

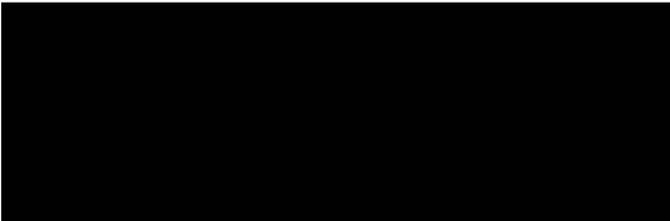
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090



U.S. Citizenship
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Services

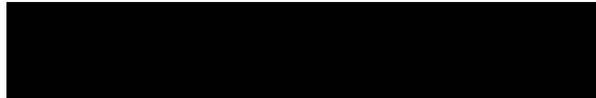
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File: WAC 08 147 55081 Office: CALIFORNIA SERVICE CENTER Date: JUN 30 2009

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:

SELF-REPRESENTED

INSTRUCTIONS:

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

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

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa and the matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition to employ the beneficiary as an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Massachusetts corporation, is engaged in software development and consulting services. 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 the worksite of Connecture, Inc. (hereinafter "the unaffiliated employer") in Waukesha, Wisconsin.

The director denied the petition on October 20, 2008 on two independent and alternative grounds. First, the director determined that the petitioner had failed to establish that the beneficiary possesses specialized knowledge or that he has been and would be employed in a capacity requiring specialized knowledge. Second, citing to the anti-"job shop" provisions of section 214(c)(2)(F) of the Act, as created by the L-1 Visa Reform Act of 2004, the director denied the petition as an impermissible arrangement to provide labor for hire.¹

On appeal, the petitioner asserts that the beneficiary possesses specialized knowledge of the petitioner's proprietary systems, best practices and infrastructure, and that his placement at the worksite of the unaffiliated employer is not an arrangement to provide labor for hire. The petitioner submits a detailed letter and additional documentary evidence in support of the appeal.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization. The petitioner must also demonstrate that the

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).

beneficiary seeks to enter the United States temporarily in order to continue to render services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

I. Relevant Law

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

For purposes of section 101(a)(15)(L), an alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a special knowledge of the company product and its application in international markets or has an advanced level of knowledge of processes and procedures of the company.

Furthermore, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

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

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if –

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

Section 214(c)(2)(F) of the Act is applicable to all L-1B petitions filed after June 6, 2005, including petition extensions and amendments for individuals that are currently in L-1B status. *See* Pub. L. No. 108-447, Div. I, Title IV, § 412, 118 Stat. 2809, 3352 (Dec. 8, 2004).

Due to the nature of the L-1 Visa Reform Act, the two issues raised by the director – whether the petitioner has established that the beneficiary possesses the requisite "specialized knowledge" and whether the requirements of the L-1 Visa Reform Act have been satisfied – are independent but legally intertwined. Prior to evaluating whether the L-1 Visa Reform Act applies, an adjudicator must determine whether the beneficiary is employed in a specialized knowledge capacity. If the beneficiary is not employed in this capacity, the petition may be denied on this basis and there is no need to address the requirements of the L-1 Visa Reform Act. Because the director reviewed both issues in a thorough and well-considered decision, and because counsel objects to both determinations, the AAO will nevertheless discuss both specialized knowledge and the elements of the L-1 Visa Reform Act. Upon review, the AAO concurs with the director's decision to deny the petition.

II. Specialized Knowledge

The first issue to be addressed 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 April 23, 2008. The petitioner indicated that the beneficiary has been employed by its Indian subsidiary since June 2005. In a letter dated April 21, 2008, the petitioner described the beneficiary's proposed duties as follows:

In the capacity of software engineer, [the beneficiary] shall participate in analysis and design as it pertains to specifications and development of applications for the Internet. This entails meeting with management to determine requirements and assisting in refinement of requirements leading to the development of technically feasible specifications. From specifications, he will participate in the difficult development, testing and documentation of the required Internet software.

Specifically, the duties would include, but not necessarily be limited to:

- Development of project plans
- Requirement and systems specifications
- Systems Design
- Performance Benchmark testing
- Development/coding

The petitioner emphasized the complex and professional nature of the duties and noted that the beneficiary is offered the position "by virtue of the combination of his formal education," which includes a master of computer applications degree from Uttar Pradesh Technical University, and "over four years of directly related experience."

The petitioner explained that the company solicits and manages major software and systems development efforts for United States corporate clients, and forwards development work to its Indian subsidiary which performs design, development, testing and documentation before returning software to the United States for installation and user acceptance. The petitioner noted that it requires the presence of key staff in the United States to support major client accounts.

In a second letter, also dated April 21, 2008, the petitioner explained that the unaffiliated employer is "the leading provider of enterprise sales automation systems to the healthcare insurance industry in the U.S.," and one of the petitioner's major accounts. The petitioner noted that, in 2007, the unaffiliated employer launched a market thrust to offer its products and services to mid-market providers, an effort which has required "significant repackaging enhancements to their base offerings and a new implementation approach." The petitioner stated that it has been engaged to assist the unaffiliated employer with this work and will require an onsite software engineer to provide liaison and direction to the offshore team.

The petitioner further described the beneficiary's role as the onsite software engineer for this client account as follows:

[The beneficiary] will be interacting with various employees of [the unaffiliated employer] in their Wisconsin engineering center to understand the new mid-market business requirements, analyze and estimate the entire development process, propose an architecture and design for the same in consultation with [the unaffiliated employer's] technical team and further manage the development and deployment of the product.

[The beneficiary] will also be responsible for determining the project estimates, which is very important and critical because that gives a clear direction to the remaining team members and also channels the complete development effort. While the estimation process is extremely complex, it is important that it is done correctly. . . .

[The beneficiary] will not only be actively involved with the client team, but also coordinating the development tasks with the offshore team. It is also important to mentor the offshore team as per the business scenarios existing at the client site. [The beneficiary] is

perfectly suited to this job because [he] has gained the requisite knowledge of client's business and understands the dynamics of distributed development.

The petitioner emphasized that the beneficiary currently leads a team of nine people assigned to the unaffiliated employer's account and has a good understanding of the unaffiliated employer's product. The petitioner noted that the unaffiliated employer has requested an increase in the size of the Indian development team and therefore the petitioner deems it necessary to assign the beneficiary to the United States to service the account. The petitioner indicated that the beneficiary will be responsible "to maintain the satisfaction level of the existing relationship with our client by assuring we deliver schedule compliance and high levels of software code quality." Finally, the petitioner emphasized that the beneficiary's assignment to the client site was "not because of [the unaffiliated employer's] demand but for our own purposes."

The petitioner submitted a copy of the beneficiary's resume, in which he summarizes his technical skills related to Java technologies (Java, RMI, Swing, JDBC, JDO, EJB, XML, JAXB); Web technologies (JSP, Servlets, Java Script); Windows operating systems; Database (SQL Server 2000, MS Access); IDE (Jbuilder, Eclipse, Power Designer); and WebServer (JBoss, WebLogic, Websphere). The resume highlights the beneficiary's years of experience in ERP solution development using Java technologies.

According to the beneficiary's resume, he has worked on two different projects for the unaffiliated employer during his tenure with the foreign entity. For one project, he implemented "Quoting, Requoting and Enrollment" components of the unaffiliated employer's "InsureConnect" insurance product suite for a "Small Group" client of the unaffiliated employer. The other project involved automating insurance functions for another "Small and Large Group" client of the unaffiliated employer.

The director issued a request for additional evidence (RFE) on June 4, 2008. The director requested, *inter alia*, a more detailed description of the beneficiary's duties abroad, and an explanation as to how the beneficiary's duties have been and will be different from those performed by the petitioner's other employees or by similarly employed workers outside the petitioning organization. The director also requested that the petitioner explain any special or advanced training completed by the beneficiary. The director advised that the initial evidence did not adequately demonstrate exactly what constitutes the beneficiary's specialized knowledge.

In a letter dated June 13, 2008, the petitioner further described the beneficiary's duties with the foreign entity as follows:

[The beneficiary] is a Software Engineer in India. He has been a very integral part of the offshore team and has provided valuable insight as a technologist on the [unaffiliated employer's] Account. He has been liaising with the business teams of [the unaffiliated employer's] Waukesha, Wisconsin engineering center to understand requirements, translating them into technical specifications and working with [the petitioner's] Indian based developers to implement the functionality. He has in-depth knowledge of [the unaffiliated employer's] business domain, proprietary framework and tools used.

The petitioner emphasized that the beneficiary has been managing a module of one of the unaffiliated employer's projects and "has gained tremendous knowledge of our customer's proprietary software technology, tools used." The petitioner explained that the beneficiary manages nine engineers responsible for UI Design, Databases, Workflow, Quality Assurance and Web Services, and is personally involved in high-level design, review of low-level design, implementation of complex functionalities, client interaction, team management and system administration. The petitioner further noted that the beneficiary not only understands the unaffiliated employer's product very well, but also has the skill to interact with its business representatives to understand and analyze their requirements.

In response to the director's request for an explanation regarding what distinguishes the beneficiary's training and experience, the petitioner noted that the beneficiary has a Master's degree in computer science, over four years of software development experience, extensive experience with the onsite offshore model of software product development, in-depth knowledge related to different Software Development Life Cycle Methodologies and processes, and strong technological/functional/process experience. The petitioner further noted that the beneficiary is an expert in software development using J2EE technologies, and has good to expert level knowledge in Java, Struts, RMI, Swing, JDO, EJB/JDBC, SQL Server and Oracle technologies, as well expertise in development and tracking tools, and knowledge of deploying transactional web applications. Finally, the petitioner stated that the beneficiary has gained "functional knowledge of [the unaffiliated employer's] suite of products.

The petitioner noted that it has two other employees assigned to the unaffiliated company's worksite in Wisconsin, but stated that they are assigned to different modules and do not have the knowledge of the core product that the beneficiary possesses. The petitioner once again emphasized that it is assigning the beneficiary to the client's site to "take care of our software development not because of our customer's demand but for our own purposes."

The petitioner's response included a copy of its consulting agreement with the unaffiliated employer, as well as a copy of the "project assignment appendix" specific to the beneficiary's assignment under the agreement, which was signed in June 2008.

The director denied the petition on October 20, 2008, concluding that the petitioner failed to establish that the beneficiary will be employed in a capacity involving specialized knowledge of the petitioner's products or any other specialized knowledge that is particular to the petitioning company.

On appeal, the petitioner asserts that the position offered "requires intimate understanding and experience with [the company's] offshore delivery model, the offshore team members and their respective capabilities as well as the [petitioner's] systems and best practices that are the basis for the success that our client's . . . products and services are seeing in the marketplace." The petitioner indicates that it has invested thousands of man hours in developing its own proprietary systems, best practices and infrastructure, and that the beneficiary's effectiveness is dependent on his knowledge of these proprietary assets and processes. The petitioner states that such assets "are not licensed or sold to [the unaffiliated employer] but are bundled into the technology services [the beneficiary] will be providing."

The petitioner indicates that these proprietary assets include "ProjectWorks" a "toolkit of customized templates, processes and procedures that are used to guide a software development effort." The petitioner stated that it has developed a "Software Product Development Maturity Model (SPDMM)" to "identify and address all significant dimensions of software product development." The petitioner indicated that SPDMM "defines design principles in 16 critical areas of enterprise software product architecture," and is used by the company as a roadmap for developing enterprise class software products.

The petitioner further stated that the beneficiary "will be supported while on-site by a very comprehensive set of . . . proprietary operational support applications called PIVOT." PIVOT includes applications for requirements management, change/defect/risk management, scheduling/task management, resource management, document management, test case management, collaboration, reporting and support.

Finally, the petitioner states that the unaffiliated employer has made use of the petitioner's proprietary product, Sandstorm, to assist in the evaluation of the scalability and performance of its insurance industry product. The petitioner described the product as follows:

Sandstorm is a proprietary software tool designed to provide web application load testing. Sandstorm is an automated load testing tool that helps predict system behavior and performance. It exercises an entire enterprise infrastructure by emulating thousands of users to identify and isolate problems. Sandstorm is written in Java, and is available to our clients under a unique usage based licensing arrangement.

The petitioner stated that the beneficiary "is expressly familiar with the systems, tools and [company] software products mentioned above, as well as the [unaffiliated employer's] products and clients, and the [petitioner's] offshore team he will be working so closely with." The petitioner further stated:

[The beneficiary] is critical and uniquely valuable to our ability to provide the support required for the client to be able to handle the volume of business growth they are experiencing. [The beneficiary] has been working with them since August, 2005 and has acquired a deep working knowledge of their complex health insurance industry, which is difficult and hard to find in the marketplace, and possesses sound software technology experience that makes him a uniquely qualified resource for this assignment. If compared to [the unaffiliated employer's] own employees, [the beneficiary] would be ranked among the most knowledgeable about our client's business.

The petitioner emphasizes that it has 70 engineers devoted to the unaffiliated employer's project, which generates close to \$3 million in revenues annually, and notes that it does not currently have anyone in the United States with the beneficiary's level of knowledge of the unaffiliated employer's software and the work that has been done by the Indian team. The petitioner asserts that it will be difficult for it to manage the client's expectations without the beneficiary's contributions.

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

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(I)(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 ERP solutions, and require him to use knowledge and technical skills which are widely available in the information technology industry, such as Java, web and database technologies. The petitioner asserts, however, that some aspects of the position require client-

specific knowledge that the beneficiary gained while employed by the foreign entity in India, and therefore cannot be performed by the typical skilled worker. The petitioner did not explain, however, how knowledge of an unaffiliated employer's proprietary products could be considered specialized knowledge related to the petitioner's organization. While such knowledge may be valuable to the petitioner in fulfilling its contractual obligations to the client, it does not fall within the statutory or regulatory definitions of specialized knowledge.

In addition, on appeal, the petitioner asserts for the first time that the beneficiary possesses, and the proffered position requires, specialized knowledge of the petitioner's own proprietary processes, systems and best practices. The petitioner, however, offers no explanation as to why these "proprietary assets," which include "ProjectWorks," "PIVOT," "SPDMM" and "Sandstorm," were not mentioned when describing the beneficiary's claimed specialized knowledge either at the time the petition was filed or when responding to the director's request for evidence, and the beneficiary makes no mention of such processes or systems in his resume. While the AAO does not doubt that the petitioner has developed internal methodologies and tools for carrying out software development projects, the petitioner's failure to mention these processes prior to the denial of the petition reasonably raises questions regarding their relative importance. If such proprietary knowledge is absolutely required to carry out the proposed job duties, then USCIS would expect it to be mentioned as a pre-requisite for the position and not revealed for the first time on appeal. Instead, the petitioner stated at the time of the filing that the beneficiary is qualified for the position based on his master's degree in computer science, his expertise in common software development tools, and his four years of related work experience. Furthermore, there is no evidence that the beneficiary has actually received training on or utilized the four "proprietary assets" mentioned while employed by the foreign entity. 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)).

Even assuming, *arguendo*, that knowledge of the petitioner's proprietary tools, processes and methodologies is required to perform the proposed job duties and that the beneficiary has such knowledge, the AAO must determine whether 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."

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. However, all IT consulting firms develop internal tools, methodologies, procedures and best practices for documenting project management, technical life cycle and software quality assurance activities. 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 customized standard software development practices. 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. 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.

To the contrary, when the petitioner was asked to distinguish the beneficiary's training from that of similarly employed workers within the company and in the industry at large, it highlighted the beneficiary's educational qualifications, industry experience, domain knowledge, expertise in J2EE and other common technologies, and functional knowledge of the unaffiliated employer's suite of products. The petitioner did not indicate that the beneficiary possesses relatively advanced knowledge of the petitioner's internal proprietary processes and procedures, and, as stated above, made no mention of any proprietary knowledge until after the petition was

denied. Furthermore, the petitioner has not articulated or documented how specialized knowledge is typically gained within the organization, or explained 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 would 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 suite of products for the healthcare insurance industry. Specifically, the petitioner indicates that the beneficiary's involvement with the unaffiliated employer's projects for approximately three years is indicative of his knowledge of the petitioner's products, services and techniques and their application in international markets. However, as stated above, 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.

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 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 client-specific knowledge in addition to knowledge of the company's internal 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 unparalleled 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.

According to the reasoning of *Matter of Penner*, work experience and knowledge of a firm's technically complex products, by itself will not equal "special knowledge."³ An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in L-1B classification. The term "special" or "advanced" must mean more than experienced or skilled. In other terms, specialized knowledge requires more than a short period of experience, otherwise, "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced 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 engineers 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.

³ As observed above, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge, and the general issues and case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. See 18 I&N Dec. at 50-53. (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

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 appeal will be dismissed.

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 Waukesha, Wisconsin. 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 record also contains a consulting agreement and project assignment appendix confirming the beneficiary's off-site employment at the unaffiliated employer's facility in Waukesha, Wisconsin.

Based on the petitioner's statements and the evidence of record, the AAO concludes that the beneficiary will

be primarily employed as a consultant at the worksite of an unaffiliated employer, thereby triggering the provisions of the L-1 Visa Reform Act. The petitioner 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:

[The beneficiary] will remain our employee and will report to us. We will be responsible for paying, hiring, firing, supervising and controlling the work of [the beneficiary].

The petitioner stated in its letter dated July 21, 2008 that the beneficiary is coming to work for the petitioner's own interests and not as a consultant for the unaffiliated employer. The petitioner emphasized that it has a development contract with the unaffiliated employer under which it will provide a finished product, as opposed to a consulting agreement.

The petitioner submitted a copy of a consulting agreement entered with the unaffiliated employer in July 2005, under which the petitioner was retained as an independent contractor "to perform consulting services with respect to software development" for the unaffiliated employer. The agreement indicates that the petitioner "shall perform the Services under the general direction of [the unaffiliated employer]," but shall determine the manner and means in which the services are accomplished.

In the RFE issued on June 4, 2008, the director requested, *inter alia*, evidence that establishes that the beneficiary will be controlled and supervised principally by the petitioner. The director advised that such evidence should include but is not limited to copies of contracts, statements of work, work orders, and service agreements between the petitioner and the unaffiliated employer for the services or products to be provided by the beneficiary.

In its letter dated June 13, 2008, the petitioner stated that the beneficiary will be controlled and supervised principally by the petitioning company and not by the unaffiliated employer, but did not further address this issue in its letter. The petitioner re-submitted a copy of its consulting agreement with the unaffiliated employer and attached a "Project Assignment Appendix" which addresses the beneficiary specifically. The agreement states:

[The petitioner is] to provide an onsite Software Engineer who will be responsible for specialized software engineering services and coordination of offshore work activities that will be under the direction of [the unaffiliated employer's] implementation services project director. Work will be performed on a time & materials basis according to [the unaffiliated employer's] defined assignments.

The beneficiary is to provide "periodic software engineering deliverables as mutually agreed by the parties." The unaffiliated employer will reimburse the petitioner for the beneficiary's services at a rate of \$65.00 per hour, and will be responsible for paying the beneficiary's relevant business expenses.

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 claim that the beneficiary would be principally supervised by an employee of the petitioner, but observed that there was no evidence in the record to substantiate this claim.

On appeal, the petitioner asserts that the beneficiary will be controlled and supervised principally by the petitioning organization and not by the unaffiliated employer. Specifically, the petitioner states that the beneficiary will be supervised by the foreign entity's Manager of Software Engineering, who is stated to supervise the entire offshore engineering team allocated to the unaffiliated employer's projects. The petitioner indicates that she and the beneficiary will communicate via formal status emails and conference calls. The petitioner indicates that the beneficiary will also be supervised by the U.S. company's Area Vice President who also serves as account manager for the unaffiliated employer.

Upon review, the petitioner has not submitted sufficient evidence to establish that the beneficiary will be principally controlled by the petitioning company.

The Form I-129 specifically requests that the petitioner "describe how and by whom the beneficiary's work will be controlled and supervised." The petitioner was also instructed to "[i]nclude a description of the amount of time each supervisor is expected to control and supervise the work." Despite the request for additional, specific evidence to establish this element of eligibility, the petitioner never provided these details or otherwise corroborated its statement that the beneficiary would report principally to the petitioning company prior to the adjudication of the petition. The petitioner's failure to submit the requested evidence precludes a material line of inquiry, and is grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Going on record without supporting evidence will not satisfy the petitioner's burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The AAO does not doubt that the petitioner maintains control over personnel issues such as salary and performance reviews, but the petitioner must still establish that the beneficiary's day-to-day work will be directly supervised and controlled by the petitioning company while he is based at the unaffiliated employer's worksite.

The only relevant documentary evidence submitted prior to the adjudication of the petition is the above-referenced "Project Assignment Appendix," which states that the beneficiary will work "under the direction of [the unaffiliated employer's] implementation services project director," and complete assignments that are defined by the unaffiliated employer. While the petitioner now identifies the names of the beneficiary's supervisors on appeal, one supervisor is located in India and the other is primarily a sales executive who appears to be based in California. It is evident that the beneficiary will not be supervised by an employee of the petitioning company at the unaffiliated employer's Wisconsin worksite.

Furthermore, the petitioner has not addressed the documentary evidence in the record which clearly states that the beneficiary will work under the supervision of the unaffiliated employer's implementation services project

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

Question 13 on the Form I-129 Supplement L asks the petitioner to "describe the reasons why placement at another worksite outside the petitioner, subsidiary, or parent is needed." In answering question 13, the petitioner is also instructed to "[i]nclude a description of how the beneficiary's duties at another worksite relate to the need for the specialized knowledge he or she possesses." In response to this question, the petitioner stated:

Participate in defining/identifying the solutions, better understand and communicate the requirements of the engagement to the team. Coordinate the development work and business unit liaison.

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 observed that "the service the petitioner is providing is essentially consultant/project managers for hire to modify the petitioner's client's IT system and/or [third]-party software and then communicate with offshore lead in modifying/fixing them." The director noted that "the beneficiary will be utilizing standard, and IT sector essential, project management tools and techniques so as to conform to the client's requirements, specifications and needs, rather than a unique software, firmware or hardware product that was/is conceptualized, designed, published, sold, maintained by the petitioner." The director concluded that "the specialized knowledge is not specific to the petitioner."

On appeal, the petitioner emphasizes that it does not provide individual engineers for hire or contract labor, and asserts that "all of our engineers remain as [company] employees, leveraging our infrastructure, our proprietary, repeatable 'ProjectWorks' process and best practices, and are supported by [the petitioner's] management system." The petitioner indicates that it provides clients with software product development work "under a strategic partnership." As discussed above, the petitioner has identified various internal processes, tools and methodologies on appeal, including SPDMM, PIVOT, ProjectWorks and Sandstorm. The petitioner states that the beneficiary's effectiveness in the offered position "is dependent on his knowledge of these proprietary . . . assets and processes," and that such processes will be "bundled into the technology services he will be providing."

The petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary's

placement at the unaffiliated employer's worksite is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

The petitioner must demonstrate in the first instance that the beneficiary's offsite employment is connected with the provision of the petitioner's product or service which necessitates specialized knowledge that is *specific to the petitioning employer*. If the petitioner fails to prove this element, the beneficiary's employment will be deemed an impermissible arrangement to provide "labor for hire" under the terms of the L-1 Visa Reform Act.

As previously discussed, the petitioner has failed to establish this element. With regard to the beneficiary's claimed knowledge, the petitioner has failed to describe with any clarity what constitutes the beneficiary's specialized knowledge, how such knowledge relates specifically to the petitioning company, or how this knowledge would be applied by the beneficiary in the course of fulfilling his assigned duties at the worksite of the unaffiliated employer. Rather, prior to the denial of the petition, the petitioner repeatedly emphasized the beneficiary's technical skills, formal education, and familiarity with the unaffiliated employer's own systems, processes, clients and personnel as being critical to his successful performance of the job duties.

The fact that the beneficiary would liaise with the petitioner's offshore team while assigned to the unaffiliated employer does not change the fact that the services he will provide do not require the application of specialized knowledge specific to the petitioning company. Based on the unaffiliated employer's requirements, the beneficiary is expected to rely on his understanding of the unaffiliated employer's core software products, interact with the client's users to understand requirements related to its products, understand the needs of the unaffiliated employer's clients, and make enhancements to the client's product. The petitioner has not shown that any of the products or services to be developed or supported will require the application of the petitioner's own technologies. The beneficiary will not 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.

As discussed above, the petitioner's claims regarding the importance of the petitioner's proprietary internal processes and methodologies were introduced for the first time on appeal and are not persuasive. While it is possible that the beneficiary here possesses knowledge that is directly related to both the petitioner and the unaffiliated employer's product or service, it is incumbent upon the petitioner to establish that the position for which the beneficiary's services are sought is one that primarily requires knowledge specific to the petitioner. Here, the petitioner has failed to provide corroborating evidence demonstrating that the beneficiary's placement with the unaffiliated employer is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. There is no evidence that the petitioner is providing the beneficiary's services in connection with the sale of any technology products or that the beneficiary's offsite employment requires any specialized knowledge specific to the petitioner's operations. The primary purpose of the assignment is for the beneficiary to support, enhance and modify the unaffiliated employer's software products. Any IT consulting company could likely provide an employee to deliver the exact same services, using its own internal project delivery tools and methodologies, and achieve the same results for the unaffiliated employer.

The petitioner suggests that the position does not involve labor for hire because the petitioner has been

retained to provide specific project work and not simply engineers for hire. However, if the "project related work" involves the unaffiliated employer essentially outsourcing entire software or IT support functions to the petitioner, then the employees assigned to the "project related work" are not providing a product or service which necessitates specialized knowledge that is *specific to the petitioning employer*. The consulting agreement submitted indicates that "All Work Product shall be deemed 'works made for hire' of which [the unaffiliated employer] shall be deemed the author."

In conclusion, the limited evidence in the record related to the nature of the contract indicates that the petitioner is providing software development services to the unaffiliated employer and that the beneficiary was chosen for the assignment because of his familiarity with the unaffiliated employer's products and personnel. 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 and the appeal will be dismissed 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 appeal is dismissed.