (1) what is the appropriate standard that should be applied to determine "specialized knowledge"; (2) whether the petitioner's *churrasqueiro* chef position requires specialized knowledge according to that standard; and (3) whether the beneficiary in this matter possesses specialized knowledge, and has been and will be employed in a specialized knowledge capacity.

III. History of the Specialized Knowledge Definition

Because this certification involves difficult issues of statutory interpretation and the effect of legislative amendments, we find it useful to review briefly the evolution of the legal framework. The history of the L-1B specialized knowledge category is discussed at length in counsel's briefs.

A. The Immigration Act of 1970

The L-1 intracompany transferee visa classification was created by Congress through the Immigration Act of 1970. Pub.L. 91-225, § 3, 84 Stat. 117 (Apr. 7, 1970). Section 101(a)(15)(L) of the Act, as amended by Public Law 91-225, provided the following:

> an alien who, immediately preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him.

See also Matter of Bocris, 13 I&N Dec. 601 (Reg. Comm'r 1970).

Congress created the L-1 visa classification after concluding that "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade." *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 at **4 (Leg. Hist.). To address the problem, Congress created the L-1 visa and noted that the "amendment would help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." *Id.*

Congress did not define "specialized knowledge" in the Immigration Act of 1970, nor was it a term of art drawn from case law or from another statute. *1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C., 1990).

The legislative history of the Immigration Act of 1970 does not elaborate on the nature of a specialized knowledge employee; instead the House Report references executives, managers, and "key personnel." Regarding the intended scope of the L-1 visa program, the House Report indicates:

> Evidence submitted to the committee established that the number of temporary admissions under the proposed 'L' category will not be large. The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service.

H.R. Rep. No. 91-851, 1970 WL 5815 at **5.

After the creation of the L-1B nonimmigrant visa classification, legacy INS developed a body of binding precedent decisions which attempted to clarify the meaning of "specialized knowledge," in the absence of a

statutory definition. *See Matter of Raulin*, 13 I&N Dec. 618 (Reg. Comm. 1970); *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988).

As it gained administrative experience with the visa classification, the INS promulgated two successive definitions of the term by regulation. First, in 1983, the INS published a final rule adopting the following definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(C) (1984):

> "Specialized knowledge" means knowledge possessed by an individual which relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the petitioner not readily available in the job market. The knowledge must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the market place.

48 Fed. Reg. 41142, 41146 (September 14, 1983).

In 1987, less than four years later, the INS provided a modified definition at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988) to "better articulate case law" relating to the term:

> "Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

52 Fed. Reg. 5738, 5752 (February 26, 1987).

B. The Immigration Act of 1990

In 1990, Congress acted to end the agency's varying interpretations of the term "specialized knowledge."

Through the Immigration Act of 1990, Congress provided a statutory definition of the term by adopting in part and modifying the 1987 INS regulatory definition. Immigration Act of 1990, Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Congress adopted the "advanced knowledge" component of the INS definition but deleted the bright-line "proprietary knowledge" element and the requirement that the knowledge be of a type "not readily available in the United States labor market." In enacting these changes,

Congress did not otherwise attempt to modify the agency's interpretation as to what constitutes specialized knowledge.

In its effort to clarify the term specialized knowledge, Congress added an ambiguous and circular component to the definition by stating that an alien is considered to be serving in a "capacity involving specialized knowledge" if the alien has a "special knowledge" of a petitioner's product.

Specifically, Congress enacted the following definition:

> 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.

Section 214(c)(2)(B) of the Act, as created by Pub.L. No. 101-649, § 206(b)(2).

Regarding the 1990 Act changes, the legislative history indicates that Congress found the L-1 visa had allowed "multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures" and that it had been "a valuable asset in furthering relations with other countries." H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 at **79 (Leg. Hist.).

In light of this experience, the House Committee stated that the L-1 category should be "broadened" by making four enumerated changes: first, Congress allowed accounting firms to have access to the intracompany visa even though their ownership structure had previously precluded them from the classification; second, Congress incorporated the "blanket petition" available under current regulations into the statute for maximum use by corporations; third, Congress changed the overseas employment requirement from a one-year period immediately prior to admission to one year within the three years prior to admission; and fourth, Congress expanded the period of admission for managers and executives to seven years to provide greater continuity for employees. *Id.*

In a separate paragraph, following the previous paragraph discussing the enumerated provisions that "broadened" the L-1 classification, the House Report discussed the new definition of "specialized knowledge." The paragraph stated in its entirety:

> One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company. The time limit for admission of an alien with specialized

knowledge is five years, approximately the same as under current regulations.

Id.

In 1991, the INS proposed and adopted "a more liberal interpretation of specialized knowledge" based on the new statutory definition. Closely following the definition provided by Congress, 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.

See 56 Fed. Reg. 61111 (December 2, 1991)(Final Rule).

C. The L-1 Visa Reform Act of 2004

In 2004, Congress passed the L-1 Visa Reform Act which provides USCIS with additional criteria governing the L-1B specialized knowledge visa classification. *See* Division J, Title IV, Subtitle A, Section 412 of the Consolidated Appropriations Act of 2005, Pub. L. 108-447.

As amended by the L-1 Visa Reform Act, section 214(c)(2)(F) of the Act prohibits classifying an alien as an L-1B if he or she "will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent" and:

> (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.

Congress intended 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)

Counsel asserts that the 2004 Act served to "foreclose use of an L-1 where the alien will be stationed at a third-party worksite, where the alien will be supervised by an unaffiliated employer, or where the arrangement is essentially labor for hire for the unaffiliated employer." Counsel asserts that "Congress could have – but did not – alter the 'specialized knowledge' standard."

D. Public Law 111-230, "Supplemental Appropriations—FY 2010."

Finally, counsel includes in his analysis of the evolution of the definition of "specialized knowledge" a discussion of Public Law 111-230, "Supplemental Appropriations—FY 2010," 124 Stat. 2485 (August 13, 2010).

Public Law 111-230 is "an Act making emergency supplemental appropriations for border security for the fiscal year ending September 30, 2010, and for other purposes." Titles I, II and III of the Act enumerate the specific sums appropriated for the emergent needs of the Department of Homeland Security, the Department of Justice, and the Judiciary branch. Public Law 111-230 imposes a filing fee and fraud prevention and detection fee increase of $2,250 for L-1 visa petitions for those petitioners that employ 50 or more employees in the United States if more than 50 percent of the petitioner's employees are nonimmigrants admitted pursuant to section 101(a)(15)(H)(i)(b) or section 101(a)(15)(L) of the Act. (Pub. L. 111-230, § 402(a)). A fee increase of $2,000 is imposed on H-1B petitions filed under the same conditions. The fee increase is in effect from the date of enactment through September 30, 2014, and has since been extended to September 30, 2015.[3]

E. Internal Agency Memoranda

Legacy INS and USCIS have issued a number of internal agency memoranda discussing the term specialized knowledge, including the above referenced Puleo Memorandum and Ohata Memorandum, the latter of which applies specifically to chefs and specialty cooks. *See supra* at page 4.

The Puleo Memorandum of 1994 is often cited as the key agency document relating to the adjudication of L-1B specialized knowledge visa petitions. Addressed to the various directors of the INS operational components, the internal agency memorandum noted that the 1990 Act statutory definition was a "lesser, but still high, standard" compared to the previous regulatory definition and declared that the memorandum was issued to provide guidance on the proper interpretation of the new statutory definition.

The memorandum advised INS officers to apply the common dictionary definition of the terms "special" and "advanced," since the statute and legislative history did not provide insight as to the interpretation of specialized knowledge. Looking to two different versions of *Webster's Dictionary*, the memorandum defined the term "special" as "surpassing the usual; distinct among others of a kind" or "distinguished by some unusual quality; uncommon; noteworthy." Puleo Memorandum at p.1. The memorandum relied on the same dictionaries to define "advanced" as "highly developed or complex; at a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage." *Id.* at p.2.

The Puleo Memorandum provided various scenarios, hypothetical examples, and a list of six "possible characteristics" of aliens that would possess specialized knowledge. Adding a gloss beyond the plain language of

---

[3] Title III, Section 302 of Public Law 111-347, [redacted] 9/11 Health and Compensation Act of 2010 (January 2, 2011) extended the applicability of this fee for one additional year.

the statute or the definitions of "special" and "advanced," the memorandum surmised that specialized knowledge "would be difficult to impart to another individual without significant economic inconvenience." *Id.* at p.3. The memorandum also stressed that the "examples and scenarios are presented as general guidelines for officers" and that the examples are not "all inclusive." *Id.* at pp. 3-4.

The Puleo Memorandum concluded with a note about the burden of proof and evidentiary requirements for the classification:

> From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

Id. at p.4.

The Puleo Memorandum closes by noting that the document was "designed solely as a guide" and that specialized knowledge can apply to any industry and any type of position.

The 2004 Ohata Memorandum refined the Puleo Memorandum's guidance as it relates to chefs and cooks and clarifies that chefs and specialty cooks presumptively do not have "specialized knowledge" even though "they may have knowledge of a restaurant's special recipe or food preparation technique." Ohata Memorandum at 1. The memorandum indicates that a chef who performs duties ancillary to cooking may possess specialized knowledge, based on an assessment of the length and complexity of in-house training required to perform the duties and the amount of economic inconvenience the employer would undergo were it required to train another person to perform the same duties. The memorandum emphasizes that an alien's knowledge of minor variations in style or manner of operations cannot be considered "specialized."

The memorandum concludes that a petition on behalf of a chef may meet the requirements of the L-1B statute if the petitioner is able to show "that the alien's knowledge of a product or process is: (a) uncommon or not generally shared by practitioners in the alien's field of endeavor; (b) not easily or rapidly acquired, but is gained from significant experience or in-house training, and (c) is necessary and relevant to the successful conduct of the employer's operations." *Id.* at 4.

IV. Analysis

A. Statutory Interpretation

As enacted by Congress, the specialized knowledge visa classification requires USCIS to draw a line to set apart those employees that possess specialized knowledge from those who do not possess such knowledge. Exactly where USCIS should draw that line is the question before the AAO. On one end of the spectrum, one may find an employee with the minimal one year of experience and basic job-related skills or knowledge. Such a person would not be deemed to possess specialized knowledge under section 101(a)(15)(L) of the Act. On the other end of the spectrum, one may find an employee with many years of experience and advanced training who developed a proprietary process that is limited to a few people within the company. That individual would clearly meet the statutory standard for specialized knowledge. In between these two extremes would fall, however, the whole range of professional experience and knowledge.

On certification, counsel asserts that legislative changes have preempted the legislative history of the 1970 Act and the subsequent precedent decisions. Counsel claims that the 1990 Act, the L-1 Visa Reform Act of 2004, and Public Law 111-230, "Supplemental Appropriations—FY 2010," confirm Congress's expansive view of specialized knowledge, and "makes it clear that there was no support for a 'narrow' or 'restrictive' interpretation" of the term. Counsel further contends that the INS precedent decisions from the 1980s were rendered partially or completely invalid by the Immigration Act of 1990 and do not inform the current standard.

1. The Immigration Act of 1990

Congress spoke directly to the issue when it created a statutory definition for the term specialized knowledge at section 214(c)(2)(B) of the Act. The definition is less than clear, however, since it contains undefined, relativistic terms and elements of circular reasoning. In interpreting section 214(c)(2)(B) of the Act, the AAO relies on existing USCIS regulations, the applicable precedent decisions, and the legislative history of the enabling and amendatory statutes, as an indication of Congressional intent. Additionally, the AAO follows guidance provided in internal agency memoranda.[4]

As enacted by the Immigration Act of 1990, section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

---

[4] While internal agency memoranda may aid in the interpretation of the specialized knowledge standard, the memoranda are intended as internal guidelines for USCIS personnel, they are not outcome determinative, and the documents do not establish judicially enforceable rights. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000); *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir.1987)); *see also Broadgate Inc. v. USCIS*, 730 F.Supp.2d 240 (D.D.C., 2010).

> 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.

Looking to the plain language of the statutory definition, Congress has provided USCIS with an ambiguous definition of specialized knowledge. Although *1756, Inc. v. Attorney General* was decided prior to enactment of the Immigration Act of 1990, the court's discussion of the ambiguity in the former INS definition is equally illuminating when applied to the definition created by Congress:

> 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).

745 F.Supp. 9, 14-15 (D.D.C., 1990).

In effect, Congress has charged the agency with making a comparison based on a relative idea that has no plain meaning. To determine what is special, USCIS must first determine the baseline of ordinary.

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the canons 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, it is instructive to look at the common dictionary definitions of the terms "special" and "advanced." According to *Webster's New World College Dictionary*, the word "special" is commonly found to mean "of a kind different from others; distinctive, peculiar, or unique." *Webster's New World College Dictionary*, 1376 (4th Ed. 2008). The dictionary defines the word "advanced" as "ahead or beyond others in progress, complexity, etc." *Id.* at 20. *See also*, Puleo Memorandum at 1.

Second, looking at the term's placement within the text of section 101(a)(15)(L), 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 with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO would expect a specialized knowledge employee to be an elevated class of workers within a company and not an ordinary or average employee. *See Matter of Penner*,18 I&N Dec. 49, 52-53 (Comm'r 1982); *see also 1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C., 1990).

Third, the legislative history indicates that the original drafters intended the class of aliens 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 WL 5815 at **5. 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.* This legislative history has been long viewed as supporting 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*, 2005 WL 2372846 at *4, *aff'd* 194 Fed.Appx. 248; *American Auto. Ass'n v. Attorney General,* Not Reported in F.Supp., 1991 WL 222420 (D.D.C. 1991); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001)(on file with AAO).

Counsel disagrees with this interpretation of the legislative history, noting that the "proprietary knowledge" and "United States labor market" references in previous regulatory definitions of the term "unmistakably served to restrict the class of individuals eligible for the classification." Counsel asserts that Congress effectively broadened the agency definition by removing these restrictions from it, and by refraining from adding any new offsetting restrictions to the definition. Counsel indicates that legacy INS and USCIS have "explicitly acknowledged and admitted – repeatedly – that the 1990 Act's definition of 'specialized knowledge' broadened and liberalized the interpretation." In this regard counsel states:

> [I]n the wake of the 1990 Act, legacy-INS promulgated its own modified regulatory definition of 'specialized knowledge' mirroring that of Congress's, explaining: "The regulations have also been modified to include *a more liberal interpretation* of specialized knowledge defined in section 214(c)(2)(B) of the Act." 56 Fed. Reg. 31553, 31554 (July 11, 1991). The Service likewise acknowledges this change in the Puleo Memo: "The *prior* regulatory definition required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market. The *current definition of specialized knowledge* contains two separate criteria, and *obviously, involves a lesser, but still high standard*." Puleo Memo at 1 (emphasis added). Most recently the Department of Homeland Security also confirmed that Congress's definition expanded the eligible class: "In 1990, Congress enacted section 214(c)(2)(B) of the Immigration and Nationality Act, as amended, 8 USC 1184(c)(2)(B), which specifically provided for a *less stringent* definition of the term 'specialized knowledge for L-1 purposes." Ex. G. (OIG-06-22) at 7-8 (emphasis added).

Counsel also argues that the broadening of the definition "was consistent with the overarching intent of the 1990 Act to ease immigration restrictions," and asserts that there is "no basis to infer a restrictive intent with respect to the new 'specialized knowledge' definition.

In effect, counsel asserts that the changes made by the 1990 Act supersede the clear statement of Congressional intent that the number of temporary admissions under the L-1 category "will not be large" and that the class of aliens eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored."

H.R. Rep. No. 91-851, 1970 WL 5815 at **5.

The mere fact of amendment itself does not indicate that Congress intended to change the law. *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984). In general, Congress may amend a statute to establish new law, but it also may enact an amendment to clarify existing law. *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004); *see also U.S. v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997). A change in statutory language need not *ipso facto* constitute a change in meaning or effect, as statutes may be passed purely to make what was intended all along even more unmistakably clear. *Brown*, 374 F.3d at 259.

To the extent that the AAO must determine whether a statutory amendment establishes new law or clarifies an existing law, the AAO must look to statements of intent made by the legislature that enacted the amendment. *Id.* Here, the 1990 Act did not expressly state that the changes were clarifying or technical amendments. However, the House Report clearly and specifically expressed a legislative intent to clarify existing law by providing "more specificity":

> One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company.

H.R. REP. 101-723, 1990 WL 200418 at **79.

Courts have also stated that, in construing an amendatory act, it is the decision maker's duty to consider the time and circumstances surrounding enactment and the object to be accomplished by it. *Callejas*, 750 F.2d at 729. The original act and the circumstances surrounding its enactment should also be considered, along with judicial and executive interpretations of the original act. *Id.* "[D]ispute or ambiguity, such as a split in the circuits, [is] an indication that a subsequent amendment is intended to clarify, rather than change, the existing law." *Id.* (quoting *Brown v. Marquette Sav. and Loan Ass'n*, 686 F.2d 608, 615 (7th Cir.1982)); *see also United States v. Tapert*, 625 F.2d 111, 121 (6th Cir.), *cert. denied*, 449 U.S. 1034 (1980); *Begay v. Kerr-McGee Corp.*, 499 F.Supp. 1317, 1325 (D.Ariz.1980).

At the time of enactment, the agency-derived definition of specialized knowledge was in dispute and subject to multiple interpretations. In 1983 and in 1987, the INS published two separate rules with two distinct definitions of the term "specialized knowledge." *See* 48 Fed. Reg. 41142, 41146 (Sept. 14, 1983); 52 Fed. Reg. 5738, 5752 (February 26, 1987). Shortly after publication of the last regulation, the INS Commissioner designated a precedent decision focusing on a rigid, bright-line "proprietary knowledge" element within the definition of "specialized knowledge." *See Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. at 666.

Five months later, the legacy INS issued a policy memorandum that contributed to the confusion. *See* Richard E. Norton, INS Associate Commissioner, Examinations, "Interpretation of Specialized Knowledge under the L Classification," (October 27, 1988), *reproduced in* 65 Interpreter Releases 1170, 1194 (November 7, 1988). Mr. Norton noted that a "too literal definition of the term 'proprietary knowledge' where the knowledge must relate

exclusively to or be unique to the employer's business operation" had the effect of excluding employees who were intended to be accommodated under L-1B classification. Instead, he stated that "it is an appropriate interpretation of specialized knowledge to also consider 'proprietary knowledge' as 'special knowledge possessed by an employee of the organization's product, service, research, equipment, techniques, management or other interests." *Id.*

The Norton memorandum produced considerable uncertainty among immigration attorneys. [redacted], chairman of the American Immigration Lawyers Association's committee on intracompany transferees, rejected the view that the memorandum was a liberalization, concluding instead that "[a]t best this throws more verbiage into an already confusing semantic mess; at worst it could create further restrictions." 65 Interpreter Releases at 1171.

Given statements of intent made by the legislature, the circumstances surrounding its enactment, along with the agency's varying interpretations of the original act, the AAO concludes that the definition of specialized knowledge provided by the 1990 Act was a clarifying amendment. *See Brown*, 374 F.3d at 259.

If a statute amends the Act so that its apparent effect is to materially modify or destroy the preexisting statutory provisions, then the AAO would strictly construe that amendment and conform to its general purposes. Here, however, the 1990 Act amendments relating to the L-1B specialized knowledge visa were clearly intended to be a clarifying amendment and not new law. The legislative history of the original drafters, stating that the intended class of aliens eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS, continues to support a restrictive view of specialized knowledge. *See generally* H.R. Rep. No. 91-851.

The AAO acknowledges that the statutory definition of "specialized knowledge" removed two elements from the then existing regulatory definition of the term, and that such elements likely had the effect of restricting the class of people eligible for the classification. Counsel has not pointed to any committee report or floor statements that undermine the statement of the original enacting Committee that L-1 admissions "will not be large" and that the category will be "carefully regulated and monitored" by USCIS. Instead, counsel consistently attributes to the 1990 Act a blanket intent to "liberalize" the definition of specialized knowledge. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge," the definition did not 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 that Congress created the statutory definition of specialized knowledge for the express purpose of clarifying a disputed and vague term from the Immigration Act of 1970. H.R. Rep. 101-723, 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 extend the "proprietary knowledge" and "United States labor market" references that had existed in the agency definition, there is no indication that Congress intended to "liberalize" the L-1B visa classification.

Counsel's assertions are further undermined by the general language of the statutory definition and the legislative history's clear statement that Congress was concerned about the lack of specificity in the agency's prior definition of specialized knowledge. If Congress had intended the 1990 Act to liberalize the L-1B classification and broaden the class of aliens who might avail themselves of the classification, the AAO would expect to see a clear statement from Congress to that effect. *See Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139, 125 S.Ct. 2169, 162 L.Ed.2d 97 (2005) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation").

The 1990 Act clearly sought to broaden the *utility* of the L-1 visa for international companies, but this objective need not lead to a conclusion that Congress also sought to broaden the *availability* of the L-1 classification by opening it to a substantially greater number or a fundamentally different class of aliens than the executives, managers and "key personnel" contemplated when the visa category was created in 1970. It is reasonable to conclude that the "proprietary knowledge" and "U.S. labor market" tests included in the 1987 regulatory definition simply rendered the classification more narrow than even the 1970 Act intended, thus prompting the observation in the Puleo Memorandum that the 1990 statutory and regulatory definitions reflect a "lesser, but still high" standard compared to previous regulatory definitions. This conclusion is supported by the agency's current regulatory definition of "specialized knowledge" in that these two terms were removed in order to conform it with the clarifying statute. *See* 8 C.F.R. § 214.2(l)(1)(ii)(D).

2. L-1 Visa Reform Act and Public Law 111-230

Counsel also argues that legislation subsequent to the 1990 Act confirms Congress's expansive view of specialized knowledge, and "makes it clear that there was no support for a 'narrow' or 'restrictive' interpretation" of the term.

Counsel asserts that Public Law 111-230 "explicitly confirms that more than 50% of a petitioner's employees may be admitted as L-1 'specialized knowledge' workers." Counsel further contends that Public Law 111-230 "makes clear that Congress does not forbid a company from having 50 or even 100 percent of its workforce comprised of L-1B beneficiaries." Counsel states that while "Congress understood that some employers were overly reliant on L-1 visas" and sought to discourage this practice, it could have instead "narrowed the 1990 Act's specialized knowledge definition, or imposed a numerical cap on L-1 visas."

Counsel also asserts that it is significant that the Public Law generates fees only when more than half of a petitioner's workforce is admitted on L-1 visas. Specifically, counsel states that "if Congress had believed that such expansive L-1 use was aberrational (let alone impermissible) then there would have been no reason to enact the Public Law, as it would not serve its purpose of generating the contemplated fees." Counsel asserts that "the very enactment of the Public Law self-proves the Congressional intent and confirms Congress's expansive view of 'specialized knowledge.'"

In addition, counsel contends that "if there was any doubt left after the 2004 Act, the new Public Law makes it clear that there was no support of a "narrow" or "restrictive" interpretation of "specialized knowledge." Counsel states that Congress "clearly confirmed that 'specialized knowledge' can be widely held," and "confirmed its intent that the 'specialized standard' can be interpreted in an expansive, rather than a restrictive fashion."

Counsel concludes that the Public Law clearly supersedes the original legislative intent of the 1970 Act that "the class of persons eligible for such nonimmigrant visas is narrowly drawn." Counsel maintains that the fee imposed by the Public Law "would have no purpose if Congress did not indeed contemplate such large numbers as falling within the 'specialized knowledge' definition." Counsel acknowledges that a January 18, 2011 USCIS policy memorandum, "Implementation of Provisions of Public Law 111-230 Instituting Increased Fees for Certain H-1B and L-1 Petitions and Applications" reveals that USCIS "is implementing the Public Law only as a fee enhancement statute." Counsel concludes that USCIS failed to give any proper thought to the substantive point of law manifested by the Public Law.

Counsel's characterization of the 2010 Supplemental Appropriations legislation as a manifestation of a substantive point of law with respect to the L-1B visa classification is misguided. Public Law 111-230 was introduced as a supplemental border security bill that reflects Congress' immediate concerns regarding the security of the Southwest U.S.-Mexico border in light of increased violence related to drug trafficking and organized crime. It includes an offsetting increase in immigration fees for certain companies filing H-1B and L petitions, but it is clearly not a substantive immigration law. This fee increase was not part of the bill as originally introduced in the House of Representatives, but rather was added when an impasse was reached as to how to pay for the increased funding. *See generally*, 156 Cong. Rec. S6996-01, 2010 WL 3184531 (August 12, 2010). The Senate did not wish to raise the federal deficit or divert stimulus funds, but rather opted to "pay for the border package by increasing visa fees on companies who hire foreign workers in a manner contrary to the original intent to the H-1B program." *Id.*

On the Senate floor, Sen. Charles Schumer (D-NY) addressed loopholes in the H-1B program which have led to its overuse by certain "body shop" companies and notes that "this type of use of the H-1B visa program will be addressed as part of comprehensive reform, and it is likely going to be dramatically restricted . . . ." 156 Cong. Rec. S6996, at *S6998. He commented that companies that are 50 percent H-1B workers are using the program in a way that is "far, far from what we envisioned when H-1B was passed," while acknowledging that such firms are not engaging in illegal behavior under the current immigration framework. *Id.* "I say to those companies: If you do not change your ways - you should not be doing what you are doing, and this duty is appropriate for that purpose." *Id.* A review of the Congressional Record reveals that there was little discussion of the enhanced visa fees in the U.S. House of Representatives.

While there was no discussion in either the House or Senate regarding the L-1 nonimmigrant classification, the ultimate legislation also imposed a filing fee and fraud prevention and detection fee increase of $2,250 for L-1 visa petitions. Like the H-1B petitioners, the fee applies to petitioners that employ 50 or more employees in the

United States if more than 50 percent of the petitioner's employees are nonimmigrants admitted pursuant to section 101(a)(15)(L) of the Act. *See* Pub. L. 111-230, § 402(a).

Counsel's interpretation of the appropriations bill as a resounding endorsement of an expansive interpretation of "specialized knowledge" is simply not supported by the legislative history. The Senate acknowledged that companies are using H nonimmigrant visa programs in a way that was not intended, yet not strictly illegal, and suggested that such issues would need to be dealt with through future comprehensive immigration reform. Public Law 111-230 was a border security emergency appropriations bill with a sunset date; it simply was not a legislative vehicle for making substantive changes to the nation's immigration laws. USCIS has implemented Public Law 111-230 as a fee enhancement statute because that is precisely what it is.

Further, the imposition of high fees on companies perceived to be using nonimmigrant visas in a way not intended by Congress further supports the position that Congress intends USCIS to carefully monitor the L-1 classification. Similarly, the L-1 Visa Reform Act of 2004 was created to provide USCIS with an additional mandate to closely regulate the classification. The legislative history of the L-1 Visa Reform Act indicates that Congress intended to close the "L-1 loophole" and "protect U.S. jobs from inappropriate use of the L-1 visa." 149 Cong. Rec. at *S11686, 2003 WL 22143105.

3. Pre-1990 Precedent Decisions

Counsel further asserts that the legacy INS precedent decisions from the 1980s were rendered invalid by the Immigration Act of 1990 and do not inform the current standard.

In the certified decision, the director concluded that the petitioner's training program was insufficient to establish that any individual *churrasqueiro* possesses specialized knowledge. The director cited to precedent decisions in support of the observation that most employees today are specialists and have been trained and given specialized knowledge. *See Matter of Colley,* 18 I&N Dec. 117 (Comm'r 1981). The director also quoted a precedent decision that stated: "A distinction can be made between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation." *Matter of Penner*, 18 I&N Dec. 49, 53 (Comm'r 1982). Finally, the director cited to *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm'r 1988) for the proposition that USCIS must draw a distinction between skilled workers and L-1B specialized knowledge employees.

Although the cited precedents pre-date the current 1990 Act, the AAO finds them instructive. Although they predate the 1990 Act, *Matter of Penner* and the other L-1 precedent decisions are not categorically rendered invalid by the statutory definition of specialized knowledge. While the underlying definitions of specialized knowledge that were discussed in the decisions are now superseded by the statutory definition and the implementing regulation, the general issues and the case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications.

For example, as correctly observed by the director, USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized knowledge workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. *See* 18 I&N Dec. at 50-53 (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

Accordingly, the director's citation of precedents that predate Immigration Act 1990 is not objectionable, as long as the director's decision is narrowly tailored to address issues that were not directly superseded by the statutory definition. If the director were to apply the precedent decisions in support of a "proprietary knowledge" requirement or a reference to "knowledge not available on the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.[5]

4. Conclusion

If any conclusion may be drawn from the ultimate statutory definition of specialized knowledge and the changes made to the legacy INS regulatory definition, it can be based on the nature of the Congressional clarification itself.

Prior to the 1990 Act, legacy INS pursued a bright-line test of specialized knowledge by including a "proprietary knowledge" element in the regulatory definition. *See* 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988). By deleting this element 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 rigid application of the law, Congress gave legacy 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)).

Accordingly, 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." *Matter of Penner*, 18 I&N Dec. 49, 53 (Comm. 1982). Specialized knowledge 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.

---

[5] Indeed, the Ninth Circuit Court of Appeals has concluded that the AAO's reliance on such authority is appropriate. [redacted] 531 F.3d 1063, 1070 n.10 (9th Cir. 2008).

Considering the definition of specialized knowledge, it is the petitioner's fundamental burden to articulate and prove that an alien 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.

After articulating 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. As noted in the Puleo Memorandum, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart 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 industry.

B. The Beneficiary's Employment

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. *Id.* In this case, the petitioner fails to establish that the beneficiary's position abroad or in the United States requires an employee with specialized knowledge or that the beneficiary has specialized knowledge.

1. Job Duties, Knowledge and Training

The AAO acknowledges that the petitioner has provided a sufficiently detailed description of the beneficiary's proposed duties as a *churrasqueiro* chef. Specifically, the petitioner, through its own assertions and through statements from experts in the hospitality industry, indicates that the 17 main functions of the beneficiary's proposed position are three-fold: (1) culinary duties, including selecting, butchering, preparing, and cooking meats; (2) service functions, including continuous tableside service to the entire restaurant, engaging customers in conversation regarding the meat they are serving and the cultural background of Southern Brazil while conveying the gaucho style, and "reading" the room for serving order; and (3) "team" functions which include setting the pace of cooking and serving, monitoring presentation by all *churrasqueiro* chefs for authenticity; and training, coaching and mentoring local hires regarding the role and duties of an authentic churrasqueiro. Finally, the petitioner explains that a latent responsibility of a Brazilian *churrasqueiro* chef is to give the company the ability to state in its marketing materials that its gauchos are "authentic."

Counsel asserted that, consistent with the regulatory definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D), the beneficiary "gained 'special knowledge' of [the petitioner's] 'product, service, . . . [and] techniques,' as a boy growing up in the gaucho culture of Rio Grande do Sul." Counsel contends that the fact that the beneficiary was recruited and selected for training confirms that he possesses the requisite authentic gaucho background and experience. Counsel further asserts that the beneficiary's skills and knowledge constitute "special knowledge" because only "genuine gauchos" can fully perform all *churrasqueiro* duties according to company standards. Referencing the Puleo Memorandum, counsel asserts that the beneficiary's knowledge is "distinguished by some unusual quality" and "uncommon" due to the small percentage of people in Brazil who are familiar with the rural Rio Grande do Sul traditions, and states that the knowledge cannot be transferred or taught to others because it "relates specifically to a unique life experience," that one either possesses or does not.

Counsel does not hesitate to assert that the beneficiary's "special knowledge" of the petitioner's products, services and techniques was largely gained outside of his employment with the company. Rather the beneficiary's special knowledge is said to be inherent to his childhood experiences, his upbringing and values, the cultural traditions of his immediate family and of the geographic region and community in which he was raised in Rio Grande do Sul in Brazil, and his "life experience" in its entirety. Counsel further asserts that any requirement that the petitioner establish that the beneficiary gained his specialized knowledge through employment or training with the petitioner's organization amounts to an impermissible condition that the beneficiary's knowledge be "proprietary."

Therefore, a critical question before the AAO is whether a beneficiary's life experience and inherent knowledge of his or her own native culture and traditions can constitute "specialized knowledge" within the meaning of the statutory and regulatory definitions. The petitioner repeatedly states that the knowledge required to successfully perform the *churrasqueiro* position "can only be fully gained by cultural assimilation to the Southern Rio Grande do Sul rural lifestyle." The AAO does not question that the petitioner represents its "product" as a "true gaucho experience" that combines the traditional gaucho way of preparing and serving *churrasco*. The petitioner's marketing materials and expert opinion letters confirm that this authenticity is a key component to the petitioner's success.

In addition to emphasizing that there is no requirement that the beneficiary's knowledge be "proprietary," counsel also relies on hypothetical example found in the Puleo Memorandum in support of his assertion that the beneficiary's native cultural traditions and upbringing have permeated him with special knowledge of the petitioner's products. Specifically, counsel cites an example from the Puleo Memorandum in which a firm involved in processing shellfish seeks to transfer an employee to the United States to catch and process the fish. In the cited example, the hypothetical beneficiary learned the relevant process from his employment in an unrelated firm and utilized the knowledge with the foreign employer, but the knowledge required to process the shellfish is unknown in the United States. The Puleo Memorandum indicates that the beneficiary in this simplistic example "possesses specialized knowledge since his knowledge of processing the shellfish must be considered advanced." Puleo Memorandum, p. 3.

As noted above, while arguments based on agency policy memoranda will be considered, the petitioner cannot parrot a hypothetical example from the memorandum and claim that the same circumstances are present in its petition. The example given in the memorandum is based on three sentences of vague information and does not even appear to meet other criteria stated in the memorandum. The example cited makes no mention of the complexity of the process, whether it is comparable to other known processes that are used in the United States such that it could be transferred or taught to another individual, or how long it would take an experienced seafood worker in the United States to learn the process. *See* Puleo Memorandum at page 3.

Notably, the petitioner has provided no examples from any source in which a beneficiary was found to possess specialized knowledge based on his or her life experience or cultural assimilation to the lifestyle of a particular region of his or her native country. The inherent knowledge a person gains as a result of his or her upbringing, family and community traditions, and overall assimilation to one's native culture necessarily falls into the realm of general knowledge, even if an individual's specific culture itself is limited to a relatively small population or geographic location. The L-1B classification has no cultural component and is clearly focused on the beneficiary's knowledge of a specific company or employer.[6]

The petitioner's business decision to recruit their *churrasqueiro* chefs from a pool of applicants with a specific cultural background does not transform their inherent general knowledge of their culture into specialized knowledge of the petitioning company's product, as contemplated by the statute and regulations. While such authentic cultural knowledge of gaucho traditions is undoubtedly valuable to the petitioner, and perhaps not widely available outside parts of the [redacted] of Brazil, it would be equally valuable to any *churrascaria* restaurant. The petitioner has not shown that the beneficiary's cultural heritage gives him knowledge that is different or uncommon compared to that generally found in the petitioner's industry. The

---

[6] *See* (1) 8 C.F.R. § 214.2(l)(i)(ii)(D) defining specialized knowledge as "special knowledge possessed by an individual *of the petitioning organization's* product, service, research, equipment, techniques, management, or other interests. . . "; (2) Section 214(c)(2)(B) of the Act, providing that "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*; and (3) section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F), which provides that an alien who will serve in a specialized knowledge capacity and placed at the worksite of an unaffiliated employer undertake an assignment "*in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary*." (Emphasis added).

As a comparison, the Act provides separate nonimmigrant visa classifications for aliens with culturally unique skills and those who are coming to the United States for the purpose of employment involving the sharing of the history, culture and traditions of their countries of nationality. These nonimmigrant visa classifications are found under sections 101(a)(15)(P)(iii) and (101)(a)(15)(Q) of the Act.

petitioner cannot effectively stake an ownership claim on the 19th Century gaucho culture of the *pampas* region of the Brazilian state of [redacted]

Based on the foregoing, the AAO concludes that the beneficiary possesses general cultural knowledge, values, and culinary skills acquired as a result of his upbringing in a rural area of Rio Grande do Sul and due to his family and community traditions. This general knowledge, which the petitioner unpersuasively equates with "special knowledge," made him a viable candidate for employment in a Brazilian *churrascaria*. The petitioner claims that, although the beneficiary possessed this cultural background and five years of relevant experience with an unrelated *churrascaria* in Brazil, he has been trained to apply his "special knowledge" in international markets, consistent with the regulatory definition of the term "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D). Counsel emphasizes that although it hires native gauchos who possess a lifetime of experience in preparing *churrasco,* such employees must still undergo up to 24 months of training in the petitioner's corporate standards to ensure that the company presents a uniform product in all of its restaurants. Counsel asserts that the training, however, is not an independent source of specialized knowledge. Rather, the specialized knowledge derives from the life experiences and traditions of the rural southern Brazilians recruited for the position of *churrasqueiro* chef in Brazil.

While the petitioner has provided an overview of its training and development program, it did not provide any documentation to confirm the beneficiary's completion of such training for the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. *Matter of Obaigbena*, 19 I&N Dec. at 534; *Matter of Ramirez-Sanchez*, 17 I&N Dec. at, 506. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

The director specifically noted this deficiency in his decision, but neither the petitioner nor counsel has directly addressed it on certification, much less provided evidence that the beneficiary actually completed the training. Rather, counsel downplays the relevance of the training program, noting that the director mischaracterized it. Counsel stresses that the beneficiary's "unique life experience" provided him with his specialized knowledge while the company-provided training is "not an independent source" of such knowledge.

Nevertheless, the petitioner still claims that the knowledge required to apply the *churrasqueiros*' existing culinary and cultural knowledge in international markets can only be acquired through completion of its internal training program. The director noted that the beneficiary in this case, according to his resume, immediately assumed the position of "*churrasqueiro* waiter" upon joining the foreign entity in June 2006. According to the beneficiary's pay statements from the foreign entity and his resume, the only position he has held within the organization is that of "*churrasqueiro* waiter."

These facts raise two different questions which have not been addressed by the petitioner.

First, if USCIS assumes that "*churrasqueiro* waiter" and "*churrasqueiro* chef" are actually the same position, it appears that, despite his lack of training in the petitioner's processes and procedures, the beneficiary was hired by the foreign entity to perform precisely the same duties he would be performing in the United States.

This fact directly undermines the petitioner's claims. There is no evidence that the beneficiary completed two years, or even 18 months, of training before assuming the duties of *churrasqueiro* chef with the foreign entity. Although the petitioner has indicated that some portion of its training program is conducted on-the-job, it has declined to specify at what point a Brazilian trainee is actually able to carry out the job duties of a *churrasqueiro* chef. Therefore, it is reasonable to question whether the foreign entity's *churrasqueiro* chefs in general, and the beneficiary specifically, have historically been required to complete the allegedly mandatory 18-month to two-year period of training.

As noted above, according to the beneficiary's resume, he had five years of experience as a kitchen assistant and waiter at an unrelated Brazilian *churrascaria* restaurants where he gained experience in both cooking and serving aspects of *churrasco* meats and "had the opportunity to show off his culture." Given that the majority of the petitioner's training program is focused upon learning skills needed to prepare and serve *churrasco* meats, it appears that the beneficiary's existing skills and experience were sufficient to allow him to commence employment with the foreign entity as a *churrasqueiro*. At most, it appears that the beneficiary may have lacked the English language skills that are included as part of the training program.

If an experienced employee such as the beneficiary, who performed similar duties with comparable restaurants in Brazil, can assume the position of *churrasqueiro* chef for the petitioner's organization without first undergoing additional training, then it significantly undermines the petitioner's claim that its methods, processes and procedures for operating a *churrascaria* restaurant are significantly different from those of other restaurant chains in the industry. The facts also undercut the petitioner's claim that the combination of inherent cultural knowledge and knowledge of its specific standards, processes and procedures relative to international markets constitutes specialized knowledge.

Second, we note that the director questioned whether the beneficiary's foreign position of "*garcon churras*" or "*churrasqueiro* waiter" and the proffered position of "*churrasqueiro* chef" are in fact the same position. The petitioner has neither acknowledged nor attempted to clarify this discrepancy on certification. Therefore the record as presently constituted does not clearly document that the beneficiary completed the foreign entity's 24-month training program, or that such training was followed by one year of employment as a *churrasqueiro* chef in the foreign entity's restaurants. These are the petitioner's stated minimum qualifications for transfer of its Brazilian *churrasqueiro* chefs to the United States.

In sum, the AAO acknowledges that the beneficiary possesses the cultural background, culinary skills and "authenticity" the petitioner finds desirable for the proffered position, but is not persuaded that these inherent qualities give him "special knowledge of the petitioner's product," as opposed to general knowledge of his

native regional culture gained through life experience. Moreover, the petitioner has not established that the beneficiary actually completed the two years of training and one year of employment as a *churrasqueiro* chef, which, according to the petitioner, is required for consideration for transfer to the United States. These deficiencies alone provide a sufficient basis for a finding that the beneficiary does not possess "special knowledge" as described in the regulatory and statutory definitions of "specialized knowledge."

The petitioner's primary argument that the position of *churrasqueiro* requires specialized knowledge is centered on a two-fold claim: (1) that knowledge of the Brazilian gaucho culture, combined with knowledge of the company's processes and standards for presenting that authentic culture in a consistent manner is unavailable in the United States and can only be learned through experience with the petitioner's group of companies; and (2) the knowledge cannot be easily transferred to a U.S. worker without significant economic hardship and interruption of business.

The AAO notes that these criteria are also examples provided in the Puleo Memorandum of situations in which a petitioner may be able to establish that a given position requires specialized knowledge. It should be noted that the statutory and regulatory definitions contain no reference to "economic inconvenience" as a determining factor when considering a beneficiary's claimed specialized knowledge. The AAO has already concluded that the beneficiary's knowledge of the culture and culinary traditions of his native region of Brazil is general knowledge that equips him to be a *churrasqueiro* chef in the petitioner's industry.

The Puleo Memorandum, consistent with the current regulatory definition of "specialized knowledge," specifically disallows a test of the U.S. labor market in making a determination as to whether the beneficiary's knowledge is specialized. The Puleo Memorandum still, however, requires USCIS to compare the beneficiary's knowledge to that of similarly-employed workers in the petitioner's industry and to the petitioner's workforce in order to distinguish between specialized and general knowledge, and to distinguish between "elementary or basic" knowledge and advanced knowledge. Puleo Memorandum at page 4. As noted above, the Acting 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." *Id.* Special knowledge must be "different or uncommon." *Id.* at page 1.

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 special or advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, USCIS would not be able to ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized. *Id.* Although counsel at times recoils from any comparisons between the beneficiary's knowledge and that of any similarly-employed worker, the petitioner itself makes the specific claim that the knowledge possessed by its Brazilian *churrasqueiros* is rare in both the United States and Brazil and that much of the knowledge simply cannot be transferred to a person who was not raised in the appropriate Brazilian regional cultural tradition.

Specifically, the petitioner claims that its "authentic" presentation of the rural Rio Grande do Sul culture and cuisine makes it unique and sets it apart from its competitors, such that the beneficiary's knowledge is "different from that generally found in the particular industry." The petitioner's industry, as noted by the director, includes all Brazilian *churrascarias*, rather than all restaurants or all steakhouses.

The petitioner grants that other restaurants "claim to be" Brazilian *churrascarias*. The petitioner relies primarily on the opinion of [redacted] to distinguish itself from these competitors. As noted above, Mr. Hornbeck states that the petitioner is "unique and differentiated" in the U.S. market and opines that it is the recognized industry leader "because of its focus on authenticity – due in large part to its authentic, Brazilian churrasqueiro chefs." Specifically, [redacted] observed that the petitioner's competitors "did not deliver a comparable, authentic, entertaining dining experience," but rather an imitation or "Americanized" version of a true Brazilian *churrascaria* experience that relies on "less skilled, costumed employees playing the role of churrasqueiros or gauchos." He opines that "guests clearly recognize this difference and it is likely a large contributor to the fact that competing churrascarias achieve only half of [the petitioner's] sales volumes." [redacted] cited newspaper and magazine reviews of the petitioner's restaurants, which offer praise for the authenticity of the food preparation and presentation by Brazilian staff.

[redacted] indicates that he has observed and assessed six *churrascaria* restaurants that are considered competitors of the petitioner's restaurant chain, including [redacted] He does not indicate on what basis he determined that these steakhouses offered an "Americanized" version of a true Brazilian churrascaria experience, or how, as a U.S.-based restaurant consultant specializing in providing consulting services to traditional American steakhouses, he is able to discern between the authentic and "Americanized" versions of the *churrascaria* business model. Instead, much of his statement distinguished *churrascaria* restaurants and *churrasqueiro* chefs from other types of restaurants, chefs, and specialty cooks.

The petitioner does not have exclusive claims to "authentic Brazilian gauchos" or indicate that its competitors have no such employees.[7] The petitioner may operate more restaurants than its competitors and charge higher prices for its food, but there is insufficient evidence in the record to link these higher prices with its claimed cultural authenticity. There are many reasons that different restaurants premised on the same style of cuisine and

---

[7] The AAO has reviewed the public websites of several of the competitor restaurants that [redacted] referenced, noting that some originated in Southern Brazil just like the petitioner's chain. Like the petitioner's marketing materials, the competitors' websites focus on the history of the gaucho culture of Rio Grande do Sul, the *churrascaria* tradition that began in the 19th century, and the authenticity of the dining experience. A review of the websites indicates that the petitioner's competitors offer the same cuts of meat, prepared and served in the same manner as it is in the petitioner's restaurants, and accompanied by Brazilian side dishes and a salad bar. The businesses operated by other *churrascarias* in the United States are similar to, if not the same as, the petitioner's business model. *See, e.g.* http://www.boinabraza.com/story.aspx; http://www.texasdebrazil.com; http://chima.cc/history.cfm; and http://rodiziogrill.com/index.html (accessed on August 18, 2011).

service may experience different levels of success. [redacted] does not provide any factual basis for his conclusion that the petitioner's authenticity is the critical ingredient to its success or that other *churrascarias* in the United States lack authenticity.

Overall, the petitioner's claims that its *churrasqueiros* possess knowledge and perform duties that are uncommon among similarly-employed workers in the petitioner's industry are simply not adequately supported in the record.

The petitioner's statements and the experts' testimonials indicate that the company screens large numbers of residents from rural southern Brazil who can realistically convey the gaucho experience. The petitioner claims that it completes and refines the "special knowledge" already held by these carefully selected rural southern Brazilians and imparts each employee with knowledge of company processes, standards and procedures during its two-year training program. The petitioner has not, however, compared its recruitment practices, training program, company standards, or *churrasqueiro* job functions to those implemented by other *churrascarias.* The petitioner has only submitted unsupported assertions that its *churrasqueiros* are "authentic" while its competitors offer an "Americanized" version of a *churrascaria.* The evidence submitted does not adequately support the petitioner's claims that its *churrascaria* restaurants are distinguished by some unusual quality that sets them apart from others in the industry, or that the knowledge required to perform as a *churrasqueiro* chef for the petitioner is uncommon in the industry.

The record reveals that the petitioner can and does recruit and train locally-hired U.S. workers as *churrasqueiro* chefs, and operates significantly more restaurants in the United States than it does in Brazil, thus requiring it to employ a larger number of *churrasqueiro* chefs in this country. The petitioner claims that it requires a staff of three to five native Brazilians per restaurant to ensure the authenticity of the experience for its diners. The petitioner claims that due to high turnover among its U.S. workforce, the company's aggressive expansion plans, and the inability of the locally-hired *churrasqueiro* chefs to fully perform the duties of the position, it needs to rely on a core group of Brazilian-born *churrasqueiros* in each restaurant to coordinate team operations and train the U.S. workers.

The petitioner claims that its locally-hired *churrasqueiros*, which make up the majority of the *churrasqueiro* chef workforce among the company's 16 U.S. restaurants, are unable to perform the majority of the actual duties of the position with any level of competence, and in fact can "barely perform" seven of the 17 duties inherent to the position. This was not a claim that was made prior to the initial adjudication of the petition, nor is it a claim that is supported by any corroborating evidence.

As noted by the director, [redacted] indicated that he interviewed and observed both Brazilian native and locally-hired *churrasqueiro* chefs, but neither he nor the other persons providing testimonial evidence distinguished between the petitioner's Brazilian and non-Brazilian workers. [redacted] addressed the petitioner's efforts to recruit and train U.S. workers to perform the *churrasqueiro* chef position, noting that the petitioner has found that prior restaurant chef/kitchen experience does not translate to success as a *churrasqueiro* chef, with the must successful hires coming from other *churrascarias.* He noted that locally-

hired chefs often find the work demanding or difficult, and have a significantly higher turnover in comparison to Brazilian chefs. He did not, however, distinguish the actual duties performed by locally-hired *churrasqueiro* chefs from those performed by Brazilian chefs, nor did he indicate whether or how the presence of the locally-hired workers affects the authenticity of the dining experience at the petitioner's restaurants. Read as a whole, his statement does not support the petitioner's contention that locally-hired *churrasqueiro* chefs are unable to satisfactorily perform the majority of the position's inherent duties.

It is evident upon review of the totality of the evidence that the petitioner has a preference for hiring young men from rural southern Brazil as *churrasqueiros* to add to the authenticity of their restaurants. Based on the submitted expert opinion letters, the AAO has no doubt that the petitioner's practice of hiring Brazilian *churrasqueiros* contributes to the petitioner's success in the industry and its ability to market its authenticity. As discussed above, however, the petitioner has not established that the beneficiary's intrinsic cultural knowledge, family traditions and upbringing in the rural Rio Grande do Sul region of Brazil must be equated with "special knowledge." The petitioner has not established how its training program, which consists primarily of general cooking methods, food safety and handling skills, customer service skills, and English language skills, imparts its workers with specialized knowledge that differs in any significant way from that possessed by *churrasqueiros* in other Brazilian *churrasco* restaurants. Unless the petitioner can successfully establish this claim, it cannot be concluded that familiarity and experience with the foreign entity's processes and procedures alone constitutes specialized knowledge.

The AAO acknowledges [redacted] assertions that the method of butchering, cooking and serving meat employed by the petitioner's restaurants is not taught in American culinary schools or other formal instructional programs. As discussed above, however, the petitioner's methods should be compared to those used by other restaurants in its own industry, not to general culinary school programs or the typical American restaurant. [redacted] acknowledges that the butchering, cooking and servicing skills employed by the petitioner can be learned only in *churrascarias*, of which there are many in the United States. His opinion letter distinguishes *churrascarias* from other types of restaurants, but not does distinguish the petitioner's restaurant from other *churrascarias*. [redacted] statement is insufficient to establish that the petitioner's hiring practices or its training program results in its employment of *churrasqueiro* chefs with culinary or service skills that are different from those generally found in the petitioner's industry. Therefore, the beneficiary's knowledge, gained through his life experiences and culture, prior *churrascaria* experience, and employment with the foreign entity, has not been shown to be different or uncommon compared to that generally found in a *churrascaria* restaurant.

The petitioner indicates that what sets its restaurants apart from its competitors are the "ancillary duties" performed by its *churrasqueiros*. It does not claim that its gaucho chefs qualify as possessing specialized knowledge based solely on their culinary skills and knowledge. Such ancillary duties include "guest service" and "entertainment duties," and the petitioner claims that it is the combination of culinary, guest service and entertainment duties that makes the knowledge specialized and impossible to transfer. The petitioner notes that it combines traditional gaucho meat preparation with the "espeto corridor" serving style and *churrasqueiros* who "entertain and perform guests, explaining the history and traditions of southern Brazil."

Again, the petitioner's training materials do not support its claims that the position requires and involves the application of specialized knowledge. The petitioner does not claim that its cooking or serving styles differ significantly from those used by other *churrascaria* restaurants. An employee's knowledge of minor variances in style or manner of operations cannot be considered specialized. Although the skills needed to prepare a certain type of cuisine are typically acquired through a period of hands-on training, they are nevertheless common in the petitioner's industry and specific culinary specialty. The petitioner's cooking methods, the types of meat served, and the continuous tableside serving style are typical in restaurants serving this type of cuisine. The evidence submitted shows that the cultural component of the *churrasqueiro* training, which the petitioner claims makes its restaurants and workers unique, is quite brief in relation to the amount of time the petitioner claims to devote to training its workers in how to speak English and how to cook and serve meat, duties that have not been shown to require specialized knowledge.

Specifically, the record shows that during the first and second semesters of the training program, its trainees complete the "gaucho culture" training module, which includes the following topics: History of Rio Grande do Sul, Culture, Culinary, Attire, Tools and Utensils, and Dances and Literature. The petitioner does not explain why its "genuine gauchos" recruited in Brazil from the rural regions of Rio Grande do Sul would even require this training.

The 2004 Ohata Memorandum indicates that chefs and specialty cooks presumptively do not have "specialized knowledge" even if they possess knowledge of a restaurant's special food preparation techniques acquired through training. The Ohata Memorandum indicates that a chef who performs duties ancillary to cooking may possess specialized knowledge, but that an assessment must be made regarding the length and complexity of the in-house training required to perform the duties. Here, the petitioner claims that the knowledge required to perform the ancillary duties of a *churrasqueiro* chef comes primarily from the beneficiary's "unique life experience" and upbringing in the gaucho culture, rather than from in-house training. The Ohata Memorandum makes no reference to cultural knowledge as a source of specialized knowledge. Further, many of the techniques that the petitioner claims is part of the cultural traditions of the gauchos are in fact butchering, cooking and serving techniques specific to the *churrasco* style of cuisine.

While knowledge specific to Brazilian gaucho culture is not widely held by skilled chefs, the petitioner has not supported its claim that this knowledge is so complex that it couldn't be mastered within a reasonable period of time by an employee who was otherwise trained in the *churrasqueiro* method of cooking and tableside service. The AAO acknowledges that a native Brazilian raised in the culture would perhaps relate the culture more convincingly to the restaurant's patrons, but once again, knowledge of the southern Brazilian regional culture and history must be considered general knowledge rather than special knowledge of the petitioner's product or processes and procedures. Furthermore, as noted above, the evidence in the record does not support the petitioner's claims that its locally-hired workers, who form the majority of the *churrasqueiro* workforce at any given restaurant location, are simply unable to perform any of these ancillary duties. If this were the case, it would be reasonable for the petitioner to present separate job descriptions for U.S. and Brazilian *churrasqueiro*

chefs, evidence that they complete different training programs, and other evidence differentiating the expectations and requirements for the position.

2. Expert Opinion Letters

As noted above, the petitioner has submitted several expert opinion letters in support of its claim that the position of *churrasqueiro* chef requires specialized knowledge. As a matter of discretion, USCIS may accept expert opinion testimony.[8] USCIS will, however, reject an expert opinion or give it less weight if it is not in accord with other information in the record or if it is in any way questionable. *Matter of Caron International, Inc.*, 19 I&N Dec. 791, 795 (Comm. 1988); *see also Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011) (citing Fed. R. Evid. 702). USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. Matter of Caron International, 19 I&N Dec. at 791; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) ("[E]xpert opinion testimony, while undoubtedly a form of evidence, does not purport to be evidence as to 'fact' but rather is admissible only if 'it will assist the trier of fact to understand the evidence or to determine a fact in issue.'").

Upon review, although the authors are well-credentialed in the restaurant industry and/or Brazilian culture, none of the three letters speaks directly to the critical question in this case – the purported special or advanced nature of this *individual beneficiary's* knowledge of the petitioner's products, methods and processes. The letters are still valuable in that they speak to the knowledge required for the *churrasqueiro* chef position. The information provided by the experts supports the petitioner's claims of the authenticity of its dining experience, and sets apart the knowledge possessed by *churrasqueiro* chefs from chefs working in other types of restaurants. As noted above, however, the testimonial evidence as a whole provides an incomplete illustration as to how the petitioner's *churrasqueiro* chefs differ from other *churrasqueiro* chefs in the petitioner's industry, and thus does not speak to the critical question of whether the knowledge possessed by the beneficiary is truly uncommon, distinctive or different.

---

[8] Letters may generally be divided into two types of testimonial evidence: expert opinion evidence and written testimonial evidence. Opinion testimony is based on one's well-qualified belief or idea, rather than direct knowledge of the facts at issue. Black's Law Dictionary 1515 (8th Ed. 2007) (defining "opinion testimony"). Written testimonial evidence, on the other hand, is testimony about facts, such as whether something occurred or did not occur, based on the witness' direct knowledge. *Id.* (defining "written testimony"); *see also id* at 1514 (defining "affirmative testimony").

Depending on the specificity, detail, and credibility of a letter, USCIS may give the document more or less persuasive weight in a proceeding. The Board of Immigration Appeals (the Board) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The Board also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

For example, [redacted] speaks generally about the petitioner's successful business model and employment model, and concludes that the *churrasqueiro* position is the most critical position in the company. He provides insufficient support for his conclusion that the petitioner's restaurants are truly differentiated from their claimed "Americanized" competitors, and fails to distinguish between the petitioner's Brazilian and locally hired workers in terms of their ability to perform the duties of the *churrasqueiro* position. As discussed above, the petitioner has not established that inherent cultural assimilation to the Rio Grande do Sul region or knowledge of the petitioner's processes and standards for conveying the culture constitutes specialized knowledge. While [redacted] concludes that the petitioner requires a core group of Brazilian *churrasqueiros* at each restaurant to maintain its reputation for authenticity, an alien cannot qualify for this classification based primarily upon his or her life experience or culture. [redacted] conclusions are not based on a review of the immigration statute or the applicable regulations.

[redacted] letter distinguishes the *churrasco* butchering, preparation, cooking and serving methods from the typical American culinary curriculum and the cooking methods used in traditional American restaurants. Since the petitioner's industry includes Brazilian *churrascarias* and not every type of restaurant operating in the United States, the comparisons made by [redacted] are simply lacking in relevance. He does not indicate that the petitioner's training program is different from those implemented by other churrascarias. Furthermore, his opinion that someone with a "good work ethic and prior industry experience" would be able to perform the duties upon completion of the petitioner's training program actually undermines the petitioner's claim that most of the duties of the *churrasqueiro* chef simply cannot be performed by a locally-hired worker. Finally, like [redacted] does not indicate that his opinion is based on a review of the immigration statute or the applicable regulations.

The letter from [redacted] indicates that he supports the petitioner's request for a "Visa of Cultural Exchange." He makes no reference to the beneficiary's specialized or advanced knowledge, nor does he indicate that his opinion is based on the applicable statute and regulations pertaining to specialized knowledge intracompany transferees. Unlike other nonimmigrant visa classifications, such as the Q-1 cultural exchange visitor, the L-1B specialized knowledge visa has no cultural component. *Cf.* 8 C.F.R. § 214.2(q).

Finally, the letter from [redacted] offers little more than a conclusion that the beneficiary "possesses the cultural background and restaurant skills necessary to fulfill the position of Churrasqueiro." While the AAO does not doubt that the beneficiary is in fact qualified for the proffered position, this opinion letter does not address whether or how the beneficiary's cultural background and restaurant skills constitute specialized knowledge under the regulatory or statutory definitions of the term.

As discussed above, USCIS may accept expert opinion testimony. However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought; the submission of expert opinion letters is not presumptive evidence of eligibility. The admissibility and weight to be accorded expert testimony letters may vary depending on such factors as the extent of the expert's qualifications, the

relevance of the testimony, the reliability of the testimony, and the overall probative value to the specific facts at issue in the case. *See Matter of D-R-*, 25 I&N Dec. 445, 460 n.13 (BIA 2011)(citing Fed. R. Evid. 702).

Here, for the reasons discussed above, the expert opinion testimony is lacking in probative value, as the letters do not assist USCIS in determining whether the beneficiary in this matter possesses specialized knowledge.

3. Special or Advanced Level of Knowledge or Expertise

The petitioner must establish that the beneficiary possesses special knowledge or an advanced level of knowledge or expertise in the organization's processes and procedures and that the position requires such knowledge. *See* 8 C.F.R. § 214.2(l)(1)(ii)(D). As discussed above, the beneficiary's "unique life experience" and cultural knowledge of the native culinary traditions of his community have not imparted him with special knowledge of the petitioner's company products, services or techniques. Further the petitioner has not established that the beneficiary has in-house training or experience that has given him knowledge that is different or uncommon compared to other *churrasqueiro* chefs in the petitioner's industry.

Therefore, the remaining question is whether the beneficiary possesses an advanced level of knowledge or expertise in the organization's processes and procedures. The petitioner claims that the beneficiary, like any of its Brazilian *churrasqueiro* chefs, is able to fully perform the duties and functions of the position, while locally-hired *churrasqueiros* can barely perform seven of the 17 required duties. Therefore, it appears that the petitioner claims that its Brazilian *churrasqueiros* possess advanced knowledge of the company's processes and procedures for conveying an "authentic gaucho experience" and perform more advanced and complex duties than their locally-hired counterparts. The petitioner indicates that these employees act as trainers for the U.S. workforce and are critical for the maintenance and expansion of the company's business model.

Counsel's argument, essentially, is that all Brazilian *churrasqueiros* working for the petitioner's organization should be deemed to have advanced knowledge of the company's policies and procedures relative to the U.S. workforce, and thus, specialized knowledge. Neither counsel nor the petitioner claims that the *instant beneficiary's* knowledge is advanced compared to similarly employed workers in the organization. In fact, little specific information regarding the beneficiary and his individual qualifications for the position have been offered.

Although it is accurate to say that the statute does not require that the advanced knowledge be narrowly held throughout the company, 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. Here, the petitioner's argued standard for advanced knowledge appears to require being a native of the rural Rio Grande do Sul region of Brazil and completing a training program that purportedly requires 18 to 24 months, which is comprised primarily of general knowledge in cooking, kitchen and food safety, current events, gaucho culture, customer service skills, and English language study. As discussed above, the petitioner has not established that the instant beneficiary actually completed the training program before assuming his duties as a *churrasqueiro* with the foreign entity.

Furthermore, since the petitioner indicates that its locally-hired workers complete the same *churrasqueiro* chef training and development program as their Brazilian counterparts, the key difference between the U.S. and Brazilian *churrasqueiros* once again appears to be their cultural background and lifelong experiences, rather than any differences in training in company processes and procedures. Just as the beneficiary's general cultural knowledge cannot be considered to be "special knowledge," this same knowledge cannot be considered to give him "advanced knowledge of the company's policies and procedures" relative to other workers in the organization. The petitioner has not distinguished the beneficiary's knowledge, work experience, or training from the other employees. Without such evidence, the AAO cannot conclude that the beneficiary's knowledge is "advanced" and, for the reasons discussed above, cannot accept the blanket assertion that all gaucho chefs employed by the foreign entity possess "advanced knowledge" of the petitioner's processes and procedures due to their cultural backgrounds.

Finally, the AAO acknowledges counsel's assertion that, according to the 2004 Ohata Memorandum pertaining to specialized knowledge chefs, the petitioner needs to establish that the beneficiary's skill set "is so complex that it contributed directly to the success of the foreign entity," or that all of the company's chefs "must undergo rigorous in-house training in order to satisfactorily perform their job duties." Counsel stated that the memorandum also requires the petitioner to submit evidence that the company now wishes to replicate its success in the United States by transferring such personnel to the United States in order to establish "substantially similar operations." Counsel asserted that the petitioner meets these requirements as the petitioner's *churrasqueiros* possess complex skills that contribute to the success of the company in Brazil and that they are key to the continued successful replication of the Brazilian business concept in the United States.

Applying the guidance in the internal agency memorandum to the facts of this case, the petitioner has not established that the beneficiary possesses specialized knowledge or that he has been or would be employed in a capacity requiring specialized knowledge. Since the petitioner has not documented the beneficiary's completion of its internal training program, it has not shown that "all of its chefs must undergo rigorous in-house training in order to satisfactorily perform their duties." As discussed, the beneficiary in this matter, based on the evidence of record, appears to have joined the foreign entity as a *churrasqueiro* chef or waiter after serving in similar positions with an unrelated entity. There is no evidence that he spent any period of time as a trainee.

Furthermore, the facts of this case can be distinguished from the hypothetical example provided in the Ohata Memorandum, which refers to a petitioner seeking to replicate the success of a foreign entity in the United States by transferring the beneficiary and using the person to establish a substantially similar operation. The petitioner was established in the United States in 1997, 13 years prior to the filing of this petition, and since that time, it has opened 16 restaurants in the United States. Meanwhile, since its establishment in 1979, the foreign entity has opened six restaurants in Brazil It is reasonable to conclude that the petitioner has already replicated the success of the foreign entity in the United States and does not require the services of the instant

beneficiary to "establish" its U.S. operations. The petitioner indicates that the beneficiary is coming to work in the petitioner's existing restaurant in [redacted] rather than in a newly-opened restaurant.

Nor has the petitioner established that the beneficiary's skill set is so complex that he contributed directly to the success of the foreign entity. The example provided in the Ohata Memorandum noted that such an alien might include one who "designed a pastry menu and a method of pastry presentation that earned the entity an international reputation." The petitioner has not established that the beneficiary has any particular skill or accomplishment not possessed by other *churrasqueiros* working for the foreign entity. The petitioner's conclusory assertion that all gaucho chefs are important and contribute to the success of the foreign entity is simply not comparable to the hypothetical facts set forth in the memorandum. The record of proceeding contains little evidence or argument relative to the instant beneficiary himself and the impression created is that any Brazilian *churrasqueiro* working for the foreign entity would be equally qualified for the proffered position.

It appears that the petitioner's business thrives on providing a feeling of authenticity to its customers. The AAO cannot ignore the fact that its practice of hiring rural southern Brazilians to serve as gaucho chefs undoubtedly contributes to this authenticity. The petitioner has, however, failed to corroborate its claims that the Brazilian employees possess knowledge or perform duties that are uncommon or different compared to those generally performed by *churrasqueiro* chefs in the Brazilian churrascaria restaurant industry. Nor has the petitioner adequately documented its claim that its locally-hired personnel can "barely perform" a fraction of the duties the position entails. The fact that the petitioner desires to employ native "gauchos" from Southern Brazil is insufficient to qualify the beneficiary for an L-1B visa. While the beneficiary's ethnic background, culinary skills and cultural knowledge may contribute to the success of the petitioning organization, the combination of these factors does not constitute the possession of specialized knowledge.

In the present matter, the petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge in the *churrasco* cooking style is different from that possessed by other similarly-employed workers in the petitioner's industry. Nor does the record establish that the proposed U.S. position requires specialized knowledge. While the position of *churrasqueiro* chef may require a comprehensive knowledge of the manner in which to prepare, cook and serve meats in the traditional barbeque style native to Southern Brazil, the petitioner has not established that a *churrasqueiro* chef must possess "specialized knowledge" as defined in the regulations and the Act.

Based on the evidence presented, it is concluded that the beneficiary does not possess specialized knowledge, nor would the beneficiary be employed in a capacity requiring specialized knowledge. For this reason, the AAO will affirm the director's decision to deny the petition.

V. Prior Approvals

Counsel asserts that the director's decision does not adequately address the fact that the petitioner previously obtained approval for over 200 petitions filed on behalf of Brazilian *churrasqueiro* chefs. Counsel claims that the approved L-1B petitions were substantively identical to this petition.

The director acknowledged this claim in his decision. The director cited to the popularity of Brazilian *churrascaria* restaurants in the United States, noting that most major cities have several such restaurants, and that these restaurants include upscale chains that are similar in concept and presentation in comparison to the petitioner's own restaurants. The director emphasized that, according to the 2004 Ohata Memorandum, a petitioner seeking to classify a chef or specialty cook as an L-1B worker must establish that the petitioner has knowledge of a company product or a process that is not generally found in the petitioner's particular industry. The director observed that the petitioner did not establish how its products, training program or processes differ in any significant way from other Brazilian *churrascaria* restaurants that have proliferated in the market.

Finally, the director concluded that "if, at the inception of [the petitioner's restaurant chain], the *churrasqueiro* position required specialized knowledge, USCIS concludes that it generally no longer does." In this regard, the director noted that the petitioner's "substantively similar" petitions "have become less persuasive over time." The director also noted that some approved petitions have been returned to USCIS by U.S. consulates in Brazil when interviews with the beneficiaries raised questions as to their qualifications for an L-1B visa.

Counsel contends that the director failed to provide a reasonable explanation for departing from prior approvals of L-1B petitions filed on behalf of *churrasqueiro* chefs. Counsel asserts that the director had no basis for concluding that the petitioner's competitors employ workers who perform the "seventeen distinct duties" performed by the petitioner's *churrasqueiro* chefs. Counsel further claims that the director's finding that hundreds of *churrasqueiros* within the petitioner's organization have the "same training" ignores the petitioner's evidence that the company is unable to teach "non-gauchos" many *churrasqueiro* duties.

In making a determination of statutory eligibility, USCIS is limited to the information contained in that individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). USCIS must make a determination regarding specialized knowledge on a case-by-case basis.

In this matter, the petitioner has provided very little evidence specific to the beneficiary, his training or his qualifications, and instead relies primarily on blanket assertions that all of its Brazilian-born *churrasqueiros* meet the requirements for employment in a specialized knowledge capacity. The petitioner also relies on a largely unsupported claim that the petitioner is differentiated among the many Brazilian *churrascaria* restaurants in the industry because it recruits *churrasqueiros* who have been raised in the gaucho traditions of the rural Rio Grande do Sul region of Brazil.

If the previous nonimmigrant petitions were approved based on the same broad, unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act.

Furthermore, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

VI. Conclusion

In conclusion, the AAO notes that the Fifth Circuit Court of Appeals has previously affirmed the USCIS decision to deny L-1B petitions filed on behalf of *churrasqueiro* chefs based on the petitioner's failure to submit evidence regarding individual beneficiaries' skills and abilities, and inability to establish that Brazilian cooking is sufficiently specialized to merit L-1B status. *Boi Na Braza*, 2005 WL 2372846, *aff'd* 194 Fed.Appx. 248.

Like the instant petitioner, the *Boi Na Braza* petitioner's restaurants "specialized in the exclusive traditional method of preparing and serving meat that descended from the gauchos of the Rio Grande do Sul region of southern Brazil." *Id* at *1. The petitioner claimed that "a *churrasqueiro* begins learning his sophisticated knowledge almost from birth." *Id.* at *2. Also, the *Boi Na Braza* petitioner had claimed that its *churrasqueiros* possessed skills and abilities unavailable elsewhere, and contended that its *churrascarias* specialize in an exclusive, flamboyant method of preparing and serving meat. In denying the petition, USCIS determined that the petitioner failed to distinguish its cooking and serving techniques from those used by other similar Brazilian restaurants, and failed to adequately describe and document the beneficiaries' skills, abilities and company-specific training such that it could be determined that any of the beneficiaries has knowledge of any aspect of Brazilian cooking that is sufficiently unusual in the Brazilian culinary industry. The court rejected the plaintiff's argument that the decisions to deny the 20 petitions were improper simply because the same USCIS service center had previously and recently granted extensions to certain other beneficiaries performing in the same employment capacity. 2005 WL 2372846 at *9.

The petitioner has sought to distinguish the facts of this matter from those presented in *Boi Na Braza.* The petitioner acknowledged that *Boi Na Braza* operates in the same restaurant industry, but emphasized that the

instant petition is entirely distinct from the facts presented in *Boi Na Braza* because the petitioner in that case did not submit expert authority, did not explain how its business model differs from industry competitors, did not provide sufficient evidence regarding the beneficiary's qualifications, and did not demonstrate that the beneficiary worked in a specialized knowledge capacity overseas. The petitioner asserts that none of these deficiencies are present in the instant petition, and asserts that *Boi Na Braza* is limited in that it "did not construe the 'specialized knowledge' definition itself, nor did it approve any generic approaches by USCIS to the L-1B category or its key definitions."

As discussed above, the current petition, while supported by expert opinion testimony, contains several of the deficiencies that led the Fifth Circuit Court of Appeals to affirm the USCIS decision to deny L-1B classification to *churrasqueiros*. The petitioner's expert testimony does not in fact explain how the petitioner's business model differs from its industry competitors, and the petitioner did not document the instant beneficiary's training or clarify the discrepancy with respect to his job title or role with the foreign entity.

As a final note, we acknowledge that counsel has allocated more than 20 pages of his 53-page brief on certification to a detailed discussion of the reasoning employed by the AAO in three unpublished decisions issued between 2006 and 2010, including one decision which affirmed the denial of an L-1B petition filed by the instant petitioner for a *churrasqueiro* chef.

The regulation at 8 C.F.R. § 103.3(c) provides that while AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Significantly, counsel does not claim that the director, Vermont Service Center, employed the same non-binding reasoning or analysis in either his initial decision issued on March 20, 2010 or in the decision dated June 16, 2011 that is now before the AAO on certification. Rather, counsel's arguments with respect to the unpublished decisions, particularly the unpublished decision in which the AAO affirmed the denial of a factually similar petition, appear to be a pre-emptive measure intended to persuade the AAO to follow a different line of reasoning in the instant matter. Nevertheless, all concerns raised in counsel's brief have been addressed in the preceding discussion and there will be no further discussion of the unpublished matters.

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 director's decision dated June 16, 2011 is affirmed. The petition is denied.