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U.S. Citizenship and Immigration Services

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File: EAC 02 129 50028 Office: VERMONT SERVICE CENTER Date: FEB 01 2008

IN RE: Petitioner:
Beneficiary: [redacted]

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 BENEFICIARY:

[redacted]

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 petitioner appealed this denial to the Administrative Appeals Office (AAO). The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the employment of the beneficiary in the position of applications software analyst/programmer 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 describes its business as being an "information technology consulting firm." The petitioner seeks to employ the beneficiary for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary will be employed in the United States in a specialized knowledge capacity.

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) further 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.

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

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

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

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

The primary issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a capacity involving specialized knowledge. 8 C.F.R. § 214.2(l)(3)(ii).

The petitioner asserts that the beneficiary has specialized knowledge of the petitioning organization's SEI-CMM Level 5 assessed software development and maintenance process as it pertains to the design and development of software application systems across business applications and technology domains for clients. The petitioner describes the SEI-CMM Level 5 assessed software development and maintenance process in a letter dated February 25, 2002. As this description is in the record, this description will not be repeated here. Generally, the SEI-CMM Level 5 assessed software development and maintenance process is described as a set of processes, procedures, or methodologies used by the petitioning organization in providing software project services to its clients.

The petitioner described the beneficiary's proposed duties in the letter dated February 25, 2002 as follows:

- Utilize [the petitioning organization's] proprietary IPMS, PAL, BAL (Quality and Knowledge management Systems) to customize the [petitioning organization's] internally developed SEI-CMM assessed (level 5) software development and maintenance process to meet project operational process requirements.

- Use Project Planning Guidelines, Project Plan Template, Software Development Life Cycle Models document, Guidelines for Software Estimation, etc. (all available in IPMS, PAL, BAL) to develop Software Project Plan.

- Establish Software Project Tracking and Oversight as per outlines in [the petitioning organization's] Quality Manual.

- Track and review software accomplishments and results against documented estimates and adjust plans based on actual accomplishments and results.

- Implement and Coordinate Software Configuration Management (SCM) activities as outlined in [the petitioning organization's] Quality Manual.
- Ensure that changes to all configurable items are done as per [the petitioning organization's] Change Control Procedure.
- Establish and Monitor Software Quality Assurance (SQA) Plan as per guidelines [the petitioning organization's] Quality Manual.
- Conduct Final Inspections to ensure compliance with the project's SQA Plan.
- Prepare specifications for offshore development.
- Identify and allocate work for offshore development.
- Coordinate the uploading of specifications for offshore development.
- Provide technical guidance to offshore resources as required.
- Review Defect Prevention activities fortnightly.
- Review and Monitor Defects Prevention activities: Peer Reviews, Code Walkthroughs, Casual Analyses Sessions, Inspections, etc.. as per IPMS, DP checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore.
- Ensure that software work product is handed over to client within established parameters.

Finally, the petitioner described the beneficiary's purported training regimen and the ubiquity of the beneficiary's knowledge across the petition's organization in the letter dated February 25, 2002 as follows:

> [The beneficiary] was selected to participate in [the petitioning organization's] In-House Training Program where he was exposed to and acquired highly specialized knowledge of the company's internally developed, SEI-CMM assessed (Level 5) software development and maintenance process, *a process that is not commonly known or generally utilized in the international software development and maintenance sector. [The beneficiary] is one of only 9,500 of some 19,000 [petitioning organization] IT professionals to have received training in the company's SEI-CMM Level 5 software development and maintenance process.*

On April 16, 2002, the director requested additional evidence. The director requested, *inter alia*, the following: evidence establishing that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and is not generally known by practitioners in the beneficiary's field of endeavor; evidence establishing that the beneficiary's advanced level of knowledge distinguishes him from those with

only elementary or basic knowledge; and evidence establishing that the beneficiary's knowledge cannot be easily transferred or taught to another individual.

In response, the petitioner submitted a letter dated May 24, 2002 in which it describes the beneficiary's training regimen as follows:

> [The beneficiary] has undergone training in such Key Process Areas of [the petitioning organization's] SEI-CMM Level 5 software development and maintenance process as:
>
> - Defects Prevention (Software Reviews, Inspections, and Walkthoughs)
> - Peer Reviews
> - Software Quality Management Procedures
> - Software Project Planning and Oversight
> - Requirements Management
> - Software Product Engineering
> - Software Metrics and Measurement
> - Software Maintenance Management
> - Software Configuration Management
> - Software Testing
> - Software Process Improvement and Assessment
> - Software Estimation
> - Software Quality Assurance
> - Inter-group Coordination
> - Quantitative Process Management
>
> [The beneficiary] has also received training in [the petitioning organization's] software development and maintenance tools including IPMS, PAL, and BAL, Quality and Knowledge Management Systems and facilitate the customization, implementation, and management of the company's SEI-CMM Level 5 software development and maintenance. All of these development and maintenance tools are unique to [the petitioning organization] and used by [the beneficiary] on the [third party client's project].
>
> Indeed, [the beneficiary's] knowledge is different from that ordinarily encountered in the field by virtue of the fact that he has been specifically trained in the processes and procedures that [the petitioning organization] wishes to be employed in each of its projects, consistent with its SEI-CMM Level 5 quality assurance methodologies. In his tenure with [the petitioning organization], he has over a year of practical, advanced, highly specialized knowledge of [the petitioning organization's] SEI-CMM Level 5 software development and maintenance process as it is specifically customized to meet the quality and operational requirements of assignments involving the design, development, and administration of software application systems across a variety of business application domains for [the petitioning organization's] clients in the international marketplace. Also, be working on the same account in India *at a development center specifically dedicated to the same client that he is working for in the*

> *United States*, [the beneficiary] has acquired considerable knowledge to [the petitioning organization's] SEI-CMM [L]evel 5 software development and maintenance process as it is specifically customized to meet the quality and operational requirements for [the third party client].

On August 13, 2002, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed in a capacity involving specialized knowledge.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary will be employed in the United States in a specialized knowledge capacity.

Upon review, the petitioner's assertions are not persuasive in demonstrating that the beneficiary will be employed in a position involving specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D) or that the beneficiary possesses specialized knowledge. Beyond the decision of the director, the record is also not persuasive in establishing that the beneficiary was employed abroad in a capacity involving specialized knowledge for the requisite one-year period.

In examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. In this matter, the petitioner fails to establish that this position requires an employee with specialized knowledge or that the beneficiary has been employed in a specialized knowledge capacity for the requisite one-year period abroad. The petitioner also fails to establish that the beneficiary's knowledge is specialized.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States requires specialized knowledge, that the beneficiary possesses specialized knowledge, and that the beneficiary has been employed abroad in a position involving specialized knowledge, the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced software workers employed by the petitioning organization or in the industry at large. Going on record without 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) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

The petitioner asserts that the beneficiary possesses specialized knowledge of the petitioning organization's SEI-CMM Level 5 assessed software development and maintenance process as it pertains to the design and development of software application systems across business applications and technology domains for clients. The petitioner asserts that this knowledge "is not commonly known or generally utilized in the international software development and maintenance sector" and that the beneficiary "is one of only 9,500 of some 19,000" similarly employed workers employed by the petitioning organization to receive the training which imparted

this purported specialized knowledge. However, despite these assertions, the record does not establish how, exactly, the SEI-CMM Level 5 assessed software development and maintenance process is so materially different from similar software development and maintenance processes that a similarly experienced and educated software professional could not perform the duties of the position.

Overall, the record does not establish that the beneficiary's knowledge is substantially different from the knowledge possessed by software professionals generally throughout the industry or by other employees of the petitioning organization. The assertion that the beneficiary and a select group of workers possess a very specific set of skills related to the SEI-CMM Level 5 assessed software development and maintenance process does not by itself establish that the beneficiary's knowledge is indeed uncommon or noteworthy. First, the mere claim that almost half of the petitioning organization's similarly employer workers possesses the same purported "specialized knowledge" undermines counsel's claim that this knowledge is uncommon, noteworthy, or distinguished by some unusual quality and is not generally known by practitioners in the beneficiary's field of endeavor. To the contrary, it is quite apparent that the beneficiary's knowledge is both common and generally known by a large number of similarly employed workers.

Second, the petitioner has not established that the beneficiary's knowledge would be difficult to impart to another similarly educated worker without suffering significant economic inconvenience. All employees can be said to possess unique and unparalleled skill sets to some degree; however, a unique skill set that can be imparted to another similarly experienced and educated employee without significant economic inconvenience is not "specialized knowledge." Moreover, the proprietary or unique qualities of the petitioner's process do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique or proprietary process require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter. The fact that other professionals may not have very specific, proprietary knowledge regarding the petitioner's process is not relevant to these proceedings if this knowledge gap could be closed by the petitioner by simply revealing the information to a newly hired, similarly educated or experienced employee.

Furthermore, while the petitioner asserts that the beneficiary received training which imparted the claimed specialized knowledge to him, the record is devoid of evidence addressing the length or substance of this training. The petitioner only submitted a list of topics covered by the purported training which, apparently, is provided in whole or in part to thousands of similarly employed workers. Absent detailed information addressing the length and substance of the training and its availability to the petitioning organization's workforce, it is impossible to conclude that the purported specialized knowledge would be significantly economically inconvenient to impart to similar workers. Once again, going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190).

Finally, and for the same reasons articulated above, the petitioner has failed to establish that the beneficiary has specialized knowledge or that he was employed abroad in a capacity involving specialized knowledge. Beyond the decision of the director, the petition will be denied for these additional reasons. 8 C.F.R. § 214.2(l)(3)(iv).

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, it is 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)). As stated by the Commissioner in *Matter of Penner*, 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." 18 I&N Dec. at 52. 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 firm's 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 the employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

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. REP. 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 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*, 18 I&N 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 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. at 119. 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. v. Attorney General*, 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.")

A 1994 Immigration and Naturalization Service (now Citizenship and Immigration Services (CIS)) memorandum written by the then Acting Executive Associate Commissioner also directs CIS to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Executive Associate Commissioner notes in the memorandum that "officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized." Memorandum from James A. Puleo, Acting Executive Associate Commissioner, Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is truly specialized." *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

As explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by software professionals employed elsewhere. As the petitioner has failed to document any materially unique qualities to the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "key" employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced professional or that he has received special training in the company's methodologies or processes which would separate him from other professionals employed with the foreign entity or elsewhere. It is simply not reasonable to classify this employee as a key employee of crucial importance to the organization.

The legislative history of 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*, 745 F. Supp. at 16. Based on the evidence presented, it is concluded that the beneficiary will not be employed in the United States, and was not employed abroad, in a capacity involving specialized knowledge. For these reasons, the appeal will be dismissed.

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).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.