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U.S. Citizenship
and Immigration
Services

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FILE: WAC 05 195 52915 Office: CALIFORNIA SERVICE CENTER Date: **MAR 11 2008**

IN RE: Petitioner: [Redacted]
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)

ON 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 nonimmigrant visa petition was denied by the Director, California Service Center, and certified to the Administrative Appeals Office (AAO) for affirmation or withdrawal pursuant to 8 C.F.R. § 103.4(a). Upon review, the decision of the director will be affirmed, and the petition will be denied.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as a design engineer 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 business information technology consulting firm that “provides product development and consulting services in all aspects of systems and software engineering to companies throughout the world.” The petitioner seeks to employ the beneficiary as a programmer for a period of three years.¹

Citing to the anti “job shop” provisions of the L-1 Visa Reform Act of 2004, the director denied the petition as an impermissible arrangement to provide labor for hire.² Specifically, the director concluded that the beneficiary, who will be stationed primarily at a worksite of an unaffiliated employer, will be employed in a position which is essentially an arrangement to provide labor for hire for the unaffiliated employer, Applied Materials (hereinafter “the unaffiliated employer”). The director further determined that the beneficiary does not have specialized knowledge of a product or service specific to the petitioner. To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria

¹ The AAO notes that Citizenship and Immigration Services (CIS) records indicate that the petitioner has filed a total of 16,429 L-1B petitions, with more than 3,979 petitions filed during fiscal year 2006.

²The term “job shop” is commonly used to describe a firm that petitions for aliens in L-1B status to contract their services to other companies, often at wages that undercut the salaries paid to U.S. workers. Upon introducing the L-1 Visa Reform Act, Senator Saxby Chambliss described the abuse as follows:

The situation in question arises when a company with both foreign and U.S.-based operations obtains an L-1 visa to transfer a foreign employee who has “specialized knowledge” of the company's product or processes. The problem occurs only when an employee with specialized knowledge is placed offsite at the business location of a third party company. In this context, if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee. Outsourcing an L-1 worker in this way has resulted in American workers being displaced at the third party company.

149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003).

In general, the L-1B visa classification does not currently include the same U.S. worker protection provisions as the H-1B visa classification. *See generally*, 8 C.F.R. §§ 214.2(h) and (l). The L-1B visa classification is not subject to a numerical cap, does not require the employer to certify that the alien will be paid the “prevailing wage,” and does not require the employer to pay for the return transportation costs if the alien is dismissed from employment. Additionally, an employer who files a petition to classify an alien as an L-1B nonimmigrant would not pay the \$1,500 fee that is currently required for each new H-1B petition and which funds job training and low-income scholarships for U.S. workers. *See Section 214(c)(9) of the Act.*

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.

I. L-1 Visa Reform Act

As amended by the L-1 Visa Reform Act of 2004, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F), provides:

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) and will be stationed primarily at the

worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) if –

- (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
- (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Section 214(c)(2)(F) of the Act was created by the L-1 Visa Reform Act of 2004 and is applicable to all L-1B petitions filed after June 6, 2005, including extensions and amendments involving individuals currently in L-1 status. *See* Pub. L. No. 108-447, Div. I, Title IV, 118 Stat. 2809 (Dec. 8, 2004). As explained above, the primary purpose of the L-1 Visa Reform Act amendment was to prohibit the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003); *see also* Sen. Jud. Comm., Sub. on Immigration, Statement for Chairman Senator Saxby Chambliss, July 29, 2003, available at <http://judiciary.senate.gov/member_statement.cfm?id=878&wit_id=3355> (accessed on July 16, 2007).

In evaluating a petition subject to the terms of the L-1 Visa Reform Act, the AAO must emphasize that the petitioner bears the burden of proof. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1). If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the alien will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel or the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988). If the petitioner fails to establish both of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee.

A. Threshold Question: Worksite of Beneficiary

As a threshold question in the analysis, Citizenship and Immigration Services (CIS) must examine whether the beneficiary will be stationed primarily at the worksite of the unaffiliated company. Section 214(c)(2)(F) of the Act.

As noted on page 3 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated that the work location for the beneficiary will be at the unaffiliated employer located in Santa Clara, California. The petitioner also stated in its letter of support, dated June 29, 2005, that it wishes for the beneficiary to enter the United States for a period of three years as a design engineer for a project at the

unaffiliated employer. Accordingly, the AAO concludes that the beneficiary will be primarily employed as a design engineer at the worksite of the unaffiliated employer.

Therefore, under the terms of the L-1 Visa Reform Act, the petitioner must establish both: (1) that the alien will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act.

B. Control and Supervision of Beneficiary

The first issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the alien will be controlled and supervised principally by the petitioner, and not by the unaffiliated employer. Section 214(c)(2)(F)(i) of the Act.

Notwithstanding the director's finding to the contrary, the petitioner has not satisfied this prong of the L-1 Visa Reform Act test. The petitioner asserted on the Form I-129 that the beneficiary will be supervised by the Business Relationship Manager, an employee of the petitioner. The petitioner further explained that the beneficiary will be supervised through "direct meetings, status reports, and e-mail." However, no evidence was submitted in support of this statement. The petitioner does not provide evidence to document how, exactly, the beneficiary is managed and controlled while offsite at the unaffiliated employer's workplace. Going on record without supporting evidence will not satisfy the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Furthermore, the petitioner did not provide sufficient documentation to establish whether the beneficiary will be controlled and supervised principally by the petitioner. On July 14, 2005, the director requested copies of contracts, statements of work, work orders, and service agreements between the petitioner and the unaffiliated employer, describing specifically the services to be provided by the beneficiary. In response, the petitioner submitted an "addendum number one to the development agreement," between the petitioner and the unaffiliated company which stated that the petitioner "performs various services" for the unaffiliated employer. The addendum is amending the initial agreement "to provide additional terms related to [the unaffiliated employer] providing Developer with the right to access and use certain Software." This addendum was signed by the unaffiliated employer on July 20, 2004, and signed by what appears to be the petitioner's U.S. subsidiary on June 23, 2004. The instant petition was filed on July 7, 2005 and the addendum was produced and signed one year earlier, without a clear termination date. The petitioner also submitted a "development agreement" between Applied India Private Limited, located in India, (hereinafter "the unaffiliated foreign company") and the petitioner which is based in India. Thus, this agreement is between the petitioner and the unaffiliated foreign company in India, rather than the unaffiliated employer in the United States. The petitioner also submitted a statement of work for the unaffiliated foreign company in India, indicating the beneficiary was a subcontractor for the India project. Again, the evidence does not establish a statement of work for the beneficiary for the position in the United States. Finally, the petitioner submitted a purchase order from the unaffiliated employer for services provided by the petitioner; however, the services were for work performed in India and did not evidence any work orders for services performed in the United States.

Since the documents submitted are for the relationship between the petitioner and the unaffiliated foreign company, the documents do not discuss the supervision or control of the beneficiary or the petitioner's personnel in the United States. As such, the petitioner's reference to the development agreement and the addendum is not probative and fails to document who actually supervises and controls the beneficiary.

Although the development agreement does not discuss the control of the beneficiary in the United States, if the petitioner follows the same agreement in the U.S. as in India, the AAO notes that at least one section in the Agreement provides for projects that are led by the unaffiliated employer using the petitioner's personnel. Specifically, according to section 1(a) of the Agreement (page 1), the petitioner is responsible for managing projects that are assigned by the unaffiliated employer and also obligated to commit personnel to projects led or managed by the unaffiliated employer. This provision of the Agreement raises unanswered questions as to which entity manages and controls the personnel that are committed to projects led by the unaffiliated employer. As concluded by the director, the beneficiary appears to be serving as a "programmer for hire" who will, at most, make changes to the unaffiliated employer's existing systems and software.

Finally, despite the director's specific request for documents relating to the services to be provided by the beneficiary, the Agreement fails to provide evidence of the beneficiary's specific work assignment and services he will provide to the unaffiliated employer. The petitioner declined to submit a statement of work or a work order with the beneficiary's itinerary. Absent such information, the petitioner has not established that it will principally control and supervise the alien beneficiary or even that the beneficiary will actually be employed at the claimed worksite.

Accordingly, the petitioner's failure to fully respond to the director's request for evidence is fatal to its claimed eligibility. The petitioner's failure to submit the requested evidence precluded a material line of inquiry and shall be grounds for denying this petition. 8 C.F.R. § 103.2(b)(14).

Moreover, as the petitioner has not established that the beneficiary will be controlled and supervised by the petitioner during his employment at the unaffiliated employer's workplace, the petition may not be approved for this additional reason.

C. Necessity of Specialized Knowledge Specific to the Petitioning Employer

The second issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

The petitioner described the beneficiary's job duties and purported specialized knowledge in a letter dated June 29, 2005 as follows (with emphasis deleted):

The [unaffiliated employer] project is specialized in nature because it involves expertise with [the petitioner's] engineering service practice group tools, procedures, and methodologies. [The petitioner's] Engineering Service Industry Practice group has strength of over 1200 engineering professionals including doctorates and postgraduates with varied expertise. The ESP of [the petitioner] has global presence and is providing

onsite and offshore engineering services for over 10 years.

The two major activities of this group are:

- Providing Engineering Services to various industries in India and overseas.
- Marketing & support of CAD/CAM/CAE/PDM software products.

Engineering Services to the Industry

[The petitioner] provides solutions to engineering and manufacturing industries in the areas of:

- Strategic Studies & Implementation of CAD/CAM/CAE/PDM/CPC & CIM solution
- Engineering Software Development
- Customization of CAD/CAM/CAE/PDM software.
- Study and Implementation of PDM.
- CAD: Redesign, Modeling, and Detailing & Digitizing
- CAM: NC programming, post processor development.
- CAR: FEA, Mechanisms, Crash analysis, Plastic Flow analysis etc.
- Real time and embedded systems.

* * *

Product Marketing

[The petitioner] distributes and supports the following products in India

- Unigraphics (for CAD/CAM/CAE applications from EDS-PLM Solutions, USA)
- IMAN (for PDM applicants from EDS-PLM Solutions, USA)
- Vericut (for NC tool path simulation from CG Tech, USA)
- Moldflow (for Plastic Flow Analysis from Moldflow, Inc., USA)
- Ansys (for advanced analysis from Ansys, Inc., USA)

[The unaffiliated employer] has been using state of the art CAD/CAM tools like Inventor and AutoCAD for designing and manufacturing its products. The drawings and relevant documents are approved and released using the Engineering Change Order (ECO) process. [The unaffiliated employer] has engaged [the petitioner] for designing parts and releasing drawings using the ECO process. [The unaffiliated employer] is currently focusing on revamping its operations to meet market needs. The project involves identification of opportunities in the engineering services space, suitable to be done using the onsite-offshore model. The efficient development, support, and maintenance of [the unaffiliated employer's] applications require specialized knowledge of [the petitioner's] proprietary tools including ECO Administration Review Tool, Drafting Validation Tool, Causal Analysis (CA), and Integrated Project Management System (IPMS), as well as advanced knowledge of [the unaffiliated employer's] applications. ECO Administration Review Tool is used for reviewing the ECO's thereby reducing errors and speeding up the ECO launch process. Drafting Validation tool is used for checking the unassociated dimensions and feature call outs in engineering specification drawings. This tool automates the quality assurance process and reduces the changes for defects in engineering specification drawings. CA is aimed at achieving the CMM level 4 KPA-Defect Prevention requirements. With CA project defects are logged and resolutions

maintained. These resolutions include long term solutions to prevent the occurrence of such problems in future. IPMS provides sophisticated functionality for managing multiple projects. IPMS automate project tracking, resource scheduling, and cost control, manages multiple projects at detailed levels, and provides visibility for quality control.

[The beneficiary] will utilize his specialized knowledge of ECO Administration Review Tool, Drafting Validation Tool, CA, and IPMS, as well as [the petitioner's] engineering service practice group tools, procedures, and methodologies to ensure the successful completion of the proposed project.

As previously noted, the director requested additional evidence on July 14, 2005. The director requested, *inter alia*, further evidence establishing that the beneficiary has specialized knowledge; evidence that he will be controlled and supervised by the petitioner; a description of where the beneficiary will work; and evidence that the placement of the beneficiary at the unaffiliated employer's worksite is not an arrangement to provide labor for hire. The director specifically requested copies of contracts, statements of work, work orders, and service agreements between the petitioner and the unaffiliated employer for the services to be provided by the beneficiary. The director also requested copies of the petitioner's human resource records that would provide the beneficiary's job description and worksite location.

The petitioner failed to fully comply with the director's request. In response, the petitioner submitted a letter dated August 2, 2005; a copy of the development agreement between the petitioner located in India and the unaffiliated foreign company in India and a copy of the "addendum number one to the development agreement" between presumably the petitioner's U.S. subsidiary and the unaffiliated employer in the United States; a letter from the petitioner's human resources confirming the beneficiary's work experience with the petitioner; a statement of work for the unaffiliated foreign company's offshore services in December 2004; and purchase orders made by the unaffiliated employer and the petitioner in India, dated in February 2004. The petitioner did not submit the Statement of Work that covers the beneficiary's services in the United States or copies of contracts, work orders, or service agreements between the petitioner and the unaffiliated employer for the services or products to be provided. Finally, the petitioner also failed to submit human resource records or any other documents that provide the beneficiary's official job description and worksite location in the United States.

In the August 2, 2005 letter, the petitioner asserted that the beneficiary will be placed on the unaffiliated employer's project because he has "over one (1) year of offshore experience on the same project." The petitioner further stated that this "project can be completed only by [the beneficiary's] expertise in Integrated Project Management Tool (IPMS)" (emphasis deleted).

On August 18, 2005, the director denied the petition. The director concluded that the beneficiary, who will be stationed primarily at a worksite of an unaffiliated employer, will be employed in a position which is essentially an arrangement to provide labor for hire for the unaffiliated employer. The director further determined that the beneficiary does not have specialized knowledge of a product or service specific to the petitioner. Specifically, the director concluded as follows:

It appears from the record that the placement of the beneficiary outside the [p]etitioning organization is essentially an arrangement to provide labor for hire rather than the

placement in connection with the provision of a product or service. The service the petitioner is providing is, essentially, a programmer for hire to change the [unaffiliated employer]'s already existing system and/or software rather than develop their own software. The specialized knowledge the beneficiary possesses is that of the petitioner's tools, procedures, and methodologies to be applied to the client's existing program. Therefore, the beneficiary's knowledge is only tangentially related to the performance of the proposed offsite activity.

In essence, the beneficiary will be working on a product that is used to conform with the [unaffiliated employer]'s specification and needs, rather than a product unique to the specifications and needs of the petitioner. In this case, the specialized knowledge is not specific to the petitioner.

As such, the petitioner has not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire.

Upon review, the AAO affirms the director's conclusion and finds that the petitioner's assertions are not persuasive. First, as discussed in Part II, *infra*, the petitioner has failed to establish that the beneficiary's knowledge is "specialized." Second, the petitioner has not established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

With regard to the beneficiary's claimed knowledge, the petitioner asserts that the beneficiary has specialized knowledge specific to the petitioner's processes and procedures. In particular, the petitioner states that the beneficiary has specialized knowledge of the petitioner's proprietary tools including ECO Administration Review Tool, Drafting Validation Tool, Causal Analysis (CA), and Integrated Project Management System (IMPS). Further, the petitioner asserts that the beneficiary will use his specialized knowledge of these tools in his capacity as an employee of the petitioner, which has been hired by the unaffiliated employer to implement the tools and redesign the organization's systems.

Overall, the petitioner describes the beneficiary as having specialized knowledge "of [the petitioner's] proprietary development procedures, methodologies, and tools" that will be integral components used for the project with the unaffiliated employer. The petitioner further explains that the beneficiary has been working on the same project abroad and that the beneficiary's specialized knowledge of the unaffiliated employer's requirements permits him to work more efficiently. The petitioner stated that with "over 40,000 employees to choose from," the beneficiary was identified as the ideal candidate based on his work abroad where he gained experience with the petitioner's tools.

On the other hand, the petitioner also asserts that the beneficiary was selected for this project because he has worked on the same project abroad and because the beneficiary has specialized knowledge of the unaffiliated employer's requirements. As noted above, although the petitioner repeatedly asserts that the beneficiary has specialized knowledge of the petitioner's proprietary tools, the petitioner notes that these tools are utilized to monitor, test, and improve the quality of the unaffiliated employer's existing systems. Thus, as the petitioner has asserted that the beneficiary's knowledge is directly related to the unaffiliated employer's processes and procedures, the beneficiary falls squarely within the prohibition imposed by the L-1 Visa Reform Act of 2004 on the "outsourcing" of L-1B nonimmigrants who do not have specialized knowledge related to the provision of a product or service specific to a petitioner.

Accordingly, the petitioner failed to establish that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary, and the petition may not be approved for that reason.³

II. Specialized Knowledge

Beyond the decision of the director, even if the beneficiary's knowledge were proven to be specific to the petitioning employer, the petitioner has also failed to establish that this knowledge is specialized as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D) and that the beneficiary has been or will be employed in a specialized knowledge capacity.

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)(ii) and (iv). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. In this case, the petitioner fails to establish that the beneficiary's position in the United States requires an employee with specialized knowledge or that the beneficiary has specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States will require "specialized knowledge," the petitioner has not adequately articulated any basis to support this claim. The petitioner has provided a detailed description of the beneficiary's proposed responsibilities as a design engineer; however, the description does not mention the application of any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other design engineers employed by the petitioner or the design engineering 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)). Based upon the lack of supporting evidence, the AAO cannot determine whether the U.S. position requires someone who possesses knowledge that rises to the level of specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

Specifically, while the petitioner repeatedly asserts that the beneficiary will be utilizing the petitioner's proprietary tools including ECO Administration Review Tool, Drafting Validation Tool, Causal Analysis (CA), and Integrated Project Management System (IPMS), the petitioner did not submit evidence to demonstrate that the knowledge of these tools is special and that the beneficiary actually possesses this knowledge. Moreover, there is no evidence in the record that the beneficiary actually participated in the development of such methodologies and processes that might lead to the conclusion that his level of knowledge is comparatively "advanced." Although there is no requirement that the beneficiary must develop

³ It is noted that, as the beneficiary is not required to possess knowledge of proprietary products or processes in order to be deemed to have specialized knowledge, the director's use of the word "unique" may not be entirely appropriate. At the same time, when the petitioner claims that the beneficiary has experience with a proprietary product or procedure, this does not serve as prima facie evidence that the beneficiary possesses specialized knowledge. As such, when the petitioner asserts, as it has in this matter, that a beneficiary has experience with proprietary products or procedures, CIS must carefully evaluate the claimed knowledge and the depth of the beneficiary's experience in order to determine whether it rises to the level of specialized knowledge as contemplated by 8 C.F.R. § 214.2(l)(1)(ii)(D). Regardless, given that the director's decision does not clearly address this issue, the director's use of the word "unique" and his decision to deny the petition on this basis is withdrawn to the extent that any proprietary knowledge requirement was imposed.

the internal methodologies and processes, this may constitute evidence of an advanced knowledge of the petitioner's internal processes that could demonstrate that the beneficiary possesses a specialized knowledge. Furthermore, according to the beneficiary's resume, it appears that the beneficiary immediately began working with the above-mentioned tools when he began his employment with the petitioner abroad. Thus, there is no evidence on record to suggest that the processes and technology pertaining to the design engineer positions for the petitioner are different from those applied for other companies providing software consulting services. While individual companies will develop a computer system tailored to its own needs and internal quality processes, it has not been established that there would be substantial differences such that knowledge of the petitioning company's processes and quality standards would amount to "specialized knowledge."

Despite the petitioner's assertions, the petitioner has not established that the beneficiary's knowledge of design engineering, either in the context of the ongoing project being performed for the unaffiliated employer or in connection with his employment with the petitioner, constitutes "specialized knowledge." The record does not reveal the material difference between the beneficiary's knowledge of the petitioner's proprietary tools and the ongoing implementation project and the knowledge possessed by similarly experienced design engineers in the industry or in the petitioner's own organization. Without producing evidence that the petitioner's design engineer services are different in some material way from similar services offered on the market by similarly experienced software professionals, the petitioner cannot establish that the beneficiary's knowledge is noteworthy, uncommon, or distinguished by some unusual quality that is not generally known by similarly experienced personnel engaged within the beneficiary's field of endeavor. 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.

The AAO does not discount the likelihood that the beneficiary is a skilled and experienced design engineer who has been, and would be, a valuable asset to the petitioner's organization and to the unaffiliated employer. 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. 49, 52 (Comm. 1982). 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, 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 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 CIS) memorandum written by the then Acting 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 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 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 special or advanced than the knowledge possessed by other similarly experienced persons employed by the petitioner's organization or in the industry generally. As the petitioner has failed to document any materially special or advanced qualities to the petitioner's product, processes, or procedures, the petitioner's claims are not persuasive in establishing that the beneficiary, while highly skilled, would be a "key" employee. There is no indication that the beneficiary has knowledge that exceeds that of other design engineers with experience with design programming tools and implementation, or that he has received special training in the company's methodologies or processes which would separate him from other persons employed with the petitioner's organization or in the industry at large.

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, supra at 16.* Based on the evidence presented, it is concluded that the beneficiary has not been employed abroad, and would not be employed in the United States, in a capacity involving specialized knowledge. For this reason, 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. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The director's decision is affirmed. The petition is denied.