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U. S. Citizenship and Immigration Services
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U.S. Citizenship and Immigration Services

PUBLIC COPY

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File: WAC 08 022 50131 Office: CALIFORNIA SERVICE CENTER Date: **AUG 1 1 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)

IN BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

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, a California corporation, filed this nonimmigrant visa petition 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 software development and consulting company, claims to be the parent company of the beneficiary's foreign employer in India. The petitioner seeks to employ the beneficiary in the position of programmer analyst for a period of three years.

The director denied the petition based on two separate grounds. First, the director determined that the petitioner had failed to establish that the beneficiary possesses specialized knowledge or that he has been and would be employed in a capacity requiring specialized knowledge. Second, citing to the anti-"job shop" provisions of section 214(c)(2)(F) of the Act, as created by the L-1 Visa Reform Act of 2004, the director denied the petition as an impermissible arrangement to provide labor for hire.[1]

On appeal, the petitioner asserts that it has satisfied the criteria for establishing that the beneficiary has been and will be employed in a specialized knowledge capacity. Specifically, the petitioner argues that the beneficiary has specialized knowledge of a proprietary tool called "Vista web development tool," which is necessary for the project on which the beneficiary will work in the United States. The petitioner also claims that there was a mistake made at the time of filing, as the petitioner submitted information pertaining to the wrong client project. The petitioner asserts that the beneficiary will be working on the "RightDB" project for Transglobal Ventures, Inc. and contends that the project does not involve labor for hire or supervision and control of the beneficiary by the client company. The petitioner submits a letter and additional documentation in support of the appeal.

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[1] The 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 United States workers. Upon introducing the L-1 Visa Reform Act of 2004, 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 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).

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.

(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.

I. Relevant Law

Under section 101(a)(15)(L) of the Act, an alien is eligible for classification as a nonimmigrant if the alien, among other things, will be rendering services to the petitioning employer "in a capacity that is managerial, executive, or involves specialized knowledge." Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

> 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. If the beneficiary is not employed in this capacity, the petition may be denied on this basis and there is no need to address the requirements of the L-1 Visa Reform Act. Because the director reviewed both issues in a thorough and well-considered decision, and because counsel objects to both determinations, the AAO will nevertheless discuss both specialized knowledge and the elements of the L-1 Visa Reform Act. Upon review, the AAO concurs with the director's decision to deny the petition.

II. Specialized Knowledge

The first issue addressed by the director is whether the petitioner established that the beneficiary possesses specialized knowledge and that he has been and will be employed in a capacity requiring specialized knowledge.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on October 30, 2007. The petitioner indicated that the beneficiary has been employed by its foreign subsidiary since August 1, 2006, performing the following duties:

> Involved in complete Software Development Life Cycle (SDLC), Designing & developing applications using JAVA and J2EE technologies. Using the IDE like Eclipse, MyEclipse & Web Logic for developing enterprise applications, web services and database. Designing applications using MVC Architecture, OOAD (Object Oriented Analysis and Design), and UML.

The petitioner describes the beneficiary's proposed duties in the United States in the Form I-129 as follows:

> Implementing STRUTS Framework and MVC Design paradigm for web module. Designing applications using MVC Architecture, OOAD (Object Oriented Analysis and Design), and UML. Development [sic] Java Beans to store and retrieve the data entered by the user and display them in the respective JSP pages.

The petitioner also submitted the beneficiary's resume. The resume confirms that the beneficiary began working for the foreign employer in August 2006, approximately 15 months prior to the filing of the instant petition. The resume also lists the beneficiary's "technical skills" and summarizes his work experience abroad. The beneficiary is describes as having a Master's degree in computer applications, over one year of experience in developing applications using Java and J2EE technologies, and expertise in using Eclipse and MyEclipse for developing enterprise applications, web services, and databases. The beneficiary indicates that he has knowledge of various computer programming and scripting languages, distributing technologies, database applications, design tools, Open Source frameworks, operating systems, Web/application servers, protocols and software package such as, *inter alia*, Java, J2EE, C, C++, Oracle, HTML, MS Visio, Rational Rose, Linux, Weblogic 8.1, Apache Tomcat 5, etc.

In a letter dated August 31, 2007, the petitioner reiterated the brief position description provided on the Form I-129. The petitioner emphasized that "[i]t is well established that the position of Programmer Analyst is a Specialty Occupation" and noted that "in as such as the Job involves [c]omplex analysis, it clearly qualifies as a "Specialty Occupation." The petitioner stated that the beneficiary is qualified for the position based on his education and over one year of experience in the information technology industry.

Although the petitioner made no specific reference in its letter to a client or the specific project to which the beneficiary would be assigned, it submitted a copy of a consulting services agreement made between the petitioner and Health Net, Inc. in March 2005, accompanied by an amendment and scope of work agreement executed in March 2007. The scope of work agreement states that "consultant will provide staff augmentation to Health Net's Corporate Systems department for the implementation of the following Procurement-centered SAP projects." The scope of work indicates that Health Net will be responsible for providing work space and applicable software applications, assigning development tasks, deliverables and deadlines, and reviewing all work performed by the petitioner's developers.

On December 4, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's duties in the United States and abroad, an explanation addressing how the beneficiary's duties are different, special or advanced compared to those of other workers employed by the petitioner or in the industry at-large, and an explanation addressing how the beneficiary's training or experience differs from that provided to other workers in the field of endeavor. The director further requested that the petitioner explain exactly what is the equipment, system, product, technique, research or service of which the

beneficiary has specialized knowledge, to describe any significant past assignments completed by the beneficiary, and to provide information regarding the number of similarly-employed workers in the foreign and U.S. entities.

In response, the petitioner submitted an offer letter dated November 12, 2007, in which it further describes the project on which the beneficiary will work in the United States, Right DB-Job Portal, and his proposed duties. The "job portal" is described as a "career website for technology and engineering professionals and the companies that seek to employ them." The petitioner further described the beneficiary's proposed duties as follows:

> At the present time, we are in need of a Programmer Analyst to participate in this application development project we are performing. This project includes the use of generally accepted application development practices in the design, documentation and implementation areas of this service.
>
> Working with full life cycle software Development, which includes requirement & Object Oriented analysis, design, development, testing and documentation and writing Requirement Specification documents, design documents, Test cases and Analysis, User Training documents and Technical Help documents. Management of the work assignments, and handle the delivery and performance of a team, while personally taking part into [*sic*] the code writing, testing, bug fixing, technical support and documentation.
>
> Programmer Analyst working in applications or systems development analyze users' needs and design, construct, test, and maintain computer applications software or systems. Programmer Analyst can be involved in the design and development of many types of software, including software for operating systems and network distribution, and compilers, which convert programs for execution on a computer. In programming, or coding, Programmer Analyst instruct[s] a computer, line by line, how to perform a function. He also solves technical problems that arise. Programmer Analyst must possess strong programming skills, but are more concerned with developing algorithms and analyzing and solving programming problems than with actually writing code. Programmer Analyst often works as part of a team that designs new hardware, software, and systems.

The petitioner stated that the beneficiary would be working as part of a 15-member project team, and would be involved in prototype designing, gathering user requirements, creating technical and user interface specifications, and using technologies such as Rational Rose, JSP, HTML, JavaScript, Ajax and JavaBeans. The petitioner also submitted a project introduction document, market analysis study and high-level design document pertaining to the RightDB project.

In addition, the petitioner provided a letter from the foreign entity dated January 14, 2008 in which the beneficiary is described as working abroad as a "programmer analyst." The beneficiary is described as working on three different projects during his approximately 15 months of employment – compliance system, multi-party video conferencing, and "TradeNet." In all these projects, the beneficiary is described as using computer skills relating to his knowledge of, *inter alia*, JDK 1.5, JSP, Struts 1.1, Java Script, and Microsoft Windows.

With respect to the beneficiary's claimed specialized knowledge, the foreign entity stated:

> [The beneficiary's] duties here and the part he will be handling in the USA office are unique and is apt for his abilities and skills.
>
> [The beneficiary] has accrued a training that is exclusive and significantly unique from the [foreign entity's] Indian Office, that is of international competency. His skills and computer proficiency is exclusively unique from the other employees holding the same position.

The petitioner provided a list of the foreign entity's 157 employees by name and job title, which shows that the beneficiary is one of 114 workers who hold the position title "programmer analyst" within the company.

The petitioner did not describe any "training" provided to the beneficiary other than his university education, which was completed prior to his employment by the foreign entity 15 months preceding the filing of the instant petition. The petitioner also did not explain how the beneficiary's knowledge differs from the knowledge possessed by the other 113 programmer analysts employed by the petitioning organization or in the industry at-large, or what makes such knowledge "exclusively unique."

On July 2, 2008, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the beneficiary has been or will be employed in a capacity involving specialized knowledge. The director emphasized that the beneficiary's duties and skills as a programmer analyst demonstrate knowledge that is common among similarly employed workers in the petitioner's industry. The director observed that the petitioner had not identified any aspect of the current or proposed position requiring or involving specialized knowledge of the petitioner's product, tools, processes or procedures, or documented that the beneficiary received any special or advanced training during his tenure with the foreign entity.

On appeal, 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. Specifically, the petitioner states:

> [The beneficiary's] one year work experience involved working on designing of the proprietary tool "Vista web development tool." Since [the beneficiary] had worked on designing a tool on the same technology previously he was assigned to work on this project. Also, his educational background He holds a Degree of Masters in Computer Applications from University of Calicut, India (One of the Best Universities in India) – contributed to him being assigned to this specific task. It is this work on the proprietary tool that makes the position he held one which requires specialized knowledge.

The petitioner further states that "the RightDB project revolves around a technical tool called Vista web development tool, which includes Vista Tag Library, Vista DAO Builder and Vista Action Controller." The petitioner explains as follows:

> This specific proprietary tool has been designed by [the petitioner] for the Right DB Project. He is one of the few employees of [the petitioning company] who worked on the development of this tool. Extensive knowledge on this proprietary tool and involvement in

> the RightDB project from inception make [the beneficiary] a very important resource to the client. An individual of such caliber is required for further implementation of the project at the clientsite [*sic*].
>
> It is this reason that makes this position one which requires specialized knowledge.

In support of the appeal, the petitioner submits: (1) a copy of the contract between Transglobal Ventures Inc. and the petitioner dated September 22, 2007, with attached statement of work for development of the RightDB-Jobs Portal dated October 4, 2007; (2) a letter dated July 22, 2008 from the client, Transglobal Ventures, Inc. confirming the beneficiary's role as a programmer analyst on the RightDB project since October 2007; and (3) a copy of the Software Requirement Specification document for the Right DB project.

Upon review, the petitioner's assertions are not persuasive in demonstrating 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).

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).[2]

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"

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[2] 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.

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 prove 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.

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.

Upon review, 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 for 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 programmer analysts employed by the petitioning organization or in the industry at-large. Going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise, meeting the definitions would simply be a matter of reiterating the regulations. *See Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

The petitioner asserts that the beneficiary has approximately one year of "IT Experience" and knowledge of various computer programming and scripting languages, distributing technologies, database applications, design tools, Open Source frameworks, operating systems, Web/application servers, protocols and software packages such as, *inter alia*, Java, J2EE, C, C++, Oracle, HTML, MS Visio, Rational Rose, Linux, Weblogic 8.1, Apache Tomcat 5, etc. The petitioner further asserts that the beneficiary, as a programmer analyst working on client projects, has used, and will use, this knowledge of "generally accepted application development practices" to design and develop software, and to program, or code, computers, which instructs "a computer, line by line, how to perform a function." On appeal, the petitioner asserts, for the first time, that the beneficiary also has specialized knowledge of a proprietary development tool called the "Vista web development tool" which is purportedly necessary for the project on which the beneficiary will work in the United States. The petitioner claims that the beneficiary directly participated in the development of the tool specifically for the Right DB project. However, even though requested by the director, the petitioner failed to explain how the beneficiary's knowledge of "vista web," and the various computer programming and scripting languages, design tools, operating systems, and software packages listed in the record, is different from or advanced compared to other workers employed by the petitioner or in the industry at-large. The petitioner also failed to address how the beneficiary's training differed from that provided to other workers in the field of endeavor. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Accordingly, despite the petitioner's claim, the record does not establish how, exactly, this knowledge materially differs from knowledge possessed by other workers employed by the petitioning organization or by programmer analysts in the industry at-large. The record does not establish what qualities of the beneficiary's computer skills, as well as his claimed knowledge of the "Vista web" development tool, are of such complexity that this knowledge constitutes special or advanced knowledge. Importantly, the record is not persuasive in establishing why, exactly, any of the beneficiary's knowledge cannot be imparted to a similarly

experienced and educated programmer analyst in a relatively short period of time. Again, going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190)). The petitioner does not articulate with specificity the nature of the claimed specialized knowledge, describe how such knowledge is typically gained within the organization, or explain how and when the beneficiary gained such knowledge.

Furthermore, the AAO notes that prior to the appeal, there was no mention in the record of the Vista web development tool, and no mention of the beneficiary's prior experience working with the Right DB project overseas. The foreign entity did not mention the Right DB project when describing the beneficiary's assignments overseas in its letter dated January 14, 2008. Notably, the AAO can find no reference to "Vista web" in the beneficiary's resume or in the extensive documentation submitted with respect to the Right DB project. Prior to the denial of the petition, the petitioner claimed that the beneficiary is qualified for the U.S. position based on his education and one year of IT industry experience, and did not identify any body of knowledge that is specific to the petitioning organization. The petitioner merely stated that the beneficiary possesses skills and computer proficiency that are "exclusively unique." If the beneficiary's project experience and knowledge of Vista web form the foundation of the beneficiary's claimed specialized knowledge, it is not clear why the petitioner did not mention them previously. The petitioner was given ample opportunity to describe and document the beneficiary's specialized knowledge qualifications prior to adjudication of the petition. On appeal, the petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

Considering that the petitioner did not commence work on the RightDB project until October 2007, the instant petition was filed in October 2007, and the record contains a letter dated November 21, 2007 advising the beneficiary that he has been offered a position as a programmer analyst on the Right DB project, the AAO must assume that any relevant project experience he might possess was gained after the date the petition was filed. The petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Moreover, given the beneficiary's relatively short tenure with the foreign entity, the record is not persuasive in establishing that the beneficiary has been or will be a "key" employee having special or advanced knowledge of a company product or service, the application of this product or service, or a process or procedure of the petitioning organization. As noted above, the beneficiary is one of 114 programmer analysts employed by the foreign entity. As the beneficiary has apparently received no special training in "Vista web" or any of the listed computer skills, the record is not persuasive in establishing that the beneficiary's knowledge is truly special or advanced.

Overall, the record does not establish that the beneficiary's knowledge is substantially different from the knowledge possessed by programmer analysts generally throughout the industry or by other employees of the petitioning organization. The fact that few other workers possess very specific knowledge of certain aspects of the petitioning organization's internal tools or processes, e.g., Vista web, does not alone establish that the beneficiary's knowledge is indeed advanced or special. All employees can be said to possess unique skill sets to some degree; however, a skill set that can be easily imparted to another similarly educated and generally

experienced programmer analyst is not "specialized knowledge." Even assuming *arguendo* that the beneficiary actually possesses knowledge of the proprietary "Vista web" tool, the proprietary qualities alone do not establish that any knowledge of this development tool is "special" or "advanced." Rather, the petitioner must establish that qualities of the processes, procedures, and technologies 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 outside of the petitioning organization may not have very specific knowledge regarding the petitioner's enterprise is not relevant to these proceedings if this knowledge gap could be closed by the petitioner by simply revealing the information to a newly hired, generally experienced and educated worker.

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."[3] 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 discount the likelihood that the beneficiary is a skilled programmer analyst. There is no indication, however, that the beneficiary has any knowledge that exceeds that of any experienced programmer analyst specializing in web-based technologies, or that he has received special training in the company's methodologies or processes which would separate him from any other worker employed within the petitioner's organization or in the industry at-large. 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. Based on the evidence presented, the petitioner has not established that the beneficiary has specialized knowledge or that he was or will be employed in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

III. L-1 Visa Reform Act

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[3] 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).

Assuming *arguendo* that the petitioner had established that the beneficiary possesses specialized knowledge, the terms of the L-1 Visa Reform Act would still mandate the denial of this petition. 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 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).

A. Threshold Question: Worksite of Beneficiary

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 Sunnyvale, California office. 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)?"

In its letter dated August 31, 2007, the petitioner stated that the petitioner would supervise and control the beneficiary from its office in Sunnyvale, and that the client would pay the company directly for his services. As noted above, at the time of filing, the petitioner submitted a consulting services agreement and statement of work referencing services to be provided by the petitioner to Health Net, Inc. The services were described as "staff augmentation" to the client's corporate systems department, with the work to take place at the client's premises.

In the request for evidence issued on December 4, 2007, the director cited to the relevant provisions of the L-1 Visa Reform Act and requested that the petitioner clarify the location where the beneficiary will work.

In its response dated January 30, 2008, the petitioner indicated that the beneficiary would work at its Sunnyvale, California office, but also stated that "the placement of the beneficiary at the client's worksite is

not to provide labor for hire." The petitioner indicated that it was submitting a "copy of product description and technical specification of product that beneficiary would work on - for the client Health Net." However, the attached product description pertained to the RightDB project, not to Health Net's project.

The director determined that the beneficiary will be stationed primarily at the worksite of the client/unaffiliated employer, Health Net, Inc., and therefore the provisions of Section 214(c)(2)(F) are applicable.

On appeal, the petitioner states: "This is to clarify that there was a mistake in the earlier petition when Health Net was given as the client. The client for this project is Transglobal Ventures Inc. and the project is called RightDB."

The petitioner submits a copy of the contract made between Transglobal Ventures, Inc. and the petitioner on September 22, 2007. The statement of work pertaining to the RightDB-Jobs Portal project identifies the location of the work to be performed as 4403 1st Ave., SE, Ste 303B, 516, Cedar Rapids, Iowa 52402. The evidence submitted on appeal includes a letter from the client stating that the beneficiary will work at the petitioner's site. However, the petitioner states in its letter dated July 25, 2008 that "the objective of placing the beneficiary at the client site is to implement the remaining phases of the project at client site," and that "the beneficiary will be supervised and controlled by other representatives of the petitioner at the client site."

Based on these responses and statements, the AAO concludes that the beneficiary will be primarily employed as a consultant at the worksite of an unaffiliated employer, thereby triggering the provisions of the L-1 Visa Reform Act. The petitioner has made a number of conflicting statements as to the actual worksite of the beneficiary and the project to which he will be assigned. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Regardless, on appeal, the petitioner does not specifically object to the director's conclusion that the beneficiary will work primarily at a client site.

With respect to the petitioner's claim that the petitioner's contract with Health Net, Inc. was submitted in error, the AAO notes that petitioner referenced both Health Net and the RightDB project in response to the RFE. Given evidence in the record that the beneficiary was assigned to the RightDB project several weeks after the petition was filed, the AAO cannot discount the possibility that the petitioner originally intended to assign the beneficiary to the Health Net project and will not completely disregard this evidence.

The petitioner therefore must 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.

B. Control and Supervision of Beneficiary

Under section 214(c)(2)(F)(i) of the Act, the petitioner must establish that the beneficiary will be controlled and supervised principally by the petitioner, and not by the unaffiliated employer. The petitioner stated the

following in its letter dated August 31, 2007:

> As an employer, [the petitioner] will be responsible for paying, hiring, firing, supervising, and controlling [the beneficiary] from our Office Located at Suite #10, 528 Weddell Dr., Sunnyvale, CA-94089. The Client pays [the petitioner] directly for the Programmer Analysts' service, who is employed by [the petitioner], and who works under the supervision of our Manager responsible for the client account at our office located at Suite #10, 528 Weddell Dr, Sunnyvale, CA-94089.

The consultant services agreement with Health Net, Inc. submitted at the time of filing indicates that the petitioner's staff will serve as "staff augmentation" and "will be assigned development tasks, deliverables, and associated deadlines as determined by the Health Net Manager and Program Manager." The agreement further indicates that "all deliverables prepared by Consultant will be subject to the review by Health Net's project manager."

In the request for evidence, the director requested evidence to establish that the beneficiary will be controlled and supervised principally by the petitioner.

In response to the RFE, the petitioner stated: "We assure you that the beneficiary will be controlled and supervised principally by the Employer in US which is [the petitioner] and the placement of beneficiary at client's worksite is not to provide labor for hire." The petitioner indicated that the beneficiary will be part of a 15-member team which includes a project manager/team lead, system architect, system administrator, six computer systems analysts, a security administrator, two developers, two testers and a facilitator. The petitioner did not specifically identify the name, job title or worksite of the individual or individuals who would be directly controlling and supervising the beneficiary's work.

In denying the petition, the director found that the petitioner submitted insufficient evidence to corroborate its statement that the beneficiary will be principally controlled and supervised by the petitioning entity, such as contracts, statements of work, etc.

On appeal, the petitioner states: "This is to confirm that the beneficiary will be supervised and controlled by other representatives of the petitioner at the client site. Hence the beneficiary working offsite and not being controlled by the petitioner does not arise."

Upon review, the AAO concurs with the director's determination. The contract between the petitioner and Health Net indicates that the petitioner's employees are supervised by Health Net's management staff. The contract between the petitioner and Transglobal Venture, Inc. is silent on the issue of who will supervise the petitioner's employees assigned to the RightDB project. The petitioner has never identified the name or location of the beneficiary's proposed supervisor, or submitted any evidence clearly establishing who would be principally supervising and controlling the beneficiary in the performance of his duties as a programmer analyst.

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. The petitioner's assertion that

that the beneficiary will be supervised and controlled by an employee of the petitioning company is not corroborated by any evidence.

We conclude, therefore, that the petitioner has failed to meet its burden of establishing that the beneficiary would be controlled and supervised principally by the petitioning company and has not satisfied the requirements of section 214(c)(2)(F)(i) of the Act. On this basis alone, the petition must be denied.

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. As discussed below, the petition also fails to meet the requirements of this section of the Act.

In denying the petition, the director referred to the petitioner's consulting services agreement with Health Net, Inc. and concluded that "the service the petitioner is providing is essentially technical specialists for hire to adjust, modify, fine tune and maintain the petitioner client's already existing system and/or software rather than develop the petitioner's own software." The director determined that the knowledge needed to perform the work for the client is not specific to the petitioner, and that the work to be performed would be labor for hire.

On appeal, as noted above, the petitioner asserts that the Health Net, Inc. contract was submitted in error. The petitioner asserts that the beneficiary will instead be working on the Right DB-Job Portal for Transglobal Ventures, Inc., and will be applying knowledge of a proprietary tool, Vista web, which was designed by the petitioner specifically for the RightDB project. The petitioner states that the beneficiary will be placed at the client's site "to implement the remaining phases of the project" and not to provide labor for hire.

The petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary's placement at the unaffiliated employer's worksite 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 must demonstrate in the first instance that the beneficiary's offsite employment is connected with the provision of the petitioner's product or service which necessitates specialized knowledge that is *specific to the petitioning employer*. If the petitioner fails to prove this element, the beneficiary's employment will be deemed an impermissible arrangement to provide "labor for hire" under the terms of the L-1 Visa Reform Act.

For the reasons discussed above, the AAO will not completely discount the petitioner's submission of its consulting agreement with Health Net, Inc. Such agreement clearly requires the petitioner to provide "staff augmentation" services requiring it to work alongside the client's employees in supporting and enhancing the clients' existing systems.

While it appears that the petitioner's agreement with Transglobal Ventures, Inc. will involve development of a new software product for the client, the evidence of record does not support a conclusion that the beneficiary

will be implementing, developing, maintaining, or supporting systems or software that is specific to or sold by the petitioning company, or providing a service that other information technology companies with comparable capabilities could not provide. The primary purpose of the assignment is for the beneficiary to develop a web-based product, based on software and technologies that are common in the industry, according to the clients needs and specifications. Any IT consulting company could likely provide an employee to deliver the exact same services, using its own internal project delivery tools and methodologies, and achieve the same results for the unaffiliated employer.

The petitioner's claim on appeal that the beneficiary was specifically chosen for the assignment based on his proprietary knowledge of the petitioner's Vista web tool, or that knowledge of Vista web is required for performance of the job duties, remains wholly unsupported by any documentary evidence. The record contains extensive descriptions of both the beneficiary's previous project assignments and the proposed U.S. project. None of the evidence submitted references the "Vista web tool," nor has the petitioner submitted any documentation describing exactly what this tool is or why it is essential to the U.S. assignment.

While it is possible that the beneficiary here possesses knowledge that is directly related to both the petitioner and the unaffiliated employer's product or service, it is incumbent upon the petitioner to establish that the position for which the beneficiary's services are sought is one that primarily requires knowledge specific to the petitioner. Here, the petitioner has failed to provide corroborating evidence demonstrating that the beneficiary's placement with the unaffiliated employer is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

To the contrary, a review of the facts of this petition suggests that this is exactly the type of employment relationship the L-1 Visa Reform Act of 2004 was enacted to prohibit. As explained above, this legislation was enacted to prevent the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software. In this matter, the petitioner indicated that the proposed project will involve the application of the beneficiary's knowledge of web-based software technologies that are widely available in the industry.

The petitioner suggests that the position does not involve labor for hire because the petitioner has been contracted to complete certain project-related work. However, if the project on which the beneficiary will work involves the unaffiliated employer essentially outsourcing the entire development of its RightDB product to the petitioner, then the employees assigned to the project are not providing a product or service which necessitates specialized knowledge that is *specific to the petitioning employer.*

In conclusion, there is no evidence that the petitioner is providing the beneficiary's services in connection with the sale of any technology products or that the beneficiary's offsite employment requires any specialized knowledge specific to the petitioner's operations. Instead, the limited evidence in the record related to the nature of the contract indicates that the petitioner is providing general software development services to the unaffiliated employer. The fact that such services appear to be delivered on a project basis is insufficient to preclude a finding that such services essentially constitute "labor for hire."

Accordingly, the petitioner has failed to meet its burden of establishing 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.

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 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

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.