Session 507: On Whose Authority? Overcoming Challenges with the Discretionary Reach of Immigration Agencies and Regulators

This program will provide practitioners with strategies, practical tips and best practices for managing challenges related to the discretionary authority of immigration agencies and regulators. The content will cover a wide array of practice areas within immigration, from those working on advocacy for prosecutorial discretion to those facing procedural and adjudicatory issues on business-related immigration matters.

Program Chair:
Jared C. Leung, Director, Fennemore Craig, P.C.

Moderator:
Jack C. Chen, Labor, Employment and Immigration Policy Counsel, Microsoft Corporation

Speakers:
Sarah Hawk, Shareholder, Business Immigration, Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Erin E. Oshiro, Senior Staff Attorney, Asian Americans Advancing Justice-AAJC
Patrick Shen, Partner, Fragomen Del Rey Bernsen & Loewy, LLP
2014 NAPABA Convention
CLE Agenda/Outline

Session: On Whose Authority? Overcoming challenges to the discretionary authority of immigration agencies

Saturday, November 8, 9:15 am

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Teleconference Recap: The Adjudication of L-1B "Specialized Knowledge" Worker Petitions - How Is It Working for You?

On February 7, 2012, the Office of the Citizenship and Immigration Services Ombudsman (Ombudsman's Office) hosted a teleconference to learn about the experiences of employers filing L-1B nonimmigrant petitions with USCIS.

Frederick Troncone, Senior Advisor to the Ombudsman on Employment Immigration, interviewed Bo Cooper, former General Counsel of the Immigration and Naturalization Service from 1999 until February 2003, when he became responsible for the transition of immigration services to the Department of Homeland Security. Mr. Cooper explained the intricacies of the L-1B visa classification and shared concerns frequently expressed by employers and their representatives.

The L-1B classification allows an employer to petition for an employee who has "specialized knowledge" of the employer's products, services, research, equipment, techniques, management, or other interests, or expertise in the employer's processes and procedures, from a qualified affiliated entity outside the United States. Stakeholders have expressed concerns that USCIS adjudicators are interpreting the term "specialized knowledge" too narrowly.

Mr. Cooper explained that the L-1B visa classification is an important tool for multinational companies seeking to manage globally competitive workforce mobility strategies. Companies make deliberate choices where to set up new operations, develop research centers, expand or add new product lines. In coming to the U.S., these multinational companies facilitate the expansion of U.S. job creation and the U.S. economy. Mr. Cooper explained that due to increasing immigration challenges directly related to transferring in specialized knowledge workers and other managers and executives, these multi-national companies are increasingly evaluating whether to do so in the United States. Mr. Cooper emphasized that the timely transfer of key personnel is a critical factor in this decision-making process.

Mr. Cooper encouraged USCIS to move to automatic extensions of L-1B petitions, giving deference to prior adjudication of the company's continuing need for the same "specialized knowledge" worker, and referenced the USCIS Adjudication Field Manual at Section 10.17 Note 1.

Teleconference participants joined the discussion, sharing their experiences with USCIS "specialized knowledge" petition adjudications.

- One stakeholder expressed concern that smaller companies are disproportionately impacted because the company or its annual income is considered too small by USCIS adjudicators. L-1B petitions are not statutorily or by regulation subject to a statutory minimum size or income requirements; small and medium-sized multinational companies are equally entitled and need to utilize the specialized knowledge worker transfers to compete in the global marketplace.
- Current L-1B processing times are routinely exceeding the 30 days. Petitioners need faster final adjudications due to tight planning schedules to stay competitive in the global environment.
- Stakeholders indicated they are not appealing denials to the Administrative Appeals Office (AAO) even when they think the decision was incorrect due to long processing times at AAO. Even if the company successfully secured a reversal, the outcome would be untimely, and therefore, irrelevant.
- Stakeholders expressed frustration with inconsistencies across the sister service centers despite USCIS’s bi-specialization model. A caller referenced receiving one L-1B petition...
approval and one denial for the same company for beneficiaries equally situated in terms of experience, training and knowledge, and expected to perform the same jobs at different locations. One petition was adjudicated at the Vermont Service Center and the other at the California Service Center.

- Attorneys have lamented a lack of predictability with regard to L-1 adjudications, making it difficult for multinational companies to plan.

Mr. Cooper stated that USCIS must be clearer on what is driving its increasing restrictive L-1B petition policy and adjudications. If the concern is fraud, then USCIS should address this directly and not mask it with restrictive actions. Multiple stakeholders inquired as to whether USCIS planned to issue further guidance on the issue of specialized knowledge, and recent announcements made by USCIS suggest that USCIS is working on this currently.

USCIS previously held a teleconference where some stakeholders expressed opposition to further L-1B guidance. These stakeholders explained that the existing L-1B guidance is sufficiently clear and flexible. Stakeholders further claim that despite a lack of any fundamental change in the governing law or regulations, USCIS is shifting to a more restrictive policies on L-1B cases, following a non-precedent 2008 AAO decision commonly referred to as the "CST" decision. Other stakeholders want clearly defined guidance for better predictability.

During the teleconference, the Ombudsman's Office suggested USCIS engage in formal notice and comment rulemaking under the Administrative Procedure Act to address stakeholder concerns. Rulemaking would help establish a clear set of rules to govern and guide both stakeholders and adjudicators as they seek to apply for or adjudicate these very important visa petitions.

The Ombudsman's Office continues to study USCIS' adjudication of L-1B petitions. Please share any comments or feedback related to this topic by emailing OISOmbudsman.PublicAffairs@hq.dhs.gov.

Last Published Date: June 29, 2012
AILA/CBP Liaison Practice Pointer:

Adjudication Procedures for Canadian L-1 Intracompany Transferee Petitions

Introduction

A United States or foreign employer may seek intracompany transferee classification for a citizen of Canada by filing an L-1 petition in conjunction with an application for admission by a Canadian citizen. 8 CFR §214.2(l)(17)(i). In recent months, the AILA/CBP liaison committee has received reports that in some U.S. Ports of Entry, CBP has been routinely sending the petition to a U.S. Citizenship and Immigration Services (USCIS) Service Center with a recommendation for denial. A careful reading of the regulations governing the adjudication by CBP officers of L-1 petitions when presented by a Canadian citizen in conjunction with an application for admission, however, suggests that this procedure should rarely be used.

The increasingly common CBP practice of sending un-adjudicated L-1 petitions to USCIS often results in a protracted delay in the adjudication process. Petitioners usually have no filing receipt number and are left with no means to follow-up on the petition and no predictable timeline for final resolution.

By closely following the procedures outlined in the applicable regulations, CBP officers would be able to fulfill their primary mission of excluding those aliens ineligible for admission to the U.S. while facilitating international travel by qualified alien workers. This Practice Pointer reviews the mandatory procedures provided by current regulations for CBP when receiving L-1 petitions from Canadian citizens concurrently with an application for admission. The procedures discussed below apply to both individual L petitions and to blanket L petitions.

This discussion assumes familiarity with the qualifications for employers to be an L petitioner that are set forth in 8 CFR §214.2(l)(1)(i) and (ii)(G) and the eligibility requirements for aliens to qualify for classification as an L-1 intracompany transferee appearing in 8 CFR §214.2(l)(1)(ii)(A). See also, Immigration and Nationality Act §§ 101(a)(15)(L), 101(a)(44) & 214(c)(2); CBP Inspector’s Field Manual §15.5(e)(1).

Intracompany Petition Procedures for Canadian Citizens

A qualifying employer prepares and files an L petition on behalf of a prospective alien intracompany transferee employee. The alien worker is not the petitioner; the alien worker is the passive beneficiary of the petition process.

A petition for L classification may be filed by a petitioning employer at a Service Center of the U.S. Citizenship and Immigration Services (USCIS) or may be presented by a citizen of Canada concurrently with an application for admission to the United States. 8 CFR §214.2(l)(17)(i) and (iii); CBP Inspector’s Field Manual §15.5(e)(2). An L petition filed by a citizen of Canada in conjunction with an application for admission must be presented at a Class A port of entry located on the United States-Canada land border or at a United States preclearance/pre-flight station in Canada. 8 CFR §214.2(l)(17)(i) and (iii); CBP Inspector’s Field Manual §15.5(e)(2); also see 9 FAM 41.54 N12.2 (which additionally lists “...a U.S.
airport handling international traffic...” as a location where such a petition may be presented.)
Regardless of where an L-1 petition is filed, the petitioning employer is not required to appear. 8 CFR §214.2(l)(17)(i); CBP Inspector’s Field Manual §15.5(e)(2).

Procedures for Handling Deficient or Deniable Petitions

1. Deficient Petitions

If an L petition presented by a Canadian citizen in conjunction with an application for admission is lacking necessary supporting documentation or is otherwise deficient, the inspecting CBP officer shall return it to the applicant for admission. 8 CFR §214.2(l)(17)(iv). The officer should instruct the applicant for admission to obtain the necessary documentation from the petitioner to correct the deficiency. Id. The officer should not accept the filing fee for a petition lacking necessary documentation or that is otherwise deficient. Id. Instead, the filing fee should be accepted once the necessary documents are presented or the deficiency overcome. Id.

The foregoing paragraph contains several noteworthy observations. First, the Code of Federal Regulations governing the Canadian L petition adjudication procedures uses mandatory language, not permissive language. The regulations clearly state that the CBP inspecting officer “shall return” such a petition to an applicant. Officers do not have discretionary authority in this matter. Accordingly, CBP officers are required to return to the applicant any L-1 petition lacking necessary documentation or that is otherwise deficient.

Second, officers should not accept a petition filing fee for any petition that lacks necessary documentation or is otherwise deficient. Of necessity, officers will be required to conduct an initial review of an L petition presented by a citizen of Canada concurrently with an application for admission to the United States in order to determine if the petition includes all necessary documentation or is otherwise deficient. Only after making such a preliminary review will an officer be able to determine whether the petition includes sufficient documentation and information or whether it should be returned to the applicant along with the tendered filing fee. Only when an applicant returns with sufficient documentation or information to overcome a deficiency may the officer accept the filing fee for the L petition.

Third, there is an implicit rationale underlying the procedures described in 8 CFR §214.2(l)(17)(iv). As noted in the section above, the petitioner, not the Canadian citizen applicant for admission, is responsible for preparing and filing the L petition. Furthermore, the petitioner is not required to appear when an L petition is filed, whether this takes place at a USCIS Service Center or at a port of entry. Therefore, the Canadian applicant for admission, in most circumstances, will not have documentation or information demonstrating that the petitioner is a qualifying organization. Documentation relating to the duties to be performed by the beneficiary also is unlikely to be available at a port of entry. Such documentation normally would be needed to provide details concerning the qualifying nature of the duties performed. In apparent acknowledgment of these realities, the regulations instruct inspecting officers to return incomplete or deficient petitions to the applicant in order to gather the needed documents or information from the petitioner.
2. Clearly Deniable Petitions

In some cases, an L petition presented by a Canadian citizen concurrently with an application for admission to the United States will be clearly deniable. In such circumstances, the inspecting officer should accept the petition with the filing fee and notify the petitioner of the denial, the reasons for the denial and the right of appeal. 8 CFR §214.2(l)(17)(iv).

It may initially appear that there is a conflict between the regulatory mandate to return to an applicant an L-1 petition lacking documentation or otherwise deficient, with the instructions to deny clearly deniable petitions. Upon closer examination, however, these two instructions are not difficult to reconcile. Consider first the definition of the term “deficient.” This word is defined as an item “lacking in some necessary quality or element.”¹ Useful synonyms are terms such as incomplete, fragmental, fragmentary, partial. Id. In contrast, the term “clearly” is defined as an activity performed “in a clear manner.”² Useful synonyms are terms such as “inarguably, incontestably, incontrovertibly, indisputably.” Id.

When a petition is deficient, it is incomplete. Information or documentation will not be present with the petition. The absence of information will leave a question remaining about whether the petitioner is a qualifying organization or whether the beneficiary is eligible for classification as an L-1 intracompany transferee. When a petition is deficient, it is only partially complete. There remains the possibility that production of additional documentation or information may demonstrate the petitioner and/or the beneficiary are eligible to utilize the L-1 intracompany transferee category.

Conversely, a petition that is clearly deniable cannot be cured by presentation of additional documentation or information. No question remains unanswered by the documentation or information presented with such a petition. Instead, the facts will indisputably demonstrate that the petitioner is not a qualifying organization or that the beneficiary does not satisfy the eligibility requirements for L-1 classification.

Since current business structures and employment relationships may be complex, examples help to distinguish those fact patterns presented which are clearly deniable from those that are merely deficient. Clearly deniable petitions are easier to identify since these must be situations that obviously, incontestably demonstrate ineligibility for L-1 classification.

Example #1: To be a qualifying organization, a petitioner must be engaged in business as an employer in the U.S. and at least one other country. 8 CFR §214.2(l)(1)(ii)(G). Therefore, an employer that has no affiliate, subsidiary, parent, or branch outside the U.S. and conducts business as an employer solely in the U.S. clearly is not a qualified L

¹ http://mw1.meriam-webster.com/dictionary/deficient
² http://mw1.meriam-webster.com/dictionary/clearly
petitioner. Where an L petition demonstrates that the petitioner has no direct or indirect presence outside the U.S., the petition is clearly deniable.

Example #2: An alien worker must have engaged in employment outside the U.S. for the petitioner, or an affiliate, subsidiary, parent, or branch of the petitioner, for at least one year during the three years preceding the filing of the L petition. 8 CFR §214.2(l)(1)(ii)(A). Therefore, an alien worker who has never been employed outside the U.S. by the petitioner, or an affiliate, subsidiary, parent, or branch of the petitioner, clearly is not qualified for L classification. Where an L petition demonstrates that the beneficiary has never worked outside the U.S. for the petitioner, or any related entity, the petition is clearly deniable.

Those situations in which a petition is deficient or lacking supporting documentation which, if produced, may demonstrate eligibility for L classification usually involve more complex fact patterns.

Example #3: To be a qualifying subsidiary of a petitioner, an entity normally must have at least 50% common ownership with that petitioner. In some circumstances, an entity that has less than 50% common ownership may be a qualifying subsidiary provided that there is managerial control over the entity. 8 CFR §214.2(l)(1)(ii)(K). Where a petition indicates that a company inside the U.S. has less than 50% common ownership with the beneficiary’s employer abroad, it is possible that the petitioner could produce additional documentation to demonstrate the existence of the required managerial control. Since additional documentation may exist to demonstrate the existence of facts supporting L-1 eligibility, such a case is an example of a deficient petition rather than one that is clearly deniable.

Example #4: To qualify as an intracompany transferee, an alien worker must have been employed outside the U.S. for at least one year during the preceding three years by a qualifying entity in a capacity that involved executive, managerial, or specialized knowledge duties. 8 CFR §214.2(l)(1)(ii)(A). An alien worker may be classified as an intracompany transferee and admitted to the U.S. in L-1 status if he possesses advanced knowledge of an organization’s processes or procedures. 8 CFR §214.2(l)(1)(ii)(D). An L-1 petition may describe duties performed by the alien beneficiary relating to the organization’s processes or procedures that requires knowledge that is beyond the elementary or basic level. A question may remain about whether such knowledge is sufficiently advanced to qualify as “specialized knowledge” as defined in 8 CFR §214.2(l)(1)(ii)(D). In this situation, it is possible that additional documentation or information could be provided by the petitioner that would demonstrate the advanced nature of the knowledge required to perform the job duties described. Accordingly, in such cases, the inspecting officer should not accept the filing fee and should return the L-1 petition to the applicant affording the opportunity to overcome the deficiency.
The examples given are not intended to be a comprehensive list of those situations in which an L-1 petition may be deficient and correctable or clearly deniable. The examples provided here are intended, instead, to be illustrative of some situations in which an L-1 petition may be clearly deniable or be merely deficient requiring CBP to return the petition and filing fee to the applicant.

**Redress Procedures**

As noted above, the regulations governing the procedures for CBP to accept and adjudicate L-1 petitions presented by Canadian citizen applicants for admission are mandatory. Officers are required to follow these procedures. In those situations where a CBP officer receives an L-1 petition from a citizen of Canada at a port of entry and does not approve it, deny it, or return it with the filing fee, attorneys may wish to bring the matter to the attention of the appropriate CBP supervisor or chief (AILA Doc. Nos. 11022365³ and 09090364⁴). While the regulation gives CBP officers the authority to forward a petition to a USCIS Service Center with a recommendation for denial, this should only be in those circumstances where “…a formal denial order cannot be issued by the port of entry…” 8 CFR §214.2(l)(17)(iv).

**Spouse and Dependent Children**

The spouse and dependent minor children of an alien classified as an L-1 intracompany transferee are eligible for L-2 classification if accompanying or following to join the principal alien. 8 CFR §214.2(l)(7)(ii). An L-2 visa is not required for the Canadian citizen spouse or child of an L-1 worker. 8 CFR §214.2(l)(17)(v)(A). Such a spouse or child who is not also a citizen of Canada, however, must obtain an L-2 visa before being admitted in L-2 status. 8 CFR §214.2(l)(17)(v)(B). Attorneys are advised to remind CBP officers in writing that current CBP protocol directs them to send a notice of the Canadian L-1 worker’s approval to the U.S. Department of State Kentucky Consular Center for entry into the Petition Information Management Systems (PIMS) in order to permit a U.S. consulate to issue an L-2 visa to the dependents. (AILA Doc. No. 11012063).⁵

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³ [http://www.aila.org/content/default.aspx?docid=34553](http://www.aila.org/content/default.aspx?docid=34553)
⁴ [http://www.aila.org/content/default.aspx?docid=29963](http://www.aila.org/content/default.aspx?docid=29963)
⁵ [http://www.aila.org/content/default.aspx?docid=34206](http://www.aila.org/content/default.aspx?docid=34206)
Dear Applicant:

Your application has been kept pending under Section 221(g) of the Immigration and Nationality Act.

Since the individual beneficiaries of blanket petitions are not named in the petition, their eligibility for L status is not examined by the INS. Consequently, according to the Code of Federal Regulations under 9 FAM 41.54 N32.1, consular officers are responsible for verifying the qualifications of alien applicants for L classification in blanket petition cases.

Some beneficiaries of L1-B blanket petitions are defined as "specialized knowledge professionals." Under 9 FAM 41.54 N8.2-2, such beneficiaries must meet the requirements as set forth below.

a) To serve in a specialized knowledge capacity, the alien's knowledge must be different from or surpass the ordinary or usual knowledge of an employee in the particular field, and must have been gained through significant prior experience with the petitioning organization. A specialized knowledge employee must have an advanced level of expertise in his or her organization's processes and procedures or special knowledge of the organization which is not readily available in the United States labor market.

b) Some characteristics of an employee who has specialized knowledge are that he or she: 1) possesses knowledge that is valuable to the employer's competitiveness in the marketplace; 2) is uniquely qualified to contribute to the U.S. employer's knowledge of foreign operating conditions, 3) has been utilized as a key employee abroad and has been given significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position; and 4) possesses knowledge which can be gained only through extensive prior experience with the employer.

Please note that petitions to accord L status may be approved for persons with specialized knowledge, but not for persons who are merely skilled workers. Specialized knowledge capability is based on the beneficiary's special knowledge of a business firm's product or service, management operations, decision-making process, or similar elements that are not readily available in the U.S. labor market. INA 101(b)(15)(L) was not intended to alleviate or remedy a shortage of U.S. workers.

Under 9FAM 41.54 N14.7, if the consular officer determines that an alien has not established his or her eligibility for an L visa under a blanket petition, the consular officer's decision shall be final. In addition, the FAM states that each application must be "clearly approvable" or the consular officer may not approve the petition. In your case, the consular officer determined that the application did not reach this threshold.

Please note that you have not been refused; the application has been kept pending under Section 221(g) of the INA. The consular officer did not find your application for blanket L1 visa status clearly approvable. We therefore recommend that the U.S. company or affiliate file an H1B or L petition on your behalf. Once you are in possession of a new approval notice, you are welcome to reapply in person at the Consulate.

Sincerely,

Consular Officer
**Guidance on L Visas and Specialized Knowledge**

**Reference Document:** STATE 002016, 01/11

1. The following guidance is in response to a request [redacted] for specific guidelines for L visa adjudications, particularly in regard to evaluating claims of "specialized knowledge," and will be useful to all posts. There is a concern about the potential for inconsistent adjudicatory standards at different constituent posts and clear standards would allow for more consistent adjudication.

2. Unfortunately, the statutory language defining "specialized knowledge" is not simple or clear. Specialized knowledge is defined in INA 214(c)(2):

   (B) For purposes of section 1101 (a)(15)(L) of this title, 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.

3. The phrase "specialized knowledge" is not otherwise defined in the law, and there have been few administrative or judicial opinions interpreting it. This statutory definition has been called tautological, in that it states an alien will serve in a capacity involving specialized knowledge if the alien has special knowledge. As the DHS/AAO noted, "the definition is less than clear, since it contains undefined, relativistic terms and elements of circular reasoning." A decision by a District Court in Washington, D.C. was even more critical: "Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning."

4. Given the relative lack of statutory clarity or interpretative guidance, determinations as to specialized knowledge by necessity will often depend on the consular officer’s expertise in the context of the specific case’s circumstances. Again, this has been noted by the AAO: "By deleting this element in the ultimate statutory definition and further emphasizing the relativistic aspects of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency’s expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave legacy INS a more flexible standard that requires adjudication based on the facts and circumstances of each individual case.

5. Despite the lack of simple, bright-line, legal criteria, there are factors which have been cited by INS/DHS sources as valid for making specialized knowledge determinations. Post can use the following criteria to assist in making this adjudication:

6. The proprietary nature of the knowledge - While it is not strictly required that specialized knowledge involve knowledge of procedures or techniques proprietary to the petitioning company, the possession of significant proprietary knowledge can in itself meet the specialized knowledge requirement. This is expressly stated in INA 214(c)(2), which makes reference to "special knowledge of the company product and its application in international markets" or "advanced level of knowledge of processes and procedures of the company." Legacy INS has in the past indicated that proprietary knowledge will meet
the L requirement when it "would be difficult to impart to another without significant economic inconvenience." This knowledge can be acquired through on-the-job training.

7. If everyone is specialized, then no one is – The legislative history indicates that the specialized knowledge requirement was intended for "key" personnel. While it could be true in a small company that all experienced employees are "key," for a larger company there should be a distinction between "key" and normal personnel. This could be made based on length of experience, level of knowledge, or level of responsibility - e.g., the person has been made responsible for more complicated and/or sensitive projects. If a company is claiming that all the employees working on technical issues should be considered to have specialized knowledge, the company is probably employing too low a standard. On the other hand, there is no legal basis to require any specific limit on the number of employees that can be considered key. As indicated, for a small company, all employees with responsible positions may be key. A large company can have a large number of key employees who would meet the specialized knowledge criteria, but there should be a distinction between those employees and ordinary skilled workers.

8. The concept of "more than ordinary" - The use in the INA of the terms "special" and "advanced" implies that the employee has more skills or knowledge than the ordinary employee. This does not require an "extraordinary" level of skills, merely more than that of the ordinary employee in the company or the field. This could involve knowledge of special company projects or greater than normal experience and/or knowledge of software techniques.

9. [Redacted]

10. Job shops - In addition to specialized knowledge criteria, the issue of job shops is important to the determination of ineligibility and is of apparent concern to Post.

11. Employer/employee relationship - L is a status for persons being transferred to work within a company structure and not for another company, and the issue of employer/employee relations has always been critical to the L adjudication. The INA flags the importance of this issue in INA 214(c)(2):

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101 (a)(15)(L) of this title and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101 (a)(15)(L) of this title 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.

12. The INA restrictions on job shops reflect general legal definitions of the employer/employee relationship. Standards on making employer/employee determinations can also be found in the L FAM notes:

9 FAM 41.54 N8 EMPLOYER-EMPLOYEE RELATIONSHIP (CT:VISA-1569; 10-04-2010)
The essential element in determining the existence of an "employer-employee" relationship is the right of control; that is, the right of the employer to order and control the employee in the performance of his or her work. Possession of the authority to engage or the authority to discharge is very strong evidence of the existence of an employer-employee relationship.

9 FAM 41.54 N8.1 Source of Remuneration and Benefits Not Controlling (CT:VISA-1569; 10-04-2010)
The source of the beneficiary’s salary and benefits while in the United States (i.e., whether the beneficiary will be paid by the U.S. or foreign affiliate of the petitioning company) is not controlling in determining eligibility for L status. In addition, the employer-employee relationship encompasses a situation in which the beneficiary will not be paid directly by the petitioner, and such a beneficiary is not precluded from establishing eligibility for L classification.

9 FAM 41.54 N8.2 Employment in the United States Directly by Foreign Company Not Qualifying (CT:VISA-1569; 10-04-2010)
A beneficiary who will be employed in the United States directly by a foreign company and who will not be controlled in any way by (and thus, in fact, not have any employment relationship to) the foreign company’s office in the United States does not qualify as an intra-company transferee.

13. The issue of control by the sending employer is critical. When the employment is off-site, there can be two ways of determining control, both indicated in the INA definition. The employee can be directly controlled by a supervisor from the sending company. The employee may also work off-site without direct supervision at that site, but in "connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary." This could mean, for example, that the employee would be working for an off-site, unaffiliated company that has no IT department, and therefore the employee would be using specialized knowledge that only the petitioning company can oversee or evaluate. It could also mean the employee is working on a proprietary project involving knowledge and skills specific to the petitioning employer and not possessed by the unaffiliated company. On the other hand, an off-site employee working in the IT section of an unaffiliated company who is not under the direct supervision of the petitioner or working on a proprietary project involving knowledge and skills specific to the petitioner would probably not qualify for L status based on job shop concerns.
Guidelines for the Filing of Amended H and L Petitions

All Service Center Directors
All District Directors
All Officers in Charge

Office Of Operations (HQOPS)

This memorandum provides general policy guidelines relating to the requirements for filing amended or new petitions for H and L nonimmigrants. As stated in the relating regulation, an amended petition must be filed when there is a material change in the terms and conditions of employment or the beneficiary’s eligibility. The amended petition procedure was not devised merely as an avenue to advise the Service of minor changes or the beneficiary’s eligibility. Petitioners should apprise the Service of these minor, immaterial changes when extensions of the beneficiary’s stay are filed.

H Petitions

When a beneficiary is transferred from one employer to another, a new petition must be filed by the new employer. This procedure insures that the new employer is liable for the alien’s return transportation abroad and that the employer files a labor condition application.

When a beneficiary is transferred from a firm to another firm within the same organization, a new or amended petition should be filed if the new firm becomes the beneficiary’s employer. The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien’s employer and, provided further, the supporting labor condition application remains valid.

The current operations instructions provide that when a beneficiary is transferred from one branch of a firm to another branch of the same firm, a new or amended petition need not be filed. This is not inconsistent with the above paragraph since a branch of a firm is not considered to be a separate entity from its parent company.
Appendix II, continued

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An amended or new petition need not be filed when the petitioner changes its name. The petitioner should advise the Service of the name change if and when it files to extend the alien’s stay.

Changes in the ownership structure of the petitioning entity do not require the filing of a new or amended petition. It is understood that the new owner(s) of the firm assumes the previous owner’s liabilities which would include the assertions the prior owner made on the labor condition application.

When the beneficiary’s employer merges with another firm to create a third entity which will subsequently employ the beneficiary, a new or amended petition must be filed since the merger has created a new legal entity. This circumstance is distinguished from a change in ownership, which does not necessarily create a new entity.

A change of the alien’s duties from one specialty occupation to another requires the filing of an amended petition. For example, an alien physician admitted to the U.S. to teach or conduct research must have an amended petition filed in his/her behalf in order to do clinical care.

II. Individual Petitions

A significant change in the beneficiary’s duties, for example, from specialized knowledge to managerial/executive, requires the filing of an amended petition. Changes from one managerial position to another do not require an amended petition. However, the petitioner must inform the Service of the change in the beneficiary’s duties when an extension of stay is filed for the alien.

If the alien is transferred from one company to another company in the same organization and becomes the employee of the new company, an amended petition must be filed. This is the only way the Service will be able to ascertain if the new firm is related to the foreign firm in a qualifying capacity.

If the alien is transferred from one company to another company in the same organization but does not become the employee of the new company, an amended petition need not be filed.
Appendix II, continued

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L-1 Blanket Petitions

The transfer of the beneficiary to another firm in the same organization does not require the filing of an amended or new petition provided that the new firm is listed in the blanket petition. Petitioners can utilize the amended petition procedure to add new organizations to the initial blanket petition.

Changes in the duties of an alien admitted to the U.S. under a blanket petition do not require the filing of amended petition. Since blanket petitions do not relate to specific beneficiaries, there is no petition to amend. The Service should be apprised of this change when an extension of the beneficiary's stay is sought.

In both individual and blanket petitions, a change of the name of the petitioning firm does not require the filing of an amended petition.

In both individual and blanket petitions, changes in the ownership of the U.S. firm require the filing of an amended petition. This is the only way the Service will be able to ascertain if the U.S. firm continues to be related in a qualifying capacity to the foreign entity. Likewise, the merger of the beneficiary's U.S. employer with another firm or firms requires the filing of an amended petition.

James J. Hogan
Executive Associate Commissioner, Operations

Appendix III

Immigrant Investor Questions 20 JUL 1992

Joseph L. Thomas
Director, WSC
ATTN: Blake Goto, I-140 Unit

Adjudications
(MOADDY)

The following are answers to questions raised in your facsimile transmittal of July 13.
FILE: WAC 10 081 50986  Office: CALIFORNIA SERVICE CENTER  Data: JAN 19 2011

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]


ON BEHALF OF PETITIONER:

DEHAI TAO
DEHAI TAO, P.C.
24 FRANK LLOYD WRIGHT DR.
ANN ARBOR, MI 48106

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

[Signature]
Perry Rhew
Chief, Administrative Appeals Office

www.uscis.gov

AILA InfoNet Doc. No. 11012430. (Posted 01/24/11)
DISCUSSION: The Director, California Service Center, denied the nonimmigrant petition and certified the decision to the Administrative Appeals Office (AAO) for review, in accordance with 8 C.F.R. §103.4(a)(5). The AAO will withdraw the director's decision and approve the petition.

The petitioner filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1101(a)(15)(L). The petitioner, a Michigan corporation, operates as an automotive parts supplier. It states that it is a subsidiary of Fawer Automotive Parts Limited Company, located in China. The petitioner seeks to employ the beneficiary in the position of president for a period of three years. The beneficiary was previously granted L-1A status in order to open a new office in the United States, and the petitioner's request to extend his status was denied in October 2009.

The petitioner then filed the current "new employment" petition on January 29, 2010. The director denied the petition on February 25, 2010, concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On November 17, 2010, the director issued a new decision denying the petition on the same grounds and certified the decision to the AAO.

In accordance with 8 C.F.R. §103.4(a)(2), the director notified the petitioner of the certification and provided an opportunity for the petitioner to submit a brief to the AAO within 30 days. Counsel for the petitioner submitted a brief and additional evidence to the AAO on December 15, 2010.

On certification, counsel claims that U.S. Citizenship and Immigration Services (USCIS) failed to follow its own policies with respect to extension petitions. Counsel asserts that the USCIS should have deferred to its prior determination that the position offered is in fact in a managerial or executive capacity. Counsel further asserts that the director's decision ignores the sizeable operations of the petitioner's Chinese parent company, mischaracterizes the nature of the roles performed by the beneficiary's subordinates, places undue emphasis on the size of the U.S. company, and is based, in part, upon irrelevant factors such as the size of the petitioner's office space and the beneficiary's salary relative to the petitioner's other employees. In further support of the petition, the petitioner submits a letter from the president of the petitioner's parent company, who seeks to clarify the nature of the beneficiary's proposed duties for the U.S. subsidiary and clarify discrepancies noted in the director's decision.

Upon review, the AAO agrees with counsel that the director's decision is based, in part, on errors of fact and flawed reasoning. The petitioner has met its burden to establish by a preponderance of the evidence that the beneficiary will be employed in a primarily managerial capacity. Accordingly, the AAO will withdraw the director's decision and approve the petition.

Although the petition will be approved, the AAO notes that this matter is not, as claimed by counsel, a request for an extension of the beneficiary's previously granted L-1A status. Furthermore, even if this were an extension petition, the director owed no deference to the previous finding that the beneficiary qualified for L-1A status to open a new office. See Memorandum of William R. Yates, Associate Director for Operations,
The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility of Petition Validity, 2 fn. 1 (April 23, 2004).

I. The Law

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

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

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien’s prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien’s prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

II. The Issue on Certification

The sole issue to be addressed in this certification proceeding is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 29, 2010. The petitioner stated on the Form I-129 that it had five employees as of that date.

In a letter dated January 27, 2010, the petitioner described its U.S. operations and the activities of its corporate group. The petitioner is an indirect subsidiary of [Redacted] which the petitioner describes as a Fortune 500 company and the "oldest and largest automotive company in China." The petitioner stated that its direct parent company has ten manufacturing subsidiaries and 20 joint venture companies with foreign partners, with over $380 million in annual sales and 10,000 employees worldwide.

The petitioner indicated that the U.S. company was established in Michigan in 2008 "to develop and expand market shares for our various automotive products in North America, and to provide timely customer service and technical support to our customers." The petitioner indicated that after almost two years of operations it has "secured substantial business deals including import, export of automotive parts and components, technical and engineering service agreement, supplier agreements, etc."
The petitioner's initial letter included a lengthy list of the beneficiary's job duties separated into two parts. In a request for additional evidence ("RFE") dated February 4, 2010, the director instructed the petitioner to submit a more detailed description of the beneficiary's duties, advising the petitioner that it should indicate the percentage of time spent in each of the listed duties. The petitioner's response to the RFE included the same list of duties as the initial letter, with the requested percentages added to the latter section of duties. The job description submitted in response to the RFE was quoted in its entirety in the director's decision and will not be repeated here. Briefly, the petitioner indicated that the beneficiary's time would be allocated to formulating and overseeing business strategies; directing sales, distribution and supply management; managing marketing strategies; overseeing compliance with government rules and requirements applicable to the petitioner's business; overseeing resource allocation; directing human resources management; and reporting and interacting with the parent company.

The petitioner's initial supporting evidence included an organizational chart which shows that the beneficiary, as president, will supervise a financial manager, [redacted] and a sales manager, [redacted]. The chart indicates that [redacted] (Aftermarket), [redacted] (OEM Passenger Car) and [redacted] (OEM Commercial Vehicle), report to [redacted].

The petitioner also submitted evidence that it entered a Sales Representation Agreement with [redacted] to represent it in the sales of products for North American OEM customers. Under the terms of the agreement, [redacted] is responsible to obtain quote opportunities, coordinate the quote process, answer customer's questions and requirements, attend customer's business and technical meetings, and follow up product shipments until the supply relationship with the customer is terminated. The agreement provides that [redacted] agents are to be paid by commission, in addition to a $1,000 monthly service fee. The AAO notes that the agreement appears to have been signed by [redacted] on behalf of [redacted]. The petitioner also provided copies of business correspondence between the petitioner's customers, the petitioner and Keith Baliko which establish that [redacted] is actively involved in the quotation and sales process on behalf of the petitioning company.

In the RFE issued on February 4, 2010, the director requested, inter alia, the following: (1) detailed description of job duties, educational level, annual salaries/wages and immigration status for the five employees identified on the organizational chart; (2) the source of remuneration of all employees; (3) copies of the petitioner's State Quarterly Wage Reports for all employees for the last six quarters; (4) copies of the U.S. company's payroll summary, Forms W-2 and W-3, evidencing wages paid to employees for the years 2008 and 2009; and (5) a copy of the petitioner's corporate income tax returns, with all schedules and attachments, for the years 2008 and 2009. As noted above, the director also requested a more detailed description of the beneficiary's duties and the percentage of time he allocates to each duty.

The petitioner provided the requested position descriptions for the beneficiary's employees in a letter dated February 5, 2010. The petitioner stated that in addition to supervising the U.S.-based employees, the beneficiary will continue "giving directions to some of the managers" based at the Chinese parent company. The petitioner indicated that [redacted] serves as a material engineer with an annual salary of $74,000, holds an H-1B visa, and has a Master's degree in computer applications and a Bachelor's degree in Material Engineering. [redacted] serves as financing manager at an annual salary of $43,000, holds an L-1A visa, and has a Bachelor's degree in Economics. Finally, the petitioner indicated that the three sales managers, [redacted] and [redacted], are all U.S. citizens who work on commission with a monthly base salary of $1,000 to $2,000. The petitioner stated that each hold Bachelor's degrees (in metal
stamping and mechanical engineering, respectively), and Mr. Baliko has a Master's degree in Business Administration.

The petitioner submitted the requested state quarterly wage reports for all four quarters of 2009, along with its payroll journal report for January 2010. The January 2010 report reflects wages paid to all five employees, and indicates that the sales managers receive Form 1099 rather than an IRS Form W-2. The petitioner's 2009 IRS Form 1040, U.S. Corporation Income Tax Return, shows that the company paid $110,707 in compensation to officers, $5,500 in salaries and wages, $89,000 in outside services, and $56,588 in professional fees.

The director denied the petition on February 25, 2010, and subsequently issued a new decision on November 17, 2010, which was certified to the AAO. The director denied the petition on the sole grounds that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive nature. The director noted that the petitioner appeared to be relying on partial sections of the regulations defining managerial capacity and executive capacity, and found that several of the beneficiary's proposed duties paraphrase elements of the regulatory definitions. The director determined that the petitioner "listed the duties as a conglomerate and left it up to USCIS to decide whether or not a duty was primarily managerial and/or executive in nature."

The director went on to discuss various discrepancies in the petitioner's submissions which she determined had not been addressed satisfactorily. The director noted that the petitioner had initially identified Mr. __ as holding the position of sales manager; however, in response to the RFE, identified him as a materials engineer and provided a job description that did not appear to encompass the duties of a sales manager. The director noted that __ had been granted a change of status to H-1B classification more than one month before the petition was filed, thus, it remained unclear what position he actually holds.

The director also found that the submitted evidence fails to establish any payments to the claimed sales managers. The director noted that the state quarterly reports for 2009 did not reflect any wages paid to these employees, although all three employees were named on the January 2010 payroll journal report. The director explained the perceived discrepancy as follows:

According to the payroll's legend, however, the three sales managers are classified as receiving 1099s and no taxes appeared to be withheld for any of three persons. Furthermore, the bank account summary provided for January 2010 indicates that only $9,721.46 was debited under the description of __ primepay payroll 1331214732 01220." Yet the payroll summary clearly shows that __ earned $3,588 and __ earned $6,235, which when combined, is equivalent to $9,823. Thus it does not appear that the U.S. entity actually paid the three sales managers the monthly base salaries indicated, which would have added an extra $4,000 to the amount debited (and/or did not pay and their professed wages). Lastly, the e-mail correspondence submitted indicates e-mail address to be __ and not __. As such, USCIS is unclear as to who the three sales managers are actually working for or reporting to and how they are being remunerated.

The AAO notes that the director misread the petitioner's payroll journal and January 2010 bank statement. The payroll journal for the month of January 2010 indicates that __, __, and __
WAC 10 081 50986
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were paid by direct deposit, in an amount totaling $9,721.46, which is precisely the amount reflected in the petitioner's bank records. The director appears to have relied upon the gross wages paid to [redacted] in calculating the expected payroll deposit amount. The payroll journal also clearly indicates that [redacted] and [redacted] were paid by company check, rather than by direct deposit.

The director further found that there was a discrepancy with respect to the beneficiary's employment dates as president of the U.S. company because it appeared that he signed a lease in that capacity two weeks before a job offer letter for the position was issued by the parent company on September 28, 2009. The director concluded that "it appears that the beneficiary was being employed for an unspecified period of time under the position title of president before the issue date of the appointment letter." The director also questioned why the beneficiary was paid the same wages during the second and third quarters of 2009, if he was in fact the president of the company and [redacted] is his subordinate.

The AAO notes that this entire line of inquiry is irrelevant to the matter at hand. The beneficiary was granted L-1A status for employment as the petitioner's president from September 2008 through September 2009. Therefore, the fact that he signed a lease in that capacity on September 14, 2009 does not create a discrepancy or raise questions regarding his actual job title. Further, the beneficiary's salary as paid during the validity period of a previous petition that has since expired is not determinative of his position within the company and provides insufficient basis for USCIS to question whether he was or is in fact the company's president. The instant petition is a new petition. The beneficiary has been offered the position of president at an annual salary of $85,000, which would make him the petitioner's highest paid employee. Nevertheless, the AAO finds no reason to doubt that the beneficiary previously held this position, regardless of what wages were paid to him during the company's first year of operation.

The director noted that based on the perceived inconsistencies and the petitioner's failure to provide the requested IRS Forms W-2, USCIS is "unable to determine which subordinate employees the beneficiary will be directing and/or supervising, what the claimed subordinate positions are in the organization, where the beneficiary's duties appear to be in the organizational hierarchy, or whether or not the U.S. entity has reached a level of organizational complexity such that the hiring/firing of personnel, discretionary decision-making and setting company goals and policies constitute significant components of the duties performed on a day-to-day basis."

The director further observed that, even if the discrepancies had been resolved, the record does not establish that the beneficiary's proposed position is primarily executive or managerial. The director, in addressing the petitioner's "minimal staffing level," noted that in a company with a president, four managers and an engineer, the president would "by necessity perform the operational duties of the U.S. organization." The director acknowledged that the petitioner's reasonable needs and stage of development must be considered pursuant to section 101(a)(44)(C) of the Act, but found that, here, the petitioner "has not explained how the reasonable needs of the petitioning enterprise justify the beneficiary's performance of non-managerial or non-executive duties."

In reaching this conclusion, the director emphasized that the petitioner's 2008 audited financial statements identify the company as "a development stage company." In addition, the director noted that the petitioner's updated lease documents appear to show that the petitioner is in possession of only 468 square feet of office space. The director concluded that "in light of the small working space, it is not unreasonable to assume that..."
the petitioning organization is not in a stage of development, having a relatively small working space, to reasonably require the beneficiary's job duties."

The AAO notes that neither the petitioner's 2008 financial statements nor the petitioner's "apparent" office space provide an adequate basis for drawing any conclusions regarding the beneficiary's employment capacity. Regardless, the AAO notes that the petitioning company was established during 2008 and therefore was reasonably characterized by its accountants as a "development stage company" during that fiscal year. Furthermore, the petitioner's lease executed in September 2009 clearly indicates that the company has rented 2,499 square feet of office space. It is unclear how the director derived the lesser figure of 468 square feet.

The director went on to question whether the beneficiary's claimed subordinate employees are employed in a professional capacity. The director noted that, after consulting the U.S. Department of Labor's 2009-2010 Occupational Outlook Handbook, it is evident that neither a sales manager nor a financial manager requires a bachelor's degree. The director further found that none of the alleged managerial positions appear to have any subordinate employees, such that they could be classified as managers or supervisors. The director acknowledged that the position of material engineer is a professional position, but found that the evidence as a whole does not establish that the beneficiary would primarily supervise a subordinate staff comprised of managerial, supervisory or professional positions. The director concluded that the beneficiary would more likely than not be acting as a first-line supervisor of non-professional employees, rather than as a manager or executive.

Counsel's brief on certification addresses various factual and legal errors on the part of the director, several of which have been addressed above. Counsel alleges that the director ignored the sizeable operations of the petitioner's parent company, noting that "the beneficiary's position as highest authority of that company's arm in the United States necessarily implies the abundance of high level managerial work for him to perform in his capacity as a key manager in coordinating the operation of the Chinese and US offices." Counsel further argues that the director ignored the fact that the beneficiary would continue to supervise employees in China.

In addition, counsel contends that the director erred by placing undue emphasis on the small size of the petitioning company, relying on National Hand Tool Corp. v. Pasquarell, 889 F.2d, n.5 (5th Cir. 1989) and Mars Jewelers, Inc. v. INS, 702 F. Supp. 1570, 1573 (N.D. Ga. 1988) to stand for the proposition that the statute does not limit managers or executives to persons who supervise a large number of persons or large enterprises.

Counsel further argues that the petitioner, given the nature of its business, has a reasonable need for a managerial or executive position. Counsel emphasizes that the petitioner is a subsidiary of the largest company in the Chinese automotive industry, and as such will play an important role in cooperation and development between the U.S. and Chinese auto industries.

Finally, counsel contends that the director's decision "ignores the fact that the case at hand is an extension petition." On appeal, counsel cites to an April 23, 2004 agency memorandum from William R. Yates, which states that in matters related to an extension of nonimmigrant petition validity involving the same parties and
the same underlying facts, deference should be given to an adjudicator's prior determination of eligibility. Counsel asserts that the director erred by failing to adhere to the guidance provided in the Yates memorandum, noting that it is not clear why USCIS "is calling into serious doubt its own previous approval of the petitioner's merits."

In support of the petition, the petitioner has submitted a letter dated December 14, 2010 from the president of the petitioner's parent company, who further addresses the beneficiary's job duties, providing several examples of specific actions the beneficiary has taken as president. He notes that the U.S. company has been challenged by the economic recession and the effects on the U.S. auto industry, and that such challenges have required the presence of an experienced manager to control risks and to alter business plans and strategies according to market conditions.

III. Conclusion

Upon review of the totality of the record, the petitioner has established that the beneficiary will be employed in a managerial capacity.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(3).

The record establishes that the petitioning company, as of the date of filing, was staffed by a total of five employees, all of whom possess at least a Bachelor's degree. All of these employees would report directly or indirectly to the beneficiary. Although the director determined that only one of the positions subordinate to the beneficiary would require an individual with a Bachelor's degree, the AAO disagrees. The petitioner has


2 In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. Matter of Sea, 19 I&N Dec. 817 (Comm. 1988); Matter of Ling, 13 I&N Dec. 35 (R.C. 1968); Matter of Shin, 11 I&N Dec. 686 (D.D. 1966).
provided copies of business correspondence between the petitioner's commissioned sales managers, its material engineer, and its auto industry customers. The record indicates that the petitioner is not merely selling a standard, stock product but rather is working with automobile company engineering staff and the petitioning group's engineering staff in order to custom design and manufacture parts for use in commercial and passenger cars sold by U.S. automakers. The documents exchanged during the quotation process are detailed engineering and manufacturing design documents. As established by the evidence, the process requires the petitioner's staff to meet with the U.S. customers' staff to discuss product specifications and would reasonably require the services of individuals who have engineering or related degrees themselves. Given the nature of the work, the AAO finds sufficient evidence in the record to support a finding that at least a majority of the U.S. company's existing staff is comprised of professionals. The AAO is also satisfied that the beneficiary would have the authority to hire and fire employees and take other personnel actions with respect to the staffing of the United States office.

The petitioner has also met its burden to establish that the beneficiary "manages the organization, or a department, subdivision, function, or component of the organization," as required by section 101(a)(44)(A)(i) of the Act. The beneficiary would be the highest-ranked employee in the petitioner's U.S. company, which is itself a subsidiary with close ties to its foreign parent company and part of a Fortune 500 multinational organization. The petitioner has also clarified that the U.S. subsidiary was established with a $1.3 million investment as a key component of the multinational organization charged with increasing the parent company's visibility in the North American market.

Finally, the petitioner must establish that the beneficiary exercises discretion over the day-to-day operations of the activity or function for which he has authority, as required by section 101(a)(44)(A)(iv) of the Act. USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business. The petitioner has satisfied this element of the definition.

As required by section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. However, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. See sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

Here, the director concluded that the beneficiary must be engaged in the operational tasks of the company due to the fact that it employs only five other employees. The director's decision does not indicate which

Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above.
operational tasks the director believes the beneficiary would engage, nor does it appear to take into account the reasonable needs of the organization. The documentary evidence demonstrates that the beneficiary is not directly involved in the day-to-day routine details of obtaining customer specifications, preparing quotes or other non-qualified tasks related to the petitioner's primary business activities. Rather, the evidence shows that the sales managers directly interact with customers and potential customers with guidance and input from the material engineer, who in turn reports to the beneficiary. The evidence also establishes that the petitioner works closely with other companies within its corporate group during the quotation, sales and manufacturing process and has resources beyond the staff of the U.S. office. While the record shows that the petitioner has been consistently doing business over the last year, and has grown from two to five employees, the scope of the U.S. operation is not large and we are satisfied that the current staff is sufficient to relieve the beneficiary from primarily performing non-managerial tasks. The petitioner's parent company has explained its reasonable need to place a bona fide manager in charge of the U.S. company to oversee its 1.3 million investment in the U.S. market and to manage risks and alter business plans as necessary in light of the economic recession and its impact on the U.S. auto industry. Overall, the evidence presented is sufficient to establish that the beneficiary would reasonably need to devote at least 51% of his time to the claimed managerial duties.

Based on the foregoing, the petitioner has established that the beneficiary would be employed in a primarily managerial capacity. Accordingly, the appeal will be sustained.

Finally, although the petition will be approved, we note that this matter is not, as claimed by counsel, a request for an extension of the beneficiary's previously granted L-1A status. Pursuant to 8 C.F.R. § 214.2(l)(14)(i), an extension petition may be filed only if the validity of the original petition has not expired. Here, the petitioner filed its request for an extension of the beneficiary's L-1A status before the initial petition expired and the extension request was denied in October 2009. The instant petition was filed well after the initial new office petition expired and is therefore adjudicated as a new petition, pursuant to 8 C.F.R. § 214.2(l)(3), rather than as an extension of the beneficiary's initial petition, pursuant to 8 C.F.R. § 214.2(l)(14)(ii).

Furthermore, even if this were an extension petition, the director owed no deference to the previous finding that the beneficiary qualified for L-1A status to open a new office. The one-year "new office" provision is an accommodation for newly established enterprises, provided for by USCIS regulation, that allows for a more lenient treatment of managers or executives that are entering the United States to open a new office. The Yates memorandum specifically states, at page 2, fn.1, that it does not apply to L-1 new office extension petitions.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has sustained that burden. For the foregoing reasons the decision of the director will be withdrawn and the petition will be approved.

ORDER: The decision of the director is withdrawn. The petition is approved.
The Immigration Act of 1990 contains a definition of the term "specialized knowledge" which is different in many respects than the prior regulatory definition. The purpose of this memorandum is to provide field offices with guidance on the proper interpretation of the new statutory definition.

The prior regulatory definition required that the beneficiary possess an advanced level of expertise and proprietary knowledge not available in the United States labor market. The current definition of specialized knowledge contains two separate criteria and, obviously, involves a lesser, but still high, standard. The statute states that the alien has specialized knowledge if he/she has special knowledge of the company product and its application in international markets or has an advanced level of knowledge of the processes and procedures of the company.

Since the statutory definitions and legislative history do not provide any further guidelines or insight as to the interpretation of the terms "advanced" or "special", officers should utilize the common dictionary definitions of the two terms as provided below.

Webster's II New Riverside University Dictionary defines the term "special" as "surpassing the usual; distinct among others of a kind." Also, Webster's Third New International Dictionary defines the term "special" as "distinguished by some unusual quality; uncommon; noteworthy."

Based on the above definition, an alien would possess specialized knowledge if it was shown that the knowledge is different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon.
Further, Webster's II New Riverside University Dictionary defines the term "advanced" as "highly developed or complex; at a higher level than others." Also, Webster's Third New International Dictionary defines the term "advanced" as "beyond the elementary or introductory; greatly developed beyond the initial stage."

Again, based on the above definition, the alien's knowledge need not be proprietary or unique, merely advanced. Further, the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced.

The determination of whether an alien possesses specialized knowledge does not involve a test of the United States labor market. Whether or not there are United States workers available to perform the duties in the United States is not a relevant factor since the test for specialized knowledge involves only an examination of the knowledge possessed by the alien, not whether there are similarly employed United States workers. However, officers adjudicating petitions involving specialized knowledge must ensure that the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry but that it is truly specialized. There is no requirement in current legislation that the alien's knowledge be unique, proprietary, or not commonly found in the United States labor market.

The following are some of the possible characteristics of an alien who possesses specialized knowledge. They are not all inclusive. The alien:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place;
- Is qualified to contribute to the United States employer's knowledge of foreign operating conditions as a result of special knowledge not generally found in the industry;
- Has been utilized abroad in a capacity involving significant assignments which have enhanced the employer's productivity, competitiveness, image, or financial position;
- Possesses knowledge which, normally, can be gained only through prior experience with that employer;
- Possesses knowledge of a product or process which cannot be easily transferred or taught to another individual.
The following are provided as general examples of situations where an alien possesses specialized knowledge.

- The foreign company manufactures a product which no other firm manufactures. The alien is familiar with the various procedures involved in the manufacture, use, or service of the product.

- The foreign company manufactures a product which is significantly different from other products in the industry. Although there may be similarities between products, the knowledge required to sell, manufacture, or service the product is different from the other products to the extent that the United States or foreign firm would experience a significant interruption of business in order to train a new worker to assume those duties.

- The alien beneficiary has knowledge of a foreign firm's business procedures or methods of operation to the extent that the United States firm would experience a significant interruption of business in order to train a United States worker to assume those duties.

A specific example of a situation involving specialized knowledge would be if a foreign firm in the business of purchasing used automobiles for the purpose of repairing and reselling them, some for export to the United States, petitions for an alien to come to the United States as a staff officer. The beneficiary has knowledge of the firm's operational procedures, e.g., knowledge of the expenses the firm would entail in order to repair the car as well in selling the car. The beneficiary has knowledge of the firm's cost structure for various activities which serves as a basis for determining the proper price to be paid for the vehicle. The beneficiary also has knowledge of various United States customs laws and EPA regulations in order to determine what modifications must be made to import the vehicles into the United States. In this case it can be concluded that the alien has advanced knowledge of the firm's procedures because a substantial amount of time would be required for the foreign or United States employer to teach another employee the firm's procedures. Although it can be argued that a good portion of what the beneficiary knows is general knowledge, i.e., customs and EPA regulations, the combination of the procedures which the beneficiary has knowledge of renders him essential to the firm. Specifically, the firm would have a difficult time training another employee to assume these duties because of the inter-relationship of the beneficiary's general knowledge with the firm's method of doing business. The beneficiary therefore possess specialized knowledge.

- An alien beneficiary has knowledge of a process or a product which is of a sophisticated nature, although not unique to the foreign firm, which is not generally known in the United States.
An alien beneficiary has knowledge of a process or a product which is of a sophisticated nature, although not unique to the foreign firm, which is not generally known in the United States.

A specific example of the above is if a firm involved in processing certain shellfish desires to petition for a beneficiary to work in the United States in order to catch and process the shellfish. The beneficiary learned the process from his employment from an unrelated firm but has been utilizing that knowledge for the foreign firm for the past year. However, the knowledge required to process the shellfish is unknown in the United States. In this instance, the beneficiary possesses specialized knowledge since his knowledge of processing the shellfish must be considered advanced.

The common theme which runs through these examples is that the knowledge which the beneficiary possesses, whether it is knowledge of a process or a product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm. The knowledge is not generally known and is of some complexity.

The above examples and scenarios are presented as general guidelines for officers involved in the adjudication of petitions involving specialized knowledge. The examples are not all inclusive and there are many other examples of aliens who possess specialized knowledge which are not covered in this memorandum.

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

In closing, this memorandum is designed solely as a guide. It must be noted that specialized knowledge can apply to any industry, including service and manufacturing firms, and can involve any type of position.

James A. Fuleo
Acting Executive Associate Commissioner
IN RE: Petitioner: TECHNICAL SERVICES, INC.
Beneficiary: SAMEER


IN BEHALF OF PETITIONER:

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

INSTRUCTIONS:

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

Robert P. Wiemann, Chief
Administrative Appeals Office

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

The petitioner is a Delaware corporation, with headquarters in Raleigh, North Carolina, that provides information technology support to customers in the United States thorough its parent company, Corporation. As a wholly owned subsidiary of Corporation, the petitioner is part of the global family of businesses that employs 355,000 persons and generates $91 billion in gross revenue. The petitioner seeks to employ the beneficiary as an "SAP ERP Consultant," to provide guidance and assistance with a client's implementation of an integrated Enterprise Resource Planning (ERP) software system that is produced by SAP AG, a European software maker, and modified for specific client needs. The petitioner stated that the beneficiary would be "assigned to the team working on the Catalyst project for our client, Foods, in our facilities in Chicago, Illinois."

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

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

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

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

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

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

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

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

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

The AAO originally denied Mr. Carter's request for oral argument after he failed to show cause for why oral argument is necessary. See 8 C.F.R. § 103.3(b). After Mr. Fragomen protested directly to the Acting Director of U.S. Citizenship and Immigration Services (USCIS), and USCIS Chief Counsel suggested that the oral argument should be permitted, the AAO agreed to request counsel's appearance pursuant to 8 C.F.R. § 103.2(b)(9).
(iv) Evidence that the alien’s prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien’s prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

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

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

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

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

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

An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101(a)(15)(L) and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101(a)(15)(L) if—

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

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

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

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

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

"Qualifying organization" means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and

(3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

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

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

Request for Evidence

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

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

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

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

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

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

Motion

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

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

Certification

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

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

Typically such deployment would be run by the parent company's subsidiary abroad (in this case, [Redacted] India). The difference in this case is simply that [Redacted] established a separate U.S. corporation to consolidate the deployment of its foreign IT specialists for certain services. In the case on appeal, [Redacted] bills [Redacted] India on a monthly basis for its services, based on an inter-
company agreement that details and captures all costs associated with the project. A separate inter-company agreement between US and India lays out the project details, allocates responsibilities for the achievement of certain benchmarks, and provides that the project will be funded by an inter-company agreement between US and India. India bills US for its costs, and US - which holds the contract with the client (in this case, Foods) - bills the client.

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

Analysis

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

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

The AAO recognizes that the term "qualifying relationship," as used at 8 C.F.R. 214.2(I)(II)(G)(2), refers to the types of acceptable relationships a U.S. entity must have with the beneficiary's foreign employer in order to qualify for classification under section 101(a)(15)(L) of the Act, and not to the relationship a U.S.-petitioning entity must have with a U.S. organization in order for the petitioner to avoid filing a petition as a "new office." However, because the definition of "new office" refers to an organization that has been doing business in the United States "through a parent, branch, affiliate, or subsidiary," the AAO notes that a petitioner must have a "qualifying relationship" with an existing U.S. entity if it is to avoid filing as a new office. 8 C.F.R. § 214.2(I)(I)(II)(F). For this reason, the AAO will use the term "qualifying relationship" in reference to the new office petition issues, as well. In this case, has established that it is the subsidiary of Corporation and that it therefore has a qualifying relationship with Corporation sufficient to enable it to avoid filing as a "new office."
Neither counsel nor the director noted that Congress has provided a statutory definition for the term "organization." Specifically, section 101(a)(28) of the Act, 8 U.S.C. § 1101(a)(28), provides:

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

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

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

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

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

6 However, as will be discussed in this decision, the petitioner may not rely on the larger corporate organization to qualify for this nonimmigrant visa petition and then take cover behind the individual corporation by stating that it cannot speak for or provide information pertaining to the larger corporate organization when the director requests material evidence that relates to the organization's business activities. While this may be the result of innocent mistake, the failure to answer questions about the organization as a whole could result in a denial. See 8 C.F.R. § 103.2(b)(14).
comments in response to the proposed rulemaking suggesting that the definition of doing business would mean that representative and liaison offices would be disqualified from L-1 status even if they were promoting the business of foreign corporations through research and providing consultation. In the preamble to the final rule, the INS responded to these concerns by stating:

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

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

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

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

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

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

\textit{Conclusion}

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

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

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

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

\begin{quote}
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.
\end{quote}

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

\begin{quote}
\textsuperscript{7} If a petitioner relies on U.S.-based parent, branch, affiliate, or subsidiary to show that it has been doing business in the United States for one year or more, it is critical that the petitioner accurately complete Part 5 of the Form I-129 ("Basic Information About The Proposed Employment And Employer"). When the form asks for information about the petitioning employer, the petitioner should complete the form with truthful and accurate information about the actual petitioning corporation. To avoid any misunderstanding, if the petitioner elects to rely on "a parent, branch, affiliate, or subsidiary" to show that it is not a new office, the petitioner should explain this clearly in the Form I-129 Supplement L and any attached brief or addendum, and demonstrate the relationship between the petitioner and the larger organization.
\end{quote}
Special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.

Denial

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

Motion

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

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

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

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

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

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

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

Certification

On certification, counsel argues that the director has applied an incorrect standard. Specifically, counsel asserts that the director used a "key employee" standard that has never been codified in the statute or the regulations nor set forth in the agency's policy memoranda. Counsel states that both the administrative decisions that were "issued by the Board of Immigration Appeals" and the Immigration Act of 1970 legislative history predate the statutory definition that was created by Congress through the Immigration Act of 1990. Because these sources predate the statutory definition, counsel objects that the director "applied standards that differ from and pre-date the current regulatory definition and the agency's own guidance for
Counsel states that the current adjudication standard for L-1B specialized knowledge petitions is established instead in successive legacy INS memoranda. In both the written briefs and the oral presentation, counsel asserted that the seminal memorandum regarding the appropriate adjudication of L-1B petitions under current law is the March 9, 1994 INS policy memorandum titled "Interpretation of Special Knowledge" that was issued by James A. Puleo, the Acting Executive Associate Commissioner (hereinafter "Puleo memorandum"). During the oral presentation, Mr. Cooper referred to the Puleo memorandum as the "agency's definitive guidance" on specialized knowledge and stated that the fundamental problem with the director's decision was that it failed to evaluate any of the criteria discussed in the Puleo memorandum.

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

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

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

A. History of the Specialized Knowledge Definition

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

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

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

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

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

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


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

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

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


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

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


\(^9\) Contrary to the assertions of counsel, the administrative precedent decisions were not decided by the U.S. Department of Justice's immigration appellate authority, the Board of Immigration Appeals (BIA). Instead, the precedents were issued by the legacy INS regional commissioners and the INS Administrative Appeals Unit, the predecessor office of the AAO. While the distinction is a technical one, the AAO observes that the precedent decisions deserve scrutiny because they represent the long experience of the agency in administering the visa category. Additionally, as will be discussed, the precedent decisions discuss recurring themes in the agency's administration of the L-1B visa program that remain relevant today.
On May 20, 1988, only 18 months after publication of the latest regulation, the INS Commissioner designated a precedent decision discussing the bright-line "proprietary knowledge" element in the definition of "specialized knowledge." *Matter of Sandoz Crop Protection Corp.*, 19 I&N Dec. 666 (Comm. 1988). In that decision, the INS adopted a highly rigid approach to evaluating the "proprietary knowledge" component of the regulatory definition:

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

*Id.* at 667-8.

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

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

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

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

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

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

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

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

Id.

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

[S]pecial knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.
Since Congress enacted the statutory definition of "specialized knowledge," the agency has issued a number of internal memoranda discussing the term specialized knowledge. See Memorandum of James A. Puleo, Acting Exec. Assoc. Comm., INS, "Interpretation of Special Knowledge," (March 9, 1994); Memorandum of Fujie Ohata, Assoc. Comm., INS, "Interpretation of Specialized Knowledge" (Dec. 20, 2002); Memorandum of Fujie Ohata, Director, Service Center Operations, USCIS, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks seeking L-1B Status," (Sept. 9, 2004).

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

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

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

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

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

Id. at p.4.

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

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

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

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

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

B. The Standard for Specialized Knowledge

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

Counsel specifically points to the Puleo memorandum as the seminal document regarding the proper adjudication of L-1B specialized knowledge petitions. Without discussing the other elements or hypothetical examples of the memorandum, counsel points to five of the memorandum's six "possible characteristics" as the agency's key factors for evaluating specialized knowledge. Counsel continues to assert that the Ohata memoranda confirm that the Puleo memorandum sets forth the proper analysis for adjudication of L-1B
specialized knowledge petitions. Counsel for the petitioner concludes that the adjudication of L-1B petitions should rely upon legacy INS guidance memoranda and that the major fault of the director's decision was its failure to analyze the elements of the Puleo memorandum.

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

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

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

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

\(^\text{10}\) By contrast, it is entirely appropriate for the director to rely on the law and legal analysis from an internal agency memorandum or letter as the basis for a decision. However, if a memorandum goes beyond interpreting existing law to suggest new analytical criteria, the memorandum may impermissibly stray beyond the limits of an interpretive memorandum and enter the realm of "legislative rulemaking" – which requires notice-and-comment – by imposing new rights or obligations. See 5 U.S.C. § 553(b).
Instead of memoranda, the AAO must look to the specific language of the statutory definition of specialized knowledge. The first question is always to inquire whether Congress has directly spoken to the precise question at issue. *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.*

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

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

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


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

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

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

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


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

As previously discussed, the Committee Report relating to the 1990 Act does state that Congress intended to "broaden" the L-1 category in general by making four specifically enumerated changes: allowing accounting firms to participate in the program, incorporating the "blanket petition" program into the statute, changing the overseas employment requirement to one year within the three years prior to admission, and enlarging the period of admission for managers and executives to seven years. H.R. Rep. 101-723(I), 1990 U.S.C.C.A.N. at 6749. This portion of the report, however, made no mention of any intent to broaden the specialized knowledge visa classification.
In a separate paragraph that was not enumerated as one of the four changes, the Committee Report discussed the new specialized knowledge definition. The paragraph begins by stating: "One area within the L visa that requires more specificity relates to the term 'specialized knowledge.' Varying interpretations by INS have exacerbated the problem." Given that the term was previously undefined by Congress, it is clear that the first sentence of the paragraph attributes the previous confusion as to what constituted specialized knowledge to the failure of the 1970 Act to define the term. The second sentence of the paragraph, in turn, simply notes that the "varying interpretations" adopted by the INS through the regulations, precedent decisions, and memoranda had contributed to the confusion over the applicable definition. There is no indication in the Committee Report that Congress otherwise intended the new definition to be considered as part of the enumerated changes that specifically "broadened" the L-1 category. Instead, the paragraph is conspicuously neutral.

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

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

\(^{11}\) Further supporting the conclusion that Congress intends USCIS to carefully monitor the L-1 classification, the L-1 Visa Reform Act of 2004 was created to provide USCIS with an additional mandate to closely regulate the classification. The legislative history of the L-1 Visa Reform Act indicates that Congress intended to close the "L-1 loophole" and "protect U.S. jobs from inappropriate use of the L-1 visa." 149 Cong. Rec. at *S11686, 2003 WL 22143105.
If any conclusion can be drawn from the ultimate statutory definition of specialized knowledge and the changes made to the legacy INS regulatory definition, it would be based on the nature of the Congressional clarification itself. Prior to the 1990 Act, legacy INS pursued a bright-line test of specialized knowledge by including a "proprietary knowledge" element in the regulatory definition. 8 C.F.R. § 214.2(I)(1)(ii)(D) (1988). By deleting this element in the ultimate statutory definition and further emphasizing the relativistic aspect of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave legacy INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case. Cf. Ponce-Leiva v. Ashcroft, 331 F.3d 369, 377 (3d Cir. 2003) (quoting Baires v. INS, 856 F.2d 89, 91 (9th Cir.1988)).

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

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

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

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

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

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


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

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

*Id.* at 53.

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

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

It is appropriate for USCIS to look beyond the stated job duties and consider the importance of the beneficiary’s knowledge of the business’s product or service, management operations, or decision-making process. *Matter of Colley*, 18 I&N Dec. at 120 (citing *Matter of Raulin*, 13 I&N Dec. at 618 and *Matter of
LeBlanc, 13 I&N Dec. at 816). As stated by the Commissioner in Matter of Penner, when considering whether the beneficiaries possessed specialized knowledge, "the LeBlanc and Raulin decisions did not find that the occupations inherently qualified the beneficiaries for the classifications sought." 18 I&N Dec. at 52. Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. Id.

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

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

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

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

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

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

... a petitioner's assertion that the alien possesses an advanced level of knowledge of the processes and procedures of the company must be supported by evidence describing and setting apart that knowledge from the elementary or basic knowledge possessed by others. It is the weight and type of evidence, which establishes whether or not the beneficiary possesses specialized knowledge.

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

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

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

A. Failure to Submit Requested Evidence

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

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

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

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

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

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

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

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

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

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

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

Since [insert team leader name] clearly represents the other L-1B team members as "employees" or, at a minimum, as supervised by the [insert team leader name] team leader, the director may reasonably review the aliens' nonimmigrant petitions to verify whether the petitioning employer indicated that the aliens would be engaged in off-site employment and supervised by an unaffiliated company. If the L-1B team members are actually employed off-site and supervised by an unaffiliated employer, the approval of the petitions may be subject to revocation pursuant to the provisions of the L-1 Visa Reform Act. See section 214(c)(2)(F) of the Act.
To interpret the regulations any other way would lead to an absurd result. If only Vintage's requirements could be considered, then any alien with a bachelor's degree could be brought into the United States to perform a non-specialty occupation, so long as that person's employment was arranged through an employment agency which required all clients to have bachelor's degrees. Thus, aliens could obtain six year visas for any occupation, no matter how unskilled, through the subterfuge of an employment agency. This result is completely opposite the plain purpose of the statute and regulations, which is to limit H1-B visas to positions which require specialized experience and education to perform.

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

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

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

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

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

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

Despite the director's specific request, the petitioner failed to submit the requested material evidence. Any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). For this reason, the petition must be denied.

B. Failure to Establish Specialized Knowledge

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

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

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

§ 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." 1987 WL 181359 (June 23, 1987).
Furthermore, he is familiar and knowledgeable not only with the project duties, but with the tools, technologies, methodologies, and processes being applied.

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

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

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

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

* * * *

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

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

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

Of the 70 employees currently working on the off-shore development team in India on the Catalyst project, Mr. is the only individual with the unique skill-set and skill level in 's proprietary methodologies, and the Model. Further, of the approximate 25,000 technical professionals employed by India, there are only approximately 10-25 technical professionals that possess this unique skill-set. Of the twelve
employees currently assigned to work in Chicago, Illinois, there are five employees that are specifically assigned to the Catalyst project through qualifying employment with India.

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

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

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

The director concluded:

The value of the beneficiary's skills are not in question. The petition must be examined to determine if the beneficiary's duties involve specialized knowledge, defined as an advanced level of knowledge of the processes and procedures of the petitioning company. The plain meaning of the term "specialized knowledge" implies that which is significantly beyond the average in a given field or occupation. The fact that the petitioner has only a small number of employees with these skills is not dispositive. A scarce skill does not necessarily establish that the skill derives from specialized knowledge. The petitioner has not demonstrated that the beneficiary's knowledge is advanced knowledge relative to the industry at large or to the
rest of its workforce. As held by the Commissioner in Matter of Penner, supra, "petitions may be approved for persons with specialized knowledge, not for skilled workers." The distinction between a skilled worker and one who will be employed in a capacity involving specialized knowledge is evident in the case at hand.

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

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

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

Analysis

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

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15 The petitioner and counsel use the terms team lead, team leader, and SAP ERP Consultant erratically. In the initial employment letter, the petitioner stated that the beneficiary had been assigned as an "SAP ERP Consultant" with an [redacted] India client, JK Tyre Industries Ltd., since December 2006. The beneficiary's resume confirms this employment, but states that he was the "Team Lead" for certain SAP modules on the project.
not only of SAP, a widely available software system, but also of \_
\_
software and implementation methodologies. Counsel for the petitioner asserts that an \_
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employee needs two to three years of experience, with at least two full-cycle SAP projects, before the employee would qualify for the proffered specialized knowledge position.

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

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

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

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

\textsuperscript{16} \_
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India Ltd., the petitioner's affiliate and the source of \_
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overseas personnel, has recently filed petitions for an additional 600 L-1B employees.
Although it is accurate to say that "the statute does not require that the advanced knowledge be narrowly held throughout the company," it is equally true to state that knowledge will not be considered "special" or "advanced" if it is universally or even widely held throughout a company. While not dispositive, USCIS will generally take note when a substantial majority of a petitioner's employees are beneficiaries of L-1B specialized knowledge petitions. While the AAO acknowledges that there will be exceptions based on the facts of individual cases, an argument that an alien is unique among a small subset of workers will not be deemed facially persuasive if a petitioner employs a majority of its workers in a specialized knowledge capacity. To quote counsel's statement during the oral presentation, "if everyone is special, then no one is special."

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

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

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

The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. Matter of Caron International, 19 I&N Dec. 791 (Comm. 1988). Since the opinions offered here do not address the individual beneficiary's claimed specialized knowledge, the opinions are not found to be persuasive on this point.
states that regularly hires SAP consultants, but then invests at least two to three years in training them in the implementation methodology. As summarized during the oral presentation, an employee requires two years of experience with at least two full-cycle SAP projects to qualify for this senior position of managing an SAP module.

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

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

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

The AAO does not dispute the possibility that the beneficiary is a skilled and experienced employee who has been, and would be, a valuable asset to the petitioner. However, as explained above, the record does not distinguish the beneficiary’s knowledge as more advanced than the knowledge possessed by other people employed by the petitioning organization or by workers employed elsewhere. As the petitioner has failed to document any special or advanced qualities attributable to the beneficiary's knowledge, the petitioner's claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a "specialized knowledge" employee. There is no indication that the beneficiary has any knowledge that so exceeds that of
any other similarly experienced professional or that he has received any degree of special training in the company's methodologies, products, or processes which would separate him from other professionals employed with the foreign entity. It is simply not reasonable to classify this employee as an alien with special knowledge of the company product and its application in international markets or an advanced level of knowledge of processes and procedures of the company.

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

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

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

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

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

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

In evaluating a petition subject to the terms of the L-1 Visa Reform Act, the petitioner bears the ultimate burden of proof. Section 291 of the Act, 8 U.S.C. § 1361; see also 8 C.F.R. § 103.2(b)(1). If a specialized knowledge beneficiary will be primarily stationed at the worksite of an unaffiliated employer, the statute
mandates that the petitioner establish both: (1) that the alien will be controlled and supervised principally by the petitioner; and (2) that the placement is related to the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. Section 214(c)(2)(F) of the Act.

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

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

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

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

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

As previously noted, the petitioner generally refused to submit any documentary evidence that related to the beneficiary's proposed employment on the [redacted] project in Chicago. The petitioner declined to submit copies of contracts, statements of work, work orders, or service agreements between the petitioner and the client. The petitioner also failed to submit the requested copies of the petitioner's human resources or employment records that would provide the beneficiary's job description and worksite location. Instead, the petitioner stated its regret and claimed that the evidence could not be released because it relates to "confidential
financial agreements" between [redacted] and [redacted] Foods. The petitioner did not attempt to submit similar or secondary evidence. See 8 C.F.R. § 103.2(b)(2). And instead of submitting the requested employment records, the petitioner submitted an unsupported "discussion" of the beneficiary's proposed duties and job site. The petitioner did not claim that the employment records were confidential or otherwise privileged.

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

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

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

Again, any failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. Matter of Soffici, 22 I&N Dec. at 165 (citing Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972)). For this additional reason, the petition must be denied.

The AAO maintains plenary power to review each appeal and certification on a de novo basis. 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); see also Janka v. U.S. Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. See, e.g., Dor v. INS, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).
The petition will be denied for the above stated reasons with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the decision of the director will be affirmed, with the exception of that part of the decision that has been specifically withdrawn by this decision. The petition will be denied.

ORDER: The decision of the director is affirmed in part and withdrawn in part. The petition is denied.
Evidence of the record shows that the beneficiary owns 100% of [redacted] Taxis and 51% of [redacted]’s Irish Pub. It is unclear how the two (2) companies are related other than ownership. Please explain how owning a taxi company can prepare the beneficiary for a position as a Director/Managing Member of a restaurant.

It appears that the beneficiary may be the owner or a major shareholder of the foreign entity. As such, you must submit evidence that the beneficiary’s services are to be used for a temporary period in the United States (U.S.) and that the beneficiary will be transferred to an assignment abroad upon completion of these temporary duties.

The beneficiary may own the foreign and U.S. organizations in whole or in part. However, maintaining a “figure head” title and position, such as “Director” or “President”, without being primarily engaged in the management of the organization is not qualifying for L1 purposes.

You have not demonstrated that in an office the size and nature of yours, the beneficiary will be engaged in primarily managerial or executive job duties. Rather, it is presumed that he/she will be engaged primarily in the non-managerial, operations tasks required in a company such as yours, with occasional first-line supervisory duties over nonprofessional employees.

8 CFR 214.2(1)(ii)(B)(4) and the (legacy) INS Memorandum of Fujio O. Ohata dated December 20, 2002 states, “A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor’s supervisory duties unless the employees supervised are professional” [emphasis added].

A manager is an employee who primarily manages the organization, or a department, subdivision, function, or component of the organization; supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization; has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised, or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and exercises direction over the day-to-day operations of the activity or function for which the employee has authority.

Submit additional evidence to establish that the beneficiary will be employed in a managerial capacity in the United States firm.

Submit a breakdown of the number of hours devoted to each of the beneficiary’s proposed job duties on a weekly basis.

Submit additional evidence showing the management structure and personnel structure of your United States entity, to assist us in determining whether the beneficiary is or will be employed in a qualifying managerial or executive capacity.

1) How many subordinate supervisors are or will be under the beneficiary’s management?
2) What are the job titles and job duties of those employees?
3) What executive/managerial and technical skills are required to perform the duties in the United States?
4) How much of the time spent by the beneficiary is or will be allotted to executive/managerial duties and how much to other non-executive functions?
5) What degree of discretionary authority in day-to-day operations does or will the beneficiary have in the United States position?
May 6, 2008

USCIS Vermont Service Center
75 Lower Welden St.
St. Albans, VT 05479-0001

Re: EAC

To Whom It May Concern:

We are in receipt of your Request for Additional Evidence dated March 27, 2008. We are pleased to respond as follows.

Evidence of the record shows that the beneficiary owns 100% of [redacted] Taxis and 51% of [redacted]'s Irish Pub. It is unclear how the two companies are related other than ownership. Please explain how owning a taxi company can prepare the beneficiary for a position as a Director/Managing Member of a restaurant.

Mr. [redacted] has been the Owner/Director of [redacted] Taxis since 1992. For six (6) years, he has directed and developed a successful business. As Owner/Director, he has overseen all business activity; held responsibility for production of management accounts and financial reports; controlled company assets, cash flow, and capital; supervised staff; communicated with banks and other financial institutions; and determined the company's future plans and established goals and projections. He has built a successful and profitable business operation: the UK company enjoyed a recent net profit of US $148,971 and has total assets in excess of US $780,000. The UK company employs six (6) direct office/dispatch staff and 172 independent contractors.

It is the extensive executive-level experience in running and managing a small business that equip Mr. [redacted] with the business skills that will allow him to be successful as a Director/Managing Member of a new US business. A good executive can parlay his/her business skills and acumen to any type of business operation; it does not matter if the business is taxis, food service, computers, etc. It is the executive-level skills and the business experience which Mr. [redacted] holds that will ensure his success in an executive capacity for the US company. Mr. [redacted] has been able to build his UK company into one of the leading businesses in the taxi industry and intends to do the same with the new restaurant venture in the United States. Mr. [redacted]'s position in the US will entail very much the same types of duties as his UK position- providing direction for the company; planning, developing, and establishing policies and objectives; incorporating appropriate systems into the company to ensure long-term growth and vitality; devising marketing strategies and supervising advertising and promotion activities; monitoring company accounts and reviewing financials; holding accountability for achieving business objectives; and revising business plans and goals as needed.

Please note, too, that the L1A regulations do not require that qualifying entities be related with
regard to the same type of business activity.

It appears that the beneficiary may be the owner or a major shareholder of the foreign entity. As such, you must submit evidence that the beneficiary's services are to be used for a temporary period in the US and that the beneficiary will be transferred to an assignment abroad upon completion of these temporary duties.

Mr. [Name] will remain as the Owner/Director of the UK company. During his temporary L1A transfer to the United States, the Office Manager will assume some of Mr. [Name]'s executive-level duties for the UK company. However, Mr. [Name] will from time to time travel back to the UK during the course of his L-1A employment. His services in the US will be temporary to get the new US business off the ground. Mr. [Name] will continue to hold the position/title of Owner/Director of the UK company concurrently with his temporary work activity in the US as Director/Managing Member for [Name]'s Irish Pub, LLC. Once the first [Name]'s Irish Pub location is up and running, with all staff and systems in place and running smoothly, Mr. [Name] will be transferred back to the UK company.

The beneficiary may own the foreign and US positions in whole or in part. However, maintaining a “figure head” title and position, such as “Director” or “President,” without being primarily engaged in the management of the organization is not qualifying for L-1 purposes.

Mr. [Name] will not hold merely a “figure head” position as Director/Managing Member for the US company. Indeed, he will be primarily engaged in the development and management of the US organization. As stated in the previously-submitted employer statement, Mr. [Name]'s duties as Director/Managing Member of [Name]'s Irish Pub, LLC will include:

- Provide direction for the company. 10%
- Plan, develop, and establish policies and objectives of US business. 10%
- Oversee construction and opening of pub/restaurant. (short-term, temporary duty) 10%
- Incorporate appropriate systems into the company to ensure long-term growth and vitality. 10%
- Establish reporting systems for staff. 10%
- Meet with and establish contacts with suppliers. 5%
- Monitor quality of goods purchased and sold. 5%
- Undertake research for new markets and new store locations. 10%
- Devise marketing strategies and supervise advertising and promotion activities. 10%
- Monitor company accounts and review financials. 10%
- Hold accountability for achieving business objectives. 10%
- Revise business plans and goals as needed. 10%

These duties are not those of someone who is merely a figure head. A figure head is a person who holds an important title or office yet executes little actual power. Unlike a figure head, Mr. [Name] will hold and execute extensive power over the US business and will actively be involved in directing the operations of the new US business.

You have not demonstrated that in an office the size and nature of yours, the beneficiary will be engaged in primarily managerial or executive job duties. Rather, it is presumed that he will be
engaged in the non-managerial operations tasks required in as company such as yours, with occasional first-line supervisory duties over nonprofessional employees.

The US business will own and operate a 4800 square foot pub/restaurant. Once the first “D[Last Name]’s Irish Pub” location is operational, the company plans to expand into a multi-unit brand with numerous D[Last Name]’s Irish Pub in Florida and elsewhere in the United States. As Director/Managing Member of the US company, Mr. D[Last Name] will engage solely in executive-level duties. He will not be involved in non-executive, non-managerial or operations tasks. The individuals who will produce the products/services of the business will be cooks, kitchen staff, bar staff and wait staff. A General Manager, Front of the House Manager, Bar Manager and Head Chef will carry out general managerial/supervisory duties. Mr. D[Last Name]’s duties are chiefly executive in nature and involve setting forth the policies and objectives of the business, providing direction at the executive level, overseeing the construction and opening of the business, establishing company-wide operational and reporting systems, researching new locations for business expansion, and monitoring the company’s financial activities. As Director/Managing Member, he will be accountable for achieving business objectives. He will report to no one other than the other owners of the business.

Submit additional evidence to establish that the beneficiary will be employed in a managerial capacity in the US firm.

Firstly, it is important to clarify that the beneficiary’s proposed US position is NOT a managerial capacity, but is an executive capacity. The employer statement previously provided at Exhibit 1 states that Mr. D[Last Name] will “undertake a temporary assignment in the United States in the executive capacity of Director/Managing Member” (page 1), that he “has been offered the temporary executive position of Director/Managing Member” (page 3), that the US company “requires the temporary services of Joseph D[Last Name] for the executive position of Director/Managing Member,” (page 4) and that he will “work for D[Last Name]’s Irish Pub, LLC in the United States in an executive capacity as Director/Managing Member.” (page 4) The attorney’s cover letter also stated that Mr. D[Last Name] “will work in an executive capacity” and “will hold the executive position of Director/Managing Member.” (These documents are provided again herein at Exhibit 1). It has never been represented or stated that Mr. D[Last Name] will be employed in a managerial capacity.

The definition of “executive capacity” pursuant to 8 CFR 214.2(l)(1)(ii)(C) is an assignment in which the employee primarily 1) directs the management of the organization or a major component or function of the organization; 2) establishes the goals and policies of the organization, component or function; 3) exercises wide latitude in discretionary decision-making and 4) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization. Mr. D[Last Name]’s offered position of Director/Managing Member for the US company clearly fits the definition of “executive capacity.”

As you can see from the detailed US job description, Mr. D[Last Name] will “direct the management of the US organization” through the following functions:
- Provide direction for the company.
- Incorporate appropriate systems into the company to ensure long-term growth and vitality.
- Establish reporting systems for staff.
- Monitor company accounts and review financials.
- Monitor quality of goods purchased and sold.

He will “establish goals and policies” by:
• Plan, develop, and establish policies and objectives of US business.
• Revise business plans and goals as needed.
• Hold accountability for achieving business objectives.

Mr. D[redacted] will “exercise wide latitude in discretionary decision-making” by:
• Plan, develop, and establish policies and objectives of US business.
• Devise marketing strategies and supervise advertising and promotion activities.

Mr. D[redacted] will “receive only general supervision or direction from stockholders.” He is the highest level executive of the US company. He receives only general direction/input from the other two US company owners, both of whom own less than a 25% interest each in the company. Pursuant to Section 5 of the company’s Operating Agreement (previously submitted at Exhibit 3), “all decisions and documents relating to the management and operation of the Company shall be made and executed by a Majority in Interest of the” owners. As Mr. D[redacted] holds the majority interest (51%) of the company, he is vested with ultimate and sole power to make decisions relating to the management and operation of the US entity.

The submitted job duties clearly show that Mr. D[redacted] will function at a senior level within the company. He is charged with providing overall direction for the business and for setting its policies and objectives. He will incorporate systems into the company to ensure long-term growth and vitality. He is charged with reviewing the company’s financials and ensuring that the business meets its objectives.

As Director/Managing Member, Mr. D[redacted] will exercise wide latitude in decision-making. All subordinate staff will report directly or indirectly to Mr. D[redacted].

Mr. D[redacted] will not serve as a first-line supervisor; his position in executive in nature. Managerial capacity involves supervising and controlling “the work of other supervisory, professional or managerial employees.” Mr. D[redacted] is not a manager; he is an executive. Nonetheless, he manages and supervises will be subordinate to him.

Submit a breakdown of the number of hours devoted to each of the beneficiary’s proposed job duties on a weekly basis.

See job description above at page 2.

Submit additional evidence showing the management structure and personnel structure of your US entity, to assist us in determining whether the beneficiary is or will be employed in a qualifying managerial or executive capacity.

Please see organizational chart at Exhibit 2.

1. How many subordinate supervisors are or will be under the beneficiary’s management?  
   Four (4)

2. What are the job titles and job duties of those employees? General Manager, Front of the House Manager, Bar Manager and Head Chef.
General Manager: Estimate food and beverage costs and requisitions. Purchase supplies. Confer with food preparation and other personnel to plan menus and related activities, such as dining room and banquet operations. Establishes and enforces nutrition and sanitation standards for restaurant. Direct hiring, firing, training and assignment of personnel. Investigate and resolve food quality and service complaints. Review financial transactions and monitor budget to ensure efficient operation, and to ensure expenditures stay within budget limitations.

Front of the House Manager: Hold managerial responsibility for “front of the house” (non-kitchen) restaurant operations. Assist General Manager in hiring and training of wait staff. Supervise wait staff. Prepare staff schedules. Liaise with customers. Ensure high customer service standards are met. Make determinations regarding supplies décor for restaurant floor area.

Bar Manager: Hold managerial responsibility for bar operations. Assist General Manager in hiring and training of bar staff. Supervise bar staff. Prepare bar staff schedules. Estimate and order liquor, wine, beer, beverages and supplies. Observe workers and patrons to ensure compliance with occupational, health, and safety standards and local liquor regulations. Plan and arrange promotional programs such as entertainers.

Head Chef: Participates in planning menus and utilization of food surpluses and leftovers, taking into account probable number of guests, marketing conditions and popularity of various dishes. Estimate food consumption. Requisition foodstuffs and kitchen supplies. Review menus, analyze recipes, determine food, labor, and overhead costs. Direct food apportionment policy to control costs. Supervise cooking and other kitchen personnel and coordinate their assignments to ensure economical and timely food production. Observe methods of food preparation and cooking, sizes of portions, and garnishing of foods to ensure food is prepared in prescribed manner. Test cooked foods by tasting and smelling them. Devise special dishes and develop recipes. Assist in hiring and firing kitchen employees. Familiarize newly hired cooks with practices of restaurant kitchen. Maintain time and payroll records.

3. What executive/managerial and technical skills are required to perform the duties in the US? Proven executive-level experience and success is essential to the position of Director/Managing Member. Executive skills necessary include ability to develop a new business from its infancy to a profitable venture; to review and analyze management accounts and financial reports; to effectively control company assets, cash flow, and capital; to manage and motivate staff; to devise company goals and objectives; to identify and incorporate appropriate systems to ensure long-term growth and vitality.

4. How much of the time spent by the beneficiary is or will be allotted to executive/managerial duties and how much to other non-executive functions? 100% of the time will be spent on executive duties.

5. What degree of discretionary authority in day-to-day operations does or will the beneficiary have in the US position? Mr. D will have the highest level degree of discretionary authority over the operations of the US company.
We trust that the enclosed is sufficient for a favorable adjudication of the L-1A petition of [Name]'s Irish Pub, LLC on behalf of Mr. Joseph [Name].

Very truly yours,

FOR IMMIGRATION LAW OFFICES OF LISA KRUEGER KHAN, PA

Lisa Krueger Khan
Re: Petition for Nonimmigrant Worker L-1A/New Office
Petitioner: X Simulation Systems, Inc.
Beneficiary: Michael Graham X
Position: Executive VP Operations

Dear Sir or Madam:

This letter is submitted in support of the petition of X Simulation Systems, Inc. to classify Mr. Michael X as an L-1A nonimmigrant so that he may undertake a temporary assignment in the United States in the executive capacity of Executive VP Operations.

CORPORATE AFFILIATION

X Simulation Systems, Inc. is a Delaware corporation established in July 2004. The company is owned 100% by X Systems Limited in the UK. Therefore, X Simulation Systems, Inc. and X Systems Limited are qualifying entities as they enjoy a subsidiary-parent relationship, respectively.

THE FOREIGN ENTITY

X Systems Limited was established in July 1994 and has its registered office in West Sussex in the UK. Since March 2002, QSL has been 100% owned by X Group Limited, which in turn is owned by D. Coghlan family companies (80%) and Jeff x.

X Systems Limited provides a comprehensive range of services to meet the challenges facing the flight simulation industry: third party training, pilot shortages, aircraft life extensions and technology enhancements. The company’s services are tailored to meet the specific needs of civil and military customers in the UK and worldwide. X Systems is the fastest growing flight simulation solutions company in the UK.

X Group Limited has a subsidiary, Q Flight Training Limited, which is a 50% joint venture with X Computer Corporation. Q Flight Training Limited has a 30-year, $100 million+ UK government contract for pilot training on the E-3D AWACS simulator.


THE US ENTITY
**Establishment and Scope.** X Simulation Systems, Inc. was established in July 2004 and has been assigned Employer Identification Number 33-1096887. X Simulation Systems, Inc. is being established as an important business development opportunity driven by demand from existing US customers of X Systems Limited.

**Sufficient physical premises to house the new office have been secured.** X Simulation Systems, Inc. has entered into a lease agreement for an office suite located at 1025 S. Semoran Blvd., Suite 1093, Winter Park, Florida 32792.

**Organizational Structure.** Mr. X will serve as Executive VP Operations of the company. Depending on the level and timing of business secured, the company aims to hire approximately ten (10) employees in the first year of operations.

**Financial Goals and Ability of the foreign entity to remunerate Mr. X and commence doing business in the United States.** X Systems Limited will be funded by the parent company until reaching a level of profitability. First year operations of the US business will be supported by the financial resources of X Systems Limited, which is committed to minimum funding of up to $200,000 for start-up and initial running costs.

**FOREIGN EMPLOYMENT/QUALIFICATIONS**

Mr. X has been employed as Manufacturing Manager of X Systems Limited in the UK since March 1995. In this capacity, Mr. X has held senior executive responsibilities for managing the development of the company’s business in simulator relocation and manufacturing services.

Prior to his employment with X Systems Limited, Mr. X served as Managing Director for Aviation Corporate Finishers (1991-1993), as Final Assembly Mechanical Engineering Team Leader for Singer Link Miles (1979-1991), as Test and Development Team Leader for Jaguar Cards Ltd. (1967-1979) and as Apprentice Trainee and Final Assembly Fitter for Armstrong Whitworth Aircraft Company (1963-1967).

**US EMPLOYMENT**

Mr. X has been offered the temporary position of Executive VP Operations for X Simulation Systems, Inc. in Winter Park, Florida. As Executive VP Operations, Mr. X will undertake a wide range of management tasks in the top executive management role in the US company. His primary duties will include:

- Lead the line operating functions of Programme Management, Engineering and Manufacturing.
- Develop the Marketing, New Business and Bid functions to win business for X Simulation Systems, Inc.
- Present a professional image of X Simulation Systems, Inc. at all times in dealing with Customer, Suppliers, Advisors and Employees.
- Coordinate and liaise with Finance, Human Resources, Quality and IT functions where administrative support will be initially supplied from the UK.
• Grow the business in a controlled manner, engage employees and establish permanent facilities in the Orlando area in line with capacity requirements.
• Report programme status, risks and forecasts and recommend business strategy to the President of X Simulation Systems, Inc.

Mr. X will report to the President of X Simulation Systems, Inc., who will be located in the UK. He will be paid an annual salary of $80,000 plus standard company benefits.

CONCLUSION

X Simulation Systems, Inc. requires the temporary services of Michael X for the executive position of Executive VP Operations in its new office in Florida. Mr. X is eligible for classification as an L-1A intracompany transferee as follows:

• X Systems Limited and X Simulation Systems, Inc. are qualifying organizations, as they have a parent-subsidiary relationship.
• Mr. X has been employed since March 1995 for X Systems Limited in the UK in the executive/managerial capacity of Manufacturing Manager.
• Mr. X will work for X Simulation Systems, Inc. in the United States in an executive capacity as Executive VP Operations.

We respectfully request favorable adjudication of X Simulation Systems, Inc.'s L-1A nonimmigrant petition on behalf of Mr. X.

Sincerely,

Jeff X
Chairman, X Systems Limited
President, X Simulations Systems, Inc.
# EXHIBITS

**US ENTITY: X SIMULATION SYSTEMS, INC.**

- Employer Statement  
- Bylaws  
- Chart of Ownership Structure  
- Statement regarding UK and US Companies  
- Office Agreement

**FOREIGN QUALIFYING ORGANIZATION:**
**Q SYSTEMS LIMITED**

- Certificate of Incorporation and Certificate of Name Change
- Company Brochure  
- Financial Documentation
- Organization Chart

**L-1 EXECUTIVE: MICHAEL X**

- Confirmation of Foreign Employment
- US Job Description

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*Sample new exhibit list*
The Petitioner

Documentation submitted with your petition indicates that your company provides Property Management.

The record does not contain evidence that the beneficiary has been employed in an executive/managerial position in the U.S. Also, the record does not establish that the U.S. entity has grown to be of sufficient size to support a managerial or executive position. Further, the evidence does not establish that the U.S. entity has the ability to pay the beneficiary's wage of $30,000.00 per year as stated, in addition, to any other employee's wages. Additional evidence is needed to show the U.S. entity has been in business.

Documents Pertaining To Your Company or Organization

USCIS has checked your company or organization in its Validation Instrument for Business Enterprises (VIBE), a Web-based tool that uses commercially available information from an Independent Information Provider (IIP). VIBE has indicated missing or contradictory information that requires additional evidence to establish your company or organization's eligibility.

Your Company or Organization's Name and Location

The information you provided about your company/organization's name and address is insufficient for USCIS to match your company/organization to information in USCIS's VIBE. Submit documentation to confirm your company/organization's official name and address. Additionally, if the location provided on your Form I-129 is used instead of, or in addition to, the official business address, explain. Below are examples of evidence that may be submitted, including copies of your company/organization's:

- current rental agreement, lease, or mortgage that is signed and dated by all parties;
- valid city, county, state or federal government business licenses;
- articles of incorporation or other corporate documentation, if applicable;
- letter from the U.S. Internal Revenue Service (IRS);
- state quarterly wage reports;
- federal tax statements;
- invoices or payment receipts.

How to Ensure that Your Company/Organization's Information is Correct in VIBE:

USCIS's VIBE receives information from the HP Dun and Bradstreet (D&B). If you believe that there are inaccuracies in your company/organization's record with D&B and wish to correct the information, there are two ways you may contact D&B directly to update your own record:

- by telephone, by calling 1-800-234-DUNS (3867), or
- online at www.dnb.com in the "Customer Resources" section of D&B's website. Once there, the "Update Your D&B Report" link provides a secure process for a business to update its information directly and correct any inconsistencies it may find within its business record.

When contacting D&B, they will apply their patented DUNSRIGHT process to the information provided to ensure accuracy and consistency. D&B will not update the record before this quality check is performed and in no instance will it include purely self-reported data in the database. Assuming the updated data is verified and correct, the new information will be included in D&B's customer record within 72 hours. There is no fee to update this information.

NOTE: USCIS does not require that you update your record with D&B. However, doing so may prevent future USCIS filings from receiving a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) for the VIBE-related issue.
MEMORANDUM
April 29, 2011

To: Interested Parties

From: Jeanne Butterfield, Esq.
Former Executive Director, American Immigration Lawyers Association

Bo Cooper, Esq.
Former INS General Counsel

Marshall Fitz, Esq.
Director of Immigration Policy, Center for American Progress

Benjamin Johnson, Esq.
Executive Director, American Immigration Council

Paul Virtue, Esq.
Former INS General Counsel

Crystal Williams, Esq.
Executive Director, American Immigration Lawyers Association

Re: Executive Branch Authority Regarding Implementation of Immigration Laws and Policies

The role of executive branch authority with respect to the implementation of immigration laws and policies has been well documented. This memorandum offers a short overview of the scope of executive branch authority and provides examples of its use in the immigration context.

Exercising Executive Authority

The authority of law enforcement agencies to exercise discretion in deciding what cases to investigate and prosecute under existing civil and criminal law, including immigration law, is fundamental to the American legal system. Every prosecutor and police officer in the nation makes daily decisions about how to allocate enforcement resources, based on judgments about which cases are the most egregious, which cases have the strongest evidence, which cases should be settled and which should be brought forward to trial.
The Supreme Court has made it clear that “an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”

In the immigration context, prosecutorial discretion is exercised at every stage in the enforcement process—whether tips or leads will be investigated, which arrests will be made, which persons will be detained, which persons will be released on bond, which cases will be brought forward for removal hearings or criminal prosecution, and which removal orders will be executed.

Despite the massive allocation of resources Congress has dedicated to immigration enforcement activities, the funding has limits and the agency must make thoughtful decisions about prosecutorial priorities. In fact, the President has repeatedly announced that the Administration’s interior enforcement priority is the prosecution and removal of immigrants who have committed serious crimes. To ensure that this and other prioritization decisions are followed and implemented, it is not uncommon for law enforcement agencies within and outside of the immigration context to provide clear guidance and training to its officers about the exercise of prosecutorial discretion. This type of guidance is not unusual. In fact, numerous memos have been issued by the DHS and its predecessor INS over the years setting forth agency priorities and seeking to provide its officers with clear guideposts for carrying out those priorities. The challenge is often in ensuring that such guidance is understood and followed on the frontlines of immigration enforcement.

Prosecutorial discretion can be exercised on a case-by-case basis with respect to individuals who have come into contact with law enforcement authorities. Or the government can exercise prosecutorial discretion by allowing individuals from explicitly defined groups that it does not consider to be enforcement priorities to ask affirmatively that discretion be applied in their case. This exercise of executive authority is not contrary to current law, but rather a matter of the extension and application of current law to contemporary national needs, values and priorities.

**Deferred Action**

The executive branch, through the Secretary of Homeland Security, can exercise discretion not to prosecute a case by granting “deferred action” to an otherwise removable (colloquially referred to as “deportable”) immigrant.

The former INS had guidelines in the form of “Operations Instructions” regarding the granting of deferred action. These guidelines provided for deferred action in cases where “adverse action would be unconscionable because of the existence of appealing humanitarian factors.”

Currently, deferred action is considered to be “a discretionary action initiated at the discretion of the agency or at the request of the alien, rather than an application process.”

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DHS has also described deferred action as an exercise of agency discretion that authorizes an individual to temporarily remain in the U.S. Regulations describe deferred action as “an act of administrative convenience to the government which gives some cases lower priority” (for enforcement action).\(^4\) DHS has stated in recent correspondence with the Hill that factors to be considered in evaluating a request for deferred action include the presence of sympathetic or compelling factors.

Deferred action does not confer any specific status on the individual and can be terminated at any time pursuant to the agency’s discretion. DHS regulations, however, do permit deferred action recipients to be granted employment authorization.\(^5\)

Deferred action determinations are made on a case-by-case basis, but eligibility for such discretionary relief can be extended to individuals based on their membership in a discrete class. For example, in June 2009, the Secretary of DHS granted deferred action to individuals who fell in to the following class: widows of U.S. citizens who were unable to adjust their status due to a statutory restriction (related to duration of marriage at time of sponsor’s death).\(^6\) Congress subsequently enacted a change in the law to address this particular problem.

Another recent example of the exercise of such executive authority to a class is the grant of deferred action to VAWA (Violence Against Women Act) applicants whose cases were awaiting the promulgation of regulations by DHS. Nearly 12,000 individuals were granted deferred action in 2010 under this exercise of executive authority.

**Extended Voluntary Departure/Deferred Enforced Departure**

Before the addition of “Temporary Protected Status” to the Immigration and Nationality Act in 1990, the Attorney General used his/her executive authority to temporarily suspend the removal of people from particular countries from the United States because of political strife, natural disasters, or other crises. Temporary relief known as “Extended Voluntary Departure” (EVD) was granted to citizens of Poland, Cuba, the Dominican Republic, Czechoslovakia, Chile, Vietnam, Lebanon, Hungary, Romania, Uganda, Iran, Nicaragua, Afghanistan, Ethiopia, and China in response to various periods of political upheaval and natural disaster between 1960 and 1990.

In the Immigration Act of 1990, Congress enacted the “Temporary Protected Status” (TPS) program. The statute set forth guidelines restricting the Secretary’s authority to grant relief from

\(^4\) 8 C.F.R. 274a.12(c)(14).
\(^5\) See 8 C.F.R. § 274a.12(c) (14).
removal exclusively on the basis of nationality. TPS can only be granted if, after consultation with the foreign government, there is a determination that it is unsafe for foreign nationals to return home due to armed conflict, natural disasters, or other extraordinary conditions.

Those TPS restrictions, however, only limit the exercise of agency discretion when the sole criterion for providing protection from removal is nationality. They do not limit the President’s exercise of class or group-based discretion under what has come to be known as “Deferred Enforced Departure” (DED). The president may direct that DED be granted to any group of foreign nationals pursuant to his foreign relations powers and his prosecutorial discretion authority. The president may grant DED for any specific amount of time and it typically is accompanied by employment authorization.

Executive authority in the form of “Deferred Enforced Departure” (DED) relief was exercised by President George W. Bush in 2007, and extended by President Obama in 2009, for certain nationals of Liberia.

Executive authority granting “Deferred Enforced Departure” was also exercised by President George H.W. Bush for Chinese nationals in the wake of Tiananmen Square events, and by President Clinton for certain Haitian nationals.

**Humanitarian Parole or Parole in Place**

Under current law, the executive branch, through the Secretary of Homeland Security, has the authority to “parole” or permit the entry of a person into the United States for “urgent humanitarian reasons or significant public benefit.” When applied to persons already living in the U.S., this authority is referred to as “parole in place” (PIP). Congress has limited this authority to individual, “case-by-case” determinations, precluding prior practice of using parole authority to admit certain classes of refugees.

**Signing Statements**

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7 See INA § 244.
8 See “Fact Sheet: Liberians Provided Deferred Enforced Departure (DED, ” September 12, 2007, at [http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm](http://www.dhs.gov/xnews/releases/pr_1189693482537.shtm); see also “Deferred Enforced Departure” at [http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fbbf3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=fbbf3e4d77d73210VgnVCM100000082ca60aRCRD](http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=fbbf3e4d77d73210VgnVCM100000082ca60aRCRD&vgnextchannel=fbbf3e4d77d73210VgnVCM100000082ca60aRCRD).
11 See INA§ 212(d)(5)(A).
Another example of how every Administration makes interpretive judgments regarding how they view and plan to enforce the law is through signing statements.

Every Administration brings its own view and interpretations to bear as it implements newly-enacted laws. These views have commonly been expressed in Presidential “signing statements” that indicate how the President intends to implement any given law and whether he considers any specific provisions of a law to be unconstitutional. For example, when President George H.W. Bush signed the Immigration Act of 1990 into law, he took specific exception to the provision of law making Temporary Protected Status the sole basis for allowing noncitizens to remain temporarily in the United States based on nationality or region of origin. He stated, “I do not interpret this provision as detracting from any authority of the executive branch to exercise prosecutorial discretion in suitable immigration cases. Any attempt to do so would raise serious constitutional questions.”

Signing statements often serve as the basis for shaping regulations and other administration policy determinations. Thus, when President Clinton expressed his displeasure over the unequal treatment of different nationalities in the Nicaraguan Adjustment and Central American Relief Act of 1997 (NACARA), he directed the Attorney General to take the history and background of the people covered as well as the “ameliorative” nature of the law into account when drafting regulations.

More recently, President George W. Bush issued 161 signing statements affecting over 1,100 provisions of law in 160 Congressional enactments. Similarly, President Obama most recently indicated in a signing statement that he considered a budget rider concerning the appointment of certain personnel unconstitutional, writing “Legislative efforts that significantly impede the President’s ability to exercise his supervisory and coordinating authorities or to obtain the views of the appropriate senior advisers violate the separation of powers by undermining the President's ability to exercise his constitutional responsibilities and take care that the laws be faithfully executed.”

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June 17, 2011

MEMORANDUM FOR: All Field Office Directors
All Special Agents in Charge
All Chief Counsel

FROM: John Morton
Director

SUBJECT: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Purpose

This memorandum provides U.S. Immigration and Customs Enforcement (ICE) personnel guidance on the exercise of prosecutorial discretion to ensure that the agency’s immigration enforcement resources are focused on the agency’s enforcement priorities. The memorandum also serves to make clear which agency employees may exercise prosecutorial discretion and what factors should be considered.

This memorandum builds on several existing memoranda related to prosecutorial discretion with special emphasis on the following:

- Sam Bernsen, Immigration and Naturalization Service (INS) General Counsel, Legal Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976);
- Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion (July 11, 2000);
- Doris Meissner, INS Commissioner, Exercising Prosecutorial Discretion (November 17, 2000);
- Bo Cooper, INS General Counsel, Motions to Reopen for Considerations of Adjustment of Status (May 17, 2001);
- William J. Howard, Principal Legal Advisor, Prosecutorial Discretion (October 24, 2005);
- Julie L. Myers, Assistant Secretary, Prosecutorial and Custody Discretion (November 7, 2007);
- John Morton, Director, Civil Immigration Enforcement Priorities for the Apprehension, Detention, and Removal of Aliens (March 2, 2011); and
- John Morton, Director, Prosecutorial Discretion: Certain Victims, Witnesses, and Plaintiffs (June 17, 2011).
Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

The following memoranda related to prosecutorial discretion are rescinded:

- Johnny N. Williams, Executive Associate Commissioner (EAC) for Field Operations, Supplemental Guidance Regarding Discretionary Referrals for Special Registration (October 31, 2002); and
- Johnny N. Williams, EAC for Field Operations, Supplemental NSEERS Guidance for Call-In Registrants (January 8, 2003).

Background

One of ICE’s central responsibilities is to enforce the nation’s civil immigration laws in coordination with U.S. Customs and Border Protection (CBP) and U.S. Citizenship and Immigration Services (USCIS). ICE, however, has limited resources to remove those illegally in the United States. ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum of March 2, 2011, which this memorandum is intended to support.

Because the agency is confronted with more administrative violations than its resources can address, the agency must regularly exercise “prosecutorial discretion” if it is to prioritize its efforts. In basic terms, prosecutorial discretion is the authority of an agency charged with enforcing a law to decide to what degree to enforce the law against a particular individual. ICE, like any other law enforcement agency, has prosecutorial discretion and may exercise it in the ordinary course of enforcement. When ICE favorably exercises prosecutorial discretion, it essentially decides not to assert the full scope of the enforcement authority available to the agency in a given case.

In the civil immigration enforcement context, the term “prosecutorial discretion” applies to a broad range of discretionary enforcement decisions, including but not limited to the following:

- deciding to issue or cancel a notice of detainer;
- deciding to issue, reissue, serve, file, or cancel a Notice to Appear (NTA);
- focusing enforcement resources on particular administrative violations or conduct;
- deciding whom to stop, question, or arrest for an administrative violation;
- deciding whom to detain or to release on bond, supervision, personal recognizance, or other condition;
- seeking expedited removal or other forms of removal by means other than a formal removal proceeding in immigration court;

1 The Meissner memorandum’s standard for prosecutorial discretion in a given case turned principally on whether a substantial federal interest was present. Under this memorandum, the standard is principally one of pursuing those cases that meet the agency’s priorities for federal immigration enforcement generally.
Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

- settling or dismissing a proceeding;
- granting deferred action, granting parole, or staying a final order of removal;
- agreeing to voluntary departure, the withdrawal of an application for admission, or other action in lieu of obtaining a formal order of removal;
- pursuing an appeal;
- executing a removal order; and
- responding to or joining in a motion to reopen removal proceedings and to consider joining in a motion to grant relief or a benefit.

Authorized ICE Personnel

Prosecutorial discretion in civil immigration enforcement matters is held by the Director\(^2\) and may be exercised, with appropriate supervisory oversight, by the following ICE employees according to their specific responsibilities and authorities:

- officers, agents, and their respective supervisors within Enforcement and Removal Operations (ERO) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- officers, special agents, and their respective supervisors within Homeland Security Investigations (HSI) who have authority to institute immigration removal proceedings or to otherwise engage in civil immigration enforcement;
- attorneys and their respective supervisors within the Office of the Principal Legal Advisor (OPLA) who have authority to represent ICE in immigration removal proceedings before the Executive Office for Immigration Review (EOIR); and
- the Director, the Deputy Director, and their senior staff.

ICE attorneys may exercise prosecutorial discretion in any immigration removal proceeding before EOIR, on referral of the case from EOIR to the Attorney General, or during the pendency of an appeal to the federal courts, including a proceeding proposed or initiated by CBP or USCIS. If an ICE attorney decides to exercise prosecutorial discretion to dismiss, suspend, or close a particular case or matter, the attorney should notify the relevant ERO, HSI, CBP, or USCIS charging official about the decision. In the event there is a dispute between the charging official and the ICE attorney regarding the attorney's decision to exercise prosecutorial discretion, the ICE Chief Counsel should attempt to resolve the dispute with the local supervisors of the charging official. If local resolution is not possible, the matter should be elevated to the Deputy Director of ICE for resolution.

\(^2\) Delegation of Authority to the Assistant Secretary, Immigration and Customs Enforcement, Delegation No. 7030.2 (November 13, 2004), delegating among other authorities, the authority to exercise prosecutorial discretion in immigration enforcement matters (as defined in 8 U.S.C. § 1101(a)(17)).
Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

Factors to Consider When Exercising Prosecutorial Discretion

When weighing whether an exercise of prosecutorial discretion may be warranted for a given alien, ICE officers, agents, and attorneys should consider all relevant factors, including, but not limited to—

- the agency’s civil immigration enforcement priorities;
- the person’s length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person’s pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person’s criminal history, including arrests, prior convictions, or outstanding arrest warrants;
- the person’s immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
- whether the person poses a national security or public safety concern;
- the person’s ties and contributions to the community, including family relationships;
- the person’s ties to the home country and conditions in the country;
- the person’s age, with particular consideration given to minors and the elderly;
- whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
- whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
- whether the person or the person’s spouse is pregnant or nursing;
- whether the person or the person’s spouse suffers from severe mental or physical illness;
- whether the person’s nationality renders removal unlikely;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
- whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
- whether the person is currently cooperating or has cooperated with federal, state or local law enforcement authorities, such as ICE, the U.S. Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others.

This list is not exhaustive and no one factor is determinative. ICE officers, agents, and attorneys should always consider prosecutorial discretion on a case-by-case basis. The decisions should be based on the totality of the circumstances, with the goal of conforming to ICE’s enforcement priorities.
Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

That said, there are certain classes of individuals that warrant particular care. As was stated in the Meissner memorandum on Exercising Prosecutorial Discretion, there are factors that can help ICE officers, agents, and attorneys identify these cases so that they can be reviewed as early as possible in the process.

The following positive factors should prompt particular care and consideration:

- veterans and members of the U.S. armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking, or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health conditions.

In exercising prosecutorial discretion in furtherance of ICE’s enforcement priorities, the following negative factors should also prompt particular care and consideration by ICE officers, agents, and attorneys:

- individuals who pose a clear risk to national security;
- serious felons, repeat offenders, or individuals with a lengthy criminal record of any kind;
- known gang members or other individuals who pose a clear danger to public safety; and
- individuals with an egregious record of immigration violations, including those with a record of illegal re-entry and those who have engaged in immigration fraud.

Timing

While ICE may exercise prosecutorial discretion at any stage of an enforcement proceeding, it is generally preferable to exercise such discretion as early in the case or proceeding as possible in order to preserve government resources that would otherwise be expended in pursuing the enforcement proceeding. As was more extensively elaborated on in the Howard Memorandum on Prosecutorial Discretion, the universe of opportunities to exercise prosecutorial discretion is large. It may be exercised at any stage of the proceedings. It is also preferable for ICE officers, agents, and attorneys to consider prosecutorial discretion in cases without waiting for an alien or alien’s advocate or counsel to request a favorable exercise of discretion. Although affirmative requests from an alien or his or her representative may prompt an evaluation of whether a favorable exercise of discretion is appropriate in a given case, ICE officers, agents, and attorneys should examine each such case independently to determine whether a favorable exercise of discretion may be appropriate.

In cases where, based upon an officer’s, agent’s, or attorney’s initial examination, an exercise of prosecutorial discretion may be warranted but additional information would assist in reaching a final decision, additional information may be requested from the alien or his or her representative. Such requests should be made in conformity with ethics rules governing
Exercising Prosecutorial Discretion Consistent with the Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens

communication with represented individuals and should always emphasize that, while ICE may be considering whether to exercise discretion in the case, there is no guarantee that the agency will ultimately exercise discretion favorably. Responsive information from the alien or his or her representative need not take any particular form and can range from a simple letter or e-mail message to a memorandum with supporting attachments.

Disclaimer

As there is no right to the favorable exercise of discretion by the agency, nothing in this memorandum should be construed to prohibit the apprehension, detention, or removal of any alien unlawfully in the United States or to limit the legal authority of ICE or any of its personnel to enforce federal immigration law. Similarly, this memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.

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3 For questions concerning such rules, officers or agents should consult their local Office of Chief Counsel.
THE MORTON MEMO AND PROSECUTORIAL DISCRETION
AN OVERVIEW

By Shoba Sivaprasad Wadhia

JULY 2011
THE MORTON MEMO AND PROSECUTORIAL DISCRETION
AN OVERVIEW

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JULY 2011

ABOUT SPECIAL REPORTS ON IMMIGRATION
The Immigration Policy Center’s Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

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ABOUT THE IMMIGRATION POLICY CENTER
The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC’s mission is to shape a rational conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at www.immigrationpolicy.org and our blog at www.immigrationimpact.com.
Introduction

On June 17, 2011, Immigration and Customs Enforcement (ICE) Director John Morton issued two significant memoranda on the use of prosecutorial discretion in immigration matters.\(^1\) Prosecutorial discretion refers to the agency’s authority to not enforce immigration laws against certain individuals and groups.\(^2\) The primary memo (the Morton Memo on Prosecutorial Discretion) calls on ICE attorneys and employees to refrain from pursuing noncitizens with close family, educational, military, or other ties in the U.S. and instead spend the agency’s limited resources on persons who pose a serious threat to public safety or national security. Morton’s second memo focuses on exercising discretion in cases involving victims, witnesses to crimes, and plaintiffs in good faith civil rights lawsuits. The memo instructs “[a]bsent special circumstances or aggravating factors, it is against ICE policy to initiate removal proceedings against an individual known to be the immediate victim or witness to a crime.”\(^3\)

A closer look at the Morton Memo on Prosecutorial Discretion reveals that it reaffirms many of the principles and policies of previous guidance on this subject. The memo, however, takes a further step in articulating the expectations for and responsibilities of ICE personnel when exercising their discretion.

Origins of Prosecutorial Discretion

The concept of prosecutorial discretion is not new to immigration law, and became public in 1975 after a lawsuit involving music legend, John Lennon. Lennon faced a medley of immigration issues. In order to help Lennon, his attorney Leon Wildes pushed the Immigration and Naturalization Service (INS) to disclose its policy on prosecutorial discretion under the Freedom of Information Act.\(^4\) This policy, known then as the “nonpriority” program, recognized that certain cases did not necessarily merit deportation; officers were instructed to consider advanced or tender age, long-time presence in the United States, health conditions, and family ties as reasons why the agency should consider exercising prosecutorial discretion favorably.\(^5\) While the agency’s stated criteria for the “nonpriority” program were subsequently repealed, the substance of that guidance was preserved in a memorandum issued by former INS Commissioner Doris Meissner (Meissner Memo). The Meissner Memo contained a mandate for every officer to exercise prosecutorial discretion in a judicious manner at every stage of the enforcement process and also published a list of equitable factors INS officers should consider in making prosecutorial decisions.\(^6\)

After 9/11, Congress passed the Homeland Security Act of 2002, abolishing INS and creating the Department of Homeland Security (DHS).\(^7\) INS functions were absorbed and dispersed throughout the Department.\(^8\) While the creation of DHS changed the landscape and functions of immigration laws in significant ways, the agency has continued to support prosecutorial discretion guidance that favors smart enforcement and temporary relief for resident noncitizens with socially desirable qualities or compelling equities.\(^9\)
Two Premises for Prosecutorial Discretion

For more than 30 years, the use of prosecutorial discretion in U.S. immigration enforcement has been based on two premises. The first is the necessity of using limited resources wisely—in other words, it’s about the money. To illustrate, a June 30, 2010, memorandum published by ICE concluded:

[ICE]...has resources to remove approximately 400,000 aliens per year, less than 4 percent of the estimated illegal alien population in the United States. In light of the large number of administrative violations the agency is charged with addressing and the limited enforcement resources the agency has available, ICE must prioritize the use of its enforcement personnel, detention space, and removal resources to ensure that the removals the agency does conduct promote the agency’s highest enforcement priorities, namely national security, public safety, and border security.10

Under that memo, ICE policy priorities are reflected in priority categories of individuals ICE seeks to target for arrest and removal. These categories are:

- Priority 1. Aliens who pose a danger to national security or a risk to public safety
- Priority 2. Recent Illegal Entrants
- Priority 3. Aliens who are fugitives or otherwise obstruct immigration controls.11

Significantly, the recent Morton Memo on Prosecutorial Discretion reaffirms these priorities, but places them within the decision-making process by identifying them as adverse factors which can mitigate or cancel out other considerations in a given case.12

The second theory of prosecutorial discretion concerns compassionate and humanitarian use of law-enforcement tools. Whereas resource issues motivate practical implementation decisions, humanitarian factors go to broader questions of whether justice is actually done in a given case. The kinds of factors that address this impulse in prosecutorial discretion include tender age, older age, the existence of a medical or mental health condition, the presence of family in the U.S., and positive contributions to the United States.13

Exercising Prosecutorial Discretion

Various agency memoranda stipulate that prosecutorial discretion can be exercised by any branch of DHS in many forms and at many points in the enforcement process, a point reiterated by the Morton Memo on Prosecutorial Discretion.14 Moreover, these memos all consistently stress the wide range of circumstances where prosecutorial discretion should be exercised. To illustrate, an officer may decide not to bring charges against someone who is out of status and is otherwise in the U.S. working. After an arrest, an officer may decide not to detain a person who does not appear to be a danger or a flight risk. Even after an arrest or detention, a DHS employee or attorney may decide not to serve the individual and the court with a Notice to Appear (charging papers) in removal proceedings because the person appears to be eligible for
a family benefit with the “services” side of immigration, United States Citizenship and Immigration Services. Moreover, if a person is already in removal proceedings, then ICE could exercise prosecutorial discretion by cancelling a Notice To Appear (NTA), or joining in a “motion to terminate.” Finally, if a person has already been ordered removed, ICE could grant a stay of removal. Alternatively, anywhere in the process any DHS component could grant “deferred action,” a discretionary remedy that keeps a person in a legal limbo. Regardless of the form prosecutorial discretion takes (i.e., NTA cancellation, deferred action, refraining from filing an NTA) the act itself confers no substantive benefit or right of action to the noncitizen.

Factors for Prosecutorial Discretion

While the standard for prosecutorial discretion in immigration matters has been largely the same for many years, the Morton Memo on Prosecutorial Discretion clarifies that standard in at least five important ways. First, it attempts to streamline the various memoranda on prosecutorial discretion by “build[ing] upon” a library of pre-existing policies on the subject. Second, it creates an extra “check” in the process by allowing ICE trial attorneys to review charging decisions by DHS employees and, as a matter of discretion, dismiss low-priority cases. Third, the Morton Memo on Prosecutorial Discretion directly addresses the role of the ICE attorney when an immigrant is in removal proceedings and the virtues of exercising discretion at this stage. Fourth, it clearly encourages ICE employees and attorneys to consider prosecutorial discretion “without waiting for an alien or alien’s advocate or counsel to request a favorable exercise of discretion.” In no other memoranda has there been such an explicit affirmative duty placed on the DHS employee to initiate prosecutorial discretion in cases. In fact, my experience in communicating with attorneys and researching this topic for several years is that only attorneys who are well informed about prosecutorial discretion and connected with DHS officials are successful. Finally, the Morton Memo on Prosecutorial Discretion offers a robust list of largely humanitarian circumstances that should trigger a favorable exercise of prosecutorial discretion. The list itself includes the following 19 factors that should be considered in deciding whether prosecutorial discretion is warranted:

- the agency’s civil immigration enforcement priorities;
- the person’s length of presence in the United States, with particular consideration given to presence while in lawful status;
- the circumstances of the person’s arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child;
- the person’s pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States;
- whether the person, or the person’s immediate relative, has served in the U.S. military, reserves, or national guard, with particular consideration given to those who served in combat;
- the person’s criminal history, including arrests, prior convictions, or outstanding arrest warrants;
the person’s immigration history, including any prior removal, outstanding order of removal, prior denial of status, or evidence of fraud;
• whether the person poses a national security or public safety concern;
• the person’s ties and contributions to the community, including family relationships;
• the person’s ties to the home country and conditions in the country;
• the person’s age, with particular consideration given to minors and the elderly;
• whether the person has a U.S. citizen or permanent resident spouse, child, or parent;
• whether the person is the primary caretaker of a person with a mental or physical disability, minor, or seriously ill relative;
• whether the person or the person’s spouse is pregnant or nursing;
• whether the person or the person’s spouse suffers from severe mental or physical illness;
• whether the person’s nationality renders removal unlikely;
• Whether the person is likely to be granted legal status or other relief from removal, including as a relative of a U.S. citizen or permanent resident;
• whether the person is likely to be granted temporary or permanent status or other relief from removal, including as an asylum seeker, or a victim of domestic violence, human trafficking, or other crime; and
• whether the person is currently cooperating or has cooperated with federal, state, or local law-enforcement authorities, such as ICE, the U.S Attorneys or Department of Justice, the Department of Labor, or National Labor Relations Board, among others. 19

The Morton Memo on Prosecutorial Discretion also identifies classes of persons who warrant “particular care” when making prosecutorial decisions. 20 Specifically, these individuals include:

• veterans and members of the U.S. armed forces;
• long-time lawful permanent residents;
• minors and elderly individuals;
• individuals present in the United States since childhood;
• pregnant or nursing women;
• victims of domestic violence, trafficking, or other serious crimes;
• individuals who suffer from a serious mental or physical disability; and
• individuals with serious health conditions. 21

Prosecutorial Discretion Does Not Confer Legal Status

Merely days after the Morton Memo was issued in June, select members of Congress, ICE’s own union, private associations opposed to any immigration reform, and the press erroneously labeled Morton’s memo on prosecutorial discretion a vehicle for circumventing Congress and, more specifically, as an “amnesty” for potential beneficiaries of the DREAM Act and other large groups. 22 The problem with this label is that the DREAM Act is a piece of legislation that has been introduced in several Congresses in various forms; at its core, the DREAM Act provides graduated high-school students with a vehicle for earning permanent legal status in the U.S. if they go to college or serve in the military for a specified period of time. 23 It should not be
surprising that some potential beneficiaries of the DREAM Act have the kinds of equities that are given favorable consideration by agency officers exercising prosecutorial discretion. That said, it is inaccurate to label the new Morton Memo on Prosecutorial Discretion a backdoor route to passing the DREAM Act. First, any form of prosecutorial discretion is tenuous at best, and does not confer a legal status or benefit. In contrast, the DREAM Act would result in a legal status for eligible students. Second, prosecutorial discretion, however tenuous, should be considered in a variety of situations and applied to low-priority cases that include strong equities, not just to qualifying DREAM Act cases. Finally, decisions about prosecutorial discretion are normally made on a case-by-case basis as opposed to categorically.

Conclusion

Prosecutorial discretion has and will continue to play an important role in immigration enforcement. ICE has taken an important step by issuing the recent memos on prosecutorial discretion and protection for crime victims, guidance that is sensitive to individuals who have attributes that our society values, but who will remain vulnerable to harsh immigration enforcement unless ICE attorneys and employees do the right thing and are given the support to make those decisions. Implementation of the memos should include a process by which prosecutorial discretion is considered in every case brought to ICE’s attention before a Notice to Appear is issued. ICE attorneys and employees must be trained on these memos, and held accountable when they are not followed. Moreover, ICE must keep statistics and profiles on the individuals considered for prosecutorial discretion and make them available to the public. Finally, ICE must invest resources in training and (re)acculturating its officers and attorneys to the concept of prosecutorial discretion and the importance of exercising it in each and every case.

Endnotes


3 See Morton, Victims, Witnesses, and Plaintiffs, supra note 3.  

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See Wadhia, Prosecutorial Discretion, supra note 3, at 248.

6 See Meissner Memo, supra note 3. For a closer examination of the factors listed in the Meissner Memo see Wadhia, Prosecutorial Discretion, supra note 3.


9 See Wadhia, Prosecutorial Discretion, supra note 3.

10 Morton, Civil Immigration Enforcement, supra note 3, at 1. This memo was reissued in March 2, 2011 with the following addition “These guidelines and priorities are not intended to, do not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.” John Morton, Civil Immigration Enforcement: Priorities for the Appreciation, Detention, and Removal of Aliens, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, 4 (2011), http://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf.


12 “ICE must prioritize the use of its enforcement personnel, detention space, and removal assets to ensure that the aliens it removes represent, as much as reasonably possible, the agency’s enforcement priorities, namely the promotion of national security, border security, public safety, and the integrity of the immigration system. These priorities are outlined in the ICE Civil Immigration Enforcement Priorities memorandum …which this memorandum is intended to support.” Morton, Exercising Prosecutorial Discretion, supra note 3, at 2.

13 See, e.g., sources cited supra note 3.

14 Most memoranda, including the Morton Memo, encourage employees to exercise prosecutorial discretion at the earliest possible stage of the enforcement process, ideally before charges are filed with the immigration court.

15 See, e.g., Morton, Exercising Prosecutorial Discretion, supra note 2; Meissner Memo, supra note 3; Howard Memo, supra note 3.


17 See, e.g., Morton, Exercising Prosecutorial Discretion, supra note 2. Beyond the scope of this paper is a discussion about whether certain acts of prosecutorial discretion should operate as a formal benefit and be accompanied by a right of review and other protections. For an analysis on this topic, see Wadhia, Prosecutorial Discretion, supra note 3.

18 Morton, Exercising Prosecutorial Discretion, supra note 2, at 5.

19 Id. at 4.

20 Id. at 5.

21 Id.


IN THE BOARD OF ALIEN LABOR CERTIFICATION APPEALS

In the Matters of:

MICROSOFT CORPORATION,
Employer,

on behalf of

DILAN SUDHARAKA HEWAGE, BALCA Case No.: 2013-PER-01478
ETA Case No.: A-11228-00132

ADIT ABHAY DALVI, BALCA Case No.: 2013-PER-02904
ETA Case No.: A-11222-98848

BHARADWAJ JANARDHAN, BALCA Case No.: 2013-PER-02962
ETA Case No.: A-11231-01013

On En Banc Review

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA
AS AMICUS CURIAE IN SUPPORT OF THE EMPLOYER

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November 7, 2013
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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents an underlying membership of more than three million businesses and organizations of every size, in every business sector, and from every region of the country. A central function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in litigation before administrative agencies and in the courts raising issues of vital concern to the nation's business community. This case implicates one of the most significant labor certification issues facing employers in the United States, which is why the Chamber files this brief, at the invitation of the Board, as amicus curiae. See 29 C.F.R. § 18.12.

SUMMARY OF ARGUMENT

The Department of Labor's foreign labor certification regulation, 20 C.F.R. § 656.17(k), requires that an employer, before hiring an available foreign worker for an open position, "notify and consider" all potentially qualified U.S. workers who have been laid off by the employer within the last six months. Neither that regulation nor any other agency directive, however, explains how an employer may or must satisfy this requirement. The result is that an employer (such as Microsoft), which may have spent years developing and implementing a system to "notify and consider" potentially qualified and recently laid-off workers, and which may have relied on that system in recruiting qualified foreign workers to staff otherwise unfillable mission-critical posts, may later find those efforts wasted if the system does not satisfy the ad hoc expectations—previously unpublished and unknowable to the employer, announced only in retrospect upon denial of a labor-certification petition—of the Department of Labor analyst
assigned to the matter. The uncertainties inherent in this standardless process impose substantial and largely unrecoverable costs on employers throughout the country.

The purpose of this brief is twofold. The first is to highlight the problems with the current regulatory structure, which provides no governing standards by which employers can with confidence develop or implement a foreign labor certification system. The second is to explain why the Department should use notice and comment rulemaking to adopt regulatory provisions defining and clarifying the “notify and consider” requirement. In all events, and however the Board rules in this particular case, it should recommend that the Department proceed as soon as possible to address these issues.

ARGUMENT

I. The Department Should Clarify The “Notify And Consider” Requirement Of The Foreign Labor Certification Regulation.

The existing regulatory structure provides insufficient—indeed, no—guidance to employers seeking to comply with the laid-off worker notification requirement of the foreign labor certification regulation, 20 C.F.R. § 656.17(k). See, e.g., Am. Immigration Lawyers Ass’n (AILA), AILA’s Guide To PERM Labor Certification 253 (2011). To bring needed certainty to this field, and to alleviate the immense burden on employers, the Department should take immediate action to clarify the steps an employer may or must take to satisfy this requirement.

A. The notification provision in 20 C.F.R. § 656.17(k) leaves critical questions unanswered. That provision states simply, without further explanation, that an employer must “notify and consider” recently laid-off, potentially qualified U.S. workers. Id. The regulation does not, however, specify how—among the wide range of possibilities—employers should go about “notifying” their former employees. And there are in fact many reasonable ways that employers may provide notice.
Legal practice is replete with disparate requirements for providing notice. Notice might be accomplished, for example, by delivery of a letter or other physical document, e.g., Fed. R. Civ. P. 5(b)(2)(A), or by transmission of information through verbal communication or electronic means, e.g., Fed. R. Civ. P. 5(b)(2)(E). In some other circumstances, notice must be specific and detailed, explaining all pertinent information and its relevance to the individual, e.g., 29 C.F.R. § 639.7, whereas in others it need only alert an individual that an obligation or opportunity may exist and should be further investigated, e.g., Fed. R. Civ. P. 23(c)(2). Notice must sometimes be delivered personally to the individual, up to and including through hand delivery by a registered agent, e.g., Fed. R. Civ. P. 4.1, but quite often (including in the rulemaking context) it can be provided through publication in an official reporter, e.g., 5 U.S.C. § 553(b), Internet site, e.g., 28 C.F.R. § 8.9, or even a local “newspaper with general circulation,” e.g., Fed. R. Civ. P. 71.1(d)(3)(B). Notice might be deemed effective only upon receipt, or only upon express certification by the recipient, e.g., Weigner v. City of New York, 852 F.2d 646, 651, n.6 (2d Cir. 1988), or it might be considered complete upon mailing or other attempt at service, regardless of whether the information is in fact ever received, e.g., Fed. R. Civ. P. 5(b)(2)(C).

The nearly boundless range of possible methods of providing “notice” poses a serious problem for employers attempting to comply with 20 C.F.R. § 656.17(k). The regulation requires them to develop and document a process to “notify” all “potentially qualified” recently laid-off workers of a job opening, id., but it does not define or restrict the method or guidelines that must be followed in doing so, id.; see also Labor Certification for the Permanent

Employment of Aliens in the United States, 69 Fed. Reg. 77,326, 77,354-55 (Dec. 27, 2004). Thus, employers must rely on their own judgment, in light of their knowledge of industry practice and experience in recruitment, to determine the most effective means to notify workers of a new opportunity. See AILA’s Guide to PERM Labor Certification, supra, at 253; see also Austin T. Fragomen, Jr., et al., Labor Certification Handbook § 2:74 (2013 supp.). That is, indeed, what appears to have occurred in this case, with the employer developing an Internet-based notification system that, in the employer’s reasonable view, provided the best means to maintain communication with former employees.

Nothing in the regulation precludes employers from relying on their own judgment and experience in crafting their notification process. Indeed, in the absence of any specific limitation regarding the form of notice that must be provided, the regulation should be interpreted as granting employers discretion to choose from the available methods of providing reasonable notice to former employees, to craft and implement their notice procedures accordingly, and then to certify that fact to the Department. See U.S. Dep’t of Labor, ETA Form 9089, Application for Permanent Employment Certification, Part I.e.26-A (directing employer to certify whether “[any] laid off U.S. workers [were] notified and considered for the job opportunity for which certification is sought”).

Nevertheless, employer-crafted notification procedures are, with increasing frequency, being rejected post hoc by Department analysts. The reasons provided vary widely—including, as here, failure to “directly” or “actively” notify the qualified workers—but they all share a common attribute: they are premised on the employer’s alleged failure to satisfy a notice requirement that appears nowhere on the face of the regulation or in any other document issued
by the Department. They are instead based on the ad hoc judgments of the analysts regarding what, in their view, should be mandated as a matter of policy and best practice.

Here, for example, the Department analyst determined that an employer cannot satisfy its obligation under the regulation by providing notice to laid-off employees of a website where jobs are posted and available for review—even though such posting would satisfy the general definition of “notify.” See supra p.3. Instead, according to the Department’s decision, employers must “actively” and “directly” contact these employees and provide them with “specific” notice of the relevant job opportunity. Even assuming for the sake of argument that this would be a permissible standard for the Department to adopt—and the Chamber does not concede that it would be—it does not currently appear in the regulation and could not have been reasonably anticipated by the employer when it was developing its notice procedures.\(^2\)

The problem is exacerbated because the Department does not publish determinations made under the foreign labor certification program and is not bound by those prior decisions. See 20 C.F.R. § 656.24. This means that employers have little if any information concerning the standards that have previously been applied to assess the sufficiency of notification procedures—and even when they do, they cannot rely on that information in crafting their own processes. Indeed, an employer cannot even be sure that a notification procedure that previously passed muster will be recognized as valid in the future. In any particular case, a Department analyst may conclude that the regulation imposes a more rigorous “notice” requirement—demanding more specificity, more direct delivery, or more clear evidence of receipt—than the one used by

\(^2\) The “notify” requirement is of quite recent vintage, having been adopted only in 2004 (effective in 2005). It represented a “clear break from [the Department’s] historical treatment of layoffs,” which was “never before set forth in regulations, BALCA decisions, or policy memoranda.” AILA’s Guide to PERM Labor Certification, supra, at 253. There is, for that reason, no prior tradition or history of practice from which employers might draw guidance in assessing the adequacy of their notification procedures.
the employer. These decisions are of course subject to review by the Board, id. § 656.26, which can and does with some regularity reverse, see, e.g., In re Cisco Systems, Inc., 2011-PER-02811, 2013 WL 1854064 (Bd. Alien Lab. Cert. App. 2013). But only a small percentage of cases reach the Board level and an even smaller percentage result in a published opinion.

In short, there is no publicly available, reliable source employers can consult to determine whether their notification process will be deemed to satisfy the regulation. "Employers must pick, at their peril, among the wide range of [notification] options"—anything from "posting on the state workforce agency ... job board to sending a letter to each laid-off worker via overnight delivery," AILA's Guide to PERM Labor Certification, supra, at 253—and then hope the selected option is favorably received by the Department analyst. This is precisely the type of regulatory system that the Supreme Court has said implicates fundamental concerns of due process: one that "fails to provide a person of ordinary intelligence fair notice of what is [required], or is so standardless that it authorizes or encourages seriously discriminatory enforcement." FCC v. Fox Television Stations, Inc., 132 S.Ct. 2307, 2317 (2012) (quoting United States v. Williams, 553 U.S. 285, 304 (2008)).

B. The vagaries and uncertainties inherent in this system impose enormous costs upon all participants in the labor certification system. Employers devote substantial time and resources to the development and implementation of their labor-certification processes, including the layoff-notification procedures. See, e.g., Fragomen et al., supra, §§ 2:62, 2:74-2:75. Managers and human resources personnel must decide how best to determine whether a laid-off worker is in the "occupation for which certification is sought or in a related occupation"; whether the laid-off worker is "potentially qualified"; how to inform the worker of the opening; and whether the employer's process of consideration meets the regulatory standard. Id. They must
then actually put that system into practice—possibly incurring, among other costs, the expense of hiring a computer consultant to set up a job-posting website or contracting with delivery companies to distribute job-notification letters. *Id.* Companies will in addition often retain experienced attorneys to advise and assist them with developing these procedures and documenting their implementation, and when necessary preparing and submitting the documentation for an audit by the Department. *Id.; see also AILA’s Guide to PERM Labor Certification, supra, at 253.*

These expenses are all for nothing if a Department analyst subsequently declares the notification procedures invalid. Any notice provided to laid-off employees under those procedures will be deemed ineffective, meaning the employer will have to start the full labor-certification process once again, essentially from scratch. The employer will, once again, need to obtain a prevailing-wage determination, place recruitment advertisements, review the résumés of any applicants, and then develop and execute, in the event of layoffs in the preceding six months, revised notification and consideration procedures for laid-off U.S. workers—all the time under the cloud that the revised procedures may suffer the same rejection as the previous process, if they do not satisfy the demands of the next Department analyst.

Beyond the direct monetary costs, this system also produces hidden, but often more significant, costs in the form of lost productivity. The reason employers go through the labor-certification process—and indeed the fundamental purpose of the regulation—is, of course, to allow them to hire workers for positions that would otherwise go unfilled. *See, e.g.,* 69 Fed. Reg. at 77,326-28; *see also AILA’s Guide to PERM Labor Certification, supra,* at 253. An employer whose notice provisions are deemed insufficient will be unable to hire the qualified foreign
worker, and the position will continue to go unfilled. Particularly for mission-critical functions, the ultimate financial loss to an employer can be severe, and potentially debilitating.

All of this can and should be avoided. The Department has in other regulatory schemes with similar notification requirements adopted clear guidelines describing when and how notice must be provided, and there is no reason it cannot do so here. See, e.g., 29 C.F.R. §§ 639.1-639.10 (stating requirements for notice under Worker Adjustment and Retraining Notification Act). Indeed, another subsection of the labor-certification regulation sets forth, in some detail, the procedures that employers must follow in publishing “notice” of job opportunities for purposes of pre-filing recruitment. See 20 C.F.R. § 656.17(e). Given the high costs associated with the current standardless system, and the regulatory and constitutional concerns it implicates, the Department should immediately take action to clarify the notification requirement in 20 C.F.R. § 656.17(k).

II. The Department Should Develop Standards Through Notice And Comment Rulemaking.

The appropriate way to establish greater clarity is through “notice and comment” rulemaking, as prescribed by the Administrative Procedure Act (APA), 5 U.S.C. § 553. Although agencies have sometimes employed less deliberative methods of setting policy, such as issuing guidance documents or case-by-case adjudication, notice and comment rulemaking is a superior choice for many reasons and should be used in these circumstances. See generally Jill E. Family, Administrative Law Through the Lens of Immigration Law, 64 Admin L. Rev. 565, 567 (2012); Robert A. Anthony, Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them To Bind the Public?, 41 Duke L.J. 1311 (1992).

A. The APA specifies notice and comment rulemaking as the method of promulgating generally applicable rules. See, e.g., Gen. Elec. Co. v. EPA, 290 F.3d 377, 382
Although the statute permits agencies in some circumstances to issue "interpretative rules" or publish "general statements of policy," 5 U.S.C. § 553(b), it affirmatively mandates notice and comment for those rules intended to bind the public and the agency with the force of law, Gen. Elec. Co., 290 F.3d at 382-83. Standards defining the manner by which employers are required to "notify" laid-off workers under the labor-certification process are precisely of this type. The current regulation, in fact, was promulgated through notice and comment rulemaking. See 69 Fed. Reg. 77,326. Furthermore, as noted above the Department has in other regulatory schemes employed the notice and comment process as the appropriate legal means by which to establish and enforce similar notification requirements. See, e.g., 29 C.F.R. §§ 639.1-639.10.

Congress, administrative officials, and courts have repeatedly admonished that notice and comment rulemaking should be preferred over other forms of agency policymaking. See, e.g., Non-binding Legal Effect of Agency Guidance Documents, H.R. Rep. No. 106-1009, at 1 (2000) (disapproving of "backdoor" regulation through guidance documents); Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,433 (Jan. 25, 2007) (Office of Management and Budge directive, which advises that notice and comment rulemaking affords the "benefit of careful consideration" that may be lacking in other forms of agency action); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1019 (D.C. Cir. 2000) (criticizing agency's practice of creating new law through guidance documents). Compared to case-by-case adjudication or informal agency guidance, notice and comment rulemaking produces rules of higher quality, greater legitimacy, and less susceptible to legal challenge. Elec. Privacy Info. Ctr. v. U.S. Dep't of Homeland Sec., 653 F.3d 1, 8 (D.C. Cir. 2011); Gen. Elec. Co., 290 F.3d at 385; Appalachian Power, 208 F.3d at 1019; Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 213 (D.C. Cir. 1999). Notably,
courts frequently strike down administrative policies issued through guidance documents and other informal publications as violating the APA’s notice and comment requirements. *E.g.*, *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966, 972 (D.C. Cir. 2013); *Elec. Privacy Info. Ctr.*, 653 F.3d at 8; *Gen. Elec. Co.*, 290 F.3d at 385; *Appalachian Power*, 208 F.3d at 1019; *Chamber of Commerce*, 174 F.3d at 213; *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). The Supreme Court has long since established that “[t]he function of filling in the interstices of [a statute] should be performed, as much as possible, through [the] quasi-legislative promulgation of rules to be applied in the future.” *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (“Since [an agency], unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct.”).

**B.** The presumption favoring notice and comment rulemaking exists for good reason. Compared to other forms of agency action, notice and comment rulemaking produces rules of higher quality and greater legitimacy. The centerpiece of the APA’s rulemaking process—the requirement of a period for receiving public comments—gives the agency an opportunity to receive a wide variety of information from all interested groups, enabling them “to obtain information that may help them better understand how current policies could be improved and also how the public or regulated parties would respond to a change in policy.” Cary Coglianese et al., *Transparency and Public Participation in the Federal Rulemaking Process*, 77 Geo. Wash. L. Rev. 924, 927 (2009). With more information from a broader range of interested persons at its fingertips, the agency is in a better position to take reasonable and effective agency action.³

³ Other requirements of notice and comment rulemaking, including the obligation of responding to “significant points raised by the public,” *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012), and adequately explaining the basis and purposes of the rule, *Northeast
That is certainly true here. The employers and employees who participate in the labor-certification process will have, by virtue of their direct experience, the best knowledge as to how notice of a recruitment opportunity can be most effectively and efficiently conveyed. This input is especially important given the wide range of commercial enterprises and industries that resort to the labor-certification process: a notification procedure that is appropriate for a high-tech company, for example, may not be appropriate for a manufacturer of heavy equipment. By inviting and obtaining the viewpoints of those across the industrial and commercial spectrum, the Department will be in the best position to decide how to craft the notification procedures so as to provide sufficient clarity for all employers (and regulators) while ensuring adequate flexibility across different sectors of the economy.

Clear standards will also help resolve another problem: the Department has for years struggled with increasing caseloads and a backlog of certification requests. See Liberty Fund, Inc. v. Chao, 394 F. Supp. 2d 105, 109 (D.D.C. 2005) (citing Declaration of William Carlson, Director of Foreign Labor Certification); see also Faegre Baker Daniels et al., PERM Applications: Longer Processing Times and Continued Scrutiny By Department of Labor, Lexology (Aug. 21, 2013), http://www.lexology.com/library/detail.aspx?g=568ecc36-c5c6-4d27-82d9-0cae8aba1d7a. Although there are many reasons for this, one of them is confusion—among both employers and Department analysts—regarding the applicable notification standards for laid-off workers. Another reason is the high number of appeals (and refilings of labor certifications) in cases where a petition is denied based on a finding of insufficient notification and consideration of U.S. workers. Clarifying the notification standards would mitigate at least

Maryland Waste Disposal Authority v. EPA, 358 F.3d 936, 948-49 (D.C. Cir. 2004), also lead to heightened agency deliberation and, in turn, to improved, better-planned regulations.
some of these problems and, thereby, would reduce the pending caseloads of the Department and its analysts.

C. Notice and comment rulemaking also serves several other interests. Perhaps most importantly, a formal regulation is the only type of rule that can legally bind the public and the agency and thus provide employers with the predictability needed in the labor-certification process. Gen. Elec. Co., 290 F.3d at 385. By contrast, agency policy statements, which may frequently change and are not binding, id., cannot remedy the chief concerns of employers: an inability to rely on specific notice standards and to predict accurately what a Department analyst will decide on any given day.

The comment period also gives employers and workers a valuable opportunity to participate in the rulemaking process by submitting input on any proposed regulation before its adoption. The right to comment places all interested groups—employers, U.S. workers, and foreign workers alike—on equal footing to express their views. Indeed, public participation is a core democratic value in its own right, one that instills a final regulation with a valuable measure of democratic legitimacy. Equally important, public rulemaking procedures foster government transparency. These values are not merely a “convenient formalism,” but have been characterized by the Supreme Court as a “structural necessity,” National Archives & Records Administration v. Favish, 541 U.S. 157, 172 (2004), and “vital to the functioning of a democratic society,” NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

Providing this opportunity for all stakeholders to participate is especially important in this circumstance. The purpose of the foreign labor certification regulation—allowing employers to hire foreign workers for positions for which no U.S. worker is available—is undoubtedly worthy and consistent with the interests of all relevant stakeholders. By engaging with these groups
through the public notice and comment process, and offering them a voice in developing a set of
governing rules, the Department can best ensure both that the final rules reflect the concerns of
these parties and that they will ultimately be viewed as legitimate.

Put simply, in light of the substantial benefits of notice and comment rulemaking, and the
risks of dispensing with the APA’s rulemaking procedures, it is in the Department’s and the
public’s best interests to use notice and comment rulemaking as the means of clarifying the
notification standards for foreign labor certifications. And because of the serious problems with
the current lack of notification standards, it is clear that greater clarity is necessary.

CONCLUSION

For all of these reasons, and the reasons stated by Microsoft, the Board should reverse the
decision of the certifying officer, and the Department should clarify the “notify and consider”
requirement in 20 C.F.R. § 656.17(k) through notice and comment rulemaking.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief as Amicus Curiae by the U.S. Chamber of Commerce is being served by first class mail, postage prepaid, on November 7, 2013, addressed to the following:

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