AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

MEMORANDUM

TO: Alejandro N. Mayorkas, Director
United States Citizenship & Immigration Services

FROM: American Immigration Lawyers Association

DATE: January 24, 2012

RE: Interpretation of the Term "Specialized Knowledge" in the Adjudication of L-1B Petitions

Dear Director Mayorkas:

The American Immigration Lawyers Association (AILA) appreciates the ongoing outreach to stakeholders conducted by USCIS in connection with its review of the interpretation of the term "specialized knowledge" and its application in the adjudication of L-1B petitions. AILA offers this memorandum on the interpretation of the term "specialized knowledge" in response to that outreach.

Introduction

For several years, there has been a widening gulf between policy guidance adopted by USCIS providing interpretation of the statutory definition of the term "specialized knowledge" and the treatment and outcome of L-1B nonimmigrant petitions submitted to USCIS service centers, as well as L-1B visa applications submitted to U.S. consulates abroad. Reacting to what some view as the improper overuse of the L-1B category and a perceived "spike" in blanket L-1B applications abroad and L-1B visa petitions submitted to USCIS domestically, a concerted effort has been underway within USCIS and the State Department to restrict the number of L-1B visas by narrowly applying key terms that appear in the statutory, regulatory and policy materials that address and define the term "specialized knowledge." The narrowing has been accomplished through unpublished, non-binding, AAO decisions, a body of administrative jurisprudence that is based on a selective review of prior legislative and regulatory history, selective reliance on precedent administrative decisions and federal district court cases that addressed the L-1B classification as it appeared prior to Congressional intervention in 1990, and selective application of common dictionary definitions of the terms "special" and "advanced."

An unpublished 2008 AAO decision is treated as the current enunciation of AAO administrative jurisprudence interpreting the meaning of the term "specialized knowledge."[1] Widely referred to as "*GST*," this July 22, 2008, decision involved an L-1B petition by GS Technical Services, Inc., (GST) a subsidiary of IBM Corporation, on behalf of an individual who was part of team that was working on a project for a client, and who would be a "'SAP ERP Consultant,' to provide guidance and assistance with a client's implementation of an integrated Enterprise Resource Planning (ERP) software system that is produced by SAP AG, a European software maker, and modified by IBM for specific client needs."[2]

The decision includes a lengthy analysis of the history of the "specialized knowledge" category. Under the amendments to the intracompany transferee category in Section 206(b)(2) of the Immigration Act of 1990 (IMMACT 90),[3] said the AAO, Congress only eliminated the "bright-line standard" that had existed prior to the enactment of IMMACT 90 which supported "a more rigid application of the law," and gave "…legacy INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case." The AAO asserted that the changes enacted by Congress in IMMACT 90 were not intended to "liberalize or broaden the specialized knowledge classification" or "expand the class of persons eligible for L-1B specialized knowledge visas."[4]

As will be shown below, the AAO's interpretation of the history of the "specialized knowledge" category in *GST*, which is repeated in many of the unpublished and non-binding AAO decisions issued before and after *GST*, is flawed. For example, in the period between January and July of 2008 alone, over 40 L-1B decisions were posted to the AAO page of the USCIS website sustaining petition denials on grounds that follow the rationale seen in *GST*. The limited availability of unpublished Administrative Appeals Office (AAO) decisions prior to 2005 makes the conduct of a comprehensive review of AAO decisions difficult to accomplish.[5] Nevertheless, a March 26, 2004, AAO decision involving Satyam Computer Services, Ltd., a worldwide provider of information technology services, is an early example illustrative of the restrictive interpretation of "specialized knowledge" employed by the AAO.[6]

---

[1] *Matter of [name not provided]*, WAC-07-277-53214 (AAO, July 22, 2008) (hereinafter *GST*); 2008 WL 5063578; http://www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20(L-1A%20and%20L-1B)/Decisions_Issued_in_2008/Jul222008_04D7101.pdf. The CIS Ombudsman drew attention to *GST* when discussing issues involving L-1B adjudications in the "Citizenship and Immigration Services Ombudsman Annual Report 2010," June 2010, at 46; http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf.

[2] *GST*, *supra* note 1, at 2.

[3] Pub. L No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

[4] *GST*, *supra* note 1, at 24-25.

[5] USCIS began posting AAO decisions in 2005. *See* http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/?vgnextoid=0609b8a04e812210VgnVCM1000006539190aRCRD&vgnextchannel=0609b8a04e812210VgnVCM1000006539190aRCRD&path=%2FD7+-+Intracompany+Transferees+%28L-1A+and+L-1B%29.

[6] *Matter of [name not provided]*, EAC-02-080-54116 (AAO, Mar. 26, 2004) (hereinafter *Satyam*); 2004 WL 2897716.

In *Satyam*, the petitioner sought L-1B classification for an employee who had been trained in Satyam's processes, Satyam itself having achieved a high rating in software development and maintenance from the Software Engineering Institute at Carnegie Mellon University. The petitioner argued that the beneficiary's training in its highly-rated software development and maintenance systems distinguished the beneficiary under the legacy INS test that "specialized knowledge" could be "different from that found in [a] particular industry."[7] The petitioner also argued that legislative history dictates that the specialized knowledge classification should not be limited to those "relatively rare employees" who possess unique knowledge of the company's exclusive processes and techniques, but rather, that the classification is intended to assist companies locating in the U.S. in transferring their present personnel who already have knowledge of their operations.

The AAO agreed with the petitioner that the "specialized knowledge" category was not solely for those "relatively rare employees with unusual knowledge." However, the AAO applied an analysis of the "specialized knowledge" category that involved reaching back prior to IMMACT 90 to the legislative history of the 1970 statute creating the intracompany transferee category, to *Matter of Penner*,[8] and to a 1990 district court case, *1756, Inc. v. Att'y Gen.*,[9] decided under pre-IMMACT 90 law and regulations, to support the proposition that there is "ample support for a restrictive interpretation of the term."

In a footnote, the AAO justified reliance on *Penner* (and *1756*):

> FN1. The precedent decision *Matter of Penner* pre-dates the 1990 amendment to the definition of "specialized knowledge." Other than deleting the former requirement that specialized knowledge had to be "proprietary," however, the 1990 amendment did not greatly alter the definition of the term. In particular, the 1990 Committee Report does not even support the claim that Congress "rejected" the INS interpretation of "specialized knowledge." The 1990 Committee Report does not criticize, and does not even refer to, any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying," [*i.e.*, not specifically incorrect], "interpretations by INS," H. Rep. No. 101-723(I), *supra*, at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became § 214(c)(2)(B) of the Act. *Id*. The AAO concludes, therefore, that *Matter of Penner* remains useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.[10]

[7] INS Memorandum, J.A. Puleo, Acting Executive Associate Commissioner, "Interpretation of Specialized Knowledge," CO 214L-P (Mar. 9, 1994), (hereinafter "Puleo memo"). *Reproduced in* the USCIS Adjudicator's Field Manual, App. 32-1; *see also* AILA InfoNet Doc. No. 01052171 (May 21, 2001).
[8] 18 I&N Dec. 49 (Comm. 1982).
[9] 745 F. Supp. 9 (D.D.C., Aug. 23, 1990).
[10] *Satyam*, *supra* note 6, at FN1.

Revealing in this footnote is how the AAO quotes and treats the passage in the IMMACT 90 Committee Report that discusses the enactment of a statutory definition of the term "specialized knowledge." Though the passage in the Committee Report simply states that Congress enacted a statutory definition of "specialized knowledge" due to "varying interpretations" by legacy INS, the AAO concludes that by using the term "varying," Congress did not mean that the narrow interpretations of "specialized knowledge" by legacy INS, tied as they were to the concept that the knowledge must be narrowly held within the petitioner's company and had to relate to a proprietary interest of the petitioner, were "not specifically incorrect." This interpretation of the Committee Report is the foundation upon which the AAO builds its argument that the term "specialized knowledge" should be "narrowly construed" and the category should be "strictly limited."

A full review of the history of the L-1 "specialized knowledge" category and an analysis of IMMACT 90 that considers all the changes impacting multinational businesses and intracompany transferees that this legislation effectuated exposes the serious flaws in the AAO's approach.

I. History of the Intracompany Transferee Classification

a. *Immigration Act of 1970, Precedent Decisions, Legacy INS Regulations, and Policy Guidance*

The L-1 intracompany transferee nonimmigrant classification was introduced into the Immigration and Nationality Act (INA) with the passage of the Immigration Act of 1970.[11] Congress created the L-1 intracompany transferee classification to provide a visa status for executives, managers, and employees with specialized knowledge to "…help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization."[12]

Congress did not define the term "specialized knowledge," and between 1970 and 1983, definitions evolved through a body of administrative law and practice. The principal precedent decisions that interpreted the term "specialized knowledge" are *Matter of Raulin*,[13] *Matter of Leblanc*,[14] *Matter of Michelin Tire*,[15] *Matter of Penner*,[16] and *Matter of Colley*.[17] These decisions, all rendered prior to the passage of IMMACT 90, which substantially revised the intracompany transferee provisions in the INA, found that "specialized knowledge" involved knowledge that had, in essence, a characteristic propriety to the petitioner.

[11] Pub. L. 91-225, Sec. 1(b), 84 Stat. 117 (April 7, 1970).
[12] *See generally*, H.R. REP. No. 91-851 (1970).
[13] 13 I&N Dec. 654 (RC 1970).
[14] 13 I&N Dec. 816 (RC 1971).
[15] 17 I&N Dec. 248 (RC 1978).
[16] *Supra* note 8.
[17] 18 I&N Dec. 117 (Comm. 1982).

For example, in *Colley*, the Commissioner, citing *Raulin* and *Leblanc*, noted that "[b]oth decisions rested on a finding that the beneficiaries had essential knowledge of the business's product or service, management operations, decision making process, or similar elements. In other words, the specialized knowledge related to the proprietary interests of the business, its management, and concerned skills or knowledge not readily available in the job market."[18]

In 1983, legacy INS published a regulatory definition of the term "specialized knowledge" at 8 CFR §214.2(l)(1)(ii)(C), explicitly drawing on the precedent decisions.[19] The 1983 regulation defined "specialized knowledge" as "knowledge possessed by an individual which relates directly to the product or service of an organization or to the equipment, techniques, management or other proprietary interests of the petitioner not readily available in the job market. The knowledge must be relevant to the organization itself and directly concerned with the expansion of commerce or it must allow the business to become competitive in the marketplace."

In a proposed revision to the regulations in 1986, legacy INS sought to modify the definition of the term "specialized knowledge." The proposal noted that "Congress expected the number of persons in this category to be small…," and stated "The Service is concerned that current Service policy, on the one hand, restricts businesses and organizations in transferring and maintaining key personnel needed in the United States and, on the other hand, permits a number of organizations and beneficiaries to qualify under section 101(a)(15)(L) that were not contemplated by Congress when section 101(a)(15)(L) was enacted."[20] The proposed regulation defined "specialized knowledge" as "…knowledge possessed by an individual in an organization which is narrowly held within the organization and relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the employer."[21]

The proposed formulation met with strong objection. In the Supplementary Information accompanying the final rule, legacy INS said:

> Fifteen commenters objected to the proposed definition of specialized knowledge and preferred to see the current definition retained. They stated that requirements that knowledge be unique and narrowly held in the organization are too rigid and very few personnel would qualify, which is contrary to Congressional intent."[22]

In response to the comments, legacy INS modified the definition, stating that the revised definition "…will not require that the knowledge be unique or narrowly held." Moreover, the Service agreed with commenters and "…reinstated the standard that

[18] *Id.* at 120. *See* also *Penner*, 18 I&N Dec. at 52.
[19] *See* 48 Fed. Reg. 41142, 41143 (Sept. 14, 1983).
[20] 51 Fed. Reg. 18591 (May 21, 1986).
[21] 51 Fed. Reg. at 18596.
[22] 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987).

knowledge which is not readily available in the United States labor market should be considered in determining specialized knowledge."[23]

The 1987 final rule set forth the following definition:

> (D) "Specialized knowledge" means knowledge possessed by an individual whose advanced level of expertise and proprietary knowledge of the organization's product, service research, equipment, techniques, management, or other interests of the employer are not readily available in the United States labor market. This definition does not apply to persons who have general knowledge or expertise which enables them merely to produce a product or provide a service.[24]

In May 1988, *Matter of Sandoz Crop Protection Corp.* was published.[25] Interpreting the 1987 regulations, the Commissioner said: "Specialized knowledge, as now described in 8 CFR §214.2(l)(1)(ii)(D) (1988), involves advanced knowledge and an advanced level of expertise not readily available in the United States job market, with the petitioner having a proprietary right to the knowledge or its product."[26] The Commissioner went on to note that "In order to qualify, the beneficiary must be a key person with materially different knowledge and expertise which are critical for the performance of the duties; which are critical to, and relate *exclusively* to, the petitioner's proprietary interest; and which are protected from disclosure through patent, copyright, or company policy."[27]

The formulation in the 1987 regulations, and in *Sandoz* itself, was problematic, leading legacy INS Associate Commissioner Richard E. Norton to issue, a short six months after the publication of *Sandoz*, a clarifying memorandum.[28] The Norton memo explained that the Service's "…interpretation and application of the definition of specialized knowledge may, in some cases, be more restrictive than Congress or the Service intended." As described in the Norton memo, "The problem stems from using a too literal definition of the term 'proprietary knowledge' wherein the knowledge must relate exclusively to or be unique to the employer's business operation." According to the memo, "It is an appropriate interpretation of specialized knowledge to also consider 'proprietary knowledge' as 'special knowledge possessed by an employee of the organization's product, service, research, equipment, techniques, management, or other interests that is different from or surpasses the ordinary or usual knowledge of an employee in the particular field.'" The Norton memo also reminded adjudicators that "…a 'specialized knowledge' employee must have an advanced level of expertise in his or her field...."

---

[23] 52 Fed. Reg. at 5741.
[24] 52 Fed. Reg. at 5752.
[25] 19 I&N 666 (Comm. 1988).
[26] *Id.* at 667.
[27] *Id.* at 668 (emphasis in original).
[28] INS Memorandum, R.E. Norton, INS Associate Commissioner, "Interpretation of Specialized Knowledge under the L Classification," CO 214.2L-P (Oct. 27, 1988) (hereinafter "Norton memo"). *Reprinted at* AILA InfoNet Doc. 11102730 (Oct. 27, 1988); *see* also 65 Interpreter Releases 1194 (Nov. 7, 1988).

b. *The Immigration Act of 1990, Legacy INS Regulations, and Legacy INS and USCIS Policy Guidance*

The efforts by Norton to moderate the impact of the 1987 regulations and the precedent decision in *Sandoz* did not satisfy Congress, which examined the treatment of intracompany transferees, both immigrant and nonimmigrant, and enacted the following statutory definition of the term "specialized knowledge" in IMMACT 90, Section 206(b)(2) (INA §214(c)(2)(B)):

> 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.[29]

In this definition, Congress removed any requirement that "specialized knowledge" relate to a petitioner's "proprietary" interest, let alone "relate *exclusively*" to the petitioner's proprietary interest, as *Sandoz* held, and eliminated the requirement that a "specialized knowledge" employee "have an advanced level of expertise in his or her field." Congress only required that the knowledge be "special knowledge of the company product and its application in international markets," or that the knowledge be "an advanced level of knowledge" of the company's processes and procedures.

The House Committee Report accompanying H.R. 4300, the bill that ultimately became IMMACT 90, observed that the L-1 visa had allowed "multi-national corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures," and that it had been "a valuable asset in furthering relations with other countries." The Committee Report further stated that the category should be "broadened."[30]

The full text of the Committee Report discussing changes to the L-1 category reads:

> (e) Intracompany transferees.–The L visa has provided multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures. This visa has been a valuable asset in furthering relations with other countries but the Committee believes it must be broadened to accommodate changes in the international arena. First, the bill allows accounting firms access to the intracompany visa. Long-established international firms providing accounting services along with consulting and managerial expertise adhere to the same quality standards, techniques and methodology which are associated with an intracompany transferee, but because of the different ownership structures have been denied use of the L visa. This provision would allow the benefits of the L Visa for this particular industry, based

[29] IMMACT 90, Section 206(b)(2)

[30] H.R. Rep. 101-723(I), 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 (hereinafter "IMMACT 90 Committee Report").

> on agreements which indicate participation in the control of the worldwide coordinating organization, thus allowing the smoother interchange of personnel. Second, the streamlined blanket petition available under current regulations is placed into the statute for maximum use by corporations. Third, the requirement of employment with the company within the one-year period immediately prior to admission is expanded so that the one year may be within three years prior to admission. Fourth, the bill's seven-year period of admission for managers and executives provides greater continuity for employees.
>
> One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company."[31]

In the Supplementary Information accompanying the proposed regulations implementing IMMACT 90, legacy INS observed that the changes in the L classification reflected the desire of Congress "…to broaden its utility for international companies."[32] Accordingly, legacy INS revised the regulations to adopt "…the more liberal definitions of manager and executive now specified in section 101(a)(44)(A) and (B) of the Act."[33] Significantly, legacy INS recognized that Congress intended a more liberal definition of "specialized knowledge," stating: "The L regulations have also been modified to include a more liberal interpretation of specialized knowledge as defined in section 214(c)(2)(B) of the Act."[34]

In 1994, legacy INS issued the Puleo memo, policy guidance on IMMACT 90 amendments and implementing regulations.[35] The Puleo memo reminded adjudicators that the "…Immigration Act of 1990 contains a definition of the term 'specialized knowledge' which is different in many respects than the prior regulatory definition." The Puleo memo states that the prior regulatory definition "required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market…The current definition of specialized knowledge contains two separate criteria and, obviously, involves a lesser, but still high, standard."

The Puleo memo provides the following as examples of characteristics of a specialized knowledge worker:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place;
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the

[31] IMMACT 90 Committee Report, at 6749.
[32] 56 Fed. Reg. 31553, 31554 (July 11, 1991).
[33] *Id.*
[34] *Id.*
[35] *Supra* note 7.

industry;

- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possesses knowledge which, normally, can be gained only through prior experience with that employer;
- Possesses knowledge of a product or process which cannot be easily transferred or taught to another individual.

In discussing the definition of the term "special," the Puleo memo states that the knowledge "need not be proprietary or unique, but it must be different or uncommon." Similarly, in discussing the term "advanced," the Puleo memo reiterates that "the alien's knowledge need not be proprietary or unique, merely advanced**.**" Moreover, the memo confirms that the statute does not require the specialized knowledge to be narrowly held within the company.

The Puleo memorandum was followed by a December 20, 2002 memorandum to all Service Center directors from Fujie Ohata, Associate Commissioner, Service Center Operations.[36] In the 2002 Ohata memo, INS reaffirmed the Puleo memo:

> Service Center employees are reminded to follow the procedures concerning specialized knowledge as outlined in the March 9, 1994 James Puleo memo on the Interpretation of Specialized Knowledge. That memo outlines the criteria for adjudicating Specialized Knowledge cases... Requests for additional evidence for specialized knowledge cases should not run contrary to the 1994 Memorandum on specialized knowledge.

The 2002 Ohata memo also succinctly summarized the general standards for specialized knowledge as follows:

> The alien should possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry. The knowledge need not be proprietary or unique. Where the alien has specialized knowledge of the company product, the knowledge must be noteworthy or uncommon. Where the alien has knowledge of company processes or procedures, the knowledge must be advanced. Note, the advanced knowledge need not be narrowly held throughout the company.

In addition, a September 2004 memorandum from Fujie Ohata, then serving as Director, USCIS Service Center Operations, addressed the issue of specialized knowledge for chefs and cooks.[37] The 2004 Ohata memo confirmed the continuing applicability of the Puleo

[36] INS Memorandum, F. O. Ohata, Associate Commissioner, Service Center Operations, "Interpretation of Specialized Knowledge," HQSCOPS 70/6.1 (Dec. 20, 2002), (hereinafter "2002 Ohata memo"). *Reprinted on* AILA InfoNet at Doc. No. 03020548 (Feb. 5, 2003).

[37] USCIS Memorandum, F. O. Ohata, Director, Service Center Operations, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks," (Sept. 9, 2004), (hereinafter "2004 Ohata memo") *reprinted on* AILA InfoNet at Doc. No. 04091666 (*posted* Sep. 16, 2004).

memo. Further, the 2004 Ohata memo reiterated the importance to the analysis of specialized knowledge of determining whether "the petitioning entity would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed. In other words, an important factor for L-1B purposes is the degree to which the alien's knowledge contributes to the uninterrupted operation *of the specific business* for which the alien's services are sought."[38] Finally the 2004 Ohata memo also reiterated that advanced knowledge "need not be narrowly held throughout the company."

Reading the Puleo and Ohata memos in conjunction with each other, a "specialized knowledge" employee would have some combination of the following characteristics:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place (whether "the petitioning entity would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed");
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;
- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possesses knowledge which, normally, can be gained only through prior experience with that employer;
- Possesses knowledge of a product or process which cannot be easily transferred or taught to another individual;
- Need not be proprietary or unique, but it must be different or uncommon;
- Possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry;
- If special knowledge of the company product, the knowledge must be noteworthy or uncommon; or,
- If knowledge of company processes or procedures, the knowledge must be advanced. The advanced knowledge need not be narrowly held throughout the company.

This interpretation of the statutory definition of "specialized knowledge" that the Service had adopted through regulation and policy guidance and applied in the adjudication of L-1B petitions was well known to Congress at the time it was considering the 2004 reforms.

c. *The L-1 Visa (Intracompany Transferee) Reform Act of 2004*

In 2004, Congress passed The L-1 Visa (Intracompany Transferee) Visa Reform Act of 2004 to address a specific concern that companies were "outsourcing" L-1B

[38] Emphasis in original.

intracompany transferees.[39] When he introduced S. 1635,[40] the bill that was ultimately enacted,[41] Senator Saxby Chambliss (R-GA) stated:

> The L-1 is an important tool for our multi-national corporations, however, some companies are making an end-run around the visa process by bringing in professional workers on L-1 visas and then outsourcing those workers to a third party company. …The problem occurs only when an employee with specialized knowledge is placed offsite at the business location of a third party company. In this context, if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee. …The bill I am introducing today clarifies Congress' intent and restricts the inappropriate use of the L-1 visa. The bill does so without forcing unnecessary restrictions on the visa that would only result in adverse effects on legitimate L-1 users. … One year is a reasonable amount of time to require an employee to have attained the specialized knowledge of the company's products, services or processes to qualify for the visa. … We need the best people in the world to come to the United States, to bring their skills and innovative ideas, and to support our business enterprises. The L-1 visa is an important tool to achieve these purposes. But we must ensure that American workers are not displaced by foreign workers, particularly when we have safeguards in place albeit a loophole in law. The L-1 Visa Reform Act will close that loophole for the benefit of U.S. workers and for U.S. businesses that use the visa as it is intended.[42]

It is clear from his statement that Senator Chambliss had a very narrow focus when introducing S. 1635. First, he stated that he only wishes to close the outsourcing "loophole" for third party placement of specialized knowledge workers and has no desire to force "unnecessary restrictions on the visa that would only result in adverse effects on legitimate L-1 users." Second, he believed that one year is a reasonable time to attain the requisite specialized knowledge to qualify for an L-1B visa.[43] Third, he viewed the L-1

---

[39] Division J, Title IV, Subtitle A of the Consolidated Appropriations Act of 2005, Pub. L. 108-447, 118 Stat. 2809, Sections 411-417 (hereinafter "L-1 Reform Act").

[40] *See* http://www.gpo.gov/fdsys/pkg/BILLS-108s1635is/pdf/BILLS-108s1635is.pdf

[41] *See* http://www.gpo.gov/fdsys/pkg/BILLS-108s1635rs/pdf/BILLS-108s1635rs.pdf

[42] *See* http://www.gpo.gov/fdsys/pkg/CREC-2003-09-17/html/CREC-2003-09-17-pt1-PgS11649.htm.

[43] In 2002, Congress reduced the required period of employment abroad from one year to six months for employees of importing employers who have approved blanket petitions. "An Act to provide for work authorization for nonimmigrant spouses of intracompany transferees, and to reduce the period of time during which certain intracompany transferees have to be continuously employed before applying for admission to the United States." Pub. L. 107-125, 115 Stat. 2403 (Jan. 16, 2002).

House Report 107-188 accompanying H. R. 2278, the bill that became Public Law 107-125, explained the necessity for the change in the period of qualifying employment abroad as follows:

> [C]urrent law requires that a beneficiary of a L visa have been employed for at least 1 year overseas by the petitioning employer. In many situations, this is an overly restrictive requirement. For example, consultancies recruit and hire individuals overseas with specialized skills to meet the needs of particular clients. The 1 year prior employment requirement can result in long delays before they can

program as an important tool to advance American competitiveness that should be available to employers who do not use it as a disguised "job shop."

This focus was reaffirmed when S. 1635 was considered by the Senate Judiciary Committee. When the Judiciary Committee reported the bill on October 4, 2004, it found that a "… key purpose of the [L-1] visa … is to provide multinational companies with a means to transfer into the United States, foreign workers whose presence is necessary because of the specialized knowledge those workers have gained with respect to the products, processes, or procedures of their employer." Other findings made it clear that the focus of the L-1 Reform Act was to address issues relating to third-party placement.[44]

The interpretation of the statutory definition of "specialized knowledge" that the Service had adopted through regulation and policy guidance, and applied in the adjudication of L-1B petitions, was well known to Congress at the time it was considering the 2004 reforms. In a July 2003 hearing before the Senate Judiciary Immigration Subcommittee, substantial testimony on the "specialized knowledge" category was heard.[45] Nonetheless, Congress enacted no legislative changes to the definition of "specialized knowledge." A well-established principle of statutory construction holds that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[46]

d. *The DHS OIG "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program"*

Mention should be made of the DHS Office of Inspector General (OIG) report "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program."[47] Section 415 of the L-1 Reform Act, discussed above, directed the OIG to examine the "vulnerabilities and potential abuses in the L-1 visa program."[48] In January 2006, the DHS OIG issued a report in compliance with the mandate. Though the OIG found that the definition of the term "specialized knowledge" is so broad that "adjudicators believe that they have little choice but to approve almost all petitions[],"[49] the OIG did not find that the L-1B

---

bring such employees to the U.S. on L visas. A shorter prior employment period would allow companies to more expeditiously meet the needs of their clients. House Report 107-188, at 3.

The 2004 L-1 Visa Reform Act restored the one-year period of service abroad for all intracompany transferees, including specialized knowledge employees on blanket petitions.

[44] *Supra*, note 41.

[45] S. Hrg. 108–327, "The L–1 Visa And American Interests In The 21st Century Global Economy," Hearing Before The Subcommittee on Immigration, Border Security and Citizenship of The Committee On The Judiciary, United States Senate, 108th Congress, First Session July 29, 2003, Serial No. J–108–31.

[46] *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974); *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 846 (1986).

[47] DHS Office of Inspector General, "Review of Vulnerabilities and Potential Abuses of the L-1 Visa program," Office of Inspections and Special Reviews, OIG-06-22, (Jan. 2006) (hereinafter "DHS OIG L-1 Report"). *See* http://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf.

[48] *See supra* note 39.

[49] DHS OIG L-1Report at 1.

category had been the subject of misuse, or that it was improperly used as a substitute for the H-1B category.[50] Moreover, when examining whether there was a basis for a concern that L-1B workers were displacing U.S. workers, the OIG concluded that displacement "does not seem to represent a significant national trend."[51] Additionally, the OIG opined that the perception that the L-1 program is larger and more significant is because beneficiaries are grouped together in certain areas of the country."[52]

In the USCIS "Comments on OIG Draft Report," USCIS Acting Deputy Director Robert C. Divine reaffirmed the central principles guiding L-1B adjudication found in the Puleo memo and the 2002 Ohata memo,[53] and stated that IMMACT 90 had the effect of "broadening the scope of the specialized knowledge category."[54] Divine also stated that "despite recent increases in the usage of the L-1B category, there continues to be a relatively low number of aliens granted L-1B classification annually."[55]

II. The AAO's Erroneous Analysis of IMMACT 90

a. *The "Varying Interpretations"*

Congress acted in 1990 in order to put to rest the "varying" restrictions imposed on the "specialized knowledge" category by legacy INS in the two decades of administrative jurisprudence, regulations, and policy guidance prior to the enactment of INA §214(c)(2)(B). When the legislative history of INA §214(c)(2)(B) is read in conjunction with the Supplementary Information accompanying the July 1991 proposed rule, there is no doubt that legacy INS properly interpreted the intent of Congress in IMMACT 90 to liberalize the definition of the term "specialized knowledge," and the AAO's reintroduction of pre-IMMACT 90 law is unsupportable.

A thread common to the "[v]arying interpretations" by legacy INS that Congress sought to address in IMMACT 90 was the narrow definition of "specialized knowledge" that the Service had developed over the years through precedent decisions, regulations, and interpretive memoranda. The *Penner/Colley* formulation focused on "essential" knowledge and the requirement that the specialized knowledge relate to the "proprietary" interests of the business and its management, and involve skills "not readily available in the job market." The 1983 regulations adopted and perpetuated the narrow definition of "specialized knowledge" that tied the knowledge closely to the petitioner's "proprietary interests."

The proposed regulations in 1986 unsuccessfully sought to restrict further the definition by imposing requirements that the knowledge be unique and narrowly held, and again tied to proprietary interests of the petitioner. As finally adopted in 1987, the regulations did not require that the knowledge be unique or narrowly held, but still required an

[50] *Id.* at 11.
[51] *Id.* at 10.
[52] *Id.* at 11.
[53] *Id.* at 31.
[54] *Id.*
[55] *Id.*

"advanced level of expertise and proprietary knowledge" which is "not readily available in the United States labor market."

The Norton memo of October 1988, which attempted to relax the "too literal definition of the term 'proprietary knowledge'" that the Service was applying in the adjudication of L-1B "specialized knowledge" petitions, was insufficient to allay Congress's concern that the agency's "varying interpretations," all of which were varying formulations of the requirement that the "specialized knowledge" have some proprietary character or quality and in which some test of the availability of the knowledge in the labor market was required, were problematic. The IMMACT 90 definition of specialized knowledge was meant to repudiate the "varying interpretations" of the term.

b. *"Elevated" or "Key" Employees*

In its decisions, the AAO relies on the legislative history of the 1970 immigration act, on *Colley* and *Penner*, precedent decisions interpreting the 1970 law, and on *1756*, to support the conclusion that "specialized knowledge" employees must be "key" to the petitioner's enterprise. The AAO attributes great significance to the inclusion of "specialized knowledge" employees in the same nonimmigrant category as executives and managers. The court in *1756* described the 1987 regulation as adopting the "natural reading that a specialized knowledge capacity should be analogous to a managerial or executive capacity." Relying on *1756*, the AAO draws the following erroneous conclusion:

> [L]ooking at the term's placement within the text of section 101 (a)(15)(L), the AAO notes that "specialized knowledge" is used to describe the nature of a person's employment and that the term is listed among the higher levels of the employment hierarchy with "managerial" and "executive" employees. Based on the context of the term within the statute, the AAO would expect a specialized knowledge employee to be an elevated class of workers within a company and not an ordinary or average employee. *See 1756, Inc.* v. *Attorney General,* 745 F. Supp. at 15.[56]

While one could argue that it may have been appropriate under the pre-IMMACT 90 law to equate "key" with "elevated," Congress changed that when it enacted the statutory definition of "specialized knowledge" in IMMACT 90. Where previously under legacy INS interpretations the "specialized knowledge" had to relate to a proprietary interest of the petitioner, and the specialized knowledge alien had to have an "advanced level of expertise," the definition found in IMMACT 90 imposed no such requirements.

c. *Consideration of the Full Range of Changes for Intracompany Transferees in IMMACT 90*

[56] *GST*, s*upra*, FN 1, at 23. *See also*: *Matter of [name not provided]*, EAC-07-013-52342 (AAO, Aug. 23, 2010), at 21.

In its attempt to minimize the impact of the changes on intracompany transferees made by IMMACT 90, the AAO fails to consider the full range of changes applicable to intracompany transferees, both nonimmigrant and immigrant, enacted in IMMACT 90, and to weigh the significance of those changes. The enactment by Congress of a definition of "specialized knowledge" was one of five changes to the nonimmigrant L-1 program enacted by Congress with IMMACT 90. The five revisions addressed changes in the evolving worldwide economy and changes in the structure of businesses:

- Accounting and consulting firms, whose ownership structures were not compatible with the prior L-1 law, were given access to the L-1 category;
- Blanket petitions were made available to high-volume L-1 users;
- The one-year period of prior employment could be satisfied if it took place in a three-year period prior to admission;
- The period of stay for L-1 aliens was made statutory, with a five-year period for "specialized knowledge" employees, and a seven-year period of stay provided for executives and managers;[57] and,
- A definition of "specialized knowledge" was enacted that eliminated the requirement that the knowledge have a characteristic "proprietary" to the petitioner, but rather, that the knowledge have a "special" characteristic relevant to the company product and its application in international markets, or be advanced knowledge of the company's processes or procedures.

When read in combination, the five changes to the L-1 program reveal a clear intent by Congress to substantially broaden the L-1 program, particularly to include accounting and consulting firms by specifically including those businesses,[58] by making processing of L-1 petitions easier for high-volume users, by enlarging the timeframe during which the one-year of qualifying employment could take place, by defining by statute periods of stay for L-1 aliens, and, by eliminating the requirement that "specialized knowledge" be closely tied to a proprietary interest of the employer. Whether Congress had found that the prior interpretation of "specialized knowledge" was "specifically incorrect" is not the issue. Congress re-defined the term to make it consistent with the other changes.

Moreover, IMMACT 90 made changes with respect to the treatment of intracompany transferee executives and managers, both nonimmigrant and immigrant, which reveal that Congress did, in fact, view executives and managers differently from "specialized knowledge" employees, whose treatment by Congress in the IMMACT 90 changes indicate that they were not so "elevated" in the eyes of Congress as the AAO claims.

[57] Regulations limited the period of admission for aliens under INA §101(a)(15)(L) to five years, except for aliens who do not reside continuously in the United States and whose employment in the U.S. is intermittent, seasonal, or an aggregate of six months or less per year, or who reside abroad and who are employed part-time in the U.S. 8 CFR §214.2(l)(12) (1-1-90 Edition).

[58] In response to changes in ownership structures of accounting and management consulting firms subsequent to the enactment of IMMACT 90, Congress amended Section 206(a), "Clarification of Treatment of Certain International Accounting Firms," in Section 6 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312, (Nov. 12, 1999), to clarify the applicability of INA §101(a)(15)(L) and INA §203(b)(1)(C) to the restructured firms.

First, for nonimmigrant intracompany transferees, Congress provided in Section 214(c)(2)(D)(i) that executives and managers would be entitled to a seven-year period of admission, whereas in Section 214(c)(2)(D)(ii), "specialized knowledge" employees would remain limited to a five-year period of stay. Second, IMMACT 90 introduced immigrant "priority workers" in Section 203(b)(1). Congress created three categories of "priority workers," "aliens with extraordinary ability" under Section 203(b)(1)(A), "outstanding professors and researchers" under Section 203(b)(1)(B), and "certain multinational executives and managers" under Section 203(b)(1)(C). Congress included intracompany transferee executives and managers among the highest classes of aliens for permanent residence, and provided to them the streamlined pathway to permanent residence that does not involve the labor certification process required under INA §212(a)(5).

"Specialized knowledge" employees were afforded neither the seven-year period of stay nor the "priority worker" permanent residence classification and streamlined permanent residence processing. The disparate treatment of "specialized knowledge" employees points to the conclusion that Congress did not consider them to be among an "elevated class of workers" along with executives and managers.

The same changes to the intracompany transferee classification – amendments to make the visa category available to accounting and consulting firms, the enactment of a definition of "specialized knowledge," the limitation on periods of stay for "specialized knowledge" workers, and the exclusion of "specialized knowledge" workers from the "priority worker" permanent resident category – also support a reexamination of how "key" Congress viewed this class of employees to be, or, said another way, supports a reexamination of the kind and level of skill a worker would need to possess to be considered "key." If it remains appropriate to consider a "specialized knowledge" employee "key," then what constitutes "key" is the possession of special knowledge of a company's product and its application in international markets, or advanced knowledge of a company's processes or procedures, not hierarchical ranking on a corporate organization chart.

III. Righting the Course of L-1B Adjudications

Though the AAO's flawed analysis of the changes to the L-1B category in IMMACT 90 has resulted in a number of erroneous conclusions, three areas stand out: the "baseline" against which "special" and "advanced" should be measured, the time needed to acquire specialized knowledge, and how widespread the knowledge can be within the company.

a. *The "Baseline" Against Which "Special" and "Advanced" Should be Measured*

The AAO correctly states that "to determine what is special, USCIS must determine the baseline of ordinary."[59] The Puleo memo and *GST* both referenced common dictionary definitions of "special" and "advanced" when discussing how to interpret the terms. Puleo, for example, suggests that "special" can mean "surpassing the usual; distinct

[59] *GST*, s*upra* note 1 at 20.

among others of a kind" or "distinguished by some unusual quality; uncommon; noteworthy." For "advanced," Puleo suggests "highly developed or complex; at a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage."[60] In *GST*, the AAO offers similar dictionary definitions of "special" and "advanced:"

> …it is instructive to look at the common dictionary definitions of the terms "special" and "advanced." According to *Webster's New World College Dictionary*, the word "special" is commonly found to mean "of a kind different from others; distinctive, peculiar, or unique." *Webster's New World College Dictionary*, 1376 (4th Ed. 2008). The dictionary defines the word "advanced" as "ahead or beyond others in progress, complexity, etc." *Id.* at 20.[61]

The AAO, however, relies on its finding that a "specialized knowledge" employee is among a "key" or elevated class of employees, along with executives and managers, to move the "baseline" from that established by the dictionary definitions, and to conclude that the qualities of "special" or "advanced" for a "specialized knowledge" employee must be compared to the "special" or "advanced" qualities of "elevated" employees. This flawed analysis of IMMACT 90 leads the AAO to incorrectly establish "baselines" for "special" and "advanced" that are far beyond what Congress intended with the 1990 amendments, to the point that knowledge must not just be "specialized," but must be "super-specialized."

The Puleo memo makes it clear that the "baseline" against which "specialized knowledge" is to be measured is whether the "…knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor."[62]

The "baseline" for "special" knowledge is whether the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry. The "baseline" for "advanced" knowledge does not require that the knowledge be narrowly held within the petitioning company, only that the knowledge be advanced. In neither case, however, is the starting point anything beyond knowledge that is considered "ordinary" to the industry, field, or company.

b. *The Time Needed to Acquire the Specialized Knowledge*

Flowing also from the AAO's flawed analysis of the changes to the multinational transferee programs is the AAO's insistence that a "specialized knowledge" intracompany transferee must have experience beyond the statutory minimum of one year of qualifying employment abroad. In *GST*, the AAO says:

---

[60] Puleo Memo, *supra* note 7.
[61] *GST*, s*upra* note 1 at 23.
[62] Puleo Memo, *supra* note 7.

> By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." *Matter of Penner*, 18 I&N Dec. at 53. The terms "special" or "advanced" must mean more than experienced or skilled. Specialized knowledge requires more than a short period of experience, such as two or three years, otherwise "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits. If everyone is specialized, then no one can be considered truly specialized.[63]

Congress considered the duration of qualifying employment in the 1990 amendments, providing that the one year of qualifying employment could take place in a three-year period prior to the admission of the intracompany transferee. When the 2004 reforms were introduced by Senator Chambliss in 2003, he said "One year is a reasonable amount of time to require an employee to have attained the specialized knowledge of the company's products, services or processes to qualify for the visa."[64] Congress had ample opportunity when considering the 2004 reforms to enlarge the period of qualifying employment, and did not do so. It is simply impermissible for the AAO to do so in its adjudication of L-1B petitions.

c. *The Number of Employees Who Can Possess Specialized Knowledge*

The AAO rejects the principle, found in the Puleo memo, that "the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced."

In *GST*, the AAO says:

> Although it is accurate to say that "the statute does not require that the advanced knowledge be narrowly held throughout the company," it is equally true to state that knowledge will not be considered "special" or "advanced" if it is universally or even widely held throughout a company. While not dispositive, USCIS will generally take note when a substantial majority of a petitioner's employees are beneficiaries of L-1B specialized knowledge petitions. While the AAO acknowledges that there will be exceptions based on the facts of individual cases, an argument that an alien is unique among a small subset of workers will not be deemed facially persuasive if a petitioner employs a majority of its workers in a specialized knowledge capacity. To quote counsel's statement during the oral presentation, "if everyone is special, then no one is special."[65]

Elsewhere in *GST*, the AAO quotes *Colley*:

> Most employees today are specialists and have been trained and given specialized knowledge. However, in view of the [legislative history], it cannot be concluded that all employees with specialized knowledge or performing highly technical

[63] *GST*, s*upra* note 1 at 39.
[64] *See supra* note 42.
[65] *GST*, s*upra* note 1 at 38.

> duties are eligible for classification as intracompany transferees. The House Report indicates the employee must be a "key" person and associates this employee with "managerial personnel." *Matter of Colley*, 18 I&N Dec. at 119-20.[66]

While the AAO's conclusion that "not all employees with specialized knowledge … are eligible for classification as intracompany transferees" may have been appropriate under the law based on the 1970 statute, the same cannot be said under the law as amended by IMMACT 90. Under the 1990 statutory definition, any employee who has "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" is eligible for classification as a "specialized knowledge" employee under INA §101(a)(15)(L) and INA §214(c)(2)(B). And, under the 1990 amendment, that knowledge can be widely held.

IV. CONCLUSION

The Immigration Act of 1990 brought watershed reforms to the treatment of multinational companies and their employees. Congress amended the Immigration and Nationality Act to provide access to intracompany transferee visas, immigrant and nonimmigrant, to multinational enterprises and business structures that barely existed, or did not exist at all, in 1970, and expanded access to the L-1 category for a new kind of "specialized knowledge" employee, the kind who were providing services that were virtually nonexistent in 1970. In comments during the 2003 Senate Judiciary Committee hearing on the L-1 visa, Senator Edward M. Kennedy noted that "[i]n 1970 … we had the beginning of internationalization…."[67]

In 2012, we clearly have a global economy, and global businesses. USCIS must abandon its misplaced reliance on precedent decisions and federal case law interpreting the term "specialized knowledge" that is based on the Immigration Act of 1970, repudiate the reasoning adopted by the AAO in L-1B decisions as embodied in *GST* and other AAO decisions that substantially repeat the rationale found in *GST*, and return to applying the sound reasoning found in the regulations and policy memoranda that properly interpreted the intent of Congress with respect to the treatment of "specialized knowledge" intracompany transferees in the Immigration Act of 1990.

[66] *GST*, s*upra* note 1 at 26.
[67] *See supra* note 45, at 22.