

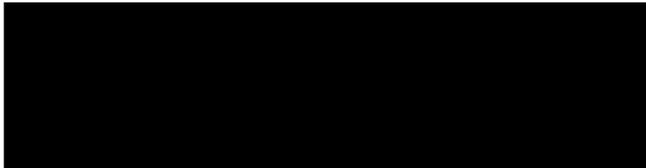
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U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
29 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
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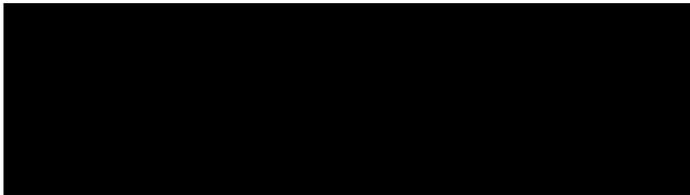
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DATE: **NOV 22 2011** Office: VERMONT SERVICE CENTER FILE: 

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:

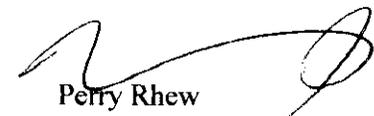


INSTRUCTIONS:

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

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

  
Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Vermont 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, an information technology development and consulting firm, filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1B intracompany transferee with specialized knowledge pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("the Act"), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a branch office of an information technology firm located in India. The petitioner seeks to employ the beneficiary as a software specialist for a period of three years, and indicates that she will be stationed at the business location of the petitioner's client ("the unaffiliated employer"), in Washington, D.C.

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.

#### **I. Facts and Procedural History**

The employer filed the nonimmigrant visa petition on January 25, 2008. The petitioner stated that the beneficiary will serve as a software specialist assigned to the unaffiliated employer's Architecture and Platform Services project team. The petitioner explained that it serves as the unaffiliated employer's technology partner for its Internet Services Program (ISP), which is described as encompassing content management model for Intranet and External web for the client organization. The petitioner stated that it will be involved in the full life cycle implementation of the unaffiliated employer's web portal and internal and external sites, from user requirement gathering, design and architecting, coding and testing for the application. The petitioner indicated that the beneficiary's responsibilities as a software specialist assigned to the project would be the following:

- Work with functional leads onsite.
- Coding and Testing based on [the petitioner's] Quality Standards.
- Participate in Defect prevention activities as per [the petitioner's] SEI-CMM Level 5 using error logging Quantify. Also involved in Code Review, Testing and Bug Fixing in adherence to Software quality Management in Quantify.
- Contribute to Technical project status meeting with [the unaffiliated employer] and coordinate with offshore team.
- Handle production moves.

The petitioner further stated that the beneficiary would utilize the following tools and technologies in executing the project:

Site Manager (Proprietary tool of [the unaffiliated employer]); Java 2.0; JSP; XML; XSL; Java Script; HTML; Servlet; Oracle 9i; IBM Web Sphere 4.0; Rational Rose; WSAD 4.0; Quantify; Vignette V6; TOAD; TextPad; UNIX, Windows 2000; Intel Pentium 4

The petitioner describes itself as a "diverse end-to-end IT solutions provider" and noted that it utilizes "proprietary, internally designed, ISO 9000 certified, offshore development process and its proprietary, internally designed development, testing and quality assurance tools and procedures" to accomplish its project objectives. The petitioner further explained as follows:

In order for [the petitioner] to meet its quality assurance objectives and maintain its competitiveness in the software industry, the company utilizes an internally developed, SEI-CMM Level 5 assessed, software development and maintenance process. Level 5 Assessment on the Software Engineering Institute's Capability Maturity Model is the highest and most sought after quality assurance standard in the information technology industry worldwide and [the petitioner] is one of very few firms to have achieved it. The project [the beneficiary] has been undertaking requires advanced knowledge of [the petitioner's] SEI-CMM Level 5, specific tools, methodologies and strict CMM conformance in its application to this specific project.

The petitioner indicated that not all of its employees receive the "CMM advanced level of training" and that not all of its projects require use of specialized knowledge.

The petitioner indicated that the beneficiary has been employed by the foreign entity since June 19, 2006, and that she has worked extensively on Web development and other applications for the unaffiliated employer's Internet Services Program, the same project to which she would be assigned in the United States. As such, the petitioner emphasized that the beneficiary "has gained knowledge of [the petitioner's] software tools, quality assurance standards, methodologies, procedures and its application in the project."

The petitioner further explained the beneficiary's qualifications and experience as follows:

[The beneficiary] is assigned as a key individual to apply [the petitioner's] unique tools and lifecycle methodology to this project. [The beneficiary] has expertise in Java and web designing and developing. Because of her expertise in the subject and [k]nowledge on project specific tools and her expertise in the CMM designs/methodologies, [the unaffiliated employer] specifically chose [the beneficiary] for the US project for this purpose. The sole reason why such a reputed organization such as [the unaffiliated employer] retained [the petitioning company] is the fact that [the petitioner] is a SEI CMM Level 5 company.

With an exposure of more than two and half years of experience at [the unaffiliated employer's] project alone, [the beneficiary] was identified for this task with her unique, advanced, high level of intellect, specifically coming from [the petitioner's] domain of Web (Java) development activities. She gained her expertise at offshore by extensively working on the [unaffiliated employer's] project, which involved use of [the petitioner's] methodologies and tools. . . . These tools/methodologies include [the petitioner's] QMS, Software Requirements Specifications (SRS) and [the petitioner's] Quality Assurance Methodologies.

The petitioner indicated that the project to which the beneficiary has been and will be assigned uses the petitioner's QMS, which includes CMM and ISO-based Quality Procedures. Specifically, the petitioner stated that it took the beneficiary six to eight months to be able to successfully complete the project as per the petitioner's QMS. The petitioner explained that the beneficiary was trained on the job and no certificates were issued, even when she attended classroom training, but rather, the quality standards were assigned as part of the

project. The petitioner emphasized that the beneficiary "has knowledge of [the petitioner's] SEI-CMM Level 5 software developments and maintenance process as it is particularly tailored to meet the quality and operational requirements for the assignments for [the unaffiliated employer's] project." The petitioner further indicated that it would be difficult to train another employee to assume the beneficiary's duties "because of the interrelationship of [the beneficiary's] specific knowledge/experience with [the petitioner's] specific methodologies and tools. The beneficiary's "specific knowledge/experience" was said to include a complete understanding of the project's activities and processes, standards and procedures, methodology and documentation "as per the petitioner's QMS."

The petitioner summarized the beneficiary's qualifications as follows:

[The beneficiary] has thorough knowledge in the existing architecture of the Content Management System maintained by [the petitioner] for [the unaffiliated employer]. The knowledge on these is very much required and it is so complex, unique and rare that it cannot be easily gained by anyone. Her advanced knowledge in the domain of Java and content management, expertise in [the petitioner's] tools/methodologies substantiates the fact that she is an individual whose knowledge is advanced and specialized. The knowledge gained over the last 1 year 6 months and the knowledge she has gained on [the petitioner's] tools alone during the same period, qualifies her as a unique software specialist aiding in translating customer requirement into special design documents, thus contributes as special knowledge not generally found in the industry. Overall, the combination of her industry expertise and her rare offshore project experience is very essential to [the unaffiliated employer] and [the petitioner].

As substantiated herein, [the beneficiary's] knowledge qualifies to contribute to both [the unaffiliated employer's] and [the petitioner's] technical processes and hence increases productivity.

Finally, the petitioner provided explanations of the internal tools and methodologies utilized by the beneficiary, including QMS tools (utilized to track project lifecycle activities); Software Requirements Specification methodology; and Quality Assurance Methodologies.

In addition to its letter in support of the petition the petitioner submitted a letter dated November 15, 2007 from the foreign entity which confirmed the beneficiary's overseas experience. The foreign entity stated the following:

[The beneficiary] has vast IT experience and also spent good time in [the unaffiliated employer's] project. During this stint with the organization, worked extensively in Java, J2EE, open source framework like spring, hibernate and well versed with RDBMS like Oracle. She is strong in developing system applications, information systems, and enterprise automation tools using J2EE Technologies. She has worked on UNIX and Windows platforms. She has good knowledge of design using methodologies like UML. She has very good experience in coding and testing. She has also undergone training with [the petitioning organization] in India through she has been immersed in [the company's] design technologies, Project Management methodologies, QMS procedures and methodologies.

The foreign entity provided a list of the beneficiary's current duties, which are similar to her proposed duties in the United States.

The Form I-129, Petition for a Nonimmigrant Worker, contains questions that relate directly to the petitioner's eligibility under the L-1 Visa Reform Act. On the Form I-129 visa petition, when asked to provide the address where the beneficiary would work, the petitioner stated that she would work in Washington, DC. Additionally, in response to question 13 on the L Classification Supplement to Form I-129, the petitioner indicated that the beneficiary would be stationed "primarily offsite" at the worksite of the unaffiliated employer, where her work "will be controlled and supervised" by the petitioner's project manager also assigned to the unaffiliated employer's worksite.

On February 4, 2008, the director issued a request for additional evidence. Among other documents, the director requested more detailed information regarding how the beneficiary gained her specialized knowledge, the minimum amount of time required to train an employee to fill the proffered position, and the number of employees within the company who have received comparable training. The director advised that the petitioner's evidence must verify that the beneficiary's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and is not generally known by others in the beneficiary's field or in the industry, or provide evidence that the beneficiary's advanced level of knowledge of the company's processes and procedures distinguishes her from those with elementary or basic knowledge. The director also instructed the petitioner to submit a copy of its contract with the unaffiliated entity, and clarification as to whether the beneficiary is installing and modifying software at the unaffiliated employer's site that is licensed to the petitioner or if the beneficiary is creating and modifying software that will be controlled by and licensed to the client exclusively.

In response, the petitioner submitted a letter dated March 6, 2008 from the foreign entity's human resources manager, who indicated that the beneficiary received one day of training in "SE with [the petitioner's] QMS." The beneficiary also received approximately two months of training for several topics such as "Spring and Hibernate", "Six Sigma", "Professionalism", "Data Structure and Algorithms", "Operating System"; "RDBMS", "Network Concepts", "SE-SSAD", "Oracle", "Core Java", "Intermediate Java", and "Advanced Java." The courses ranged from one day to one week in length.

The petitioner also submitted a letter from its Delivery Manager, stating that the beneficiary would utilize proprietary tools/methodologies in executing the project for the unaffiliated employer. The petitioner stated that the tools the beneficiary will utilize will include QMS, Software Requirements Specifications (SRS), SiteManager, CacheClear Manager, Web Statistics, FeedBuilder, and the petitioner's Quality Assurance Methodologies. The petitioner identified two QMS tools that are proprietary to the company, Qualify and Quantify. Finally, the petitioner provided an expanded description of the beneficiary's proposed duties, noting that she will utilize her "specialized knowledge of [the petitioner's] internally designed SEI-CMM Level 5 rated onsite-offshore development processes, as well as her experience with the offshore component of the project, and her specialized knowledge of [the petitioner's] proprietary tools Qualify and Quantify" to perform her duties.

Counsel for the petitioner stated in a letter dated March 19, 2008, that the petitioner was submitting a copy of the contract between the petitioner and the unaffiliated employer. The petitioner attached a document titled "Terms of Reference" and labeled as [REDACTED]. The petitioner is not named in the contract annex, and there are no dates provided for the services to be provided. In addition, the petitioner submitted only pages 1 to 3 of the annex, which does not appear to be the complete document. The contract is incomplete and does not satisfy the requested evidence for a contract between the petitioner and the client in the United States.

The contract annex does, however, mention the "Internet Services Program," and indicates that the petitioner will provide the following services in this area: support to content migration and cataloging; design and media services, enhancement and support to web portal development; support to maintenance of ISP web tools and applications; facilitation of e-business; and enhancement and support to business warehouse maintenance. The section titled "Implementation Services/Skills Requirements," is truncated, but does indicate that "Contractor's employees will work as part of the [unaffiliated employer's] project teams . . . ."

On October 22, 2007, after reviewing the petitioner's response to the request for evidence, 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 she 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.<sup>1</sup>

Specifically, the director concluded that majority of the beneficiary's purported specialized knowledge hinges upon her knowledge of the unaffiliated employer's internal processes and methodologies, therefore, the beneficiary's placement at the worksite of the unaffiliated employer is an impermissible arrangement to provide labor for hire. The director found that the beneficiary's position 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 petitioner provided ample evidence to establish that the beneficiary possesses specialized knowledge and would continue to be employed in a position that requires specialized knowledge. Counsel asserts that the director erred by finding that the beneficiary possesses knowledge of the petitioner's proprietary tools and methodologies, but nonetheless concluding that she does not possess specialized knowledge. Counsel asserts that such a conclusion is contrary to the current statutes and regulations defining "specialized knowledge," which "appear to be a culmination of years and years of lowering the standard for specialized knowledge." Counsel further emphasizes that a 1994 legacy Immigration and

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<sup>1</sup> 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, [REDACTED] 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 (i).

Naturalization Service (INS) memorandum "loosened specialized knowledge standards by emphasizing the interruption of business that was likely to occur if a US worker had to be trained to acquire the same knowledge that the alien worker possessed." *Interpretation of Special Knowledge*, (March 9, 1994).

Counsel further contends that an alien who possesses proprietary knowledge has "surpassed the less stringent standard" created by the current statute and regulations. Counsel asserts that the director conceded that the beneficiary is required to use the petitioner's proprietary tools and methodologies and therefore should have concluded that the beneficiary meets the specialized knowledge standard.

Second, counsel objects to the director's conclusion that the beneficiary's experience does not amount to specialized knowledge and that "any other employee" could be trained to fill the position. Counsel suggests that the director placed undue emphasis on the relatively short length of the beneficiary's formal training, while discounting the beneficiary's one and one half years of experience working on the unaffiliated employer's project and how such experience imparted her with specialized knowledge. Counsel asserts that it is the combination of the beneficiary's formal training and practical experience working with the petitioner's services and techniques gave her the required knowledge of how these services and techniques are applied in the international market, and that this experience is what qualifies her as someone with specialized knowledge.

Furthermore, counsel argues that even if the training alone were indicative of specialized knowledge "having to train someone new would interrupt business and is counter to the legislative intent of L Visas." Counsel asserts that this intent was recognized by the Puleo memorandum, and asserts that it is important to the success of American businesses that they not face delays in delivering their product to their clients because they are unable to temporarily bring in a foreign employee who possesses the exact knowledge and experience necessary to complete the task effectively and quickly. Counsel contends that the L visa was created by Congress in order to facilitate the transfer of key employees to the United States for companies who are completing projects that have onshore and offshore phases. Counsel further suggests that having to train another individual for any length of time would constitute the type of disruption in business that the L visa classification was intended to eliminate.

In addition, counsel contends that the director erred in finding that the petitioner's designation as an SEI-CMM Level 5 company, and the beneficiary's knowledge of SEI-CMM Level 5 assessed tools and methodologies, is easily accessible and does not rise to the level of specialized knowledge. Counsel asserts that the attainment of SEI-CMM Level 5 status "surely sets [the petitioner] apart from the majority of companies in its industry and attests to the quality standards that [the petitioner] utilizes." Counsel further states that the training of its employees on the methodologies and processes needed to maintain such rating likewise sets the petitioner's employees apart from those of other companies that have not attained such a rating.

Counsel asserts that the director erred in finding that where a large number of the petitioner's employees hold proprietary knowledge that said proprietary knowledge does not establish specialized knowledge. Citing to the Puleo memorandum, counsel asserts that the knowledge need not be narrowly held throughout the company, but only needs to be advanced. Counsel asserts that "it is clear that many employees having advanced knowledge of a company's procedures and methodologies does not mean that the beneficiary's knowledge is not specialized and thus is not grounds for denying a petition." Counsel contends that the beneficiary has specialized knowledge based on her experience with the unaffiliated employer's project overseas, and has specialized knowledge of the petitioner's product, services and techniques as they apply to international markets, thus meeting the requirements set forth in the regulation. Counsel argues that beneficiary's experience with the specific project distinguishes her

from other employees in the petitioning company and in the field, and her knowledge of the petitioner's proprietary processes and methodologies is not commonly known in the general field of information technology consulting.

Counsel asserts that the director erred in finding that the specialized knowledge criteria cannot be met when the beneficiary's work product benefits the "end-client" as opposed to the petitioning entity. Counsel stresses that it is the nature of information technology consulting firms to require their employees to know not only their own methodologies, processes and software, but also to become familiar with the client's processes and software. Counsel states that "the Director's claim that the petitioner must prove that the beneficiary is performing duties that benefit the petitioner in a manner other than economic viability has no foundation in the law and is a gross deviation from the realities of international commerce."

Counsel argues that the director has violated the Administrative Procedures Act by applying a standard not found in any statute, regulation, or precedent case law. Specifically, counsel argues that the director "has introduced the concept that specialized knowledge does not meet the specialized knowledge standard when the use of said specialized knowledge is 'incidental' to the US assignment." Counsel states that the director's determination that the petitioner's proprietary tools and processes are merely incidental to the U.S. project is based on an unfounded assumption. Counsel claims that the petitioner's tools and methods are in large part the reason the unaffiliated employer chose the petitioner to fulfill its information technology needs. Counsel asserts that the petitioner has a relationship with the unaffiliated employer spanning ten years, and the petitioner's methodologies and processes were in fact utilized in the creation of the unaffiliated employer's information systems.

Finally, counsel contends that the director erred in finding that the petitioner did not meet the regulatory requirements for offsite employment under the L-1 Visa Reform Act. Counsel asserts that the petitioner stated on Form I-129 that the beneficiary will be supervised by an onsite project manager employed by the petitioning company, and submitted a copy of the contract between the petitioner and the unaffiliated employer "which clearly shows that the petitioner has been retained to provide specific project related work as opposed to a relationship involving labor for hire."

## II. Relevant Law

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

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

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

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management or other interests and its application in

international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

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

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

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

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

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

### **III. Specialized Knowledge**

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

In denying the petition, the director noted that the beneficiary's knowledge of the petitioner's proprietary tools are "incidental" to the duties of the proffered U.S. position, since the beneficiary's assigned project is to develop and maintain the client's system. The director also noted that the petitioner failed to demonstrate that its software development procedures rated at SEI-CMM Level 5 are significantly different from the methods generally used in any computer consulting company. The director also noted that the beneficiary's duties do not appear to be significantly different from those of any other IT consultants employed by the petitioner, or different from the duties performed by other consultants in the computer industry. The director further stated that the petitioner did not submit the content of the training provided to the beneficiary, and that the courses were relatively

short on-the-job professional development training which may be offered to several of the petitioner's employees. The director found that the beneficiary's employment with the foreign entity alone, is not sufficient to establish specialized knowledge.

Upon review, and for the reasons discussed herein, the AAO finds that 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. History of the Specialized Knowledge Definition**

Because the petitioner's assertion relies in part on the evolution of the specialized knowledge definition, the AAO will examine the history of this term.

The L-1 intracompany transferee visa classification was created by Congress through the Immigration Act of 1970. Pub.L. 91-225, § 3, 84 Stat. 117 (Apr. 7, 1970). Congress created the L-1 visa classification after concluding that "the present immigration law and its administration have restricted the exchange and development of managerial personnel from other nations vital to American companies competing in modern-day world trade." *See generally* H.R. Rep. No. 91-851 (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). To address the problem, Congress created the L-1 visa and noted that the "amendment would help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization." *See generally id.*

Congress did not define "specialized knowledge" in the Immigration Act of 1970, nor was it a term of art drawn from case law or from another statute. *1756, Inc. v. Attorney General*, 745 F.Supp. 9, 14 (D.D.C., 1990).

The legislative history of the Immigration Act of 1970 does not elaborate on the nature of a specialized knowledge employee; instead the House Report references executives, managers and "key personnel." Regarding the intended scope of the L-1 visa program, the House Report indicates:

Evidence submitted to the committee established that the number of temporary admissions under the proposed 'L' category will not be large. The class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated and monitored by the Immigration and Naturalization Service.

H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. at 2754.

After the creation of the L-1B nonimmigrant classification, legacy INS developed a body of binding precedent decisions which attempted to clarify the meaning of "specialized knowledge," in the absence of a statutory definition. *See Matter of Raulin*, 13 I&N Dec. 618 (Reg. Comm. 1970); *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988).

As it gained administrative experience with the visa classification, the INS promulgated two successive definitions of the term by regulation. First, in 1983, the INS published a final rule adopting the following definition of "specialized knowledge" at 8 C.F.R. § 214.2(l)(1)(ii)(C) (1984):

"Specialized knowledge" means knowledge possessed by an individual which relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the petitioner not readily available in the job market. The knowledge must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the market place.

48 Fed. Reg. 41142, 41146 (September 14, 1983).

In 1987, less than four years later, the INS provided a modified definition at 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988) to "better articulate case law" relating to the term:

"Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service, research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.

52 Fed. Reg. 5738, 5752 (February 26, 1987).

On May 20, 1988, only 18 months after publication of the latest regulation, the INS Commissioner designated a precedent decision discussing the bright-line "proprietary knowledge" element in the definition of "specialized knowledge." *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988). In that decision, the INS adopted a highly rigid approach to evaluating the "proprietary knowledge" component of the regulatory definition:

A petitioner's ownership of patented products and processes or copyrighted works, in and of itself, does not establish that a particular employee has specialized knowledge. In order to qualify, the beneficiary must be a key person with materially different knowledge and expertise which are critical for performance of the job duties; which are critical to, and relate exclusively to, the petitioner's proprietary interest; and which are protected from disclosure through patent, copyright, or company policy.

*Id.* at 667-8.

Adding to the confusion, Richard Norton, an Associate Commissioner of the INS, issued a memorandum stating that since the new specialized knowledge regulations had been implemented, the INS had often used "a too literal definition of the term 'proprietary knowledge' wherein the knowledge must relate exclusively to or be unique to the employer's business operation." See Memo. of Richard Norton, *Interpretation of Specialized Knowledge Under the L Classification*, (Oct. 27, 1988), reproduced in 65 Interpreter Releases 1170, 1194 (November 7, 1988). Issued only six months after the *Matter of Sandoz Crop Protection Corp.*

decision, the memorandum produced considerable uncertainty among immigration attorneys. Daryl R. Buffenstein, chairman of the American Immigration Lawyers Association's committee on intracompany transferees, rejected the view that the memo was a liberalization, concluding instead that "[a]t best this throws more verbiage into an already confusing semantic mess; at worst it could create further restrictions." 65 Interpreter Releases at 1171.

In 1990, Congress acted to end the agency's varying interpretations of the term "specialized knowledge." Through the Immigration Act of 1990, Congress provided a statutory definition of the term by adopting in part and modifying the 1987 INS regulatory definition. Immigration Act of 1990, Pub.L. No. 101-649, § 206(b)(2), 104 Stat. 4978, 5023 (1990). Congress adopted the "advanced knowledge" component of the INS definition but deleted the bright-line "proprietary knowledge" element and the requirement that the knowledge be of a type "not readily available in the United States labor market." In enacting these changes, Congress did not otherwise attempt to modify the agency's interpretation as to what constitutes specialized knowledge. In its effort to clarify the term specialized knowledge, Congress did, however, add an ambiguous and circular component to the definition by stating that an alien is considered to be serving in a "capacity involving specialized knowledge" if the alien has a "special knowledge" of a petitioner's product.

Specifically, Congress enacted the following definition:

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.

Section 214(c)(2)(B) of the Act, as created by Pub.L. No. 101-649, § 206(b)(2).

Regarding the new statutory definition, the legislative history indicates that Congress found the L-1 visa had allowed "multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures" and that it had been "a valuable asset in furthering relations with other countries." In light of this experience, the House Committee stated that the category should be "broadened" by making four enumerated changes: first, Congress allowed accounting firms to have access to the intracompany visa even though their ownership structure had previously precluded them from the classification; second, Congress incorporated the "blanket petition" available under current regulations into the statute for maximum use by corporations; third, Congress changed the overseas employment requirement from a one-year period immediately prior to admission to one year within the three years prior to admission; and fourth, Congress expanded the period of admission for managers and executives to seven years to provide greater continuity for employees. H.R. Rep. 101-723(I) (1990), reprinted in 1990 U.S.C.C.A.N. 6710, 6749, 1990 WL 200418 (Leg. Hist.).

In a separate paragraph, outside of the previous paragraph discussing the enumerated provisions that "broadened" the L-1 classification, the House Report discussed the new definition of "specialized knowledge." The paragraph stated in its entirety:

One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its

application in international markets, or an advanced level of knowledge of processes and procedures of the company. The time limit for admission of an alien with specialized knowledge is five years, approximately the same as under current regulations.

*Id.*

In 1991, the INS proposed and adopted "a more liberal interpretation of specialized knowledge" based on the new statutory definition. Closely following the definition provided by Congress, 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.

*See* 56 Fed. Reg. 61111 (December 2, 1991)(Final Rule).

Since Congress enacted the statutory definition of "specialized knowledge," the agency has issued a number of internal agency memoranda discussing the term specialized knowledge, such as the Puleo Memorandum.

*Interpretation of Specialized Knowledge* (Dec. 20, 2002); Memo. from [redacted] USCIS, *Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status* (Sept. 9, 2004).

As noted by counsel, the Puleo Memorandum of 1994 is often cited as the key agency document relating to the adjudication of L-1B specialized knowledge visa petitions. Addressed to the various directors of the INS operational components, the internal agency memorandum noted that the 1990 Act statutory definition was a "lesser, but still high, standard" compared to the previous regulatory definition and declared that the memorandum was issued to provide guidance on the proper interpretation of the new statutory definition.

The memorandum advised INS officers to apply the common dictionary definition of the terms "special" and "advanced," since the statute and legislative history did not provide insight as to the interpretation of specialized knowledge. Looking to two different versions of Webster's Dictionary, the memorandum defined the term "special" as "surpassing the usual; distinct among others of a kind" or "distinguished by some unusual quality; uncommon; noteworthy." Puleo Memorandum at p.1. The memorandum relied on the same dictionaries to define "advanced" as "highly developed or complex; at a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage." *Id.* at p.2.

The Puleo Memorandum provided various scenarios, hypothetical examples, and a list of six "possible characteristics" of aliens that would possess specialized knowledge. Adding a gloss beyond the plain language of the statute or the definitions of "special" and "advanced," the memorandum surmised that specialized knowledge "would be difficult to impart to another individual without significant economic inconvenience." *Id.* at p.3. The memorandum also stressed that the "examples and scenarios are presented as general guidelines for officers" and that the examples are not "all inclusive." *Id.* at pp. 3-4.

The Puleo Memorandum concluded with a note about the burden of proof and evidentiary requirements for the classification:

From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien 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. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

*Id.* at p.4.

The Puleo Memorandum closes by noting that the document was "designed solely as a guide" and that specialized knowledge can apply to any industry and any type of position.

#### **B. Standard for Specialized Knowledge**

The L-1B specialized knowledge classification requires USCIS to distinguish between those employees who possess specialized knowledge from those who do not possess such knowledge. Exactly where USCIS should draw that line is the question before the AAO. On one end of the spectrum, one may find an employee with the minimum one year of experience and the basic job-related skill or knowledge that was acquired through that employment. Such a person would not be deemed to possess specialized knowledge under section 101(a)(15)(L) of the Act. On the other end of the spectrum, one may find an employee with ten years of experience and advanced training who developed a product or process that is narrowly understood by a few people within the company. That individual would clearly meet the statutory standard for specialized knowledge. In between these two extremes would fall, however, the whole range of experience and knowledge that may be found within a workplace.

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).

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.* 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(1) (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.<sup>2</sup>

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). 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 burden to articulate and prove that the beneficiary possesses "special" or "advanced" knowledge. Section 214(c)(2)(B) of the Act. 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

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<sup>2</sup> The mere fact of amendment itself does not indicate that Congress intended to change the law. *Callejas v. McMahon*, 750 F.2d 729, 731 (9th Cir. 1984). In general, Congress may amend a statute to establish new law, but it also may enact an amendment to clarify existing law. *Brown v. Thompson*, 374 F.3d 253, 259 (4th Cir. 2004); see also *U.S. v. Sepulveda*, 115 F.3d 882 (11th Cir. 1997). A change in statutory language need not *ipso facto* constitute a change in meaning or effect, as statutes may be passed purely to make what was intended all along even more unmistakably clear. *Brown*, 374 F.3d at 259. Furthermore, if Congress had intended the 1990 Act to liberalize the L-1B classification and broaden the class of aliens, the AAO would expect to see a clear statement from Congress to that effect. See *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139, 125 S.Ct. 2169, 162 L.Ed.2d 97 (2005) ("[C]lear statement rules ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation").

Given statements of intent made by the legislature, the circumstances surrounding its enactment, along with the agency's varying interpretations of the original act, the AAO concludes that the definition of specialized knowledge provided by the 1990 Act was a clarifying amendment.

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 industry.

### C. Analysis

In examining the specialized knowledge of the beneficiary, the AAO will look to the petitioner's description of the job duties and the weight of the evidence supporting any asserted specialized knowledge. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. At a minimum, the petitioner must articulate with specificity the nature of the claimed specialized knowledge. Merely asserting that the beneficiary possesses "special" or "advanced" knowledge will not suffice to meet the petitioner's burden of proof. *See* Puleo Memorandum at 4.

Upon review, the petitioner in this case has failed to establish either that the beneficiary's position in the United States requires an employee with specialized knowledge or that the beneficiary has specialized knowledge. While the petitioner has provided a detailed description of the beneficiary's duties, such duties are typical of a software specialist working with web-based data warehousing technologies, and require her to use knowledge and technical skills which are widely available in the information technology industry, such as Java, JSP, XML, XSL, HTML, Oracle 9i, IBM Websphere, Rational Rose, Unix and Windows 2000. Counsel for the petitioner acknowledged that "certainly, there is a portion of the beneficiary's job duties that could be performed by any highly skilled IT professional." Counsel asserts, however, that some aspects of the position "require use of [the petitioner's] proprietary tools and processes" and therefore could not be performed by the typical skilled worker.

Therefore, the first question before the AAO is whether the beneficiary's knowledge of and experience with the petitioner's proprietary tools and methodologies alone constitutes specialized knowledge. Counsel argues on appeal that "the elimination of the requirement of proprietary knowledge has created a less stringent standard for proving specialized knowledge. Thus an alien has demonstrated specialized knowledge if he is able to show proprietary knowledge. Indeed he has surpassed the less stringent standard."

Counsel's assertion is unpersuasive. While the current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the beneficiary's knowledge be proprietary, the petitioner cannot satisfy the current standard merely by establishing that the beneficiary's purported specialized knowledge is proprietary. The knowledge must still be either "special" or "advanced." As discussed above, the elimination of the bright-line "proprietary" standard did not, in fact, significantly liberalize the standards for the L-1B visa classification.<sup>3</sup>

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<sup>3</sup> The AAO acknowledges that the statutory definition of "specialized knowledge" removed two elements from the then existing regulatory definition of the term, and that such elements likely had the effect of restricting the class of people eligible for the classification. Counsel has not pointed to any committee report or floor statements that undermine the statement of the original enacting Committee that L-1 admissions "will not be large" and that the category will be "carefully regulated and monitored" by USCIS.

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 cannot 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 claimed proprietary specialized knowledge in this matter is stated to include proprietary tools and methodologies developed by the petitioner for the management of the company's software and systems development projects. These tools and methodologies are said to include QMS tools (Quantify and Qualify), SRS and the petitioner's Quality Assurance Methodologies. The petitioner emphasizes that its quality procedures are ISO 9001 and SEI-CMM Level 5 certified, thus further setting apart its employees' knowledge from that generally possessed by similarly employed workers in the information technology industry. The petitioner states that "QMS contains detailed processes for project management and technical life cycle activities in projects." However, all IT consulting firms develop internal tools, methodologies, procedures and best practices for documenting project management, technical life cycle and software quality assurance activities. It is also industry standard practice for such companies to seek ISO 9001 and SEI-CMM assessment of their processes and methodologies. The software Capability Maturity Model is not particular to the petitioner's organization.

Other than stating that its software development processes have been given the highest rating from the Software Engineering Institute, the petitioner did not attempt to explain how its processes and methodologies differ significantly from those utilized by other IT companies who have also adopted and followed the software CMM. The petitioner has not specified the amount or type of training its technical staff members receive in the company's tools and procedures and therefore it cannot be concluded that processes are particularly complex or different compared to those utilized by other companies in the industry, or that it would take a significant amount of time to train an experienced information technology consultant who had no prior experience with the petitioner's family of companies. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

To the contrary, the minimal evidence submitted suggests that the petitioner's employees are not required to undergo any extensive training in the company's processes and methodologies. The beneficiary completed a one-day course in the petitioner's Quality Management System, and there is no evidence that she received any other formal training in the beneficiary's proprietary tools, systems and procedures. Rather, it is evident that she was hired by the foreign entity directly following graduation from college and immediately assigned to work on the offshore component of the unaffiliated employer's ISP project in a role similar to the one she has been offered in the United States. While the petitioner made a reference to the beneficiary's on-the-job training, there is no indication that she has been doing anything other than fully performing the duties of the position since the date she was hired by the foreign entity.

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

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

In addition, even if we assume *arguendo* that the beneficiary's familiarity with the client's systems could be considered "specialized knowledge," the petitioner claims that it has provided IT services to the unaffiliated employer for over ten years, has developed some of the unaffiliated employers internal information systems, and has over 80 ongoing onshore and offshore projects for the unaffiliated employer. In light of this

information, it is unclear how the beneficiary, who has worked as a team member on a single project for the unaffiliated employer for approximately 18 months, is considered to have "advanced" knowledge of the petitioner's processes and methodologies relative to the unaffiliated employer's projects. The petitioner submitted an organizational chart that shows the beneficiary is one of 14 persons assigned to her project's offshore team, and she does not hold a senior or lead role.

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

It is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of LeBlanc*, 13 I&N Dec. at 816). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.*

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

The petitioner has not successfully demonstrated that the beneficiary's knowledge of the petitioner's processes and procedures gained during her 18 months of employment with the foreign entity is advanced compared to other similarly employed workers within the organization. As noted above, the petitioner's attempts to distinguish the beneficiary's knowledge as advanced relative to a specific client project are unpersuasive. All of the foreign entity's technical employees would reasonably have project-specific knowledge in addition to knowledge of the company's proprietary tools and processes for implementing projects. By this logic, any of them would qualify for L-1B classification if offered a position working on the same project in the United States.

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>4</sup> 18 I&N Dec. at 52-53. An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in L-1B classification. The term "special" or "advanced" must mean more than experienced or skilled. In other terms, specialized knowledge requires more than a short period of experience, otherwise, "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, as explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by workers employed elsewhere in the industry. The beneficiary's duties and technical skills, while impressive, demonstrate that she possesses knowledge that is common among software specialists in the information technology consulting field. Furthermore, it is not clear that the performance of the beneficiary's duties would require more than basic proficiency with the company's internal processes and methodologies. The petitioner has failed to demonstrate that the beneficiary's training, work experience, or knowledge of the company's processes is more advanced than the knowledge possessed by others employed by the petitioner, or that the processes used by the petitioner are substantially different from those used by other technology consulting companies. The petitioner has failed to demonstrate that the beneficiary's knowledge is any more advanced or special than the knowledge held by a skilled worker. See *Matter of Penner*, 18 I&N Dec. at 52.

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

#### IV. L-1 Visa Reform Act of 2004

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 primary purposes of the L-1 Visa Reform Act amendment was to prohibit the outsourcing of L-1B intracompany transferees to

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<sup>4</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).

unaffiliated employers to work with "widely available" computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, \*S11686, 2003 WL 22143105 (September 17, 2003); *see also* Sen. Jud. Comm., Sub. on Immigration, Statement for Chairman Senator Saxby Chambliss, July 29, 2003, available at <[http://judiciary.senate.gov/member\\_statement.cfm?id=878&wit\\_id=3355](http://judiciary.senate.gov/member_statement.cfm?id=878&wit_id=3355)> (accessed on September 5, 2008).

If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute mandates that the petitioner establish both: (1) that the beneficiary will be controlled and supervised principally by the petitioner, and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act. These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel or the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaigbena*, 19 I&N Dec. at 534.

If the petitioner fails to establish *both* of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee. As with all nonimmigrant petitions, the petitioner bears the burden of proving eligibility. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1).

#### **A. Threshold Question: Worksite of Beneficiary**

As a threshold question in the analysis, USCIS must examine whether the beneficiary will be stationed primarily at the worksite of the 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 at the Washington, D.C. offices of the unaffiliated employer. 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. Although the director failed to enter a specific finding on this issue, the AAO concludes that the petitioner has not satisfied this prong of the L-1 Visa Reform Act test.

As discussed, the petitioner asserted on the Form I-129 Supplement L that the beneficiary "will be controlled and supervised by" a project manager from the petitioning company working on-site at the unaffiliated entity. The petitioner did not provide copies of work orders, contracts, or other evidence referencing the beneficiary's assignment to the unaffiliated employer's worksite.

The director specially requested that the petitioner submit a copy of the contract from the entity with whom the beneficiary will actually be working. Rather than submitting a complete copy of the contract, the petitioner submitted a partial copy of an annex to a contract. The contract annex does not reference the beneficiary or indicate who would supervise her work at the unaffiliated employer's location. In fact, it appears that the "Terms of Reference" provided in the annex relate to a contract that was signed in or before 2002, four years before the beneficiary joined the foreign entity. The "Terms of Reference" indicate that "Contractor's employees will work as part of [the unaffiliated employer's] project teams" but makes no reference as to who supervises the petitioner's employees in general.

Although the petitioner asserts that that the beneficiary will be supervised and controlled by an employee of the petitioning company, this assertion is not corroborated by any evidence. 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 AAO concludes, therefore, that the petitioner has failed to meet its burden of establishing that the beneficiary would be controlled and supervised principally by the petitioning company and has not satisfied the requirements of section 214(c)(2)(F)(i) of the Act. On this basis alone, the petition must be denied.

### **C. Necessity of Specialized Knowledge Specific to the Petitioning Employer**

The second issue under the L-1 Visa Reform Act analysis is whether the petitioner has established that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F)(ii) of the Act. As discussed below, the petitioner also fails to satisfy the requirements of this section of the Act.

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

[The beneficiary] is well versed with the tools, designs, methodologies and processes of [the petitioner] and [the unaffiliated employer] which is a requirement to meet the required standards while working in [the unaffiliated employer's] location. She has gained in depth knowledge about the systems and processes where she can successfully execute the projects. She has been trained extensively on the quality standards by the "Quality" unit of [the petitioner] to ensure that specific projects adhere to [the petitioner] and [the unaffiliated employer's] standards.

In denying the petition, the director concluded that the placement of the beneficiary at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. The director observed that "the beneficiary's value related to [the unaffiliated employer's] project team appears directly and primarily related to [her] knowledge of [the unaffiliated employer's] internal processes and methodologies." The director concluded that the majority of the beneficiary's purported specialized knowledge hinges upon her knowledge of the unaffiliated employer's internal processes. In making this conclusion, the beneficiary determined that the beneficiary's use of the petitioner's proprietary tools and methods "is merely incidental" to the proposed duties of the U.S. position, because "the

stated purpose of the beneficiary's assigned project is to develop and maintain the client's systems."

On appeal, counsel objects to the conclusion that the beneficiary's services constitute an arrangement to provide "labor for hire" for the unaffiliated employer. First, counsel asserts that the director erred in finding that specialized knowledge cannot be met when the beneficiary's work product benefits the end-client as opposed to the petitioning entity. Counsel emphasizes that the beneficiary's successful performance of her duties contributes to the economic viability of the petitioning organization. Counsel asserts that any employee of an IT consulting firm will be required to possess knowledge of both the firm's own methodologies and processes, but also the client's software and processes, and the fact that the beneficiary's knowledge encompasses both the petitioner's processes and those of the client should not be a basis for denial.

Counsel also argues that the director's finding that the beneficiary's use of the purported specialized knowledge is "incidental" to the U.S. assignment creates a standard not found in the statute, regulation or any precedent of case law. Counsel asserts that the beneficiary was identified for transfer to the United States, in part because of her knowledge of the petitioner's proprietary software and processes. Counsel indicates that the petitioning company has in fact used its proprietary tools and methods over the years to create the unaffiliated employer's systems and that knowledge of the petitioner's tools and methodologies is therefore critical to the ongoing support and customization of such systems.

Finally, counsel asserts that the L-1 Visa Reform Act of 2004 provides that "the position in question must not be staff augmentation or labor for hire." Counsel asserts that the petitioner provided a complete description of the project on which the beneficiary will be working and a copy of the contract between the petitioner and the unaffiliated employer which "clearly shows that the petitioner has been retained to provide specific project related work as opposed to a relationship involving labor for hire."

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

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

As discussed above, the petitioner has not submitted a complete copy of the contract governing the work to be done by the beneficiary at the unaffiliated employer's worksite. The limited information contained in the "Terms of Reference" annexed to the contract indicate that the petitioner was contracted to provide support for the unaffiliated employer's existing Corporate Information System Programs, not to develop such programs. Such programs include the unaffiliated employer's Enterprise Business Systems (based on SAP) Human Resources and Payroll Systems (based on PeopleSoft), Loan Systems (custom developed), Internet Services Program (supported by IBM Web Sphere), Business Warehouse and Management Reporting (SAP and Web-based) and Information Management Services. The "Terms of Reference" indicate that the petitioner's employees "work as part of [the unaffiliated employer's] project teams" and provide such services as programming SAP custom add-on solutions, Notes applications, and web applications. There is no reference to any system, processes, tools or methodologies of the petitioning company in the scope of work to

be performed for the unaffiliated employer.

While it appears that the "Terms of Reference" annexed to the petitioner's contract do outline the unaffiliated employer's skills requirements, the submitted contract is incomplete and does not include this information.

The petitioner has not shown that any of the products or services to be supported or enhanced will require the application of the petitioner's own technologies. The evidence of record does not support a conclusion that the beneficiary will not be implementing, developing, maintaining, or supporting systems or software developed by the petitioning company, or providing a service that other information technology companies with comparable capabilities could not provide. It is for this reason that the director found that the beneficiary's use of the petitioner's internal tools and methodologies would be "incidental" to the assignment. The primary purpose of the assignment is for the beneficiary to support, enhance and modify the unaffiliated employer's internal systems. Any IT consulting company could likely provide an employee to deliver the exact same services, using its own internal project delivery tools and methodologies, and achieve the same results for the unaffiliated employer.

The petitioner's claim that the beneficiary was specifically chosen for the assignment by the unaffiliated employer based on her purported specialized knowledge remains wholly unsupported by any documentary evidence. The "Terms of Reference" for the petitioner's contract appear to pre-date the beneficiary's employment with the foreign entity by four years. If there is a more recent contract with the unaffiliated entity which names the beneficiary and the specific services she will provide at the unaffiliated employer's worksite, the petitioner has opted not to provide it.

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.

To the contrary, a review of the facts suggests that this is exactly the type of employment relationship that the L-1 Visa Reform Act of 2004 intended to prohibit. As explained above, the legislation was enacted to prevent the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software. In this matter, the petitioner indicated that the beneficiary's project involves the beneficiary to apply her knowledge of Java 2.0, JSP, XML, XSL, Java Script, HTML, Servlet, Oracle 9i, IBM Web Sphere 4.0 and Rational Rose, among others. This software technology is widely available in the industry.

Counsel indicates that the position does not involve labor for hire because the petitioner "has been retained to provide specific project related work." However, if the "project related work" involves the unaffiliated employer essentially outsourcing its entire IT support function to the petitioner, then the employees assigned to the "project related work" are not providing a product or service which necessitates specialized knowledge that is *specific to the petitioning employer*. Furthermore, the "Terms of Reference" annexed to the petitioner's contract with the unaffiliated employer indicate that the petitioner's employees will "work as part of [the unaffiliated employer's] project teams." Since the petitioner has not provided the entire contract for review, the AAO cannot conclude that the petitioner's employees would not act as staff augmentation for the unaffiliated employer's existing information systems department.

There is no documentary evidence that would substantiate the beneficiary's position on the unaffiliated employer's ISP project or whether her position will involve specialized knowledge. Without these documents, USCIS is unable to determine the project details, how the beneficiary's work will be utilized on the project, or even if the project was ongoing at the time the petition was filed. The "Terms of Reference" appeared to refer to a contract signed in 2002.

In conclusion, there is no evidence that the petitioner is providing the beneficiary's services in connection with the sale of any technology products or that the beneficiary's offsite employment requires any specialized knowledge specific to the petitioner's operations. Instead, the limited evidence in the record related to the nature of the contract indicates that the petitioner is providing general IT services to the unaffiliated employer. The fact that such services appear to be delivered on a large-scale "project" basis is insufficient to preclude a finding that such services essentially constitute "labor for hire."

Accordingly, the petitioner has failed to meet its burden of establishing that the beneficiary's placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary, and the petition may not be approved.

#### V. Conclusion

Beyond the decision of the director, it is noted that the petitioner indicated under penalty of perjury in Part 4 of the Form I-129 petition that the beneficiary had never been denied the requested classification. This petition was filed on January 25, 2008. U.S. Department of State records indicate that the beneficiary submitted a Blanket L-1B visa application on Form I-129S to the U.S. Consulate in Chennai, India on January 3, 2008, and the visa was refused. The regulations at 8 C.F.R. § 214.2(l)(2)(i) state that "[f]ailure to make a full disclosure of previous petitions filed may result in a denial of the petition." As the petitioner indicated on the form that the beneficiary had never been denied the requested classification, and the petitioner failed to fully disclose the previously filed petition, this petition will be denied for this additional reason as a matter of discretion.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied and the appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if he or she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

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

**ORDER:** The appeal is dismissed.