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File: EAC-04-210-53100 Office: VERMONT SERVICE CENTER Date: **OCT 04 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:



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, 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 qualify the employment of its bakery/confectionary specialist as an L-1A 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 is a corporation organized under the laws of the Commonwealth of Massachusetts and is engaged in operating a bakery franchise. The petitioner claims that it is a franchise of Hot Breads, located in Abu Dhabi, UAE.

The director denied the petition concluding that the petitioner did not establish that (1) the beneficiary is a key employee with specialized knowledge that will be employed in the United States in a specialized knowledge capacity, or (2) the beneficiary had been employed abroad in a specialized knowledge capacity.

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, counsel for the petitioner asserts that the director's decision is not consistent with the Department of Labor's Occupational Outlook Handbook (OOH), that it takes an employee in its company 6 – 8 years to be able to handle one of its bakeries independently, and that the position held by the beneficiary therefore involves specialized knowledge. In support of this assertion, the petitioner submits additional evidence.

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 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, germane to several issues on which the petitioner failed to establish eligibility, is whether the petitioner has established that the beneficiary's proposed 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 beneficiary was employed abroad in a capacity that utilized such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(ii).

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

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

Furthermore, 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 or procedures.

In the initial petition, the petitioner, in its letter dated June 21, 2004, described the beneficiary's job duties as follows:

The [b]eneficiary is offered the position of Bakery/Confectionary Specialist. His duties include [m]ixing and [b]aking ingredients according to recipes to produce breads, rolls, cakes, pies, pastries, baked goods, etc., in accordance to [petitioner's] unique formula(s). [The beneficiary] shall evaluate and review the customer evaluation of the products periodically with the management to modify/ develop new products recommending to the customers since the [petitioner's] products are the main focus of this [c]ompany. [The petitioner's] main goal is to serve a unique line of bakery and confectionary goods to its customers.

On July 23, 2004, the director denied the petition. The director determined that the position did not require a person with specialized knowledge.

The petitioner subsequently appealed. On appeal, counsel for the petitioner asserts that the beneficiary has been training with the foreign organization for a number of years and that the U.S. position requires a person with the beneficiary's specialized knowledge.

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)).<sup>1</sup>

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. 49, 50 (Comm. 1982)); 3) has knowledge that qualifies as "special" 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* Memo. from ██████████ Acting Exec. Assoc. Commr., Office of Operations, Immigration and Naturalization Serv., to All Dist. Dir. et al., Immigration and Naturalization Serv., *Interpretation of Special Knowledge*, 1-2 (Mar. 9, 1994) (copy on file with *Am. Immig. Law. Assn.*).

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 special knowledge of the company product, the knowledge must be noteworthy or uncommon. Where the alien has knowledge of company processes and procedures, the knowledge must be advanced. The petitioner must also establish that the alien has such specific knowledge of the employer's product or processes that it would be burdensome, 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).

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<sup>1</sup> 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.

In this case the petitioner has admitted that the beneficiary will be directly providing the product or service of the petitioner, as opposed to being hired to perform a key process or function. 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. *Matter of Penner*, 18 I&N Dec. at 53. Routine duties necessary to provide a product or service are not considered a key process or function in the context of the L-1 classification. 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. An employee of "crucial importance" or "key personnel" must rise above the level of an average employee. A baker is not considered the basis of a specialized knowledge, as the knowledge is not significantly distinguishable to be uncommon, noteworthy or an advanced knowledge of process or procedure. 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"). Thus, the duties of a baker are not duties prosecuted in a specialized knowledge capacity.

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. It is not sufficient to merely assert that an employee has been working for a number of years and thus has a specialized knowledge. Without a basis of significant distinction for the petitioner's products, Citizenship and Immigration Services (CIS) is not persuaded that it takes four years, using the example cited by counsel for the petitioner, to learn how to fill a jelly pastry. 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, and asserting that the beneficiary is an expert in the petitioner's manner of procedure is not sufficient. Thus, the materials submitted which show that the beneficiary has been trained and has worked as a baker are not probative of any unusual or uncommon skill or knowledge, and do not indicate that the beneficiary's knowledge rises above the basic knowledge possessed by similarly situated employees within the industry.

In addition, the materials submitted with regard to the franchise operation are not related to the beneficiary's specific specialized knowledge, and based on this evidence CIS is unable make an informed determination as to the beneficiary's relative specialized knowledge. *See 1756, Inc. v. Attorney General*, 745 F. Supp. 9, 15 (D.D.C. 1990)(concluding that specialized knowledge is a relative determination). On appeal the petitioner has submitted portions of the OOH drafted by the department of labor. These materials were not drafted in contemplation of the Department of Homeland Security's visa administration, and are thus not informative of the criteria established by regulation which govern CIS visas. The regulations that set forth the standards applicable to these classifications are contained 8 C.F.R. § 214.2(l) *et. seq.*, and are informed by precedent and internal guidance as outlined above. 8 C.F.R. § 214.2(l)(1)(i). However, even assuming *arguendo* that the OOH evidence is relevant, it only provides overall industry information without discussing the specific position offered or the beneficiary's position abroad and whether either involves specialized knowledge as that term is defined in the Act and in the regulations.

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 subcommittee 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*, 18 I & N Dec. at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91<sup>st</sup> Cong. 210, 218, 223, 240, 248 (November 12, 1969)). In this case the petitioner has failed to provide evidence that there is any significant distinction between the beneficiary and other similarly situated or trained bakers. The record does not support that the beneficiary qualifies as a part of the narrowly drawn class of specialized knowledge individuals or that the position which the beneficiary will fill requires a person with specialized knowledge.

All bakers can generally be expected to know how to prepare baked goods. Although those skills are typically acquired through a period of hands-on training, they are nevertheless common to the baking industry, and therefore, are not, standing alone, sufficiently specialized to meet the requirements of the L-1B category. Similarly, the mere fact that each baker has his or her own unique or special way of preparing baked goods, or that the baker has gained knowledge, by virtue of his or her employment with the company, of particular techniques or procedures employed by the company in making its baked goods, does not mean, in and of itself, that the baker's knowledge is sufficiently uncommon within the field of baking. Further, the fact that the knowledge may be closely held within a company, without more, does not establish that the knowledge is specialized. All persons and companies are different, and it can generally be expected that no two companies will employ the same procedures, provide exactly the same product, or employ the same methods of preparation. Standing alone, however, an alien's knowledge of minor variations in recipes, style or manner of operations cannot be considered specialized. *See* Legacy INS memo, HQSCOPS, 70/6.1, "Interpretation of Specialized Knowledge" (December 20, 2002); Legacy INS memo, HQSCOPS, Fujie O. Ohata, September 9, 2004, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B status".

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 beneficiary would be employed in a capacity utilizing any such specialized knowledge as required by 8 C.F.R. § 214.2(l)(3)(ii).

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 knowledge possessed by beneficiary of petitioner's business procedures is advanced.

Beyond the decision of the director, a related issue is whether the petitioner has established that it has secured sufficient physical premises to house the new office. The petitioner has submitted a copy of its lease which contains the handwritten clause:

This entire lease is contingent upon the lessees obtaining all permits and approvals for the conduct of a "Hot Breads" bakery franchise at the leased premises prior to the lease commencement date (see para 27.c), failing which, lessee may cancel this lease and receive prompt refund of all sums paid hereunder.

In this matter, the petitioner has not verified that it has in fact secured the premises upon which the business will operate. The lease specifies a term which was to begin on November 1, 2003. While this petition was filed July 17, 2004, however the record does not conclusively demonstrate that the store has opened and that operations have commenced. Based on the insufficiency of the information furnished, it cannot be concluded that the petitioner has secured sufficient space to house the new office. For this additional reason, the petition will not be approved.

Also, beyond the decision of the director, the minimal documentation of the parent's and the petitioner's business structure raises the issue of whether there is a qualifying relationship between and U.S. entity and a foreign entity pursuant to 8 C.F.R. § 214.2(l)(1)(ii)(G). In this case the petitioner has admitted that the petitioner is merely a franchise of the foreign organization. The contractual agreement between the foreign organization and the U.S. corporation can be terminated as opposed to one in which the foreign organization and a domestic organization are permanently tied together and not limited to a single, specific venture. *See Matter of Schick*, 13 I&N Dec. 647 (Reg. Comm. 1970). In addition, while the petitioner claims on the Form I-129 that the foreign organization owns 51% of the petitioner, the Election by a Small Business Corporation (Form 2553) clearly indicates that the petitioner is owned 50% by Uma Yalamanchili and 50% by Vijay Yalamanchili. Thus, as discussed above, it appears that the only relationship between the U.S. entity and the foreign organization is that of a franchise agreement. As such, no qualifying relationship exists, and for this additional reason the petition must be denied.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043, *aff'd*, 345 F.3d 683.

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.

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**ORDER:** The appeal is denied.