

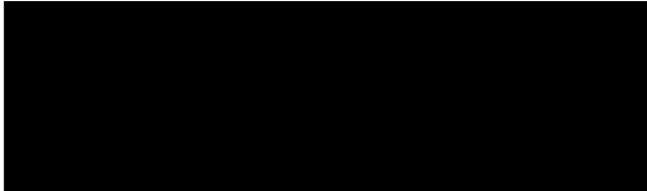
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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Services

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**JAN 07 2010**

File: WAC 08 249 51334 Office: CALIFORNIA SERVICE CENTER Date:

IN RE: Petitioner:  
Beneficiary:



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

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

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

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

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 visa petition to employ the beneficiary in the United States as an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a California corporation, develops digital cinema technology. It claims to be a subsidiary of [REDACTED] located in Chennai, India. The petitioner seeks to employ the beneficiary in the position of software engineer for a period of three years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been and would be employed 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. On appeal, counsel for the petitioner asserts that the director had no basis for dismissing the petitioner's sworn affidavit as mere "unsupported assertions." Counsel asserts that the beneficiary has been acting as the lead software engineer for the development of the petitioner's proprietary QubeMaster digital cinema mastering systems and possesses an advanced knowledge of the company's products.

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.

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.

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

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker on September 19, 2008. In a letter dated September 18, 2008, the petitioner described the beneficiary's current duties as follows:

From May 2004 to current, [the beneficiary] has been employed as a Lead Software Engineer. In this position his responsibilities have included the following: Building and coding applications and modules using languages such as C++, visual basic, ABAP, JAVA, XTML, etc. Providing patches and upgrades to existing systems. Designing graphical user interface (GUI) to meet the specific needs of users. Preparing operating instructions, compiling documentation of program development, and analyzing system capabilities to resolve questions of program intent, output requirements, input data acquisition, programming techniques and controls. Building add-on modules using application program language.

The petitioner indicated that the beneficiary would perform essentially the same duties as a software engineer in the United States.

The petitioner also submitted the beneficiary's resume, in which he indicates that he has been involved in the design and development of the foreign entity's "Qube" and "QubeMaster" products. According to the beneficiary's resume, he is currently heading the development team for the QubeMaster product and is

responsible for the product's design, development and project tracking. The beneficiary describes his "major accomplishments" as the following:

- Performance tuned the video encoder to work on multi-core processors. Increased the speed of encoding by 5 times the original encoding speed. Used Intel's Threaded Building Blocks 2.0 to parallelize the encoder. Also designed a framework for parallelly [sic] processing images in DirectShow.
- Implemented DirectShow filters in C++ for various image processing functions such as color space conversion, logarithmic to linear color transformation and geometric manipulation of images.
- Implemented the security aspects of the software ranging from secure exchange of data using cryptographic techniques such as RSA/AES encryption, digital signatures and signed XML, to protecting the software from unauthorized access during hardware locks (dongles). I was also responsible for the generation and processing of X509 certificates – the digital identities for each of the digital cinema servers.
- Implemented the interoperability standards (MXF Interop and SMPTE) for Qube and QubeMaster to work with other Digital Cinema solutions.
- Implemented support for automation devices installed in the cinema halls. These automation devices control lighting and curtains in the cinema hall and need to be triggered by the digital cinema server during a show. The digital cinema server communicates with these devices through serial port and TCP/IP.
- Designed and implemented a subtitling systems to be used in movie playback. This is a real-time system written in C++/DirectShow, which generates high-resolution images based on the dialog tracks and blends the same with the primary video.
- Implemented a system for monitoring and controlling the playback engine. This system written in C#, has a user interface displayed in a separate character based LCD panel. I was also responsible for the design and implementation of the user interface library whose main purpose is to be used for writing user interfaces for such LCD panels.
- Designed and implemented a fault-tolerant movie download system, which can download gigabytes of digital cinema files despite network failures, etc. through HTTP and FTP.

The beneficiary indicates that he has strong knowledge of C, C++, and STL programming languages, considerable knowledge of C#, .NET, DirectX, Windows programming, COM, Visual C++/MFC and x86 assembly, and experience in developing object-oriented design, writing SQL queries/procedures in SQL Server 2000, XML and related technologies such as DTD and XSD.

The director found the initial evidence insufficient to establish that the beneficiary possesses specialized knowledge. Accordingly, on October 2, 2008, the director issued a request for additional evidence (RFE), in which he instructed the petitioner to explain how the duties the beneficiary 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 similar positions. The director further requested that the petitioner explain how the beneficiary's training or experience is uncommon, noteworthy, or distinguished by some usual quality and not generally known by practitioners in the beneficiary's field. The director advised the petitioner that it must submit probative evidence to corroborate its statements and provide evidence that would allow USCIS to

make comparisons between the knowledge held by the beneficiary and other similarly employed workers within the petitioning company and within the general labor market.

In response to the RFE, the petitioner submitted an affidavit from its president and chief technology officer, [REDACTED] Mr. [REDACTED] reiterated the position description provided in the petitioner's previous letter, and noted that there are no employees holding the position of software engineer or a similar position at the U.S. location where the beneficiary will be employed.

[REDACTED] further described the beneficiary's experience, proposed duties, and claimed specialized knowledge as follows:

The beneficiary has been the lead software engineer responsible for the design and development of the Qube Digital Cinema Mastering System – QubeMaster – for over 4 years. The primary responsibility of the beneficiary at [the U.S. company] would be to engineer this system to meet the compliance requirements set forth by the Digital Cinema specification created by Digital Cinema Initiatives, LLC (DCI). DCI is a joint venture of Disney, Fox, Paramount, Sony Pictures Entertainment, Universal and Warner Bros. Studios. The primary purpose of DCI is to establish uniform specifications for d-cinema. The beneficiary's presence is required at [the petitioner's] offices in North Hollywood, California as his duties require a significant level of face to face interactions with the members of the DCI, Society of Motion Picture and Television Engineers, and DCI Compliance Testing organizations. The beneficiary will also be required to interact with vendors of components used in the Qube system, the important one being from a manufacturer based in Northern California. Until the present time, [the petitioner's] primary involvement in business development and representation in standards committees did not warrant the services of any software engineers. So, the duties of the current employees of [the petitioner], like business development, sales, marketing and technical support, are very different from the nature of duties the beneficiary will be performing at [the U.S. company]. While there are only a handful of companies working on Digital Cinema, only [the foreign entity] has implemented a Digital Cinema Theater Mastering System based on the DirectShow multimedia streaming architecture in the Windows platform. Being the key engineer in such a unique implementation, the beneficiary's engineering duties are significantly different from workers employed by other U.S. employers in this type of business.

[REDACTED] stated that the beneficiary "has very specialized knowledge in the engineering of a Digital Cinema Mastering System – QubeMaster." He provided a description of the product, its purpose, and its components and further described the beneficiary's specialized knowledge as follows:

The beneficiary is a highly skilled software engineer proficient in implementing multimedia streaming components known as DirectShow filters in the C++ programming knowledge [sic]. The beneficiary has also done a significant amount of SQL Server database design and the implementation of the data access layer for QubeMaster in the C# programming language. A key feature of the QubeMaster is its ability to harness all of the processing power of the computer in an optimal fashion. This is the result of the beneficiary becoming an expert in some recent advancement in processor technologies collectively referred to as Multi-Core

platforms. This work has given the beneficiary a unique mix of experience with the strong knowledge of Digital Cinema standards including JPEG2000 compression, XML Digital Signatures and encryption technologies like Advanced Encryption Standard (AES) and Public Key Cryptography. It is not typical for engineers to have such a breadth of knowledge and this knowledge and experience is critical for the beneficiary's future work at [the petitioner] the most important of which would be the achieving compliance with the specification set forth by the Digital Cinema Initiatives (DCI).

Finally, [REDACTED] further expanded upon the purpose of the beneficiary's transfer to the United States:

[The beneficiary] is being brought in to primarily work on engineering the Qube Digital Cinema Theater Playback System toward obtaining compliance with the Digital Cinema Initiatives' specification. As there are no software engineers employed by [the petitioning company] at the present time, the beneficiary will not immediately be involved in any training directly related to his job function. However, the beneficiary is expected to be involved in the training of some of the technical support engineers currently employed by [the petitioner]. . . . The beneficiary will also be providing training in performing diagnostics and troubleshooting on the system by explaining the key interactions and metrics available in the system based on the deep knowledge he possesses.

The director denied the petition on November 18, 2008, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he has been or would be employed in a position that requires specialized knowledge. In denying the petition, the director found that the petitioner provided no evidence that the beneficiary had received any specialized or advanced training, nor any evidence to establish that he possesses knowledge that exceeds that of any other software engineers employed by the petitioning organization or in the petitioner's industry. The director acknowledged the petitioner's affidavit submitted in response to the RFE, but noted that the RFE specifically instructed the petitioner to submit corroborative evidence in support of its claims. The director therefore found that the petitioner's claims failed on an evidentiary basis.

On appeal, counsel for the petitioner asserts that the beneficiary has served as lead software engineer for the foreign entity for a period of over four years and therefore has specialized knowledge of the petitioner's proprietary software. Counsel states that "because QubeMaster software is proprietary software of the petitioning company, by definition knowledge of that software system exceeds that of software engineers in the industry." Counsel asserts that the director wrongfully dismissed information contained in the sworn affidavit of the petitioner's president, "without any contravening evidence or articulable reason to call its credibility into question." Counsel contends that "there is literally no basis upon which the adjudicator would be tempted to question the evidence being presented in support of this petition," and asserts that the adjudicator failed to adhere to the legal standard as set forth in Matter of Chawathe, a USCIS adopted decision.

Counsel further objects to the director's observation that the petitioner failed to establish that the beneficiary possesses knowledge that exceeds that of other software engineers employed by the company, emphasizing that the U.S. entity does not currently employ any software engineers.

Finally, counsel objects to the director's reference to *1756 Inc. v. Attorney General*, 745 F. Supp. 9 (D.D.C. 1990), noting that the cited matter is "an 18 year-old, non-precedent district court case which was decided under the old, pre-IMMACT 1990 'specialized knowledge' standard." Counsel further asserts that the director erroneously referred to the 1970 legislative history of the L-1 classification, and not the congressional history from the Immigration Act of 1990, which counsel states "broadened the definition of 'specialized knowledge.'" Counsel asserts that "the instant petition nonetheless meets the prior, more restrictive standard in effect before the Immigration Act of 1990." Specifically, counsel asserts that the beneficiary clearly "rises above the level of the petitioner's average employee," since the petitioner does not employ any software engineers. Counsel states that the petitioner has established the beneficiary's expertise in proprietary software and a lack of readily available expertise in the job market generally.

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

As a preliminary matter, the AAO emphasizes that when denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. *See* 8 C.F.R. § 103.3(a)(1)(i).

Upon review of the director's decision, the AAO agrees that the reasons given for the denial are conclusory with little explanation as to why the petitioner's evidence failed to satisfy the burden of proof. The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). Accordingly, the AAO will discuss the petitioner's evidence and eligibility herein.

#### *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 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).

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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.

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.

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. Instead, counsel consistently attributes to the 1990 Act, without citing any specific legislative history, a blanket intent to "broaden" the definition of specialized knowledge. 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).

The Committee Report relating to the 1990 Act does state that Congress intended to "broaden" the L-1 category in general by making four specifically enumerated changes: allowing accounting firms to participate in the program, incorporating the "blanket petition" program into the statute, changing the overseas employment requirement to one year within the three years prior to admission, and enlarging the period of admission for managers and executives to seven years. H.R. Rep. 101-723(I), 1990 U.S.C.C.A.N. at 6749. This portion of the report, however, made no mention of any intent to broaden the specialized knowledge visa classification.

In a separate paragraph that was not enumerated as one of the four changes, the Committee Report discussed the new specialized knowledge definition. The paragraph begins by stating: "One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem." Given that the term was previously undefined by Congress, it is clear that the first sentence of the paragraph attributes the previous confusion as to what constituted specialized knowledge to

the failure of the 1970 Act to define the term. The second sentence of the paragraph, in turn, simply notes that the "varying interpretations" adopted by the INS through the regulations, precedent decisions, and memoranda had contributed to the confusion over the applicable definition. There is no indication in the Committee Report that Congress otherwise intended the new definition to be considered as part of the enumerated changes that specifically "broadened" the L-1 category. Instead, the paragraph is conspicuously neutral.

The AAO notes that the Committee Report does not take issue with the specifics of the previous INS interpretations and does not state an intent to "broaden" the "narrow class" of aliens that Congress initially stated would be eligible for the classification. The 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. The report simply states that the Committee was recommending a statutory definition because of "[v]arying interpretations by INS." H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that statement, the Committee Report simply restates the tautology that became the statutory definition of specialized knowledge. There is nothing in the legislative history to indicate that Congress intended to specifically liberalize or broaden the specialized knowledge classification, other than the narrow changes made by the statute itself: the deletion of the "proprietary knowledge" and "United States labor market" references that had existed in the agency definition.

Moreover, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge. The AAO generally presumes that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Indeed, the Ninth Circuit Court of Appeals recently concluded that the AAO's reliance on such authority was appropriate. *Brazil Quality Stones v. Chertoff*, --- F.3d ---, 2008 WL 2675825 n.10 at \*4 (9th Cir., July 10, 2008).

Although the cited precedents pre-date the current 1990 Act, the AAO finds them instructive. While the underlying definitions of specialized knowledge that were discussed in the decisions are now superseded by the statutory definition, the general issues and the case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. For example, USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized knowledge workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. *See* 18 I&N Dec. at 50-53 (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

Accordingly, the director's citation of precedents that predate the Immigration Act of 1990 is 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 on the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.

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*

Turning to the question of whether the petitioner established that the beneficiary possesses specialized knowledge and will be employed in a capacity requiring specialized knowledge, upon review, the petitioner has not demonstrated that this employee possesses knowledge that may be deemed "special" or "advanced"

under the statutory definition at section 214(c)(2)(B) of the Act, or that the petitioner will employ the beneficiary in a capacity requiring specialized knowledge. The decision of the director will be affirmed as it relates to this issue and the appeal will be dismissed.

The AAO further concurs with the director's finding that the petitioner's claim fails primarily on an evidentiary basis. Contrary to counsel's argument on appeal, the director does not have to articulate a doubt regarding the accuracy or credibility of the petitioner's assertions in order to justify denial of the petition, although, as noted above, the director did fail to adequately explain why the petitioner's assertions were insufficient to establish eligibility in this matter. There is nothing in the director's decision to indicate that she doubted the credibility of the petitioner's statements regarding the beneficiary's duties and assignments. The director simply found that the information provided by the petitioner in the form of statements and affidavits from authorized officials of the organization was insufficient to establish eligibility for L-1B classification.

Counsel essentially argues that if a petitioner provides a job description for the beneficiary and states that a beneficiary has specialized knowledge and will be employed in a specialized knowledge capacity, the petition should be approved without additional evaluation unless USCIS has reason to believe that the petitioner's statements are inaccurate or fraudulent. Counsel's viewpoint does not allow for a situation in which the petitioner's opinion of what constitutes "specialized knowledge" simply does not comport with what the regulatory and statutory definitions, case law and policy guidance interpreting the term "specialized knowledge" require, or is simply not sufficiently detailed to establish eligibility by the preponderance of the evidence standard.

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

Thus, USCIS evaluates evidence not only in terms of its credibility, but in terms of its relevance and probative value. As discussed further below, the AAO finds that the petitioner's statements were lacking to some degree in relevance and probative value as they did not provide all of the information needed for USCIS to make an affirmative determination of eligibility.

In examining the specialized knowledge of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. *Id.*

The petitioner's initial description of the beneficiary's current and proposed job duties was vague and could have described the duties of any software engineer working for any organization that engages in software development. The petitioner stated that the beneficiary has been and would be coding applications and modules using common

programming languages such as C++, visual basic, Java, XHTML; patching and upgrading existing systems; designing graphical user interfaces, compiling documentation, analyzing system capabilities; and building add-on modules using application program language. The petitioner failed to identify any special or advanced body of knowledge which would distinguish the beneficiary's role from that of other similarly experienced software engineers employed by the petitioning organization or in the industry at-large. Furthermore, the petitioner did not articulate a claim that the beneficiary possesses specialized knowledge, much less identify with specificity what product, system or other interest of the petitioning organization constitutes his specialized knowledge, or why such knowledge is currently required in the United States. Moreover, there was nothing in the petitioner's initial letter that would suggest that the beneficiary has spent more than four years leading the design and development of the petitioner's QubeMaster product. 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)).

While the AAO does not doubt that the beneficiary has worked on the QubeMaster product in the capacity of lead software engineer, as shown in his resume, we do find it reasonable to question why such information was not articulated at the time of filing, as his role in the development of this product now appears to form the entire basis of the petitioner's claim that the beneficiary possesses specialized knowledge. The beneficiary's exact role in the development of the QubeMaster product remains unclear. For example, in response to the RFE, the petitioner provided a description of the beneficiary's current duties that is identical to the generic description provided in the initial letter. The petitioner added that the beneficiary "has been the lead software engineer responsible for the design and development" of the system for over four years, but provided little detail regarding any advanced duties he has performed in this role. Furthermore, according to the beneficiary's resume, he has served as a lead software engineer for two years, not four years, and has worked on two products during his tenure with the foreign entity, rather than just the QubeMaster product, as stated in the petitioner's affidavit.

Based on the information provided in the beneficiary's resume, it is not evident that the design and development of the QubeMaster product should be directly attributed to him. Rather, it appears that he is charged with implementing new features or improvements to an existing product. For example, the beneficiary mentions that his accomplishments have included performance tuning the video encoder to work with new Intel multi-core processors, implementing DirectShow filters in C++, and implementing security aspects of the software. The record does not establish when the QubeMaster product was developed, how many engineers are involved in its ongoing development and enhancement, or where the beneficiary falls within the hierarchy of employees responsible for participating in the product development activities. While the AAO does not doubt that the beneficiary is intimately familiar with the product, the petitioner has provided little information regarding the nature of the beneficiary's role in the development of the product beyond providing his job title. Again, the actual duties described appear typical of a software engineer and do not appear to rise to the level of an employee who is substantially responsible for development of a proprietary product.

The petitioner indicated that it is "not typical" for engineers to have the beneficiary's breadth of knowledge, which is stated to include experience with multi-core platforms, Digital Cinema standards such as JPEG 2000 compression, XML Digital Signatures, and advanced encryption techniques. However, there is nothing in the

record to suggest that these technologies are specific to the petitioner's organization. Rather, it appears that the petitioner's proprietary product was designed to be compliant with the Digital Cinema specifications created by [REDACTED] and was designed and developed using technologies and programming languages that are widely used. The petitioner notes that, while other companies develop Digital Cinema products, its QubeMaster product is the only Digital Cinema Theatre Mastering System "based on the DirectShow multimedia streaming architecture in the Windows platform." DirectShow is a Microsoft product so it appears unlikely that other software engineers working in the digital video field would be unfamiliar with it. The petitioner has not explained in sufficient detail what distinguishes its digital cinema products from those developed by other companies in compliance with the same DCI standard.

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 claiming 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 petitioner's QubeMaster system and related components of its Digital Cinema product. As discussed, the petitioner did not attempt to explain how its products differ significantly from those developed by other companies that develop similar products based on industry standards. The petitioner has not specified the amount or type of training its engineers receive in the company's products or processes and therefore it cannot be concluded that the technology is different compared to that developed by other companies in the industry, or that it would take a significant amount of time to train an experienced software engineer in the digital cinema field who had no prior experience with the petitioner's family of companies. The petitioner has not identified any training received by the beneficiary since joining the foreign entity, nor has the petitioner articulated or documented how specialized knowledge is typically gained within the organization, or explained how and when the beneficiary gained such knowledge.

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 product 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.

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 petitioner has not successfully demonstrated that the beneficiary's knowledge of the company's products gained during his employment with the foreign entity is advanced compared to other similarly employed workers within the organization. Counsel emphasizes that the U.S. company does not currently employ any software engineers. However, the fact that the beneficiary would be the only software engineer in the United States is not sufficient to establish that his knowledge is specialized or advanced, as the petitioner indicates that it has not previously required the services of a software engineer. There is no explanation as to why the beneficiary was chosen for the U.S.-based position over other software engineers and the AAO cannot assume that it was because he is deemed to have advanced knowledge of the company's processes and procedures.

All of the foreign entity's technical employees would reasonably have knowledge of the company's digital cinema products. By this logic, any of them would qualify for L-1B classification if offered a position working in the United States as long as they were working for the foreign entity for over one year.

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."<sup>2</sup> An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in L-1B classification. The term "special" or "advanced" must mean more than experienced or skilled. In other terms, specialized knowledge requires more than a short period of experience, otherwise, "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, as explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioner's parent company or by software engineers employed elsewhere. The beneficiary's duties and technical skills demonstrate that he possesses technical skills and familiarity with technologies that are common among engineers in this field. The petitioner has not established that familiarity with its proprietary product alone constitutes specialized knowledge, and has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's products is more advanced than the knowledge possessed by others employed by the petitioner, or that the products developed by the petitioner are substantially different from those used by other technology consulting companies. The petitioner has failed to demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. *See Matter of Penner*, 18 I&N Dec. at 52.

The legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See 1756, Inc. v. Attorney General, supra* at 16. The record does not establish that the beneficiary has specialized knowledge or that the position offered with the United States entity requires specialized knowledge. Accordingly, the petition will be denied.

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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<sup>2</sup> As observed above, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge, and the general issues and case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. See 18 I&N Dec. at 50-53. (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).