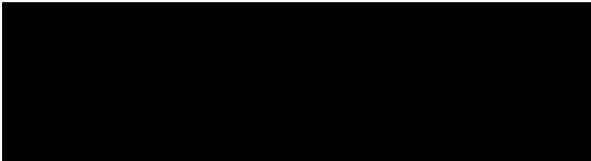


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File: EAC-04-029-50960 Office: VERMONT SERVICE CENTER

Date: AUG 22 2005

IN RE: Petitioner:
Beneficiary:



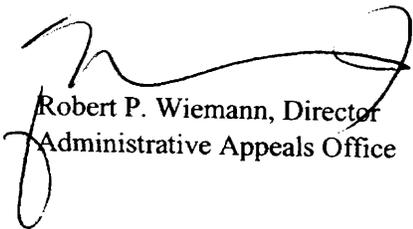
Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Virginia that is engaged in computer software design and consulting. The petitioner claims that it is the subsidiary of [REDACTED], located in Enfield, England. The petitioner now seeks to employ the beneficiary for three years as a Technical Consultant.

The director denied the petition concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the prospective position requires an individual with 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 for review. On appeal, the petitioner asserts that the position of Technical Consultant with the petitioner requires specialized knowledge and that the beneficiary's experience with the foreign entity is necessary to perform his prospective duties. In support of these assertions, the petitioner submits a brief and documents previously entered into the record of proceeding.

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, 8 U.S.C. § 1101(a)(15)(L). 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 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) 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.

The issues in the present matter are whether the petitioner has established that the beneficiary's position in the United States will involve specialized knowledge, and whether the petitioner has established that the beneficiary's prior employment abroad was in a position that involved specialized knowledge, such that the beneficiary possesses specialized knowledge. *See* 8 C.F.R. §§ 214.2(I)(3)(ii) and (iv).

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 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(I)(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 or procedures.

In a letter submitted with the initial petition on November 10, 2003, the petitioner described the beneficiary's experience abroad and its product as follows:

[The beneficiary's] responsibilities in the UK include the design and implementation of communication software, the technical marketing of services and products, and liaison with clients. He has worked with a number of the company's US customers, and has developed complex communications software for [the foreign entity]

He has been deployed full-time by [the foreign entity], initially working as a member of the product development teams. For the past three years he has been specializing in our DC-MPLS product, initially as a development manager, more recently as a customer support manager. DC-MPLS is a software product that is integrated into data and voice switches produced by a large and growing number of US equipment manufacturers.

[The beneficiary] has a unique knowledge of the complexities involved integrating DC-MPLS with equipment manufacturers' other technology to create equipment that will support voice and data services across different types of networks. Due to the increasing numbers of US customers using DC-MPLS, we require his assignment to [the petitioner].

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[The foreign entity's] products are

- Highly complex; only skilled software professionals are capable of taking on the technical consulting and systems analysis roles required to successfully market them to the industry
- developed in the UK, by software professionals recruited and trained by [the foreign entity]

The petitioner described the beneficiary's prospective job duties as follows:

While in the US, [the beneficiary] will be working with [the petitioner's] prospective and current customers in the network equipment manufacturers sector to identify solutions to their technology requirements, support their integration of DC-MPLS into their solutions, and develop new business opportunities and relationships for [the petitioner].

On December 24, 2003, the director requested additional evidence. In part, the director instructed the petitioner as follows:

- Submit evidence relating to the unique methodologies, tools, programs, and/or applications that your company uses. Evidence may include your company's brochure or other literature describing the tools your company uses. Please describe in detail how these are different from the methodologies, tools, programs and/or applications used by other companies.

Explain, in more detail, exactly what is the equipment, system, product, technique, or service of which the beneficiary of this petition has specialized knowledge, and indicate what it is used [f]or.

In a response dated December 29, 2003, the petitioner submitted a letter that states the following:

[The beneficiary's] responsibilities included

- creating the MPLS product architecture
- approving the designs of all components
- reviewing much of the software written
- writing some components himself
- agreeing the test plan
- management of a team of up to 6 other engineers who were designing, coding and testing DC-MPLS
- participating in the definition of the industry standards for MPLS at several different standards bodies.

This gave [the beneficiary] unequalled knowledge in DC-MPLS and he remains our key expert in these technologies. DC-MPLS and its test software is close to one million lines of

software. An exceptional software engineer from outside [the foreign entity] would take years to achieve anything near [the beneficiary's] level of knowledge, and even then the knowledge gained from being involved in the original software development is impossible to emulate.

* * *

[The beneficiary's] support responsibilities include

- working with customers in using DC-MPLS
- helping customers design their systems
- providing education and support at the customer's site
- debugging any problems which they hit
- providing additional software to satisfy specific requirements
- reacting extremely quickly to problem reports.

This level of support can only be achieved by someone that has previously worked on the development of DC-MPLS, and gained years of detailed technical knowledge. This cannot be done by a new hire.

This also requires knowledge of our existing customer relationships. Such knowledge is proprietary and confidential; no-one outside of [the petitioner or foreign entity] could have this knowledge.

The petitioner further stated that it has transferred five additional workers to the United States in L-1B status, including one senior personal assistant and four technical consultants. The petitioner provided that none of the L-1B employees are in the same business unit as the beneficiary, and they do not have the same expertise. The petitioner submitted a document titled DC-MPLS Technical Data Sheet that provides detail regarding the technical aspects and capabilities of its DC-MPLS product. The petitioner included an organizational chart for the foreign entity that reflects that it employs 275 workers, including 152 software professionals, as of December 10, 2003.

On January 8, 2004, the director denied the petition concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the prospective position requires an individual with specialized knowledge. The director discussed the beneficiary's experience with the petitioner's procedures, and stated that "[i]t is not evident that the proffered position could be considered one requiring an individual of specialized knowledge simply because of a knowledge of [the petitioner's] practices." The director referenced the beneficiary's work with DC-MPLS, and indicated that "[i]t is not evident that the program the beneficiary would be utilizing in the [petitioner] is so advanced/specialized that the duties of the position could only be performed by someone with specialized knowledge from [the foreign entity]." The director noted that the petitioner indicated that three or four other companies worldwide provide MPLS technology, and thus the director found that "MPLS would evidently be found regularly within [the petitioner's] industry."

The director highlighted that the petitioner currently employs 12 workers in L-1 status, nine of which are in L-1B status as employees with specialized knowledge. The director concluded that the petitioner failed to show that the beneficiary qualifies as key personnel, as the petitioner chose to transfer 12 other employees to the United States before him. The director observed that the petitioner's organizational chart reflects that there are five employees serving in the same position as the beneficiary who have ostensibly been successfully trained in the United States. The director found that this shows that prior experience with the foreign entity is not required for the beneficiary's position.

On appeal, the petitioner asserts that the beneficiary's prospective position requires specialized knowledge and that the beneficiary's experience with the foreign entity is necessary to perform his duties in the United States. The petitioner discusses the beneficiary's experience abroad with DC-MPLS, and states that "[h]e is one of a very small number of employees (approximately 10) that have such deep and broad knowledge." The petitioner explains the need for the beneficiary's particular knowledge, and confirms that it "is only available from engineers within [the foreign entity] that have worked on [DC-MPLS]." The petitioner explains that "[n]one of [its] existing technical staff based in the US work in the Network Protocol Group or have technical experience of DC-MPLS, and it would take years to develop the level of knowledge that [the beneficiary] has attained."

The petitioner provides that its internal procedures are unique, and that "[b]ecause our customers receive and use the source code and development tools for DC-MPLS, they need to be trained in the associated procedures." The petitioner states that "[a]n engineer with general experience of MPLS, ATM, Frame Relay or other networking protocols would not be able to handle [the beneficiary's] responsibilities because of their complete lack of knowledge in our DC-MPLS implementation and our systems and processes." The petitioner explains that, while there are other companies that work with MPLS technology, its implementation is specific to its own company. The petitioner states that "[t]he vast majority of engineers in the industry that have experience with MPLS software will have gained that experience developing a particular networking device. In that case, they will have developed software that is specific to that device, not software that is portable to many devices."

Upon review, the petitioner has not demonstrated that the beneficiary's prospective position requires "specialized knowledge" as defined in section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), and the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D). Instead, the petitioner consistently describes the position as one requiring an experienced and skilled software professional, rather than someone who possesses specialized knowledge.

In examining whether a position requires specialized knowledge, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed description of the services to be performed sufficient to establish that it involves specialized knowledge. *Id.* It is also appropriate for the AAO to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. 117, 120 (Comm. 1981)(citing *Matter of Raulin*, 13 I&N Dec. 618 (R.C. 1970) and

Matter of LeBlanc, 13 I&N Dec. 816 (R.C. 1971)).¹ As stated by the Commissioner in *Matter of Penner*, 18 I&N Dec. 49, 52 (Comm. 1982), when considering whether the beneficiaries possessed specialized knowledge, “the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought.” Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

A distinction can be made between a person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is employed primarily for his ability to carry out a key process or function which is important or essential to the business' operation.

Id. at 53.

It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term “specialized knowledge” is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, “[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning.” 745 F. Supp. 9, 15 (D.D.C. 1990). The Congressional record specifically states that the L-1 category was intended for “key personnel.” See generally, H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. 2750. The term “key personnel” denotes a position within the petitioning company that is “of crucial importance.” *Webster's II New College Dictionary* 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered “important” to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of “crucial importance” or “key personnel” must rise above the level of the petitioner's average employee. Accordingly, based on the definition of “specialized knowledge” and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's workforce.

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). The decision noted that the 1970 House Report, H.R. No. 91-851, stated that the number of admissions under the L-1 classification “will not be large” and that “[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service.” *Id.* at 51. The decision further noted that the House

¹ Although the cited precedents pre-date the current statutory definition of “specialized knowledge,” the AAO finds them instructive. Other than deleting the former requirement that specialized knowledge had to be “proprietary,” the 1990 Act did not significantly alter the definition of “specialized knowledge” from the prior INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of “[v]arying [i.e., not specifically incorrect] interpretations by INS,” H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became section 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that the cited cases, as well as *Matter of Penner*, remain useful guidance concerning the intended scope of the “specialized knowledge” L-1B classification.

Report was silent on the subject of specialized knowledge, but that during the course of the sub-committee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed "L" category. In response to the Chairman's questions, various witnesses responded that they understood the legislation would allow "high-level people," "experts," individuals with "unique" skills, and that it would not include "lower categories" of workers or "skilled craft workers." *Matter of Penner, id.* at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, "[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees." 18 I&N Dec. 117, 119 (Comm. 1981). According to *Matter of Penner*, "[s]uch a conclusion would permit extremely large numbers of persons to qualify for the 'L-1' visa" rather than the "key personnel" that Congress specifically intended. 18 I&N Dec. at 53; *see also, 1756, Inc.*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to "key personnel" and "executives.")

In the present matter, the petitioner has consistently described the beneficiary's proffered position as a technical consulting and marketing position that requires a skilled software professional with extensive experience in DC-MPLS. When asked by the director to describe how the beneficiary's knowledge of the product is "uncommon, noteworthy, or distinguished by some unusual quality," the petitioner responded by emphasizing the beneficiary's experience with the petitioner's overseas office. The petitioner claimed in part that "[o]nly an employee of Data Connection with substantial experience will be able to effectively use our systems." Although the petitioner submitted copies of a DC-MPLS "Technical Data Sheet," the petitioner did not establish how this product differs in any sense from the specialized and highly technical products provided by other software design and consulting firms. By itself, work experience and knowledge of a firm's technically complex work product will not equal "special knowledge." *See Matter of Penner*, 18 I&N Dec. at 53.

As the petitioner emphasizes the beneficiary's education and work experience, the AAO must conclude that, while it may be correct to say that the beneficiary is a highly skilled and experienced employee, the beneficiary does not rise to the level of a specialized knowledge or a "key" employee, as contemplated by the statute. *Id.*

The petitioner's claims are also hindered by a lack of evidence. Although the petitioner implied that the beneficiary was involved in the original software development, no evidence was submitted in support of the claim. Also, while the petitioner claimed that the beneficiary is one of approximately 10 of the foreign entity's employees who have the level or depth of knowledge of DC-MPLS possessed by the beneficiary, the petitioner did not identify those other employees or provide evidence in support of that claim. As the foreign entity employs approximately 275 workers, the fact that the beneficiary is one of 10 who possess specialized

knowledge of DC-MPLS would be critical and probative as to whether the beneficiary possesses special knowledge.

The petitioner further indicated that none of its technical consultants currently working in the United States, in L-1B status or otherwise, work on the same projects as the beneficiary or possess the same background and expertise. Again, the petitioner submitted no evidence of this claim. The organizational chart submitted does not include position titles or descriptions of the working groups. Instead, the chart represents the organizational hierarchy of 28 employees in three offices (Reston, Virginia; Alameda, California; and Dallas, Texas). CIS records reveal that of the 24 nonimmigrant petitions filed by Data Connection Corp., 15 were for L-1B specialized knowledge employees. Absent documentary evidence or a detailed description of the petitioner's organization, the petitioner's unsupported assertion that no other technical consultant currently working in the United States possesses the same expertise as the beneficiary carries little weight.

Upon review, in every instance where the petitioner attempted to distinguish the beneficiary as having specialized knowledge, the petitioner failed to submit any evidence that would allow the AAO to evaluate the claim. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998)

Finally, the petitioner asserts on appeal that only the beneficiary will suffice for this position because there are no other workers available that can perform the beneficiary's functions without extensive training and experience. It is noted that the L-1B nonimmigrant visa category was not intended to alleviate or remedy a shortage of workers. The H-1B "specialty occupation" temporary worker category, as described in section 101(a)(15)(H) of the Act, provides a basis for the admission of technical workers for whom there is a shortage. See §§ 101(a)(15)(H)(i)(b) and 212(n)(1) of the Act; see also *Matter of Penner*, 18 I&N Dec. at 53-4. The L-1B classification is not intended to serve as a substitute for H-1B when the petitioner is not paying the prevailing wage or when there are no visa numbers available out of the numerical limits set by Congress.

The petitioner may, of course, file a new visa petition on the beneficiary's behalf that is supported by competent evidence that the beneficiary is entitled to L-1B nonimmigrant classification or another appropriate nonimmigrant classification.

Based on the foregoing, the petitioner has not demonstrated that the beneficiary's prospective position requires specialized knowledge or that the beneficiary possesses specialized knowledge. See section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), and the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In visa proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.