U.S. Department of Justice

Immigration and Naturalization Service

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ADMINISTRATIVE APPEALS OFFICE
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PUBLIC COPY

[redacted]

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File: EAC 02 080 54332 Office: VERMONT SERVICE CENTER Date: FEB 28 2003

IN RE: Petitioner: [redacted]
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:

[redacted]

INSTRUCTIONS:
This is the decision 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.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center denied the petition for an extension of a nonimmigrant L-1B visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

[redacted] provides information technology services worldwide. The petitioner serves as the company's U.S. branch office. The Service approved an L-1B visa for the beneficiary under a blanket petition. The petitioner seeks to extend the beneficiary's classification as an L-1B 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 director concluded that the beneficiary did not qualify as a specialized knowledge worker as contemplated under the regulations. Specifically, the director determined, "[The beneficiary's] duties . . . do not appear to be significantly different from those of any software engineer in a technology consulting firm, and therefore do not serve to establish that they warrant the expertise of someone possessing truly specialized knowledge." The petitioner submitted a brief to the director captioned "Motion to Reopen." In accordance with 8 C.F.R. § 103.3(a)(2)(iv), the director declined to treat the appeal as a motion and forwarded the appeal to the Associate Commissioner for review.

On appeal, counsel states that the petitioner has achieved a rating of 5 under the Capability Maturity Model for Software (CMM), which the Software Engineering Institute (SEI) administers. According to counsel, "SEI-CMM assessment levels range from 1 to 5, where 1 represents an organization whose processes are random. Level 5 represents an organization where processes are optimized . . . ." Citing a March 2001 SEI report, counsel asserts that the petitioner "was one of only 3 large organizations (establishments (national and international) with more than 2,000 employees primarily engaged in software development and maintenance activities) to have achieved SEI-CMM Level 5 Assessment." In turn, counsel argues that, because the petitioner trained the beneficiary to function at SEI-CMM Level 5, the beneficiary qualifies as a specialized knowledge worker.

To establish L-1 eligibility under section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States,

has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

Moreover, 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.

In regard to specialized knowledge capacity, 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) [of the Act, 8 U.S.C. § 1101(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 regulations at 8 C.F.R. § 214.2(l)(1)(ii)(D) define "specialized knowledge":

> *Specialized knowledge* means 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.

In examining the specialized knowledge capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). In a May 1, 2002, letter submitted in response to the director's request for evidence, the petitioner listed the beneficiary's job duties as a software specialist:

- Use tools such as Qual[IFY] (Quality Management, Knowledge Management, and Process Capability Systems) to size, estimate, and track projects
- Gather and analyze requirements
- Prepare detailed technical and functional specifications
- Ensure that offshore project resources understand the project's quality goals
- Plan Software Quality Assurance (SQA) activities
- Quantify and manage progress towards achieving goals for software work products
- Establish and monitor the project's defined software process
- As may be required, inform senior management of non-compliance issues and deviations from the established SQA plan that cannot be resolved at project level
- Establish and coordinate Software Configuration Management (SCM) activities as per [redacted] SCM Plan
- Implement Software Project Tracking and Oversight Plan
- Establish, monitor and ensure that changes to all configurable items as per [redacted] Change Control Procedure

- Ensure that all development, testing, implementation, etc. activities are done as per guidelines established in [redacted] Quality Management System

- Ensure that onsite and offshore software work products meet project operational process requirements and Software Project Plan

- Conduct Final Inspections of onsite and offshore software work products before releasing to the client

- Ensure adherence to standards for the project for activities relating to Interface Programs development, Conversion Programs development, and Custom Program development

- Carry out integration and acceptance testing

- Oversee system implementation

- Coordinate the uploading of specifications for offshore development

- Provide technical/functional guidance to onsite and offshore resources as required

- Lead/Oversee Defects Prevention Activities: Peer Reviews, Causal Analyses Sessions, Inspections, etc., as per DP Checklist, guidelines for software product quality, project plan template, etc., of work product produced onsite and offshore

- Monitor/Track Defects Prevention activities

- Report non-conformance issues that cannot be addressed at project level to Project Manager

- Implement strategies, as required, to minimize defects density

- Schedule fortnightly Defects Prevention meetings, as well as on a need basis as required

- As may be required, lead efforts to pilot and implement process and/or technology change measures as per guidelines established by the Software Process Engineering Group

Additionally, the May 1 letter noted that the petitioner provided the beneficiary with an unspecified period of training in the company's SEI-CMM Level 5 software development and maintenance process.

The petitioner appended the beneficiary's resume to Form I-129. The resume reported the beneficiary's technical skills as:

Hardware	Sun Enterprise Class Servers, Dec Alpha, Pentium III
Operating Systems	Windows NT/98/95, UNIX, MS-DOS
Databases	Oracle 8.x/8i
GUIs	Oracle Developer 2000 (Form 6i/4.5, Reports 6i/3)
ERP	Oracle Applications Release 10.7/ 11.0.3/11i
Languages	C, PRO*C, SQL, PL/SQL, PASCAL, FORTRAN-77, ASSEMBLY LANGUAGE
Tools & Utilities	SQL Loader, Export/Import

The beneficiary's duties and technical skills as a software specialist, while impressive, demonstrate knowledge which is common among software specialists and others in the field of information technology. In fact, on appeal, counsel admits, "The petitioner readily acknowledges that the beneficiary's level of knowledge of the kinds of computer hardware and software systems used on the assignments on which he was employed is comparatively common in the industry." Thus, the only question is whether the beneficiary's knowledge of SEI-CMM

Level 5 assessment tools qualifies him as a specialized knowledge worker.

In the petitioner's view, the beneficiary's knowledge of SEI-CMM Level 5 assessment tools qualifies the beneficiary as a specialized knowledge worker. Specifically, counsel states, first, that the petitioner is one of a handful of companies which has achieved an SEI-CMM Level 5 assessment. Second, counsel reports that the petitioner trains its employees, including the beneficiary, to use the SEI-CMM Level 5 assessment process. Counsel argues that, given these facts, the beneficiary must be a specialized knowledge worker.

Counsel's assertions are unpersuasive. The petitioner has not submitted any evidence, such as training certificates or official class rosters, to establish that the beneficiary received the claimed training in the use of the SEI-CMM Level 5 assessment process. Simply going on record without supporting documentary evidence is insufficient to meet the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972). Counsel's assertions do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Counsel's reasoning is unpersuasive for two reasons. First, counsel focuses on the *petitioner's* qualifications as an entity which has achieved an SEI-CMM Level 5 assessment. The evidence establishes that few companies have achieved a Level 5 assessment; thus, *the company* could be characterized as having some specialized knowledge. Nevertheless, the issue here is whether *the beneficiary* qualifies as a specialized knowledge worker. As the director correctly observed, the company apparently trains all of its systems analysts to use the SEI-CMM system; thus, the beneficiary's knowledge is common within the petitioner's operations. Furthermore, the petitioner acknowledged that learning the SEI-CMM system requires only one month of training.

Second, even though few companies have earned a Level 5 rating, information about earning that rating is widely available. Specifically, when it responded to the request for evidence, the petitioner submitted the Software Engineering Institute's complete technical report entitled, "*Capability Maturity Model*^{SM} *for Software, Version 1.1.*" Under the Section labeled, "How Do You Receive More Information?" the reports states:

> For further information regarding the CMM and its associated products, including on the CMM and how to perform software process assessments and software capability evaluations, contact:
>
> SEI Customer Relations
> Software Engineering Institute
> Carnegie Mellon University
> Pittsburgh, PA 15213-3890
> (412) 268-5800
> Internet: customer-relations@sei.cmu.edu

The above contact information appears to indicate that, for a fee, any software company could purchase the report. In turn, any software firm could train its employees so that the organization as whole could achieve a Level 5 rating.

Moreover, SEI states that the above technical report is available through other sources including, Research Access, Inc., the National Technical Information Service, and the Defense Technical Information Center. Finally, SEI's Internet web site reveals that the organization holds regular conferences on CMM products and makes guidance documents freely available on the Internet. *See* Carnegie Mellon Software Engineering Institute, *available at* http://www.sei.cmu.edu (last modified Dec. 16, 2002); *see, e.g.*, SEI List of Reports, Technical Report CMU/SEI-2002-TR-0, *available at* http://www.sei.cmu.edu/publications/documents/02.reports/02tr028.html (Dec. 16, 2002). In sum, while it may be difficult for an organization to achieve Level 5 status, the knowledge to gain that status is widely available. Thus, the director correctly concluded that the beneficiary failed to qualify as a specialized knowledge worker.

On appeal, counsel refers to a 1994 Service memorandum that offers guidance on interpreting the statutory definition of specialized knowledge. Memorandum from James A. Puleo, Acting Associate Commissioner, *Interpretation of Specialized Knowledge*, CO 214L-P (March 9, 1994). Counsel emphasizes that the memorandum states that specialized knowledge includes not only knowledge that is proprietary or unique but also encompasses knowledge "that is different from that generally found in [a] particular industry." As noted above, the knowledge required to develop the SEI-CMM Level 5 assessment process is widely available to the industry. Although the Service memorandum to which counsel refers is instructive, it is important to examine

the underlying purpose of the specialized knowledge classification. In *Matter of Penner*, the Commissioner emphasized that the specialized knowledge worker classification was not intended for "all employees with any level of specialized knowledge." 18 I&N Dec. 49 (Comm. 1982). 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 just the "key" personnel that Congress specifically intended.

The courts have previously held that the legislative history for the term "specialized knowledge" provides ample support for a restrictive interpretation of the term. In *1756, Inc. v. Attorney General*, 745 F.Supp. 9 (D.D.C. 1990), the court upheld the denial of an L-1 petition for a chef, where the petitioner claimed that the chef possessed specialized knowledge. The court stated, "[I]n light of Congress' intent that the L-1 category should be limited, it was reasonable for the INS to conclude that specialized knowledge capacity should not extend to all employees with specialized knowledge. On this score, the legislative history provides some guidance: Congress referred to 'key personnel' and executives." *1756, Inc.*, 745 F.Supp. at 16.

If the Service were to follow counsel's reasoning, then any employee would qualify for a specialized knowledge visa if that employee had experience working for a company with special accreditation, such as SEI-CMM Level 5 or ISO 9001. The evidence presented indicates that at least 40 software engineering firms have attained SEI-CMM Level 5 certification. To assert that any employee of these firms should qualify for an L-1B visa would fundamentally alter the nature of the visa classification. Such an expansion of the term "specialized knowledge" would transform the visa classification from one for aliens with specialized knowledge to one for any employee working for an enterprise at the forefront of its field. In short, counsel's interpretation of the regulations improperly emphasizes a firm's accreditation rather than an employee's specialized knowledge.

Furthermore, Congress' 1990 amendments to the Immigration & Nationality Act did not overrule *1756, Inc.*, or affect the Service's 1994 memorandum interpreting "specialized knowledge." The House Report, which accompanied the 1990 amendments, stated:

> 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.

H.R. REP. No. 101-723(I), 1990 WL 200418, at *6749. As previously noted, the Act states, "[A]n 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." 8 U.S.C. § 1184(c)(2)(B). Despite providing some specificity, the House Report and amendments to the statute still require the Service to make comparisons in order to determine what constitutes specialized knowledge. "Simply put, specialized knowledge is a relative . . . idea which cannot have a plain meaning." *1756, Inc.*, 745 F.Supp. at 15. As explained previously, the Service used reasonable comparisons to determine whether the beneficiary qualifies as a specialized knowledge worker. The comparison revealed that many employees with the petitioner's company have the alleged specialized knowledge, that the knowledge itself is freely available on the Internet, and that other employers have achieved an SEI-CMM Level 5 rating. Thus, as the petitioner has not established that the beneficiary received the claimed training or otherwise possesses a special knowledge of the petitioner's product or an advanced level of knowledge of the company's processes or procedures, the director rationally determined that the beneficiary does not qualify as a specialized knowledge worker.

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; *see generally Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991) (holding burden is on the petitioner to provide documentation); *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999) (requiring the petitioner to provide adequate documentation). The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.