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

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IN RE: Petitioner:
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:

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 and certified his decision to the Administrative Appeals Office (AAO) in accordance with 8 C.F.R. § 103.4(a)(5). The AAO will affirm the director's decision and deny the petition.

The petitioner filed this nonimmigrant visa petition to employ of 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 is engaged in the delivery of high-quality, cost-effective software solutions. It states that is the parent company of the beneficiary's foreign employer in India. The petitioner seeks to employ the beneficiary as a software engineer for a period of three years, and indicates that he will be assigned to perform work related to an unaffiliated employer's project, based in Irvine, California.

The director denied the petition on December 10, 2008 and certified his decision to the AAO. The denial was 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]

Counsel for the petitioner has submitted a brief and additional evidence in support of the certification proceeding as provided by 8 C.F.R. § 103.4(a)(2).

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

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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).

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 September 10, 2008. The petitioner indicated that the beneficiary has been employed by its Indian subsidiary since February 5, 2007 "working for Balboa Life & Casualty in the application Collateral Command System in [the foreign entity]." The petitioner stated on Form I-129 that, in the United States, the beneficiary will also be "working for Balboa Life and Casualty in the application Collateral Command System (CCS) at [the petitioner]."

In a letter dated September 2, 2008, the petitioner provided additional explanation regarding the beneficiary's knowledge and experience and the client project to which he will be assigned. The petitioner indicated the Collateral Command System on which the beneficiary would be working is the client's "flagship Insurance tracking system," a mainframe system developed by the client in the 1980s and enhanced to track mortgage

loans in the 1990s. The petitioner stated that the beneficiary will be responsible for working with this system in the United States, performing the following duties:

- Currently CCS system has only Flood GAP for Auto safe lenders; [the beneficiary] will be enhancing the system to make the Flood GAP product available for Failsafe billing lenders.
- Understanding business process and requirements to effectively manage the project as per [client] specific standards and guidelines.
- Working with business analysts in gathering business requirements, obtaining clarifications and approvals during functional analysis, data validations and integration testing[.] Analyzing requirements to prepare functional and technical specifications.
- Documenting the gathered requirements as per the Quality procedures.
- Solve the technical issues with the systems.
- Interacting with Business Analysts as well as with the SME's to meet client's requirements.
- Perform system testing activities which include formulating the testing strategy, preparing the test plans and identifying key business scenarios.
- Regression tests and issue resolution as a result of new Product/Code changes going into production.
- To implement the new Flood gap product into production.

The petitioner stated that the beneficiary currently performs similar work in CCS engagements for the same client at the foreign entity's office in Hyderabad, including the following duties:

- Interacting and participating in Client meetings through conference calls. . .
- Involved in planning & execution of the development & maintenance work.
- Providing periodic status reports with work allocation and communicating to onsite of any foreseen issues.
- Resolving post-production implementation issues.
- Responsible to ensure all deliveries adhere to [the petitioner's] quality process and procedures.
- Proactively suggest any modifications to the existing system to enhance client's business from the business knowledge gained on the job over a period of time.
- Act as interface between team and client to address all client queries.
- Provide on call support for daily job streams in production.
- Responsible for providing training & technical guidance to the team members

The petitioner indicated that, upon joining the foreign entity, the beneficiary "has been trained extensively on various methodologies, techniques, processes and procedures to build the software applications and maintain systems specific to our Client's needs." The petitioner stated that the beneficiary possesses "distinguished knowledge" including the following:

- Specialize[d] technical skills: COBOL, CICS, JCL, DB2, VSAM, IDMS and application knowledge expertise.

- Other skills: Version Management tools: PANVALET and ENDEVOR, File handling tools: FILEAID. Database tools: DMLO, OLQ, QMF, SPUFI
- Involving in designing of Flood GAP product for Auto Safe Lenders.
- Involved in critical changes after production move and enhancement of the Flood Gap application for Auto Safe Lenders
- Involved in the development of Front end, CCS – Core and Outbound process of FailSafe lenders
- Interacting the Business Analysts as well as with the SME's to meet client's requirements.
- Provide lender specific product solutions in the Insurance tracking system.
- Documenting the gathered requirements as per the Quality procedures within the project.
- Quality Team lead for testing of [the client's] Accelerated Configuration Technology.
- Trained on Test Design and Testing Best Practices.
- Conceptual understanding of the Software Quality Assurance methodology in compliance with SEICMM5 standards.
- Complete knowledge on [the client's] regulations and standards in all deliverables.

The petitioner further stated that the beneficiary has specialized knowledge of company processes and procedures, including two "proprietary processes" for project management and tracking software development activities - iPTS and KADET.

Finally, the petitioner elaborated on the U.S. assignment as follows:

> In order to successfully complete the project, a thorough understanding of the Collateral Command System (CCS) is required. By virtue of having extensively worked on testing such applications and understanding [the client's] requirements, [the beneficiary] has acquired specialized business knowledge of the application. The onsite position that [the beneficiary] is identified for, requires a high level of technical expertise and [client] interaction skills.
>
> This position requires a person with detailed understanding of the application as well as expertise in testing of such applications. This role will also involve acting as a bridge between the business users of [the client] and the testing team at offshore. [The beneficiary] has the required combination of skills from the functional and technical perspectives that are relevant to this project and also has a proven track record in customer interactions. The combination of these skills sets makes him the ideal candidate for this requirement.
>
> The beneficiary is one of a handful of [company] employees who possess specialized knowledge and experience to successfully complete the company's project for [the client]. It would be great hardship to [the petitioner] to pull one of the few other employees with [the beneficiary's] level of specialized knowledge experience to work on [the client] project when they are all working on other large-scale projects for [the petitioner].

The petitioner stated that it would be virtually impossible to fill the beneficiary's position if he were unable to contribute to the project, considering his previous experience and training with the overseas company.

In support of the petition, the petitioner submitted a copy of the beneficiary's resume which indicates that he graduated with a bachelor's degree in mechanical engineering in 2005 and worked for Infosys Technologies Ltd. in India for one year prior to joining the petitioner's subsidiary in India in February 2007. He indicates that he has worked on the U.S. client project for 15 months, using mainframe technologies and tools, IDMS and DB2, and working on a team of 20 people. The beneficiary indicates that his project responsibilities include coding and testing programs to deliver quality deliverables, communicating with onsite counterparts in the United States, and providing on-call support for daily job streams in production. The beneficiary states that he is strong at developing and maintaining enterprise applications for mainframe development projects using COBOL, JCL, IDMS, DB2 and CICs and is conversant in CMMI quality procedures. The beneficiary's resume indicates that he has undergone three months of training in "mainframe" and one month of training in SQL.

The petitioner also submitted extensive internal documentation describing its tools and procedures for project implementation. The documentation submitted described: the KADET project management tool; C language, Functional Specifications; Analysis and Design Standards using UML; Business Modeling Discipline; Requirements Modeling Discipline; Analysis and Design; Implementation; Testing; Deployment; Configuration and Change Management; Project Management; Environment; and the V Process Life Cycle Model.

The director issued a request for additional evidence (RFE) on October 10, 2008, in which he requested, *inter alia,* additional evidence to establish that the beneficiary will be coming to the United States to perform duties in a specialized knowledge capacity. The director requested a more detailed description of the beneficiary's proposed duties and clarification regarding the reason for his transfer to the United States at this time. The director also requested additional information regarding exactly what is the equipment, system, product, technique or service of which the beneficiary has specialized knowledge, as well as additional explanation regarding any special or advanced duties the beneficiary will perform and how such duties differ from those performed by other workers employed by the petitioner or other U.S. employers. In addition, the director requested a milestone plan showing the beginning and ending dates for the product or service to be provided by the petitioner on a weekly basis.

In a response dated November 24, 2008, the petitioner provided additional information related to the beneficiary's duties in India, noting that his roles have included the following:

> Performed as a role based team lead for the maintenance and testing of "Flood Gap" application for Autosafe Lender with a team size of 3. This project involved testing activities related to development of preprocessor unit, front end segmentation, CCS core changes and outbound changes.
>
> Performed as a role based team lead for the maintenance and testing of Failsafe billing method for [client] lender with a team size of 2. The project involved testing activities related to development of CCS core changes for Fail Safe billing.
>
> * * *
>
> Special or Advanced Duties

- Development of preprocessor unit, front end segmentation, skip logic, CCS core changes and outbound changes for "Flood Gap" product for Auto Safe lenders.
- Extensive knowledge in "Failsafe Billing Method."
- Extensive application framework knowledge leverages to efficient coding and testing.
- Hands on domain knowledge would support to implement new business scenarios.

The petitioner indicated that the beneficiary's duties in the United States will require "understanding business process and requirements to effectively manage the project as per [the client's] specific standards and guidelines." The petitioner further described the "uniqueness" of the beneficiary's knowledge as follows:

> [The beneficiary] has thorough knowledge of the Fail Safe Lenders, processing of which is different from Auto Safe Lenders. He is the only resource who has in depth knowledge of Flood Gap product as well as Fail Safe Billing this makes him distinguished from the other resources available at offshore and onsite.

The petitioner reiterated that the beneficiary has specialized knowledge of its processes and procedures, including SEI-CMM procedures, and proprietary processes including: Mainframe; Auto and Mortgage Insurance; iPTS (proprietary project management tool); and Kadet (proprietary SLA Compliance tool). The petitioner also described its "proprietary" system design and quality management processes.

The petitioner further described the beneficiary's training and experience as follows:

> [The beneficiary] has undergone training at [the petitioning company] on Insurance domain and testing methodologies at [the company].
>
> [The beneficiary] has undergone training at [the company] on various business events that has helped him in performing his tasks effectively and efficiently in this project.
>
> Shown below are the lists of classroom training courses which he has undergone:
>
> - [Company] induction and training
> - Software development life cycle
> - Test design training
> - Testing Best Practices
> - Global etiquette
> - Business Management System
> - Configuration management
> - Estimation @ [the company]
> - Inspection & review record & defect prevention
> - Achieving excellence
> - Written Communication Skills
>
> The minimum amount of time required to train an employee to fill the above position is more than a year. Considering his previous experience and having undergone extensive on the job &

> in house classroom training at [the petitioning company], [the beneficiary] has all requirements to fill the above position.

The petitioner submitted a copy of a single training certificate issued to the beneficiary by the foreign entity, which indicates that he completed "Introduction to S/W Architecture," a one-day course, on May 12, 2008.

On December 10, 2008, the director denied the petition and certified his decision to the AAO. The director concluded that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the beneficiary will be employed in a capacity involving specialized knowledge. The director determined that the beneficiary's duties performed with the foreign entity and proposed duties are essentially those of a skilled worker, and require knowledge that is common among software engineers employed by the petitioner's organization and by others within the information technology field. The director noted that the fact that the petitioner claims to employ only a small number of employees with the beneficiary's exact knowledge and skills is not necessarily indicative of specialized knowledge, absent evidence that the knowledge is advanced relative to its workforce or to the industry at large.

In the brief submitted in the certification proceeding, counsel for the petitioner asserts that the beneficiary possesses specialized knowledge of the customized client application that he and his team enhanced in India, and will apply such knowledge to the U.S. end of the project. Counsel provides additional background information on the petitioner's off-shore/on-site business model, noting that customized systems developed for clients are often developed by its subsidiaries in India or Canada, and, once developed, installed, tested and refined on-site, usually at a client's place of business. Counsel states that the model requires off-shore employees to travel to the client site during critical phases of the project, and notes that the engineers who perform the off-shore development are best suited to transfer their knowledge to the on-site staff. Such employees are referred to as "rotationals" within the organization, and according to counsel, the company uses the L-1B classification primarily for these employees.

Counsel also provides additional background information regarding the petitioner's relationship with the client, noting that it dates back to 2000. Counsel states that the petitioning company developed the "Flood Gap" application for the client in April 2006 and has continually modified the application to adapt to the client's changing requirements. Counsel asserts that the beneficiary was assigned to the part of the client project "where he could utilize his mainframe skills and knowledge of software systems in the insurance industry," and now possesses in-depth knowledge of a very specific part of the project which now requires his services in the U.S., specifically, Flood Gap and the conversion of FailSafe to AutoSafe billing.

With respect to the claimed specialized knowledge, counsel asserts:

> [The beneficiary] has "special" knowledge of the company product in that he has detailed knowledge of the customized software that [the petitioner] has developed for a particular client. He has this "special" knowledge because he has been doing the development of that specific product on a daily basis for the past two years in [the foreign subsidiary]. . . .
>
> [The beneficiary's] knowledge is not only specific to [the petitioner], but it is specific to a particular part of the [petitioner's] project for this particular client. In short, he has

> specialized knowledge of a special customized product that was created by [the petitioner] in the first place. This is much different from knowledge of a product or system that is available on the open market, such as SAP. It is for this reason that [the beneficiary] fits into a narrow class of people with specialized knowledge about this particular product as it stands on the off-shore end in India. By definition, the only other people who would have this same kind of specialized knowledge would be the other members of the [petitioner's] team that have been working with [the beneficiary] in India.

Counsel emphasizes that the beneficiary is "not simply a skilled worker," although "there are many people with similar baseline technical skill sets." Counsel asserts that the beneficiary's two years of experience on a specific project have imparted him with the specialized knowledge that is needed in the United States, and indicates that the beneficiary will be rotated back to India to "complete the cycle of knowledge transfer" when his work in the United States is completed.

The petitioner has also submitted a letter dated February 18, 2009 from the foreign entity's Manager-Human Resources, [redacted]. [redacted] further describes the content of the work the beneficiary performed in India between February 2007 and February 2009. The foreign entity indicates that much of the beneficiary's time in India has been spent implementing the Flood Gap system for banks that partner with the client, and also supporting other banks that were already using the client's system. [redacted] states that some banks work with the client through Fail Safe procedures (using manual methods for billing, policy review, funding) and some use Auto Safe procedures, which are fully automated methods. He further explains:

> An essential part of the [petitioner's] project for [the client] has been to convert all the banks that partner with [the client] to Autosafe.... To convert a lender from Failsafe to Autosafe many parties will be involved. To begin with the lender/bank should be willing to enhance their systems to send/receive files to/from [the client's] systems. [The client's] systems need to be enhanced to send/receive files to/from banks and be able to decode the bank's response and issue/cancel the policies. [The client] outsources the IT work to [the petitioner] to enhance the systems whenever a new bank needs to be converted to the Autosafe billing method. [The petitioner's] development teams (both onsite and offshore) design, developed, test, and deploy these enhancements. [The beneficiary] was involved in all these phases from our offshore ADC at Hyderabad. A team of 3 people including [the beneficiary] are being involved in this conversion.

indicates that the process of converting all banking partners will take 12 to 15 months and that the beneficiary, in the meantime, has been enhancing the CCS system to ensure that the Flood Gap product is available to Failsafe billing lenders. In addition to the Flood Gap project, the beneficiary has supported other CCS applications that were developed by the petitioner.

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

Standard for Specialized Knowledge

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

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

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

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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.

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.

Analysis

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 requires an employee with specialized knowledge or that the beneficiary has specialized knowledge. While the petitioner has provided a detailed description of the beneficiary's duties, such duties are typical of a software engineer working with mainframe-based database technologies, and require him to use knowledge and technical skills which are widely available in the information technology industry, such as C, Cobol, JCL and CICS programming languages, IDMS and DB2 database management systems, and

mainframe system tools. Counsel for the petitioner acknowledged that "there are many people with similar baseline technical skill sets." Counsel and the petitioner assert, however, that some aspects of the position require project-specific knowledge that the beneficiary gained in India, as well as experience with the petitioner's processes and procedures, and therefore could not be performed by the typical skilled worker.

Therefore, the first question before the AAO is whether the beneficiary's knowledge of and experience with the petitioner's proprietary tools, processes and methodologies alone constitutes specialized knowledge. While the current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the beneficiary's knowledge be proprietary, the petitioner cannot satisfy the current standard merely by establishing that the beneficiary's purported specialized knowledge is proprietary. The knowledge must still be either "special" or "advanced." As discussed above, the elimination of the bright-line "proprietary" standard did not, in fact, significantly liberalize the standards for the L-1B visa classification.

Reviewing the precedent decisions that preceded the Immigration Act of 1990, there are a number of conclusions that were not based on the superseded regulatory definition, and therefore continue to apply to the adjudication of L-1B specialized knowledge petitions. In 1981, the INS recognized that "[t]he modern workplace requires a high proportion of technicians and specialists." The agency concluded that:

> Most employees today are specialists and have been trained and given specialized knowledge. However, in view of the [legislative history], it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees. The House Report indicates the employee must be a "key" person and associates this employee with "managerial personnel."

Matter of Colley, 18 I&N Dec. at 119-20.

In a subsequent decision, the INS looked to the legislative history of the 1970 Act and concluded that a "broad definition which would include skilled workers and technicians was not discussed, thus the limited legislative history available therefore indicates that an expansive reading of the 'specialized knowledge' provision is not warranted." *Matter of Penner*, 18 I&N Dec. at 51. The decision continued:

> [I]n view of the House Report, it cannot be concluded that all employees with any level of specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees. Such a conclusion would permit extremely large numbers of persons to qualify for the "L-1" visa. The House Report indicates that the employee must be a "key" person and "the numbers will not be large."

Id. at 53

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." USCIS must interpret specialized knowledge to require more than fundamental job skills or a short period of experience. 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 the L-1B classification.

The proprietary specialized knowledge in this matter is stated to include proprietary tools and methodologies developed by the petitioner for the management of the company's software and systems development projects. These tools and methodologies are said to include iPTS (a proprietary project management tool); Kadet (a proprietary SLA Compliance tool), as well as the petitioner's "proprietary" system design and quality management processes. The petitioner emphasizes that its quality procedures are SEI-CMM Level 5 certified, thus further setting apart its employees' knowledge from that generally possessed by similarly employed workers in the information technology industry. However, all IT consulting firms develop internal tools, methodologies, procedures and best practices for documenting project management, technical life cycle and software qualify assurance activities. It is also industry standard practice for such companies to seek SEI-CMM assessment of their processes and methodologies. The software Capability Maturity Model is not particular to the petitioner's organization.

Other than stating that its software development processes have been given the highest rating from the Software Engineering Institute, the petitioner did not attempt to explain how its processes and methodologies differ significantly from those utilized by other IT companies who have also adopted and followed the software CMM. The petitioner has not specified the amount or type of training its technical staff members receive in the company's tools and procedures and therefore it cannot be concluded that processes are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an experienced information technology consultant who had no prior experience with the petitioner's family of companies. 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. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

To the contrary, the minimal evidence submitted suggests that the petitioner's employees are not required to undergo any extensive training in the company's processes and methodologies. The petitioner indicates that the beneficiary completed 11 classroom-based courses, the majority of which do not appear to be clearly associated with the petitioner's claimed proprietary tools and processes. The petitioner has not provided certificates of completion or other evidence indicating the content and length of his classroom training, so it cannot be concluded that such training imparted him with specialized knowledge. Again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. However, it is evident that courses in written communication, global etiquette and achieving excellence are not directly related to the petitioning company's processes and procedures.

Rather, it is evident that the beneficiary was hired by the foreign entity with one year of insurance industry software application development experience and assigned to work on the offshore component of the client's CCS customization project in a role similar to the one he has been offered in the United States. While the petitioner made a reference to the beneficiary's on-the-job training, and indicated that it would take "over a year" to train another employee to perform the same duties, there is no indication that the beneficiary has not been fully performing the duties of the position since the date he was hired by the foreign entity. The

petitioner does not articulate or document how specialized knowledge is typically gained within the organization, or explain how and when the beneficiary gained such knowledge.

Based on the petitioner's representations, its proprietary processes and tools, while highly effective and valuable to the petitioner, are simply customized versions of standard practices used in the industry that can be readily learned on-the-job by employees who otherwise possess the requisite technical background in software and systems development and appropriate functional background for the project to which they will be assigned. For this reason, the petitioner has not established that knowledge of its processes and procedures alone constitute specialized knowledge.

The petitioner argues that the second, and most important, component of the beneficiary's purported specialized knowledge is his existing knowledge of the unaffiliated employer's CCS customization project, specifically, his experience with the implementing the Flood Gap application for both Auto Safe and Fail Safe lenders who utilize the client's services. Specifically, the petitioner indicates that the beneficiary's involvement in this project for over one year is indicative of his knowledge of the petitioner's products, services and techniques and their application in international markets. The beneficiary's familiarity with the unaffiliated employer's systems and requirements, while valuable to the petitioner, cannot be considered knowledge specific to the petitioning organization and cannot form the basis of a determination that he possesses specialized knowledge. All software development employees within the petitioning organization would reasonably be familiar with its proprietary internal processes and methodologies for carrying out client projects. Similarly, most employees would also possess project-specific knowledge relative to one or more international clients, which the petitioner would equate to knowledge of the application of the petitioner's methodologies and processes in international markets. However, the fact that the beneficiary possesses very specific experience with a particular international client project does not establish that the beneficiary's knowledge is indeed special or advanced.

In addition, even assuming *arguendo* that the beneficiary's familiarity with the client's systems could be considered "specialized knowledge," the petitioner claims that it has provided IT services to the client since 2000, has developed many applications to enhance the client's major systems (including the Flood Gap application), and has many ongoing onshore and offshore projects for the client . In light of this information, it is unclear how the beneficiary, who had worked as a team member on a single project for the unaffiliated employer for approximately 19 months, is considered to have "advanced" knowledge of the petitioner's processes and methodologies relative to the client's projects.

All employees can be said to possess unique skill or experience to some degree. Moreover, the proprietary qualities of the petitioner's process or product do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique process or product require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter. The fact that other workers may not have the same level of experience with the petitioner's methodologies as applied to one component of a specific client project is not enough to establish the beneficiary as an employee possessing specialized knowledge.

It is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making

process. *Matter of Colley*, 18 I&N Dec. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of LeBlanc*, 13 I&N Dec. at 816). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.*

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

The petitioner has not successfully demonstrated that the beneficiary's knowledge of the petitioner's processes and procedures gained during his 19 months of employment with the foreign entity is advanced compared to other similarly employed workers within the organization. As noted above, the petitioner's attempts to distinguish the beneficiary's knowledge as advanced relative to a specific client project are unpersuasive. All of the foreign entity's technical employees would reasonably have project-specific knowledge in addition to knowledge of the company's proprietary tools and processes for implementing projects. By this logic, any of them would qualify for L-1B classification if offered a position working on the same project in the United States. All employees can be said to possess uncommon and unique skill sets to some degree; however, a skill set that can be easily imparted to another similarly educated and generally experienced computer programmer is not "specialized knowledge." 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 AAO does not dispute the possibility that the beneficiary is a skilled employee who has been, and would be, a valuable asset to the petitioner. However, as explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by workers employed elsewhere. The beneficiary's duties and technical skills, while impressive, demonstrate that he possesses knowledge that is common among software specialists in the information technology consulting field. Furthermore, it is not clear that the performance of the beneficiary's duties would require more than basic proficiency with the company's internal processes and methodologies. The petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's processes is more advanced than the knowledge possessed by others employed by the petitioner, or that the processes used by the petitioner are substantially different from those used by other technology consulting companies. The petitioner has failed to demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. *See Matter of Penner*, 18 I&N Dec. at 52.

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary

should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. The record does not establish that the beneficiary has specialized knowledge or that the position offered with the United States entity requires specialized knowledge. Accordingly, the petition will be denied.

III. L-1 Visa Reform Act

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 in Irvine, California, but did not provide a street address. In response to Question 13 on the Form I-129 Supplement L, the petitioner answered "Yes" when asked: "Will the beneficiary be stationed primarily offsite (at the worksite of an employer other than the petitioner or its affiliate, subsidiary, or parent)?" The petitioner stated: "[The petitioner] is in the Business of providing custom software solutions and support, as a result development and support activities takes place at offshore in India and at the Client's sites."

In its letter dated September 2, 2008, the petitioner stated that the beneficiary will be based at the petitioner's office in Irvine, California, but also referred to "L-1B Offsite Employment" to take place in Irvine, California. In a separate letter, the petitioner stated that the beneficiary will be working "on-site" at the petitioner's office at 133 Technology Drive, Suite #200, Irvine, CA 92618.

The petitioner submitted a copy of a Consulting Services Agreement the petitioner executed with the client on July 1, 2004, which is valid through June 30, 2009. The agreement states that the petitioner "has expertise and experience in providing staff augmentation services in the United States and offshore project IT consulting and programming services from Company's application development centers in India." The agreement replaced a "Master Agreement for Temporary Employee Services" that was made in 1995, and discusses the "general terms and conditions" governing the contractual agreement between the parties. It does not provide specific information regarding the petitioner's obligations with respect to the client engagement to which the beneficiary has been and will be assigned.

Generally, the agreement provides that the petitioner is not required to perform services on the client's premises. However, the agreement indicates that, unless otherwise specified in the "applicable Statement of Work," the client shall provide work space, equipment, software, and other resources, including personnel, necessary for the petitioner's onsite consultants to perform its services. The agreement states that "unless otherwise mutually agreed and specified in the applicable Statement of Work, Company shall provide the facility space and workstations necessary for Company to deliver the Services from a Company owned or leased facility."

In the RFE issued on October 10, 2008, the director advised the petitioner that it had provided insufficient evidence concerning the location where the beneficiary will work and the conditions of employment. The director requested copies of contracts, statements of work, work orders, and/or service agreements between the petitioner and the client for the services or products to be provided.

In response the petitioner stated that the address of the client where the beneficiary would work is the petitioner's own office located at 133 Technology Drive in Irvine, California. There is also evidence in the record indicating that the client has an office in Irvine, California.

The petitioner re-submitted a copy of the Consulting Services Agreement entered with the client in 2004, but did not provide a copy of the Statement of Work that is specific to the project to which the beneficiary would be assigned, as requested by the director.

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

Counsel does not object to this determination, and notes in his brief that typically, the petitioning company will install, test and refine customized systems on-site, "usually at the client's place of business." In a letter dated February 19, 2009, the petitioner notes that "rotational employees" from India "need to come to the U.S. to continue the same project for the same client in person at the client site." The record also contains a chart outlining the roles of the client's and petitioner's project staff in the United States which indicates that the client must provide "required seating and desktops for the onsite team."

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. While the petitioner has an office in Irvine, California, it has not indicated that the director was incorrect in concluding that the beneficiary would work primarily at the client's Irvine location, and instead

seeks to establish that the beneficiary's placement does not fall under the restrictions of the L-1 Visa Reform Act.

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 on Form I-129:

> Employee shall be managed and controlled by [the petitioner's] Managerial staff. All duties are project based. [The petitioner] does not provide bodies to supplement staffing. Projects are developed by [the petitioner's] employees under the control of [the petitioner's] managers.

In its letter dated September 2, 2008, the petitioner stated the following with respect to the offsite employment:

> During his stay, [the beneficiary] will be working with a team that reports to [redacted], a Green Card Holder, who is stationed at Irvine, CA, USA. [redacted] will review the team's plans along with [the beneficiary] and his team. He will track the status against the plans on a weekly basis as well as on an event-driven basis. [redacted] is involved in determining the salary for people that are in [the beneficiary's] grade and designation. Further, he will be responsible for conducting [the beneficiary's] annual performance appraisal.

The petitioner attached an organizational chart for the project which indicates that the petitioner's U.S. project staff includes a project manager who has an L-1A visa, [redacted], who is an account manager, and a client relationship manager. The chart appears to show that the petitioner's project manager reports to the client's project manager, the account manager reports to the client's program manager, and the client relationship manager reports to the client's senior management.

As noted above, the petitioner submitted a Consulting Services Agreement which indicates that the petitioner provides both staff augmentation and offshore project IT consulting and programming services based out of India. The Statement of Work describes the procedures through which the client obtains staff augmentation services but notes that "all project Services performed pursuant to this agreement will be mutually agreed upon and described in a Statement of Work similar in content and format to the template Statement of Work" which is referred to as "Attachment A-1." The petitioner did not provide a copy of the referenced attachment, and more importantly, did not provide a copy of the Statement of Work for the client project on which the beneficiary will work in the United States. The general Consulting Services Agreement contains the following provision:

> 1.8 Control and Supervision. The applicable Statement of Work shall specify which party has primary project responsibility. If the applicable Statement of Work specifies that [the petitioner] has primary project responsibility, [the petitioner] shall be responsible for the control and supervision of its personnel. If the applicable Statement of Work specifies that [the client] has primary project responsibility and/or for all staff augmentation Services performed hereunder, [the client] shall be responsible for the technical direction of [the petitioner's] personnel and the overall quality and end result of such tasks.

The general Statement of Work also includes a "Right to Hire" provision which allows the client to hire certain Consultants who have been providing staff augmentation services in the United States for more than three months and less than nine months for a hiring fee. The provision does not apply to company project managers and onsite/offsite coordinators or to consultants performing services other than staff augmentation "unless otherwise specified in the applicable statement of work."

In the RFE, the director requested that the petitioner provide additional evidence that establishes that the beneficiary will be controlled and supervised principally by the petitioner.

In response, the petitioner reiterated that the beneficiary will be supervised by [redacted], an Account Manager employed by the petitioning organization, who will "review" the beneficiary and his team members.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be principally controlled by the petitioner and not by the unaffiliated employer. The director acknowledged the petitioner's statement that [redacted] will be supervising the beneficiary, but questioned the accuracy of such statements in light of the "Right to Hire" clause included in the Consulting Services Agreement made with the client.

Counsel for the petitioner objects to the director's conclusion and asserts that the "staff augmentation" services referred to in the Consulting Services Agreement do not apply to the beneficiary, and that he is included among the classes of exempt employees not covered by the right to hire clause. Counsel emphasizes that such staff include on-site/offshore coordinators and consultants performing services other than staff augmentation. Counsel explains that staff augmentation services refer to "stand alone workers," and not rotational employees who serve as a point of contact for offshore/onsite projects. The petitioner also submits a letter dated February 19, 2009 which further addresses the company's "rotational employee" model and emphasizes that such employees are not to be hired by U.S. clients, as well as a document titled "Using Staff on Rotation to Support our Business Model and Client Needs," which is dated January 2009, and outlines "positions that will qualify placement of L1 rotational employees."

Upon review, the petitioner has not established that the beneficiary will be controlled and supervised principally by the petitioner, and not by the unaffiliated employer. However, the AAO does not find that the "Right to Hire" provision in the petitioner's consulting services agreement with the client is clearly indicative of a situation in which the petitioner does not control the employee. The AAO is satisfied that the beneficiary's assignment is project-based and does not fall under the staff augmentation services provisions.

The major deficiency in the evidence submitted is the lack of a statement of work specific to the services the beneficiary will be performing for the client in the United States. As noted above, the general Consulting Services Agreement signed by the petitioner and client in 2004 specifically states that individual Statements of Work will be prepared for projects and that such Statements of Work will identify the work location and resources and "shall specify which party has primary project responsibility," and responsibility for control and supervision of personnel. The agreement indicates that not all project work performed for the client is controlled by the petitioner. Therefore, the submission of the Statement of Work for the project to which the beneficiary will be assigned is critical in determining who is ultimately responsible for his supervision. 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 the beneficiary will be supervised and controlled by an employee of the petitioning company is not corroborated by sufficient evidence.

Further, the AAO notes that the record contains an invoice dated October 13, 2008 issued by the petitioner for services rendered by the offshore Indian team in connection with the client's CCS project. The beneficiary is listed among the Indian employees who provided services related to the project. There is a notation on the invoice which indicates that this project is *not* controlled by the petitioning company. If this is the case, and the beneficiary will be assigned to the same project in the United States, then it is reasonable to believe that he would be subject to the control and supervision of the client with respect to technical issues and the quality of his work.

Finally, the petitioner indicated that [redacted]s supervision of the beneficiary will include review of the team's plans, tracking of the project on a weekly basis, determining the beneficiary's salary, and conducting a performance appraisal. Such tasks do not appear to amount to daily control and supervision of the services performed by the beneficiary.

Based on the foregoing discussion, 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. For this additional reason, 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 concluded that the placement of the beneficiary 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. The director concluded that "[t]he service the petitioner is providing is, essentially, programmers for hire to fine tune the client's already existing system and/or software rather than develop the petitioner's own software." The director further determined that the knowledge the beneficiary possesses "appears to be that of the petitioner's tools, procedures, and

methodologies to be applied to the client's existing program," and therefore, "the beneficiary's knowledge may only be tangentially related to the performance of the proposed offsite activity."

On appeal, counsel objects to the conclusion that the beneficiary's services constitute an arrangement to provide "labor for hire" for the unaffiliated employer, emphasizing that the beneficiary has specialized knowledge related to an offshore/onsite project developed by the petitioner for the client, and is not merely acting as staff augmentation. Counsel's arguments with reference to the beneficiary's specialized knowledge have been discussed at length above and will not be repeated here.

Counsel'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.

As discussed above, the petitioner has not submitted a copy of the Statement of Work governing the services to be provided by the beneficiary at the unaffiliated employer's worksite. The information contained in the record indicates that the petitioner is providing ongoing support for one of its client's major information systems, and that such support includes ongoing maintenance and development of applications to enhance the client's systems. There is no indication that the client contracted with the petitioner to implement any system, product, processes, or tools of the petitioning company within the scope of the services to be performed at the client's worksite.

Furthermore, as noted above, the invoice issued by the petitioner to the client for the offshore team's services indicates that the project being implemented is in fact managed by the client and not by the petitioner. Again, absent a copy of the applicable Statement of Work for this specific project to which the beneficiary will provide services, the petitioner's assertions remain uncorroborated.

Nevertheless, the petitioner has not shown that any of the products or services to be supported or enhanced will require the application of the petitioner's own technologies. The evidence of record does not support a conclusion that the beneficiary will be implementing, developing, maintaining, or supporting systems or software developed by the petitioning company, or providing a service that other information technology companies with comparable capabilities could not provide. According to the terms of the Consulting Services Agreement, any applications developed by the petitioner in performing services become the client's property. It is for this reason that the director found that the beneficiary's use of the petitioner's internal tools and methodologies would be "incidental" to the assignment. The primary purpose of the assignment is for the beneficiary to support, enhance and modify the client's internal systems. An unrelated 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 client.

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 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 beneficiary's project involves the application of the beneficiary's knowledge of a variety of mainframe and database technologies that are widely available in the industry.

Counsel indicates that the position does not involve labor for hire because the petitioner has been retained to provide specific project-related work. However, if the project-related work involves the unaffiliated employer essentially outsourcing many aspects of its IT support function to the petitioner, then the employees assigned to the client's project are not providing a product or service which necessitates specialized knowledge that is specific to the petitioning employer. The record indicates that the petitioner's employees will be provided with the client company's technical documentation and existing code, and the petitioner will utilize this information regarding the client's applications to perform the contracted services of maintaining, supporting, enhancing the client's applications, and implementing new functionalities. The petitioner has not identified any aspect of the beneficiary's position that would require him to apply specialized knowledge relating to the petitioning company's products, processes or other interests. The duties and requirements of the project employees appear to have been determined primarily by the client, and thus reflect the unaffiliated employer's interests, standards and requirements.

In conclusion, there is no evidence that the petitioner is providing the beneficiary's services in connection with the sale of any of its 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 IT services to the unaffiliated employer. The fact that such services appear to be delivered on a large-scale "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 the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The director's decision dated December 10, 2008 is affirmed. The petition is denied.