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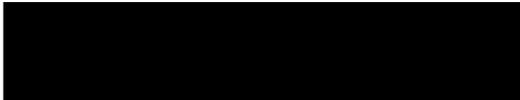


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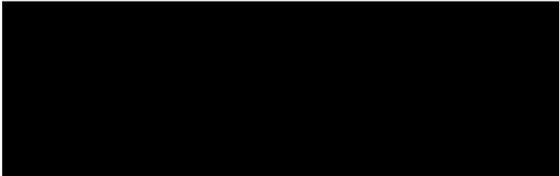
Date: **MAY 03 2007**

IN RE: Petitioner:
Beneficiary:



Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



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

DISCUSSION: On November 14, 2003, the Director of the Vermont Service Center denied the nonimmigrant visa petition. On March 24, 2004, the director affirmed the November 14, 2003 decision after considering a motion to reconsider. The petitioner appealed the March 24, 2004 decision to the Administrative Appeals Office (AAO), and, on August 2, 2005, the AAO summarily dismissed the appeal. On September 6, 2005, counsel to the petitioner filed a Motion to Reopen and Reconsider the AAO's decision in accordance with 8 C.F.R. § 103.5. While the AAO will grant the Motion to Reopen and Reconsider *in part*, it will affirm the AAO's decision to dismiss the appeal.

The petitioner is a Puerto Rico corporation and claims to be a wholesale and retail florist. The petitioner seeks to employ 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 denied the petition, and later affirmed this denial, after concluding that the petitioner failed to establish that the beneficiary had been or would be employed in a specialized knowledge capacity.

The AAO subsequently summarily dismissed the appeal. The AAO determined that, since the petitioner did not identify specifically any erroneous conclusion of law or statement of fact, the appeal should be summarily dismissed pursuant to 8 C.F.R. § 103.3(a)(1)(v). The AAO relied primarily on the fact that the petitioner failed to file a brief.

On motion, the petitioner asserts that it did file a brief on May 26, 2004, and argues that the AAO should reopen or reconsider its summary dismissal. In support of this motion, the petitioner provides a copy of the brief, an associated declaration titled "Unsworn Declaration Under Penalty of Perjury," and evidence that UPS delivered a package associated with "Benincore" to the Vermont Service Center on May 26, 2004.

Upon review of the evidence submitted by the petitioner, the AAO has concluded that it is more likely than not that the petitioner did file the brief and evidence on May 26, 2004. Therefore, the AAO will grant the Motion to Reopen and Reconsider as it pertains to the brief dated May 25, 2004. However, for the reasons articulated below, the AAO will not grant the Motion as it pertains to the "Unsworn Declaration Under Penalty of Perjury," and will affirm its August 2, 2005 dismissal of the appeal.

Before addressing the substance of the petitioner's appeal, the AAO will first address its decision to deny the Motion as it pertains to the "Unsworn Declaration Under Penalty of Perjury." The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹ Since the facts contained in the "Unsworn Declaration Under Penalty of Perjury" could have been presented in the previous proceeding, i.e., the motion which was the subject of the director's March 24, 2004 decision currently on appeal, the facts may not be considered "new" under 8 C.F.R.

¹The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984)(emphasis in original).

§ 103.5(a)(2), may not be considered by the AAO in the context of the current Motion, and would have been disregarded by the AAO initially if it had not summarily dismissed the appeal.²

Moreover, it must be noted that the underlying appeal to the AAO currently being considered is from the director's decision on a motion to reconsider. The petitioner clearly characterized its November 23, 2003 motion as a motion to reconsider and *not* as a motion to reopen. This is significant in that a motion to reconsider must "establish that the decision was incorrect based on the evidence of record at the time of the initial decision." 8 C.F.R. § 103.5(a)(3). As explained above, only a motion to reopen containing "new" facts will permit an adjudicator to look beyond the existing record. *See* 8 C.F.R. § 103.5(a)(2). Therefore, since the instant appeal is from the director's decision on a motion to reconsider, the scope of the AAO's review is limited to the propriety of the director's "application of law" to the record as it existed when the director issued her decision. This limited scope of review would prohibit the introduction of the "Unsworn Declaration Under Penalty of Perjury" even if it contained "new" facts. If the petitioner had wanted to preserve its opportunity to introduce "new" facts after the director rendered her decision, the petitioner would have needed to file either a motion to reopen or a timely appeal. As the petitioner did neither, the current appeal is limited to the record as it existed when the director denied the petition on November 14, 2003.

In view of the above, the primary issue in this appeal is whether the director correctly applied the law in concluding that the petitioner failed to establish that the beneficiary had been or would be employed in a specialized knowledge capacity.

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:

²The petitioner (1) was put on notice of required evidence regarding specialized knowledge in the director's Request for Evidence dated September 11, 2003; (2) was given a reasonable opportunity to provide it for the record before the visa petition was originally adjudicated by the director; and (3) chose not to provide the evidence. Therefore, the AAO would have been obligated to disregard this evidence even if it had not summarily dismissed the appeal on August 2, 2005. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). The petitioner failed to submit the requested evidence in response to the director's Request for Evidence and attempted to submit in on appeal. Although this evidence has not been addressed by the AAO until now in the context of this instant Motion to Reopen and Reconsider, the AAO nevertheless will not consider this evidence for any purpose.

- (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 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.

Counsel to the petitioner described the beneficiary's specialized knowledge in a letter dated November 4, 2003. As this letter is part of the record, the totality of the description will not be reproduced here. Generally, counsel explained that the beneficiary has specialized knowledge of the pre- and post-harvesting processes essential to protecting the quality and freshness of cut flowers. Counsel asserts that the beneficiary gained this specialized knowledge through 13 years of experience with the foreign employer where she had the opportunity to also work directly with the flower growers. Counsel also asserts that it would take at least 18 months for the petitioner to train a replacement. Finally, counsel asserts that the beneficiary received formal training on quality control in 1997, 1998, and 2000.

The petitioner described the beneficiary's proposed job duties in the United States in a letter dated August 29, 2003 as follows:

[The petitioner] wishes to employ [the beneficiary] as a Quality Control Manager. Her duties

and responsibilities will include: verification of flower condition and quality upon receipt of the shipment, control and verification of packaging for exports, flower handling, temperature control in refrigerated warehouse, cost controls, coding and pricing and programming of inventory controls and cross-references, implementation of the company's sanitary and safety regulations.

On November 14, 2003, the director denied the petition concluding that the petitioner failed to establish that beneficiary has been or would be employed in a specialized knowledge capacity. Specifically, the director determined that the beneficiary's knowledge "is not uncommon, unique or proprietary when compared with the expected knowledge and skills of other Quality Control Managers who successfully manage wholesale and retail establishments in the flower industry."

On November 24, 2004, counsel to the petitioner filed a motion to reconsider. Counsel asserts that the director erred in her interpretation of specialized knowledge and that the regulations do not require a petitioner to establish that a beneficiary's knowledge is unique, uncommon, or proprietary when compared with the knowledge of others who hold similar positions in the industry. Counsel further asserts that "whether other individuals in the same field working for other employers possess more knowledge is totally irrelevant to the definition of 'specialized knowledge.'" In support of this assertion, counsel cites a 1988 memorandum from the Associate Commissioner for Examinations. *See* Memo., Norton, Assoc. Comm., Examinations, Immigration and Naturalization Service (Oct 27, 1988).

On March 24, 2004, the director denied the motion. The director did not specifically address counsel's argument regarding her interpretation of specialized knowledge.

On appeal, counsel asserts again that the director misinterpreted the meaning of specialized knowledge.

Upon review, counsel's argument is not persuasive that the director erred in her interpretation of specialized knowledge or that the beneficiary has been, or will be, employed in a specialized knowledge capacity as defined at 8 C.F.R. § 214.2(l)(1)(ii)(D).

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)(ii). The petitioner must submit a detailed job description of the services to be performed sufficient to establish specialized knowledge. In this case, while the beneficiary's job description adequately describes her duties as a cut flower quality control employee, the petitioner fails to establish that these positions, both in the United States and abroad, require an employee with specialized knowledge.

Although the petitioner repeatedly asserts that the beneficiary's proposed position in the United States requires "specialized knowledge," the petitioner has not adequately articulated any basis to support this claim. The petitioner has failed to identify any specialized or advanced body of knowledge which would distinguish the beneficiary's role from that of other experienced cut flower quality control personnel employed by the petitioner or in the industry at large. Going on record without documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165

(Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Specifics are clearly an important indication of whether a beneficiary's duties involve specialized knowledge; otherwise meeting the definitions would simply be a matter of reiterating the regulations. See *Fedin Bros. Co., Ltd. v. Sava*, 724, F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905, F.2d 41 (2d. Cir. 1990).

The record does not reveal the *material difference* between the petitioner's cut flower harvesting and quality control processes and the cut flower harvesting and quality control processes of other flower exporters/importers in the industry at large. While the petitioner asserts repeatedly that the beneficiary gained her knowledge of the petitioner's processes from years of work experience with the foreign entity as well as in-house training, the record does not establish that the beneficiary's knowledge is different from the knowledge of cut flower quality control managers generally throughout the industry, in the petitioner's workforce, or in the foreign entity's workforce.

In her motion to reconsider and in the subsequent appeal, counsel to the petitioner relies entirely on the guidance on the interpretation of "specialized knowledge" provided in a 1988 memorandum. See Memo., Norton, Assoc. Comm., Examinations, Immigration and Naturalization Service (Oct 27, 1988). However, counsel entirely ignores more recent guidance on the interpretation of "specialized knowledge." For example, a 1994 memorandum regarding the interpretation of specialized knowledge is generally consistent with the director's decision in this matter. That memorandum states in part:

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.

Memo., [REDACTED] Acting Assoc. Comm., Immigration and Naturalization Service, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). While this memorandum does make clear that the knowledge does not need to be unique or proprietary, it must be different or uncommon. *Id.*

Generally, the 1994 memorandum directs Citizenship and Immigration Services (CIS) to compare the beneficiary's knowledge to the general United States labor market and the petitioner's workforce in order to distinguish between specialized and general knowledge. The Associate Commissioner notes in the memorandum that "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." *Id.* A comparison of the beneficiary's knowledge to the knowledge possessed by others in the field is therefore necessary in order to determine the level of the beneficiary's skills and knowledge and to ascertain whether the beneficiary's knowledge is advanced. In other words, absent an outside group to which to compare the beneficiary's knowledge, CIS would not be able to "ensure that the knowledge possessed by the beneficiary is truly specialized." *Id.* The analysis for specialized knowledge therefore requires a test of the knowledge possessed by the United States labor market, but does not consider whether workers are available in the United States to perform the beneficiary's job duties.

As explained above, the petitioner has not established that the beneficiary possesses knowledge which is different from the knowledge of cut flower quality control managers generally throughout the industry or in the petitioner's workforce. Accordingly, the petitioner has not established that the beneficiary possesses specialized knowledge.

The AAO does not dispute the likelihood that the beneficiary is a skilled and experienced cut flower quality control manager who has been, and would be, a valuable asset to the petitioner. However, it is appropriate for the AAO 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. 117, 120 (Comm. 1981)(citing *Matter of Raulin*, 13 I&N Dec. 618(R.C. 1970) and *Matter of LeBlanc*, 13 I&N Dec. 816 (R.C. 1971)). 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. 49, 52 (Comm. 1982). Rather, the beneficiaries were considered to have unusual duties, skills, or knowledge beyond that of a skilled worker. *Id.* The Commissioner also provided the following clarification:

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

Id. at 53.

It should be noted that the statutory definition of specialized knowledge requires the AAO to make comparisons in order to determine what constitutes specialized knowledge. The term "specialized knowledge" is not an absolute concept and cannot be clearly defined. As observed in *1756, Inc. v. Attorney General*, "[s]imply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." 745 F. Supp. 9, 15 (D.D.C. 1990). The Congressional record specifically states that the L-1 category was intended for "key personnel." See generally, H.R. REP. NO. 91-851, 1970 U.S.C.C.A.N. 2750. The term "key personnel" denotes a position within the petitioning company that is "of crucial importance." *Webster's II New College Dictionary* 605 (Houghton Mifflin Co. 2001). In general, all employees can reasonably be considered "important" to a petitioner's enterprise. If an employee did not contribute to the overall economic success of an enterprise, there would be no rational economic reason to employ that person. An employee of "crucial importance" or "key personnel" must rise above the level of the petitioner's average employee. Accordingly, based on the definition of "specialized knowledge" and the congressional record related to that term, the AAO must make comparisons not only between the claimed specialized knowledge employee and the general labor market, but also between the employee and the remainder of the petitioner's workforce. While it may be correct to say that the beneficiary in the instant case is a highly skilled and productive employee, this fact alone is not enough to bring the beneficiary to the level of "key personnel."

Moreover, in *Matter of Penner*, the Commissioner discussed the legislative intent behind the creation of the specialized knowledge category. 18 I&N Dec. 49 (Comm. 1982). The decision noted that the 1970 House Report, H.R. REP. NO. 91-851, stated that the number of admissions under the L-1 classification "will not be

large” and that “[t]he class of persons eligible for such nonimmigrant visas is narrowly drawn and will be carefully regulated by the Immigration and Naturalization Service.” *Id.* at 51. The decision further noted that the House Report was silent on the subject of specialized knowledge, but that during the course of the subcommittee hearings on the bill, the Chairman specifically questioned witnesses on the level of skill necessary to qualify under the proposed “L” category. In response to the Chairman’s questions, various witnesses responded that they understood the legislation would allow “high-level people,” “experts,” individuals with “unique” skills, and that it would not include “lower categories” of workers or “skilled craft workers.” *Matter of Penner, id.* at 50 (citing H.R. Subcomm. No. 1 of the Jud. Comm., Immigration Act of 1970: Hearings on H.R. 445, 91st Cong. 210, 218, 223, 240, 248 (November 12, 1969)).

Reviewing the Congressional record, the Commissioner concluded in *Matter of Penner* that an expansive reading of the specialized knowledge provision, such that it would include skilled workers and technicians, is not warranted. The Commissioner emphasized that the specialized knowledge worker classification was not intended for “all employees with any level of specialized knowledge.” *Matter of Penner*, 18 I&N Dec. at 53. Or, as noted in *Matter of Colley*, “[m]ost employees today are specialists and have been trained and given specialized knowledge. However, in view of the House Report, it can not be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees.” 18 I&N Dec. at 119. According to *Matter of Penner*, “[s]uch a conclusion would permit extremely large numbers of persons to qualify for the ‘L-1’ visa” rather than the “key personnel” that Congress specifically intended. 18 I&N Dec. at 53; *see also, 1756, Inc. v. Attorney General*, 745 F. Supp. at 15 (concluding that Congress did not intend for the specialized knowledge capacity to extend to all employees with specialized knowledge, but rather to “key personnel” and “executives.”)

As explained above, the record does not distinguish the beneficiary’s knowledge as more advanced than the knowledge possessed by other experienced cut flower quality control managers. As the petitioner has failed to document any materially unique qualities to the petitioner’s processes or products, the petitioner’s claims are not persuasive in establishing that the beneficiary, while perhaps highly skilled, would be a “key” employee. There is no indication that the beneficiary has knowledge that exceeds that of other cut flower quality control managers, or that she has received special training in the company’s methodologies or processes which would separate her from other cut flower quality control employees employed with the petitioner or with the foreign entity.

The legislative history of the term “specialized knowledge” provides ample support for a restrictive 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 1756, Inc. v. Attorney General, supra at 16.* Based on the evidence presented, it is concluded that the beneficiary has not been employed abroad, and would not be employed in the United States, in a capacity involving specialized knowledge. For this reason, the appeal will be dismissed.

ORDER: The appeal is dismissed.