U.S. Department of Homeland Security
20 Massachusetts Ave., N.W., Rm. 3000
Washington, DC 20529

U.S. Citizenship and Immigration Services

[redacted]

File: WAC 07 277 53214 Office: CALIFORNIA SERVICE CENTER Date: JUL 22 2008

IN RE: Petitioner: [redacted]ECHNICAL SERVICES, INC.
Beneficiary: SAMEER[redacted]

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)

IN BEHALF OF PETITIONER:

JOHN H. CARTER
515 MADISON AVE.
NEW YORK, NY 10022

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

cc: Austin T. Fragomen, Jr.
Owen B. Cooper

DISCUSSION: The Director, California Service Center, denied the petition for L-1B nonimmigrant visa classification. The petitioner subsequently filed a motion for reconsideration. On January 30, 2008, the director granted the motion but concluded that the grounds for the denial had not been overcome. The director certified the decision to the Administrative Appeals Office (AAO) for review. The decision of the director will be withdrawn in part and affirmed in part. The petition will be denied.

The petitioner is a Delaware corporation, with headquarters in Raleigh, North Carolina, that provides information technology support to customers in the United States thorough its parent company, [redacted] Corporation. As a wholly owned subsidiary of [redacted] Corporation, the petitioner is part of the [redacted] global family of businesses that employs 355,000 persons and generates $91 billion in gross revenue. The petitioner seeks to employ the beneficiary as an "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 [redacted] for specific client needs. The petitioner stated that the beneficiary would be "assigned to the [redacted] team working on the Catalyst project for our client, [redacted] Foods, in our [redacted] facilities in Chicago, Illinois."

Accordingly, the petitioner filed the present petition to classify the beneficiary as an L-1B nonimmigrant intracompany transferee having "specialized knowledge" pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L).

The director originally denied the petition after concluding that the petitioner failed to establish that it has been doing business or that the beneficiary would be employed in a capacity requiring specialized knowledge. After the petitioner submitted a motion to reopen, the director entered a new decision denying the petition on the same two grounds. The director certified that decision to the AAO for review. *See generally* 8 C.F.R. § 103.4(a).

On certification, counsel asserts that the petitioner has been doing business as a qualifying organization and that the beneficiary has been and will be employed in a position involving specialized knowledge.[1] Counsel supplemented the record with a 24-page legal brief on motion and a 25-page brief on certification. Counsel also submitted advisory opinions from the following individuals: Professor J.P. [redacted] at [redacted] University; Dr. James [redacted] at [redacted] University; Professor Lawrence [redacted] at the [redacted] Business School; and Professor David [redacted] at the University of [redacted]. Counsel for the petitioner also submitted a letter from Mr. Austin Fragomen, an article from *Foreign Affairs* titled "Globally Integrated Enterprise," and a recent article from *Interpreter Releases* titled "Meeting the Standard: Specialized Knowledge Workers and the L-1B Visa Category," authored by Mr. Austin Fragomen. Finally, the AAO received *amicus curiae* statements of interest from the American Council on International Personnel, the

[1] The petitioner is represented by Mr. John H. Carter, Jr., who entered his appearance on November 15, 2007, after the director issued the original request for evidence. On certification, the petitioner submitted a notice of appearance for two additional representatives: Mr. Austin T. Fragomen, Jr. and Mr. Owen B. Cooper. This decision will refer to the individual attorneys only when it makes reference to their personal statements during the oral presentation of May 22, 2008.

Information Technology Association of America, and the United States National Chamber of Commerce.

On May 22, 2008, counsel appeared in person before the AAO to present legal argument on behalf of the petitioner.[2] During the oral presentation, Mr. Austin Fragomen first addressed the question of whether [redacted] was doing business, Mr. Owen Cooper then discussed the standard for evaluating specialized knowledge and how the director allegedly deviated from that standard, and finally Mr. Fragomen argued that the beneficiary of the current petition met the standard for specialized knowledge. Mr. John Carter, though present, did not participate in the oral presentation.

During the presentation, counsel noted the multiple *amici curiae* briefs that had been submitted and emphasized that the "unreasonable standard" for specialized knowledge that had been applied in this case was of critical importance for multinational corporations and L-1B professionals. While counsel attributed the director's decision and the recent scrutiny of L-1B petitions to the L-1 Visa Reform Act of 2004, counsel asserted that the law did not apply to this case. Counsel concluded by requesting that the AAO withdraw the decision of the director and approve the petition.

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

The regulation at 8 C.F.R. § 214.2(l)(3) further 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.

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[2] The AAO originally denied Mr. Carter's request for oral argument after he failed to show cause for why oral argument is necessary. *See* 8 C.F.R. § 103.3(b). After Mr. Fragomen protested directly to the Acting Director of U.S. Citizenship and Immigration Services (USCIS), and USCIS Chief Counsel suggested that the oral argument should be permitted, the AAO agreed to request counsel's appearance pursuant to 8 C.F.R. § 103.2(b)(9).

(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.

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

> 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.

Finally, the provisions of the L-1 Visa Reform Act apply to all petitions filed on or after June 6, 2005. As amended by the L-1 Visa Reform Act of 2004, section 214(c)(2)(F) of the Act, 8 U.S.C. § 1184(c)(2)(F), provides:

> An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(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 1101(a)(15)(L) if –
>
> (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
>
> (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

Through the enactment of the L-1 Visa Reform Act, Congress intended to prohibit the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003); *see also* Sen. Judiciary Comm., Sub. on Immigration, Statement for Chairman Senator Saxby Chambliss, July 29, 2003, available at <http://judiciary.senate.gov/member_statement.cfm?id =878&wit_id=3355> (accessed on June 3, 2008).

I. Issue: Is the Petitioner Doing Business as a Qualifying Organization?

The initial issue in this matter is whether the petitioner is doing business as a qualifying organization. As it relates to this specific issue, the decision of the director will be withdrawn. As previously noted, the regulations require the petitioner to submit evidence that it and the foreign business which employed the alien are "qualifying organizations." 8 C.F.R. § 214.2(l)(3)(i).

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(G) provides:

> "Qualifying organization" means a United States or foreign firm, corporation, or other legal entity which:
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> (*1*) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (*2*) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
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> (*3*) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

The regulation further provides that "doing business" means "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii)(H).

Finally, the regulations provide for a one-year approval for a "new office" that has been doing business for less than one year. *See* 8 C.F.R. § 214.2(l)(7)(i)(A)(*3*). The term "new office" is defined as follows: "*New office* means an organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary for less than one year." 8 C.F.R. § 214.2(l)(1)(ii)(F).

Request for Evidence

The director's adverse decision on this issue can be directly attributed to the information that the petitioner provided on the original USCIS Form I-129, Petition for a Nonimmigrant Worker. Given the regulatory requirements, the official Form I-129 is designed to elicit information regarding the petitioner, the alien's overseas employer, and the nature of the claimed qualifying organization. Although the petition clearly indicated in Part 1 that the employer is [redacted] Services, Inc., the petitioner indicated in Part 5 of the Form I-129 that it was established in 1911; that it is engaged in information processing, manufacturing, sales and service; and that it has 355,000 employees and a gross annual income of $91.4 billion. In an addendum to the form, the petitioner also indicated that it was established in 2006 and that it was providing the corporate data of its parent company, [redacted] Corporation, because the [redacted] data was not yet available. The petitioner

stated that the beneficiary would be "assigned to the [redacted] team working on the Catalyst project for our client, [redacted] Foods, in our [redacted] facilities in Chicago, Illinois."

The director issued a request for evidence (RFE) on October 4, 2007 that solicited, *inter alia*, documentation regarding the nature of the petitioning corporation and its business activities. The director noted the discrepancy between the claimed dates of incorporation and stated that it appeared that the petitioner's corporate information was not true and correct.[3] The director specifically requested copies of the petitioner's organizational chart; a detailed explanation of the petitioner's product or service; copies of contracts, work orders, and service agreements between the petitioner and the unaffiliated employer; proof that the client received the petitioner's product or services; employment records that provide the beneficiary's job description and worksite; a "milestone plan" showing the beginning and ending dates for the product or service that is provided by the petitioner; and press releases discussing the product or service to be provided by the petitioner. The director also requested copies of federal income tax returns, state quarterly wage reports, W-2 and W-3 wage and tax statements for its employees, and photographs and a floor plan for the petitioner's business premises.

In a response dated November 15, 2007, the petitioner stated that it provides information technology support to the U.S. market through its parent company, [redacted] Corporation, and has over 600 employees and a gross annual income of $14.2 million. The petitioner indicated that the services provided are not available on the open market, but that it "provides information technology (IT) support to the U.S. market, leveraging [redacted] global delivery model in technology, business, and skilled technology resources." The petitioner refused to submit any documentation regarding the contracts, work orders, or service agreements between the petitioner and the unaffiliated employer; or proof that the client received the petitioner's product or services; or a "milestone plan" for the project. The petitioner stated that, "regrettably," they were unable to provide the requested documents because they constituted "confidential financial agreements between our Parent Corporation, [redacted] Corporation, and our business client, [redacted] Foods."

The petitioner stated that it had provided the corporate data for [redacted] on the Form I-129 because it did not have any tax returns available and could not easily document its financial viability as a separate corporate entity. In the absence of its own financial information, the petitioner stated that it provided its parent company's financial information "to ensure it would not be treated as a new office" under 8 C.F.R. § 214.2(l)(1)(ii)(F).

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[3] The director's RFE was appropriate. Reviewing the initial submission, the petitioner was not represented by counsel and provided publicly available information regarding the claimed parent company, [redacted] Corporation. The AAO acknowledges that the agency frequently discovers "imposter petitions" and fraudulent employment letters where individuals claim to be associated with an existing foreign or domestic corporation, without the knowledge of that corporation, and submit publicly available documents as evidence. *See, e.g.*, EAC0222053525, 2004 WL 2897158 (USCIS AAO). The AAO has seen fraudulent employer letters filed on behalf of numerous well-known entities, including publicly traded corporations and government agencies. Outside of an actual investigation, the most effective means for detecting this common fraud scheme is a detailed RFE, like the one issued by the director in this case.

Denial

The director denied the petition on November 26, 2007, finding that [redacted] was not engaged in the regular, systematic, and continuous provision of goods or services. In the decision, the director stated that "rarely does USCIS receive such evasive and ambiguous responses with a near complete failure to provide requested items as has been its experience with this petitioner." The director discussed how the petitioner had failed to submit quarterly wage reports even though it had several hundred visa petitions approved and had been doing business for nearly a year. The director also noted that the beneficiary would be providing services for [redacted]'s client and that the beneficiary would be controlled and supervised by [redacted]'s management team. The director concluded that [redacted] was in business as an immigration and human resources department for [redacted] and that there was no business activity occurring at the petitioner's location in Raleigh, North Carolina.

Motion

On January 30, 2008, after reopening the decision on motion, the director issued a new decision concluding again that the petitioner was not doing business and specifically concluded that [redacted] must show that it is doing business as a separate legal entity outside of the larger [redacted] group. The director noted that [redacted] continued to identify itself with the IBM global organization and was essentially relying on the business conducted "through" a parent, subsidiary, or affiliate rather than qualifying on its own. The director analyzed the governing L-1 regulations and noted that USCIS has long held that a corporation exists as a separate legal entity. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958; A.G. 1958).

The director observed that "the petitioner is acting more as a staffing agent for [redacted] and merely maintains the alien's payroll records . . . rather than acting as the actual employer." The director concluded that the "real employer" is the [redacted] office that has the contract with the end user of its IT services. The director affirmed her denial and certified the decision to the AAO for review.

Certification

On certification, counsel for the petitioner asserts that [redacted] is "doing business" under the regulations because it is a qualifying organization, an actual employer, and because it is providing services. Counsel argues that "the fact that it provides services internally within the [redacted] group of companies . . . rather than on the open marketplace is immaterial and does not mean that it is not 'providing services' under the 'doing business' provision of the regulations."

In an effort to clarify the nature of the petitioner's business operations, counsel notes that [redacted] "manages the deployment of temporary IT personnel from [redacted]'s Global Delivery Centers abroad." Counsel emphasizes that this service is a critical link in [redacted]'s global operations:

> Typically such deployment would be run by the parent company's subsidiary abroad (in this case, [redacted] India). The difference in this case is simply that [redacted] established a separate U.S. corporation to consolidate the deployment of its foreign IT specialists for certain services. In the case on appeal, [redacted] bills [redacted] India on a monthly basis for its services, based on an inter-

> company agreement that details and captures all costs associated with the project. A separate inter-company agreement between [redacted] U.S. and [redacted] India lays out the project details, allocates responsibilities for the achievement of certain benchmarks, and provides that the project will be funded by an inter-company agreement between [redacted] US and [redacted] India. [redacted] India bills [redacted] U.S. for its costs, and [redacted] U.S. - which holds the contract with the client (in this case, [redacted] Foods) - bills the client.

Counsel asserts that the director's treatment of each branch, subsidiary or affiliate as a "separate legal entity," completely apart from the larger corporation of which they are a component, would undermine the very purpose of the L-1 program. Counsel notes that according to the legislative history for the 1970 Act, the L-1 visa was intended to "help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the *organization*." H.R. Rep. No. 91-851 (1970), *reprinted in* 1970 U.S.C.C.A.N. 2750, 2754, 1970 WL 5815 (Leg. Hist.). (Emphasis added.) Counsel stresses that the term "organization" clearly refers to the overall corporate entity which may be composed of multiple branches, subsidiaries, and affiliates.

Analysis

Upon review, the petitioner has established that it is a qualifying organization and that it is doing business in a regular, systematic, and continuous manner. For purposes of the L-1 nonimmigrant visa category, the AAO considers the term "organization" to include the whole organization and not the individually incorporated petitioner, provided that the petitioner is in a qualifying relationship with the U.S.-based entity that, itself, meets the requirements set forth in 8 C.F.R. § 214.2(l)(ii)(G)(2).[4]

Critical to this issue is the term "organization." The term "organization" is used frequently in the statute, regulations, and legislative history relating to the L-1 nonimmigrant visa. *See, e.g.,* sections 101(a)(44)(A) and (B) of the Act (defining the terms "managerial capacity" and "executive capacity" in terms of the duties that an alien performs "within an organization"); *see also* 8 C.F.R. § 214.2(l)(1)(i)("the organization which seeks classification of an alien as an intracompany transferee is referred to as the petitioner").

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[4] The AAO recognizes that the term "qualifying relationship," as used at 8 C.F.R. 214.2(l)(ii)(G)(*2*), refers to the types of acceptable relationships a U.S. entity must have with the beneficiary's foreign employer in order to qualify for classification under section 101(a)(15)(L) of the Act, and not to the relationship a U.S.-petitioning entity must have with a U.S. organization in order for the petitioner to avoid filing a petition as a "new office." However, because the definition of "new office" refers to an organization that has been doing business in the United States "through a parent, branch, affiliate, or subsidiary," the AAO notes that a petitioner must have a "qualifying relationship" with an existing U.S. entity if it is to avoid filing as a new office. 8 C.F.R. § 214.2(l)(1)(ii)(F). For this reason, the AAO will use the term "qualifying relationship" in reference to the new office petition issues, as well. In this case, [redacted] has established that it is the subsidiary of [redacted] Corporation and that it therefore has a qualifying relationship with [redacted] Corporation sufficient to enable it to avoid filing as a "new office."

Neither counsel nor the director noted that Congress has provided a statutory definition for the term "organization." Specifically, section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), provides:

> The term "organization" means, but is not limited to, an organization, corporation, company, partnership, association, trust, foundation or fund; and includes a group of persons, whether or not incorporated, permanently or temporarily associated together with joint action on any subject or subjects.

Given the broad statutory definition of "organization," including corporate persons that are associated together with joint action on any subject, the AAO must conclude that the petitioner, [redacted] is part of a larger qualifying organization, [redacted] that is doing business as an employer in the United States and in at least one other country.[5]

Additionally, the L-1 regulations allow for the petitioner to avoid classification as a new office if it can show that it has been doing business for at least one year through a related entity. Specifically, in the definition of "new office," the regulations refer to an "organization which has been doing business in the United States *through* a parent, branch, affiliate, or subsidiary." 8 C.F.R. § 214.2(l)(1)(ii)(F). (Emphasis added.) While the director asserts that the "parent, branch, affiliate, or subsidiary" must refer to the petitioning entity itself, such a construction would render the definition redundant and meaningless. Accordingly, for purposes of the term "doing business" and the one-year new office period, the petitioner will not be considered a new office if it is part of a larger "organization which has been doing business in the United States through a parent, branch, affiliate, or subsidiary" for one year or more.[6]

The AAO notes that the director improperly discounted counsel's observation that legacy Immigration and Naturalization Service (INS) intended the "doing business" requirement to be interpreted broadly. The legacy INS originally proposed the current definition of "doing business" in a 1986 Proposed Rule. 51 Fed. Reg 18591 (May 21, 1986) ("'Doing business' means the regular, systematic and continuous provision of goods and/or services by a qualifying organization and shall not include the mere presence of an agent or office of the qualifying organization in the United States or abroad."). Counsel noted that legacy INS received public

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[5] As will be discussed, the petitioner failed to submit evidence relating to the beneficiary's assignment to [redacted] and his ultimate employment on the [redacted] Foods project. However, the record contains copies of Wage and Tax Register reports that were prepared by Automatic Data Processing, Inc. on behalf of [redacted] and its employees. While questions remain regarding the nature of the beneficiary's ultimate assignment, this evidence is facially sufficient to satisfy the narrow question whether the petitioner is doing business as an employer within the United States, as required by 8 C.F.R. § 214.2(l)(1)(ii)(G)(*2*).

[6] However, as will be discussed in this decision, the petitioner may not rely on the larger corporate organization to qualify for this nonimmigrant visa petition and then take cover behind the individual corporation by stating that it cannot speak for or provide information pertaining to the larger corporate organization when the director requests material evidence that relates to the organization's business activities. While this may be the result of innocent mistake, the failure to answer questions about the organization as a whole could result in a denial. *See* 8 C.F.R. § 103.2(b)(14).

comments in response to the proposed rulemaking suggesting that the definition of doing business would mean that representative and liaison offices would be disqualified from L-1 status even if they were promoting the business of foreign corporations through research and providing consultation. In the preamble to the final rule, the INS responded to these concerns by stating:

> The Service recognizes that company representatives and liaison offices provide services in the United States, even if the services are to a company outside the United States. Such services are included in the doing business definition and aliens who perform such services may qualify for L classification, if they are otherwise qualified under section 101(a)(15)(L).

52 Fed. Reg. 5738, 5741 (Feb. 26, 1987). The director dismissed counsel's argument, stating that the agency's supplemental statement to the regulation is "not binding on USCIS" and that "the petitioning entity is clearly not a liaison or representative office and thus the cited comments are not relevant to the issues presented in the instant petition."

It is clear that the regulation was intended to be interpreted broadly and in a manner that would serve the overarching purpose of the L-1 visa category – facilitating the exchange and development of managerial and key personnel within multinational companies. While the legacy INS comments in the supplemental information to the "new office" regulation are not legally binding on USCIS like the rule itself, the comments of the drafter provide significant guidance on how the regulation was intended to be applied. The INS clearly recognized that a representative or liaison office may provide services in a regular, systematic, and continuous manner, even if the services are provided to a company outside the United States. The similarities to [redacted] operations are not lost on the AAO, since it is providing a service by managing the deployment of temporary IT personnel from [redacted] India.

When the regulation states that "[t]he mere presence of an agent or office of the qualifying organization will not suffice," the emphasis of the director's review should be on the phrase "mere presence" and not on the fact that a petitioner is acting as a representative or agent. 8 C.F.R. § 214.2(l)(1)(ii)(H). As noted in the supplemental information, the form of business will not disqualify an entity as long as that entity is providing services in a regular, systematic, and continuous manner in accordance with the regulations.

While the director may have been concerned that the petitioner was attempting to evade the regulation's "new office" provisions, that concern is not warranted. *See* 8 C.F.R. §§ 214.2(l)(3)(vi) and (l)(14)(ii). The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers, executives, and specialized knowledge employees that are entering the United States to open an entirely new office, as opposed to an office that is related to an existing U.S. entity. *See* 52 Fed. Reg. at 5740. The new office provision is less strict than the narrow language of the statute, since the "new office" regulation allows a newly established petitioner one year to develop to a point that it can support the employment of an alien in a primarily managerial or executive position or as a specialized knowledge employee.

In short, if a petitioner, as here, is part of a larger corporate organization that has been doing business in the United States for more than one year "through a parent, branch, affiliate, or subsidiary," that petitioner will

not qualify to file as a "new office" petitioner.[7] 8 C.F.R. § 214.2(l)(1)(ii)(F). Regardless of whether a petitioner files a visa petition as a new office, the director may request "such evidence as the director, in his or her discretion, may deem necessary." 8 C.F.R. § 214.2(l)(3)(viii). If the director decides to request evidence that relates to the physical premises of the operation or the financial ability of the petitioner to remunerate the beneficiary, the director may do so regardless of whether the petitioner filed as a new office or as a petitioner that has been doing business for more than one year. As long as the requested evidence is material to the petitioner's eligibility, the director may legitimately request such additional evidence. And upon reviewing the initial petition or the extension petition, along with any additional evidence that the director may have requested, the director may deny the petition if he or she determines that the petitioner has not satisfied its burden of proof.

Conclusion

Accordingly, the petitioner, as a component corporation of the larger [redacted] organization, has established that it is doing business in a regular, systematic, and continuous manner. The director's decision will be withdrawn as it relates to this issue.

II. Issue: Will the Beneficiary Be Serving in a Capacity Involving Specialized Knowledge?

The second issue in this matter is whether the petitioner has established that the beneficiary will be serving in a capacity involving "specialized knowledge." Upon review, even under counsel's more generous view of the appropriate standard, the petitioner has not demonstrated that this employee possesses knowledge that may be deemed "special" or "advanced" under the statutory definition at section 214(c)(2)(B) of the Act. The decision of the director will be affirmed as it relates to this issue.

As previously noted, section 214(c)(2)(B) of the Act provides:

> 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.

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

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[7] If a petitioner relies on U.S.-based parent, branch, affiliate, or subsidiary to show that it has been doing business in the United States for one year or more, it is critical that the petitioner accurately complete Part 5 of the Form I-129 ("Basic Information About The Proposed Employment And Employer"). When the form asks for information about the petitioning employer, the petitioner should complete the form with truthful and accurate information about the actual petitioning corporation. To avoid any misunderstanding, if the petitioner elects to rely on "a parent, branch, affiliate, or subsidiary" to show that it is not a new office, the petitioner should explain this clearly in the Form I-129 Supplement L and any attached brief or addendum, and demonstrate the relationship between the petitioner and the larger organization.

> [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.

Denial

After requesting additional evidence, the director initially concluded that the beneficiary did not possess specialized knowledge and denied the petition. In reaching this decision, the director cited to a number of legacy INS precedent decisions, including *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); and *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988). The director cited to these precedents in support of the proposition that one must draw a distinction between "skilled workers" and "specialized knowledge workers" and for the discussion of the legislative history of the 1970 statute that created the L-1 classification.

Motion

On motion, counsel argued that the director applied an improper standard in denying the underlying L-IB petition which rendered the denial "not in accordance with the law." Specifically, counsel stated that the director relied upon antiquated case law which interpreted a prior definition of specialized knowledge that has been intentionally replaced by Congress in 1990. Counsel asserted that the current adjudication standard for L-1B specialized knowledge petitions is found, instead, "in successive legacy INS memoranda." Counsel claimed that USCIS had recently endorsed the memoranda as the appropriate standard in a letter that was issued in response to a draft report by the DHS Office of the Inspector General (OIG) that reviewed vulnerabilities and potential abuses of the L-1 visa program.

In her final decision, the director affirmed the previous denial. The director noted that the instant petition was not denied on the basis of the pre-1990 definition of specialized knowledge and did not touch on the only two issues Congress specifically addressed in enacting the 1990 definition: "proprietary or unique" knowledge and a test of the United States labor market. The director also observed that the USCIS response to the draft OIG report had itself referenced one of the disputed precedent decisions that counsel claimed had been superseded by the statutory definition. Citing to *Matter of Penner*, the USCIS letter noted that:

> There is no indication in the legislative history of IMMACT to indicate that Congress intended to depart from its previous position that the L-1B classification was intended for "key employees" and that the number of admissions under the L-1 classification "will not be large" or that "[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated ...." *See Matter of Penner*, 18 I&N Dec. 49, 51 (Comm. 1982) (citing to the 1970 House Report, H.R. No. 91-851).

Letter, Robert C. Divine, Acting Deputy Director of USCIS, to Robert L. Ashbaugh, Assistant Inspector General, "Comments on OIG Draft Report: A Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program" at page 31 (January 10, 2006).

Without citing to the pre-1990 legacy INS precedent decisions, the director concluded that the beneficiary did not possess special knowledge of the petitioner, but was simply "skilled or familiar" with the services provided by [redacted] India. The director noted that even if the petition had been filed by [redacted] itself, the record still would not establish that the position qualifies as specialized knowledge because the petitioner failed to adequately respond to the director's request for evidence on this issue. The director found insufficient evidence to make the determination because the petitioner failed to submit the requested contract between [redacted] and the "end-client" [redacted] Foods. She also found that the petitioner failed to contrast the beneficiary's duties with those of the other [redacted] employees at the work location or to other SAP ERP consultants in the industry.

Finally, the director noted that upon a review of publicly available internet websites for software similar to that used by the beneficiary, it appeared that the SAP software described by the petitioner is "common place and the industry standard" rather than advanced or specialized in nature. The director cited to one website that indicated that SAP AG, the company that produces SAP, is the third largest software maker in the world and estimated that there are approximately 55,000 SAP consultants worldwide. *See* "SAP - The Basics Series, Article 1, Who and/or what is SAP? How popular is it? Wow!," available at <www.thespot4sap.com/Articles/TheBasics_1.asp> (last accessed June 9, 2008). According to the website, SAP is a common software solution, with 44,500 installations of SAP in 120 countries and more than 10 million users. *Id.*

After noting the evidentiary deficiencies, the director discussed the plain meaning and statutory definition of specialized knowledge, as well as the legislative history for the Immigration Act of 1970. The director noted that the plain meaning of the term specialized knowledge is "knowledge or expertise beyond the ordinary in a particular field, process, or function." The director also observed that the legislative history demonstrated a concern by Congress that the L-1 visa category would become too large if the class of persons eligible for such visas was not "narrowly drawn and carefully regulated" by legacy INS.

On this basis, the director observed that the specialized knowledge classification "should not extend to all employees with mere familiarity with the organization's product but, rather to 'key personnel' and 'executives.'" The director concluded that the beneficiary's duties appear to be essentially those of a "skilled worker" and further "demonstrate knowledge which is common among systems analysts/programmers employed by the foreign entity, the petitioner's workforce at the unaffiliated employer's work location, and others in the field of information technology." The director denied the petition accordingly.

Certification

On certification, counsel argues that the director has applied an incorrect standard. Specifically, counsel asserts that the director used a "key employee" standard that has never been codified in the statute or the regulations nor set forth in the agency's policy memoranda. Counsel states that both the administrative decisions that were "issued by the Board of Immigration Appeals" and the Immigration Act of 1970 legislative history predate the statutory definition that was created by Congress through the Immigration Act of 1990. Because these sources predate the statutory definition, counsel objects that the director "applied standards that differ from and pre-date the current regulatory definition and the agency's own guidance for

determining specialized knowledge."

Counsel states that the current adjudication standard for L-1B specialized knowledge petitions is established instead in successive legacy INS memoranda. In both the written briefs and the oral presentation, counsel asserted that the seminal memorandum regarding the appropriate adjudication of L-1B petitions under current law is the March 9, 1994 INS policy memorandum titled "Interpretation of Special Knowledge" that was issued by James A. Puleo, the Acting Executive Associate Commissioner (hereinafter "Puleo memorandum"). During the oral presentation, Mr. Cooper referred to the Puleo memorandum as the "agency's definitive guidance" on specialized knowledge and stated that the fundamental problem with the director's decision was that it failed to evaluate any of the criteria discussed in the Puleo memorandum.

The certification raises two distinct issues for consideration: (1) what is the appropriate standard that should be applied to determine "specialized knowledge," and (2) whether the beneficiary in this matter has been and will be employed in a specialized knowledge capacity.

(1) What is the Appropriate Standard To Determine Specialized Knowledge?

Contrary to counsel's assertion, USCIS is not legally bound to follow the Puleo memorandum or any of the "successive legacy INS memoranda." Rather, in determining what constitutes specialized knowledge, the only standards by which the AAO is bound are those set forth in the statutory definition of specialized knowledge itself, as provided at section 214(c)(2)(B) of the Act, USCIS regulations, and applicable precedent decisions. When a statute is ambiguous, Congress has left a gap for the agency to fill. *See Chevron USA Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843-44 (1984). This is the situation here. In interpreting section 214(c)(2)(B), the AAO must rely on existing USCIS regulations, the applicable precedent decisions, and the legislative history of the enabling and declaratory statutes, as an indication of Congressional intent.

A. History of the Specialized Knowledge Definition

As noted by Mr. Cooper during the oral presentation, "Since the L-1 category was created almost four decades ago now, the interpretation has gone through a lot of twists and turns." Counsel urges the AAO to review the history of the classification and avoid repeating the "inappropriate tightening of the standard" that occurred prior to the enactment of the Immigration Act of 1990.

The AAO agrees that the history of the L-1B specialized knowledge category is critical to understanding the applicable standard in this case. Although counsel submitted multiple legal briefs and articles discussing specialized knowledge, the record does not contain an accurate review of the L-1B classification's development. For example, counsel incorrectly attributes the agency precedent decisions to the Board of Immigration Appeals rather than the legacy INS, the agency that was charged with administering the classification. More significantly, counsel focuses almost exclusively on the Immigration Act of 1990 without discussing the statute that created the L-1B classification, the Immigration Act of 1970. Finally, the AAO notes that the submitted briefs fail to discuss the actual text of the House Committee reports relating to

the critical legislative actions.[8] Considering that counsel hangs the majority of the argument on Congress' intent to "liberalize" the specialized knowledge classification in 1990, the absence of this discussion is a surprising omission.

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

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

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

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

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

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[8] In the initial brief submitted on motion, dated December 27, 2007, counsel quoted a heavily altered sentence fragment from the 1990 legislative history, noting that the 1990 Act "intended to reconcile '[v]arying interpretations [of the term 'specialized knowledge' adopted] by INS.'" Petitioner's "Brief in Support of Appeal" at 11 (December 27, 2007) (alterations in original). In the brief submitted on certification, dated February 28, 2008, counsel failed to discuss or even cite the legislative history of the 1990 Act, despite holding the director to task for "fail[ing] to account for the different legislative intent behind the 1990 revision of the definition of specialized knowledge." Petitioner's "Brief on Certification" at 18 (February 28, 2008).

Counsel also submitted a recently published article from *Interpreter Releases* that purports to discuss the history of the L-1B specialized knowledge classification. Austin T. Fragomen, Jr., "Meeting the Standard: Specialized Knowledge Workers and the L-1B Visa Category" 85 No. 11 *Interpreter Releases* 757 (March 10, 2008). Again, this article fails to cite or discuss the legislative history of the 1970 Act and then selectively quotes a sentence out of context from the 1990 Act legislative history. *Id.* at 759. Without discussing the actual text of the legislative history of the 1970 Act, counsel's arguments are not persuasive.

After the creation of the L-1B nonimmigrant classification, legacy INS developed a body of binding precedent decisions which attempted to clarify the meaning of "specialized knowledge," in the absence of a statutory definition.[9] *See Matter of Raulin*, 13 I&N Dec. 618 (Reg. Comm. 1970); *Matter of Vaillancourt*, 13 I&N Dec. 654 (Reg. Comm. 1970); *Matter of LeBlanc*, 13 I&N Dec. 816 (Reg. Comm. 1971); *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978); *Matter of Colley*, 18 I&N Dec. 117 (Comm. 1981); *Matter of Penner*, 18 I&N Dec. 49 (Comm. 1982); *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988).

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

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

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

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

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

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

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[9] Contrary to the assertions of counsel, the administrative precedent decisions were not decided by the U.S. Department of Justice's immigration appellate authority, the Board of Immigration Appeals (BIA). Instead, the precedents were issued by the legacy INS regional commissioners and the INS Administrative Appeals Unit, the predecessor office of the AAO. While the distinction is a technical one, the AAO observes that the precedent decisions deserve scrutiny because they represent the long experience of the agency in administering the visa category. Additionally, as will be discussed, the precedent decisions discuss recurring themes in the agency's administration of the L-1B visa program that remain relevant today.

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

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

Id. at 667-8.

Adding to the confusion, Richard Norton, an Associate Commissioner of the INS, issued a memorandum stating that since the new specialized knowledge regulations had been implemented, the INS had often used "a too literal definition of the term 'proprietary knowledge' wherein the knowledge must relate exclusively to or be unique to the employer's business operation." *See* Memorandum of Richard Norton, "Interpretation of Specialized Knowledge Under the L Classification," (October 27, 1988), *reproduced in* 65 *Interpreter Releases* 1170, 1194 (November 7, 1988). The memorandum explained the Associate Commissioner's view that possession of proprietary knowledge is an indicator of specialized knowledge capacity, but that it is not a necessary condition.

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

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

Specifically, Congress enacted the following definition:

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

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

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

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

> One area within the L visa that requires more specificity relates to the term "specialized knowledge." Varying interpretations by INS have exacerbated the problem. The bill therefore defines specialized knowledge as special knowledge of the company product and its application in international markets, or an advanced level of knowledge of processes and procedures of the company. The time limit for admission of an alien with specialized knowledge is five years, approximately the same as under current regulations.

Id.

In 1991, the INS proposed and adopted "a more liberal interpretation of specialized knowledge" based on the new statutory definition. Closely following the definition provided by Congress, the regulation at 8 C.F.R. § 214.2(l)(1)(ii)(D) defines specialized knowledge as:

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

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

Since Congress enacted the statutory definition of "specialized knowledge," the agency has issued a number of internal memoranda discussing the term specialized knowledge. *See* Memorandum of James A. Puleo, Acting Exec. Assoc. Comm., INS, "Interpretation of Special Knowledge," (March 9, 1994); Memorandum of Fujie Ohata, Assoc. Comm., INS, "Interpretation of Specialized Knowledge" (Dec. 20, 2002); Memorandum of Fujie Ohata, Director, Service Center Operations, USCIS, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status," (Sept. 9, 2004).

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

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

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

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

> From a practical point of view, the mere fact that a petitioner alleges that an alien's knowledge is somehow different does not, in and of itself, establish that the alien possesses specialized knowledge. The petitioner bears the burden of establishing through the submission of probative evidence that the alien's knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor. Likewise, a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not

the beneficiary possesses specialized knowledge.

Id. at p.4.

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

Most recently, Congress passed the L-1 Visa Reform Act of 2004, providing USCIS with additional criteria governing the L-1B specialized knowledge visa classification. *See* Division J, Title IV, Subtitle A, Section 412 of the Consolidated Appropriations Act of 2005, Pub. L. 108-447. As amended by the L-1 Visa Reform Act, section 214(c)(2)(F) of the Act prohibits classifying an alien as an L-1B if he or she "will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent" and:

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

As previously noted, Congress intended to prohibit the "outsourcing" of L-1B intracompany transferees to unaffiliated employers to work with "widely available" computer software and, thus, help prevent the displacement of United States workers by foreign labor. *See* 149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003)

B. The Standard for Specialized Knowledge

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

Counsel specifically points to the Puleo memorandum as the seminal document regarding the proper adjudication of L-1B specialized knowledge petitions. Without discussing the other elements or hypothetical examples of the memorandum, counsel points to five of the memorandum's six "possible characteristics" as the agency's key factors for evaluating specialized knowledge. Counsel continues to assert that the Ohata memoranda confirm that the Puleo memorandum sets forth the proper analysis for adjudication of L-1B

specialized knowledge petitions. Counsel for the petitioner concludes that the adjudication of L-1B petitions should rely upon legacy INS guidance memoranda and that the major fault of the director's decision was its failure to analyze the elements of the Puleo memorandum.

The Puleo memorandum is not legally binding on the agency. USCIS memoranda articulate internal guidelines for agency personnel; they do not establish judicially enforceable standards. Agency interpretations that are not arrived at through precedent decision or notice-and-comment rulemaking - such as those in opinion letters, policy statements, agency manuals, and enforcement guidelines - lack the force of law and do not warrant *Chevron*-style deference. *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's internal guidelines "neither confer upon [plaintiffs] substantive rights nor provide procedures upon which [they] may rely." *Loa-Herrera v. Trominski*, 231 F.3d 984, 989 (5th Cir. 2000)(quoting *Fano v. O'Neill*, 806 F.2d 1262, 1264 (5th Cir. 1987)). Agency policy memorandum and unpublished decisions do not confer substantive legal benefits upon aliens or bind USCIS. *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1024 (9th Cir. 1985); *see also Prokopenko v. Ashcroft*, 372 F.3d 941, 944 (8th Cir. 2004).

In contrast to agency memoranda, a legacy INS or USCIS decision is binding as a precedent decision once it is published in accordance with 8 C.F.R. § 103.3(c). The INS precedent decisions relating to L-1B specialized knowledge are considered "interpretive rules" under the APA. *See Spencer Enterprises, Inc. v. U.S.*, 229 F.Supp.2d 1025, 1044 (E.D.Cal. 2001), *aff'd* 345 F.3d 683 (9th Cir. 2003); *see also R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d 1014 (D.Hawaii 2000).

Accordingly, counsel's reliance on the Puleo memorandum as a binding legal standard, to the exclusion of existing legacy INS precedent, is misplaced. The Puleo memorandum was not intended to advise the public of the agency's interpretation of specialized knowledge. Instead it was an internal agency memorandum addressed to the INS District Directors, Officers in Charge, Service Center Directors, the Director of the Administrative Appeals Unit, and the Office of Operations. Additionally, the memorandum was never published in the Federal Register and the memorandum closed by stating that it was "designed solely as a guide." The AAO recognizes that the memorandum received wide mention in the immigration press. However, even where an agency memorandum or General Counsel opinion is publicized and discussed in a widely circulated immigration periodical, the document will not be considered as a rulemaking that a petitioner may rely on. *See R.L. Inv. Ltd. Partners v. INS*, 86 F.Supp.2d at 1022.

As an unpublished, internal policy memorandum, the Puleo memorandum is not binding as a matter of law and therefore, should not be cited in a USCIS denial. The legacy INS precedent decisions, on the other hand, continue to serve as binding agency precedent decisions and may be cited, when applicable. *See* 8 C.F.R. § 103.3(c). Upon review, it would have been inappropriate for the director to have relied on an internal agency memorandum as the legal authority for her decision.[10]

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[10] By contrast, it is entirely appropriate for the director to rely on the law and legal analysis from an internal agency memorandum or letter as the basis for a decision. However, if a memorandum goes beyond interpreting existing law to suggest new analytical criteria, the memorandum may impermissibly stray beyond the limits of an interpretive memorandum and enter the realm of "legislative rulemaking" – which requires notice-and-comment – by imposing new rights or obligations. *See* 5 U.S.C. § 553(b).

Instead of memoranda, the AAO must look to the specific language of the statutory definition of specialized knowledge. The first question is always to inquire whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A., Inc., v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

The narrow legal question here is the "standard" for determining specialized knowledge. As previously discussed, Congress spoke directly to the issue when it created a statutory definition for the term specialized knowledge. However, the definition is less than clear since it contains undefined, relativistic terms and elements of circular reasoning.

Like the plaintiff in *1756, Inc. v. Attorney General*, Congress "uses the concept of special in defining to specialize and thus sheds little light on the meaning of specialized knowledge capacity." 745 F.Supp. at 14 (D.D.C., 1990). Although *1756, Inc. v. Attorney General* was decided prior to enactment of the Immigration Act of 1990, the court's discussion of the ambiguity in the former INS definition is equally illuminating when applied to the definition created by Congress:

> This ambiguity is not merely the result of an unfortunate choice of dictionaries. It reflects the relativistic nature of the concept special. An item is special only in the sense that it is not ordinary; to define special one must first define what is ordinary. For example, a carpenter who concentrates on putting different parts of furniture together (a joiner) would have specialized knowledge in comparison to a neophyte carpenter who has not yet concentrated on any particular aspect of the craft. In comparison to a scientist or doctor, even a general practitioner, however, that joiner's knowledge may seem quite ordinary. These two examples use different baselines for ordinary knowledge: in the first case, ordinary knowledge is the minimum level of information and skill needed to participate in a profession; in the second case, ordinary knowledge is nonscientific knowledge. There is no logical or principled way to determine which baseline of ordinary knowledge is a more appropriate reading of the statute, and there are countless other baselines which are equally plausible. Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning. *Cf.* Westen, *The Empty Idea of Equality*, 95 Harv.L.Rev. 537 (1982).

745 F. Supp. at 14-15.

In reviewing the plain language of section 214(c)(2)(B), it is clear to the AAO that Congress has provided USCIS with an ambiguous definition of specialized knowledge. In effect, Congress has charged the agency with making a comparison based on a relative idea that has no plain meaning. That is, to determine what is special, USCIS must first determine the baseline of ordinary.

While Congress did not provide explicit guidance for what should be considered ordinary knowledge, the canons of statutory interpretation provide some clue as to the intended scope of the L-1B specialized knowledge category. *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123, 108

S.Ct. 413, 421, 98 L.Ed.2d 429 (1987) (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987)).

First, 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.

Second, looking 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.

Third, the legislative history indicates that the original drafters intended the class of aliens eligible for the L-1 classification would be "narrowly drawn" and "carefully regulated and monitored" by USCIS. The legislative history of the 1970 Act plainly states that "the number of temporary admissions under the proposed 'L' category will not be large." H.R. Rep. No. 91-851, 1970 U.S.C.C.A.N. at 2754. This legislative history has been widely viewed as supporting a narrow reading of the definition of specialized knowledge and the L-1 visa classification in general. *See 1756, Inc. v. Attorney General*, 745 F.Supp. at 15-16; *American Auto. Ass'n v. Attorney General,* Not Reported in F.Supp., 1991 WL 222420 (D.D.C. 1991); *Fibermaster, Ltd. v. I.N.S.*, Not Reported in F.Supp., 1990 WL 99327 (D.D.C., 1990); *Delta Airlines, Inc. v. Dept. of Justice*, Civ. Action 00-2977-LFO (D.D.C. April 6, 2001); *Boi Na Braza Atlanta, LLC v. Upchurch*, Not Reported in F.Supp.2d, 2005 WL 2372846 at *4 (N.D.Tex., 2005), *aff'd* 194 Fed.Appx. 248 (5th Cir. 2006).

Although counsel objects strongly to the director's reliance on any law or legislative history that pre-dates the 1990 Act and the statutory definition of specialized knowledge, counsel has not pointed to any committee report or floor statements that undermine the statement of the original enacting Committee that admissions "will not be large" and that the category will be "carefully regulated and monitored" by USCIS. Instead, counsel consistently attributes to the 1990 Act, without citing any specific legislative history, a blanket intent to "liberalize" the definition of specialized knowledge. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

As previously discussed, the Committee Report relating to the 1990 Act does state that Congress intended to "broaden" the L-1 category in general by making four specifically enumerated changes: allowing accounting firms to participate in the program, incorporating the "blanket petition" program into the statute, changing the overseas employment requirement to one year within the three years prior to admission, and enlarging the period of admission for managers and executives to seven years. H.R. Rep. 101-723(I), 1990 U.S.C.C.A.N. at 6749. This portion of the report, however, made no mention of any intent to broaden the specialized knowledge visa classification.

In a separate paragraph that was not enumerated as one of the four changes, the Committee Report discussed the new specialized knowledge definition. The paragraph begins by stating: "One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem." Given that the term was previously undefined by Congress, it is clear that the first sentence of the paragraph attributes the previous confusion as to what constituted specialized knowledge to the failure of the 1970 Act to define the term. The second sentence of the paragraph, in turn, simply notes that the "varying interpretations" adopted by the INS through the regulations, precedent decisions, and memoranda had contributed to the confusion over the applicable definition. There is no indication in the Committee Report that Congress otherwise intended the new definition to be considered as part of the enumerated changes that specifically "broadened" the L-1 category. Instead, the paragraph is conspicuously neutral.

While counsel claims that the legislative history evinces a clear intent to liberalize the general scope of the specialized knowledge classification, neither the legal briefs nor the oral presentation submitted in this case provide persuasive legal authority for this conclusion. The AAO notes that the Committee Report does not take issue with the specifics of the previous INS interpretations and does not state an intent to "broaden" the "narrow class" of aliens that Congress initially stated would be eligible for the classification. The 1990 Committee Report does not reject, criticize, or even refer to any specific INS regulation or precedent decision interpreting the term. The report simply states that the Committee was recommending a statutory definition because of "[v]arying interpretations by INS." H.R. Rep. No. 101-723(I), at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that statement, the Committee Report simply restates the tautology that became the statutory definition of specialized knowledge. There is nothing in the legislative history to indicate that Congress intended to specifically liberalize or broaden the specialized knowledge classification, other than the narrow changes made by the statute itself: the deletion of the "proprietary knowledge" and "United States labor market" references that had existed in the agency definition.

In summary, the AAO concludes that Congress created the statutory definition of specialized knowledge in the Immigration Act of 1990 for the express purpose of clarifying a previously undefined term from the Immigration Act of 1970. While the 1990 Act declined to extend certain elements of the agency's existing regulatory definition, the AAO observes that the applicable Committee Report indicates that Congress was concerned about the lack of specificity relating to the term specialized knowledge; there is no indication that Congress intended to "liberalize" or expand the class of persons eligible for L-1B specialized knowledge visas. Neither the legislative history nor the plain language of the statute indicates that Congress intended to abandon the widely recognized conclusion that the visa classification was "narrowly drawn" and should be "carefully regulated and monitored" by legacy INS, now USCIS.[11]

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[11] Further supporting the conclusion that Congress intends USCIS to carefully monitor the L-1 classification, the L-1 Visa Reform Act of 2004 was created to provide USCIS with an additional mandate to closely regulate the classification. The legislative history of the L-1 Visa Reform Act indicates that Congress intended to close the "L-1 loophole" and "protect U.S. jobs from inappropriate use of the L-1 visa." 149 Cong. Rec. at *S11686, 2003 WL 22143105.

If any conclusion can be drawn from the ultimate statutory definition of specialized knowledge and the changes made to the legacy INS regulatory definition, it would be based on the nature of the Congressional clarification itself. Prior to the 1990 Act, legacy INS pursued a bright-line test of specialized knowledge by including a "proprietary knowledge" element in the regulatory definition. 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988). By deleting this element in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave legacy INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. *Cf. Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 377 (3d Cir. 2003) (quoting *Baires v. INS*, 856 F.2d 89, 91 (9th Cir.1988)).

As a related issue, in the brief submitted on certification, counsel states that "the precedent decisions cited by the [director] were, in fact, improperly applied; since those decisions interpreted a pre-1990 definition of specialized knowledge, they were overruled by IMMACT." As observed above, the AAO notes that the precedent decisions that predate the 1990 Act are not categorically superseded by the statutory definition of specialized knowledge. The AAO generally presumes that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Indeed, the Ninth Circuit Court of Appeals recently concluded that the AAO's reliance on such authority was appropriate. *Brazil Quality Stones v. Chertoff*, --- F.3d ---, 2008 WL 2675825 n.10 at *4 (9th Cir., July 10, 2008).

Although the cited precedents pre-date the current 1990 Act, the AAO finds them instructive. While the underlying definitions of specialized knowledge that were discussed in the decisions are now superseded by the statutory definition, the general issues and the case facts themselves remain cogent as examples of how the INS applied the law to the real world facts of individual adjudications. For example, as noted by Mr. Cooper during the oral presentation, USCIS must distinguish between skilled workers and specialized knowledge workers when making a determination on an L-1B visa petition. The distinction between skilled and specialized knowledge workers has been a recurring issue in the L-1B program and is discussed at length in the INS precedent decisions, including *Matter of Penner*. *See* 18 I&N Dec. at 50-53 (discussing the legislative history and prior precedents as they relate to the distinction between skilled and specialized knowledge workers).

Accordingly, the director's citation of precedents that predate Immigration Act 1990 is not objectionable, as long as the director's decision is narrowly tailored to address issues that were not directly superseded by the statutory definition. If the director were to apply the precedent decisions in support of a "proprietary knowledge" requirement or a reference to "knowledge not available on the U.S. labor market," then the use of the precedents would be objectionable. The director, however, did not do so in this case.

Reviewing the precedent decisions that preceded the Immigration Act of 1990, there are a number of conclusions that continue to apply to the adjudication of L-1B specialized knowledge petitions. As the agency determinations were not based on the superseded regulatory definition, these conclusions include the following:

(i) *Technicians and Specialists*

More than twenty years ago, in 1981, the INS recognized that "[t]he modern workplace requires a high proportion of technicians and specialists." The agency concluded that:

> Most employees today are specialists and have been trained and given specialized knowledge. However, in view of the [legislative history], it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees. The House Report indicates the employee must be a "key" person and associates this employee with "managerial personnel."

Matter of Colley, 18 I&N Dec. at 119-20.

In a subsequent decision, the INS looked to the legislative history of the 1970 Act and concluded that a "broad definition which would include skilled workers and technicians was not discussed, thus the limited legislative history available therefore indicates that an expansive reading of the 'specialized knowledge' provision is not warranted." *Matter of Penner*, 18 I&N Dec. at 51. The decision continued:

> [I]n view of the House Report, it cannot be concluded that all employees with any level of specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees. Such a conclusion would permit extremely large numbers of persons to qualify for the "L-1" visa. The House Report indicates that the employee must be a "key" person and "the numbers will not be large."

Id. at 53.

According to the reasoning of *Matter of Penner*, work experience and knowledge of a firm's technically complex products, by itself, will not equal "special knowledge." USCIS must interpret specialized knowledge to require more than fundamental job skills or a short period of experience. An expansive interpretation of specialized knowledge in which any experienced employee would qualify as having special or advanced knowledge would be untenable, since it would allow a petitioner to transfer any experienced employee to the United States in the L-1B classification. The terms special or advanced must mean more than experienced or skilled. In other terms, specialized knowledge requires more than a short period of experience, otherwise "special" or "advanced" knowledge would include every employee with the exception of trainees and recent recruits. As Mr. Cooper recognized during the oral presentation, "clearly it is true that if everyone is specialized, then no one is specialized."

(ii) *Importance of the Beneficiary's Knowledge*

It is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary's knowledge of the business's product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of*

LeBlanc, 13 I&N Dec. at 816). As stated by the Commissioner in *Matter of Penner*, when considering whether the beneficiaries possessed specialized knowledge, "the *LeBlanc* and *Raulin* decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.*

(iii) *L-1B Not Intended to Remedy a Shortage of Workers*

The INS also recognized that the L-1B visa classification was not intended to supply basic personnel when there is a shortage of certain workers in the United States labor market. After reviewing a petition where an employer sought to import their overseas employees because similarly trained workers were not available in the United States, the INS concluded that the L-1B nonimmigrant visa classification "was not intended to alleviate or remedy a shortage of United States workers." Instead, the "temporary worker provisions contained in section 101(a)(15)(H) of the Act, provide a basis for admission of workers for whom there is a shortage." *Matter of Penner*, 18 I&N Dec. at 53-54.

As provided for at 101(a)(15)(H) of the Act, the H nonimmigrant visa category has historically been available for aliens who are coming to the United States as temporary workers and trainees. In the past, the visa category has included aliens of distinguished merit and ability (H-1), registered nurses (H-1A and H-1C), agricultural laborers (H-2A), non-agricultural laborers (H-2B), and trainees (H-3). In 1990, Congress created the H-1B nonimmigrant classification for aliens coming temporarily to the United States to perform services in a "specialty occupation," which is defined as an occupation that requires the "application of a body of highly specialized knowledge" and the "attainment of a bachelor's degree or higher." Sections 101(a)(15)(H)(i)(b) and 214(i)(1) of the Act.

Through *Matter of Penner*, the legacy INS recognized that the H nonimmigrant visa category was specifically created by Congress to provide for the admission of workers for whom there is a shortage. 18 I&N Dec. at 53-54. The L-1B visa classification was never intended to remedy a shortage of United States workers. The widespread use of the L-1B nonimmigrant visa classification instead of H-1B visa would undermine the broad statutory scheme by circumventing the safeguards and worker protection provisions that Congress mandated as part of the H-1B nonimmigrant visa program.[12]

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[12] In general, the L-1B visa classification does not include the same U.S. worker protection provisions as the H 1B visa classification. *See generally* sections 212(n) and 214(g)(1) of the Act, 8 C.F.R. §§ 214.2(h) and (l). The L-1B visa classification is not subject to a numerical cap, does not require the employer to certify that the alien will be paid the actual "prevailing wage," and does not require the employer to pay for the return transportation costs if the alien is dismissed from employment. Additionally, an employer who files a petition to classify an alien as an L-1B nonimmigrant would not pay the $1,500 fee that is currently required for each new H-1B petition and which funds job training and low-income scholarships for U.S. workers. *See* section 214(c)(9) of the Act.

C. The Petitioner's Burden

Considering the definition of specialized knowledge, it is the petitioner's burden to prove that an alien possesses "special" or "advanced" knowledge by a preponderance of the evidence. Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B). The inherently subjective standard serves to make the L-1B classification more flexible and capable of responding to changing economic models. Depending on the facts of the specific case, a petitioner may put forward a novel argument that is based on the employer's specific situation. Or, as in the present case, a knowledgeable petitioner may choose to rely on aspects of the INS memoranda to frame his or her argument. Even though the Puleo memorandum does not constitute a binding legal "standard," it does describe possible attributes that would support a claim of specialized knowledge. However, the petitioner would be unwise to simply parrot the memorandum, without submitting supporting evidence, and expect USCIS to approve a petition. Or, as observed in the Puleo memorandum:

> . . . 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.

Pursuant to section 291 of the Act, the petitioner bears the burden of proof in these proceedings. The petitioner must submit relevant, probative, and credible evidence that would lead the director to believe that the claim is "probably true" or "more likely than not." *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm. 1989).

(2) Has the Petitioner Established the Beneficiary's Specialized Knowledge Capacity?

Because the petitioner failed to respond fully to the director's request for evidence, the petitioner's claim primarily fails on an evidentiary basis. 8 C.F.R. § 103.2(b)(14). Additionally, upon review of the case facts, the petitioner has failed to establish that the beneficiary has been and would be employed in a specialized knowledge capacity.

A. Failure to Submit Requested Evidence

As previously noted, the director requested evidence on October 4, 2007. The director cited to the L-1 Visa Reform Act and stated that the petitioner "provided insufficient evidence concerning the location where the beneficiary will work, the product or service to which the beneficiary will be providing specialized knowledge, and/or the conditions of employment." The director requested, *inter alia*, evidence establishing that the beneficiary's knowledge is "uncommon, noteworthy, or distinguished by some unusual quality" and is not generally possessed by others in the beneficiary's field of endeavor. The director also requested an explanation addressing how the beneficiary's training or experience distinguishes him from others employed by the petitioner. Relating to the ultimate services that are to be provided by the beneficiary, the director requested a more detailed explanation regarding the petitioner's product, along with copies of contracts, statements of work, work orders, and service agreements between the petitioner and the client. The director

also requested copies of the petitioner's human resources or employment records "that provide the beneficiary's job description and worksite location" and a "milestone plan" to show the beginning and ending dates of the client's project.

The petitioner refused to submit a large portion of the requested evidence. While the response answered most of the general questions about the beneficiary's duties and the general services provided by [redacted], the petitioner refused to submit any documentary evidence that related to the beneficiary's proposed employment on the [redacted] project in Chicago. The petitioner declined to submit copies of contracts, statements of work, work orders, or service agreements between the petitioner and the client. The petitioner also failed to submit the requested copies of the petitioner's human resources or employment records that would provide the beneficiary's job description and worksite location. Finally, the petitioner refused to submit the requested "milestone plan" with the beginning and ending dates for the beneficiary's assigned project.

Instead of submitting the requested documentary evidence, the petitioner stated: "Regrettably, we are unable to provide contracts, proofs of purchase or the milestone plan as it pertains to the present client engagement because this information relates to confidential financial agreements between our Parent Corporation, [redacted] Corporation, and our business client, [redacted] Foods." The petitioner did not attempt to submit similar or secondary evidence. *See* 8 C.F.R. § 103.2(b)(2). Instead of submitting the requested employment records, the petitioner submitted an unsupported "discussion" of the beneficiary's proposed duties and job site.

On motion, after the director denied the petition, the petitioner finally submitted a milestone plan, an organizational chart for the [redacted] Foods Catalyst project, and a letter from a [redacted] project manager that briefly discussed the project and the beneficiary's role. Based on font changes and discrepancies in the format of the organizational chart, the beneficiary appears to have been added to the "Catalyst Material-to-Inventory Team" after the official chart was produced. The petitioner did not submit any additional evidence that had been specifically requested.

Ultimately, after reviewing the petitioner's claim on motion, the director concluded that "the petitioner failed to provide sufficient information such as contracts between the petitioner, [redacted] and the 'end-client' [redacted] Foods to compare and contrast the beneficiary's duties to those of the other twelve (12) L-1B employees at the work location or to other SAP ERP consultants industry-wide to determine that the duties require specialized knowledge."[13] The director affirmed her prior decision.

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[13] The director's conclusion that the petitioner employs 12 L-1Bs at the [redacted] office in Chicago is incorrect. First, the petitioner failed to indicate the claimed employees' immigration status, contrary to the director's request. Second, although the petitioner referred to the individuals on the beneficiary's Chicago team as "employees," USCIS records indicate that [redacted] had filed a nonimmigrant visa petition for only one of the twelve individuals. The remaining employees were petitioned for as H-1Bs and L-1Bs by unrelated companies, with the majority in a current nonimmigrant period of stay. It is unclear how [redacted] could consider these individuals as employees unless they were hired or contracted from the information technology consulting firms that originally petitioned for them. If they were hired, there is no explanation for the lack of amended petitions that should have been filed for them by their new employer.

Analysis

Upon review, other than the late-submitted letter and organizational chart, the record is devoid of any documentary evidence that would support the claim that the beneficiary will be employed by the petitioner in a specialized knowledge capacity on the [redacted] Foods project in Chicago, Illinois. The petitioner had three opportunities to submit this evidence – in response to the RFE, on motion, and on certification – and failed to provide any evidence to substantiate the existence of this project or the beneficiary's actual duties for the project. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Based on the lack of evidence in the record, the beneficiary's involvement with the [redacted] Foods project appears to be entirely speculative, with no certain employment of the beneficiary and no assurance that the beneficiary will be actually engaged in a specialized knowledge capacity. Instead of responding to the RFE, the petitioner attempted to focus the director's attention on the fact that [redacted] would place the beneficiary with its parent company, IBM Corporation, to perform IT services on the [redacted] Foods project.

If an alien will be employed offsite or delegated to another affiliate or unaffiliated employer, USCIS must review the nature of the alien's ultimate employment to determine whether an alien will be employed in a specialized knowledge capacity. *See Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000). The unsupported assertions of the "pass-through" petitioner will not suffice to show the actual nature of a beneficiary's employment as a contract or off-site employee.

Similar to the situation with the H-1B contract employees, USCIS must examine the ultimate employment of the alien to determine whether a position requires specialized knowledge. In *Defensor v. Meissner*, the legacy INS denied a series of Form I-129 nonimmigrant petitions that had been filed by a medical contract service agency which sought to bring foreign nurses into the United States as H-1B nonimmigrants after locating jobs for them at hospitals as registered nurses. *Id.* In response to an RFE, Vintage had submitted evidence that it only hired nurses with a Bachelor of Science in Nursing degrees. The INS claimed, however, that the proper focus of inquiry is not what Vintage required as the employment agency, but rather what the contracting facility required as the alien's ultimate employer. *See generally* section 101(a)(15)(H)(i)(B) of the Act.

The Fifth Circuit Court of Appeals agreed with the INS conclusion and stated:

Since [redacted] clearly represents the other L-1B team members as "employees" or, at a minimum, as supervised by the [redacted] team leader, the director may reasonably review the aliens' nonimmigrant petitions to verify whether the petitioning employer indicated that the aliens would be engaged in off-site employment and supervised by an unaffiliated company. If the L-1B team members are actually employed off-site and supervised by an unaffiliated employer, the approval of the petitions may be subject to revocation pursuant to the provisions of the L-1 Visa Reform Act. *See* section 214(c)(2)(F) of the Act.

> To interpret the regulations any other way would lead to an absurd result. If only Vintage's requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

Defensor v. Meissner, 201 F.3d at 387.

Like the contract service agency in *Defensor*, the petitioner in the present matter is not the ultimate employer of the beneficiary's services. Instead, [redacted] makes it clear that it is part of a larger corporate organization and that it simply "manages the deployment of temporary IT personnel from [redacted] Global Delivery Centers abroad." Counsel emphasized that once they arrive in the United States, the temporary IT personnel are allocated to [redacted] for use on projects for [redacted] clients. Arguing that the petitioner's service is a critical link in [redacted] global operations, counsel noted that:

> [redacted] bills [redacted] India on a monthly basis for its services, based on an inter-company agreement that details and captures all costs associated with the project. A separate inter-company agreement between [redacted] U.S. and [redacted] India lays out the project details, allocates responsibilities for the achievement of certain benchmarks, and provides that the project will be funded by an inter-company agreement between [redacted] US and [redacted] India. [redacted] India bills [redacted] U.S. for its costs, and [redacted] U.S. - which holds the contract with the client (in this case, [redacted] Foods) - bills the client.

Based on counsel's statement, the director clearly requested material evidence when she asked for copies of contracts, statements of work, work orders, and service agreements between the petitioner and the ultimate client, [redacted] Foods. Other than unsupported statements of the petitioner and counsel, and a late-submitted letter from a [redacted] project manager, there is no documentary evidence that would substantiate the beneficiary's position on the [redacted] Foods Catalyst Project or whether his position will involve specialized knowledge. Without these documents, USCIS is unable to determine the project details, how the beneficiary's work will be utilized on the project, or even whether the project actually exists.

While the petitioner never specifically claimed that the evidence was privileged, the AAO notes that the petitioner originally claimed that the "information relates to confidential financial agreements between our Parent Corporation, [redacted] Corporation, and our business client, [redacted] Foods." While a petitioner should always disclose when a submission contains confidential commercial information, the claim does not provide a blanket excuse for the petitioner's failure to provide such a document if that document is material to the requested benefit.[14] Although a petitioner may always refuse to submit confidential commercial information

[14] Both the Freedom of Information Act and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4), 18 U.S.C.

if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314 (BIA 1977).

Despite the director's specific request, the petitioner failed to submit the requested material evidence. Any 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). For this reason, the petition must be denied.

B. Failure to Establish Specialized Knowledge

Notwithstanding the petitioner's failure to respond to the director's request for evidence, the AAO will discuss the claim that the beneficiary will be employed in a specialized knowledge capacity. Generally, in examining the specialized knowledge capacity of the beneficiary, the AAO will look to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3). The petitioner must submit a detailed job description of the services performed sufficient to establish specialized knowledge.

In support of its initial petition, the petitioner submitted a letter dated September 25, 2007 in which it describes the beneficiary's duties abroad and the purported specialized knowledge as follows:

> The Catalyst project, to which Mr. [redacted] specialized knowledge is crucial, concentrates primarily on providing SAP ERP implementation to assist with the establishment of integrated systems that will support all major business processes. This will include phasewise implementations and rollouts and also post Go-Live support. The [redacted] project team will assist with activities such as system analysis, system design, system configuration, custom developments, integration testing, training, and system support. Knowledge of SAP applications, especially SAP ERP Central Component (CC) Versions 5.0 and 6.0 are essential; Mr. [redacted] possesses 42-months of specialized knowledge that has resulted from direct interaction with SAP ERP CC Versions 5.0 and 6.0. Of those 42-months, he has spent 24-months employed at [redacted] India Pvt. Ltd. ([redacted] India) developing and learning internal [redacted] processes and procedures while concurrently advancing his SAP skills. The technical environment of the project involves such [redacted] and project specific technologies, tools, methodologies, and processes such as SAP R/3 4.6C, SAP R/3 3.1H, SAP ECC Version 5.0, SAP ECC Version 6.0, SAP Implementation Guide (IMG), [redacted] Application Management Services, Business Consulting Services, [redacted] Global Delivery method, [redacted] Ascendent, SAP BAPI, Batch Data Conversion, Legacy System Workbench, and SAP Solution Manager. Since December 2006, Mr. [redacted] has been assigned as a SAP ERP Consultant to [redacted] India client, JK Tyre Industries Ltd. on the Sarvodaya SAP ERP End to End Implementation project, which is similar in nature to the [redacted] Catalyst project to which he will be assigned. Thus, Mr. [redacted] has attained on-the-job experience and extensive training on the technologies, tools, methodologies, and processes being utilized on the Catalyst project.

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§ 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." 1987 WL 181359 (June 23, 1987).

Furthermore, he is familiar and knowledgeable not only with the project duties, but with the tools, technologies, methodologies, and processes being applied.

As a SAP ERP Consultant, Mr. [redacted] will be a key member of the team responsible for understanding the specific requirements from the client by architecting appropriate solutions for the integrated systems through SAP ERP implementation. Mr. [redacted] primary responsibilities for the project will consist of the following job duties: preparing data migration strategies and conducting the data migration from legacy to the SAP ERP system; studying and incorporating new requirements with the delivered solution; trouble shooting system errors; process redesigning; integration and unit testing; finalizing blue prints in the SAP ERP system; preparing and maintaining project and process specific documentation using [redacted] Ascendent ERP toolset and SAP Solution Manager; producing customized developments via SAP BAPI and SAP Function Modules; and supporting the client with solutions to specific problems, including system failure. His specialized knowledge of IBM and SAP internal processes and products, systems skills, and technologies, such as SAP R/3 4.6C, SAP R/3 3.1H, SAP ECC Version 5.0, SAP ECC Version 6.0, SAP Implementation Guide (IMG), IBM Application Management Services, Business Consulting Services, IBM Global Delivery method, [redacted] Ascendent, SAP BAPI, Batch Data Conversion, Legacy System Workbench and SAP Solution Manager, will prove profitable for the successful completion of work assigned to him on the project. Mr. [redacted] daily activities on the Catalyst project will consist of, but not be limited to, the following actions: assuring processes flow as per the global templates; preparing functional specifications; troubleshooting system failures and inconsistencies; configuring existing processes by employing the use of SAP IMG; conducting integration testing and confirming proper integration; preparing and maintaining project and process specific documentation using [redacted] Ascendent ERP Toolset and Solution Manager; and uploading master data using Batch Data Conversion and/or Legacy System Migration Workbench.

In response to the director's request for evidence, the petitioner submitted a letter dated November 15, 2007 in which it further explains the beneficiary's training and purported acquisition of specialized knowledge as follows:

Due to Mr. [redacted] specialized knowledge of Ascendant, [redacted]'s trademarked SAP ERP implementation techniques (Systems Applications and Products in Data Processing for Enterprise Resource Planning), and [redacted]'s Global Delivery Model he has been selected from our global talent pool to implement a complex SAP ERP technical solution because there are currently no other employees in the U.S. with the skills necessary to perform this role. Given Mr. [redacted]'s extensive experience in implementing Quality Management Modules for large organizations, Mr. [redacted] possesses unique technical expertise and specialized knowledge that is required to complete the current project.

* * * *

In particular, Mr. [redacted] possesses unique skills and significant experience in implementing SAP's Quality Management Module package for large business organizations in a variety of different industries. In fact, Mr. [redacted] possesses more than ten years of functional experience in Quality Management and Production, making him an essential member for this project because he is able to thoroughly understand the client requirements, troubleshoot and implement an optimal technical solution given the tremendous technical obstacles that arise in implementation projects of this large scope.

* * * *

Ascendant is also vital in Mr. [redacted] niche expertise of implementing the Quality Management (QM) module. As referenced earlier, Mr. [redacted] has developed the niche skill of the Quality Management (QM) module. Mr. [redacted] has mastered this skill through his work on the [redacted] project in India. Prior to working on the [redacted] project for [redacted] India, Mr. [redacted] worked on QM modules for other large customers and eventually moved up to a global environment. At [redacted] he has developed a cross industry niche that is unique in the [redacted] SAP, QM niche. He not only has become among the very best at QM, but his specific cross-industry skill set has made him an invaluable addition to a project like the [redacted] consolidation endeavor.

Through his mastery of Ascendant, [redacted]'s proprietary SAP implementation tool, Mr. [redacted] is able to perform the QM module implementation and perfection. This is a skill that is nearly impossible to find, as it involves expertise in the rarely used QM module with the [redacted] specialized knowledge of Ascendant. Again, competency in QM in the industry itself is very rare and coupled with the [redacted] trademarked Ascendant implementation expertise, it is impossible to find. There are no U.S. Consultants that have this skill currently on the [redacted] project, or in other US [redacted] affiliates. He is able to understand specific business processes at high level because of his exposure to a variety of clients including food services and finance among others. QM experts must understand how QM interacts with all other parts of SAP implementation including Finance and Human Resources. Most SAP implementation projects do not include a QM component since it is [a] very specialized and sophisticated module. The [redacted] Catalyst project however, includes a strong QM component. As such, someone with unique QM expertise who has knowledge of [redacted] proprietary implementation methodologies is unique and essential to the [redacted] Catalyst project.

After the director's initial denial, the petitioner provided a letter from the [redacted] manager of the Catalyst project which asserted that:

Of the 70 [redacted] employees currently working on the off-shore development team in India on the Catalyst project, Mr. [redacted] is the only individual with the unique skill-set and skill level in [redacted]'s proprietary methodologies, Ascendant and the Global Delivery Model. Further, of the approximate 25,000 technical professionals employed by [redacted] India, there are only approximately 10-25 technical professionals that possess this unique skill-set. Of the twelve

> [redacted] employees currently assigned to work in Chicago, Illinois, there are five employees that are specifically assigned to the Catalyst project through qualifying employment with [redacted] India.

According to his resume, the beneficiary began working for the foreign employer in September 2005. The instant petition was filed on September 26, 2007, approximately 24 months later. Prior to his employment with [redacted] India, the beneficiary worked for TATA Motors for ten years as an assistant manager in a manufacturing plant. Of those ten years, the beneficiary claims eight years and six months were spent managing an assembly line for sport utility vehicles and handling quality assurance functions for the factory. The beneficiary claims 18-months experience as an information technology worker for TATA Motors, specifically as a "Super User" for SAP ERP R/3 implementation. After his 18 months of experience using SAP ERP R/3 with TATA Motors, the beneficiary was hired by [redacted] India and immediately sent to Italy as the "Team Lead for Quality Management Module" for a new company rollout of SAP using [redacted] Application Management Services (AMS) and [redacted] Ascendant methodology.

As previously discussed, the director ultimately denied the petition on January 30, 2008, after concluding that the beneficiary "does not possess special knowledge of the petitioner, [redacted] human resource management processes or services." Instead, the director concluded that the beneficiary is "merely skilled or familiar with the petitioner's client, [redacted] India's, IT services." The director stated that, assuming that the beneficiary might have specialized knowledge of the larger [redacted] organization, the petition could not be approved even if it had been filed by [redacted] since the petitioner failed to provide sufficient information such as contracts between [redacted] and the "end-client" [redacted] Foods. The director noted that she was unable to compare and contrast the beneficiary's duties to those of the other twelve employees at the work location or to other SAP ERP consultants in the industry.

The director did not comment on the claim that the beneficiary was one of 10-25 technical professionals out of 25,000 that possess his unique skill-set, other than stating that the number of employees with these skills is not dispositive. However, the director did note that the petitioner had filed nonimmigrant petitions for more than 600 L-1B employees and that it is pursuing the "wholesale transfer of hundreds and, at the present rate of filing, soon to be thousands of IT consultants from [redacted] locations around the world." The director further noted that knowledge of SAP software is commonplace and an industry standard, and that there are approximately 55,000 SAP consultants in the world.

The director concluded:

> The value of the beneficiary's skills are not in question. The petition must be examined to determine if the beneficiary's duties involve specialized knowledge, defined as an advanced level of knowledge of the processes and procedures of the petitioning company. The plain meaning of the term "specialized knowledge" implies that which is significantly beyond the average in a given field or occupation. The fact that the petitioner has only a small number of employees with these skills is not dispositive. A scarce skill does not necessarily establish that the skill derives from specialized knowledge. The petitioner has not demonstrated that the beneficiary's knowledge is advanced knowledge relative to the industry at large or to the

> rest of its workforce. As held by the Commissioner in *Matter of Penner*, *supra*, "petitions may be approved for persons with specialized knowledge, not for skilled workers." The distinction between a skilled worker and one who will be employed in a capacity involving specialized knowledge is evident in the case at hand.

On certification, the petitioner concedes that SAP is indeed one of the world's largest software makers, but asserts that "it is an incredibly powerful tool that cannot simply be installed 'off-the-shelf.'" Counsel states that "entire industries have developed around SAP's software, creating customized applications for its implementation, which give companies a competitive advantage as they vie for clients who seek to have SAP as their software of choice." Counsel further asserts that "[k]nowledge of SAP is a baseline; it is knowledge of a particular company's customized software for implementation that is specialized, uncommon, and distinct from the industry at large." Pointing to [redacted]'s trademarked implementation software tool for SAP-ERP, called "Ascendant," counsel states that:

> IBM has also developed a proprietary methodology for implementing SAP-ERP through Ascendant for optimal quality assurances and security. [redacted]'s highly specialized, proprietary tools and methodologies give IBM its competitive advantage in the marketplace. Ascendant has been refined and perfected for over fifteen years. [redacted] prides itself on the software the company has created, which enables it to service [redacted] clients optimally and efficiently. [redacted] hires SAP consultants regularly, but then invests at least two to three years in training them in IBM's Ascendant implementation methodology. Accordingly, an SAP-ERP consultant at IBM must have knowledge not only of SAP, but also of [redacted]'s Ascendant software and implementation methodologies, making the position specialized.

During the oral presentation, Mr. Fragomen discussed the beneficiary's qualifications and how he purportedly qualifies as a specialized knowledge employee. Counsel recounted the details of the [redacted] Global Delivery Model and [redacted]'s trademarked SAP implementation method, Ascendant. Finally, Mr. Fragomen discussed the beneficiary's role as "team leader" for the SAP Quality Management module on the [redacted] Foods project and detailed the beneficiary's daily job duties.[15] Mr. Fragomen asserted, without providing evidence in support of his statement, that to qualify for this senior position of managing an SAP module, an [redacted] employee requires two years of experience with at least two full-cycle [redacted] SAP projects. Again, the unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534.

Analysis

The petitioner's basic claim is undermined by the facts in the present case. The petitioner's fundamental claim is that an [redacted] SAP-ERP consultant possesses "special" knowledge because he or she must have knowledge

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[15] The petitioner and counsel use the terms team lead, team leader, and SAP ERP Consultant erratically. In the initial employment letter, the petitioner stated that the beneficiary had been assigned as an "SAP ERP Consultant" with an [redacted] India client, JK Tyre Industries Ltd., since December 2006. The beneficiary's resume confirms this employment, but states that he was the "Team Lead" for certain SAP modules on the project.

not only of SAP, a widely available software system, but also of [redacted] Ascendant software and implementation methodologies. Counsel for the petitioner asserts that an [redacted] employee needs two to three years of experience, with at least two full-cycle SAP projects, before the employee would qualify for the proffered specialized knowledge position.

Although the petitioner claims that this knowledge can be acquired only through two to three years of training and experience with [redacted] the AAO notes that the beneficiary in this case came to [redacted] India with only *eighteen months* of experience as an SAP information technology worker with an unrelated company. Specifically, the beneficiary was a "Super User" for SAP ERP R/3 implementation with TATA Motors for a total of eighteen months. Despite his lack of [redacted] specific training or experience, the beneficiary was hired by [redacted] India and immediately sent to Italy as the "Team Lead for Quality Management Module" for a new company rollout of SAP. The beneficiary's resume states that as Team Lead, he used [redacted] Application Management Services (AMS) and [redacted] Ascendant methodology to handle multiple responsibilities in the roll out of an SAP project for an Italian electronics company, Celestica Italy. The beneficiary's duties as Team Lead in Italy closely resemble the proposed duties on the [redacted] project, as described by counsel.

This fact directly undermines the petitioner's claims. It is apparent that the beneficiary did not have two years of experience with at least two full-cycle [redacted] SAP projects prior to his overseas assignment as "Team Lead for Quality Management Module" for a new company rollout of SAP. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The AAO also notes a discrepancy between the number of L-1B petitions that have been filed by the petitioner and the petitioner's quantitative claims. The petitioner claims that the beneficiary is the only individual out of 70 off-shore employees with the unique skill-set and skill level in [redacted] proprietary methodologies, Ascendant and the Global Delivery Model. Taking this assertion further, the petitioner claimed that "there are only approximately 10-25 technical professionals that possess this unique skill-set" out of the approximate 25,000 technical professionals employed by [redacted] India. In other words, the petitioner claims that the beneficiary is special because he is "one out of seventy" or even one out of 2,500 employees, given the petitioner's most inflated claim. Although the director noted that the petitioner had filed petitions for "hundreds" of IT consultants, current USCIS records reflect that the petitioner has now filed over 800 L-1B petitions.[16] The director did not rely on the large number of L-1B employees as a basis for her decision, yet the director did note the large number of petitions and was not swayed by the petitioner's attempt to "quantify" the special nature of the beneficiary's knowledge.

In response to the director's decision, counsel asserts that the Puleo memorandum specifically states that "the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced." Puleo memorandum at p.2.

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[16] [redacted] India Ltd., the petitioner's affiliate and the source of [redacted] overseas personnel, has recently filed petitions for an additional 600 L-1B employees.

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."

In the present case, the petitioner initially failed to disclose how many employees it had on staff, despite the question in Part 5 of the Form I-129. After the director's RFE, the petitioner disclosed that it had "more than 600 employees." When a petitioner claims that an individual is "one of seventy" or "one out of 2,500" employees, USCIS may reasonably inquire further into the nature of the claimed specialized knowledge if it notes that the majority of the United States petitioner's employees are claimed to have special or advanced knowledge. In the present case, the petitioner claims to employ "more than 600 employees" but has actually petitioned for over 800 L-1B specialized knowledge workers. While it may be accurate to state that these 800 employees are a small percentage of the [redacted] organization's total number of employees, the mathematical exercise itself is not persuasive. As noted by the director, without the requested evidence, USCIS is unable to compare and contrast the beneficiary's duties to those of the other twelve employees at the work location or to other SAP ERP consultants in the industry.

Ultimately, the petitioner's claims are not persuasive.[17] The petitioner claims that it is the beneficiary's knowledge of [redacted] customized software that is specialized, uncommon, and distinct from the industry at large. Pointing to [redacted] trademarked implementation software tool for SAP-ERP, "Ascendant," counsel

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[17] The AAO acknowledges the expert opinion letters that the petitioner submitted on certification. Upon review, these letters will not be given any evidentiary weight in this proceeding. Although the authors are well-credentialed in the field of international business and information technology, none of the four letters speak directly to the critical question in this case – the purported special or advanced nature of this *particular individual beneficiary's* knowledge of the petitioner's or end user's methods or products. Instead, the letters all speak in general terms regarding the multinational business trends, the petitioner's business model, the need for experienced individuals, and the complex nature of the global marketplace. The expert opinion letters do not establish that the director's decision was based on an incorrect application of law or USCIS policy. Instead, the letters state the authors' opinion based on a review of scholastic documents outside of the record and are not based on a review of the immigration statute or the applicable regulations.

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988). Since the opinions offered here do not address the individual beneficiary's claimed specialized knowledge, the opinions are not found to be persuasive on this point.

states that [redacted] regularly hires SAP consultants, but then invests at least two to three years in training them in the Ascendant implementation methodology. As summarized during the oral presentation, an [redacted] employee requires two years of experience with at least two full-cycle [redacted] SAP projects to qualify for this senior position of managing an SAP module.

As previously discussed, the petitioner's argued standard for specialized knowledge is overbroad and untenable, since it would allow the petitioner to transfer any employee with two or three years of experience to the United States in the L-1B classification. The petitioner concedes that all SAP projects and project staff require the use of the Ascendant implementation methodology and that it invests two to three years to training its SAP staff in this program. This further undermines the petitioner's claims that the beneficiary's knowledge is noteworthy or uncommon. It also indicates that the beneficiary's knowledge is both common and generally known by a large number of similarly employed workers. That is, it is not knowledge of the Ascendant methodology that rises to the level of "special" or "advanced" knowledge, since all [redacted] SAP employees receive this training, but the two to three years of experience that sets a potential L-1B candidate apart from his peers.

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.

Overall, the record does not establish that the beneficiary's knowledge is substantially different from the knowledge possessed by similar workers generally throughout the industry or by other employees of the petitioning organization. The fact that the beneficiary and a select group of workers possess a very specific set of skills does not alone establish that the beneficiary's knowledge is indeed special or advanced. All employees can be said to possess unique and unparalleled skill sets to some degree. Moreover, the proprietary or unique qualities of the petitioner's process or product do not establish that any knowledge of this process is "specialized." Rather, the petitioner must establish that qualities of the unique process or product require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter. The fact that other workers may not have the same level of experience with the petitioner's Ascendant implementation methodology is not enough to equate to special or advanced knowledge if the gap could be closed by the petitioner by simply revealing the information to a similarly educated or experienced employee.

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, as explained above, the record does not distinguish the beneficiary's knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by workers employed elsewhere. As the petitioner has failed to document any special or advanced qualities attributable to the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "specialized knowledge" employee. There is no indication that the beneficiary has any knowledge that so exceeds that of

any other similarly experienced professional or that he has received any degree of special training in the company's methodologies, products, or processes which would separate him from other professionals employed with the foreign entity. It is simply not reasonable to classify this employee as an alien with 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.

Again, the legislative history of the term "specialized knowledge" provides ample support for a narrow interpretation of the term. In the present matter, the petitioner has not demonstrated that the beneficiary should be considered a member of the "narrowly drawn" class of individuals possessing specialized knowledge. *See Matter of Penner,* 18 I&N Dec. at 51-3.

Based on the evidence presented, the AAO concludes that the beneficiary will not be employed in the United States, and was not employed abroad, in a capacity involving specialized knowledge.

III. Issue: Does the L-1 Visa Reform Act of 2004 Apply to this Petition?

Beyond the decision of the director, the petition must also be denied on additional grounds that were not addressed in the certified decision. Contrary to counsel's claims, this case does present issues under the L-1 Visa Reform Act and section 214(c)(2)(F) of the Act.

On certification, counsel attributed the "intense scrutiny of L-1B petitions by USCIS in recent years" to the enactment of a new law that imposed special restrictions on employers contracting L-1B workers out to unrelated third parties. Counsel asserted that "[s]ince [redacted]'s business model does not, however, involve contracting L-1B workers out to unrelated third parties, these special statutory restrictions do not apply in this case." Rather than emphasizing that it is part of a larger corporate organization, as it did in response to the director's assertion that the petitioner was not doing business as a separate legal entity, counsel emphasizes that the [redacted] L-1B employees are contracting the employees to the [redacted] parent company instead of an unaffiliated, third-party employer. Counsel asserts that "[t]he restrictions set out in the L-1 Visa Reform Act do not apply in the instant case because [redacted] is not a staffing agency providing IT workers to third parties; rather, [redacted] provides services to [redacted] in furtherance of [redacted]'s contracts with clients by providing turnkey development and implementation solutions for clients."

Counsel's assertions are not persuasive. As previously discussed, USCIS must examine the ultimate employment of the beneficiary to determine whether a position qualifies under section 214(c)(2)(F) of the Act. *See Defensor v. Meissner*, 201 F.3d at 387. Even if the petitioner is acting as a "pass-through" employer and assigning its staff to a related organization, USCIS must look at the alien's ultimate employment to determine whether the petitioner is in compliance with the L-1 Visa Reform Act. The alien's actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

In evaluating a petition subject to the terms of the L-1 Visa Reform Act, the petitioner bears the ultimate burden of proof. Section 291 of the Act, 8 U.S.C. § 1361; *see also* 8 C.F.R. § 103.2(b)(1). If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute

mandates that the petitioner establish both: (1) that the alien will be controlled and supervised principally by the petitioner; and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act.

These two questions of fact must be established for the record by documentary evidence; neither the unsupported assertions of counsel or the employer will suffice to establish eligibility. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998); *Matter of Obaigbena*, 19 I&N Dec. at 534. If the petitioner fails to establish both of these elements, the beneficiary will be deemed ineligible for classification as an L-1B intracompany transferee.

As a threshold question in the analysis, USCIS must examine whether the beneficiary will be stationed primarily at the worksite of the unaffiliated company. Section 214(c)(2)(F) of the Act.

The petitioner is located in Raleigh, North Carolina. The petitioner initially claimed that the beneficiary would be "assigned to the [redacted] team working on the Catalyst project for our client, [redacted] Foods, *in our* [redacted] *facilities in Chicago, Illinois*." (Emphasis added.) In part 5 of the Form I-129, in the field entitled "Address where the person(s) will work," the petitioner stated that the work location for the beneficiary will be at 71 South Wacker Drive, Chicago Illinois 60606.

The director requested additional evidence on October 4, 2007. The director cited to the L-1 Visa Reform Act and stated that the petitioner "provided insufficient evidence concerning the location where the beneficiary will work, the product or service to which the beneficiary will be providing specialized knowledge, and/or the conditions of employment." The director requested evidence relating to the ultimate services that are to be provided by the beneficiary: a more detailed explanation regarding the petitioner's product; copies of contracts, statements of work, work orders, and service agreements between the petitioner and the client; copies of the petitioner's human resources or employment records "that provide the beneficiary's job description and worksite location;" and a "milestone plan" to show the beginning and ending dates of the client's project.

Because the petitioner had not revealed that it was simply managing the deployment of [redacted] temporary IT personnel from abroad, and because it claimed that the beneficiary would be employed in the '[redacted] facilities in Chicago, Illinois," the director also made a non-specific request for evidence relating to the petitioner's business facilities. The director requested a copy of the "company's" floor plan, including office and production spaces; photographs of the business premises showing the inside and outside of all production and office space; and lease agreements for the company's office space, showing the total square footage of all office and production space.

As previously noted, the petitioner generally refused to submit any documentary evidence that related to the beneficiary's proposed employment on the [redacted] project in Chicago. The petitioner declined to submit copies of contracts, statements of work, work orders, or service agreements between the petitioner and the client. The petitioner also failed to submit the requested copies of the petitioner's human resources or employment records that would provide the beneficiary's job description and worksite location. Instead, the petitioner stated its regret and claimed that the evidence could not be released because it relates to "confidential

financial agreements" between [redacted] and [redacted] Foods. The petitioner did not attempt to submit similar or secondary evidence. *See* 8 C.F.R. § 103.2(b)(2). And instead of submitting the requested employment records, the petitioner submitted an unsupported "discussion" of the beneficiary's proposed duties and job site. The petitioner did not claim that the employment records were confidential or otherwise privileged.

Despite the director's specific statement that the petitioner had "provided insufficient evidence concerning the location where the beneficiary will work," the petitioner also failed to submit documentation relating to the beneficiary's assigned office in Chicago. The petitioner instead submitted documentation relating to the administrative offices in Raleigh, North Carolina. The lease agreement and photographs of the [redacted] facilities in North Carolina were simply not responsive to the director's request for documentation relating to the location where the beneficiary will actually work.

The AAO also notes that in the final decision, the director discovered that the address in Chicago was not a [redacted] facility, but was instead an [redacted] facility. Additionally, during the oral presentation on May 22, 2008, Mr. Fragomen stated for the first time that, "[a]s the record demonstrates, the [redacted] personnel are located *primarily* at an [redacted] facility, not at a customer site." (Emphasis added.) If the beneficiary will be "primarily" employed at an [redacted] location, the record does not document or even address the question of what remaining proportion of the duties will be performed at the worksite of the unaffiliated employer, [redacted] Foods.

Upon review, there is insufficient evidence to show whether the beneficiary will be stationed primarily at the worksite of the unaffiliated company or whether he will be primarily employed at a [redacted] or [redacted] facility. The director clearly requested material evidence when she asked for copies of contracts, statements of work, work orders, and service agreements between the petitioner and the ultimate client, [redacted] Foods. Other than unsupported statements of the petitioner and counsel, and a late-submitted chart and letter from a [redacted] project manager, there is no documentary evidence that would substantiate the claim that the beneficiary will be stationed primarily at an [redacted] or [redacted] facility in Chicago, Illinois, rather than off-site at the [redacted] facility or elsewhere. Without these documents, USCIS is unable to determine the beneficiary's actual work location or the proportion of time that the beneficiary will spend at the worksite of the unaffiliated employer, as it is required to do under the L-1 Visa Reform Act.

Again, any 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the petition must be denied.

The AAO maintains plenary power to review each appeal and certification on a *de novo* basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

The petition will be denied for the above stated reasons with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the decision of the director will be affirmed, with the exception of that part of the decision that has been specifically withdrawn by this decision. The petition will be denied.

ORDER: The decision of the director is affirmed in part and withdrawn in part. The petition is denied.