

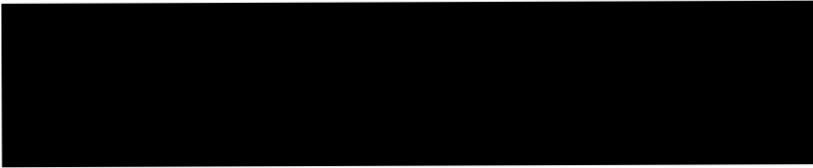
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U.S. Citizenship
and Immigration
Services

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File: EAC-04-171-52862 Office: VERMONT SERVICE CENTER

Date: JUL 11 2006

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.

A handwritten signature in black ink, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a logistics manager under the L-1B nonimmigrant, intracompany transferee program for 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 rents cell phones and cell plans for international travelers, and was formed under the laws of the state of New York. The petitioner claims to be a subsidiary of [REDACTED] located in North Yorkshire, United Kingdom.

The director denied the petition concluding that the petitioner had not established that the beneficiary has been or would be employed in a specialized knowledge capacity.

The petitioner subsequently filed an appeal. On appeal, counsel for the petitioner asserts that the decision was based on improperly explained facts. In support of this assertion, the petitioner submits a brief.

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 primary issue to be discussed in the present matter is whether the petitioner has established that the beneficiary's position in the United States will involve specialized knowledge as required by the regulation at 8 C.F.R. § 214.2(l)(3)(ii), and whether the beneficiary was employed abroad in a capacity that utilized such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(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) of this title, 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.

In the initial petition, the petitioner in its letter dated May 6, 2004, described the beneficiary's job duties and specialized knowledge as follows:

- Manage, develop and motivate [petitioner's] [l]ogistics team to ensure the smooth and efficient running of the department.
- Provide the [l]ogistics team with training and guidance as required to ensure optimum team performance.
- Review work practices within the team and make recommendations for change to policy and/or procedure where necessary to improve performance
- Ensure stock is managed efficiently, and undertake regular stock audits in order to maintain the [c]ompany's electronic stock control system accurately
- Negotiate best price/quality contracts with suppliers, and implement adequate performance/review measures to ensure all supplier services (e.g. couriers) meet agreed service levels
- Provide management information as required.

* * *

[The beneficiary] worked for [the foreign organization] as our [t]echnical [l]ogistics [m]anager from May 2000 to March 2003. In this position he managed the logistics team in our UK office. This included managing, leading, motivating, and organizing the team, performing staff appraisals, carrying out company disciplinary procedures when necessary, and manage the functional operation of the logistics office.

On August 3, 2004, the director denied the petition. The director determined that the beneficiary did not possess specialized knowledge and that the position did not require a person with specialized knowledge.

The petitioner subsequently appealed. On appeal, counsel for the petitioner asserts that the director was erroneous in her determination.

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 description of the services to be performed sufficient to establish specialized knowledge. *Id.* It is also appropriate for the AAO to then 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. A specific occupation will not inherently qualify a beneficiary as possessing specialized knowledge. *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

In making a determination as to whether or not knowledge possessed by a beneficiary is special or advanced the AAO relies on the statute and regulations, prior precedent decisions, and legislative history. This yields a multiple pronged analysis to determine whether the petition has employed and will employ the beneficiary in a specialized knowledge capacity. In examining whether an alien has "special knowledge" of the petitioner's product and its application in international markets or an "advanced level" of knowledge of its processes and procedures, the AAO will consider whether the beneficiary: 1) is part of the petitioner's "key personnel" (*See generally*, H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. 2750); 2) is more than a specialist or a skilled employee (*Matter of Penner*, 18 I&N Dec. at 50); 3) has knowledge that qualifies as "special" or "advanced" under the plain meaning of the term; 4) performs a key process or function for the petitioner (*See Matter of Penner, id.*); and 5) possesses certain characteristics that have been deemed to be illustrative of specialized knowledge (*see Puelo Memo (1994)*).

The alien should possess a type of special or advanced knowledge that is different from that generally found in the particular industry. Where the alien has specialized knowledge of the company product, the knowledge must be noteworthy or uncommon. Where the alien has specialized knowledge of company processes and procedures, the knowledge must be advanced. The petitioner must also establish that it would be burdensome,

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 decisions 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.

or counterproductive to the petitioner's business plan to hire someone other than the alien to fill this position in the United States. *See generally*, Memorandum of Fujie Ohata, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status" (September 9, 2004).

One key characteristic of a beneficiary with specialized knowledge is that they constitute the petitioner's key personnel. 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 an 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 such that the beneficiary's knowledge is relative to the petition at bar. *See 1756, Inc. v. Attorney General*, 745 F. Supp. 9, 15 (D.D.C. 1990)(concluding that specialized knowledge is a relative determination).

The record does not demonstrate that the beneficiary is a key or crucial employee of the organization. There are no indications that the beneficiary occupied a senior position within the organization or performed a key process or function of the organization. If the beneficiary is not regarded as a key or crucial employee of the foreign organization then the beneficiary lacks a key characteristic of an employee possessing specialized knowledge.

A second characteristic of a beneficiary with specialized knowledge is that they are more than skilled employees. In *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. at 49. 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." *Id.* at 51. 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)).

The petitioner has not clearly articulated a basis of distinction for the beneficiary's training and education other than to assert that the beneficiary was employed by the foreign organization for three years. The petitioner failed to articulate and demonstrate that the beneficiary's training and experience distinguish him from other similar employees in the particular industry or within the foreign organization itself. Without a basis for distinction the AAO cannot determine that the beneficiary is more than a trained or experienced employee. The record does not support that the beneficiary is more than a skilled employee. Lacking the

characteristic of being more than a skilled employee reduces the likelihood that the beneficiary actually possesses specialized knowledge.

Although the petitioner regards the beneficiary as an "expert" by virtue of the beneficiary's experience with the petitioner's business procedures and products, the petitioner has not established that the beneficiary is more than a skilled or experienced employee. The petitioner has submitted a resume of the beneficiary, but the beneficiary's listed experience is varied and does not indicate that the beneficiary had any related training other than with the foreign organization. In order to receive this classification, the claimed specialized knowledge has to be examined in the context of those in the particular industry and within the petitioning entity itself to such a degree that the employee would qualify as key or crucial personnel with an uncommon or noteworthy knowledge. In this case the record does not support that the beneficiary is more than a skilled employee producing a product through more than merely skilled labor. Further, the burden of demonstrating eligibility rests with the petitioner; this burden includes clearly articulating and supporting assertions of eligibility. The AAO will not presume or construct assertions on behalf of a petitioner, nor will it extrapolate facts from evidentiary submissions where the relevance of those submissions has not been made clear.

Based on the petitioner's description of the beneficiary's duties, and the failure to distinguish those duties among other employees in the petitioner and within the particular industry, the AAO must conclude that the beneficiary has been performing functions that are common and routine in the software industry and which are not specialized. Without a description of the beneficiary's skill relative to the petitioners' other employees or to the market as a whole, the AAO can not determine whether the beneficiary possesses "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." *See* section 214(c)(2)(B) of the Act.

A third characteristic of a beneficiary with specialized knowledge is that they possess knowledge that meets the plain meaning of special. Special is defined as "surpassing the usual; distinct among others of a kind; peculiar to a specific person or thing." Webster's II New College Dictionary, 2001, Houghton Mifflin. *See also* Webster's Third New International Dictionary, 2001 (defining special as "distinguished by some unusual quality; uncommon; noteworthy").

In the instant case, the petitioner has not demonstrated that the knowledge possessed by the beneficiary is special among a kind, as any employee chosen by petitioner could be trained to fill the position. It is not sufficient to assert that a beneficiary's experience prior to employment with the foreign organization is a basis for specialized knowledge because this fails to distinguish the beneficiary from other employees that the petitioner has hired based on the subjective qualifications determined by the foreign organization. The record does not distinguish the beneficiary's knowledge from what other cell-plan sales employee in other companies would have to learn about their companies' product or service in order to be effectively employed. This type of knowledge would be expected of any employee that interfaces with customers, that is to know their company's product or service. The petitioner has indicated that the beneficiary is to be employed as a logistics manager, but the beneficiary's knowledge has not been demonstrated to be uncommon or noteworthy in nature.

For instance, the petitioner has not articulated or supported any assertion that its business procedure or manner of operations vary from the norm such that this particular beneficiary's knowledge of that operational procedure distinguishes the beneficiary among the petitioner's other employees, or among other employees within this particular industry, as having a special knowledge or an advanced level of knowledge of petitioner's processes and procedures. Without an articulation of how the beneficiary's knowledge is distinguished among petitioner's employees or within this particular industry, the AAO cannot make a determination that this knowledge surpasses the usual or is particular to this beneficiary. For these reasons, the petitioner has not established that the knowledge possessed by beneficiary is "special" or "advanced," in accordance with the plain meaning of the terms as used by the statute.

The description of the beneficiary's duties is over broad and fails to provide enough detail to make a favorable decision. Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. 8 C.F.R. § 214.2(l)(3)(ii). The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The basic description of the beneficiary's duties does not articulate exactly what is specialized about the position, and instead represents the beneficiary as managing a non-existent "logistics team", providing training and guidance, reviewing employee performance and 'providing management information'. This language is typical of a petition for an L-1A managerial or executive position, but the duties have not been demonstrated to constitute specialized knowledge duties or to require specialized knowledge for their performance. As stated above, this classification is not based on characterizations or legal fiction; the petitioner must demonstrate that the beneficiary actually possesses specialized knowledge and will be employed in a capacity that involves specialized knowledge. The mere assertion that a beneficiary might possess knowledge that is different, without further distinction of the beneficiary's experience and duties from those typically found within the industry and within the company itself, is not sufficient to carry the burden in this petition.

A fourth characteristic of a beneficiary with specialized knowledge is that he or she typically carries out key processes or functions. As stated by the Commissioner in *Matter of Penner*, 18 I&N Dec. at 52, the beneficiaries were considered to have specialized knowledge if they had 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 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.

Id. at 53.

The record does not indicate that the beneficiary has been or would be performing a key process or function which is essential to the firm's operation. Without an articulation of what distinguishes the beneficiary's knowledge among other employees it cannot be determined that the beneficiary is performing anything other

than normal and routine duties. Even if an employee were trained or possesses knowledge that is different, this does not establish that the employee is performing a key process or function. In this case the record does not support that the beneficiary is performing a key process or function which rises above the basic economic rationale of hiring the employee in the first place.

Finally, the agency has interpreted "specialized knowledge" to find that a qualified beneficiary should possess certain characteristics. In a 1994 memo written by James A. Puleo, Acting Executive Associate Commissioner, on the subject of "Interpretation of Specialized Knowledge," the legacy INS offered the following examples of the characteristics of an alien who possesses specialized knowledge:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;
- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possesses knowledge which, normally, can be gained only through prior experience with that employer;
- Possesses knowledge of a product or process, which cannot be easily transferred or taught to another individual.

The Associate Commissioner also stated:

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.

Id. In a subsequent memorandum, the Associate Commissioner later added that "[a]ll companies are different, and it can generally be expected that no two companies will employ the same procedures. Standing alone, however, an alien's knowledge of minor variations in style or manner of operations cannot be considered specialized." Legacy INS memo, HQSCOPS, 70/6.1, "Interpretation of Specialized Knowledge" (December 20, 2002).

The petitioner has not articulated any distinguishing characteristic, knowledge or experience from other employees within the foreign organization or within this particular industry. This leads the AAO to conclude that the petitioner or the foreign entity would not sustain economic inconvenience to train and/or teach someone the special knowledge that it claims is possessed by the beneficiary. The petitioner has asserted that

the beneficiary's knowledge of the European cell phone market would allow him to better serve the petitioner's clients. However, the record does not corroborate this assertion with such evidence as work product or other evidence that the beneficiary's knowledge is relevant to selling cell phone plans in the United States. Further, it remains unexplained how the specialized knowledge of European cell phone systems will even be needed in the United States, given the petitioner's explanation of their differences. Even if such knowledge were proven to be relevant, the fact that a beneficiary's knowledge is different, standing alone, is not sufficient to demonstrate that the knowledge is specialized or advanced in terms of process or procedure. In addition, the petitioner has asserted that the beneficiary's work abroad was important, but this has not been supported by documentation and is in fact doubtful given that the beneficiary does not currently appear to be working for the foreign organization. Finally, the record does not support that the knowledge possessed by the beneficiary can only be gained by employment with the foreign organization or is not easily transferable to another similarly situated employee within this company or within the particular industry.

Moreover, the description of the beneficiary's experience with the foreign entity portrays the beneficiary as a supervisory employee as opposed to a specialized knowledge employee. The supervisor like duties listed do not involve any knowledge that could be considered specialized, or which have been distinguished from other similarly situated employees within the particular industry or within the company itself. This classification requires that the beneficiary have been employed one year within the last three in a specialized knowledge capacity. The petitioner has failed to distinguish what, if any, specialized knowledge duties the beneficiary performed for the duration of his employment abroad.

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. See *1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary was not employed abroad, and will not be employed in the future, in a specialized knowledge capacity. Nor has it been established that the beneficiary's knowledge of the petitioner's business procedures is advanced, despite the fact that only two other employees have received the training that serves as the basis of a distinction from other employees of the petitioner.

On review, counsel has not demonstrated that the beneficiary possesses "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), nor has counsel demonstrated that the beneficiary has been or would be employed in a capacity utilizing any such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(ii) and (iv).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.