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U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
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U.S. Citizenship and Immigration Services

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File: WAC 08 207 50753 Office: CALIFORNIA SERVICE CENTER Date: **AUG 07 2009**

IN RE: Petitioner: [redacted]
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)

ON BEHALF OF PETITIONER:

[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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California 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 visa petition seeking to employ the beneficiary as an L-1B 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, a New Jersey-based information technology company, claims to be a subsidiary of the beneficiary's foreign employer located in India. The petitioner seeks to employ the beneficiary as a software engineer for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been or will be employed in a capacity involving specialized knowledge. The director further found that the beneficiary's assignment to the worksite of an unaffiliated employer would be an impermissible arrangement to provide labor for hire under provisions of section 214(c)(2)(F) of the Act, as created by the L-1 Visa Reform Act of 2004. In denying the petition, the director determined that the claimed specialized knowledge is not specific to the petitioning organization.

On appeal, counsel for the petitioner asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has been and will be employed in a specialized knowledge capacity under the "broad definition," found at 8 C.F.R. 214.2(l)(1)(ii)(D), and as defined in a 1994 legacy Immigration and Naturalization Service (INS) memorandum.[1] Specifically, counsel argues that the beneficiary has specialized knowledge of customer's Electronic Control Module (ECM) which is both "complex and unique" and necessary for the project on which the beneficiary will work in the United States. Counsel further asserts that the director has read the definition of "specialized knowledge" too narrowly and applied an incorrect evidentiary standard by requiring the petitioner to submit evidence beyond statements from the company's authorized representative. Counsel submits a brief and copies of previously submitted evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

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.

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[1] *See* Memorandum from James A. Puleo, Assoc. Comm., INS, *Interpretation of Special Knowledge*, March 4, 1994. (hereinafter "Puleo memorandum").

(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.

Section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F) (the "L-1 Visa Reform Act"), in turn, provides:

> An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(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 101(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 is applicable to all L-1B petitions filed after June 6, 2005, including petition extensions and amendments for individuals that are currently in L-1B status. *See* Pub. L. No. 108-447, Div. I, Title IV, § 412, 118 Stat. 2809, 3352 (Dec. 8, 2004).

Due to the nature of the L-1 Visa Reform Act, the two issues raised by the director – whether the petitioner has established that the beneficiary possesses the requisite "specialized knowledge" and whether the requirements of the L-1 Visa Reform Act have been satisfied – are independent but legally intertwined. Prior to evaluating whether the L-1 Visa Reform Act applies, an adjudicator must determine whether the beneficiary is employed in a specialized knowledge capacity.

I. Specialized Knowledge

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

In a letter dated July 17, 2008, the petitioner described the petitioner's purpose for transferring the beneficiary to the United States as follows:

> [The petitioning organization] is working on an in-house project relating to development and software support to Core I Automotive Cummins Engines. The work focuses on the Electronic Control Module (ECM") [*sic*], which has a micro controller interfaced with different memory modules like RAM, Flash and Eeprom, which have ASICs and other communication controllers embedded in the modules. [The petitioner] requires a software engineer to come to the US to generate code that is calibrated to these modules and is used for controlling the function of the engine. Changes must be implemented for different features of the engines and the new software changes must be tested, analyzed and debugged prior to delivery of the engines. It is critical to the success of this project to have an engineer who is knowledgeable in software development, but also in hardware and embedded systems in order to maximize functionality of the engines.

The petitioner described the beneficiary's proposed duties in the United States as the following:

> He will be primarily responsible for three activities: 1) understanding Cummins' requirements and creating usable specifications <u>using [the petitioner's] unique methodology, quality, and testing</u>; 2) onsite coordination and production support of the project as well as the offshore/onshore teams; and 3) handling Problem Report Change Requests for maintenance and development of software designed to meet the requirements of a given feature relating to a particular engine.
>
> While in the United States, he will continue to carry out substantially the same duties as in India. The Beneficiary will be responsible for Component View for all components given a set requirements; generate error reports for components; identify error in rules according to which calibration violated; and prepared consolidate [*sic*] Error Reports for all components. [The

> beneficiary] will test the modules according to tags and Component View. His duties will also entail code analysis and testing of code as to various engines.

The petitioner stated that the beneficiary has been employed by its Indian parent company since June 27, 2007, and described his qualifications for the proffered position as the following:

> Over the past 12 months, Beneficiary has been working exclusively on projects dealing with Cummins engines, embedded controllers and related software for various features. Specifically, he has performed testing on Associated rules according to tags and Component View, which is part of the Cummins' proprietary development tool: Rules Development Environment ("RDE"). Further, during testing, he has identified and logged errors in rules according to violations in calibration and he has monitored and prepared consolidated Error Reports for all component rules.

On August 1, 2008, the director requested additional evidence, including, *inter alia*, an explanation addressing how the beneficiary's duties are special or advanced compared to those of other workers employed by the petitioner or other U.S. employers in the same type of position, and an explanation addressing how the beneficiary's training or experience is distinguished from similarly employed workers in this particular field. The director further requested that the petitioner explain exactly what is the equipment, system, product, technique or service of which the beneficiary has specialized knowledge and indicate whether it is used by other employers in the United States and abroad. The director instructed the petitioner to submit "probative evidence" in support of its explanations.

The director also requested information regarding the number of foreign nationals employed at the U.S. location where the beneficiary will be employed, including the job titles of each foreign national's position, the type of visa held, and information regarding any L-1B visa holders who have been transferred to the same location. Finally, the director requested that the petitioner specify the number of persons holding the same or similar positions in the United States.

In a response dated October 23, 2008, counsel for the petitioner further described the beneficiary's role with the foreign entity:

> [The beneficiary] has, for more than twelve months, been actively working with the Cummuns Automotive Current Product Support Group developing and supporting software for their ISX and ISM engine programs and families, but offshore. He uses programming languages, to include: C, VB (RDE work): and tools, to include: matlab and beacon. [The beneficiary] has played an integral part in the writing of RDE rules in VB scripting language. RDE is used to validate the tuning of the calibration software. As a result, he is well equipped and knowledgeable of the associated workflows and processes. During this year-plus of experience, he has gained advanced knowledge of Cummins' service and development tools, to include INSITE, VEPS, Calterm, and RDE. As a result, he understands the engine system and the interaction of the system with Cummins specific tools. [The beneficiary] has analyzed Problem Report Change Requests in completing these duties.

> As a result of the Beneficiary's experience working with Petitioner's development tools over the last 12+ months, the Beneficiary has met two of the characteristics listed in the Puleo memorandum for finding specialized knowledge. The knowledge the Beneficiary possesses of Petitioner's proprietary development tools, workflows, and processes, can only be gained through this prior experience. Most professionals in the industry, and even in Petitioner's own company, have not worked directly with this proprietary component. This meets the fourth characteristic listed on page 2 of Mr. Puleo's memorandum for finding specialized knowledge.

In a letter dated October 17, 2008, the petitioner stated that the beneficiary's role in the United States will be as a software engineer responsible for "tool integration," and indicated that only three other individuals have undergone similar training in the same tools and methodologies. Counsel further emphasized that the beneficiary "is only one of four of Petitioner's 4,000+ employees who have undergone similar training." Counsel asserted that the beneficiary's training, in addition to his twelve months of experience working with the Cummins Automotive Current Product Support Group "equates to the advance[d] (or specialized) knowledge referenced in Mr. Puleo's memorandum." Counsel indicated that "[the petitioner] has advised that, to the best of their knowledge, their and Cummins' methodologies and tools are not used or produced by other employers either in the United States or abroad." The petitioner indicated that training materials exist on a centralized database provided by Cummins and used by the foreign entity to train its employees, but stated that the material is "Cummins confidential, so cannot be disclosed."

The petitioner stated that the company would face a loss of $112,752 in revenue if it is unable to transfer the beneficiary to the proposed role in the United States, which would result from the cost of recruiting, hiring and training a worker and "the time involved in achieving full productivity." The petitioner further stated that failure to fulfill its contractual obligations with Cummins, Inc. could result in legal action, monetary damages, cancellation of other contracts and the loss of future business with Cummins.

The petitioner indicated that the foreign entity employs 3,972 employees at the location where the beneficiary works and provided a spreadsheet which appears to list all company employees, including U.S. employees, by name, job title, department and date of hire. Counsel stated that the petitioner was also including "a manual describing their job duties according to their job titles" as Exhibit 9.[2] The petitioner also provided a list of the 165 employees who are working for the petitioner at its Columbus, Indiana location in a nonimmigrant status. Six other employees - a senior tester, tech lead, senior test lead, a project manager, a senior software engineer, and a software engineer - report to the engagement manager to whom the beneficiary would report in his proposed position.

The attached manual is a 133-page document which defines roles and responsibilities of "technical resources working on projects," published by the foreign entity. The role of software engineer is listed as the second-most junior position among "Delivery/MIS" roles within the company, requiring a bachelor's degree and six months to two years of experience.

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[2] Counsel asserts on appeal that the petitioner did not submit this document, although counsel himself specifically referred to the document in his response to the RFE.

The director denied the petition on October 31, 2008, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been or will be employed in a capacity involving specialized knowledge. Referring to the "Roles & Responsibilities" document, the director observed that "the beneficiary holds a relatively low level position." The director emphasized that the beneficiary had been employed by the foreign entity for less than 13 months at the time the petition was filed and appeared to possess knowledge that is typical of software engineers who had joined the company at the same time, and who also would have undergone on-the-job training with respect to the petitioner's tools and methodologies. The director determined that the petitioner had failed to establish how the beneficiary's knowledge of the petitioner's processes or procedures rises to the level of special or advanced. Rather, the director observed that the beneficiary's expertise appears to pertain to Cummins Automotive.

The director acknowledged the petitioner's claim that the beneficiary possesses specialized knowledge because "'his knowledge would be difficult to impart to another individual without significant economic inconvenience to the United States of [sic] foreign firm.'" However, the director determined that "the claimed knowledge was not described with any degree of specificity." The director further noted that the petitioner "fails to demonstrate why the beneficiary's knowledge is specific to the petitioning organization and is different from other Software Engineers employed by the petitioner and whether it is needed for the beneficiary's assignment in the United States." The director concluded that the claimed specialized knowledge is not specific to the petitioner and that the beneficiary would not be employed in a position requiring specialized knowledge.

On appeal, counsel asserts that the petitioner has satisfied the criteria for establishing that the beneficiary has been and will be employed in a specialized knowledge capacity. Counsel cites heavily to the Puleo memorandum, and specifically, to several "characteristics" of specialized knowledge set forth in the memorandum. Counsel summarizes the beneficiary's experience with the foreign entity and the reason for his transfer to the United States and states that, as a result of such experience, he meets two of the characteristics outlined in the memorandum. First, counsel asserts that the beneficiary possesses knowledge of Cummins' engine modules, testing procedures and methodologies that can only be gained through prior experience with the petitioner. Counsel notes that "most professionals in the industry, and even in Petitioner's own company, have not worked directly with the ECM and tested the impact and effect of controls on the module." Second, counsel asserts that the beneficiary has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness and image with its client. Counsel states that "the utilization of the Beneficiary by the Petitioner on the Cummins, Inc. engines embedded controllers abroad was a significant assignment (i.e., 12 months in length)," and that this assignment "enhanced the Petitioner's ability to meet project goals and timelines." Counsel asserts that "it is the degree to which the knowledge would be difficult to impart onto another and the impact and inconvenience it would have on the United States or foreign firm that assists in determining if any employee has specialized knowledge." Counsel contends that USCIS's application of the terms "crucial importance" or "key personnel" as applied to an employee with specialized knowledge "clearly contradicts the plain language defining 'specialized knowledge' in Mr. Puleo's 1994 memorandum."

Counsel also argues that the director's comparison of the beneficiary's knowledge to that possessed by other members of the petitioner's workforce, i.e., other software engineers hired around the same time, is not supported by any authority and also contradicts guidance provided in a 2002 INS memorandum issued by

Fujie Ohata. [3] Counsel emphasizes that, according to the Ohata memorandum, there is no requirement that the claimed specialized knowledge be narrowly held throughout the company, and there is no test of the labor market. Counsel suggests that the director incorrectly assumed that all of the engineers hired on the same day as the beneficiary "must possess the same level and type of knowledge."

Counsel further states that the regulatory definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(D) is a "broad definition" and that the legislative history of the L-1 category reflects that it was created for a "broad purpose," with the intent "to make it easy for multinational companies to transfer personnel where it relates to the expansion of commerce." Counsel submits that the beneficiary is "a key individual with knowledge of how the ECM works with different testing procedures and interfaces with different memory modules like RAM, Flash, and Eeprom and other engine communication controllers." Counsel emphasizes that the beneficiary's knowledge is directly related to the petitioner's contract to provide software development services for Cummins' product, and therefore the knowledge "directly concerns the expansion of commerce."

Counsel asserts that USCIS has read the regulatory definition of "specialized knowledge" too narrowly by requiring the petitioner to establish that the beneficiary's proposed position primarily requires "specialized knowledge" of a product or service specific to the petitioner. Counsel emphasizes that the regulatory definition is "fairly broad" and includes knowledge of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets. Counsel suggests that knowledge of the customer's products is directly related to the petitioner's interests.

Counsel emphasizes that the USCIS *Adjudicator's Field Manual's* discussion of "Specialized Knowledge Capacity" cites to and quotes extensively from the Puleo memorandum, thus suggesting that the memorandum is to be given considerable weight in guiding adjudicators with respect to whether a foreign national possesses "specialized knowledge." Counsel goes on to state that "the text of the 1994 Puleo memorandum defining 'specialized knowledge' as it appears in the USCIS *Adjudicator's Field Manual* is binding on USCIS Officers and must be followed. In support of this assertion, counsel states that "the *Adjudicator's Field Manual* would supersede all other USCIS policy materials, and USCIS correspondence addressing the issue of 'specialized knowledge,' including precedent decisions issued by the Administrative Appeals Office."

Finally, counsel asserts that the director applied an incorrect evidentiary standard in this case by contending that the petitioner "failed to provide corroborating evidence." Counsel cites to a 2005 memorandum from William Yates, Associate Director of Operations. Memorandum of William R. Yates, Assoc. Dir. Of Operations, USCIS, *Changes to the L Nonimmigrant Classification made by the L-1 Reform Act of 2004* (July 28, 2005) ("the Yates memorandum") and to the *Adjudicator's Field Manual* in support of his claim that L-1 petitioners are not required to submit extensive evidence of the alien's prior and proposed employment.

Counsel asserts that the evidentiary requirements differ depending on the nature and size of the petitioner, and contends that "since Petitioner is a large established multi-national organization with offices around the world, the USCIS examiner should have accepted the statements made by the authorized representative in the

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[3] Memorandum of Fujie Ohata, Assoc. Comm., INS, *Interpretation of Specialized Knowledge* (Dec. 20, 2002)(hereinafter "Ohata memorandum").

supporting letter." Counsel notes that "since the USCIS examiner did not indicate how the statements made by Petitioner's authorized representative describing the 'specialized knowledge' possessed by the Beneficiary were insufficient or doubtful, no other documentation should have been required by the USCIS examiner to find that the Beneficiary possesses 'specialized knowledge.'"

Counsel concludes as follows:

> The USCIS examiner did not properly analyze the statements made by the Petitioner's authorized representative in the support letter, which described the "specialized knowledge" possessed by the Beneficiary. The Beneficiary [*sic*] did not articulate a basis as to why these statements were not true, show that adverse factors exist, or show how the statements did not meet the definition of "specialized knowledge" described in the USCIS Adjudicator's Field Manual. The USCIS examiner simply stated that the evidence was not sufficient. This is not a proper basis for denying the L-1B petition, and violates Chapter 32.3 of the USICS Adjudicator's Field Manual, which is binding. In addition, the USCIS examiner appears to have read the definition of "specialized knowledge" too narrowly, claiming and/or implying that the regulations require the "specialized knowledge" to be derived or acquired purely from the Petitioner and not from an international agreement between Cummins, Inc. and Petitioner and Petitioner's parent company to provide computer software development services.

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary has specialized knowledge or that he has been or will be employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

The Standard for Specialized Knowledge

Looking to the language of the statutory definition, Congress has provided USCIS with an ambiguous definition of specialized knowledge. In this regard, one Federal district court explained the infeasibility of applying a bright-line test to define what constitutes specialized knowledge:

> This ambiguity is not merely the result of an unfortunate choice of dictionaries. It reflects the relativistic nature of the concept special. An item is special only in the sense that it is not ordinary; to define special one must first define what is ordinary. . . . There is no logical or principled way to determine which baseline of ordinary knowledge is a more appropriate reading of the statute, and there are countless other baselines which are equally plausible. Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning. *Cf.* Westen, *The Empty Idea of Equality*, 95 Harv.L.Rev. 537 (1982).

1756, Inc. v. Attorney General, 745 F.Supp. 9, 14-15 (D.D.C., 1990).[4]

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[4] Although *1756, Inc. v. Attorney General* was decided prior to enactment of the statutory definition of specialized knowledge by the Immigration Act of 1990, the court's discussion of the ambiguity in the legacy Immigration and Naturalization Service (INS) definition is equally illuminating when applied to the definition created by Congress.

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the principles of statutory interpretation provide some clue as to the intended scope of the L-1B specialized knowledge category. *NLRB v. United Food & Commercial Workers Union, Local 23,* 484 U.S. 112, 123 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)).

First, the AAO must look to the language of section 214(c)(2)(B) itself, that is, the terms "special" and "advanced." Like the courts, the AAO customarily turns to dictionaries for help in determining whether a word in a statute has a plain or common meaning. *See, e.g., In re A.H. Robins Co.*, 109 F.3d 965, 967-68 (4th Cir. 1997) (using *Webster's Dictionary* for "therefore"). According to *Webster's New College Dictionary*, the word "special" is commonly found to mean "surpassing the usual" or "exceptional." *Webster's New College Dictionary*, 1084 (3rd Ed. 2008). The dictionary defines the word "advanced" as "highly developed or complex" or "at a higher level than others." *Id.* at 17.

Second, looking at the term's placement within the text of section 101(a)(15)(L) of the Act, the AAO notes that specialized knowledge is used to describe the nature of a person's employment and that the term is listed among the higher levels of the employment hierarchy together with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO therefore would expect a specialized knowledge employee to occupy an elevated position within a company that rises above that of an ordinary or average employee. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 14.

Third, a review of the legislative history for both the original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L) of the Act intended that the class of persons eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." *Id.* In addition, the Congressional record specifically states that the L-1 category was intended for "key personnel." *See generally, id.* The term "key personnel" denotes a position within the petitioning company that is "[o]f crucial importance." *Webster's New College Dictionary* 620 (3rd ed., Houghton Mifflin Harcourt Publishing Co. 2008). Moreover, 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." *See* 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 (Nov. 12, 1969).

Neither in 1970 nor in 1990 did Congress provide a controlling, unambiguous definition of "specialized knowledge," and a narrow interpretation is consistent with so much of the legislative intent as it is possible to determine. H. Rep. No. 91-851 at 6, 1970 U.S.C.C.A.N. at 2754. This interpretation is consistent with legislative history, which has been largely supportive of a narrow reading of the definition of specialized knowledge and the L-1 visa classification in general. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 15-16; *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at *4 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006); *Fibermaster, Ltd. v. I.N.S.*, Not Reported in F.Supp., 1990 WL 99327 (D.D.C.,

1990); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001)(on file with AAO).

Further, although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge" in section 214(c)(2) of the Act, the definition did not generally expand the class of persons eligible for L-1B specialized knowledge visas. Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Instead, the legislative history indicates that Congress created the statutory definition of specialized knowledge for the express purpose of clarifying a previously undefined term from the Immigration Act of 1970. H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 ("One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem."). While the 1990 Act declined to codify the "proprietary knowledge" and "United States labor market" references that had existed in the previous agency definition found at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988), there is no indication that Congress intended to liberalize its own 1970 definition of the L-1 visa classification.

If any conclusion can be drawn from the enactment of the statutory definition of specialized knowledge in section 214(c)(2)(B), it would be based on the nature of the Congressional clarification itself. By not including any strict criterion in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave the INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. *Cf. Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (quoting *Baires v. INS*, 856 F.2d 89, 91 (9th Cir. 1988)).

To determine what is special or advanced, USCIS must first determine the baseline of ordinary. As a baseline, the terms "special" or "advanced" must mean more than simply "skilled" or "experienced." By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." *See Matter of Penner*, 18 I&N Dec. 49, 53 (Comm. 1982). 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. In other words, specialized knowledge generally requires more than a short period of experience; otherwise special or advanced knowledge would include every employee in an organization with the exception of trainees and entry-level staff. If everyone in an organization is specialized, then no one can be considered truly specialized. Such an interpretation strips the statutory language of any efficacy and cannot have been what Congress intended.

Considering the definition of specialized knowledge, it is the petitioner's, not USCIS's, burden to articulate and establish by a preponderance of the evidence that the beneficiary possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. A petitioner's assertion that the beneficiary possesses advanced knowledge of the processes and procedures of the company must be supported by evidence describing and distinguishing that knowledge from the elementary or basic knowledge possessed by others. Because "special" and "advanced" are comparative terms, the petitioner should provide evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's specific industry.

Analysis

As a preliminary matter, the AAO will address counsel's assertion the petitioner is not required to submit evidence of the beneficiary's eligibility for L-1B classification beyond submitting a statement from an authorized company official. As noted above, counsel relies on the *Adjudicator's Field Manual* in support of his claim that L-1 petitioners, particularly those that are large, established companies, need not submit extensive evidence relating to the beneficiary's prior and proposed employment. The AAO acknowledges that there may be limited instances in which a statement from the petitioner alone is sufficient to establish a beneficiary's eligibility as a specialized knowledge employee.

However, when the petitioner does not adequately articulate with specificity the nature of the claimed specialized knowledge or how such knowledge is typically gained within the organization, or if the petitioner's statements otherwise fail to establish the beneficiary's eligibility, the regulations state that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary. The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. §§ 103.2(b)(8) and (12). The regulation at 8 C.F.R. § 214.2(l)(3)(viii) provides that the petitioner shall submit "such other evidence as the director, in his or her discretion, may deem necessary."

Contrary to counsel's argument on appeal, the director does not have to articulate a doubt regarding the accuracy or credibility of the petitioner's assertions in order to justify a request for corroborating evidence of eligibility or a request for additional explanation regarding the nature of the beneficiary's claimed specialized knowledge. The director in this matter simply found that the information provided by the petitioner in the form of statements from authorized officials of the organization insufficient to establish eligibility for L-1B classification, so he exercised his discretion to request additional evidence.

Counsel essentially argues that if a large international corporation provides a job description for the beneficiary and states that a beneficiary has specialized knowledge and will be employed in a specialized knowledge capacity, the petition should be approved without additional evaluation unless USCIS has reason to believe that the petitioner's statements are inaccurate. Counsel's viewpoint does not allow for a situation in which the petitioner's opinion of what constitutes "specialized knowledge" simply does not comport with what the regulatory and statutory definitions, case law and policy guidance interpreting the term "specialized knowledge" require, or is simply not sufficiently detailed to establish eligibility by the preponderance of the evidence standard.

Considering the definition of specialized knowledge, it is the petitioner's burden to prove that an alien possesses "special" or "advanced" knowledge by a preponderance of the evidence. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). The inherently subjective standard serves to make the L-1B classification more flexible and capable of responding to changing economic models. Depending on the facts of the specific case, a petitioner may put forward a novel argument that is based on the employer's specific situation. Or, as in the present case, a knowledgeable petitioner may choose to rely on aspects of the INS memoranda to frame his or her argument. Even though, as addressed further below, the Puleo memorandum does not constitute a binding legal "standard," it does describe possible attributes that would support a claim of specialized knowledge. However, the petitioner would be unwise to simply parrot the memorandum, without submitting supporting evidence, and expect USCIS to approve a petition. Or, as observed in the Puleo memorandum:

> . . . a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

Pursuant to section 291 of the Act, the petitioner bears the burden of proof in these proceedings. The petitioner must submit relevant, probative, and credible evidence that would lead the director to believe that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

Here, the AAO finds that the director did not abuse his discretion by requesting evidence to establish that the beneficiary's duties are special or advanced in relation to others, or by inquiring as to how the beneficiary's experience or training differs from other similarly-employed workers within the petitioner's organization.

The AAO will now turn to the question of whether the petitioner established that the beneficiary possesses specialized knowledge and will be employed in a capacity requiring specialized knowledge. Upon review, even under counsel's more generous view of the appropriate evidentiary standard, the petitioner has not demonstrated that this employee possesses knowledge that may be deemed "special" or "advanced" under the statutory definition at section 214(c)(2)(B) of the Act. The decision of the director will be affirmed as it relates to this issue and the appeal will be dismissed.

In examining the specialized knowledge 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 job description of the services to be performed sufficient to establish specialized knowledge. At a minimum, the petitioner must articulate with specificity the nature of the claimed specialized knowledge. Merely asserting that the beneficiary possesses "special" or "advanced" knowledge will not suffice to meet the petitioner's burden of proof.

The petitioner in this case has failed to establish either that the beneficiary's position in the United States or abroad requires an employee with specialized knowledge or that the beneficiary has specialized knowledge. Although the petitioner repeatedly asserts that the beneficiary has been and will be employed in a "specialized

knowledge" capacity, 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 engineers working with embedded systems employed by the petitioning organization or in the industry at-large. For example, the petitioner stated in its letter dated July 15, 2008 that it requires "an engineer who is knowledgeable in software development, but also in hardware and embedded systems." While not all software engineers work with embedded systems, this is hardly an uncommon specialty within the industry. The petitioner stated that the beneficiary would be required to use the petitioner's "unique methodology, quality and testing," but never further elaborated upon the petitioner's methodology or unique processes. 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 claims that the beneficiary's knowledge is derived from his "training" and from his approximately 13 months of experience with developing and supporting engine control software for Cummins, Inc.'s ECM products. Despite the petitioner's reliance on the beneficiary's training, and the director's specific request that the petitioner identify any advanced or special training received by the beneficiary, the petitioner has neither explained nor documented exactly what type of training the beneficiary has received since joining the foreign entity. The petitioner claims that the beneficiary is one of only four people out of more than 4,000 workers who have been trained in specific tools and methodologies related to the U.S. assignment, but offers no additional explanation regarding what was involved in the training, when the beneficiary completed such training, or how long it took the beneficiary to complete such training. The AAO notes that, based on the petitioner's representations, the beneficiary was hired by the foreign entity as a software engineer immediately upon completion of his bachelor's degree studies and assigned to a role that is essentially identical to that which he will perform in the United States. 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.

With respect to the beneficiary's client-specific project experience, counsel emphasizes on appeal that the petitioner and Cummins Inc. are related entities. Based on the evidence of record, it is evident that Cummins, Inc. is a minority shareholder of the petitioner's parent company and that it does outsource many information technology functions to the petitioning organization, thereby granting the petitioner's employees access to Cummins proprietary product and systems information. However, the petitioner and Cummins Inc. do not have a parent-subsidiary, affiliate or branch relationship as defined at 8 C.F.R. § 214.2(l)(1)(ii) and are not considered part of the same international organization for the purposes of this visa classification. Accordingly, Cummins' products and systems cannot be considered specific to the petitioning company, and knowledge of such products cannot be considered "specialized knowledge."

Thus, while counsel argues that the beneficiary's familiarity with the client's proprietary products and systems should be considered knowledge that is "specific to the petitioner's interests" and therefore "specialized," the AAO notes that such an interpretation would essentially open the classification to any information technology

consultant who worked on any client project with on-site and off-shore components for at least one year. The beneficiary's familiarity with the client's systems and requirements, while valuable to the petitioner, cannot be considered knowledge specific to the petitioning organization and cannot form the basis of a determination that he possesses specialized knowledge. All information technology consultants within the petitioning organization would reasonably be familiar with its internal processes and methodologies for carrying out client projects. Similarly, most employees would also possess project-specific knowledge relative to one or more international clients and the client's products or systems. However, the fact that the beneficiary possesses very specific experience with a particular international client's project does not establish that the beneficiary's knowledge is indeed special or advanced.

In addition, even assuming *arguendo* that the beneficiary's familiarity with the client's software could be considered "specialized knowledge," it is unclear how the beneficiary, who has worked as a team member on a single project for the client for less than 13 months, is considered to have "advanced" knowledge of the petitioner's processes and methodologies relative to Cummins Inc. projects.

Absent additional explanation regarding these factors, it cannot be concluded that the beneficiary's ECM project-related knowledge is truly "specialized" or that his knowledge of such procedures is "advanced" compared to his similarly-employed peers within the petitioner's international organization. The evidence submitted indicates that the petitioner's parent company employs hundreds of software engineers within its automotive systems group, many of whom are likely assigned to different components of various Cummins, Inc. projects.

All employees can be said to possess unique skills or experience to some degree. Moreover, any proprietary qualities of the petitioner's process or product do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique process or product 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 workers may not have the same level of experience with the petitioner's methodologies as applied to one component of a specific client project is not enough to establish the beneficiary as an employee possessing specialized knowledge. While the AAO acknowledges that there will be exceptions based on the facts of individual cases, an argument that an alien is unique among a small subset of workers, (i.e., one of only four software engineers assigned to a small client project team) will not be deemed facially persuasive if a petitioner's definition of specialized knowledge is so broad that it would include the majority of its workforce.

Although the petitioner asserts that the petitioner would suffer a los of $112,752 in revenue if it had to recruit, hire and train a worker to achieve full productivity in the offered position, it has not indicated that the beneficiary himself received any specific formal or on-the-job training upon joining the company in either the petitioner's internal policies and procedures, or in the subject matter related to his project assignment. He was hired with a bachelor's degree and no professional work experience. Despite his lack of company-specific training or experience, the beneficiary was hired by the foreign entity and immediately assigned to the role of software engineer for the Cummins Core I Automotive CPS project, performing the same duties that are proposed in the United States. There is no indication that the beneficiary has not been fully performing the duties of the position since the date he was hired by the foreign entity. The facts of the case undermine the petitioner's claim that the beneficiary could only be replaced at great expense and considerable delay.

Further, the petitioner has not specified the amount or type of training its technical staff members receive in the company's tools and procedures and therefore it cannot be concluded that its processes are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an experienced embedded systems software engineer who had no prior experience with the petitioner's family of companies. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165.

Since it appears the beneficiary was able to assume such a role on the Cummins Inc. project with no prior work experience, then it is also reasonable to question to what extent the knowledge required to perform the duties is truly specific to the petitioning organization, and not general knowledge the beneficiary gained while completing his coursework for a bachelor's degree in electronics and telecommunications engineering. It appears that the petitioner's internal tools and processes, while highly effective and valuable to the petitioner, can be readily learned on-the-job by employees who otherwise possess the requisite technical background in software engineering for embedded systems. For this reason, the petitioner has not established that knowledge of its processes and procedures alone constitutes specialized knowledge.

It is appropriate for USCIS 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. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of LeBlanc*, 13 I&N Dec. at 816). 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 AAO acknowledges that the specialized knowledge need not be narrowly held within the organization in order to be considered "advanced." However, it is equally true to state that knowledge will not be considered "special" or "advanced" if it is universally or even widely held throughout a company. If all similarly employed workers within the petitioner's organization receive essentially the same training, then mere possession of knowledge of the petitioner's processes and methodologies does not rise to the level of specialized knowledge. The L-1B visa category was not created in order to allow the transfer of all employees with any degree of knowledge of a company's processes. If all employees are deemed to possess "special" or "advanced" knowledge, then that knowledge would necessarily be ordinary and commonplace.

The petitioner has not demonstrated that the beneficiary's knowledge of the petitioner's processes and procedures gained during his 13 months of employment with the foreign entity is advanced compared to other similarly employed workers within the organization. As noted above, the petitioner's attempts to distinguish the beneficiary's knowledge as advanced relative to a specific client project are unpersuasive. All of the foreign entity's software engineers would reasonably have project-specific knowledge in addition to knowledge of the company's tools and processes for implementing projects. By the petitioner's logic, any of them would qualify for L-1B classification if offered a position working on the same project in the United States.

According to the reasoning of *Matter of Penner*, work experience and knowledge of a firm's technically complex products, by itself will not equal "special knowledge."[5] An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in L-1B classification. The term "special" or "advanced" must mean more than experienced or skilled. In other terms, specialized knowledge requires more than a short period of experience, otherwise, "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits.

The AAO does not dispute the possibility that the beneficiary is a skilled employee who has been, and would be, a valuable asset to the petitioner. However, 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 workers who are similarly employed elsewhere. The beneficiary's duties and technical skills, while impressive, demonstrate that he possesses knowledge that is common among software engineers specializing in embedded systems. Furthermore, it is not clear that the performance of the beneficiary's duties would require more than basic proficiency with the company's internal processes and methodologies. The petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's processes is more advanced than the knowledge possessed by others employed by the petitioner, or that the processes used by the petitioner are substantially different from those used by other technology consulting companies. The petitioner has failed to demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. *See Matter of Penner*, 18 I&N Dec. at 52.

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.

Finally, regarding the petitioner's reliance, in part, on the Puleo memorandum, it must be noted that in making a determination as to whether the knowledge possessed by a beneficiary is special or advanced, the AAO relies on the statute and regulations, legislative history and prior precedent. Although counsel suggests that USCIS is bound to base its decision on the above-referenced Puleo and Ohata memoranda, the memoranda were issued as guidance to assist USCIS employees in interpreting a term that is not clearly defined in the statute, not as a replacement for the statute or the original intentions of Congress in creating the specialized knowledge classification, or to overturn prior precedent decisions that continue to prove instructive in

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[5] As observed above, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge, and the general issues and case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner.* See 18 I&N Dec. at 50-53. (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

adjudicating L-1B visa petitions. The AAO will weigh guidance outlined in the policy memoranda accordingly, but not to the exclusion of the statutory and regulatory definitions, legislative history or prior precedents.[6]

Therefore, based on the evidence presented and applying the statute, regulations, and binding precedents, the petitioner has not established that the beneficiary has specialized knowledge or that he has been or would be employed in the United States in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

II. L-1A Visa Reform Act

The remaining issue addressed by the director is whether the petitioner has satisfied the requirements of the L-1 Visa Reform Act prohibiting placement of L-1B beneficiaries at the worksites of unaffiliated employers.

One of the main purposes 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 September 5, 2008).

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 beneficiary 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

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[6] USCIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind USCIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004).

In contrast to agency memoranda, a legacy INS or USCIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c). The INS precedent decisions relating to L-1B specialized knowledge are considered "interpretive rules" under the APA. *See Spencer Enterprises, Inc. v. U.S.*, 229 F.Supp.2d 1025, 1044 (E.D.Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014 (D.Hawaii 2000).

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 Obaigbena*, 19 I&N Dec. at 534.

If the petitioner fails to establish *both* of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee. As with all nonimmigrant petitions, the petitioner bears the burden of proving eligibility. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1).

As a threshold question in the analysis, USCIS must examine whether the beneficiary will be stationed primarily at the worksite of the client/unaffiliated company. Section 214(c)(2)(F) of the Act. The petitioner indicated on the Form I-129 petition that the beneficiary will be employed at its own offices located at 1266 Washington Street in Columbus, Indiana. In response to Question 13 on the Form I-129 Supplement L, the petitioner answered "No" when asked: "Will the beneficiary be stationed primarily offsite (at the worksite of an employer other than the petitioner or its affiliate, subsidiary, or parent)?"

The petitioner stated in its letter dated July 17, 2008 that the beneficiary will be working at its offices in Columbus, Indiana. The petitioner indicated that the beneficiary would be interfacing with Cummins engineers on technical matters, but will be supervised by the petitioner's own engagement manager and will not be controlled by or paid by Cummins, Inc. or its employees.

The director issued an RFE on August 1, 2000, but did not request additional evidence regarding the beneficiary's proposed worksite or the beneficiary's supervision and control.

The director ultimately denied, the petition, in part, based on the following determination:

> According to the petitioner, the alien will be controlled and supervised by the petitioner. However, the record of evidence is insufficient to substantiate the foregoing assertion of control and supervision of the beneficiary. No details were provided as to the amount [of] time the beneficiary would be spending with the Cummins staff or the locations where the beneficiary would work. Therefore, the instant petition does not qualify for the first requirement of the L-1 Visa Reform Act.

On appeal, counsel for the petitioner asserts that the petitioner clearly indicated that the beneficiary would be working at its own facility located in Columbus, Indiana, and not at the worksite of Cummins, Inc. Based on the petitioner's statements and the evidence of record, the AAO will withdraw the director's decision, in part, as it relates to his conclusion that the beneficiary will be assigned to the worksite of an unaffiliated employer. The petitioner has consistently indicated that the beneficiary will be assigned to its own offices. The director has not adequately articulated his basis for concluding that the employment would occur offsite. Therefore, the provisions of the L-1A Visa Reform Act are inapplicable to this petition.

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.