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

(b)(6)

DATE: APR 2 6 2013 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

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

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

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.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will withdraw the director's decision and remand the matter to the director for further action and issuance of a new decision.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1B nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Delaware corporation, is a claimed affiliate of The foreign employer is a power and energy systems consultant. The petitioner provides technical control systems and energy market expertise for three federally established non-profit organizations that operate electrical transmission grids. The petitioner seeks to employ the beneficiary in the position of Energy Market Systems/Electrical Market Engineer for a period of three years.

The director denied the petition, concluding that the petitioner provided insufficient evidence to establish that the beneficiary possesses specialized knowledge or that he will be employed in a capacity requiring specialized knowledge.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel asserts that the director ignored certain key evidence on the record critical to demonstrating by a preponderance of the evidence that the beneficiary is a key employee with the foreign employer holding specialized knowledge.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the U.S. temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate.

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien. *Id.*

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

> For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

> [S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

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

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

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

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training and employment qualifies him/her to perform the intended services in the United States; however the work in the United States need not be the same work which the alien performed abroad.

II. Specialized Knowledge:

Facts and Procedural History

The sole issue addressed in the director's decision was whether the petitioner had established that the beneficiary possessed specialized knowledge and was to be employed in a specialized knowledge capacity.

The petitioner was established in 2005, has 17 employees and grosses $4 million in annual revenue. As noted, the petitioner is an affiliate of the foreign employer providing consulting services in the electric energy industry. More specifically, the petitioner provides technical control systems and energy management market expertise to organizations in the United States that operate electrical transmission grids, assisting these entities in reliability and security to ensure that power gets to customers with minimized power shortages. The foreign employer, based in Australia, states it is an expert in deregulated energy market systems first introduced in Australia and New Zealand. The petitioner asserts that the beneficiary will work as an Energy Market Systems/Electrical Market Engineer providing expertise to a U.S. non-profit organization, [redacted] which operates a power grid that provides electricity to nine states in the United States.

In his role, the beneficiary will provide expertise to staff to help improve their control systems and energy market management, and train technical staff in implementing a modal market electrical system.

The petitioner maintains that the U.S. position requires advanced knowledge of the foreign employer's practices and services related to computer-controlled electricity markets. The petitioner further states that the beneficiary has been employed with the foreign employer as a SCADA/EMS/Market Engineer since 2008 and that he has mastered the foreign employer's proprietary processes, procedures, and control systems, including those that relate to the aforementioned SCADA systems. The petitioner defines SCADA systems as centralized systems that monitor and control entire complexes of electricity transmission over large areas. Additionally, the foreign employer offers the beneficiary as an expert in the implementation and commissioning of SCADA systems and their testing, updating and enhancement once operational. The petitioner also provided extensive supporting documentation confirming the beneficiary's expertise in deregulated electricity markets and the beneficiary's intimate knowledge of the foreign employer's engineering processes, procedures, standards, and efficiencies as they relate to market systems. This documentation included detailed support letters from the Chief Executive Officer (CEO) of the foreign employer, the beneficiary's manager with the foreign employer, and two other letters from customers of the beneficiary. The beneficiary's experience, including his current and past assignments, is thoroughly described in these letters. His work is additionally confirmed through company newsletters and a thorough resume. Further, the petitioner provided evidence that the beneficiary earned a Masters of Engineering in the field of electricity markets from the in Australia in 2011.

Despite the apparent completeness of the record, the director subsequently issued a request for evidence ("RFE") requesting that the petitioner provide additional evidence and explanation supporting the beneficiary's claimed specialized knowledge and specialized knowledge role in the United States.

In response, the petitioner complied with the director's request point by point, re-submitting much of the previous evidence discussed above, including an additional support letter from the foreign employer's CEO that further explains that the beneficiary is one of only five employees, out of 124 worldwide, with a mix of experience in both energy management systems and market systems. The CEO identified these employees in the foreign employer's extensive organizational chart and explained that it would likely take approximately six years for another engineer to gain the level of experience held by the beneficiary. The CEO provided detailed examples of various projects the beneficiary has been assigned to over the years and their specific relevancy to his proposed role with the petitioner. For instance, the CEO explained that the beneficiary has unique training and experience critical to providing professional services to its new U.S. customer ; specifically the beneficiary has unique knowledge of the energy management system [EMS] and market management system [MMS], both of which will be implemented by the petitioner for the new U.S. customer. Further, the CEO stated that the beneficiary has worked on developing the petitioner's approaches, processes and models with respect to the implementation of the aforementioned technologies.

The director found that the record was insufficient to establish that the beneficiary possesses specialized knowledge or would be employed in a specialized knowledge capacity. The director reasoned that the beneficiary's duties appeared similar to those listed for an electrical engineer in the Department of Labor's

Occupational Outlook Handbook (OOH), suggesting that the beneficiary's knowledge was not sufficiently unique or advanced to qualify. The director noted that the petitioner had not shown with sufficient evidence that the U.S. position required knowledge of the foreign employer's tools, processes, and methodologies. The director further concluded that the petitioner could likely train another similarly educated candidate to fill the position without undue hardship.

Counsel asserts on appeal that the director failed to consider certain key evidence on the record that establishes the beneficiary's knowledge as special and advanced. Counsel maintains that the petitioner has demonstrated with a preponderance of the evidence that the beneficiary is a key employee with specialized knowledge possessed by few other employees in the petitioner's organization and that the knowledge could not be easily transferred to another engineer. Counsel points to two outside opinions from the petitioner's customers attesting to the special, advanced and unique nature of the beneficiary's knowledge. Counsel further notes that the beneficiary's knowledge is advanced since he will be training other engineers in these advanced techniques, and that a highly experienced and expert representative is required to fulfill the petitioner's obligations to its U.S. client.

Analysis

Upon review, the petitioner's assertions are persuasive. The petitioner has established that the beneficiary possesses specialized knowledge and that he will be employed in the United States in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In order to establish eligibility, the petitioner must show that the individual will be employed in a specialized knowledge capacity. 8 C.F.R. § 214.2(l)(3)(ii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." *See also* 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the petitioning company and/or against others holding comparable positions in the industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is advanced or special, and that the beneficiary's position requires such knowledge.

Upon review, the AAO finds that the petitioner has established by a preponderance of the evidence that the beneficiary possesses advanced knowledge of the foreign employer's processes and procedures and that such knowledge is required for the U.S. position.

First, the petitioner has provided very detailed explanations of the beneficiary's job duties with both the foreign employer and petitioner, including examples of projects, products, and processes focused on and specific duties performed related thereto. Further, the petitioner has provided relevant, probative, and credible evidence sufficient to establish that the beneficiary has five years of experience with the foreign employer and that he has unique knowledge within the foreign employer's extensive team of engineers. Indeed, the record credibly establishes that the beneficiary is one of only five engineers holding a similar level of expertise in both energy managements systems and market management systems within a company of 127 employees. Further, the petitioner has adequately documented its claims with relevant supporting documentation. In short, the totality of the evidence establishes that it is more likely than not that the beneficiary's knowledge of the foreign employer's processes and procedures is special and advanced when compared to the rest of the organization.

Second, the petitioner has provided credible evidence that the beneficiary's role in the United States requires the beneficiary's advanced knowledge. The petitioner has submitted substantial documentation, including very detailed support letters, two of which are from parties independent of the foreign employer's organization, that confirm the specialized nature of his proposed duties in the United States. The petitioner and foreign entity have persuasively emphasized that the role requires an engineer with an advanced level of knowledge of the foreign employer's processes and capabilities, and that the nature of the position is not, as suggested by the director, that of an ordinary electrical engineer. The record credibly supports a conclusion that the beneficiary will in fact be providing a special and advanced level of knowledge to other professionals in an engineering specialization that is quite new in the United States.

In conclusion, the evidence submitted establishes that the beneficiary possesses specialized knowledge and that he will be employed in a specialized knowledge capacity with the petitioner in the United States. *See* Section 214(c)(2)(B) of the Act. Accordingly, the director's decision of July 30, 2012 will be withdrawn.

II. Qualifying Relationship

Although the petitioner has overcome the sole issue raised in the director's decision, the AAO finds insufficient evidence to establish that the petitioner maintains a qualifying relationship with the foreign entity.

To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner asserts that it is an affiliate of the foreign employer located in Australia. The petitioner states that the foreign employer is owned by three individuals; who together own 52% of the petitioner. The petitioner further maintains that the three aforementioned individuals control the petitioner's board of directors through a voting agreement dated December 11, 2007, which it states is intended to provide for "consistency of control" between the two entities.

Certain discrepancies on the record regarding ownership in the foreign employer cast doubt on whether the petitioner is owned and controlled as asserted above. The petitioner provides a company statement dated August 13, 2011 reflecting that the foreign employer has only two shareholders, and each owning 50% of the foreign employer. However, the foreign employer's corporate counsel asserts in a provided letter that the foreign employer is controlled by the three shareholders mentioned above; specifically

Additionally, the referenced voting agreement makes no reference to the beneficiary's foreign employer, but reflects agreement between the petitioner and . As such, the voting agreement is not relevant to establishing common ownership and control between the petitioner and the foreign employer. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Therefore, based on the evidence presented, the petitioner has not sufficiently established that the petitioner and the foreign employer are affiliates.

Even if the AAO were to accept the presented voting agreement as being between the petitioner and the foreign employer, it is still questionable that the petitioner and the foreign employer would be affiliates consistent with the regulatory definition. First, the petitioner does not offer that the petitioner and foreign employer are: (1) one of two subsidiaries both of which are owned and controlled by the same parent or individual, or (2) one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity. The petitioner is presented on the record as being owned and controlled by six separate shareholders, while the foreign employer is alternatively presented as being owned by two or three shareholders. Therefore, the two entities are not commonly owned by a *parent or individual*, or by the same group of individuals.

Further, the voting agreement presented is not an agreement that would assure complete concert of action between the shareholders. Black's Law Dictionary defines a voting agreement (or pooling agreement) as "a contractual arrangement among corporate shareholders whereby they agree that their shares will be voted as a unit." *See Black's Law Dictionary* 58 (7th Ed., West 1999). However, the provided agreement only provides that the two entities will have the same members on their respective boards and does not assure any common voting with respect to the shareholders. In fact, the agreement explicitly states that it is not intended to be a voting trust. Neither legacy Immigration and Naturalization Service nor USCIS has ever accepted a combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

As such, based on the record as presently constituted, the petitioner has not established a qualifying relationship as defined by the Act due to the discrepancies on the record related to ownership of the petitioner and foreign employer and the failure of the provided evidence to demonstrate that the petitioner and foreign employer are affiliates as asserted.

At this time, the AAO takes no position on whether the beneficiary qualifies for the classification sought. The director must make the initial determination on this issue. Therefore, the AAO will remand this matter to the director for a new decision. The director should request any additional evidence deemed warranted and allow the petitioner to submit such evidence within a reasonable period of time. As always in these proceedings, the burden of proof rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

ORDER: The director's decisions are withdrawn. The petition is remanded to the director for further action in accordance with the foregoing discussion and entry of a new decision which, if adverse to the petitioner, shall be certified to the Administrative Appeals Office for review.