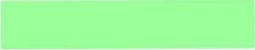




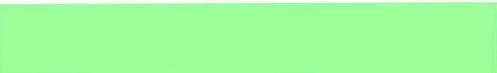
U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: OFFICE: CALIFORNIA STATE SERVICE CENTER FILE: 

FEB 08 2013
IN RE:

Petitioner: 

Beneficiary: 

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

ON BEHALF OF PETITIONER:

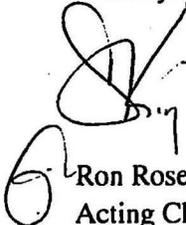
SELF REPRESENTED

INSTRUCTIONS:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,



Ron Rosenberg
Acting Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1B nonimmigrant intracompany transferee 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, an Illinois corporation, is a manufacturer of ice cream and specialty desserts. The petitioner claims to be a joint venture of [REDACTED] located in Spain.¹ The petitioner seeks to employ the beneficiary as its production manager for a period of two years.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, the petitioner contends that the beneficiary possesses specialized knowledge and submits a brief in support of the appeal.

I. The Law

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

If the beneficiary will be serving the United States employer in a managerial or executive capacity, a qualified beneficiary may be classified as an L-1A nonimmigrant alien. If a qualified beneficiary will be rendering services in a capacity that involves "specialized knowledge," the beneficiary may be classified as an L-1B nonimmigrant alien.

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.

¹ Assuming all facts are true, it appears the petitioner is better defined as a subsidiary, rather than a joint venture, of [REDACTED] based upon [REDACTED] ownership of the petitioner.

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

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

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

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

I. The Issue on Appeal

The sole issue to be addressed is whether the petitioner established that the beneficiary possesses specialized knowledge.

The petitioner is a manufacturer of ice cream and specialty desserts established in 1991. In 2002, the petitioner was acquired by the foreign entity for the dual purpose of producing the foreign entity's products for sale and distribution in the United States, and reorganizing and upgrading the U.S. operations' facilities in order to increase sales. The petitioner has three employees - a general manager/corporate secretary and two assistant production personnel - and a gross annual income loss of \$14,207.

The petitioner stated the beneficiary will be working in the United States as a production manager. The petitioner provided a description of the beneficiary's proposed duties in the United States. The petitioner asserted that the beneficiary would be responsible for reviewing the current plant and equipment to prepare it for production of sorbet in skin, which is currently being exported from Spain. The petitioner asserted that

the beneficiary will be responsible for completing the reorganization, expansion, and modernization of the production unit for the U.S. facilities to make it suitable for the production of the foreign entity's European specialties, including the purchase of new equipment and importing some specialized equipment from Spain. The petitioner asserted that the beneficiary would be responsible for starting up the modified plant in the United States. The petitioner asserted that the beneficiary would be responsible for producing the European specialties according to the foreign entity's recipes, while adapting ingredients, sourcing raw materials and fruit locally. Finally, the petitioner asserted that the beneficiary will be responsible for training U.S. personnel.

The director issued a request for evidence ("RFE"). The director requested that the petitioner provide additional evidence to establish that the beneficiary has specialized knowledge including, *inter alia*, the following: (1) a description of the number of persons holding the same or similar positions as the beneficiary at the U.S. location; (2) how the duties of the beneficiary will be different from those of other workers employed by the petitioner or other U.S. employees in this type of position; (3) an explanation of exactly what is the equipment, system, product, technique, or service of which the beneficiary has specialized knowledge, and if it is used or produced by other employers in the United States and abroad; (4) an explanation of how the beneficiary's training or experience is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by others in the same field; (5) what specialized training the beneficiary will provide in the United States; and (6) a description of the impact upon the petitioner's business if the petitioner is unable to obtain the beneficiary's services, and what alternative action will be taken to fill the responsibilities.

In response to the RFE, the petitioner asserted that there are no similar positions in the United States, as they do not have a designated supervisor. The petitioner explained that they previously produced gelato style desserts and sorbet desserts in small batches on small batch freezers (capacity 10-12 gallons per hour), not on continuous freezers and special equipment with significantly larger capacity (capacity 160-400 gallons per hour). The petitioner explained that they use a pasteurized mix and pasteurized ingredients. The petitioner explained that they need to improve and revise their entire production process, as well as make their own sorbet and gelato bases, in order to improve their products, costs, and sales. The petitioner explained that it has two other employees who pack and fill products after freezing in batch freezers, and who fill out production reports with the General Manager. The petitioner stated that their entire production process is being revised.

The petitioner described the beneficiary's special and advanced job duties in the United States as including the following: adapting new recipes to mix bases and equipment; analyzing costs and space allocation for the building; training and supervising current employees on processes and formulations; supervising additional training and duties for current employees; automating the tartufo making and filling process; producing fruit sorbet in their unique shell for current customers importing from Spain; adding unique frozen products to the dessert line; reworking and developing proprietary formulas to run on new and redesigned equipment to match the foreign entity's recipes and profiles; adjusting the packaging line; and reviewing and analyzing efficiencies and costs for the petitioner. The petitioner explained that the beneficiary would provide training

on new recipes, the use of the new and redefined equipment, and quality assurance and new standard operating procedures.

The petitioner described its products as “Gelato and Sorbet single serve proprietary desserts and equipment needed to be updated.” The petitioner then listed the equipment it needed to update as including: automated ice cream ball machine; larger pasteurizer; enrober and juice extractor/hollowing machine; freezing tunnels; dosing and curing rooms; fruit storage and sanitizing. The petitioner explained that they do not currently produce fruit sorbet in the skin, but other manufacturers have similar products and one Italian company manufactures “some fruit in the states.” The petitioner described how the foreign entity has been making these products since the 1970’s under a private label as well as the [REDACTED] label. The petitioner explained that they have opportunities but lack “the manufacturing experience to capitalize on many of the cost saving opportunities in the gelato and sorbet business in this market as well as knowledge to produce large volumes of sorbet in the skin for current U.S. customer[s] of [the foreign entity].”

The petitioner described the beneficiary’s experience and training with the foreign entity. The petitioner described how the beneficiary has been a long time member of the manufacturing team of the foreign entity and a consultant to the petitioner, and is familiar with all machines and processes involved. The petitioner asserted that the beneficiary originally travelled with the owners of the foreign entity to visit the petitioner in 2002 before the acquisition was completed. The petitioner also asserted that the beneficiary was involved in the start-up of the foreign entity’s manufacturing plant in Shenyang, China, and is currently employed at the new plant (opened in November 2009) in Jerez de la Frontera, Spain.

Finally, the petitioner described the impact on its business if it were unable to employ the beneficiary. The petitioner asserted that it needs the beneficiary’s manufacturing skills to help in the reorganization of its business, as the beneficiary is familiar with their products, equipment, and building. The petitioner asserted that the beneficiary would be responsible for making the necessary changes to manufacture the specialty fruit gelato and tartufo in the United States. The petitioner concluded by stating that its sales have drastically declined in the last few years due to the need for capital to improve the manufacturing facility and adapt its procedures to more economical processes.

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary possess specialized knowledge. In denying the petition, the director found that the beneficiary’s knowledge of the foreign entity’s operations does not automatically constitute special or advanced knowledge. The director observed that the petitioner failed to describe how many other employees within the organization possess the same specialized knowledge as the beneficiary. The director also observed that the petitioner failed to provide a sufficient description of the beneficiary’s job duties in the United States. The director concluded that the beneficiary’s employment was too generally described to establish that the beneficiary possesses special knowledge.

On appeal, counsel asserts that the beneficiary possesses special knowledge. In specific, counsel asserts that the beneficiary has expert knowledge of the foreign entity’s recipes and formulas, as he was the sole

individual responsible for developing the proprietary formulas. Counsel asserts that the beneficiary's knowledge of trade secrets used in creating the petitioner's product and his experience and expertise in manufacturing the product constitutes specialized knowledge. Counsel asserts that the beneficiary also has expert knowledge and experience with the new and sophisticated equipment that is currently being used by the foreign entity. Counsel asserts that without the beneficiary's employment, the petitioner lacks the expertise and experience to develop its proprietary product. Counsel asserts that the beneficiary has been specifically trained by the foreign entity to replicate and produce their unique product, and that the beneficiary's unique knowledge and experience is absolutely essential to the petitioner's existence. Counsel emphasizes the beneficiary's long time employment with the foreign entity, his "extensive and active involvement in 'the set-up and start-up of a large production plant for [the foreign entity] in Shenyang (PR of China),' and his unique involvement in their new Jerez de la Frontera, Spain production plant." Counsel concludes that "no other employee possesses specialized knowledge similar to that of Beneficiary, and his employment is absolutely necessary for the success of Petitioner."

III. Analysis

Upon review, the petitioner's assertions are not persuasive. The petitioner has not established that the beneficiary possesses specialized knowledge as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

In visa petition proceedings, the burden is on the petitioner to establish eligibility. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.* The director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

In order to establish eligibility, the petitioner must show that the individual will be employed in a specialized knowledge capacity. 8 C.F.R. § 214.2(l)(3)(ii). The statutory definition of specialized knowledge at Section 214(c)(2)(B) of the Act is comprised of two equal but distinct subparts. First, an individual is considered to be employed in a capacity involving specialized knowledge if that person "has a special knowledge of the company product and its application in international markets." Second, an individual is considered to be serving in a capacity involving specialized knowledge if that person "has an advanced level of knowledge of processes and procedures of the company." *See also* 8 C.F.R. § 214.2(l)(1)(ii)(D). The petitioner may establish eligibility by submitting evidence that the beneficiary and the proffered position satisfy either prong of the definition.

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. 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.

As both "special" and "advanced" are relative terms, determining whether a given beneficiary's knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against that of others in the petitioning company and/or against others holding comparable positions in the industry. The ultimate question is whether the petitioner has met its burden of demonstrating by a preponderance of the evidence that the beneficiary's knowledge or expertise is advanced or special, and that the beneficiary's position requires such knowledge.

In the present case, the petitioner has failed to specify whether its claims are based on the first or second prong of the statutory definition found in Section 214(c)(2)(B) of the Act. The petitioner only asserted in a general and broad manner that the beneficiary has specialized knowledge. The petitioner also failed to identify with any specificity the company's product(s), process(es), or procedure(s) that form the basis of its claims.

The petitioner provided only general descriptions of its current products and the products it hopes to manufacture in the United States. For example, the petitioner described its products as "European specialties," "proprietary desserts," and "additional unique frozen products," but provided no detailed explanation of what these specialty, proprietary, and unique desserts are. Notably, in the RFE the director specifically advised the petitioner to explain its products in more detail. The petitioner responded by broadly stating that its products are "gelato and sorbet single serve proprietary desserts."

The petitioner indicated that it wants to start manufacturing "fruit sorbet in the skin," which it currently does not produce and is exporting from Spain. However, the petitioner failed to explain what exactly "fruit sorbet in the skin" is, and why this product is different from other sorbets. The petitioner also referenced its desire to start manufacturing "specialty fruit gelato and tartufo" in the United States, but again, the petitioner failed to explain and distinguish these products from other fruit gelatos and desserts.

In the RFE, the director specifically advised the petitioner to explain its products in more detail and indicate whether this product is produced by other employers in the United States and abroad. The petitioner responded by broadly stating that it currently does not manufacture sorbet in skin, and that "other manufacturers have made similar products and one Italian company manufacturers some fruit." The petitioner's answer fails to provide any meaningful understanding of what this particular product is and whether it can be readily found in the United States and abroad. Without such information, it is impossible for the AAO to assess whether the beneficiary possesses a special knowledge of the product, i.e., whether his knowledge of the product is of the sort that is not generally found in the particular industry.

The petitioner also failed to provide an adequate description of the particular processes and procedures in which the beneficiary purportedly possess advanced knowledge. The petitioner made broad references to the petitioner's "experience and expertise in manufacturing" and knowledge of "specialized equipment," but

failed to identify what particular processes, procedures, and equipment are involved, and why these processes, procedures, and equipment are different from those normally utilized in the industry. Without this specific information, it is impossible for the AAO to assess whether the beneficiary's knowledge of the processes and procedures can be considered "advanced."

The director's RFE specifically requested the petitioner to explain the equipment, system, technique, or service that the beneficiary has specialized knowledge of, and whether it is used by other employers in the United States and abroad. The petitioner failed to respond to this aspect of the RFE. The regulation at 8 C.F.R. § 214.2(l)(3)(viii) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner did not provide the requested evidence. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The petitioner asserted that one of the beneficiary's special and advanced duties will be to complete the reorganization, expansion, and modernization of the production unit for the U.S. facility, including the purchase of new equipment and importing some specialized equipment from Spain. The petitioner asserted that the beneficiary would be responsible for starting up the modified plant in the United States. The petitioner asserted that the beneficiary is qualified to do so from his prior experience in setting up new plants in China and Spain. Specifically, the petitioner claims the beneficiary was actively involved in the "set-up and start up" of the foreign entity's manufacturing plant in China, and is currently employed at the foreign entity's new plant in Jerez de la Frontera, Spain. On appeal, counsel for the petitioner characterizes the beneficiary's involvement in the "set-up and start-up" of these two plants as "extensive," "active," and "unique."

However, the petitioner failed to provide any detailed explanation or documentation as to the beneficiary's exact roles and duties in the "set-up and start-up" of the new Chinese and Spanish plants. The beneficiary's resume lists only general duties he performed at the Chinese and Spanish plants, such as "quality control assistant," "raw materials reception and selection," and "production management." His resume did not list any particular achievements or duties to indicate that the beneficiary played a critical role in the formation and development of these plants. Notably, the beneficiary's resume indicates that he was transferred to the Chinese plant approximately one year after he started working at the foreign entity. The short amount of time the beneficiary worked at the foreign entity before he was transferred to China gives reason to question the scope of his roles and responsibilities in China. In light of the above, the petitioner has failed to support its claim that the beneficiary was extensively, actively, or uniquely involved in the "set-up and start-up" of these two plants.

On appeal, the petitioner asserts that the beneficiary has "knowledge of trade secrets in creating the Petitioner's product" and was "privy to and essential to the development of proprietary formulas and trade secrets." However, the petitioner provides no documentary evidence to support these claims, which were made for the first time on appeal. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Finally, the petitioner misrepresented its filing history on behalf of the beneficiary. On Part 4, Questions 8 and 9 on Form I-129, the petitioner misrepresented that it has never previously filed a petition for the beneficiary, and that the beneficiary has never been given or denied the L-1B classification within the past seven years. USCIS records confirm that the petitioner previously petitioned for, and was granted, two L-1B visas for the beneficiary from July 1, 2007 to June 30, 2009, and July 1, 2009 to June 30, 2011.

In the RFE, the director specifically requested the petitioner to indicate the number of specialized knowledge L-1s transferred to the U.S. location in the last five years, with the position description and title of each. The petitioner responded that one L-1 transfer previously worked for the petitioner from May 2007 to December 2009, and provided salary details for this position. The petitioner's response failed to acknowledge that this prior L-1 was the beneficiary, and failed to provide any explanation of the beneficiary's prior position duties and title. The petitioner's failure to provide the requested information, particularly the beneficiary's prior position duties in the United States, precludes the AAO from making an accurate assessment of the petitioner's claims. Again, the failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

For the reasons discussed above, the evidence submitted fails to establish that the beneficiary possesses specialized knowledge. See Section 214(c)(2)(B) of the Act. Accordingly, the appeal will be dismissed.

IV. Conclusion

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 the petitioner has not met that burden.

ORDER: The appeal is dismissed.