You filed Form I-129, Petition for a Nonimmigrant Worker on [Date], with the United States Citizenship and Immigration Services ("USCIS") in order to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("INA").

You, [Petitioner's Name], an [Insert Type of Business listed in Part 5] entity, seek authorization to employ the beneficiary, [Name of Beneficiary], temporarily in the United States as a [Position Title].

You state that the beneficiary has been employed abroad as an [Position Title] for your organization since [Date]. You now seek to transfer the beneficiary to the U.S. in L-1B status for a period of three years. You indicate that the beneficiary will be working primarily [CHOOSE: onsite at your location in [Location] in support of a project for the end-client, [End-Client Name]. OR onsite at your location in [Location]. OR offsite in [Location] is support of a project for the end-client, [End-Client Name].]

[OPTIONAL: If seeking an extension based on a blanket petition: The beneficiary has been employed as a [Position Title] by you in L-1 status since [Date]. The beneficiary was admitted to the United States pursuant to a blanket L-1 petition [WAC or EAC number] filed by [Blanket petitioner]. In matters relating to an extension of a nonimmigrant visa petition validity involving the same petitioner, beneficiaries, and underlying facts, USCIS will generally give deference to a prior determination of eligibility. However, each nonimmigrant petition filing is a separate proceeding with a separate record and separate burden of proof. 8 CFR 103.8(d). In making a determination of statutory eligibility, USCIS is limited to the information contained in the individual record of proceeding. 8 CFR 103.2(b)(16)(ii). The current petition is the first individual petition filed on behalf of the beneficiary with USCIS. Thus, USCIS must determine whether the beneficiary is eligible under each requirement for the requested classification.]

The [three] issues to be evaluated involve related, but distinct, issues: (1) employment abroad was in a position that was managerial, executive, or involved specialized knowledge; (2) whether the beneficiary possesses specialized knowledge; and (3) whether the beneficiary's position in the United States involves specialized knowledge. Should the petitioner fail to establish any of these three criteria, the L-1 petition must be denied. [OPTIONAL: If denial is also for "Off-Site" Employment Further, in the case of an L-1B petitioner, even if the petitioner establishes that the beneficiary meets these three criteria, the petitioner must further establish by a preponderance of the evidence that the prospective employment is not in fact an arrangement to provide labor for hire for an unaffiliated employer in the United States.]

Upon initial filing, you submitted the following evidence:

- Your cover letter describing the beneficiary's duties abroad, the beneficiary's knowledge, education, training, and employment, the beneficiary's duties in the U.S, and the beneficiary's project in the U.S.;

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- Counsel's cover letter describing the beneficiary's duties abroad, the beneficiary's knowledge, education, training, and employment, the beneficiary's duties in the U.S, and the beneficiary's project in the U.S.;
- Letter from the beneficiary's supervisor(s) describing the beneficiary's duties with the organization abroad;
- Copies of the beneficiary's personnel records;
- Copy of the foreign entity's organizational chart;
- Letter from the beneficiary's supervisor(s) describing the beneficiary's training and experience with the organization abroad;
- A copy of the beneficiary's resume;
- A copy of the beneficiary's college degree and school transcripts;
- Copies of the beneficiary's training records;
- Copy of the United States entity's organizational chart; and
- Other [Describe in detail];

Subsequent to the filing of the petition, you were requested to provide additional documentation to establish eligibility for the classification sought. USCIS provided a list of suggested evidence you may submit to meet this requirement and advised you that any other evidence may also be submitted if you felt it would satisfy the request.

In response to that request, you submitted the following additional documentation:

- An additional cover letter describing the beneficiary's duties abroad, the beneficiary's knowledge, education, training, and employment, and the beneficiary's duties in the U.S;
- Other [Describe in detail];

To establish eligibility for the nonimmigrant L-1 visa classification, the petition must meet the criteria outlined in INA 101(a)(15)(L) and 8 CFR 214.2(l)(1)(ii):

> . . . an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

Title 8, Code of Federal Regulations ("8 CFR") 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph

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

INA 214(c)(2)(B) provides the framework for the specialized knowledge transferee:

> 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 regulations at 8 CFR 214.2(l)(1)(ii)(D) further define "specialized knowledge" thusly:

> Specialized knowledge means special knowledge possessed by an individual of the petitioning organizations 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. (Emphasis in original)

A "specialized knowledge professional" is further defined at 8 CFR 214.2(l)(1)(ii)(E) as:

> [A]n individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the immigration and Nationality Act.

To determine what is specialized knowledge, USCIS must first look to the language of section 214(c)(2)(B) itself, that is, the terms "special" and "advanced." USCIS will turn to the dictionary for help in determining whether a word in a statute has plain or common meaning. According to Webster's New College Dictionary, the word "special" is commonly found to mean "surpassing the usual" or "exceptional." Webster's New College Dictionary, 1084 (3rd Ed. 2008). The dictionary defines the word "advanced" as "highly developed or complex" or "at higher level than others." In addition, the determination of specialized knowledge should also consider whether the United States business would experience a significant disruption or

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interruption in business operations should the petitioner be unable to transfer the beneficiary to the United States.

Considering the definition of specialized knowledge, it is the petitioner's burden to establish through the submission of probative evidence that the beneficiary possesses "special" or "advanced" knowledge. USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, how such knowledge is necessary to perform the duties described in the petition, and how the beneficiary gained such knowledge. USCIS will consider this, and all other relevant evidence presented, in determining whether the beneficiary actually possesses specialized knowledge.

Has the Beneficiary Been Employed Abroad in a Position that was Managerial, Executive, or Involved Specialized Knowledge?

The first of the three issues to be discussed is whether the position abroad was managerial, executive, or involved specialized knowledge. In examining the beneficiary's position abroad, USCIS will look to your description of the beneficiary's job duties abroad and whether, based on the evidence you have provided, those duties in fact met the regulatory requirement that they be managerial, executive, or involved specialized knowledge.

Your [cover letter] dated [insert date], describes the beneficiary's duties abroad, in part, as follows:

- [If the list of duties abroad is 5 sentences or less, list all the duties. OR If the duties are more than 5 sentences, use the first two duties and add "..." and the last duty. Example: Develop and Test Applications. Identify solutions for critical problems...Discuss problem resolution with team members.]

[OPTIONAL]Your additional [cover letter] dated [Date] states the following in regards to the beneficiary's duties abroad:

- [If a "breakdown" of duties was provided indicating the percentage of time performing those duti s list the beneficiary's primary duties abroad in the manner indicated above]

[DUTIES] The descriptions of duties provided are similar and typical of a [Position Title] or related occupation working in the [insert occupa ion] field. The beneficiary, like any other [Position Title], [insert duties from OOH]. However, the knowledge a [Position Title] possesses alone, is not specialized knowledge.

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Insufficient evidence was presented to show that the position [Position Title], involves a special or advanced level of knowledge in the [insert occupation] field or related occupation. There is no indication that position involves knowledge that exceeds that of any other [Position Title] or similar occupation working in this field.

Therefore, you have not established that the position abroad involves specialized knowledge.

[CHOOSE ONE: The petitioner did not indicate that the position abroad was managerial or executive. In addition, the submitted evidence was insufficient to show that the position abroad was managerial or executive.

OR

INSERT analysis about managerial or executive positions.]

For the foregoing reasons, you have not established that the beneficiary has been employed abroad in a position that was managerial, executive, or involved specialized knowledge.

Does the Beneficiary Possess Specialized Knowledge?

The second of the three issues to be discussed is whether the beneficiary possesses specialized knowledge. In examining the specialized knowledge of the beneficiary, USCIS will look to your description of the beneficiary's employment, experience, training, and education and determine based on the evidence you have provided, whether the beneficiary meets the regulatory requirement of possessing specialized knowledge.

In the cover letter dated [Date] you describe the beneficiary's employment, experience, training, and education as follows;

[Insert counsel/petitioner's description]

The description and/or documentation you submitted show the beneficiary has a wide range of skills, experience, and training with various [policies, processes, methodologies, framework, projects] including [insert names of policies, processes, methodologies, framework, projects]. USCIS cannot conclude based on the evidence submitted that the beneficiary, as a result of his or her knowledge, education, training, and employment with your organization and foreign company, has knowledge or experience in the field of [occupation] that is significantly different from that possessed by similarly employed workers employed by you, your foreign company, or other companies in the same business activity.

[EXPERIENCE] In this case, the beneficiary's has only been working with your organization since [Date] and the petition was filed in [Date]. Although you indicate the beneficiary is familiar with your policies, processes, methodologies, framework, projects] there is no indication in the record that the beneficiary is responsible for the development of your

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[policies, processes, methodologies, framework, projects]. The beneficiary along with others employed by your organization, like any other [insert job title], is responsible for [insert common job duties]. In order to support your services, the beneficiary gained experience and job-related training of your [policies, processes, methodologies, framework, projects] through employment and experience with your organization. However, knowledge of your organization's [policies, processes, methodologies, framework, projects] is not specialized knowledge.

[TRAINING] The training listed does not show the number of employees that received the same training. Also, [the length of each training course was not noted OR each training course was completed in [Number] days or less. It appears that the knowledge of the subject matters listed on the training record is easily transferrable to other employees with the same or similar experience as that of the beneficiary. Moreover, the training received appears to be common in the [occupation or organization] field.

[EDUCATION] Similarly, although you submitted copies of the beneficiary's formal education records, a bachelor's or higher degree is commonly required for an [Position Title] and related occupations and employers favor applicants who already have relevant skills and experience in the field CITE THE USDOL WEBSITE HERE. As this is a typical requirement for persons in the beneficiary's field, obtaining a bachelor's or master's degree in the [insert occupation] field does not amount to "special" or "advanced" knowledge.

[OPTIONAL] In your cover letter, you have also indicated, that your [policies, processes, methodologies, framework, projects] are also "used by practitioners across the globe," "being installed at customer site," "created by a another company especially for you"] Therefore, USCIS is unable to determine whether knowledge in these [policies, processes, methodologies, framework, projects] is specialized knowledge based on their apparent wide use by you and [Parent/Affiliated Company] as well as your [customer, client, developing company]. In addition, USCIS was unable to determine from the submitted evidence whether the same or similar [policies, processes, methodologies, framework, projects] are used by other companies in the field.

[PROPRIETARY KNOWLEDGE] While there is no requirement that an L-1B specialized knowledge employee possess proprietary knowledge of your company's [policies, processes, methodologies, framework, projects], you state in your petition that the beneficiary here is familiar with them. There is no indication in the record, however, whether others in the field could obtain such knowledge in sufficient time so as not to cause a disruption or interruption of your business operations. If such company-specific knowledge is easily transferable to, or obtainable by, other [occupation or organization] professionals in the field without causing disruption to your business, this is a strong indicator that the knowledge in question is not sufficiently special or advanced in nature as to be considered "specialized" for purposes of the L-1B classification. By contrast, had a beneficiary been responsible for the development of your proprietary tools, processes, and methodologies, not being able to obtain that person's services might in fact result in a significant disruption to your business.

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[PROPRIETARY CONTINUED] In short, all employees can be said to possess unique skill or experience to some degree. Moreover, possession of knowledge of your company's products, process, or procedures and experience with your organization do not, standing alone, establish that such knowledge is something that others in the industry could not readily obtain with little or no disruption to your company's operations. Merely stating that other workers in the field may not have the same level of experience or training with your proprietary products as applied to one component is not enough to establish the beneficiary as an employee possessing specialized knowledge.

In this case, the beneficiary's training and experience with your tools, processes, and methodologies with your foreign company are insufficient to establish the beneficiary as an individual with specialized knowledge. The record fails to establish that the beneficiary, while perhaps skilled, possesses a special or advanced level of knowledge in the [occupation] field. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced [Position Title] or person in a related occupation employed in the same field.

Based on the reasons discussed above, you have not established that the beneficiary possesses specialized knowledge.

Will the Beneficiary be Employed in the United States in a Capacity that Involves Specialized Knowledge?

The last of the related issues to be discussed is whether the U.S. position of "[US POSITION TITLE]" involves specialized knowledge.

[Choose: You described the duties of a [Position Title] in the U.S. exactly the same as the beneficiary's duties performed abroad as an [Position Title]. Those duties as stated above were listed as: OR You described the duties of a [Position Title] in the U.S. as follows:]

- [nsert the primary description of duties]

[OPTIONAL] In the cover letter dated [Date] you provided the same description of duties as indicated in the original cover letter.

OR

[OPTIONAL]Your additional [cover letter] dated [Date] states the following in regards to the beneficiary's duties in the U. S.:

- [If a "breakdown" of duties was provided indicating the percentage of time performing those duties list the beneficiary's primary duties abroad in the manner indicated above]

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[DUTIES] The descriptions of duties provided are similar and typical of a [Position Title] or related occupation working in the [insert occupation] field. The beneficiary,l ike any other [Position Title], [insert duties from OOH]. However, the knowledge a [Position Title] possesses alone, is not specialized knowledge.

As previously discussed, you also indicate that the proffered position involves knowledge of your [policies, pro esses, methodologies, framework, projects]. Therefore, implicating that the duties could not be performed by the typical skilled worker, even one with similar education and professional background compared to the beneficiary. However, upon review of the record, you submitted insufficient evidence to establish that the position involves a body of specialized knowledge.

In the present case, there is no evidence on record to suggest that the processes pertaining to your organization are different from those applied by any [Position Title] or similar position working in the same industry. In addition, an assertion that the beneficiary possesses knowledge of your products, tools and processes does not amount to specialized knowledge. While individual companies will develop methodologies, products, processes, and procedures tailored to their own needs, internal processes, and customer specifics, it has not been established that similarly employed persons in the field could not readily acquire such company-specific knowledge.

Merely indicating, as you have, that the beneficiary possesses knowledge proprietary to the petitioner is insufficient to show that the knowledge is either "special" or "advanced." As noted above, if such knowledge can be readily transferred to others employed in the field in an occupation similar to the beneficiary with little or no disruption to the company's operations, that raises doubt that the knowledge necessary to perform the duties in question is specialized.

The record is insufficient to establish that the position [Position Title], involves a special or advanced level of knowledge in the [occupation] field. There is no indication that the position involves knowledge that exceeds that of any other [Position Title] in this field.

In view of the above, the record is insufficient to establish the employment abroad was in a position that was managerial, executive, or involved specialized knowledge; whether the beneficiary possesses specialized knowledge; and whether the beneficiary's position in the United States involves specialized knowledge.

Off-Site Work with an "Unaffiliated Employer"

The last issue to be evaluated in this case involves whether the beneficiary is eligible for employment at an unaffiliated employer's worksite.

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The L-1 Visa Reform Act of 2004, effective June 06, 2005, states the following:

SEC. 412. NONIMMIGRANT L-1 VISA CATEGORY.

(a) IN GENERAL- Section 214(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)) is amended by adding at the end the following:

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if--

(i) the alien will be controlled and supervised principally by such unaffiliated employer; or

(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.'.

(b) APPLICABILITY- The amendment made by subsection (a) shall apply to petitions filed on or after the effective date of this subtitle [June 06, 2005], whether for initial, extended, or amended classification.

The first part of the issue to be discussed is whether the alien will be controlled and supervised principally by the unaffiliated employer.

[Insert analysis for first part of issue] OR [USCIS will not dispute your claim that the beneficiary will be supervised and controlled by you in order to establish the first requirement of the L-1 Visa Reform Act. Thus, according to your statements and supporting documentation, it appears that the beneficiary will be controlled and supervised principally by you.]

The second part of the issue to be discussed is whether 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.

[Insert analysis in regards to the submitted documentation; what do the contracts/work orders/end-client letter say?]

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According to the submitted documentation, the service you are providing is, essentially, labor for hire to your client's already existing system and/or products rather than developing your own products. The knowledge the beneficiary possesses appears to be that of [tools, technologies, and methodologies] specific to the assigned client project and [methodologies] to be applied to your client's existing products. Therefore, it appears the beneficiary's knowledge may only be tangentially related to the performance of the proposed offsite activity.

As such, you have not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

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U.S. Department of Homeland Security
P.O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

TO:

DATE: JUL 22 2011

Petition: Form I-129

File:

DECISION

Your Form I-129, Petition for a Nonimmigrant Worker, filed in behalf of has been denied for the following reason(s):

See Attachment

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed with this office at the address at the top of this page within 30 days of the date of this notice. Your appeal must be filed on Form I-290B. A fee of $630.00 is required, payable to U. S. Citizenship and Immigration Services with a check or money order from a bank or other institution located in the United States. If no appeal is filed within the time allowed, this decision will be the final decision in this matter.

In support of your appeal, you may submit a brief or other written statement for consideration by the reviewing authority. You may, if necessary, request additional time to submit a brief. Any brief, written statement, or other evidence not filed with Form I-290B, or any request for additional time for the submission of a brief or other material must be sent directly to:

U. S. Citizenship and Immigration Services
Administrative Appeals Office MS 2090
Washington, D.C. 20529-2090.

Any request for additional time for the submission of a brief or other statement must be made directly to the Administrative Appeals Office (AAO), and must be accompanied by a written explanation for the need for additional time. An extension of time to file the appeal may not be granted. The appeal may not be filed directly with the AAO. The appeal must be filed at the address at the top of this page.

Sincerely,

Rosemary Langley Melville
Director, California Service Center

Enclosure: Form I-290B

cc:

Form I-292

www.dhs.gov

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You filed Form I-129, Petition for a Nonimmigrant Worker on June 02, 2011, with the United States Citizenship and Immigration Services ("USCIS") in order to classify the beneficiary as an intracompany transferee pursuant to section 101 (a)(15)(L) of the Immigration and Nationality Act ("INA" or "Act").

You, [redacted], a manufacturing entity, seek authorization to employ the beneficiary, [redacted] temporarily in the United States as a Continuous Improvement Manager.

You state that the beneficiary has been employed abroad as a Senior Supply Chain Manager for your organization since January 2009. You now seek to transfer the beneficiary to the U.S. in L-1B status for a period of three years. You indicate that the beneficiary will be working primarily onsite at your location in [redacted]

The two issues to be evaluated involve related, but distinct, issues: (1) whether the beneficiary possesses specialized knowledge; and (2) whether the beneficiary's position in the United States involves specialized knowledge.

To establish eligibility for the nonimmigrant L-1 visa classification, the petition must meet the criteria outlined in INA 101(a)(15)(L) and 8 C.F.R. 214.2(l)(1)(ii):

> . . . an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

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

INA 214(c)(2)(B) provides the framework for the specialized knowledge transferee:

> 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.

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The regulations at 8 C.F.R. 214.2(l)(1)(ii)(D) further define "specialized knowledge" thusly:

> Specialized knowledge means special knowledge possessed by an individual of the petitioning organizations 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. (Emphasis in original)

A "specialized knowledge professional" is further defined at 8 C.F.R. 214.2(l)(1)(ii)(E) as:

> [A]n individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the immigration and Nationality Act.

In the Matter of Colley, 18 I. & N. Dec. 117 (Comm'r 1981), the Commissioner of the legacy Immigration and Naturalization observed that "Most employees today are specialists and have been trained and given specialized knowledge; however, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees." Moreover, "A distinction can be made between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation." Matter of Penner, 18 I. & N. Dec. 49 (Comm'r 1982). See also Matter of Sandoz Crop Protection Corporation, 19 I. & N. Dec. 666 (Comm'r 1988) where the Commissioner drew a distinction between skilled workers and intracompany transferees coming to perform services in a specialized knowledge capacity.

First, USCIS must first look to the language of section 214(c)(2)(B) itself, that is, the terms "special" and "advanced." The USCIS will turn to the dictionary for help in determining whether a word in a statute has plain or common meaning. According to Webster's New College Dictionary, the word "special" is commonly found to mean "surpassing the usual" or "exceptional." Webster's New College Dictionary, 1084 (3rd Ed. 2008). The dictionary defines the word "advanced" as "highly developed or complex" or "at higher level than others."

Second, looking at the term's placement within the text of section 101(a)(15)(L) of the Act, USCIS notes that specialized knowledge is used to describe the nature of a person's employment and the term is listed among the higher levels of employment hierarchy together with "managerial" and "executive" employees. Based on the context of the term within the statute, USCIS therefore would expect a specialized knowledge employee to be within an elevated class of workers within a company and not that of an ordinary or average employee.

Third, a review of the legislative history for both original 1970 statute and the subsequent 1990 statute indicates that Congress intended for USCIS to closely administer the L-1B category. Specifically, the original drafters of section 101(a)(15)(L)of the Act intended that the class of persons 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." 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.

Further, although the Immigration Act of 1990 provided a statutory definition of the term "specialized knowledge" in section 214(c)(2) of the Act, the definition did not generally expand the class of persons eligible for L-1B specialized knowledge visas. Instead, the legislative history indicates that Congress created the

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statutory definition of specialized knowledge for the express purpose of clarifying a previously undefined term from Immigration Act of 1970. While the 1990 Act declined to codify the "proprietary knowledge" and "United States labor market" references that had existed in the previous agency definition found at 8 C.F.R. 214.2(l)(1)(ii)(D)(1988), there is no indication that Congress intended to liberalize its own 1970 definition of the L-1 visa classification.

If any conclusion can be drawn from the enactment of statutory definition of specialized knowledge in section214(c)(2)(B), it would be based on the nature of the Congressional clarification itself. By not including any strict criterion in the ultimate statutory definition and further emphasizing the relativistic aspect of "specialized 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 adjudication based on the facts and circumstances of each individual case.

To determine what is special or advanced, USCIS must first determine the baseline of ordinary. As a baseline, the terms "special" or "advanced" must mean more than simply "skilled" or "experienced." By itself, work experience and knowledge of a firm's technically complex products will not equal "special knowledge." Specialized knowledge generally requires more than a short period of experience, otherwise special or advanced knowledge would include every employee in an organization with the exception of trainees and entry-level staff. If everyone in an organization is specialized, then no one can be considered truly specialized.

Considering the definition of specialized knowledge, it is the petitioner's not USCIS's burden to articulate and prove that the beneficiary possesses "special" or "advanced" knowledge. USCIS cannot make a factual determination regarding the beneficiary's specialized knowledge if the petitioner does not, at a minimum, articulate with specificity the nature of the claimed specialized knowledge, described how such knowledge is typically gained within the organization, and explain how and when the beneficiary gained such knowledge.

Once the petitioner articulates the nature of the claimed specialized knowledge, it is the weight and type of evidence which establishes whether or not the beneficiary actually possesses specialized knowledge. A petitioner's assertion that the beneficiary possesses and 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. Because "special" and "advanced" are comparative terms, the petitioner should provided evidence that allows USCIS to assess the beneficiary's knowledge relative to others in the petitioner's workforce or relative to similarly employed workers in the petitioner's industry.

Does the Beneficiary Possess Specialized Knowledge?

The first of the two issues to be discussed is whether the beneficiary possesses specialized knowledge. In examining the specialized knowledge of the beneficiary, USCIS will look to your description of the beneficiary's experience, training, and the weight of the evidence supporting any asserted specialized knowledge.

Upon initial filing, the following evidence to establish that the beneficiary has specialized knowledge:

- Your cover letter describing the beneficiary's knowledge, education, training, and employment.

In the cover letter dated May 23, 2011 you describe the beneficiary's employment, experience, training, and education as follows;

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> [redacted] has been the Senior Supply Chain Manager for [redacted] since January 2009. In this position, she is responsible for all aspects of sourcing and supply chain activities and reported directly to the General Manager. She has thus gained in-depth knowledge of the supply chain function as it relates to [redacted] and particularly in China, a major source of materials world-wide. This knowledge, when applied to the CI process is invaluable to the success of our efforts to expand that process to the supply chain function. Obviously, if this process is successful, it will have a direct bearing on our competitiveness as it will lower our costs, avoid waste and better attune [redacted] and our external vendors to our customers' needs.
>
> While supply chain management is a broadly-known concept, its application to [redacted] manufacturing processes is unique to [redacted]. We maintain certain quality standards, which require that we source material in a way tot meet our standards and using methods that conform to our company culture. These parameters can only be met by experience in [redacted]
>
> [redacted] came to [redacted] with extensive experience in purchasing, supply chain processes and quality management. She has spent more than two years in [redacted] learning our supply chain management process and has gained expertise in applying CI principals to that process. We cannot hire someone in the United States that will have the same expertise, even if that person has experience in CI, kaizen, or Lean.

From the initial documentation submitted, USCIS was unable to determine that the beneficiary has specialized knowledge because:

- Although you have submitted a description of the duties, it is not clear, exactly what knowledge is involved that is either "advanced" or "special" in performing those duties and whether that knowledge is held by other employees on the project, team, department, division, organization and/or others employed in the industry performing the same type of work.

- Your description does not compare and contrast the beneficiary's knowledge, education, training, and employment with other employees on the project, team, division, organization, and/or others employed in the industry performing the same type of work.

Subsequent to the filing of the petition, you were requested to provide additional documentation to establish that the beneficiary has specialized knowledge. USCIS provided a list of suggested evidence you may submit to meet this requirement and was advised that any other evidence may also be submitted if you felt it would satisfy the request.

On July 11, 2011 you submitted the following additional documentation:

- Counsel's cover letter describing the beneficiary's knowledge, education, training, and employment; and
- Letter from the beneficiary's supervisor(s) describing the beneficiary's training and experience with the organization abroad.

The submitted description and/or documentation show the beneficiary has a wide range of skills, experience, and training with proprietary policies, processes, methodologies, and/or framework. However, the experience

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with and knowledge of your organization's proprietary systems, methodologies, processes, procedures, software is not "special" or "advanced."

In this case, the beneficiary's has only been working with your organization since January 2009 and the petition was filed in June 02, 2011. Although you indicate the beneficiary is familiar with proprietary policies, processes, methodologies, and/or framework there is no indication in the record that the beneficiary is solely responsible for the development of your proprietary policies, processes, methodologies, and/or framework. The beneficiary along with others employed by your organization, like any other supply chain managers, is responsible for studying sales records and inventory levels of current stock, identifying foreign and domestic suppliers, and keeping abreast of changes affecting both the supply of, and demands for, needed products and materials. In order to support your services, the beneficiary gained experience and job-related training of proprietary policies, processes, methodologies, and/or framework through employment and experience with your organization. However, knowledge of your organization's proprietary policies, processes, methodologies, and/or framework is not specialized knowledge.

In the new cover letter, you re-assert the beneficiary possesses specialized knowledge. You list proprietary policies, processes, methodologies, and/or framework the beneficiary is experienced with. However, you have not explained how the beneficiary's knowledge of these policies, processes, methodologies, and/or framework is specialized in relation to any of your other existing employees in the same or similar position as the beneficiary.

The specialized knowledge classification requires USCIS to distinguish between those employees that possess specialized knowledge from those that do not possess such knowledge. 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 product, process, or procedure 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.

USCIS must interpret specialized knowledge to require more than fundamental job skills or 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 supply chain manager to the United States in the L-1B classification.

All employees can be said to possess unique skill or experience to some degree. Moreover, the proprietary qualities of your products, process, or procedures and experience with your organization do not establish that knowledge and experience with these methodologies, systems, products, process, or procedures is "specialized." Rather, you must establish that qualities of the unique product, process, or procedure 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 or training with your proprietary products as applied to one component is not enough to establish the beneficiary as an employee possessing specialized knowledge.

USCIS cannot conclude based on the evidence submitted that the beneficiary, as a result of his or her employment with your organization and foreign company, has knowledge or experience in the field of

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manufacturing that is significantly different from that possessed by similarly employed workers employed by you, your foreign company, or other companies in the same business activity.

USICS acknowledges that the specialized knowledge need not be narrowly held within the organization in order to be considered "advanced." However, 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. If all similarly employed workers within your organization receive essentially the same training, then mere possession of knowledge of your processes and methodologies does not rise to the level of specialized knowledge. The L-1B visa category was not created in order to allow the transfer of all employees with any degree of knowledge of a company's processes. If all employees are deemed to possess "special" or "advanced" knowledge of proprietary methodologies, systems, products, process, or procedures, then that knowledge would necessarily be ordinary and commonplace.

In this case the beneficiary's training and experience with your proprietary methodologies, systems, products, process, or procedures, and experience with your foreign company do not deem the beneficiary an individual with specialized knowledge. The record fails to establish that the beneficiary, while perhaps highly skilled, possesses a special or advanced level of knowledge in the manufacturing field. There is no indication that the beneficiary has any knowledge that exceeds that of any other similarly experienced supply chain managers or related occupation. Although you indicate the beneficiary was trained on your special methodologies, systems, products, process, or procedures, the evidence submitted does not show the knowledge obtained by the beneficiary was exclusive.

You have not successfully demonstrated that the beneficiary's knowledge of your methodologies, systems, products, process, or procedures gained during his or her employment is advanced compared to other similarly employed workers within the organization. All of the foreign company's employees would reasonably have specific knowledge of methodologies, systems, products, process, or procedures in addition to knowledge of the company's proprietary products and procedures. By this logic, any of them would qualify for L-1B classification if offered a position working on the same or similar projects in the United States.

While the current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the specialized knowledge be proprietary, you cannot satisfy the current standard merely by establishing that the purported specialized knowledge is proprietary. The knowledge must still be either "special" or "advanced."

Work experience and knowledge of a firm's technically complex products, by itself, will not equal "special knowledge." USICS must interpret specialized knowledge to require more than fundamental job skills or 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.

Therefore, you have not established that the beneficiary possesses specialized knowledge.

Will the Beneficiary be Employed in the United States in a Capacity that Involves Specialized Knowledge?

The last of the related issues to be discussed is whether the U.S. position of "Continuous Improvement Manager" involves specialized knowledge.

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Upon initial filing, you submitted the following evidence to establish that the beneficiary will enter the United States in order to render services in a capacity that involves specialized knowledge:

- Your cover letter describing the beneficiary's duties in the U.S.; and
- Copy of the United States entity's organizational chart.

You described the duties of a Continuous Improvement Manager in the U.S. as follows:

- Promoting lean activities in support of culture change and plan, prepare, execute, review and audit events. Serve as the internal consultant for CI, and assist in the development of the version for the CI Department. Provide guidance as a mentor to direct reports (if applicable) and team members at all levels of the organization to become CI leaders. Conduct training for the current team members, new hires, employees and dealership personnel, to ensure individuals understand the importance of the customer. (35%)

- Manage assigned personnel (as required) in performance of their duties including, but not limited to, interviewing, hiring, training, evaluation, scheduling and managing work activities, performance management, personnel development, discipline and discharge; coach on CI principals and leadership skills and ensure projects/customer orders are completed on time. (25%)

- Lead, facilitate and/or participate in kaizen events. Develop and track metrics related to improvement activities, promote lean activities in support of culture change. Develop long-term and short-term improvement in strategies and plans. (25%)

- Assess lean training and education needs of the organization and assist in the development and execution of these trainings. Establish and monitor individual and team goals which are aligned with [redacted]'s business strategies and objectives. (15%)

From the documentation submitted with your petition, USCIS is unable to determine that the beneficiary will be employed in a position that involves specialized knowledge because:

- Although you have submitted a technical description of the beneficiary duties, it is not clear, in layman's terms, exactly what the beneficiary's duties will be and how they compare to other employees on the project, team, department, division, and/or organization.

- Although you state that the duties to be performed are "special" or "advanced", you have not explained how you reached this conclusion.

- Your description of duties does not sufficiently establish how the duties the beneficiary will perform in the United States: (1) if "special," are uncommon, noteworthy, distinguished by some unusual qualification, and not generally known by practitioners in the beneficiary's industry; or, (2) if "advanced" are highly developed or complex, at a higher level than others, beyond the elementary or introductory, or greatly developed beyond the initial stage.

- Your description only lists the duties to be performed rather than explaining why the duties involve specialized knowledge and/or how those duties compare between the beneficiary and the

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remainder of your work force at the same location in the United States where the beneficiary will work.

- Your description of duties does not compare and contrast the beneficiary's duties with others performing the same type of work.

- USCIS is unable to determine whether the beneficiary has been or will be performing duties as an L-1B based on "special" knowledge of your company's product, service, research, equipment, techniques, management, or other interests or an "advanced" knowledge of your company's processes and procedures.

Subsequently you were requested to provide additional documentation to establish that the beneficiary's U.S. position involves specialized knowledge. USCIS provided a list of suggested evidence you may submit to meet this requirement and you were advised that any other evidence may also be submitted if you felt it would satisfy the request.

The evidence provide in response includes:

- Counsel's cover letter describing the beneficiary's duties in the U.S.; and
- Copy of the United States entity's organizational chart.

In the cover letter dated July 07, 2011 you provided the same description of duties as indicated in the original cover letter.

The descriptions of duties provided are similar and typical of a manager or related occupation working in the manufacturing field. The beneficiary's duties: "promoting lean activities in support of culture change and plan, prepare, execute, review and audit events. Serve as the internal consultant for CI, and assist in the development of the version for the CI Department. Provide guidance as a mentor to direct reports (if applicable) and team members at all levels of the organization to become CI leaders. Conduct training for the current team members, new hires, employees and dealership personnel, to ensure individuals understand the importance of the customer", "manage assigned personnel (as required) in performance of their duties including, but not limited to, interviewing, hiring, training, evaluation, scheduling and managing work activities, performance management, personnel development, discipline and discharge; coach on CI principals and leadership skills and ensure projects/customer orders are completed on time", "lead, facilitate and/or participate in kaizen events. Develop and track metrics related to improvement activities, promote lean activities in support of culture change. Develop long-term and short-term improvement in strategies and plans" and "assess lean training and education needs of the organization and assist in the development and execution of these trainings. Establish and monitor individual and team goals which are aligned with [redacted]'s business strategies and objectives", are duties that are common to the position held. The beneficiary, like any other managers, plan, direct, and coordinate the production activities required to produce the vast array of goods manufactured. They devise methods to use the plant's personnel and capital resources to best meet production goals. However, the knowledge a Continuous Improvement Manager possesses alone, is not specialized knowledge.

As previously discussed, you also indicate that the proffered position requires knowledge of proprietary products, processes, and procedures. Therefore, implicating that the duties could not be performed by the typical skilled worker, even one with similar education and professional background compared to the beneficiary. However, upon review of the record, you submitted insufficient evidence to establish that the position requires a body of specialized knowledge. Therefore, it has not been established that knowledge in

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these products, processes, and procedures would be considered specialized knowledge based on their wide use by your organization and your parent/affiliate/subsidiary abroad.

In the present case, there is no evidence on record to suggest that the processes pertaining to your organization are different from those applied for any managers or similar position working in the same industry. In addition, the knowledge of your proprietary products, processes, and procedures does not amount to specialized knowledge. While individual companies will develop methodologies, products, processes, and procedures tailored to their own needs, internal processes, and customer specifics, it has not been established that there would be a substantial difference such that knowledge of that company's proprietary products alone would amount to "specialized knowledge."

While the current statutory and regulatory definitions of "specialized knowledge" do not include a requirement that the specialized knowledge be proprietary, you cannot satisfy the current standard merely by establishing that the purported required specialized knowledge is proprietary. The knowledge must still be either "special" or "advanced."

The record fails to establish that the position, Continuous Improvement Manager, requires a special or advanced level of knowledge in the manufacturing field. There is no indication that position requires knowledge that exceeds that of any other managers in this field.

The record is insufficient to establish the position in the United States will involve specialized knowledge.

In view of the above, the record is insufficient to establish the employment abroad was in a position that was managerial, executive, or involved specialized knowledge; whether the beneficiary possesses specialized knowledge; and whether the beneficiary's position in the United States involves specialized knowledge.

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L-1B Off-Site Employment
Position in the U.S. is not Specialized Knowledge
Denial
Rev 06-10-2009

Computer Programmer/Analysts, Software engineers

This format addresses one issue as follows:

1. Beneficiary will not be employed in the U.S. in a position that requires a Specialized Knowledge capacity

   - This focuses on the U.S. position as described by the petitioner and supported by contracts, and statements of work, etc.

READ EVERYTHING CAREFULLY AND MAKE SURE IT APPLIES TO YOUR CASE!

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker on [Date of Filing], with the United States Citizenship and Immigration Services ("USCIS") in order to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner, [Insert Name of Petitioner], is a [City, State], enterprise engaged in the information technology consulting business with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years. The petitioner claims that the U.S. entity is a [affiliate, subsidiary, parent, or branch] of the [affiliate, subsidiary, parent, or branch] company located in [Insert Country].

Position in the U.S. does not require Specialized Knowledge

The [first, second, third, next, only] issue to be discussed in this case is whether the beneficiary will be employed in a capacity that requires specialized knowledge as defined in INA 214(c)(2)(B) and 8 C.F.R. 214.2(l)(1)(ii)(D).

GENERAL RULE:

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in INA 101(a)(15)(L) and 8 C.F.R. 214.2(l)(1)(ii):

> . . . an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation

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> or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him; (Underlining added)

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

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

SPECIFIC RULE:

INA 214(c)(2)(B) provides the framework for the specialized knowledge transferee:

> 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 regulations at 8 C.F.R. 214.2(l)(1)(ii)(D) further define "specialized knowledge" thusly:

> *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organizations 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. (Emphasis in original)

In the Matter of Colley, 18 I. & N. Dec. 117 (Comm'r 1981), the Commissioner of the legacy Immigration and Naturalization observed that "Most employees today are specialists and have been trained and given specialized knowledge; however, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees." Moreover, "A distinction can be made between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation." Matter of Penner, 18 I. & N. Dec. 49 (Comm'r 1982). *See also* Matter of Sandoz Crop Protection Corporation, 19 I.

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& N. Dec. 666 (Comm'r 1988) where the Commissioner drew a distinction between skilled workers and intracompany transferees coming to perform services in a specialized knowledge capacity.

In general, all employees can be reasonably considered "important to a petitioner's enterprise." If an employee did not contribute to the overall economic success of an enterprise, there would be no rational reason to employ the person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, USCIS must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's work force.

ANALYSIS:

Proposed Duties: Concentrate on the proposed duties in this issue and whether they would require Specialized Knowledge. The first issue addresses the lack of contracts and work orders as proof that the position is specialized knowledge.

The petitioner indicates that the beneficiary will be required to perform as a [Job Title] for a project to be completed at a client company, [Name of Client Company], in [Location of Client Company- Full Address]. The petitioner also indicates that the beneficiary has worked on the client's product in [Name of Country – (e.g., India)] and is therefore familiar with the client's implementation processes and procedures.

Optional – RFE information: Subsequent to the filing of the petition, the petitioner was requested to provide the following information to determine that the position qualifies in specialized knowledge capacity: [Choose the following that apply – delete those things you did not request in your RFE]

- A more detailed explanation of exactly what is the equipment, system, product, technique, or service of which the beneficiary of this petition has specialized knowledge, and indicate if it is used or produced by other employers in the United States and abroad.

- Copies of contracts, statements of work, work orders, service agreements between the petitioner and the unaffiliated employer or "client" for the services or products to be provided;

- a list of all foreign national employees working at the same location as the beneficiary with the employee's name, date of birth, immigration status, title of each foreign national's position and whether it is the same or similar position as the beneficiary at U.S. location where beneficiary will be employed.

OPTION #1: Description of duties too technical

Although, the petitioner has submitted a lengthy, detailed, technical description of the beneficiary duties, it is not clear, in layman's terms, exactly what the beneficiary duties will be and how they compare to other employees on the project. If USCIS can not clearly understand the duties described by the petitioner then it is impossible to determine that these duties are specialized knowledge as opposed to the skills required merely to use the petitioner's product, tools, processes, or procedures.

OPTION #2: Petitioner did not provide a copy of the contract

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In its response, the petitioner failed to provide a copy of the contract between itself and, [Name of Unaffiliated Employer], the client company on whose project the beneficiary will work. Absent additional competent objective evidence such as contracts and statements of work between the petitioner and the unaffiliated employer or "client" where the beneficiary will be employed, USCIS is unable to determine if the position qualifies as a specialized knowledge capacity.

The burden of proof to establish eligibility for benefits sought rests with the petitioner under section 291 of the Act. As such, simply going on record with unsupported statements does not satisfy the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm'r 1972).

OPTION #3: Pet claims Bene was [Job Title] responsible for development of [e.g., product, software, etc.]:

The petitioner lists the proposed duties [OR: the project (contract) requirements] as follows:

List the beneficiary's proposed duties and/or the project (contract) requirements here.

The petitioner claims that the beneficiary was primarily responsible for the development of one of the petitioner's products, [Name of product or project, e.g., an XTND Connect Server]. An employment letter from the foreign entity indicates that the beneficiary was a "[Job Title]" and worked on the [Name of product or project, e.g., an XTND Connect Server].

OPTIONAL: However, on an organizational chart submitted in response to USCIS' request for additional evidence, the beneficiary's name is listed next to the bottom of the petitioner's organization.

Further, while the petitioner argues that it is at the forefront in at least one area of developing technology, there is no substantive evidence demonstrating that the beneficiary has played a major role in the attainment of that position. The document submitted by the petitioner as having been authored by the beneficiary does not acknowledge any author.

It is significant that none of the documentation recognizing the petitioner's endeavors mentions the beneficiary as either authoring or being an integral part of the developing technology. While, some evidence indicates that this product may have been developed at the foreign, the record does not indicate that it was solely or substantially developed by the beneficiary.

OPTION #4: Optional – List of Foreign National Employees working at the same Job Site:

[Also, Additionally, Further,] the petitioner was requested to provide a list of all foreign national employees working at the same location as the beneficiary including the foreign national's position, the type of visa held by each and whether it is the same or similar position as the beneficiary at U.S. location where beneficiary will be employed.

Option 1 – No Response: In its response, the petitioner did not provide any further information in response to this request. Absent the requested evidence, USCIS is unable to determine if the beneficiary has specialized knowledge.

Option 2 – Silly, Irrational, Illogical, Arrogant or Non-Responses: The petitioner merely responds with the following statement:

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[Insert the petitioner's statement here, e.g. "It is not our policy to release such information."]

Absent the requested evidence, USCIS is unable to determine if the beneficiary has specialized knowledge.

Option 3 – Too Many L-1B's Already Here: The petitioner indicates that approximately [Enter amount: 20, 50, 100, 5,000,000] other [Choose: software engineers, computer analysts, computer consultants] are currently performing work at the same location where the beneficiary will be employed.

Given the fact that the petitioner already employs [Insert Number of L-1B's already employed at the site.] at the same site where the beneficiary will work, it is not clear that specialized knowledge has anything to do with the project with so many other L-1B's employed on the same project.

USCIS is unable to distinguish between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation."

There does not appear to be any standard by which to compare and/or contrast the beneficiary's proposed position

If the petitioner is calling common application programmers "specialized knowledge" then it is not clear how USCIS can depend on the petitioner's claim that the beneficiary is "specialized knowledge."

It does not appear that there is an advanced level of knowledge necessary to complete the project. However, it does appear that the petitioner is merely seeking admission of employees at any level of knowledge to complete the project.

An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, USCIS must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between that employee and the remainder of the petitioner's work force.

Given the fact that the petitioner already employs [e.g., fourteen (14)] L-1B employees at the same sites where the beneficiary will work, it is not clear that specialized knowledge has anything to do with the project. With so many other L-1B's employed on the same project, USCIS is unable to distinguish between those persons with skills and knowledge that are used to produce a product (eleven of which are common Application Programmers), and the persons who are supposed to be employed primarily for their ability to carry out a key process or function which is important or essential to the business firm's operation.

A "key" employee of "crucial importance" must rise above the level of the petitioner's average employee. If the petitioner is calling common application programmers "specialized knowledge" then it is not clear how USCIS can depend on the petitioner's claim that the beneficiary, also possesses "specialized knowledge." It does not appear that there is an advanced level of knowledge necessary to complete the project. Instead, it appears that the petitioner is merely seeking admission of employees at any level of knowledge to complete the project.

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In this case, USCIS is unable to make a comparison between the beneficiary and the remainder of the petitioner's work force.

As such, the petitioner has not established that the beneficiary has specialized knowledge and would be employed in a capacity involving specialized knowledge as required for classification as an intracompany transferee pursuant to section 101(a)(15)(L) of the Act.

Optional – Internet Search of Similar Jobs:

Proprietary Software: Sometimes the petitioner will claim the software is proprietary. However, when you "Google"-it you may discover that it belongs to another software company. Let them know in the denial if you found contradictory evidence.

[Also, Additionally, Further,] USCIS has searched the internet for positions that seem to be similar to that of the position described by the petitioner – that is, for positions that use similar programs, applications, tools, methodologies, or languages to perform their jobs. After a review of a variety of employment web-sites, it appears that the requirements to qualify for a position similar to that described by the petitioner are common place and the industry standard rather than advanced in nature.

CONCLUSION:

The statutory definition of "specialized knowledge" requires USCIS to make comparisons in order to determine what constitutes specialized knowledge. In 1756, Inc. v. Attorney General, 745 F. Supp. 9 (D.D.C. 1990), the court upheld the denial of an L-1 petition for a chef, where the petitioner claimed that the chef possessed specialized knowledge. The court noted that the legislative history demonstrated a concern that the L-1- category would become too 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." Id. at 16 (citing H.R. REP. No. 91-851, 1970, U.S.C.C.A.N. 2750, 2754, 1970 WL 5815). The court stated, "[I]n light of Congress' intent that the L-1 category should be limited, it was reasonable for the INS to conclude that specialized knowledge capacity should not extend to all employees with specialized knowledge. On this score, the legislative history provides guidance: Congress referred to 'key personnel' and 'executives.'" 1756, Inc., 745 F. Supp. at 16. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." Webster's II New College Dictionary 605 (Houghton Mifflin Co. 2001).

The duties performed with the foreign entity and to be performed at the client's work site, as simply stated, appear to be essentially that of a skilled worker. The beneficiary's duties and skills as a [Job Title], while impressive, 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 plain meaning of the term "specialized knowledge" is knowledge or expertise beyond the ordinary in a particular field, process, or function. The petitioner has not furnished evidence sufficient to demonstrate that the beneficiary's duties involve specialized knowledge of the petitioner's product, tools, processes, or procedures, as opposed to the skills required merely to use such products. Mere familiarity with an organization's product or service does not constitute special knowledge under section 214(c)(2)(B) of the

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Act. The record as presently constituted is not persuasive in demonstrating that the beneficiary has specialized knowledge or that she has been and will be employed primarily in a specialized knowledge capacity.

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. Congress has enacted separate and specific provisions regarding the classification and admission of alien crewmen and skilled workers. See Sections 101(a)(15)(D) & (H) of the Act.

The petitioner has not established that the beneficiary has specialized knowledge and would be employed in a capacity involving specialized knowledge as required for classification as an intracompany transferee pursuant to section 101(a)(15)(L) of the Act.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

AILA InfoNet Doc. No. 14073040. (Posted 7/30/14)

L-1B Off-Site Employment
Computer Programmer/Analysts, Software engineers
Denial
Rev 06-10-2009

This format addresses one issue as follows:

1. Beneficiary not employed abroad in a Specialized Knowledge capacity for one year

   - Evidence shows the beneficiary hasn't even worked for the company for a year; or
   - Time spent in training does not count towards the one-year in a position that involved Specialized Knowledge;
   - Employment which is not at the highest level does not count towards the one-year in a position that involved Specialized Knowledge.
     - Beneficiary's knowledge must be "beyond the ordinary."
     - General operating knowledge of a tool, procedure, methodology, or program is the lowest level of knowledge not the high level claimed

READ EVERYTHING CAREFULLY AND MAKE SURE IT APPLIES TO YOUR CASE

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker on [Date of Filing], with the United States Citizenship and Immigration Services ("USCIS") in order to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner, [Insert Name of Petitioner], is a [City, State], enterprise engaged in the information technology consulting business with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years. The petitioner claims that the U.S. entity is a [affiliate, subsidiary, parent, or branch] of the [affiliate, subsidiary, parent, or branch] company located in [Insert Country].

Beneficiary not qualified for Specialized Knowledge

The [first, second, third, next, only] matter to be discussed is whether the beneficiary's prior year of employment abroad was in a capacity that involved specialized knowledge.

GENERAL RULE:

To establish eligibility for the nonimmigrant L-1 visa classification, the petitioner must meet the criteria outlined in INA 101(a)(15)(L) and 8 C.F.R. 214.2(l)(1)(ii):

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> . . . an alien who, within 3 years preceding the time of his application for admission into the United States, has been employed continuously for one year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States temporarily in order to continue to render his services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge, and the alien spouse and minor children of any such alien if accompanying him or following to join him;

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

> (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
>
> (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
>
> (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
>
> (iv) <u>Evidence that the alien's prior year of employment abroad was in a position that</u> was managerial, executive, or <u>involved specialized knowledge</u> 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. (Underlining added.)

<u>SPECIFIC RULE:</u>

INA 214(c)(2)(B) provides the framework for the specialized knowledge transferee:

> 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 regulations at 8 C.F.R. 214.2(l)(1)(ii)(D) further define "specialized knowledge" thusly:

> *Specialized knowledge* means special knowledge possessed by an individual of the petitioning organizations 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. (Emphasis in original)

A "specialized knowledge professional" is further defined at 8 C.F.R. 214.2(l)(1)(ii)(E) as:

> [A]n individual who has specialized knowledge as defined in paragraph (l)(1)(ii)(D) of this section and is a member of the professions as defined in section 101(a)(32) of the immigration and Nationality Act.

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In the Matter of Colley, 18 I. & N. Dec. 117 (Comm'r 1981), the Commissioner of the legacy Immigration and Naturalization observed that "Most employees today are specialists and have been trained and given specialized knowledge; however, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intra-company transferees." Moreover, "A distinction can be made between the person whose skills and knowledge enable him or her to produce a product through physical or skilled labor and the person who is to be employed primarily for his ability to carry out a key process or function which is important or essential to the business firm's operation." Matter of Penner, 18 I. & N. Dec. 49 (Comm'r 1982). See also Matter of Sandoz Crop Protection Corporation, 19 I. & N. Dec. 666 (Comm'r 1988) where the Commissioner drew a distinction between skilled workers and intracompany transferees coming to perform services in a specialized knowledge capacity.

ANALYSIS:

Subsequent to the filing of the petition the petitioner was requested to provide: (Add or delete requested items as appropriate)

- Present copies of the foreign company's payroll records pertaining to the beneficiary for the one year he or she was employed in the three years preceding the filing of the first petition for L-1 status that specify when the beneficiary was hired, the positions that were held and why the beneficiary was selected for the position with the U.S. entity.

- copies of the petitioner's human resource records that provide the beneficiary's job description and worksite location;

- a copy of the beneficiary's latest resume.

- an explanation as to how the duties the alien performed abroad and those he or she will perform in the United States are different from those of other workers employed by the petitioner or other U.S. employers in this type of position.

- Explain how the beneficiary's training or experience is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field in comparison to that of others employed by the petitioner in this particular field.

The petitioner states that the beneficiary was employed abroad with the parent, affiliate, or subsidiary company from [Date] to [Date] or a period of approximately [six months; one year; one and half years; 20 months...etc.].

OPTION #1 of 3 - Total employment with foreign entity is less than one year – DONE DEAL:

However, the copies of the beneficiary's [payroll records, resume, etc.] indicate that the beneficiary worked only [6 months, 8 months,...etc] with the foreign entity. As such, the evidence is insufficient to establish that the beneficiary has even one year of employment with the foreign entity, much less, the requisite one-year employment in a specialized knowledge capacity. [Go to the conclusion – delete the following unless you prefer to beat a dead horse.]

OPTION #2 of 3 – Time in training does not count towards the one year in Specialized Knowledge capacity:

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The petitioner describes the beneficiary's prior training abroad, in part, as follows:

> List pertinent parts of the beneficiary's training abroad that supports your analysis that the training was less than specialized.
>
> For instance, list the training that appears to be, for the most part, generalized and primarily of on-the-job training to acquire knowledge of tools, procedures, and methodologies – especially if it was training over a long period of time as this would not be specialized.

ANALYSIS ON TRAINING: Make sure that the beneficiary has ONE FULL YEAR abroad in a specialized knowledge capacity. The one year does not include formal training, or on-the-job training. There must be one year in a capacity that is at a high level of knowledge. A high level of knowledge would be the actual designer or developer of a particular program.

If the beneficiary is merely training on general tools, processes, methodologies, procedures developed by others – write that down because it probably does not qualify as specialized knowledge.

Look for evidence. Mere statements are insufficient to establish one full year in a specialized knowledge capacity. Deduct the time in training from the total time abroad. If there is no time period given for each training program note that in your analysis and state that no training time period was provided and, therefore, it is difficult to determine the actual time spent in a Specialized Knowledge capacity.

Conclusion to Time in Training Analysis – Use the following paragraphs and phrases to sum-up your analysis

The petitioner states that the beneficiary's training and experience have given him or her knowledge that is special because it is specific to the petitioning entity. However, logic dictates that job training at any company teaches procedures that are predominately relevant to that organization.

Specialized knowledge generally comes as a by-product of the projects and activities employees are assigned - not knowledge that can be learned through a training program. Thus, the employee who develops and/or writes a particular program is more likely to obtain "specialized knowledge" of the program rather than the employee who merely attends a class to learn how a program works.

Also, on-the-job training to acquire knowledge of tools, procedures, and methodologies does not automatically qualify as specialized knowledge. For instance, most engineers if not all, who are working for the petitioner, would have to possess knowledge of the petitioner's tools, procedures, and methodologies to perform their duties.

The skills described for the beneficiary do not appear to be skills that cannot be taught nor would they require a specialized knowledge of the petitioning company's product, processes, or procedures that surpasses the ordinary or usual knowledge of a [computer programmer analyst].

OPTIONAL – Training not highly technical: Although the training period is espoused to be advanced and highly technical in nature, there is insufficient evidence that the beneficiary received any highly skilled training. In fact, the record indicates that it only takes [Insert amount of days, weeks, or months, training

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time – if known] specific training for the beneficiary to acquire the knowledge of the petitioner proprietary tools. It is therefore concluded that the [Insert amount of days, weeks, or months, training time – if known] training in the petitioner's tools, procedures, methodologies, and programs does not count for the purposes of the beneficiary meeting the requisite one-year in a specialized knowledge capacity.

OPTION #3 of 3 – Employment abroad not at highest level:

[Also, Additionally, Further,] the petitioner describes the beneficiary's prior experience abroad, in part, as follows:

> List pertinent parts of the beneficiary's experience abroad that supports your analysis that the experience was less than specialized.
>
> For instance, list the training that appears to be, for the most part, generalized and primarily of on-the-job training or experience to acquire a general knowledge of tools, procedures, and methodologies.

ANALYSIS OF EXPERIENCE: If the beneficiary is merely working with general tools, processes, methodologies, procedures developed by others – write that down because it probably does not qualify as specialized knowledge.

Conclusion to Time in Experience Analysis – Use the following paragraphs and phrases to sum-up your analysis

While the petitioner contends that the beneficiary's knowledge is sufficient to qualify as "specialized knowledge," the plain meaning of the term "specialized knowledge" is knowledge or expertise "beyond the ordinary" in a particular field, process, or function.

Merely, limiting an employee's knowledge to specific tools, procedures, methodologies, and/or programs, proprietary or otherwise, does not necessarily create specialized knowledge. Operating knowledge of a tool, procedure, methodology, and/or program is, actually, the lowest level of knowledge rather than the high level claimed.

The employee who develops and/or writes the tool, procedure, methodology, and/or program would obtain "specialized knowledge" of the program that others could not possess. Likewise, the employee who merely performs low level and common routine maintenance and/or use of tools, procedures, methodologies, and/or programs, proprietary or otherwise would not be engaged in "specialized knowledge."

In addition, others such as experienced trainers would also possess a higher level of knowledge of the processes and procedures than that of a trainee or user of a program. Further, while individual users in the past may have qualified as a specialized during the introduction of a new procedure or process, it is reasonable to expect other employees would be trained and the knowledge would no longer qualify as Specialized Knowledge.

The duties performed with the foreign entity, as simply stated, appear to have been essentially that of a skilled worker. The beneficiary's duties and skills as a [Job Title], while impressive, demonstrate

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knowledge which is common among [systems analysts/programmers] employed by the foreign entity and others in the field of information technology.

The plain meaning of the term "specialized knowledge" is knowledge or expertise beyond the ordinary in a particular field, process, or function. The petitioner has not furnished evidence sufficient to demonstrate that the beneficiary's duties involve specialized knowledge of the petitioner's product, tools, processes, or procedures, as opposed to the skills required merely to use such products. Mere familiarity with an organization's product or service does not constitute special knowledge under section 214(c)(2)(B) of the Act. The record as presently constituted is not persuasive in demonstrating that the beneficiary has specialized knowledge or that she has been and will be employed primarily in a specialized knowledge capacity.

CONCLUSION:

In view of the above, the record is insufficient to establish that the beneficiary has been employed abroad for one year in a capacity that involves specialized knowledge.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

AILA InfoNet Doc. No. 14073040. (Posted 7/30/14)

L-1B Off-Site Employment
Computer Programmer/Analysts, Software engineers
Denial

This format addresses one issue as follows:

1. Alien not eligible for employment at unaffiliated employer's worksite
    - Control and supervision is by unaffiliated employer
    - Position is labor for hire for the unaffiliated employer

READ EVERYTHING CAREFULLY AND MAKE SURE IT APPLIES TO YOUR CASE!

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker on [Date of Filing], with the United States Citizenship and Immigration Services ("USCIS") in order to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act ("INA" or "Act").

The petitioner, [Insert Name of Petitioner], is a [City, State], enterprise engaged in the information technology consulting business with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years. The petitioner claims that the U.S. entity is a [affiliate, subsidiary, parent, or branch] of the [affiliate, subsidiary, parent, or branch] company located in [Insert Country].

Not eligible for employment at unaffiliated employer's worksite

The [first, second, third, next, only] issue to be evaluated in this case involves whether the beneficiary is eligible for employment at an unaffiliated employer's worksite.

The L-1 Visa Reform Act of 2004, effective June 06, 2005, states the following:

SEC. 412. NONIMMIGRANT L-1 VISA CATEGORY.

> (a) IN GENERAL- Section 214(c)(2) of the Immigration and Nationality Act (8 U.S.C. 1184(c)(2)) is amended by adding at the end the following:
>
> > (F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning

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> employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 101(a)(15)(L) if--
>
> (i) the alien will be controlled and supervised principally by such unaffiliated employer; or
>
> (ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.'.
>
> (b) APPLICABILITY- The amendment made by subsection (a) shall apply to petitions filed on or after the effective date of this subtitle [June 06, 2005], whether for initial, extended, or amended classification.

Control and supervision by unaffiliated employer

The first part of the issue to be discussed is whether the alien will be controlled and supervised principally by the unaffiliated employer.

Subsequent to the filing of the petition, the petitioner was requested to establish that the alien working for the petitioner and stationed primarily at the worksite of an unaffiliated employer will not be controlled and supervised principally by the unaffiliated employer.

OPTIONAL STATEMENT #1 – No Contest:

USCIS will not dispute the petitioner's claim that the beneficiary will be supervised and controlled by the petitioner in order to establish the first requirement of the L-1 Visa Reform Act. Thus, according to the petitioner it appears that the alien will be controlled and supervised principally by the petitioner.

OPTIONAL STATEMENT #2 – Petitioner does not Control the Beneficiary:

Although the petitioner states that the beneficiary will be controlled and supervised by the petitioner, absent additional competent, objective evidence, the record is insufficient to establish the petitioner's claim.

Position is labor for hire for the unaffiliated employer

The second part of the issue to be discussed is whether 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.

NOTE TO ADJUDICATOR: If you want, you can describe the work to be done as stated by the petitioner or taken from the contract:

Satyam has been contracted by the client, Borg Warner, to provide IT services (as described in the attached support letter of May 10, 2007).

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> Borg Warner has designed an electronically controlled torque transmission unit Controller Area Network (CAN) is used for serial data transmission to and fro the ECU. The project is to implement the Diagnostic on CAN and Network layer for the diagnostic protocol as per the specifications provided. The Diagnostic on CAN is used for examining the various faulty vehicle parameters. All the diagnostic request and response to and from electronic unit are on CAN protocol and are passed through the network layer where it segmented an un-segmented. The network layer involves various timing parameters and state transition technique. CANalyzer with CAPL scripts were used to test the functionality of the above modules.

The copy of the supplier agreement between the petitioner and client, Borg Warner, states the following with regards to the petitioner's authorship under the provisions of the United States Copyright Act:

> 4. Should the work performed by SUPPLIER [Satyam Computer Services Limited] for BW under this Agreement or any purchase order or the like issued by BW result in any invention or work of authorship, whether patentable, copyrightable or not, regarding any automotive component or assembly, or the manufacture or use thereof, including any software, control logic, algorithm or the like, SUPPLIER hereby assigns and shall assign to BW all right, title and interest to such invention or work of authorship and to any patents, copyrights or other intellectual property which SUPPLIER may obtain thereon. SUPPLIER will assist BW, at the request and expense of BW, in the completion and execution of all documents necessary to obtain such patents, copyrights or other intellectual property and perfect and record BW's ownership thereof. <u>SUPPLIER agrees that any such work of authorship which can be construed to be "work for hire" under the provision of the United States Copyright Act shall be considered a "work for hire."</u> (Underlining added)

It appears from the record that the placement of the beneficiary outside the petitioning organization is essentially an arrangement to provide labor for hire rather than the placement in connection with the provision of a product or service. The service the petitioner is providing is, essentially, programmers for hire to [<u>CHOOSE</u>: change, alter, adjust, modify, fine tune, switch, convert, exchange, maintain...] the petitioner client's already existing system and/or software rather than develop the petitioner's own software. The knowledge the beneficiary possesses appears to be that of the petitioner's tools, procedures, and methodologies to be applied to the client's existing program. Therefore, the beneficiary's knowledge may only be tangentially related to the performance of the proposed offsite activity.

As such, the petitioner has not established that the placement of the beneficiary at the worksite of the unaffiliated employer is not merely labor for hire. Therefore the petition is denied.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. <u>Matter of Brantigan</u>, 11 I. & N. Dec. 493. Here, that burden has not been met.

<u>One Issue Denial</u>

Consequently, the petition is denied for the above stated reason.

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Multiple Issue Denial

Consequently, the petition is denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

ATTACHMENT TO I-292

AILA InfoNet Doc. No. 14073040. (Posted 7/30/14)