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

(b)(6)

U.S. Citizenship and Immigration Services

DATE: MAR 19 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.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

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 dismiss the appeal.

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 was formed as a corporation under the laws of the Commonwealth of Massachusetts in 2002, and is an electronics design company, specializing in system level design and integration. It claims to be an affiliate of , located in Poland. The petitioner seeks to transfer the beneficiary to the United States to serve in a specialized knowledge capacity, as Software Engineer (Systems Requirements Engineer), for an initial period of three years. The petitioner indicates that the beneficiary will be stationed primarily offsite at the San Diego, California worksite of its client, (hereinafter "the unaffiliated employer").

The director denied the petition, concluding that the petitioner failed to establish that the placement of the beneficiary at the unaffiliated employer's worksite is not an arrangement to provide labor for hire in violation of Section 214(c)(2)(F)(ii) of the L-1 Visa Reform Act.

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 evidence of record is sufficient to establish that the placement of the beneficiary at the unaffiliated employer's worksite is not an arrangement to provide labor for hire.

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.

Section 412 of the L-1 Visa Reform Act of 2004 states the following:

> (F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if—
>
> (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
>
> (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge to the petitioning employer is necessary.

Finally, 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.
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> (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.
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> (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. The Issue on Appeal

A. L-1 Visa Reform Act

The sole issue addressed by the director is whether the petitioner established that the placement of the beneficiary at the unaffiliated employer's worksite is not an arrangement to provide labor for hire in violation of Section 214(c)(2)(F)(ii) of the L-1 Visa Reform Act.

The petitioner is an electronics design company, specializing in system level design and integration. The petitioner's group had a consolidated gross annual income of $24 million in the year prior to filing with two United States employees and over 300 employees worldwide.

The petitioner stated that the beneficiary would be working as Software Engineer (Systems Requirements Engineer). On the L Classification Supplement to the Form I-129, the petitioner answered "yes" to Section 1 question 13, indicating that the beneficiary would be stationed primarily offsite at the worksite of an unaffiliated employer. Other than the worksite address listed on Part 5, question 5 of the Form I-129, the petitioner did not provide any details regarding the worksite placement or identify the unaffiliated employer in its initial evidence.

The petitioner submitted a statement from the Human Resources Director of its parent company, who stated that the beneficiary's team is supervised by the Business Line General Manager, Consumer Healthcare, who is based in Poland. The statement explained that all team members report on a weekly basis to the manager "in respect of performance against objectives and the removal of any roadblocks or issues." The petitioner did not indicate whether the reporting requirements would continue at the third party worksite in the United States. In a letter from its General Manager, North America, the petitioner stated that the beneficiary "will communicate to management in the San Jose office as well as the Ireland office and provide feedback."

The director issued a Request for Evidence ("RFE"), advising the petitioner that it provided insufficient evidence concerning the location where the beneficiary will work, the product or service to which the beneficiary will be providing specialized knowledge, and the conditions of employment. The director requested that the petitioner provide, *inter alia,* evidence to establish: (1) that the beneficiary will be controlled and supervised principally by the petitioner; (2) the location where the beneficiary will work; and (3) that the placement of the beneficiary at the client's worksite is not merely to provide labor for hire.

In response, the petitioner provided (1) the beneficiary's duties in the United States; (2) a "product statement" which further explains the beneficiary's claimed specialized knowledge; and (3) the Master Services Agreement and Statement of Work pertaining to the beneficiary's project assignment with the unaffiliated employer.

The petitioner described its operation as "providing system development services for consumer healthcare products for internet and wireless remote patient monitoring devices." In the beneficiary's job description, the petitioner stated that the beneficiary will report to its San Jose, California-based general manager for "functional reporting" and to the manager of its Polish affiliate for technical reporting on "products/services."

Section one of the Master Services Agreement states that the petitioner shall provide "services" in accordance with the terms of the agreement and pursuant to statement(s) of work. Section 2.1 of the agreement states that the services are either "i) level of effort (labor hours) work provided at fixed fully burdened labor rate(s) or ii) work provided on a firm fixed fee basis." Section 6.1 of the agreement further states that if the unaffiliated employer determines that the "performance or conduct of any person employed, hired, or retained by

Contractor" is unsatisfactory, the unaffiliated employer shall notify the petitioner and the petitioner shall "take such actions as may be necessary to substantially improve the performance or conduct of such person" or shall replace the person. Pursuant to Section 6.2 of the agreement, the petitioner must notify the unaffiliated employer in the event that a change of personnel is required, ensure that a knowledge transfer takes place, and ensure that any new personnel have the skills and experience necessary to perform the contracted services.

The Statement of Work governs the terms of provision of services provided by the petitioner to the unaffiliated employer. The petitioner's role under the Statement of Work is to assist the unaffiliated employer with the development of technical systems and products that will permit a third entity, , to operate as a Wireless Health Services Provider. Specifically, the unaffiliated employer is contracted "to complete the 'Concept' and 'Specification' phases of four development projects." Further, the background/objective portion of the Statement of Work states that "Under the terms of this Statement of Work, [the petitioner] shall be part of the [unaffiliated employer's] team providing services to ."

Page two of the Statement of Work states that the petitioner shall "provide personnel with the skills necessary to assist [the unaffiliated employer] in completing" the first phase of each of the four development projects identified in the contract. The Statement of Work at page 3 states that the unaffiliated employer's Technical Representative "will determine the need for [the petitioner's] personnel when staffing the above tasks and shall coordinate with the [the petitioner's] Technical Representative in determining assignment of [the petitioner's] personnel to the specific tasks."

The director ultimately denied the petitioner finding that the petitioner failed to establish that the unaffiliated employer/client will not supervise and control the beneficiary. The director noted that Part II of the Statement of Work states that the petitioner "'shall provide personnel who will work with [the unaffiliated employer] to complete the following tasks: [see list].'" The director determined that this section, along with other unspecified sections of the SOW, establish that the "petitioner's role is to provide skilled personnel to [the unaffiliated employer]." Furthermore, the director found that the petitioner's contract with the unaffiliated employer is "essentially a contract for labor."

On appeal, counsel for the petitioner contends that the director's decision was based upon a "misunderstanding of the nature of the Master Services Agreement." Specifically, counsel points to Section 6 of the Master Services Agreement stating that the petitioner, and not the unaffiliated employer, is responsible for dealing with the unsatisfactory performance of the petitioner's employee by "ensuring improvement, reassigning or replacing the [petitioner's] employee."

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the placement of the beneficiary at the unaffiliated employer's worksite meets the conditions of Section 214(c)(2)(F)(ii) of the L-1 Visa Reform Act.

If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the beneficiary will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel nor the employer will suffice to establish eligibility.

Matter of Soffici, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988). If the petitioner fails to establish either of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee.

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.

First, the petitioner failed to fully complete the Form I-129 specifying who will supervise the beneficiary. Question 13 of the Form I-129 L Classification Supplement specifically requests that the petitioner "describe how and by whom the beneficiary's work will be controlled and supervised" and requires that the petitioner "include a description of the amount of time each supervisor is expected to control and supervise the work." The petitioner stated "Please see attached letter" in response to these questions; however, the petitioner's attached letter did not specifically answer either inquiry posed on the petition. The petitioner vaguely stated in the referenced letter that the beneficiary "will communicate to the management in the San Jose office as well as the Ireland office and provide feedback," but provided no details describing "how and by whom the beneficiary's work will be controlled and supervised."

Elsewhere, the petitioner stated that the beneficiary will report to both a manager in Poland and the general manager of the petitioning company, but it never specified who will actually supervise and control the beneficiary's work at the unaffiliated employer's worksite. 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)).

Counsel points to the Master Services Agreement as evidence of the petitioner's ultimate supervision and control over the beneficiary. The Statement of Work, however, contains a requirement that the petitioner must report to the unaffiliated employer on a monthly basis "any issues or concerns regarding the assignment of the [petitioner's] personnel, or any intent to replace any currently assigned personnel." Further, the Statement of Work indicates that the petitioner "shall be part of the [unaffiliated employer's] team providing services to " The petitioner has not described or documented the leadership of this team, indicated how the beneficiary will be incorporated into the team at the unaffiliated employer's worksite, or directly addressed the nature of his interaction with or supervision by the unaffiliated employer's team.

Further, the Statement of Work calls into question the petitioner's ability to make ultimate decisions regarding placement and assignment of personnel without the approval of the unaffiliated employer. For example, it states that the unaffiliated employer "will determine the need for [the petitioner's] personnel when staffing" and "coordinate with [the petitioner's] Technical Representative when assigning [the petitioner's] personnel to specific tasks." Based on the limited information provided, it is reasonable to believe that responsibility for supervising the beneficiary's work, at a minimum, would be shared with the unaffiliated employer. The

petitioner has therefore not met its burden to submit relevant, credible and probative evidence in support of its claim that the beneficiary will not be controlled and supervised principally by the unaffiliated employer.

For the reasons discussed above, the evidence submitted fails to establish that the beneficiary's placement at the unaffiliated employer's worksite meets the conditions of Section 214(c)(2)(F)(ii) of the L-1 Visa Reform Act. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary will be working in a specialized knowledge position. 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. 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.

The petitioner states that the beneficiary is one of two "specialists" that have specialized knowledge of the petitioner's Quality Management systems for development of remote patient monitoring devices. The petitioner further claims that the beneficiary gained this specialized knowledge through "extensive training abroad." The petitioner, however, provided very little evidence regarding the training required for the position. In the petitioner's initial letter submitted with the Form I-129, the beneficiary is described as having obtained specialized knowledge in the petitioner's proprietary Quality Management System since 2005 as an Architect/Technical Leader/Project Leader. The petitioner, however, describes the beneficiary as having "applied" his specialized knowledge of the Quality Management System in this same position, making it unclear when the beneficiary actually received any specialized training in this system. The petitioner makes further vague references to the beneficiary having developed specialized knowledge of the petitioner's "QMS Requirements Engineering process, products, the company, its vision and its philosophy" without any further detail on the type, length, and nature of the training or knowledge received by the beneficiary "[t]hrough his experience" with the petitioner. 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)).

For the reasons discussed above, the evidence submitted fails to establish that the beneficiary would be employed in the United States in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F.Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)(noting that the AAO reviews appeals on a *de novo* basis).

IV. Conclusion

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here the petitioner had not met that burden.

ORDER: The appeal is dismissed.