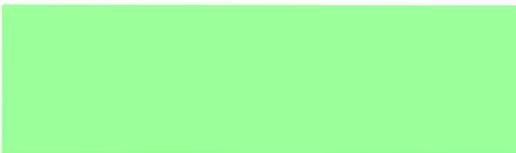
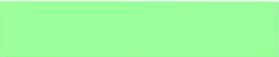


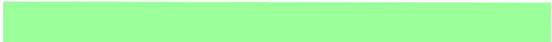


U.S. Citizenship  
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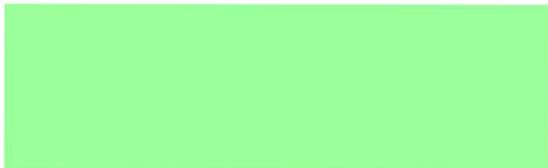


DATE: **AUG 01 2014** Office: VERMONT SERVICE CENTER FILE 

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:

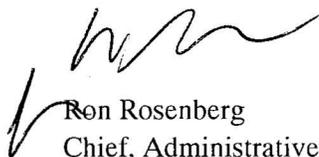


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg  
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 appeal will be dismissed.

The petitioner filed the Petition for a Nonimmigrant Worker (Form I-129), seeking to extend the beneficiary's employment 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, a Delaware corporation, is engaged in custom computer programming services. The petitioner states that it is an affiliate of [REDACTED] located in Russia. The petitioner seeks to extend the beneficiary in her capacity as a functional analyst for a period of two years.

The director denied the petition, concluding that the petitioner had failed to demonstrate that the beneficiary possesses specialized knowledge or that she would be employed in a capacity requiring specialized knowledge. Further, the director found that the evidence submitted by the petitioner was insufficient to establish that the beneficiary's employment in the United States would not be labor for hire as defined in the L-1 Visa Reform Act of 2004.<sup>1</sup>

On appeal, counsel contends that the director erred in concluding that the beneficiary only had knowledge of its client's proprietary products, and states that the beneficiary holds specialized knowledge of proprietary products owned by the company which were developed for the client. In addition, counsel asserts that the director ignored submitted evidence demonstrating that the petitioner supervises and controls the work of the beneficiary thereby establishing that she is not employed as labor for hire.

## I. SPECIALIZED KNOWLEDGE CAPACITY

The first issue addressed by the director was whether the petitioner established that the beneficiary possesses specialized knowledge and whether she was employed abroad, and will be employed in the United States, in a specialized knowledge capacity.

### A. 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.

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<sup>1</sup> To the extent the director's decision implies that the petitioner did not establish that the beneficiary had been employed with the qualifying foreign entity for at least one of the three years preceding the filing of the petition or at the time of admission as an L-1 nonimmigrant, the director's implication is withdrawn.

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.

B. Facts and Procedural History

The petitioner filed the Form I-129 on June 3, 2013. The petitioner states that it is a member of the IBS Group, “one of Russia’s most successful IT enterprises,” and that its services “consist of complex software development and support services, product engineering and testing, and technology consulting.” The petitioner stated that Luxoft has over 5,400 employees worldwide, that it has approximately 74 employees in the United States and that it earned \$6,288,881 in gross revenue in 2012. The petitioner noted that the global company has successfully implemented over 200 projects, including those relevant to “end-to-end engineering services, specializing in Product Lifecycle Management (PLM) solutions, Computer-Aided Engineering (CAE) tools, Digital Rights Management (DRM) solutions, information protection, 3D data exchange and transformation utilities, and mobile platform development.” The petitioner stated that it draws its strength from “the leveraging of specialized knowledge and deep domain expertise and growing professionals with years of experience.”

The petitioner indicated that the beneficiary has been employed with the company since July 2009, and has been assigned to the United States since October 2010. In a support letter submitted along with the petition, the petitioner explained the beneficiary’s duties in the United States as follows:

[The beneficiary] will continue to be responsible for the communication with Boeing specialists to analyze and specify user requirements, configuration of [company] applications into shared environment, technical consultation of Boeing specialists during installation and configuration in Boeing test and production environment, maintaining and testing the system. [The beneficiary] will consult with engineering staff in [the company] to resolving [sic] technical problems, improve application performance. She will generally utilize scientific programming and system administration skills to identify and resolve any issues with applications. As needed, [the beneficiary] will develop software system testing procedures and documentation.

[The beneficiary’s] specific duties include the following:

- 1) Analyze customer functional requests;
- 2) Diagnose application problems and analyze programming solutions to fix it;
- 3) Support installation and configuration of all deliverables;
- 4) Provide periodical reports to customer and work with them to overcome problems and resolve issues;
- 5) Support communication between [redacted] personnel and offshore team in Moscow.

The petitioner indicated that the beneficiary would “continue to support operation of Luxoft developed applications in the Boeing environment.” Specifically, the petitioner stated that the beneficiary was a “key developer” of a proprietary application called [redacted], a large multinational aerospace manufacturer. The petitioner explained that [redacted] was developed by [redacted] to implement existing [redacted] application

suite dedicated to airplane wiring manufacturing process support in [REDACTED] environment.” The petitioner specified that the beneficiary will be supervised by a petitioner engagement manager located in the Seattle region.

In addition, the petitioner described the beneficiary’s employment and experience abroad as follows:

Based on [the beneficiary’s] experience and training with [the foreign entity] in the [REDACTED] project, [the beneficiary] has developed specialized skills and expertise in the following areas:

1. Software design and developing of specific and custom CAD/CAM application components for Boeing electrical engineering in the context of Boeing infrastructure and environment.
2. Delivering and maintenance process of [REDACTED] developed applications
3. Business processes of [REDACTED] in the scope of her responsibility related to Luxoft developed systems – the interaction with external systems (methods of user authentication, receiving feed files with data release triggers, sending various information to other systems, design of protected linking mechanisms to engineering information in other systems).

The petitioner indicated that the beneficiary worked on several projects for [REDACTED] as a lead specialist/functional analyst prior to her assignment to the United States including “providing technical guidance and support to the development team, analyzing functional customer requirements, architecture design, development and maintenance of [REDACTED] based components.” Further, the petitioner stated that the beneficiary held a “Mathematician, Systems Programmer Degree” from [REDACTED] and that she has “over six years programming experience in CAD/CAM/CAE and PLM/PDM domains.”

The petitioner submitted an organizational chart indicating that the beneficiary reported to an engagement manager employed in the United States and that she was assigned to the [REDACTED] working parallel to an “[REDACTED] overseen by a project manager and program manager abroad. The petitioner also provided a “Software Development Agreement” dated February 10, 2000 between The [REDACTED] and [REDACTED] (now the petitioner) pursuant to which it provides professional services. Section 6.a. of the agreement indicated that all “inventions, discoveries, and improvements” created pursuant to the provided services would remain the “sole and exclusive property of Boeing.”

Furthermore, the petitioner submitted a resume for the beneficiary indicating that she had been employed by Epam Systems from January 2009 through July 2009 as an engineer focusing on “architecture design, prototyping and development [of] CAD/CAM/CAE applications components.” The resume also showed that the beneficiary was employed by [REDACTED] company, from May 2004 through January 2009, and

that she was engaged in the “development and maintenance of CAD/CAM/CAE components.” The resume further provided summaries of nine projects worked by the beneficiary, including her current assignment to [REDACTED]. Each project listed included references to the beneficiary working on the [REDACTED] technologies.

The director later issued a request for evidence (RFE). In the RFE, the director stated that the submitted evidence was insufficient to establish that the beneficiary had been employed in a specialized knowledge capacity abroad. As such, the director requested that the petitioner submit the following evidence relevant to the beneficiary’s asserted specialized knowledge capacity abroad: (1) an organizational chart showing the beneficiary’s department including the names of the employees, their job titles, a summary of duties for each employee, and their education levels and salaries; and (2) a letter from the foreign entity describing the beneficiary’s specialized knowledge duties abroad including the percentage of time she spends on each duty, how the knowledge is considered advanced within the company or special in the international marketplace, and the minimum amount of time required to obtain the knowledge. Further, the director indicated that the petitioner should submit evidence in support of the letter demonstrating that the beneficiary’s knowledge is not generally found in the industry and that the knowledge can only be taught through prior experience with the company. The director also suggested the petitioner submit evidence of pertinent training courses taken by the beneficiary and/or other documentation from industry sources establishing that the beneficiary’s knowledge is special or advanced. Further, the director requested that the petitioner submit a letter similar to that described above, but relevant to the beneficiary’s employment in the United States.

In response, the petitioner submitted a support letter signed by the foreign entity’s HR manager and director of the department of aviation industry describing the beneficiary’s attainment of specialized knowledge as follows:

Since 2009, during [the beneficiary’s] employment with [the foreign entity] she has worked on various projects for Boeing as a Lead Specialist/Functional Analyst. Her responsibilities included providing technical guidance and support to the development team, analyzing functional customer requirements, architecture design, development and maintenance of [REDACTED] Application Architecture Rapid Application Development Environment) based components. Also [the beneficiary] holds over 6 years programming experience in CAD/CAM/CAE and PLM/PDM domains. She has extensive skills in object oriented programming and 4 years experience in component application development for [REDACTED] environment.

The foreign entity letter reiterated that it developed the [REDACTED] application for [REDACTED] “to implement existing [REDACTED] application suite dedicated to airplane wiring manufacturing process support in [REDACTED] environment,” and that this required “deep knowledge of [REDACTED] business processes in 3’d CAD visualization.” The letter also explained that the beneficiary held knowledge of [REDACTED] Integration Visualization Tool (IVT) “a suite of software applications targeted to view, manipulate and analyze large quantities of 3D design geometry and its megadata,” which “has been developed within [REDACTED] for more than 16 years.” The letter indicated that [REDACTED] has been using [REDACTED] for assistance,

software maintenance, development, regression, and content testing tasks. The foreign entity stated that a “deep understanding” of [REDACTED] application and process knowledge is required to support the customer, and that the beneficiary holds this knowledge. The foreign entity explained the specialized nature of this knowledge as follows:

She understands the specific [REDACTED] customized object structure and lifecycle processes, has experience in the Interference Management application and special knowledge that allows her to provide expert service and system support to the customer and off-shore development and testing teams. The deep understanding of the [REDACTED] project structure [sic]. [REDACTED] specific data and Boeing database specific environment give her a substantial expertise in conducting customer problem analysis and clarification of business requirements. Her [REDACTED] application support experience allows resolving production and Boeing testing issues in an efficient way with a small amount of time. [REDACTED] environment delivery process knowledge and experience gives the benefits in the customer request process, definition of the solution for the customer’s systems and as a result of successful releases delivery.

Likewise, the petitioner submitted a letter from its CEO specifying that the beneficiary performed an almost identical role in her capacity in the United States by continuing to support their client [REDACTED] at their offices in the United States, noting that “her work requires integrated knowledge of the supported system and could be acquired only by her active participation in product development within the development offshore teams in Russia.”

The petitioner submitted an organizational chart reflecting the company’s [REDACTED] program, reflecting over 60 professionals, including managers, developers, analysts, architects, and testers working in Russia, the United States and Vietnam. The beneficiary’s immediate group was supervised by a release manager and included one analyst located with the beneficiary in the United States. The group also included an [REDACTED] architect, architect, senior developer, a development lead, and four other developers. The petitioner provided a second organizational chart also reflecting the [REDACTED] program. The second organizational chart included two engagement managers, a project manager, program manager, two new business champions, and two release managers (including an onsite architect, architects and developers) devoted to [REDACTED] and [REDACTED]. Further, the second chart indicated an [REDACTED] Test team, “configuration management,” and an “analysis group.” In addition, the petitioner resubmitted the organizational chart submitted in support of the petition reflecting the beneficiary reporting to an engagement manager employed by the petitioner, with an [REDACTED] working parallel to the beneficiary overseen by the a project manager and program manager.

Lastly, the petitioner provided a company power point stating that the company had achieved “engineering excellence” and that it had “over 3,000 top engineers in Eastern Europe and South East Asia.” Charts provided by the petitioner indicated that the company had over 5,000 employees, that it was “growing fast,” and that nearly 75% of its employees had Masters level degrees and 40% had more than 10 years of experience.

In denying the petition, the director stated that the petitioner had failed to submit additional evidence in response to the RFE regarding the beneficiary's foreign employment. The director found that the beneficiary's knowledge of proprietary products, and their specific modification for a client, was insufficient to demonstrate that the beneficiary possessed special or advanced knowledge.

On appeal, counsel states that the beneficiary has led 35% of the development of the [REDACTED] application for [REDACTED] while employed by the company. Counsel asserts that the beneficiary was specifically sought out by the foreign entity, amongst other employees, after it won a contract from [REDACTED] to develop the [REDACTED] application due to her knowledge of CAD/CAM 3D algorithms and manufacturing processes. Counsel states that the director erred in concluding that the beneficiary only has knowledge of [REDACTED]'s proprietary products and contends that she has knowledge of proprietary products owned by the company, but developed for [REDACTED]. Counsel references memos from INS director [REDACTED] in March 1994 and [REDACTED] in December 2002 to stand for the premise that the beneficiary's knowledge of the company's proprietary tools is sufficient to establish it as special or advanced. See Memorandum from [REDACTED] "Interpretation of Specialized Knowledge," March 4, 1994 [REDACTED] and Memorandum from [REDACTED] [REDACTED] "Interpretation of Specialized Knowledge," December 20, 2002. Counsel notes that the product or process cannot be easily transferred or taught to another without causing significant disruption of the business to train another employee.

In addition, counsel submits two new support letters from the petitioner and the foreign entity further explaining the advanced nature of the beneficiary's knowledge. The letter from the foreign entity again emphasizes that "[the beneficiary] was one of the key developers of the proprietary application and software application project for our client, [REDACTED]" namely making reference to the [REDACTED] application. The foreign entity indicates that [REDACTED] application was completely designed and implemented by the company for Boeing and that consists of 4 frameworks, 27 modules, more than 800 source files and 150,000 lines of code. The foreign entity explained that the beneficiary led 35% of the development of the [REDACTED] application and provided a list of components developed or supervised by the beneficiary, including straightening 3D planar geometry, creating a border for the 3D planar, preparing a CAT drawing to upload, flattening and 3D model into a dimensioned 3D planar, amongst other claimed developments. Further, the foreign entity explains the beneficiary's knowledge of [REDACTED] suite of applications, her design work related thereto, and its complexity. Lastly, the foreign entity states "it is important to mention that when [we] won the contract for [REDACTED] and [REDACTED] we led extensive search all over Eastern Europe to find people with specific knowledge of CAD/CAM 3-d algorithms and manufacturing practices," including the beneficiary.

Likewise, the petitioner submitted a similar letter from its CEO and HR manager based in the United States largely reiterating the same information set forth in the aforementioned foreign entity letter about the beneficiary's expertise in [REDACTED] applications. The letter indicates that the company's relationship with [REDACTED] began in 2000, that it is actively developing 60 [REDACTED] systems, and that its expected revenue from [REDACTED] in 2013 will be an estimated \$30 million.

### C. Analysis

Following a review of the totality of the evidence submitted, the petitioner has not established that the beneficiary possesses specialized knowledge or that she will be employed in a specialized knowledge capacity 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's prior year of employment abroad was in a position involving specialized knowledge. 8 C.F.R. § 214.2(l)(3)(iii). 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 matter, the petitioner has not provided evidence that compares the beneficiary with similarly employed workers within or outside the company as necessary to demonstrate that her knowledge is special or advanced. The beneficiary's knowledge must be distinguished as different from knowledge that is commonly held by other software engineers in the industry or advanced in comparison to other similarly-employed

workers in the petitioner's organization. Merely stating that the beneficiary holds proprietary knowledge or establishing that it is technically complex is not sufficient. The petitioner must demonstrate that this knowledge is noteworthy or uncommon within the company's organization or within the industry, when compared to similarly placed colleagues. However, the petitioner has submitted little evidence to establish that the beneficiary's knowledge is advanced or special as compared to her colleagues. Despite being requested by the director, the petitioner has not provided information on these colleagues necessary to compare the beneficiary against her colleagues, including their experience, education, or a summary of their duties. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

In fact, the petitioner has submitted an organizational chart reflecting over 60 employees devoted to supporting the [REDACTED] application and the beneficiary's immediate department includes an [REDACTED] architect, architect, senior developer, a development lead, and four developers, all devoted to providing support and development for this [REDACTED] application. The petitioner also indicates that the beneficiary will be working closely with an offshore team, suggesting that they also have intimate knowledge of [REDACTED] and [REDACTED] applications, and other [REDACTED] specific processes. The petitioner submits evidence detailing that the company has over 5,000 employees and that it has been working with [REDACTED] application for over 16 years. Further, evidence on the record indicates that over 75% of the company's employees have Master's degrees, similar to the beneficiary, and that over 40% hold more than 10 years' experience, or more experience than the beneficiary. In addition, the petitioner states that the company focuses on "3D data exchange and transformation utilities," suggesting that there are likely several other employees holding advanced knowledge of these utilities, thereby leaving question that the beneficiary's stated knowledge in these applications is special or advanced. In fact, the beneficiary's work history reveals that she gained most of her knowledge in these applications prior to beginning employment with the foreign entity, indicating that knowledge of these applications is commonly held within the beneficiary's field. an area of expertise offered for the beneficiary,. As such, without evidence to the contrary, it can be reasonably assumed that there are many other similarly placed professionals in the company with knowledge of the [REDACTED] applications. Also, the petitioner's business model, with thousands of software professionals, suggests that it has many employees with intimate knowledge of specific technologies and customer requirements. Likewise, it can also be reasonably concluded that similarly placed professionals with other companies in the industry also hold knowledge of proprietary concepts and specific customer processes and requirements.

Although the petitioner claims that the beneficiary completed or led 35% of the development work on the [REDACTED] project, it fails to document this assertion or articulate who completed the other 65% of the development. It is not sufficient to establish that the beneficiary holds proprietary knowledge or knowledge of specific customer requirements, rather this knowledge must also be demonstrated as noteworthy and uncommon when compared to colleagues within or outside the company. Certainly, it can also be assumed that many other software developers hold knowledge of proprietary tools and specific customer requirements. To expand the definition of specialized knowledge to all such employees would expand the concept well beyond its intended limitations.

On appeal, counsel cites the [REDACTED] memo, stating that this establishes that the beneficiary's knowledge of the company's proprietary tools and their potential hardship in replacing the beneficiary is sufficient to establish her knowledge as special or advanced. However, the [REDACTED] memo states the following:

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.

Here, the petitioner has not submitted sufficient evidence to set the beneficiary's knowledge apart or to demonstrate that it is uncommon, noteworthy, or distinguished by some unusual quality. Again, basing this claim on its proprietary or customer specific nature or its technically complex nature is not alone sufficient. Indeed, although the petitioner states that denial of the petition would cause undue hardship in training another employee, it fails to articulate or document how long it would take for another to attain this level of knowledge. In sum, the petitioner has not sufficiently compared the beneficiary against her colleagues as necessary to demonstrate that her knowledge is specialized, beyond simply stating that she holds knowledge of the [REDACTED] application. Again, 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. 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)).

Furthermore, the petitioner has not established that the beneficiary has advanced knowledge of the company's processes or procedures. The evidence submitted indicates that the beneficiary gained most of her knowledge while employed with other companies, working with the [REDACTED] applications and CAD/CAM 3-d algorithms. For instance, pursuant to her employment with [REDACTED] for nearly six years prior to joining the foreign employer, the beneficiary is offered as working on "architecture design, prototyping and development CAD/CAM/CAE applications components." In fact, the petitioner states directly that it specifically recruited the beneficiary, and other similar employees with extensive knowledge of CAD/CAM, when it won the [REDACTED] application contract from [REDACTED]. This assertion suggests that many other software engineers in the industry hold the same or similar knowledge as the beneficiary, particularly taking into consideration the extensive listing of the beneficiary's colleagues in the submitted organizational chart who also work with and have knowledge of [REDACTED] application. In fact, the evidence submitted suggests that the beneficiary began working on [REDACTED] application immediately upon beginning employment, and no

significant training in petitioner technology or applications was documented, suggesting that many other similarly placed professionals could have done the same. The majority of the beneficiary's experience was accumulated outside of the company, rather than within, leaving question as to whether the beneficiary's knowledge lies with the company's processes and procedures or with knowledge acquired elsewhere and commonly held within the field.

Again, 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 or that she 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.

## II. BENEFICIARY'S ASSIGNMENT TO THE UNITED STATES AS "LABOR FOR HIRE"

The next issue to be addressed is whether the beneficiary's placement primarily at the petitioner's worksite is considered labor for hire as defined as specified in section 204(c)(2) of the Act, 8 U.S.C. § 1184(c)(2).

### A. The Law

As added by the L-1 Visa Reform Act of 2004, section 214(c)(2)(F) of the Act states:

- (F) 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 of the petitioning employer is necessary.

### B. Facts and Procedural History

As previously noted, the petitioner stated that the beneficiary will be assigned to a client location, or corporate location in Seattle. The petitioner stated that the beneficiary's duties will involve analyzing customer functional requests, diagnosing application problems and analyzing solutions to fix these problems,

supporting installation and configuration of deliverables relevant to the [REDACTED] solution in [REDACTED] suite of software applications, providing periodical reports to the customer and working with them to overcome problems and resolve issues, and supporting communication between [REDACTED] personnel and the offshore team in Moscow. The petitioner noted in a support letter submitted along with the petition that “[the beneficiary] will remain at all times on the [REDACTED] payroll and under [REDACTED] exclusive control and supervision.”

As previously mentioned, the petitioner submitted a “Software Development Agreement” dated February 10, 2000 between The [REDACTED] (now the petitioner) pursuant to which it provides professional services. Section 6.a. of the agreement indicated that all “inventions, discoveries, and improvements” created pursuant to the agreement would remain the “sole and exclusive property of [REDACTED].” In addition, section 5.a. of the agreement titled “qualified employees” stated that “no Employee unsatisfactory to [REDACTED] will be assigned to perform any of the Work.” The section further indicated that [REDACTED] was entitled to request resumes, references, or other information relevant to the qualifications of assigned employees. Section 5.b. also stated that “if any Employee is or becomes unsatisfactory to [REDACTED] Supplier [REDACTED] or its Subcontractor, as the case may be, shall provide a qualified replacement satisfactory to [REDACTED] in a timely fashion.” The section further indicates that [REDACTED] may cancel the work or contract without obligation if a satisfactory replacement employee is not provided. However, section 5.c. indicated that “all Employees shall at all times be and remain employees of Supplier or its Subcontractor, not employees of [REDACTED]” and that “supplier shall pay Supplier’s employees.” An offer letter issued to the beneficiary on May 24, 2010 indicated that the beneficiary would be paid, and remain an employee of, the petitioner.

In the RFE, the director stated that the evidence submitted was insufficient to establish: that the beneficiary would principally remain under the supervision and control of [REDACTED] while on assignment to Boeing; and, that she was providing a product or service specific to her company and not the client. As such, the director requested that the petitioner submit: (1) copies of contracts, statements of work, work orders and/or service agreements specifying who retained the authority to fire the beneficiary, who was responsible for her time and pay, and how much the beneficiary was controlled and supervised by the client as compared to the company, and (2) an explanation as to why the beneficiary is not labor for hire and/or how the beneficiary will be primarily supervised and controlled by the petitioner.

In response, counsel stated that “[the beneficiary] is part of a software development team that is working at [REDACTED] facilities to provide [REDACTED] with expertise in the maintenance, development, regression and content testing of [REDACTED] application, in particular with adoption of [REDACTED] applications from [REDACTED] environment to V5.” Counsel explained that the beneficiary developed the [REDACTED] application for the purpose of this transition. Counsel stated that the beneficiary received “training which is available only to [REDACTED] employees and [REDACTED] major contractors such as [REDACTED].” Support letters submitted by the petitioner and the foreign entity did not specify the nature of the beneficiary’s supervision and control. The petitioner merely resubmitted its contract with [REDACTED]. A submitted organizational chart showed that the beneficiary reported to a release manager located in Moscow and that she was one of only two employees assigned to the client location out of ten total employees on the development team. A second organizational chart indicated that the beneficiary reported to an engagement manager employed by the petitioner.

In denying the petition, the director stated that the evidence submitted failed to provide insight as to whether the beneficiary was under the supervision and control of the petitioner during her assignment to the client location. Further, the director found that the evidence demonstrated that the beneficiary's value to the project primarily involved her knowledge of the client's software, methodologies and procedures, rather than specialized or advanced knowledge of her company's products or services.

On appeal, counsel contends that the petitioner has positioned itself as a high end software solutions provider and that it is not in the business of providing labor for hire. He notes that the petitioner retains full control over the statement of work, deliverables, and the milestones of the beneficiary's project, and that the petitioner is developing and implementing the [REDACTED] application to work within the [REDACTED] environment. Counsel asserts that the director ignored submitted evidence, including the service agreement between the petitioner and [REDACTED] and the organizational charts, which demonstrate that the beneficiary is under the supervision and control of the petitioner while at the client site. Counsel points to a letter from the president of the petitioner stating that the beneficiary will remain under the supervision of release managers located in Russia and an engagement manager located in Seattle. The president of the petitioner stated that the beneficiary receives instructions from the release managers abroad and that she is prohibited from taking assignments or directions directly from Boeing personnel.

### C. Analysis

Here, the petitioner has not submitted sufficient evidence to establish that the beneficiary is primarily under the supervision and control of the petitioner. In fact, the submitted evidence indicates that the beneficiary is one of only two petitioner personnel located at [REDACTED]'s location, working primarily on the client's [REDACTED] application, and that her asserted supervisors work off location. Further, the service agreement between the petitioner and [REDACTED] reflects that the client retains the right to remove the beneficiary at will and choose her replacement, indicating that the client essentially holds the right to hire and fire the beneficiary from her position. Despite the requests of the director, the petitioner has failed to provide specifics or supporting evidence to corroborate that the beneficiary is primarily supervised and controlled by agents of the petitioner, beyond simply stating that this is the case. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). 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)).

Further, the evidence submitted demonstrates that the beneficiary will predominantly provide knowledge of the client's software, methodologies and procedures, rather than specialized or advanced knowledge of her company's products or services. Counsel contends on appeal that the petitioner developed the [REDACTED] application for [REDACTED]'s benefit and that this represents a proprietary product of the petitioner. However, the agreement between the petitioner and [REDACTED] states otherwise, indicating that that all "inventions, discoveries, and improvements" created pursuant to the petitioner's services will remain the "sole and exclusive property of [REDACTED]." The petitioner has not submitted statements of work, work orders, emails, or other such

documentation to corroborate its claims that the petitioner will primarily direct the beneficiary's provision of goods and services. 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).

Indeed, the preponderance of the evidence suggests that the petitioner is significantly engaged in providing maintenance and support of [REDACTED] application, rather than developing this system, because it is performing such duties as providing "expert service and systems support," "conducting customer problem analysis," and "resolving production and [REDACTED] testing issues." Organizational charts indicate over 60 employees assigned to this function and the petitioner had failed to demonstrate with supporting evidence that the beneficiary primarily develops an application for [REDACTED]. In fact, the petitioner alternatively asserts that the beneficiary takes direction from release managers abroad, while being a leader in the development of the product. The petitioner has not overcome evidence suggesting that the beneficiary more likely takes direction from [REDACTED] in the service and maintenance of applications within a [REDACTED] system. Indeed, the petitioner confirms that its employees received specialized training from [REDACTED] in its systems. Therefore, the evidence is more suggestive that [REDACTED] has outsourced the maintenance its [REDACTED] function to the petitioner and its foreign affiliates, rather than relying on the petitioner and its foreign affiliates for development. In the present matter, the petitioner has failed to provide sufficient detail and other supporting evidence to overcome the weight of evidence indicating a labor for hire arrangement for the beneficiary. Therefore, for this additional reason, the appeal must be dismissed.

### III. CONCLUSION

The appeal will be dismissed for the above stated reasons. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

**ORDER:** The appeal is dismissed.