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**U.S. Citizenship
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File: WAC 06 111 51214 Office: CALIFORNIA SERVICE CENTER Date:

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:

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).

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1B nonimmigrant intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, states that it provides technical training to software developers. The petitioner claims to be the parent company of the beneficiary's foreign employer, DevelopMentor UK Ltd., located in the United Kingdom. The petitioner seeks to employ the beneficiary in the position of Technical Trainer – Guerilla SQL for a three-year period. The petitioner indicates that the beneficiary will be assigned to the business location of Microsoft Corporation (hereinafter, "the unaffiliated employer").

The director denied the petition on two separate grounds. First, the director determined that the petitioner had failed to establish that the beneficiary possesses specialized knowledge or that he 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 The director found that the beneficiary's placement with the unaffiliated employer was not associated with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Thus, the director determined that the beneficiary is not eligible for employment at the unaffiliated employer's worksite pursuant to the provisions of the L-1 Visa Reform Act.

On appeal, counsel for the petitioner asserts that the beneficiary has specialized knowledge of the petitioner's processes and procedures, which were in part developed by the beneficiary, and not those of the unaffiliated employer. Counsel emphasizes that the petitioner's processes are copyrighted and that knowledge of such processes alone "should rise to the level of proof of specialized knowledge beyond a reasonable doubt."

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).

Counsel further states that the beneficiary's placement at the worksite of the unaffiliated employer is a placement in connection with the provision of service for which specialized knowledge specific to the petitioning organization is necessary, and not simply "labor for hire" as suggested by the director. Counsel submits a brief in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within the three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

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.

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.

I. Specialized Knowledge

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

The petitioner filed the nonimmigrant petition on February 23, 2006. In a letter dated February 16, 2006, the petitioner described the beneficiary's proposed duties as follows:

The position of Technical Trainer – Guerilla SQL offered to [the beneficiary] in the U.S. is an occupation requiring knowledge of [the petitioner's] training materials, procedures and instruction methods, including our Unity Software training platform. In selecting and preparing specific course materials, he will be required to analyze project requirements and to implement specific teaching solutions to meet student goals and corporate client objectives. [The beneficiary] will have full authority in conducting the courses he will teach and will receive only general supervisory feedback from [the petitioner's] Chief Operating Officer.

With respect to the beneficiary's qualifications, the petitioner noted that prior to joining the foreign entity in 2000, the beneficiary earned a bachelor's degree in computer science and was self-employed for ten years as a software development consultant, during which time he obtained a "solid understanding" of Microsoft's SQL server. The petitioner provided the following description of the beneficiary's foreign employment:

[The beneficiary] has worked for [the foreign entity] as an Instructor since January of 2000 without interruption. In his work to date, he has worked closely with clients both as an instructor and as a creator of customized training curriculum, incorporating our teaching methods with the latest developments in technology to create effective training programs for our customers. His specific focus has been on SQL server and he has received specific training on this technology from Microsoft and has played a direct role in designing and developing our propriety [*sic*] Unity Software community training software platform. He is currently the only person in our Company at this time who can fill this specific role.

The petitioner explained that the U.S. and foreign entities provide in-depth training for software developers, using a curriculum written by its own technical team, and "based upon the most current information available from our direct industry sources." The petitioner noted that its instructors utilize "proprietary training materials and methods, including our Unity Software community training platform," which the petitioner claimed is in the process of being copyrighted. The petitioner described its services as follows:

We offer both standard courses as well as programs specifically tailored by our curriculum developers to the stated needs of our corporate customers

Specifically, we are regularly requested by Microsoft Corporation to construct training programs with their development teams to prepare for pre-release training. Prior to the release of new Microsoft software applications, [the petitioner] will already have a team of trainers in place to train high-level users in the newest feature of the released product, which is an enormous benefit to Microsoft. Due to the high level of knowledge required to cover just one product, our team members are application specific. This means that we do not have a fungible group of trainers. Instead, we must move personnel around the world as needed to address a specific course offering or training request.

The petitioner submitted copies of advertisements for its training programs, published in professional journals, and copies of press releases addressing the company's curriculum highlights and status as a Microsoft Certified Partner for Learning Solutions (CPLS).

On March 8, 2006, the director requested additional evidence. The director requested further evidence establishing that the beneficiary has specialized knowledge and, specifically, documentary evidence to establish the beneficiary possesses knowledge above that which other technical trainers employed by the foreign organization and the U.S. organization normally possess. The director also requested documentary evidence that clearly describes the training project to which the beneficiary will be assigned, his role, the environment in which he will be working, the hardware and software to be used, and an explanation, in laymen's terms, as to how and why the assignment requires the beneficiary's knowledge of the petitioner's tools.

In a response received on May 31, 2006, the petitioner submitted a letter and supporting documentary evidence. The letter further described the beneficiary's claimed specialized knowledge as follows:

[The beneficiary] has played a critical role in building [the petitioner's] worldwide training services in the SQL 2005 and database curriculum area.

[The petitioner] specializes in creating and delivering training on technologies before they are even released to the public. In March of 2004, [the beneficiary] and his database team developed the first training course on SQL 2005 which at the time was still 18 months from being released to the public. This could only be accomplished by having developers like [the beneficiary] working directly with Microsoft developers at Microsoft research facilities.

Microsoft has several stages of development and release of their products. In the early TAP phase there are only 5-10 vendors worldwide who are allowed to work closely with the development teams. Each of those vendors has a unique specialty which brings value to Microsoft through their involvement. Of the 5 TAP vendors for SQL 2005, [the petitioner], through [the beneficiary], was the only training organization chosen. The next phase of the cycle is known as Ascent where the product is test bedded, internal groups are trained and Microsoft Partners are trained on the pre-release product worldwide. . . .

In prior versions of SQL and its competitors like Oracle, there were separate job functions for database administration and writing software that utilized that database. The SQL 2005 product is a unique product from the standpoint that it allows software development programmers to utilize the Visual Studios 2005 programming features natively to program the SQL 2005 database. This means that to take advantage of the new product the user must have both database administration skills and software development skills. Currently out of our 50 instructors, [the petitioning organization] has only two staff members that meet these criteria: [a U.S. employee] and [the beneficiary].

In June 2004, [the beneficiary] and co-authors were the first to publish a book about the new SQL product called [REDACTED]

The information in this book was the basis for [the petitioner's] current SQL 2005 courses.

The beneficiary has been an active member of the Microsoft technical community and was awarded Microsoft Value Professional status for OLE DB and ADO – there are only 3000 MVP's worldwide and only about 200 in the database specialty. He is also a member of the 15,000 member Professional Association for SQL Server (PASS) and has been chosen as one of only 12 speakers for their November 2006 conference.

In the past year [the beneficiary] has specialized in delivering in depth technical training based on SQL Server 2005 in multiple locations in Europe, Middle East and Asia. His audience is specifically Microsoft and other multinational organizations preparing them to develop and deploy this new product.

In support of its response to the director's request for evidence, the petitioner submitted: (1) evidence that the beneficiary was a co-author of [REDACTED] (2) organizational charts for the foreign and U.S. entities, identifying all of the company's full-time and contract instructors by specialty; (3) a copy of an independent contractor agreement, dated June 1, 2004, between the petitioner and Microsoft Corporation, through which the petitioner was hired to create course material and training curriculum for "SQL Server 2005 Developer Training" to be used for a five-day instructor-led training workshop, and to be videotaped and edited by Microsoft for the purpose of electronic redistribution to partners, customers and internal audiences, as well as performing other services related to SQL Server 2005 training; and (4) copies of e-mail messages intended to confirm the beneficiary's "specialized and unique qualifications among Microsoft Valued Professionals worldwide and invitations ... to give courses in countries including the U.K., India, Germany, Australia, and Korea."

The director denied the petition on June 14, 2006. The director determined that the beneficiary has been and would be working "on a product that is used to conform to the client's specifications in this case Microsoft, rather than a product exclusive to the specifications of the petitioner." The director found that the skills described for the beneficiary would not require a specialized knowledge that surpasses the ordinary or usual knowledge held commonly throughout the industry." The director further determined that while the beneficiary possesses knowledge of how to perform his duties competently, "that knowledge cannot be considered to be an advanced level of knowledge of the processes and procedures of the petitioning entity." Specifically, the director observed:

The record does not establish that the beneficiary has an unusual, advanced, or specialized knowledge of the petitioning organization that would be gained only by the completion of substantial or extensive specialized training, education, or experience directly related to the duties of the proffered position. The petitioner has not demonstrated that the parent company's teaching techniques are so unique and out of the ordinary that their implementation requires specialized knowledge. The beneficiary's experience with the parent company has not been shown to constitute specialized knowledge. It is concluded that the

petitioner has not established that the beneficiary is eligible for classification as an alien coming to perform the service [*sic*] involving specialized knowledge.

On appeal, counsel for the petitioner disputes the director's decision and asserts "it is unclear why the Citizenship and Immigration Services (CIS) views proprietary, copyright protected material not to be specialized. Having a patented, copyright protected or otherwise recognized proprietary property right in a product, idea or process should rise to the level of proof of specialized knowledge beyond any reasonable doubt." Counsel emphasizes that the beneficiary was the author of [REDACTED]

[REDACTED] "which confirms his specialized knowledge in providing high-level instruction to software developers."

Counsel asserts that the beneficiary's knowledge is not limited to information obtained from Microsoft, noting that the petitioner specializes in creating and delivering training on technologies before they are even released to the public. Counsel further states that, rather than simply passing on knowledge obtained from Microsoft, the beneficiary must be able to explain the technologies to program developers, who will use it at other companies. Counsel claims that the beneficiary and "the database team" developed the first training course on SQL 2005 a full 18 months prior to the release of the technology to the public. Counsel contends "[the beneficiary's] essential knowledge is his instruction and teaching methods. These are clearly proprietary and can be found in his copyright protected book."

In addition, counsel asserts that the U.S. position requires knowledge of the petitioner's training materials, procedures and instruction methods, including the "Unity Software training platform." Counsel notes that the beneficiary is one of two persons within the petitioner's organization qualified for the position offered, and is "not a skilled body, interchangeable with one of any other numbers of employees or persons from within the general pool of SQL instructors."

Counsel further objects to the director's citation to pre-1990 law which applies the "key personnel" standard, and requests that USCIS apply the current statutory definition of "specialized knowledge" pursuant to section 214.2(c)(2)(F) of the Act, rather than a dictionary definition or the "key personnel" standard. Counsel asserts that based on the clear statutory definition, the beneficiary "is providing a copyright protected service, as allowed under the law as passed by Congress." Counsel states that the director failed to make any mention of the book written by the beneficiary or the high salary offered to him as evidence that "he is not just an 'average' cog-in-the-machine low level worker."

Finally, counsel objects to the director's assertion that the beneficiary's knowledge is "held commonly throughout the industry." Counsel emphasizes that the beneficiary "is one of a select handful of persons with specialized knowledge of SQL" who possesses skills that are not widely available throughout the U.S. and "his instruction to leading-edge professionals in the field is not comparable to weekend community college classes for persons just learning how to turn on a computer."

Upon review, and for the reasons discussed herein, the petitioner has not established that the beneficiary possesses specialized knowledge or that the beneficiary would be employed in the United States in a capacity requiring specialized knowledge.

A. Standard for Specialized Knowledge

As enacted by the Immigration Act of 1990, 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.

Looking to the plain 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 as to what constitutes specialized knowledge to the nature of the term itself:

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." Although counsel objected to the director's reference to a dictionary definition, it should be noted that, 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.

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 former INS definition is equally illuminating when applied to the definition created by Congress.

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 be within an elevated class of workers within a company and not that of an ordinary or average employee. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 14.

Third, a review of the legislative history for both the original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L) of the Act intended that the class of persons eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." *Id.* This legislative history has been widely viewed as supporting 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).

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 legacy 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)).

In effect, Congress has charged the agency with making a comparison based on a relative idea that has no plain meaning. 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). 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.

Counsel asserts that USCIS may not cite to a pre-1990 "key personnel standard," in adjudicating the petition, and instead must rely on the term "specialized knowledge" as "clearly defined" at 8 C.F.R. § 214.2(l)(1)(ii)(D). However, 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 legacy 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 that 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."

[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."

Matter of Penner, 18 I&N Dec. at 53.

Finally, it is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary's knowledge to 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 classification 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.*

Although counsel objects to the director's reliance on any law or legislative history that pre-dates the 1990 Act and the statutory definition of specialized knowledge, counsel has not pointed to any committee report or floor statements that undermine the statement of the original enacting Committee that admissions "will not be large" and that the category will be "carefully regulated and monitored" by USCIS. The legacy INS precedent decisions continue to serve as binding agency precedent decisions and may be cited, when applicable. See 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). Furthermore, the precedent decisions that pre-date the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge. The director's citation to precedents that predate the Immigration Act of 1990 are not objectionable, as long as the director's decision is narrowly tailored to address issues that were not directly superseded by the statutory definition. If the director were to apply the precedent decisions in support of a "proprietary knowledge" requirement or a reference to "knowledge not available in the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.

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 an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. 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 industry.

B. Analysis

In examining the specialized knowledge capacity 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.

A review of the record reveals that the beneficiary has been and will be serving as an instructor of intensive training programs designed for advanced users of Microsoft SQL Server 2005 technologies. The AAO recognizes that the beneficiary has been shown to possess an advanced level of knowledge related to certain Microsoft technologies, and has been recognized in the industry for his abilities as an instructor in these technologies.

However, the petitioner has failed to establish that the beneficiary's qualifications equate to specialized knowledge specific to the petitioning organization. The petitioner described the beneficiary as having specialized knowledge of the petitioner's "training materials, procedures and instruction methods, including [its] Unity Software training platform." The record is devoid of any description or documentation explaining exactly what are the petitioner's procedures and methods, nor is there any documentary evidence related to the "Unity Software" training platform referenced by the petitioner. Without this evidence, the AAO is unable to evaluate the petitioner's claims that knowledge of the petitioning company's procedures and claimed proprietary methods and training systems is truly specialized knowledge. For this reason, the petitioner's claims fail on an evidentiary basis. 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)). The AAO cannot accept the petitioner's and counsel's unsupported assertions regarding the claimed specialized knowledge. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States will require "specialized knowledge," the petitioner has neither adequately articulated nor documented any basis to support its claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other technical trainers qualified to provide high-level technical training in Microsoft SQL Server to advanced users of this technology. The petitioner's vague references to its instruction methods, procedures and training platform are insufficient, and the petitioner has provided no information regarding how specialized knowledge is acquired within the company. The AAO notes that according to organizational charts submitted for the record, the U.S. company employs a total of one full-time instructor and more than 30 contract staff as instructors, and the foreign entity has 11 contract instructors and three "full-time" instructors. The petitioner's reliance on contract staff suggests that its instructors are primarily employed for their subject matter knowledge and expertise in various technologies, rather than their specialized knowledge of the petitioner's instruction methods and training platforms.

In addition, although requested by the director, the petitioner did not submit any documentation to evidence that the beneficiary possesses any training or experience not provided to or possessed by other software engineers employed within its organization. Again, failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Absent some further explanation as to what exactly constitutes the beneficiary's specialized knowledge, how he gained that knowledge, how the knowledge is specific to the petitioner's products and interests, and how

the beneficiary's training or experience differs significantly from other employees within the petitioner's organization, the petitioner has not met its burden to establish that the beneficiary's knowledge of the petitioner's processes and procedures can be considered "advanced" compared to similarly employed workers within its international organization.

The Microsoft corporate web site shows that Microsoft has 278,099 partners, 1,223 of which are companies that provide learning solutions – i.e., training programs in Microsoft products.³ It is not clear how the training programs offered by the petitioning organization differ from those offered by similar organizations in the industry providing similar training solutions to professional users of Microsoft technologies. While it may be accurate to state that the beneficiary's role as a trainer in Microsoft SQL technologies requires an advanced knowledge of this particular technology, this knowledge does not relate specifically to the petitioning organization and does not constitute "specialized knowledge" as specified by the statutory and regulatory definitions.

The petitioner emphasizes the beneficiary's participation in the pre-release phases of SQL Server 2005, and states that he worked with Microsoft developers and later provided pre-training to Microsoft employees and partners. The petitioner goes so far as to suggest that the beneficiary was the only employee of the petitioning company, or any company, eligible to participate in pre-release training development activities for SQL Server 2005, noting that "of the 5 TAP vendors for SQL 2005, [the petitioner], through [the beneficiary], was the only training organization chosen." However, the petitioner has not provided any documentation of the beneficiary's exclusive involvement in pre-release phases of SQL Server 2005 to support these statements. In fact, while the beneficiary's co-authorship of a book regarding SQL Server 2005 shows that he was privy to information regarding the technology prior to its release, he was one of three authors of the book. There is no evidence that the other authors, including the primary author, are or were in fact employees of the petitioning organization. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 165. The petitioner's claim that its organization, and the beneficiary in particular, have obtained information from Microsoft that is otherwise unavailable in the industry, and utilized that knowledge to create a unique and proprietary training program that can only be delivered by the beneficiary is not persuasive.

According to an independent contractor agreement dated June 1, 2004, the petitioning company was required to develop training content and materials subject to audit and approval by Microsoft. The petitioner has the right of first refusal to deliver training to Microsoft customers and partners, but if it declines, Microsoft is free, under the terms of the agreement, to select another vendor to deliver the same training using the course materials developed by the petitioner, and Microsoft maintains exclusive rights to the training content. These facts suggest that there are in fact other vendors and instructors who are able to provide the services identical to those provided by the petitioning company.

Furthermore, while the petitioner repeatedly refers to the proprietary nature of its course materials, Article II, part 3 of the independent contractor agreement is titled "Ownership of Work; Assignment of Rights to Microsoft" and states the following:

³ See <https://solutionfinder.microsoft.com/Partners/PartnersDirectory.aspx>, accessed on December 23, 2009.

- 3.1 *Work for Hire.* Microsoft has specially ordered and commissioned the Work and may incorporate the Work in existing Microsoft works as a compilation or collective work. Contractor agrees that Microsoft will own all copyrights in the Work and that the Work is a "work made for hire" for copyright purposes.
- 3.2 *Assignment.* Contractor hereby assigns to Microsoft, its successors and assigns, all rights, title and interest in and to the Work including, without limitation, the following:
 - (a) any copyrights that Contractor may possess or acquire in the Work to do not qualify as a work made for hire, and all copyrights and equivalent rights in the Work throughout the world, including all renewals and extensions of such rights that may be secured under the laws now or hereafter in force and effect in the United States of America or in any other country or countries;
 - (b) All rights in and to any inventions, ideas, designs, concepts, techniques, discoveries, or improvements, whether or not patentable, embodied in the Work or developed in the course of Contractor's creation of the Work, including, but not limited to, all trade secrets, utilize and design patent rights and equivalent rights in and to such inventions and designs throughout the world, regardless of whether or not legal protection for the Work is sought;
 - (c) Any documents, magnetically or optically encoded media, or other materials created by Contractor under this Agreement . . .

According to the terms of the agreement, the "Work" to be performed by the petitioner is the following:

Contractor shall create the development of all course materials for a training curriculum referred to as "SQL Server 2005 Developer Training," which includes exercises, sample code, PowerPoint slides, labs, and other student materials necessary to conduct a five day, Instructor Led Training Workshop.

This course will be videotaped and edited by Microsoft for the purposes of electronic redistribution by Microsoft to its partners, customers, and internal audiences. It is anticipated that this distribution will be accomplished by both online and recorded media means.

The specific project deliverables include: an internet-based web-log; distance learning-style training delivered via the internet; a seminar-style "developer summit" for software developers; one-day training workshops delivered on the premises of a Microsoft partner or customer site; a five-day instructor-led training workshop delivered to a group of students in a location specified by Microsoft. There is no reference in the contract to Microsoft's need for the petitioner or its employees to utilize or apply any knowledge specific to the petitioning organization in developing the training materials or delivering the training.

The petitioner especially highlights the beneficiary's co-authorship of a book published in June 2004, [REDACTED] [REDACTED]. While these facts further support a conclusion that the

beneficiary has an advanced knowledge of this particular Microsoft technology and Microsoft's requirements for providing training to users of the technology, the petitioner has failed to explain how these achievements relate to his specialized knowledge of the petitioning organization, other than to state that the book itself served as a basis for the development of the company's training course in SQL Server 2005, a fact that has not been established through any documentary evidence. As noted above, the beneficiary is one of three authors listed for the book, and it is unclear whether the other authors have any relationship with the petitioning organization. While the book is clearly copyrighted material, the purpose of the book is to provide information and advice to professionals working with technologies developed by Microsoft, not by the petitioning organization. The petitioner has not established that the beneficiary's participation in pre-release training sessions or his co-authorship of a pre-release book would establish specialized knowledge of the petitioner's products, services or other interests. Regardless, based on the evidence in the record, the course materials developed by the petitioner for Microsoft belong to Microsoft, not to the petitioner. Overall, the petitioner has not described the beneficiary as one having specialized or advanced knowledge of the petitioner's services, processes or procedures. To the contrary, the petitioner has described the beneficiary as one having specialized knowledge of the products of the unaffiliated employer.

The AAO recognizes the petitioner's claim that the beneficiary is one of only two employees within its organization qualified to deliver the "Guerilla SQL" training course. The petitioner is also quite clear in emphasizing that its instructors are "application specific." The fact that the company chooses to maintain a limited number of employees qualified to provide instruction on any given technology is not sufficient to establish that the beneficiary's knowledge of the *petitioner's* processes and procedures is comparatively "advanced." The petitioner has made no attempt to differentiate the beneficiary's knowledge of the company's methods, policies and procedures from that possessed by its other instructors.

In sum, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other similarly experienced persons employed by the petitioner's organization or in the industry generally. As the petitioner has failed to document any materially unusual or uncommon qualities to the petitioner's processes and procedures, the petitioner's claims are not persuasive in establishing that the beneficiary, while highly skilled, possesses specialized knowledge. There is no indication that the beneficiary has knowledge that exceeds that of any other experienced training professional in his area of expertise, or that he has received special training in the company's methodologies or processes which would separate him from any other persons employed with the petitioner's organization or in the industry at large.

The legislative history of the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. Based on the evidence presented, it is concluded that the beneficiary has not been employed abroad, and would not be employed in the United States, in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

II. 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).

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. 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 unaffiliated company. Section 214(c)(2)(F) of the Act.

The petitioner indicated on the Form I-129 petition and in accompanying statements that the beneficiary will be employed on an intermittent basis at a Microsoft Training Center in Mountain View, California. 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)?" Based on these responses and statements, the AAO concludes that the beneficiary will be primarily employed as a consultant at the worksite of an unaffiliated employer, thereby triggering the provisions of the L-1 Visa Reform Act.

The petitioner 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 in response to question #13 on Form I-129 Supplement L that the beneficiary "reports directly to [the petitioner's] Chief Operating Officer." In its letter dated February 16, 2006, the petitioner

stated that the beneficiary "will have full authority in conducting the course he will teach and will receive only general supervisory feedback from [the petitioner's] Chief Operating Officer."

The director did not address the issue of the control and supervision of the beneficiary in the request for evidence issued on March 8, 2006; however, the director did request such evidence as work orders written by the client with a complete itinerary of services or engagements, and clearly describing the beneficiary's role and the environment in which he would be working. In response, the petitioner submitted copies of purchase orders for training services provided by the foreign entity to the unaffiliated employer, and the above-referenced independent contractor agreement dated June 1, 2004 between the petitioner and Microsoft.

On appeal, counsel notes that the petitioner controls the terms of the beneficiary's employment, "including when and where he works and ultimately the instruction methods he uses in the high-level classes he teaches." Counsel asserts that he is not supervised by the unaffiliated employer. However, the unsupported statements of counsel on appeal or in a motion are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980).

Despite the director's specific request for evidence, the petitioner did not provide sufficient documentation to establish whether the beneficiary will be controlled and supervised principally by the petitioner or by the unaffiliated employer. 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. 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.

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 stated: "Please see attached Company support letter for additional details."

In its letter dated February 16, 2006, the petitioner noted that, due to the nature of its business, it "must move personnel around the world as needed to address a specific course offering or training request." The petitioner stated that the position requires "knowledge of [the petitioner's] training materials, procedures and instruction methods, including our Unity Software training platform."

As noted above, the director included the following request in the RFE issued on March 8, 2006:

Work orders written by client, Microsoft Corporation, along with a complete itinerary of services of engagements where the beneficiary will perform those services. The itinerary should include all services planned for the period of time requested. Work orders should clearly provide project's outline description, duration, role and the environment that the beneficiary will be working on. The evidence should also include the hardware and software tools that are utilized in the training project. It has to explain in laymen's terms why and how the training require[s] the beneficiary's knowledge of [the petitioner's] tools.

In its response, the petitioner submitted copies of purchase orders from Microsoft and the above-referenced June 1, 2004 contract as evidence of the petitioner's "early involvement in product training development 18 months prior to product release." Counsel for the petitioner stated that these documents provide "evidence of the petitioner's continuing role in providing high level trainers to Microsoft facilities worldwide, including sites here in the U.S."

The director referred to the "work made for hire" provisions of the independent contractor agreement, and concluded the following:

It appears from the record that the service the petitioner is providing is, essentially, to work on the petitioner's client's already existing program, system and/or software. In essence, the beneficiary will be working on a product that is used to conform to the client's specifications in this case, Microsoft, rather than a product exclusive to the specifications of [the petitioner].

As such, the petitioner has not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire.

On appeal, counsel objects to the directors' determination, emphasizing that the petitioner is providing Microsoft with "a copyright protected service, as allowed under the law as passed by Congress." Counsel emphasizes that the beneficiary will not be providing low-level instruction to the general public, and states that the beneficiary is one of only 200 persons to have received the Microsoft Value Professionals (MVP) status in the SQL database specialty. Counsel asserts that "he is one of a select few with the insight and ability to make useful to others a software tool which would otherwise be underutilized," and that he is able to do so through "the gift of his copyright protected know-how." Counsel asserts that the beneficiary's proposed employment is "clearly not a labor for hire situation."

Upon review, counsel's assertions are not persuasive. The petitioner has not established that the beneficiary's placement at the unaffiliated employer's worksite is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act.

Preliminarily, the AAO notes that counsel appears to rely, at least in part, on the fact that the beneficiary is providing training services at a very high level for a considerable salary as evidence that he is not providing "labor for hire." In evaluating the criteria at section 214(c)(2)(F)(ii) of the Act, the focus of the inquiry is not whether the beneficiary will perform non-professional services or labor for wages, but whether the beneficiary's services at the unaffiliated employer's worksite will require specialized knowledge specific to

the petitioning employer. Although the common use of the term "labor for hire" may imply physical labor or work for wages rather than salary, the petitioner can not overcome the bar in section 214(c)(2)(F)(ii) of the Act simply by demonstrating that the beneficiary is an independent, salaried, or professional employee. Since most IT professionals – irrespective of the degree of their knowledge - share, to one extent or another, such attributes, petitioner's interpretation of what constitutes "labor for hire" clearly conflicts with Congress's expressed intent to prohibit the outsourcing of L-1B intracompany transferees to unaffiliated employers to work with common tools or "widely available" computer software. See 149 Cong. Rec. at S11686.

More fundamentally, however, the petitioner's argument is at odds with the plain and unambiguous language of section 214(c)(2)(F)(ii) itself. The rules of statutory construction require that the whole statute be given effect to avoid absurd results. *Matter of Avila-Perez*, 24 I&N Dec. 78 (BIA 2007) (citing 2A N. Singer, *Sutherland Statutory Construction* §§ 46.05, 46.06, 46.07, at 90, 104, 110 (4th. ed. 1985)). Counsel's argument, by taking the phrase "labor for hire" out of context, fails to give full meaning to the entirety of section 214(c)(2)(F)(ii) of the Act. By using the correlative words "rather than" in the same sentence with the term "labor for hire," Congress clearly intended the bar on labor for hire to mean situations where the placement is in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is not necessary. Section 214(c)(2)(F)(ii) of the Act.

Accordingly, 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 specialized knowledge, the petitioner has failed to provide any documentation regarding its training and instruction methods, procedures or "Unity Software" training platform, nor has it indicated that specialized knowledge specific to the petitioning organization is required to perform the proposed duties. As noted, there is nothing in the independent contractor agreement to suggest that the service offered requires an employee who has specialized knowledge related to the petitioning company. The petitioner is charged with developing course materials that become the property of Microsoft, and Microsoft is free to utilize other vendors to provide identical training services in circumstances where the petitioner is unwilling or unable to do so. The agreement also indicates that the training content developed would be released to customers and partners after January 20, 2005, and that the petitioner can obtain consent from Microsoft to subcontract the work to be performed. Given the terms of the agreement, it is impossible to conclude that the services provided under the agreement are proprietary or exclusive to the petitioner, or require specialized knowledge of the petitioner's training and instructional methods and procedures.

The fact that the beneficiary would function independently 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. The petitioner's training course was developed based on information provided by Microsoft and the petitioner has not established that the beneficiary would be providing a service that other information technology companies with comparable capabilities could not provide.

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. For this additional reason, the appeal will be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.