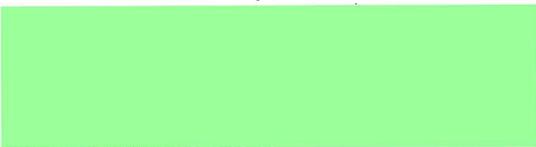




U.S. Citizenship
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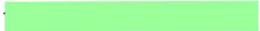
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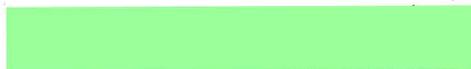
DATE: **FEB 28 2013**

Office: CALIFORNIA 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:

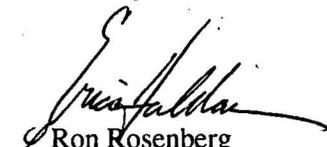
SELF-REPRESENTED

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 nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant 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 is a California corporation established in 1997. It is an affiliate of [REDACTED] based in India. The petitioner is in the business of supplying software outsourcing development services and solutions. The petitioner seeks to employ the beneficiary in the position of Programmer Analyst for an initial period of three years.

The director denied the petition, finding the petitioner failed to establish that the beneficiary possesses specialized knowledge or that the proposed position requires specialized knowledge.

The petitioner subsequently filed a timely appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, the petitioner submits a brief and asserts that the evidence of record establishes that the beneficiary possesses specialized knowledge and that the proposed position requires an individual with specialized knowledge.

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 three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof.

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. *Id.*

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides the statutory definition of specialized knowledge:

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

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

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

The 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.

II. The Issue on Appeal

The issue on appeal is whether the petitioner established that the beneficiary possesses specialized knowledge and that it will employ the beneficiary in a position requiring specialized knowledge.

The petitioner states that it is engaged in providing "software outsourcing development services and solutions" to customers located in the United States, Europe and Asia-Pacific. In addition, the petitioner states that it is also "in the process of developing its next generation products, [REDACTED] Desktop Surveillance System and [REDACTED] MPEG4 Video Encoder." It currently has three employees in the United States and approximately 40 employees working for its Indian affiliate. It wishes to hire the beneficiary as a programmer analyst.

The petitioner stated that the beneficiary has been employed as a programmer analyst in its Indian affiliate's engineering department for approximately two years. The petitioner provided a description of his current role, which involves "working with product management to define the requirements of [REDACTED] Encoder products and document functional specifications." The petitioner indicated that the beneficiary has been "a

key member of the design and development team from the outset" and that he has played an integral role in the specification, analysis, design and development of the software.

The petitioner stated that the video compression and encoding process used in the [REDACTED] MPEG4 Video Encoder is "unique to our product." The petitioner described the product as a "state-of-the-art video encoder for high resolution video" and emphasized that "no product of this kind currently exists in the market in the U.S. or abroad." According to the petitioner, the beneficiary "has been working on the areas of customizing, configuring and testing video compression and streaming for our product" and "has been one of the key developers and lead" for the encoder product. The petitioner also stated that the beneficiary has a deep understanding of the company's software development and business processes. The petitioner emphasized that "the algorithms, methodologies and processes that are and will be used in our product are unique to our company and are not generally known throughout the industry."

The petitioner stated that it requires the beneficiary in the United States so that he can work closely with the U.S. team "to continue the development and enhancement of our proprietary product to make it suitable for the US market." The beneficiary's duties would be the same as those he performs abroad. The petitioner indicated that the position requires, in part, the following: knowledge of digital video encoding and streaming using multimedia protocols such as MPEG4, H.264, RTP, RTSP, STCP, SIP; strong programming skills in Flex, Apache, MySQL, PHP, C++, C, JavaScript on Linux, and Windows; knowledge of databases such as Oracle or MySQL; expertise in building complex configuration user interfaces; knowledge of version control and network monitoring tools such as CVS and Subversion; and experience with IDEs including Eclipse, Zend Studio, Visual Studio, and Adobe Flex Development IDE. Additionally, the stated requirements for the position included a bachelor's degree in computer science or information technology and "3 to 4 years relevant experience."

The petitioner provided evidence that the beneficiary has a Bachelor of Technology degree in Information Technology awarded in October 2005. According to the beneficiary's resume, he was employed by an unrelated Indian company as a programmer for approximately 17 months before joining the petitioner's foreign affiliate. His projects included work on a local search engine, an "image sharing and comic creation portal," and a payment gateway for an e-commerce shopping site.

The petitioner also provided a copy of the beneficiary's resume. He indicates that he has worked on three different projects during his two years of employment with the foreign entity: [REDACTED]

[REDACTED] The resume does not indicate the dates the beneficiary worked on specific projects. He indicates that [REDACTED] MPEG4 Encoder is "an Advanced Simple Profile (Level 5) video encoder implemented on [REDACTED] programmable Video Signal Processor system ([REDACTED] hardware)" and states that the encoder software "is highly optimized by [the petitioner] to run on [REDACTED] hardware."

Finally, the petitioner submitted a company catalog and information from its website which provided additional information regarding its MPEG4 video encoder product, including the following product description:

MPEG4 encoder boasts superior performance achieved with multiple VLIW functional units and special video memories. It requires minimal host interaction to drive the whole encoding process. It can be reused in any SOC where MPEG4 ASP coding is required. Its design is highly optimized to reduce traffic on system bus and has its own internal data paths to handle bulk of the encoding process stages.

The director found that petitioner did not submit sufficient evidence with its initial petition to establish specialized knowledge and issued a Request for Evidence (RFE). The RFE instructed the petitioner to provide more information regarding how the duties of the beneficiary, both current and proposed, differ from those of other employees of the petitioner and other programmers in the field. The director also requested that the petitioner explain in more detail exactly what is the equipment, system, product, technique or service of which the beneficiary has specialized knowledge and to indicate if it is used or produced by other companies in the industry.

In response, the petitioner submitted a nine-page letter, significant portions of which were taken verbatim from its initial supporting letter. In response to the director's request that the petitioner identify any special or advanced duties that differentiate the beneficiary from other programmers in the company and in the industry, the petitioner stated that the beneficiary "has the knowledge and experience of configurations and administration software and interfaces for MPEG4 Video Encoder and Desktop Surveillance System apart from having the knowledge and thorough understanding of various compression algorithms and streaming media protocols used in the product." The petitioner maintained that it was not aware of any other company developing the same product and therefore it believes the beneficiary's duties and knowledge are different from what other U.S. employers would have. The petitioner also stated that the beneficiary's duties are different from those of others employed within its Indian office.

With respect to the company's MPEG4 Encoder, the petitioner reiterated the product description and features and added that it "employs specialized software techniques to make this process practical" and uses "advanced video compression software technology and algorithms." The petitioner stated that it is imperative that it bring knowledge of the product to its U.S. engineering personnel and noted that "to the best of the petitioner's knowledge these exact products are not used or produced by other employers in the United States or abroad."

With respect to the beneficiary's qualifications, the petitioner maintained that he "possesses valuable, uncommon specialized knowledge in video compression, encoding, streaming and user interface development" on the Encoder product, has "the thorough knowledge or skills to develop the interfaces and configuration programs that are part of the first releases of the products," and "is intimately familiar with the product and our company's software development processes."

The director ultimately denied the petition, concluding that the petitioner failed to establish that the beneficiary possesses specialized knowledge or that he would be employed in a specialized knowledge position. In denying the petition, the director found that the record did not support the petitioner's claim that the beneficiary has played a lead role in the development of its products or that he possesses any specialized knowledge of the petitioner's products that could only be gained by completion of substantial training or experience related to the duties of the proffered position. The director acknowledged that, while the beneficiary likely possesses knowledge of processes that are specific to the company, the record did not establish how this knowledge alone is special or advanced compared to other similarly-employed workers.

On appeal, the petitioner repeats that the beneficiary has experience customizing its MPEG4 video encoder for clients, as well as experience with streaming protocols, video compression standards, and operating systems, which qualifies him as a specialized knowledge worker.

III. Analysis

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

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 or prongs. 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.

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. *See Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). 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. *Id.*

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 special or advanced, and that the beneficiary's position requires such knowledge. All employees can be said to possess unique skill or experience to some degree; the petitioner must establish that qualities of its products or processes require this employee to have knowledge beyond what is common in the industry or knowledge that is advanced within the company and required to perform the intended job duties in the United States.

The petitioner alleges that the beneficiary has both "special knowledge of the company product and its application in international markets" and "an advanced level of knowledge of processes and procedures of the company" due to his experience with the petitioner's MPEG4 video encoder.

The petitioner contends that its MPEG4 video encoder, and therefore the beneficiary's knowledge of and experience with the product, is unique. As noted above, the petitioner claims: "Our video compression and encoding process is unique to our product. It is a state-of-the-art video encoder for high resolution video and no product of this kind currently exists in the market in the US or abroad." However, the petitioner provided no outside evidence to support the claim that its product is significantly different from other MPEG4 video encoders available in the market, nor any explanation as to how its product differs from others other than claiming that it used its own algorithms, methodologies and processes to develop it. The record indicates that MPEG4 is an industry standard protocol and that other MPEG4 video encoders are readily available on the market. 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)).

In explaining why its MPEG4 video encoder is special, the petitioner stated in its response to the RFE that its encoder has the following features:

- Support for B Frames
- Quarter Pixel Motion Compensation
- Excellent Picture Quality at Higher Compression Ratios
- Global Motion Compensation
- Fully compliant with MPEG-4 ISO/IEC standard 14496-2
- Context Adaptive Variable Length Coding (CAVLC) Encoding

However, the petitioner did not provide evidence that these features are in fact unique or even unusual among MPEG4 video encoder products. Specifically, it failed to explain how these features differ from those of any other video encoding program classified as MPEG4 Advanced Simple Profile (ASP), a recognized classification in multimedia technology, or how the implementation of such features on a common product requires specialized knowledge specific to the petitioner. Further, although the petitioner initially stated that its product is "unique" it subsequently stated that it is simply "not aware" of any other product that is exactly identical.

The petitioner also asserted that the beneficiary has specialized knowledge due to his involvement in the development of the MPEG4 video encoder. The petitioner alleges that the beneficiary was a key developer. At times the petitioner stated that the beneficiary was the lead developer, however, this designation was not consistent. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner gave no further information regarding the development of the encoder or the beneficiary's role in the development process.

The AAO notes that the beneficiary does not mention in his resume that he played a "lead role" in the development of the MPEG4 video encoder. He indicates that he: performed requirements analysis; created a design which allows end users to configure and test the encoder; created a user interface for configuring encoder settings such as frame rate, input type, frame size; developed a module which allows encoded video to be displayed on a browser; performed simulation testing; and interacted with target customers regarding specifications and customizations. The minimal information provided regarding the beneficiary's actual duties fails to support the petitioner's claim that the beneficiary was the lead developer responsible for key aspects of the product's design.

The record reflects that the beneficiary was hired by the petitioner's foreign affiliate as a Programmer Analyst in February of 2007. The petitioner filed the instant petition on the beneficiary's behalf on January 27, 2009. An organizational chart of the foreign entity indicates that, out of a total of 43 employees, 27 of them are programmer analysts. The petitioner's organizational chart indicates that all 27 programmer analysts report to the same manager, and the chart does not indicate any hierarchy or functional specializations among the programmer analysts. Further, the petitioner did not indicate how many programmer analysts worked on the development of the MPEG4 video encoder or how many programmer analysts currently work on its customization for clients. Without such details, the petitioner fails to show that the beneficiary possesses the claimed special or advanced knowledge of its product. Further, based on the information provided in the beneficiary's resume, he had no prior work experience with MPEG4 or other video compression technologies either within the petitioner's organization or with his prior employer at the time he was assigned to the [REDACTED] MPEG4 Video Encoder project, which undermines the petitioner's claim that he was assigned to the project as the lead developer. See 8 C.F.R. § 214.2(l)(3)(iv).

While the petitioner indicates that the proffered position requires 3 to 4 years of relevant experience in digital video encoding and streaming technologies, the record reflects that the beneficiary himself had no experience with such technologies when he was assigned to work on the company's MPEG4 video encoder, and that he currently has significantly less than 3 to 4 years of experience with such technologies. In fact, it cannot be determined based on the evidence provided that he has worked in a position requiring the claimed specialized knowledge for one full year, as the beneficiary has also worked on two unrelated projects involving different technology during his two years of employment with the foreign entity. Based on the evidence submitted and the stated requirements for the proffered position, the AAO cannot conclude that the beneficiary's prior

education, training, and employment qualifies him to perform the intended services in the United States. *See* 8 C.F.R. § 214.2(l)(3)(iv).

Lastly, the petitioner asserted that the beneficiary's involvement in creating its product establishes that he has knowledge and experience of "configurations and administration software and interfaces" for the product and "knowledge and thorough understanding of various compression algorithms and streaming media protocols used in the product." However, the petitioner failed to explain why such knowledge would be foreign to an individual trained in computer programming and experienced with video encoding technologies and why such knowledge would require a substantial period of training or experience with the petitioner's company. Again, the record reflects that the beneficiary was assigned to work as a programmer analyst on the MPEG4 video encoder despite having no prior experience in this particular programming field. Due to the above-mentioned deficiencies in the instant petition, the petitioner has failed to establish that the beneficiary possesses specialized knowledge or that the proffered position requires specialized knowledge.

Even if the petitioner had submitted evidence to differentiate its product from other MPEG4 video encoders, the petitioner must still establish that the duties of the proffered position require the petitioner's programmer analysts to possess knowledge that is different from the knowledge possessed by other similarly educated and experienced programmer analysts. The petitioner has failed to make this distinction.

The petitioner's list of qualifications necessary for the beneficiary's proposed position includes knowledge of several programming languages, databases, and digital video encoding and streaming techniques, a bachelor's degree in computer science or technology, and three to four years of relevant work experience. These qualifications appear to be those of an experienced and highly skilled computer programmer with prior experience in video encoding technology. The petitioner failed to explain how any of the qualifications listed were specific to the petitioner or why they should be considered specialized knowledge. There is nothing in the position description to indicate that the position requires advanced knowledge of the petitioner's processes and procedures or special knowledge of its product. Further the petitioner has not shown that the beneficiary's educational background, training or experience contributed to an advanced level of knowledge regarding the processes and procedures of the company. *See* 8 C.F.R. § 214.2(l)(3)(iv).

The petitioner stated in response to the RFE: "There is no one in the petitioner's workforce or in the open market who can fulfill the requirements, knowledge, and expertise that is required for the proposed position." Without more specific information, this conclusory statement of the petitioner cannot be accepted. Again, 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 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As noted above, had the petitioner established that the knowledge is special because the MPEG4 video encoder product itself is patented, proprietary, or otherwise exclusive to the petitioner, it would still need to demonstrate that the knowledge required to work with the product is of significant complexity, requires a period of company-specific training or experience, or that it is otherwise not easily transferrable to others in the beneficiary's field.

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. at 376. In evaluating the evidence, eligibility is to be determined not by the quantity of evidence alone but by its quality. *Id.*

For the reasons discussed above, the evidence submitted fails to establish by a preponderance of the evidence that the beneficiary possesses specialized knowledge and will be employed in a specialized knowledge capacity with the petitioner in the United States. *See* Section 214(c)(2)(B) of the Act. Accordingly, the appeal will be dismissed.

IV. Conclusion

Based on the foregoing, the AAO cannot conclude that the petitioner will employ the beneficiary in a specialized knowledge capacity. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). 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.