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



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

D7.

[REDACTED]

File: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: **AUG 20 2010**

IN RE: Petitioner: [REDACTED]  
Beneficiary: [REDACTED]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[REDACTED]

**INSTRUCTIONS:**

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner is engaged in computing and imaging solutions and services. It states that it is the parent company of the beneficiary's foreign employer, located in India. The petitioner seeks to employ the beneficiary in the position of test consultant for a period of three years, based at its office in Farmington Hills, Michigan.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he would be employed in the United States in a capacity requiring specialized knowledge.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the director erred by making a relative comparison between the beneficiary and the remainder of the petitioner's workforce and instead should have confined her examination to the knowledge possessed by the beneficiary. Nevertheless, counsel asserts that the beneficiary possesses specialized knowledge in the field of test automation and that such knowledge is rarely held within the petitioner's organization. Counsel submits a brief and additional evidence in support of the appeal.

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (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.

## **II. Specialized Knowledge**

The sole issue addressed by the director is whether the petitioner established that the beneficiary possesses specialized knowledge and that he would be employed in the United States in a capacity requiring specialized knowledge.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on January 28, 2009. The petitioner stated that the beneficiary has been working for its Indian subsidiary since February 2005 and that he will serve in the position of test consultant in the United States.

In a letter dated January 23, 2009, the petitioner stated that the beneficiary will be responsible for providing consulting services to internal company customers with regard to test automation. The petitioner described the petitioner's proposed duties as the following:

- Provide consultancy to internal [company] teams for test automation tools using HP Quick Test Professional (HP QTP), HP Quality Center and HP Load Runner;
- Design and develop Automation framework using HP Automation framework model;
- Develop Automation scripts using HP QTP and HP's Business Technology Optimization (BTO);
- Perform test projects using HP LoadRunner to develop Scripts;

- Prepare automated test cases/scripts using HP QTP, HP LoadRunner and HP Quality Center;
- Analyze application performance using HP LoadRunner and effectively communicate bottlenecks to [the petitioner's] development team;
- Implement HP Test process for new projects using HP Global Methods (GM) standards;
- Plan project activities, including the estimation effort and schedule required for performance testing using HP LoadRunner; and
- Develop customized HP software test cases using HP Quality Center.

The petitioner indicated that the beneficiary is currently employed as a technology consultant with its Indian subsidiary, where he is responsible for developing module test plans and planning test executions. Specifically, the petitioner stated that the beneficiary currently performs the following duties:

- Design and develop automation framework by using HP QTP with Java add-in;
- Derive regression test cases from used cases and executed Functional Automation testing with HP QTP;
- Defect management by setting up an HP Quality Center to handle HP's software test management;
- Develop Functions using Open Test Architecture (OTA) to connect HP Quality Center to fetch the test data;
- Perform Load Testing using HP LoadRunner with Java Record and Replay Protocol;
- Perform estimation using wideband Delphi Sheet estimation method and support the generation of HP LoadRunner scripts;
- Develop new tool for Asynchronous transactions Automation by integrating Silk Test and Java Application Program Interface's (API);
- Develop automated system test scenarios using Silk Test Tool;
- Design system test approach and involved in system test planning;
- Report bugs through WESTAR;
- Coordinate with onsite development team and offshore test team;
- Prepare test plan documentation, test case reviews and test case executions; and
- Perform System Integration Testing.

The petitioner stated that the beneficiary is qualified for the proposed position "[d]ue to his specialized knowledge of [company] specific software testing strategies including [the company's] proprietary testing tools HP QTP, HP Service Test, HP Business Process Testing, HP Quality Center and HP Loadrunner." The petitioner further explained the beneficiary's specialized knowledge qualifications as follows:

During his tenure with [the petitioning organization] he has developed a deep understanding of the complexities of [the petitioner's] suite of testing tools and with [the petitioner's] proprietary methods in project planning, site administration, requirement gathering, testing planning, test execution, defect tracking and software estimation techniques using HP Quality Center. [The beneficiary] has gained expertise in HP QTP which he uses for a functional test automation tools for Graphical User Interface (GUI) applications, framework design and

implementation. And, he uses HP Business Process Testing to test web-based design solutions that bridge the quality gap between subject matter experts and quality engineers. [The beneficiary's] knowledge is uncommon in the industry because of his ability to implement the automation suite of HP tools along with [the company's] test process and methodologies. His expertise in [the petitioner's] tools usage has helped him successfully deliver quality products aligned with [company] testing process standards. [The beneficiary] possesses the requisite specialized knowledge and technical expertise to successfully provide high quality test consultancy to internal [company] customers. He has successfully utilized [the petitioner's] testing tools to automate software testing, per [the petitioner's] global delivery application services testing framework, and has mastered [the petitioner's] global methods in project planning, and software estimation techniques.

The director issued a request for additional evidence ("RFE") on February 26, 2009, in which she requested, *inter alia*, the following: (1) an explanation as to how the duties the alien performed abroad and those he will perform in the United States are different from those of other workers employed by the petitioner or other U.S. employers in this type of position; (2) a detailed explanation of the equipment, system, product, technique or service of which the beneficiary has specialized knowledge, and information regarding whether it is used by other employers in the United States or abroad; and (3) an explanation regarding how the beneficiary's training or experience is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioner's in his field in comparison to others similarly employed by the petitioner. The director also requested organizational charts depicting the beneficiary's current and proposed positions, the number of employees currently working at his foreign and proposed U.S. worksites, the number of foreign workers assigned to the beneficiary's proposed worksite, and the number of persons holding the same or similar positions at the U.S. location.

In response to the RFE, counsel for the petitioner submitted a detailed letter dated April 6, 2009. Counsel cited to the regulatory definition of specialized knowledge at 8 C.F.R. § 214.2(l)(1)(ii)(D) and a 2002 legacy INS memorandum that provides guidance in the interpretation of the term "specialized knowledge." See Memorandum of Fujie Ohata, Assoc. Comm., INS, *Interpretation of Specialized Knowledge* (Dec. 20, 2002)(hereinafter "Ohata memorandum").

Counsel noted that the beneficiary has been employed by the petitioner's Indian subsidiary for four years, and has "exceeded expectations in leading a number of test automation projects," resulting in his receipt of nine "eAwards." Counsel stated that the beneficiary will be "the sole expert on the relevant test automation" to be stationed at the petitioner's Michigan location. The petitioner stated that the beneficiary has specialized knowledge of the following proprietary products:

- HP Quick Test Professional 10.0 is advanced, automated testing software for building functional and regression test suites. . . . [The beneficiary] has undergone extensive training in QTP 10.0 and has also been providing training to other [company] team members. [The beneficiary] has extensive knowledge in the process of integrating HP QTP with other tools as part of designing the automation framework. Additionally, please note that HP QTP is a [company] proprietary product which is not used by other employers in the United States.

- HP Load Runner 9.2 is a performance and load testing product for examining system behavior and performance, while generating actual load. Load Runner can emulate hundreds or thousands of concurrent users to put the application through the rigors of real-life user loads, while collecting information from key infrastructure components. . . . The results are then analyzed in detail, to identify and eliminate performance bottlenecks during the software development lifecycle. This application is crucial in reducing production downtime and improving application performance. Again, HP Load Runner 9.2 is an [company] proprietary product which is not used by other employers in [the] United States.
- HP Quality Center 10.0 software is an industry-leading, global quality management software solution. It allows technicians to manage the quality process for delivering high-quality applications efficiently and effectively. This proprietary software also stores all testing related artifacts such as test requirements, test cases and automation scripts. This version of the HP Quality Center is very new and requires specialized knowledge to implement optimally for new projects. [The beneficiary] has highly developed expertise in configuring and implementing this version of HP Quality Center. HP Quality Center 10.0 is also [a company] proprietary product which is not used by other employers in the United States.

In response to the director's request for information regarding any specialized or advanced duties performed by the beneficiary, counsel noted that the petitioner's Global Delivery Center has an "Independent Verification and Validation Practice which is mainly responsible for performing testing activities for various worldwide projects." Counsel indicated that the beneficiary is a "key member" of this team and has "highly-developed expertise in test automation" using the above-referenced core products for test management. Counsel stated that the beneficiary "will be responsible for the advanced duty of designing and developing an automation framework using [company] proprietary tools including HP Quality Center, HP Load Runner, and HP Quick Test Professional."

Counsel indicated that there are currently no employees at the Michigan location at which the beneficiary will be placed who perform the same or similar job duties relating to test automation. Rather, counsel indicated that the beneficiary will be automating test processes that have been done manually in the past. Counsel further stated that the beneficiary is "rare among technical experts because of his leadership experience in managing the [company's] test automation development and execution process." Counsel further explained as follows:

[The beneficiary] has worked for [the petitioning organization] for more than four years, and has been a dedicated software testing professional for more than six years. He has overseen and helped to build a wide range of testing regimes, including readiness testing for system configurations, as well as alpha, beta and acceptance testing. [The beneficiary] has undergone extensive classroom and job training in [the petitioner's] proprietary testing tools such as HP Quick test professional, HP Quality center and HP Load Runner.

Counsel went on to discuss in more detail the beneficiary's role with the foreign entity as a Module Lead (Automation Test Engineer) from February 2005 to January 2007. Counsel indicated that the beneficiary developed a module test plan, planned cycle-wide test execution, designed the system test approach, and worked with the Silk Test Tool to develop and analyze various automated system test scenarios. Counsel stated that during the rest of 2007, the beneficiary worked on multiple test automation projects for both internal customers and a client, during which time he used QuickTest Professional and Quality Center to automate the customers testing, and developed functions using an Open Test Architecture to create the most efficient mechanism of retrieving test data.

Counsel stated that more recently, the beneficiary served as a Test Automation Lead for a client project, in which he was responsible for preparing the automation test plan, the automation estimation document, and the automation process document, as well as the QuickTest Professional coding standards. Counsel indicated that the beneficiary trained his nine-member team on the QuickTest Professional tool. Finally, counsel stated that, most recently, the beneficiary served as Test Automation Specialist for another client project, where he was responsible for preparing the test plan document, test case execution, test case review, managing defects, and performing load testing using HP Load Runner.

Referring to the Ohata memorandum, counsel stated that "[the beneficiary's] specialized knowledge of [the petitioner's] procedures, technologies and methods, in combination with his superb expertise in general testing standards, compel a finding that his knowledge is noteworthy and uncommon," and "different from that generally found in the particular U.S. industry." In addition, counsel indicated that the beneficiary has served as a corporate trainer for the petitioner's clients in India, and has provided training on "how to select the correct type of automation framework, how to formulate test data strategy, and how to integrate software systems with [the petitioner's] Quality Center."

Counsel objected to the director's request for information regarding the job titles, types of visas held and number of foreign nationals working for the petitioner in the same location where the beneficiary will work, noting that the regulations governing L-1 petitions do not require "a showing that no other employees at the U.S. location are able, willing, qualified and/or available to perform [the beneficiary's] job." Regardless, counsel emphasized that no other employee stationed in the United States "has [the beneficiary's] unique combination of expertise on [the petitioner's] proprietary tools and testing methodology."

Finally, the petitioner submitted organizational charts for the U.S. and foreign entities which depict the beneficiary and his immediate line of command in each entity.

The director denied the petition on June 3, 2009 concluding 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 petitioner failed to demonstrate that the beneficiary's duties require knowledge or expertise beyond what is commonly held in his field. The director noted that mere familiarity with the petitioner's products, such as Load Runner, Quick Test Professional and Quality Center, does not constitute specialized knowledge.

The director further noted that the petitioner failed to provide information regarding the number of employees working at the beneficiary's current and proposed U.S. worksites, and the number of similarly employed

workers in the organization. The director concluded that the duties as stated appear to be those of a skilled worker.

On appeal, counsel asserts that the director's decision was based on an inappropriate application of law. Counsel, referring to the above-referenced Ohata memorandum and a 1994 legacy INS memorandum, emphasizes that the test for specialized knowledge involves only an examination of the knowledge possessed by the alien, not whether there are similarly employed workers in the United States." *See* Memorandum of [REDACTED], Acting Exec. Assoc. Comm., INS, "Interpretation of Special Knowledge," (March 9, 1994). Counsel emphasizes that according to the guidance provided in these memoranda, the petitioner must establish that the beneficiary's knowledge is noteworthy or uncommon, and different from that generally found in the industry, but does not have to establish that there are no U.S. workers available to perform the duties. Counsel asserts that in view of legal guidance on determining "specialized knowledge," the director erroneously applied the law in denying this petition.

Counsel emphasizes that the beneficiary "is one of very few employees within [the petitioner's] organization who possesses 'specialized knowledge' in test automation" and that such knowledge is "reflected by the proposed detailed job duties previously submitted to USCIS." Counsel states that the focus of USCIS' inquiry "should be on [the beneficiary's] knowledge solely." Counsel asserts that the petitioner established that the beneficiary is more than a mere skilled worker, and that "he will be employed for his ability to carry out a key process or function which is important to [the petitioner's] operation in serving its corporate clients."

Counsel also contends that, "[e]ven if USCIS were to make a relative comparison between [the beneficiary] and the remainder of [the petitioner's] workforce for purposes of determining 'specialized knowledge,' we would respectfully point out that the availability of other 'specialized knowledge' employees at [the petitioning company] does not preclude a finding that [the beneficiary] has 'specialized knowledge' of [the petitioner's] same or different product(s), service(s), equipment, or techniques." Counsel acknowledges that specialized knowledge is not "special" if it is possessed by everyone within the petitioning company. However, counsel states that, in this case, "very few individuals within [the petitioner's] organization possess the same type of 'specialized knowledge' as the beneficiary."

Counsel once again objects to the director's requests for information regarding the number of workers at the petitioner's U.S. and foreign locations, the number of foreign nationals employed at the U.S. location, and the number of similarly employed workers in the organization. Counsel asserts that "in using the line of inquiries to make the relative comparison between the beneficiary and the remainder of [the petitioner's] workforce, USCIS would necessarily presume that as long as there are other L-1B 'specialized knowledge' workers employed by [the petitioner] at the same U.S. location, and/or the fact that [the petitioner] employs other IT workers in both the U.S. location and India . . . [the beneficiary's] claimed 'specialized knowledge' in test automation is diminished or reduced to nil." Counsel contends that USCIS would also presume that other specialized knowledge workers must be working on the same company products and services, and would not allow that the beneficiary may be working on a different product of which he possesses specialized knowledge.

Counsel nevertheless indicates that he will respond to the inquiries, noting that the Indian subsidiary that employs the beneficiary employs approximately 4,700 workers comprised mostly of IT workers. Counsel

notes that such workers generally work in teams and specialize in different products, therefore, counsel asserts that "the number of workers does not diminish the fact that [the beneficiary] possesses 'specialized knowledge' in test automation – the type of knowledge rarely held by others within the [petitioner's] organization." Counsel notes that the petitioner has transferred a total of 128 L-1B workers to its Michigan office within the last five years, including 10 in the last twelve months who are still at the location.

Counsel states that the "[the beneficiary's] test automation skills constitute noteworthy and uncommon 'specialized knowledge' within [the petitioning] organization because he caters [the company's] proprietary products to different corporate clients (hence crating [sic] unique test automation solutions) for purposes of running test automation." Counsel asserts that the many advanced duties the beneficiary performed during his tenure with the foreign entity establish his specialized knowledge with the petitioner's test automation processes and proprietary testing software. Counsel reiterates much of the information that was contained in his response to the RFE, including a description of the petitioner's test automation products and descriptions regarding the duties the beneficiary performed while employed by the foreign entity.

In support of the appeal, the petitioner submits copies of four eAward certificates awarded to the beneficiary "for his consistently excellent performance in test automation." The certificates are for: "conducting the QTP WebServices workshop for Symatec"; "successful delivery of CPGT Regression Testing project on time and with good quality, using HP Quick Test Professional"; "successful completion of a Test Automation Project using HP Quick Test Professional and HP Quality Center"; and "for successful completion of Shaw Cable Test Automation using HP Quick-Test Professional."

The petitioner also submits evidence of training completed by the beneficiary, including the following courses:

- CBT Download – QuickTest Professional 9.5 Web Services Add-in
- Exam HP0-M81 Implementing HP Quality Centre Software
- HP Equity (Stock) Program Basic Training
- Introduction to VuGen 9.0 Click and Script (WBT)
- Mercury – Business Process Testing 9.0 for Automation Engineers
- QuickTest Professional 9.5 Web Services Add-in (WBT)
- Using QuickTest Professional 9.2 (WBT)
- Web-based – QuickTest Professional 9.5 Web Services Add-in

The records indicate that the beneficiary registered for these self-paced, web-based courses between October 2007 and July 2009. The "date marked complete" for the various courses is April 25, 2009 for some courses and July 1, 2009 for others. The petitioner also submits course training materials for the QuickTest Professional 9.5 Web Services Add-in Overview. According to these materials, the course is intended for QA Testers and Business analysts with basic knowledge on QTP, XML and Web Services.

Upon review, the petitioner has not established 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).<sup>1</sup>

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

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

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

Third, a review of the legislative history for both the original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L) of the Act intended that the class of persons eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act

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<sup>1</sup> 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.

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 (3<sup>rd</sup> 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, 91<sup>st</sup> 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 description of the services to be performed sufficient to establish specialized knowledge. *Id.* At a minimum, the petitioner must articulate with specificity the nature of the claimed specialized knowledge.

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. The petitioner indicates that the beneficiary's duties as a test consultant specializing in automating testing will make extensive use of the petitioner's proprietary automated testing framework and proprietary products such as HP QuickTest Professional, HP LoadRunner and HP Quality Center, as well as the petitioner's internal processes and procedures for implementation of test automation projects, and therefore could not be performed by the typical skilled worker in the test automation or software quality assurance field.

Therefore, the first question before the AAO is whether the beneficiary's knowledge of and experience with the petitioner's proprietary products 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 the products HP QuickTest Professional, HP LoadRunner, and HP Quality Center, as well as "proprietary methods in project planning, site administration, requirement gathering, testing planning, test execution, defect tracking and software

estimation techniques." While the AAO does not doubt the beneficiary's expertise with the above-referenced proprietary products, the petitioner has not established that such knowledge is "proprietary" in the sense that it is exclusive to the petitioner's organization, or that it is uncommon in the field of automated testing. The petitioner has not provided any corporate documentation or product information beyond the statements made in counsel's supporting letters. However, the AAO notes that the evidence of record indicates that the petitioning company offers training courses to persons outside the organization, as the beneficiary was recognized for delivering training in QTP Webservices to Symantec. The petitioner also describes its HP Quality Center software as "an industry-leading, global quality management software solution," thus suggesting that the software is in fact available outside the company and used and implemented by other organizations.

A review of the petitioner's corporate web site reveals that it is possible for the petitioner's employees, partners, and customers to earn the technical certifications of Accredited Integration Specialist (AIS), Accredited Systems Engineer (ASE) and Master ASE. See "HP Certified Professional Program," [http://www.hp.com/partnerlearning/certified\\_professional\\_program\\_intro.html](http://www.hp.com/partnerlearning/certified_professional_program_intro.html) (accessed on August 12, 2010). These certifications include ASE – HP Load Testing using Load Runner v9, ASE – HP Quality Center v10 Implementation, and ASE – Functional Testing Using HP QuickTest Professional v10. See "Newest Certifications – North America," [http://www.hp.com/partnerlearning/newest\\_certifications\\_na.html](http://www.hp.com/partnerlearning/newest_certifications_na.html) (accessed on August 12, 2010). Counsel's statements that Load Runner, QTP and Quality Center are not used by other employers in the United States appear to be inaccurate as access to training and certification in such products is not restricted to the petitioner's company. The products themselves are available for download from the petitioner's website. See "HP LoadRunner Software - Prevent costly performance problems in production with integrated software performance testing tools," [https://h10078.www1.hp.com/cda/hpms/display/main/hpms\\_content.jsp?zn=bto&cp=1-11-126-17%5E8\\_4000\\_100\\_\\_](https://h10078.www1.hp.com/cda/hpms/display/main/hpms_content.jsp?zn=bto&cp=1-11-126-17%5E8_4000_100__) (accessed on August 12, 2010).

While there are certainly other test automation and quality assurance products on the market, the petitioner has not established that the beneficiary's knowledge of the petitioner's testing and quality management products is uncommon or noteworthy among test automation experts.

The petitioner also states that the beneficiary possesses knowledge of "proprietary methods in project planning, site administration, requirement gathering, testing planning, test execution, defect tracking and software estimation techniques." Although the petitioner names "Global Methods" and "Business Technology Optimization" processes or methods the beneficiary will use in carrying out his duties, the petitioner offers no additional explanation or evidence pertaining to these claimed proprietary methods. 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)).

However, all IT consulting firms develop internal methodologies, procedures and best practices for documenting project management, 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. The petitioner has not specified the amount or type of training its technical staff members receive in the company's methods and procedures and therefore it cannot be concluded that the petitioner's 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.

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 has documented the beneficiary's completion of seven web-based courses in the implementation of products relevant to his job duties and completion of one exam in implementing Quality Center software. Although counsel refers to the beneficiary's extensive classroom and job training, only these few web-based, self-paced courses are documented in the record, and, based on the information provided, they were completed subsequent to the filing of the petition in January 2009. None of the beneficiary's documented training appears to have been concentrated on the company's internal methodologies or processes. 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 other than through his regular employment duties.

Even assuming *arguendo* that the beneficiary's knowledge of the petitioner's QTP, LoadRunner and Quality Center products could be considered "specialized knowledge," it appears that the beneficiary did not even begin using these products until sometime in 2007 and it has not been established that his knowledge of the products is advanced within the petitioner's organization. The petitioner's description of the duties the beneficiary performed during his first two years with the foreign entity contains no reference to these products. Rather, the petitioner states that the beneficiary worked with Silk Test Tool in carrying out his automated test projects. While the petitioner indicates that the beneficiary has performed advanced duties involving QuickTest Professional and LoadRunner since the end of 2007 for two different client projects, the petitioner has provided little context regarding the team on which the beneficiary has worked or the size and scope of the Global Delivery Center's Independent Validation and Verification Practice sufficient to support its assertion that the beneficiary is a key member of such practice. As noted above, the organizational charts the petitioner submitted in response to the director's request for evidence show the beneficiary and his direct line of supervision, but provide no information regarding who else may be on his team or what positions they hold.

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 or more components 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 and job assignments, 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 products and 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 supported counsel's assertions that the beneficiary's knowledge of HP QuickTest Professional, HP LoadRunner, or HP Quality Center, and the ability to implement these technologies on a project basis, "is rarely held by others within [the petitioner's] organization." The director specifically requested evidence establishing that the beneficiary's knowledge is "uncommon, noteworthy, or distinguished by some unusual quality" and is not generally possessed by others in the beneficiary's field of endeavor. The director also requested an explanation addressing how the beneficiary's training or experience distinguishes him from others employed by the petitioner. The petitioner's response to the RFE barely addressed these specific requests.

Given the nature of these products and their prevalence in the automated testing field at large, the AAO finds the petitioner's unsupported claims that such knowledge is "rarely held" within the company to be insufficient to establish that the beneficiary's knowledge should be considered specialized or advanced. As noted above, knowledge of the QTP, LoadRunner and Quality Center products alone has not been shown to constitute specialized knowledge.

The petitioner has 172,000 employees worldwide, many of which are technical specialists with specific areas of expertise. All of the organization's technical employees would reasonably have product and project-specific knowledge which would set them apart from other employees who work in other departments or teams. By this logic, any of them would qualify for L-1B classification if offered a position working with the same products or types of projects in the United States. The fact that the beneficiary may have two years of experience with the above-referenced products, while another technical employee may have the same amount of experience with different company products in a different functional domain does not establish that both employees have "specialized knowledge" as contemplated by the statutory and regulatory definitions.

Such a standard for specialized knowledge would be overbroad and untenable, since it would allow the petitioner to transfer any employee with one or two years of experience with a specific product to the United States in the L-1B classification. The petitioner has opted not to provide any information regarding the number of similarly employed workers with knowledge in the petitioner's automated test products, but does acknowledge that it has an entire practice within the foreign entity devoted to Independent Verification and Validation and indicates that the beneficiary is included in this practice. It is reasonable to believe, and has not been shown otherwise, that the beneficiary's knowledge is both common and generally known by a large number of similarly employed workers within that practice, notwithstanding his "lead" role in one project.

Furthermore, as noted above, it is possible to become an accredited certified professional in the petitioner's products without working for the petitioning organization.

By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." *Matter of Penner*, 18 I&N Dec. at 53. The terms "special" or "advanced" must mean more than experienced or skilled. Specialized knowledge requires more than a relatively short period of experience, such as two years, otherwise "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits. If everyone is specialized, then no one can be considered truly specialized.

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. As the petitioner has failed to document any special or advanced qualities attributable to the beneficiary's knowledge beyond vague, unsupported statements regarding the relative rarity of the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "specialized knowledge" employee. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced professional or that he has received any degree of special training in the company's methodologies, products, or processes which would separate him from other professionals employed with the foreign entity. It is simply not reasonable to classify this employee as an alien with special knowledge of the company product and its application in international markets or an advanced level of knowledge of the processes and procedures of the company.

Finally, regarding the petitioner's reliance, in part, on the [REDACTED] memorandum, it must be noted that in making a determination as to whether the knowledge possessed by a beneficiary is special or advanced, the AAO relies on the statute and regulations, legislative history and prior precedent. Although counsel suggests that USCIS is bound to base its decision on the above-referenced [REDACTED] memorandum, the memorandum was issued as guidance to assist USCIS employees in interpreting a term that is not clearly defined in the statute, not as a replacement for the statute or the original intentions of Congress in creating the specialized knowledge classification, or to overturn prior precedent decisions that continue to prove instructive in adjudicating L-1B visa petitions. The AAO will weigh guidance outlined in the policy memoranda accordingly, but not to the exclusion of the statutory and regulatory definitions, legislative history or prior precedents.<sup>2</sup>

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

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.

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

**ORDER:** The appeal is dismissed.

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*Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004).

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