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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

PUBLIC COPY

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[redacted]

File: WAC 07 225 52532 Office: CALIFORNIA SERVICE CENTER Date: JUL 08 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 withdraw the director's decision and remand the petition to the director for further action and entry of a new decision.

The petitioner filed this nonimmigrant visa petition to employ the beneficiary 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 California corporation established in 1999, claims to be a subsidiary of eInfochips Ltd., located in India. The petitioner is a provider of ASIC and embedded software solutions and services. The petitioner has employed the beneficiary as an ASIC Engineer in L-1B status since 2005 and now seeks to extend his status for two additional years.

The director denied the petition, concluding that the petitioner failed to establish that the petitioner has a qualifying relationship with the beneficiary's foreign employer. In denying the petition, the director determined that there are unresolved discrepancies in the record regarding the company's issuance of stock.

On appeal, counsel for the petitioner asserts that the petitioner has provided ample evidence to establish that the petitioner is a wholly-owned subsidiary of the foreign entity. Counsel concedes that there have been some "small corporate errors" and a typographical error which have been corrected, and states that such small inconsistencies are irrelevant to the legal requirements for establishing a qualifying relationship. Counsel requests that the AAO review the evidence as a whole and apply the preponderance of the evidence standard.

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.

The sole issue addressed by the director is whether the petitioner established that there is a qualifying relationship between the petitioning company and the beneficiary's last foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

> (G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]
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> * * *
>
> (I) *Parent* means a firm, corporation, or other legal entity which has subsidiaries.
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> * * *
>
> (K) *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner filed the nonimmigrant petition on July 25, 2007 and stated on Form I-129, Petition for a Nonimmigrant Worker, that the petitioner is a subsidiary of the foreign entity, eInfochips Ltd., located in Ahmedabad, India. The petitioner submitted evidence that the beneficiary was admitted to the United States in L-1B status under the U.S. company's Blanket L petition in 2005, along with a copy of the company's most

recent Blanket L approval notice, which is valid indefinitely as of December 2006. The petitioning company and the foreign entity are included on the list of qualifying entities appended to the Blanket L approval notice.

As additional evidence of the qualifying relationship between the two companies, the petitioner submitted:

- A copy of the original Articles of Incorporation of Digital Yantra, Inc. endorsed by the California Secretary of State on February 20, 1998. The Articles indicate that the corporation is authorized to issue 100,000 shares of common stock.
- A copy of a Certificate of Amendment to the Articles of Incorporation endorsed by the California Secretary of State on September 25, 1998. The document amends Article 4 of the original Articles of Incorporation and indicates that the total number of shares authorized is 500,000.
- A copy of a Certificate of Amendment to the Articles of Incorporation endorsed by the California Secretary of State on June 3, 1999. The document amends the company's name from Digital Yantra, Inc. to its current name, and indicates that the total number of outstanding shares of the corporation is 400,000.
- A copy of the petitioner's stock ledger, which indicates that all outstanding shares have been issued to "Solutions Machines Pvt. Ltd., now eInfochips Ltd." The ledger indicates that stock certificates 1, 3, and 4, totaling 400,000 shares were issued to the foreign entity in September and November 1998 in exchange for $20,000. According to the ledger, the foreign entity was issued stock certificate #5 for 2,000,000 shares in exchange for $100,000. The ledger indicates that stock certificate #2, for 400,000 shares, was cancelled, and that stock certificate #6 was issued on May 15, 2003 and issued 6,600,000 shares to the foreign entity in exchange for $330,000. The total number of shares issued according to the ledger is 9,000,000 and the total value of the issued shares is $450,000.
- Copies of stock certificates #1 through 6. Stock certificates # 1-5 were issued in the petitioner's original name of "Digital Yantra, Inc.," while stock certificate #6 reflects the company's current name.
- A copy of the petitioner's Notice of Transaction Pursuant to Corporation Code Section 25012(f), which indicates that the petitioner issued stock valued at $25,000, filed with the California Department of Corporations on September 25, 1998.
- A copy of the petitioner's 2004 IRS Form 1120, U.S. Corporation Income Tax Return, which indicates at Schedule K that the foreign entity is the petitioner's sole shareholder. The petitioner indicated at Schedule L that the company's issued common stock is valued at $450,000. The petitioner filed Form 5472, Information Return of a 25% Foreign-Owned U.S. Corporation along with its Form 1120.
- A copy of the petitioner's 2003 IRS Form 1120 and Form 5472, also identifying the foreign entity as the sole shareholder. Schedule L indicates that there was an increase in the value of the capital stock from $120,000 to $450,000 during the fiscal year.
- A copy of the foreign entity's 2004-2005, 2003-2004 and 2002-2003 Annual Reports, which discuss the petitioner's financial results and identify the U.S. company as its wholly-owned subsidiary. The annual report also includes the petitioner's year-end balance sheet and shows the value of the company's common stock as $120,000 in 2003

and as $450,000 in 2004 and 2005.

- A statement from UTI Bank Ltd. detailing the dates, amounts and purposes of equity transferred to the U.S. company by eInfochips Ltd. between 1998 and 2003. The sum of all of the transactions was $450,000.
- Evidence of the foreign entity's name change from Solution Machines Private Limited to eInfochips Ltd. on March 13, 2000.

The director issued a request for additional evidence on May 29, 2008, in which he stated:

> USCIS notes that the petitioner's name was changed from Digital Yantra, Inc. to E-Infochips, Inc. when [a] Certificate of Amendment of Articles of [In]corporation was filed with the Secretary of State of California on June 3, 1999. It is noted that the total number of outstanding shares of the corporation is 400,000. However the record contains copies of stock certificates numbered 1 through 5 showing that the total number of shares is 2,400,000. Provide evidence that the corporation is authorized to issue more than 400,000 shares.

The director also requested evidence to establish the ownership of the foreign entity, including its annual report and a list of owners.

In response to the RFE, the petitioner submitted a detailed letter dated January 24, 2008, which was prepared by the petitioner's corporate counsel, in relation to a petition for a different beneficiary. The letter was accompanied by 21 exhibits. As the response is part of the record, it will not be discussed in detail here. The evidence included authorizing board actions and evidence of payment for shares for stock issuance, and the petitioner's Amended & Restated Articles of Incorporation filed with the California Secretary of State on November 27, 2007, which increased the number of authorized shares to 20,000,000. The petitioner also submitted a "verified and updated" share ledger as of December 6, 2007 and a Notice of Transaction Pursuant to Corporations Code Section 21052(f) filed December 3, 2007, which indicates that stock valued at $425,000 has been issued since May 15, 2003. Petitioner's counsel attributed any discrepancies in the record at the time of filing to "errors and oversights in corporate governance procedures," and emphasized that the record as a whole demonstrates that the foreign entity is the sole owner of the U.S. company.

The director denied the petition on August 20, 2008, concluding that the petitioner did not establish that the petitioner and foreign entity have a qualifying relationship. In denying the petition, the director acknowledged the petitioner's response to the request for evidence but found that it "has not established that the petitioner has been authorized to issue 2,000,000 common shares." The director therefore found the evidence insufficient to establish the foreign entity's claimed ownership interest in the U.S. entity.

On appeal, counsel for the petitioner emphasizes that the standard of proof in nonimmigrant cases is the preponderance of the evidence and asserts that the director applied a much higher standard in adjudicating the instant petition. Counsel asserts that the petitioner has provided ample evidence to establish that the petitioner is a wholly-owned subsidiary of eInfochips Ltd., as all stocks have been issued to the foreign entity.

Counsel notes that the petitioner has provided a multitude of documentation and lengthy explanations from outside corporate counsel regarding any discrepancies or inconsistencies. Counsel asserts that the director

focused on "insignificant details in the mounds of evidence provided."

Upon review, counsel's assertions are persuasive. The AAO finds the totality of the evidence in the record sufficient to establish the claimed parent-subsidiary relationship between eInfochips Ltd. and the petitioner.

The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989). In evaluating the evidence, *Matter of E-M-* also stated that "[t]ruth is to be determined not by the quantity of evidence alone but by its quality." *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (defining "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, the submitted evidence is relevant, probative, and credible. The inconsistencies and errors in the record, which mostly relate to the number of shares the petitioner is authorized to issue, appear to be more a function of careless corporate recordkeeping than any attempt to obscure critical information from USCIS regarding the ownership of the petitioning company. A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003).

While the petitioner's corporate record keeping practices may be imperfect, there are no inconsistencies in the record with respect to the actual ownership of the company. The foreign entity publishes an independently audited annual report in which it has consistently identified the U.S. entity as its wholly-owned subsidiary and included the petitioner's balance sheet and financial results. The petitioner has consistently identified the foreign entity as its sole shareholder on all tax filings, and there is no evidence in the record that any shares of the company have been issued to any other shareholder. Therefore, even if the 2,000,000 shares issued in 2000 and the 6,600,000 shares issued in 2003 could be deemed invalid due to the petitioner's failure to amend its articles of incorporation to authorize the issuance of additional shares, the record shows that the petitioner issued 400,000 authorized shares to the foreign entity in 1998. The director did not articulate any reason to doubt that the foreign entity remains the owner of those authorized shares.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289

(Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In light of the totality of the evidence in the record, the petitioner has established by a preponderance of the evidence that the foreign entity wholly owns the U.S. company. Accordingly, the claimed parent-subsidiary relationship has been demonstrated and the director's decision dated August 20, 2008 will be withdrawn.

Although the director's decision will be withdrawn, the AAO finds that the record as presently constituted does not establish that the beneficiary possesses specialized knowledge, or that he has been and will be employed in a position requiring specialized knowledge, as required by 8 C.F.R. § 214.2(l)(3)(ii) and (iv). The current record also does not establish whether the beneficiary will be primarily employed at the worksite of an unaffiliated employer, and therefore it is not clear whether the provisions of section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F), are applicable to this petition. Accordingly, the petition will be remanded to the director for further consideration of these issues and entry of a new decision.

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).

The petitioner, a provider of ASIC and embedded software solutions and services for technology companies, stated on Form I-129 that the beneficiary will be employed as an ASIC Engineer and will work at the company's Sunnyvale, California office. In a letter dated July 16, 2007, the petitioner stated that "the transferee will undertake temporary assignments from our US offices currently located in Millbury, MA, Austin, TX, Schaumburg, IL and Sunnyvale, California." The petitioner indicated on Form I-129 that the beneficiary will not be stationed primarily offsite at the worksite of an unaffiliated employer.

The petitioner described the beneficiary's current and ongoing duties as follows:

> [The beneficiary] has been responsible for and will be involved on PCI Express eVC (e-Language Verification Component) project, mainly used in verification of PCI Express technology applications. It executes on Specman Elite tool and on UNIX (Solaris) and Linux platforms. He will be involved in all phases of PCI Express eVC development like preparing design and function specification, implementation and integrated verification.
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> * * *
>
> [The beneficiary] has gained knowledge of employer's internally developed proprietary product software and processes only through prior experience and this knowledge cannot be easily transferred or taught to another individual. [The petitioner] would experience a significant interruption of business in order to train a new employee to assume the above duties. He is also very well versed in implementing these processes in customer projects to improve the efficiency and quality of deliverables. The combination of the procedures which [the beneficiary] has knowledge of render him essential to the client in US and the development team in India. [The beneficiary's] special or advanced duties are so intricate that they can only be implemented efficiently by him.
>
> [The beneficiary] possesses knowledge, which has only been gained through extensive prior experience with the client. The knowledge that he possesses is extremely valuable to our competitiveness in the US marketplace. He is not only skilled in the requisite areas, but has previously worked on the client project in India, or is intimately familiar with the technical requirements for the client in the USA. It is this familiarity with on-going projects, and business and technical requirements of our clients that make his knowledge so specialized that he qualifies for this L-1B visa extension.

The petitioner indicated that the beneficiary's training is "exclusive and significantly unique" compared to others employed in his field. The petitioner indicated that his "in-house" training includes: "e" language using Specman Elite, eRM (e Reusable Methodology) and CDV (Coverage Driven Verification); Programming Languages such as Verilog, C, C++, "e" from Verisity; EDA Tools such as Specman Elite, Modelsim, NC-Verilog, and Operating Systems such as Windows 9x, Windows NT, Unix (Solaris) and Linux.

The petitioner noted that its parent company has developed "several products" which are "significantly different from other products in the industry," but did not further elaborate as to what the products are or how they differ from those developed by similar companies.

The petitioner further described the beneficiary's duties and claimed specialized knowledge in a letter dated July 2, 2007, in which it stated that the beneficiary "will be responsible to execute project from client location and co-ordinate with staff in India for offshore projects," and will "be responsible for the development of verification environments as per client's requirements."

The petitioner submitted a copy of the beneficiary's resume which describes the projects on which he has worked since joining the foreign entity in 2002. The three most recent projects are described as "on-site projects" for clients.

The director issued a request for evidence on May 29, 2008, in which the director advised the petitioner that it provided insufficient evidence concerning the location where the beneficiary will work, the product or service to which the beneficiary will be providing specialized knowledge, and/or the conditions of employment. The director requested: "evidence that establishes the beneficiary has the required specialized knowledge; that he will be controlled and supervised principally by the petitioner; the location where the beneficiary will work; and that the placement at a client's worksite is not merely to provide labor for hire.

The director requested, among other evidence, a description in layman's terms of the reason the beneficiary's specialized knowledge is required and evidence that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in his field of endeavor. The director stated that "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." The director advised that it is the "weight and type of evidence that establishes whether or not the beneficiary possesses specialized knowledge.

The director also requested copies of the petitioner's human resources records that provide the beneficiary's job description and worksite location, and evidence related to the beneficiary's provision of services for an unaffiliated employer, if applicable.

The petitioner's response to the director's detailed request consisted of the following statement:

> [The petitioner] develops Verification IP (VIP – Verification Intellectual Property) which is software which is sometimes used by semiconductor companies to often test their semiconductor design in a simulated environment before the semiconductor is actually fabricated . . . . [The beneficiary] has extensive knowledge on interfaces and bus protocols

> which are used to develop the VIP. In addition [the beneficiary] has demonstrated expertise on Specman simulation environment under which the VIP is used for testing purposes.
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> To customize or support the VIP developed by [the petitioner] one needs to be very familiar with the architecture and design which are proprietary in nature and are the Intellectual Property of [the petitioner] It is extremely time consuming and difficult for someone with no knowledge of [the petitioner's] architecture and design of the VIP to be able to perform demonstration, customization or support [activities] with a degree of effectiveness which meets the acceptable industry requirements. As [the beneficiary] was involved in developing VIP he has extensive knowledge on how the VIP works and how best it can be customized with minimum effort and time so as to remain competitive in the business.

The petitioner did not clarify the beneficiary's worksite location or further address the director's requests regarding the claimed specialized knowledge.

Looking to the language of the statutory definition of specialized knowledge at section 214(c)(2)(B) of the Act, Congress has provided USCIS with an ambiguous definition. 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).[1]

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

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[1] 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.

(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.

In this matter, the petitioner has not adequately described or documented the beneficiary's claimed specialized knowledge. The petition will be remanded and the director instructed to request a comprehensive description

of all positions held by the beneficiary, which describes the projects to which he has been assigned, and explains any special or advanced assignments that would help to compare the beneficiary's knowledge and experience to that of other similarly employed workers within the petitioner's workforce and the industry at large.

If the beneficiary has undertaken specialized training with the foreign entity, the petitioner should identify the type and length of training, the purpose of such training, and evidence, such as course completion certificates or other records, to establish that the beneficiary actually completed the training. The petitioner should also describe the training program typically completed by similarly employed workers in the foreign organization. If all employees receive exactly the same training, mere completion of the training program is insufficient to establish that the beneficiary's knowledge is advanced.

The record contains no information regarding other similarly employed workers employed by the foreign and U.S. entities which would allow USCIS to make comparisons between the beneficiary and the remainder of the foreign entity's workforce. The petitioner has stated that the beneficiary is the only employee capable of performing the duties of the position offered in the United States, but did not provide documentary evidence or sufficient explanation to support this statement, or any other information that would distinguish the beneficiary's knowledge from that held by other engineers within the U.S. and foreign entities.

Finally, the petitioner has not provided sufficient information or documentation regarding the petitioner's products and services that would distinguish it from other companies providing similar hardware verification and testing services to technology companies. The beneficiary's technical skills appear to include tools, software, programming languages and testing environments that are common in the industry. The petitioner should submit a detailed description of any company-specific knowledge possessed by the beneficiary and indicate how he utilizes this knowledge in performing his duties. If the beneficiary contributed to the development of any proprietary software or related technologies, the petitioner should explain the extent of his contribution, identify the technical environment in which it was developed, and explain how the petitioner's products differ from what is available in the industry from other verification service providers.

The lack of evidence in the record as presently constituted makes it impossible to classify the beneficiary's knowledge of the petitioner's products, services and processes as advanced. Furthermore, the record as presently constituted does not establish that knowledge of the petitioner's products, services and processes alone constitutes specialized knowledge. Although the knowledge need not be narrowly held within an organization in order to be specialized knowledge, the L-1B visa category was not created in order to allow the transfer of employees with any degree of knowledge of a company's products or services. As the petition will be remanded, the petitioner shall be given the opportunity to submit additional evidence in order to establish the beneficiary's specialized knowledge qualifications.

The final issue to be address is whether the beneficiary would be placed at the worksite of an unaffiliated employer during his U.S. assignment. Notwithstanding the petitioner's statement on Form I-129 that the beneficiary will not be assigned to offsite employment, the record as presently constituted contains conflicting information as to whether the beneficiary will work principally at the petitioner's offices. Specifically, the petitioner indicated in its letter dated July 2, 2007 that the beneficiary will execute projects from client locations, and the beneficiary indicates on his resume that he participates in on-site project-related activities

for clients. 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).

Accordingly, the director's request for additional evidence in this regard was justified and the petition could have been denied solely on the basis of the petitioner's failure to submit such evidence. See 8 C.F.R. § 103.2(b)(14).

As these issues were not raised in the denial letter, the petition will be remanded to the director, and the petitioner shall be given another opportunity to submit the evidence requested in the RFE dated May 29, 2008, and any other evidence the director deems necessary in order to establish the beneficiary's specialized knowledge and the petitioner's compliance with section 214(c)(2)(F) of the Act.

Although the petitioner has overcome the director's sole ground for denial of the petition, the evidence of record raises underlying questions regarding eligibility. Further evidence is required in order to establish that the petitioner and beneficiary meet the requirements for L-1B classification. Accordingly, the matter is remanded to the director, who is instructed to issue a request for evidence addressing the issues discussed above, and any other evidence he deems necessary.

ORDER: The decision of the director dated August 20, 2008 is withdrawn. The matter is remanded for further action and consideration consistent with the above discussion and entry of a new decision.