Business Immigration, Workforce and Compliance Law

Benjamin N. Cardozo School of Law

Professor Michael J. Wildes

Supplemental Materials

Class #5

201 F.3d 384 (2000)

Febe Rose Belle E. DEFENSOR; Vintage Health Resources Inc., Plaintiffs-Appellants,

v.

Doris MEISSNER, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Vivian May P. Sibayan, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Melody E. Mendoza, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Froilene Fe V. Atendido, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Jocelyn A. Bayudang, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Maria Cecilia D. Consolacion, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Vintage Health Resources Inc.; Leonora B. Caceres, Plaintiffs-Appellants,

v.

Doris Meissner, Commissioner of the United States Immigration & Naturalization Service, Defendant-Appellee.

Nos. 98-60340, 98-60357 to 98-60362.

United States Court of Appeals, Fifth Circuit.

January 17, 2000.

385 *385 David A.M. Ware (argued), David Ware & Associates, Metairie, LA, for Plaintiffs-Appellants.

Nancy E. Friedman (argued), U.S. Dept. of Justice, Office of Immigration Litigation, Washington, DC, for Defendant-Appellee.

Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON[1], District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Vintage Health Resources and seven Filipino nurses appeal the district court's affirmance of the Immigration & Naturalization Service's denial of H1-B visas for the nurses. Because Vintage did not produce evidence sufficient to show that the nurses were members of a "specialty occupation," as required under § 101(a)(15)(H)(i)(B) of the Immigration and Nationality Act, we AFFIRM the denial of H1-B visas.

I.

Vintage is a medical contract service agency which brings foreign nurses into the U.S. locating jobs for them at hospitals as registered nurses. Vintage sought to have seven Filipino nurses classified as H-1B nonimmigrants, performing services in a "specialty occupation." H-1B aliens in a specialty occupation may spend up to six years in the U.S., rather than the one year allowed for regular business travelers.

The INS denied each petition, stating that Vintage failed to establish that the nurses worked in a "specialty occupation," under § 101(a)(15)(H)(i)(B) of the Immigration and Nationality Act. *See* 8 U.S.C. § 1101(a)(15)(H)(i)(B). A "specialty occupation" is defined in part as one in which the "attainment of a bachelor's or higher degree ... (or its equivalent) [is] a minimum for entry into the occupation in the United States." *Id.* § 1184(i)(1)(B).

Vintage produced evidence that it only hired nurses with B.S.N. degrees. The INS claimed, however, that the proper focus of inquiry is not what Vintage
386 as an employment agency required, but instead what the contracting facility required, and *386 Vintage failed to establish that the medical facilities where the nurses would actually work required bachelor degrees. At best, Vintage showed that such facilities preferred nurses with B.S.N. degrees, but did not require that nurses have B.S.N. degrees.

The seven nurses whose petitions were denied appealed to the INS Administrative Appeals Unit, which upheld the denial. The appellants then filed complaints in federal district court, seeking to compel the INS to approve their petitions. The district court dismissed their claims, determining that despite some ambiguity in the regulations, the statutory requirement for a "specialty occupation" was clear: the occupation must be one in which the attainment of a bachelor's degree or higher is the minimum for entry into that occupation, and the nurses had failed to satisfy that requirement. The nurses filed separate appeals, which were then consolidated.

II.

Under the Administrative Procedure Act, agency action is reviewed solely to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *See* 5 U.S.C. § 706. In general, a federal agency's interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Even if statutory or regulatory language is ambiguous, deference is usually given to the agency's interpretation. *See United States v. Moses*, 94 F.3d 182, 185 (5th Cir.1996). Thus, Vintage has a high hurdle to overcome in this case which primarily concerns an agency's interpretation of the following statutes and regulations.

Title 8 U.S.C. § 1101(a)(15)(H)(i)(b) provides for the temporary admission of a nonimmigrant alien "to perform services ... in a specialty occupation described in section 1184(i)(1) of this title." Section 1184(i)(1) defines "specialty occupation" as an occupation which requires

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

8 U.S.C. § 1184(i)(1).

While the preceding is the statutory definition of "specialty occupation," the related regulations state that a

> [s]pecialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 C.F.R. § 214.2(h)(4)(ii).

Additionally, 8 C.F.R. § 214.2(h)(4)(iii)(A) defines a standard for specialty occupation positions. This section states that

> [t]o qualify as a specialty occupation, the position must meet one of the following criteria:
>
> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;

387 *387 (3) The employer normally requires a degree or its equivalent for the position; or

> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Id. § 214.2(h)(4)(iii)(A).

Section 214.2(h)(4)(iii)(A) appears to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. However, this section might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. The ambiguity stems from the regulation's use of the phrase "to qualify as." In common usage, this phrase suggests that whatever conditions follow are both necessary and sufficient conditions. Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. In other words, if a regulation says "To qualify as a lawyer, one must have a law degree," then a law degree is a necessary but not necessarily sufficient condition for becoming a lawyer, as there may be other requirements. For example, the next regulation may say "To qualify as a lawyer, one must pass the bar exam."

If § 214.2(h)(4)(iii)(A) is read to create a necessary and sufficient condition for being a specialty occupation, the regulation appears somewhat at odds with the statutory and regulatory definitions of "specialty occupation." For example, if an employer always required a bachelor's degree for a particular position (but for no good reason), then the position would qualify for a visa, but would probably not meet the statutory definition unless one assumes that any employer's requirements suffice to prove the U.S. minimum for the relevant occupation.[1]

On the other hand, one might assume that § 214.2(h)(4)(iii)(A) simply imposes a requirement that is related to the statutory and regulatory definitions, but which is not a complete substitute for them. Such a requirement would help confirm a finding that an occupation is a specialty occupation when the occupation's minimum requirements were not well defined in the United States. In such cases, requiring that the position meet one of the four § 214.2(h)(4)(iii)(A) prongs would help ensure that the occupation was a specialty occupation. The problem with this interpretation is that a commonsense reading of § 214.2(h)(4)(iii)(A) indicates an intention to fully implement the definition of "specialty occupation."

Giving Vintage the benefit of the doubt we will assume arguendo that § 214.2(h)(4)(iii)(A) creates necessary and sufficient conditions for the category of "specialty occupation." Vintage argues that under the third prong, its seven nurses are entitled to visas because Vintage required all of its contract employees to have B.S.N. degrees before it contracted them to medical facilities. Vintage, however, puts forward no reason that it has such a requirement, although the regulation admittedly does not require one. Instead, Vintage simply wants to use its token degree requirements to mask the fact that nursing in general is not a specialty occupation.[2]

388 In a situation such as this one, however, it does injustice to the statute and regulations *388 to view Vintage as the only relevant employer. For in addition to its token degree requirements, Vintage is at best a token employer. Under § 214.2(h)(4)(ii)(2), an employer is someone who "[h]as an employer-employee relationship with respect to the employees . . ., as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee." It is unclear whether Vintage's ability to simply "hire" or "pay" an employee is sufficient standing alone to grant Vintage employer status under this definition. Another interpretation would be that "hire, pay, fire, supervise" are to be read conjunctively as one prong of the test and "otherwise control the work" is to be viewed as an independent prong of the test. Under the latter interpretation, merely being able to "hire" or "pay" an employee, by itself, would be insufficient to grant employer status to an entity that does not also supervise or actually control the employee's work.

While the second interpretation accords better with the commonsense notion of employer, we need not decide whether Vintage is or is not an employer under the Act. For even if Vintage is an employer, the hospital is also an employer of the nurses and a more relevant employer at that. The nurses provide services to the hospitals; they do not provide services to Vintage. Even if Vintage mails the nurses' paycheck, the nurses are paid, in the end, by the hospital and not Vintage. The hospitals are the true employers of the nurses, since at root level the hospitals "hire, pay, fire, supervise, or otherwise control the work" of the nurses, even if an employer-employee contract existed only between Vintage and the nurses. As such, the INS interpreted "employer" in § 214.2(h)(4)(iii)(A) to refer to the true employer—namely the hospitals—even though Vintage was the only "employer" petitioning for visas. Under this interpretation, the INS required Vintage to provide information regarding the hospitals' requirements for the nursing positions.

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.

For these reasons, it was not an abuse of discretion to interpret the statute and regulations so as to require Vintage to adduce evidence that the entities actually employing the nurses' services required the nurses to have degrees, which Vintage could not do.

AFFIRMED.

[*] District Judge of the Eastern District of Louisiana, sitting by designation.

[1] In many cases, such an assumption might be a good rule of thumb for defining "specialty occupation," since an employer incurs a cost by only hiring applicants with degrees. However, if the "employer" is an employment agency, such an assumption may no longer be valid, since the true employer may also be hiring those without degrees for the position.

[2] A bachelor's degree is not a minimum requirement for being a nurse in the United States; associate degrees and other diplomas are accepted. *See, e.g.*, DEPARTMENT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK (1996-1997). Notably, Vintage does not contend that its nurses are practicing in a specialized area of nursing which might have different requirements than that of general nursing.

531 F.3d 1063 (2008)

BRAZIL QUALITY STONES, INC., a California Corporation; Eugenio Tavaresdos Santos, Plaintiffs-Appellants,
v.
Michael CHERTOFF, Secretary, United States Department of Homeland Security; Department of Homeland Security; United States Citizenship and Immigration Services; Eduardo Aguirre, Jr., Director, United States Citizenship and Immigration Services; Donald W. Neufeld, Center Director, California Service Center of the United States Citizenship and Immigration Service; Christine Poulos, Acting Director, California Service Center of the United States Citizenship and Immigration Services; Michael B. Mukasey, Attorney General, United States Department of Justice; Robert P. Wiemann, Director, Administrative Appeals Office; Department of Homeland Security Administrative Appeals Office, Defendants-Appellees.

No. 06-55879.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 7, **2008**.
Filed July 10, **2008**.

1065 *1065 Angelo A. Paparelli, Paparelli & Partners LLP, Irvine, CA, argued the cause for the plaintiffs-appellants and filed briefs; Debi Gloria, Paparelli & Partners LLP, Irvine, CA, was on the opening brief.

Thomas K. Buck, Assistant United States Attorney, Los Angeles, CA, argued the cause for the defendants-appellees and filed a brief; Leon W. Weidman, Assistant United States Attorney, Chief, Civil Division, and George S. Cardona, Acting United States Attorney, Los Angeles, CA, were on the brief.

Before: ALFRED T. GOODWIN, DIARMUID F. O'SCANNLAIN, and W. FLETCHER, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the United States Bureau of Citizenship and Immigration Services abused its discretion in denying a small corporation's petition to extend the visa of its Brazilian President and Chief Executive Officer.

I

Eugene Tavares dos Santos is a Brazilian citizen who has served as the President and Chief Executive Officer ("CEO") of a Brazilian corporation known as Granite Ebenezer since the corporation's founding in 1998. Granite Ebenezer sells and exports Brazilian granite and other decorative **stones** for use in residential and commercial construction. Dos Santos owns 99% of the corporation's stock; his wife owns the remaining 1%.

In 2002, in an effort to improve its ability to import its wares into the United States, Granite Ebenezer established a U.S.-based affiliate, **Brazil Quality Stones**, Inc. ("BQS"), as a California corporation. Like Granite Ebenezer, dos Santos owns 99% of the corporation's stock, while his wife owns the remaining 1%.

Once established, BQS and dos Santos (collectively "Petitioners") sought to transfer dos Santos from **Brazil** to the United States so that he could operate BQS as its President and CEO. Thus, *1066 BQS filed a petition for an L-1A nonimmigrant visa on dos Santos's behalf. The L visa is designed to allow multinational firms to transfer employees from the firm's

1066 overseas operations to its operations in the United States. The Immigration and Nationality Act ("INA") requires an alien granted such a visa (referred to as an "intra-company transferee") to be employed by the entity sponsoring his or her petition for a continuous period of at least one year within the three years preceding the petition. 8 U.S.C. § 1101(a)(15)(L). In addition, the noncitizen must "seek[ ] to enter the United States temporarily in order to continue to render his services to the same employer... in a capacity that is managerial, executive, or involves specialized knowledge." *Id.* A noncitizen employed in a "managerial" or "executive capacity" is eligible for an L-1A classification, while a noncitizen employed in a position of "specialized knowledge" is eligible for L-1B status. 8 U.S.C. §§ 1101(a)(44)(A), (B); 8 C.F.R. § 214.2(*l*)(1)(i). The two classifications impose different limitations upon the noncitizen's stay. *See* 8 U.S.C. §§ 1184(c)(2)(D)(i), (ii).

On August 29, 2002, the Immigration and Naturalization Service ("INS") granted dos Santos the L1-A visa Petitioners had requested. Dos Santos arrived in the United States and began operating BQS the next month. Because the applicable regulations classified BQS as a "new office," however, dos Santos's L-1A classification was approved for only one year, subject to extension by a later application.[1] Thus, as the end of dos Santos's first year in the United States drew near, BQS filed a second petition seeking to extend his L-1A classification for an additional three years. To obtain such extension, the INA and applicable regulations required BQS to demonstrate that it was "doing business" in the United States for the year preceding dos Santos's petition, 8 C.F.R. §§ 214.2(*l*)(1)(ii)(H), 214.2(*l*)(14)(ii)(B), and that dos Santos was employed in a "managerial" or "executive capacity," 8 U.S.C. §§ 1101(a)(15)(L), 1101(a)(44).

The United States Bureau of Citizenship and Immigration Services ("USCIS"), as the successor to the INS,[2] received the petition and soon thereafter requested additional evidence from BQS, explaining that the petition failed to establish that dos Santos was employed in a managerial or executive capacity. BQS timely responded with additional documentation.

The evidence submitted by BQS included an organizational chart of the corporation listing dos Santos at the top, supervising five employees: an International Budget Analyst, an Accounting Clerk, and a three-person sales team. Yet payroll records indicated that BQS had paid only three employees other than dos Santos during the quarter preceding the petition.

1067 *1067 BQS also set forth dos Santos's duties, explaining that he was responsible for (1) supervising and managing BQS's "office and business affairs"; (2) "overseeing capital investment opportunities"; (3) developing "plans to further channels of distribution"; (4) "hiring and firing all employees and supervising managers"; (5) overseeing "domestic and international sales"; and (6) managing "outsourced relationships" with BQS's accounting firm and warehouse.

To document dos Santos's performance of these tasks, BQS submitted, among other things, a letter dos Santos sent to the INS seeking an H-1B visa on behalf of the International Budget Analyst, letters from BQS's accounting and warehousing firms indicating that dos Santos managed BQS's relations with them, and a brochure for a $35,000 piece of granite-cutting equipment that dos Santos had proposed for purchase by BQS.

After reviewing this evidence, the Director of the USCIS California Civil Service Center denied the petition to extend dos Santos's L-1A classification, concluding that the record failed to establish that dos Santos was employed in a managerial or executive capacity and that the record did not prove that BQS was doing business in the United States.

BQS appealed the Director's decision to the DHS Administrative Appeals Office ("AAO").[3] BQS submitted additional evidence at this time, including a report by Dr. James S. Gould, a professor at Pace University in New York, which set forth his opinion that dos Santos qualified as a managerial or executive employee. The AAO considered the new evidence but dismissed the appeal, affirming the Director's conclusion that the record failed to show that dos Santos was a qualifying employee or that BQS was a qualifying organization.[4]

Petitioners then filed a complaint in the district court pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, seeking a declaratory judgment that the agency's decision was arbitrary and capricious and further seeking an injunction ordering the agency to approve the petition. The district court conducted a bench trial and ruled in favor of the agency.

This appeal timely followed.[5]

II

In examining a district court's decision after a bench trial, we review the district court's findings of fact for clear error and its conclusions of law *de novo*. *See* Poland v. **Chertoff**, 494 **F.3d** 1174, 1179 (**9th Cir.**2007). However, the underlying agency decision in this case

may not be set aside unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, to prevail on its contention that the agency abused its discretion in declining to extend dos Santos's L-1A classification, Petitioners must demonstrate that the record compels two conclusions: (1) that dos Santos was primarily employed in a managerial or executive capacity (2) that BQS was doing
1068 business in the United States for the year preceding *1068 BQS's petition. *See id.; Family, Inc. v. U.S. Citizenship & Immigration Servs.*, 469 F.3d 1313, 1315 (9th Cir.2006) (explaining that this court "will not disturb the agency's findings under this deferential standard unless the evidence presented would *compel* a reasonable finder of fact to reach a contrary result" (internal quotation marks omitted)). If we determine that the record fails to compel either determination, the agency's decision must stand.

A

1

In 1970, Congress created the L nonimmigrant visa for a multinational firm's intra-company transferees by providing for the temporary admission of such noncitizens if, among other things, the noncitizen sought to render services in the United States to the firm or its subsidiary or affiliate "in a capacity that is managerial, executive, or involves specialized knowledge." 8 U.S.C. § 1101(a)(15)(L). Years later, in 1987, the INS in a set of regulations defined the terms "managerial" and "executive capacity." *See* 8 C.F.R. § 214.2(*l*)(1)(ii)(B), (C) (1989). Although nothing in the express language of the INA limited the availability of L visas to employees of multinational firms of a certain size, the INS comments accompanying the final rule expressed concern that sole proprietors were taking improper advantage of this classification. As the INS explained,

> A self-employed person ... will frequently attempt to qualify under the L category by setting up a corporation in the United States, giving himself an executive title (e.g., "president") and continuing his self-employment in the U.S., often with a minimal "investment," with no foreign operations abroad and no intent to return abroad.... We do not believe that Congress intended the L classification to be used in this manner, and the regulations are intended to control this abuse.

Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 52 Fed.Reg. 5738, 5740 (Feb. 26, 1987).

Accordingly, the regulation required that any noncitizen seeking an L-1A visa demonstrate that he or she would supervise decision-making personnel in his or her new position. Specifically, the regulation defined "managerial capacity" as

> an assignment within an organization in which the employee *primarily* directs the organization or a department or subdivision of the organization, *supervises and controls the work of other supervisory, professional, or managerial employees,* has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), and exercises discretionary authority over day-to-day operations.

8 C.F.R. § 214.2(*l*)(1)(ii)(B) (1989) (emphasis added).[6]

This regulation was short-lived. In the Immigration Act of 1990, Congress availed the L-1A classification to a wider group of noncitizens by amending the INA to define the term "managerial capacity" more broadly than the preceding regulation. Specifically, the Act provided that an intra-company transferee would qualify as an employee acting in a
1069 "managerial capacity" *1069 if he or she "primarily ... 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."[7] 8 U.S.C. § 1101(a)(44)(A)(ii) (emphasis added). Thus, Congress removed the requirement that an applicant supervise decision-making personnel as a prerequisite to obtaining an L-1A classification. Indeed, Congress unequivocally expressed such intent by adding an additional subsection to the INA stating that "[a]n individual shall not be considered to be acting in a managerial or executive capacity ... merely on the basis of the number of employees that the individual supervises," and instructing the agency to "take into account the reasonable needs of the organization ... in light of [its] overall purpose and stage of development" in cases where "staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity." *Id.* § 01(a)(44)(C).

2

In the case before us, the agency concluded that dos Santos's supervision of BQS personnel did not place him in a managerial capacity because he supervised only one professional employee.[8] Petitioners do not challenge such conclusion here. Rather, they argue that the agency failed properly to consider whether dos Santos was managing an "essential function" of BQS's organization, and urges that he was.

We agree with Petitioners that the INA, as amended, renders managers of an essential business function eligible for an L-1A classification even if they supervise no employees at all. *See id.* § 1101(a)(44)(A)(iii) (stating that "if no other employee is directly supervised," the intra-company transferee must "function[ ] at a senior level within the organizational hierarchy or with respect to the function managed"). We also acknowledge the agency's observation that dos Santos holds a leadership position at the very top of BQS's corporate structure. Yet regardless of an intra-company transferee's position in the organizational hierarchy of his employer, the INA imposes the burden on the transferee and his or her employer to demonstrate that the transferee's responsibilities are "primarily" managerial. *Id.* § 1101(a)(44)(A).

1070 *1070 The Director held, and the AAO affirmed, that BQS failed to satisfy this burden. First, while BQS suggested that dos Santos was responsible for overseeing capital investment opportunities at BQS, the AAO pointed out that the only evidence to support such assertion was the fact that dos Santos proposed the purchase of a single piece of granite-cutting equipment. The AAO reasoned that this purchase, even if consummated, indicated only that dos Santos had authority to invest in equipment on BQS's behalf, but did not indicate that such investments were made on a regular basis or that their oversight constituted a significant portion of dos Santos's responsibilities.

Petitioners also maintain that dos Santos was responsible for overseeing BQS's domestic and international sales and its distribution chains. Yet the documents submitted to the agency do not describe with particularity what such duties entailed.[9] In summarizing the evidence, the AAO acknowledged dos Santos's leadership role at the top of BQS's hierarchy, but also concluded that dos Santos's direct involvement in the corporation's daily operations was necessary for its success and that such fact precluded dos Santos from qualifying as a managerial employee. In other words, the AAO determined that BQS has not yet reached the level of organizational sophistication in which dos Santos could devote his primary attention to managerial duties as opposed to operational ones, even though he held a position at the head of BQS's corporate structure.

We cannot conclude that the record compels a contrary conclusion. BQS is a small business that paid only three employees other than dos Santos during the quarter preceding its petition to extend his visa. As we have held before, an organization's small size, standing alone, cannot support a finding that its employee is not acting in a managerial capacity, but size is nevertheless a relevant "factor in assessing whether [an organization's] operations are substantial enough to support a manager." *Family, Inc.*, 469 **F.3d** at 1316. Under the plain terms of the INA, dos Santos cannot qualify for an L-1A visa simply because he performs managerial tasks; such tasks must encompass his *primary* responsibilities. *See Republic of Transkei v. INS*, 923 F.2d 175, 177-78 (D.C.**Cir.** 1991) (holding that, under the pre-1990 version of the INA, a visa applicant who performs both operational and managerial tasks bears the burden of demonstrating what proportion of his responsibilities are consumed with the latter).[10]

1071 BQS bore the burden of demonstrating that dos Santos was primarily engaged *1071 in overseeing essential functions of BQS's business rather than performing them himself. While the record contains evidence that dos Santos performed managerial tasks, it does not compel the conclusion that such tasks comprised his primary responsibilities at BQS.

Petitioners argue that requiring such a showing will impose an onerous burden on small businesses seeking to gain visas for their executive and managerial employees. Yet whatever policy Petitioners' argument might advance, we are bound by the plain terms of the INA and confined by the deferential standard with which we review agency decisions. *See* 5 U.S.C. § 706(2). Accordingly, based on the record before us, we conclude that the agency's determination that dos Santos was not acting in a managerial capacity at the time of BQS's petition to extend his visa was not an abuse of discretion.

B

Because we conclude that the agency did not abuse its discretion in finding that dos Santos was not a qualifying employee, Petitioners cannot demonstrate that he is eligible for an L-1A classification. Accordingly, we express no view on the agency's alternative determination that BQS failed to establish that it was "doing business" in the United States for the year preceding its petition to extend dos Santos's visa as is required of a qualifying organization. *See* 8 C.F.R. §§ 214.2(*l*)(14)(ii)(B), 214.2(*l*)(1)(ii)(H).

III

Based on the foregoing, the decision of the district court is

AFFIRMED.

[1] A "new office" is "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). A petition filed on behalf of a noncitizen seeking to open or to be employed n such office "may be approved for a period not to exceed one year," after which time the employer may petition to extend the visa if it can demonstrate that it is "doing business" in the United States. *Id.* § 214.2(*l*)(7)(i)(A)(3); *see id.* § 214.2(*l*)(14)(ii)(B). "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." *Id.* § 214.2(*l*)(1)(ii)(H).

[2] In 2003, services provided by the Bureau of Citizenship and Immigration Services at the INS were transitioned to the USCIS at the newly-created Department of Homeland Security ("DHS").

[3] Where appropriate, we refer to the Director and the AAO collectively as "the agency."

[4] Although BQS only appealed the Director's conclusion that dos Santos was not a qualifying employee to the AAO, the AAO affirmed the Director's decision on both grounds the Director articulated. Because Petitioners challenged both aspects of the AAO's decision in the district court, we consider their claim that BQS was a qualifying organization preserved for purposes of this appeal.

[5] In a concurrently filed memorandum disposition, we address Petitioners' additional challenges to the district court's decision. *See* ***Brazil Quality Stones****, Inc. v.* ***Chertoff****,* No. 06-55879, **2008** WL 2743927, ___ Fed.Appx. ___ (**9th Cir.** July 10, **2008**).

[6] The regulation went on to state that

[t]he term manager does not include a first-line supervisor, unless the employees supervised are professional, nor does it include an employee who primarily performs the tasks necessary to produce the product and/or to provide the service(s) of the organization.

8 C.F.R. § 214.2(*l*)(1)(ii)(B) (1989).

[7] In full, the Act defines the term "managerial capacity" as "an assignment within an organization 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.

8 U.S.C. § 1101(a)(44)(A).

[8] As explained above, an employee acting in a "managerial capacity" must supervise other "supervisory, professional, or managerial employees." 8 U.S.C. § 1101(a)(44)(A). The organizational chart submitted by BQS indicated that three paid employees were under dos Santos's supervision, but only the International Business Analyst qualified as a "professional" under the regulations. *See* 8 C.F.R. §§ 204.5(k)(2), (3)(i).

[9] In the proceedings before the AAO, BQS submitted Dr. Gould's report, which set forth his opinion that an individual acting as outlined in BQS's description of dos Santos's responsibilities would qualify as an executive or manager under the INA. The AAO declined to give this opinion evidentiary weight, however, because it was based on the generalized job description furnished by BQS, rather than any specific study of dos Santos's performance at BQS. Under these circumstances, we cannot conclude that the agency abused its discretion in failing to give Dr. Gould's opinion evidentiary weight.

[10] The AAO relied on the BIA's decision in *In re Church of Scientology*, 19 I. & N. Dec. 593, 604 (1988) for the proposition that an applicant bears the burden of demonstrating the proportion of his or her activities that are managerial. Even though *Scientology* was decided before the Immigration Act of 1990, we reject Petitioners' assertion that the AAO's reliance on such authority was inappropriate. While the Act expanded the definition of "managerial capacity" to include employees managing an essential function of a qualifying organization's business, the Act retained the preceding regulation's requirement that such employee's responsibilities must be "primarily" managerial. 8 U.S.C. § 1101(a)(44)(A).

U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 04 March 2005

BALCA Case No.: **2004-INA-12**
ETA Case No.: P2003-VT-01333129

In the Matter of:

IBM CORPORATION,
Employer,

on behalf of

IVAN IVOR CHOBOT,
Alien.

Appearances: Stuart J. Reich, Esquire
Fragomen, Del Rey, Bernsen & Loewy, P.C.
New York, New York
For the Employer and the Alien

Certifying Officer: Raimundo A. Lopez
Boston, Massachusetts

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by an Information Processing, Manufacturing, Sales and Services company for the position of Staff Software Engineer. (AF 97-100).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File.

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[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On October 30, 2002, the Employer, IBM Corporation, filed an application for alien employment certification on behalf of the Alien, Ivan Chobot, to fill the position of Staff Software Engineer in a Vermont facility. The job to be performed was described as follows:

> Design, develop and implement applications and application modules utilizing Electronic Design Automation (EDA) tools such as Candence, Avanti and Synosys with Perl Programming on AIX and Windows operating systems. Diagnose and fix product defects and document and explain usability issues. Perform design and code walkthroughs to ensure accuracy and adherence to solid development methodologies and internal quality standards. Assemble documentation. Change system software and enhance system performance in order to meet clients' needs. Conduct system needs analysis and business studies and based upon analysis, provide recommendations. Liaise with other technical professionals. Utilize script languages such as Perl, Kshell, Cshell, Bshell and network architecture.

Minimum requirements for the position were listed as a Bachelor's degree in Computer Science, CIS or Engineering (any type) and two years of experience in the job offered. (AF 98-99). [3]

The Employer received 18 applicant referrals in response to its recruitment efforts, all of whom were rejected as disinterested or unqualified for the position. (AF 33-40). A number of the applicants were rejected, *inter alia,* for lack of experience with EDA tools such as Candence, Avanti and Synosys with Perl Programming on AIX and

[3] At the time of application, Employer submitted a letter stating that "IBM Canada, while majority owned by IBM Corporation in the United States is operated as a separate company with separate management structure, separate hiring criteria, and a separate recruiting infrastructure. Therefore, this individual did not simply transfer within the company – he resigned his position with IBM Canada as a Centre of Competence (COC)(Software Engineer) and accepted a position with IBM Corporation in the United States to work as a Staff Software Engineer. It follows that reliance on his IBM Canada experience to demonstrate that he is qualified for the position offered does not violate 20 CFR 656.21(b)(5) as interpreted by BALCA." (AF 108-109).

Windows. The ETA Form 750B, Statement of Qualifications of Alien, indicates that the Alien received a BA in Education and a Diploma as an Electronics Engineering Technician. The application further reflects that the Alien gained experience in EDA tools and the duties as described in this position, with IBM Canada from May 1979 through January 2000. The Alien was hired by IBM in the U.S. in January 2000. (AF 102-103).

A Notice of Findings (NOF) was issued by the Certifying Officer on June 13, 2003, citing 20 C.F.R. § 656.21(b)(5), and proposing to deny labor certification on the basis that the Employer's stated requirement of two years of experience in the job did not appear to be its actual minimum requirement as the Alien did not meet this requirement at the time of hire. The NOF also cited as unlawful the rejection of three U.S. workers who appeared qualified for the position. (AF 23-25).

In Rebuttal, the Employer asserted that IBM Canada is a separate corporate entity from IBM Corporation in the U.S. so as to permit use of experience gained in a position with IBM Canada to qualify the Alien for the petitioned position. In support thereof, the Employer states that "IBM Canada has a separate President, a separate management structure, its own Research and Development Software Laboratory, and its own human resources personnel and systems." The Employer further stressed that the Alien was not transferred but independently chose to cease employment with IBM Canada and applied for an openly posted position with the Employer. The Employer asserts that the two positions are distinct in that the IBM Canada position was more of an administrative and advisory role concerning the EDA software tools used whereas the petitioned position is concentrated mainly on initial analysis of EDA requirements, architecture of EDA installations, and setup. With respect to the three U.S. workers cited as qualified, the Employer further documented their lawful rejection. (AF 9-22).

A Final Determination denying labor certification was issued by the CO on August 14, 2003, based upon a finding that Employer had failed to establish that IBM Canada and IBM Vermont are separate corporate entities, and hence had failed to

adequately document that the Alien met the two years of experience requirement at the time of hire. The CO also concluded that IBM Canada and IBM Vermont are the same entity, owned by the same stockholders. Thus, the CO concluded that experience gained with IBM Canada cannot be used to qualify the Alien beneficiary for the position. The CO further concluded the two positions were not dissimilar, the Employer having had provided training to the Alien following his original hiring. Hence the Alien was not being held to the same standards as possible U.S. applicants. The CO, however, found the evidence sufficient to show that the three cited U.S. workers were lawfully rejected for the position. (AF 6-8).

The Employer filed a Request for Administrative Review by letter dated September 17, 2003. The Request was considered as a Request for Reconsideration and denied, and the matter was then referred to this Office and docketed on November 18, 2003. (AF 1-5).

DISCUSSION

Pursuant to 20 C.F.R. § 656.21(b)(5), an employer is required to document that its requirements for the job opportunity are the minimum necessary for performance of the job and that it has not hired or that it is not feasible for employer to hire workers with less training and/or experience. Section 656.21(b)(5) addresses the situation of an employer requiring more stringent qualifications of a U.S. worker than it requires of the alien; the employer is not allowed to treat the alien more favorably than it would a U.S. worker. *ERF Inc., d/b/a Bayside Motor Inn.* 1989-INA-105 (Feb. 14, 1990). The Board has consistently held that where an employer hires an alien with less training or experience than that required for the job opportunity and fails to offer the same opportunity to U.S. workers, such disparate treatment violates section 656.21(b)(5). *Brent-Wood Products, Inc.*, 1988-INA-259 (Feb. 28, 1989)(*en banc*); *Mario Kopeiken*, 1988-INA-299 (June 27, 1989).

In the instant case, the Employer set its requirements for the job at two years of experience with EDA tools such as Candence, Avanti and Synosys with Perl Programming on AIX and Windows operating systems. The Alien gained this experience prior to his hire with IBM Corporation in Vermont, but he did not possess the experience prior to being hired by IBM Canada. While the Employer argues that IBM Canada is a demonstrably separate corporate entity from IBM Corporation in the U.S. because IBM Canada has a separate President, a separate management structure, its own Research and Development Software Laboratory, and its own human resources personnel and systems, IBM Canada is majority owned by IBM Corporation in the United States. The Employer has repeatedly emphasized that this particular case was not an IBM-orchestrated transfer. Nonetheless, similar to the facts in *Imos Corp.,* 1988-INA-326 (June 1, 1990) (*en banc*), it is apparent from these statements that, for purposes of determining whether the Alien gained his experience while working for the Employer, these corporate entities are indistinguishable.

Moreover, similar to the facts in *Imos*, there appears to be no basis to support a theory that the two IBM corporations are in different businesses with nothing in common except a corporate entity connection. The Board noted in *Imos* that cases may arise where the two entities involved are so unrelated that blanket prohibition on experience with one of the corporations would be inequitable, but this is not that case. Although the Employer states that these are two separate positions, there are only two separate job duties and much overlap in the positions described.

On this record, it is determined that IBM Corporation of Vermont and IBM Canada are considered one and the same employer for purposes of section 656.21(b)(5). Therefore, the Alien did not possess the requirements for the position prior to being hired by the Employer. The Employer hired the Alien with less training or experience than is required for the position and has not offered the same opportunity to U.S. workers. Such disparate treatment violates 656.21(b)(5). Accordingly, it is determined that labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

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Joel Stewart's BALCA Review (May 10, 2005)

by Joel Stewart

Beauty Sales Manager Gained Experience as Beautician (pre-PERM)

In *Sanchez Elvina, Inc. d/b/a Ely-Lyn House of Beauty*, 2004-INA-8 (BALCA, February 25, 2005), the Employer filed a request for reduction in RIR for a Beauty Sales Manager, however, the C.O. issued a Notice of Findings proposing to deny the application, since the alien was hired as a Beautician and trained by the employer. Using the *Delitizer* analysis, the Employer detailed the dissimilarities of the two positions in its rebuttal, especially differences in the level of responsibility and salary. The Board agreed with the employer, finding the positions to be sufficiently dissimilar to permit training with the same employer. Note: *Delitizer* is a pre-PERM case where the Board interpreted the need to document the dissimilarity of jobs if the alien gained experience with the same employer. *Delitizer* suggests a series of flexible criteria. Under PERM, the *Delitizer* decision has been adopted and codified at 656.17(i)(5)(ii), and it is applied now with a bright line test. The Employer need only prove that the positions are not substantially comparable, meaning that the new job requires performance of different job duties more than 50 percent of the time. The Board reversed denial and stated that since the job had been filed RIR, the CO must either grant the decision or remand to the SWA for further recruitment. (San Francisco, California).

Experience gained with Canadian affiliate prohibited under PERM

In *IBM Corporation*, 2004-INA-12 (BALCA, March 4, 2005), the employer sought to transfer an alien gained who gained experience with IBM in Canada to a position at IBM in Vermont. Using the per-PERM *Inmos* analysis, the Board reasoned that the companies, although different corporations, with separate presidents, management, research and development and human resources, should be treated as if they were one company. The Board merely stated laconically, "...there appears to be no basis to support a theory that the two IBM corporations are different businesses with nothing in common except a corporate entity connection....On this record, it is determined that IBM Corporation of Vermont and IBM Canada are considered one and the same employer...." Ironically, if this case had been decided under PERM, it should not have been denied, since PERM permits experience gained at an affiliate or subsidiary if the two companies do not use the same FEIN number. (Boston, Massachusetts).

Two Bites of the Apple Permitted after NOF

In *Cottonwood Home*, 2004-INA-2 (BALCA, March 11, 2005), the employer received a notice of findings to document a live-in requirement and combination of job duties. Under the principle enunciated in the *O'Mara* case, the Employer, in response to an NOF, can offer to cure the defect by proffering business necessity, and if the C.O. does not find the documentation to be sufficient, then the Employer may remove the restrictive requirement and re-advertise the job. Under this doctrine, the C.O. must provide a second chance to cure the defect, hence the phrase second bite of the apple! In the instant case, the C.O. told the Employer either to delete and re-advertise or justify the business necessity and did not give the employer a second bite. Therefore the Board remanded to the C.O. to give the employer an opportunity to remove the restrictive requirements and re-advertise without the restrictive requirements. (San Francisco, California).

Employer refers workers out on contract

In *Professional Staffing Services of America*, 2004-INA-7 (BALCA, March 7, 2005), the Employer required an Accountant, but the job was created to provide contract labor to third parties. When the C.O. required information to prove a permanent, full-time position, the Employer provided contracts between itself and two corporate clients. However, the Board upheld the C.O.'s denial, citing the Employer's failure to provide specific information to document a full-time, permanent position. The Board complained that the staffing agreements provided by the Employer were only general, and did not stipulate the number of hours, length of employment during referrals, or number of workers to be referred. (San Francisco, California).

Ziegler exceptions carved out where further recruitment held futile

In *Madni, Inc., t/a Silver and Watch Palace*, 2004-INA-75 (BALCA, March 30, 2005), C.O. had denied an RIR application and transmitted the case to BALCA, instead of ordering additional recruitment as required by the pre-PERM regulations. When the Ziegler memo first came out, ordering C.O.'s to issue a NOF in lay-off cases, instead of remanding for additional recruitment, the Board held that the C.O. must follow the regulations, i.e., remand for further recruitment instead of denying. However, some exceptions have been carved out to this rule, where the employer fails to meet a deadline set by the CO for responding to a request or where the application is so fundamentally flawed that a remand would be pointless. The Board also permits the CO to deny if the Employer fails to establish sufficiency of funds to pay the Alien's wages for the position. Such cases are considered to be so fundamentally flawed that a remand would be pointless. Since the C.O. had failed to consider evidence provided by the Employer with a request for reconsideration, the Board remanded to the C.O. for consideration of the financial evidence. (Philadelphia, Pennsylvania).

Ziegler memo may not be used to request interlocutory review

In *Siemens Energy and Automoation, Inc.*, 2005-INA-1 (BALCA, February 11, 2005), the Board considered the Employer's request for interlocutory review after denial of an RIR without first remanding to the SWA for regular recruitment. Since a denial of RIR is not considered to be a final decision of the C.O., the Board held that the Employer's request for accelerated review was in effect a request for interlocutory. The Board then cited several exceptions to the general rule that interlocutory appeals are disfavored, but found that the instant petition failed to meet the exceptional criteria for interlocutory appeal.

About The Author

Joel Stewart works exclusively in the area of immigration law. Joel Stewart is the editor and author of THE PERM BOOK. He is Past President of the South Florida Chapter of the American Immigration Lawyers Association (AILA) and is a nationally recognized authority on employment-based immigration matters and a popular speaker at immigration seminars for national and local bar associations throughout the United States. From 1988 to 2004, Mr. Stewart wrote the monthly BALCA Case Summaries for AILA Monthly Mailing/Immigration Law Today and now contributes monthly summaries to ILW.COM. He has also authored Process and Procedure at the U.S. Consulates and Embassies in Brazil and Portuguese for AILA for many years. Fluent in Portuguese, Spanish, French, and Russian, Mr. Stewart specialized in Romance and Slavic Linguistics before receiving a J.D. from the University of Connecticut School of Law, and is a partner at the firm of Fowler-White-Burnett in Miami, Florida.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

JAN 0 8 2010

HQ 70/6.2.8
AD 10-24

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
> (1) Engages a person to work within the United States;
> (2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
> (3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

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[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's **right to control the manner and means by which the product is accomplished**. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

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[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers.** However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the

[13] See 8 C.F.R. 214.2(h)(4)(ii).

petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

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[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable

at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

***

(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a

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[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers.** However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools

[8] See 8 C.F.R. 214.2(h)(4)(ii).

needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
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- Copy of dated performance review(s); and/or

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete

itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

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MEMORANDUM

TO: Alejandro N. Mayorkas, Director
United States Citizenship & Immigration Services

FROM: American Immigration Lawyers Association

DATE: January 24, 2012

RE: Interpretation of the Term "Specialized Knowledge" in the Adjudication of L-1B Petitions

Dear Director Mayorkas:

The American Immigration Lawyers Association (AILA) appreciates the ongoing outreach to stakeholders conducted by USCIS in connection with its review of the interpretation of the term "specialized knowledge" and its application in the adjudication of L-1B petitions. AILA offers this memorandum on the interpretation of the term "specialized knowledge" in response to that outreach.

Introduction

For several years, there has been a widening gulf between policy guidance adopted by USCIS providing interpretation of the statutory definition of the term "specialized knowledge" and the treatment and outcome of L-1B nonimmigrant petitions submitted to USCIS service centers, as well as L-1B visa applications submitted to U.S. consulates abroad. Reacting to what some view as the improper overuse of the L-1B category and a perceived "spike" in blanket L-1B applications abroad and L-1B visa petitions submitted to USCIS domestically, a concerted effort has been underway within USCIS and the State Department to restrict the number of L-1B visas by narrowly applying key terms that appear in the statutory, regulatory and policy materials that address and define the term "specialized knowledge." The narrowing has been accomplished through unpublished, non-binding, AAO decisions, a body of administrative jurisprudence that is based on a selective review of prior legislative and regulatory history, selective reliance on precedent administrative decisions and federal district court cases that addressed the L-1B classification as it appeared prior to Congressional intervention in 1990, and selective application of common dictionary definitions of the terms "special" and "advanced."

AILA InfoNet Doc. No. 12012560. (Posted 01/25/12)

An unpublished 2008 AAO decision is treated as the current enunciation of AAO administrative jurisprudence interpreting the meaning of the term "specialized knowledge."[1] Widely referred to as "*GST*," this July 22, 2008, decision involved an L-1B petition by GS Technical Services, Inc., (GST) a subsidiary of IBM Corporation, on behalf of an individual who was part of team that was working on a project for a client, and who would be a "'SAP ERP Consultant,' to provide guidance and assistance with a client's implementation of an integrated Enterprise Resource Planning (ERP) software system that is produced by SAP AG, a European software maker, and modified by IBM for specific client needs."[2]

The decision includes a lengthy analysis of the history of the "specialized knowledge" category. Under the amendments to the intracompany transferee category in Section 206(b)(2) of the Immigration Act of 1990 (IMMACT 90),[3] said the AAO, Congress only eliminated the "bright-line standard" that had existed prior to the enactment of IMMACT 90 which supported "a more rigid application of the law," and gave "...legacy INS a more flexible standard that requires an adjudication based on the facts and circumstances of each individual case." The AAO asserted that the changes enacted by Congress in IMMACT 90 were not intended to "liberalize or broaden the specialized knowledge classification" or "expand the class of persons eligible for L-1B specialized knowledge visas."[4]

As will be shown below, the AAO's interpretation of the history of the "specialized knowledge" category in *GST*, which is repeated in many of the unpublished and non-binding AAO decisions issued before and after *GST*, is flawed. For example, in the period between January and July of 2008 alone, over 40 L-1B decisions were posted to the AAO page of the USCIS website sustaining petition denials on grounds that follow the rationale seen in *GST*. The limited availability of unpublished Administrative Appeals Office (AAO) decisions prior to 2005 makes the conduct of a comprehensive review of AAO decisions difficult to accomplish.[5] Nevertheless, a March 26, 2004, AAO decision involving Satyam Computer Services, Ltd., a worldwide provider of information technology services, is an early example illustrative of the restrictive interpretation of "specialized knowledge" employed by the AAO.[6]

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[1] *Matter of [name not provided]*, WAC-07-277-53214 (AAO, July 22, 2008) (hereinafter *GST*); 2008 WL 5063578; http://www.uscis.gov/err/D7%20-%20Intracompany%20Transferees%20(L-1A%20and%20L-1B)/Decisions_Issued_in_2008/Jul222008_04D7101.pdf. The CIS Ombudsman drew attention to *GST* when discussing issues involving L-1B adjudications in the "Citizenship and Immigration Services Ombudsman Annual Report 2010," June 2010, at 46; http://www.dhs.gov/xlibrary/assets/cisomb_2010_annual_report_to_congress.pdf.

[2] *GST*, *supra* note 1, at 2.

[3] Pub. L No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

[4] *GST*, *supra* note 1, at 24-25.

[5] USCIS began posting AAO decisions in 2005. *See* http://www.uscis.gov/portal/site/uscis/menuitem.2540a6fdd667d1d1c2e21e10569391a0/?vgnextoid=0609b8a04e812210VgnVCM1000006539190aRCRD&vgnextchannel=0609b8a04e812210VgnVCM1000006539190aRCRD&path=%2FD7+-+Intracompany+Transferees+%28L-1A+and+L-1B%29.

[6] *Matter of [name not provided]*, EAC-02-080-54116 (AAO, Mar. 26, 2004) (hereinafter *Satyam*); 2004 WL 2897716.

In *Satyam*, the petitioner sought L-1B classification for an employee who had been trained in Satyam's processes, Satyam itself having achieved a high rating in software development and maintenance from the Software Engineering Institute at Carnegie Mellon University. The petitioner argued that the beneficiary's training in its highly-rated software development and maintenance systems distinguished the beneficiary under the legacy INS test that "specialized knowledge" could be "different from that found in [a] particular industry."[7] The petitioner also argued that legislative history dictates that the specialized knowledge classification should not be limited to those "relatively rare employees" who possess unique knowledge of the company's exclusive processes and techniques, but rather, that the classification is intended to assist companies locating in the U.S. in transferring their present personnel who already have knowledge of their operations.

The AAO agreed with the petitioner that the "specialized knowledge" category was not solely for those "relatively rare employees with unusual knowledge." However, the AAO applied an analysis of the "specialized knowledge" category that involved reaching back prior to IMMACT 90 to the legislative history of the 1970 statute creating the intracompany transferee category, to *Matter of Penner*,[8] and to a 1990 district court case, *1756, Inc. v. Att'y Gen.*,[9] decided under pre-IMMACT 90 law and regulations, to support the proposition that there is "ample support for a restrictive interpretation of the term."

In a footnote, the AAO justified reliance on *Penner* (and *1756*):

> FN1. The precedent decision *Matter of Penner* pre-dates the 1990 amendment to the definition of "specialized knowledge." Other than deleting the former requirement that specialized knowledge had to be "proprietary," however, the 1990 amendment did not greatly alter the definition of the term. In particular, the 1990 Committee Report does not even support the claim that Congress "rejected" the INS interpretation of "specialized knowledge." The 1990 Committee Report does not criticize, and does not even refer to, any specific INS regulation or precedent decision interpreting the term. The Committee Report simply states that the Committee was recommending a statutory definition because of "[v]arying," [*i.e.*, not specifically incorrect], "interpretations by INS," H. Rep. No. 101-723(I), *supra*, at 69, 1990 U.S.C.C.A.N. at 6749. Beyond that, the Committee Report simply restates the tautology that became § 214(c)(2)(B) of the Act. *Id.* The AAO concludes, therefore, that *Matter of Penner* remains useful guidance concerning the intended scope of the "specialized knowledge" L-1B classification.[10]

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[7] INS Memorandum, J.A. Puleo, Acting Executive Associate Commissioner, "Interpretation of Specialized Knowledge," CO 214L-P (Mar. 9, 1994), (hereinafter "Puleo memo"). *Reproduced in* the USCIS Adjudicator's Field Manual, App. 32-1; *see also* AILA InfoNet Doc. No. 01052171 (May 21, 2001).
[8] 18 I&N Dec. 49 (Comm. 1982).
[9] 745 F. Supp. 9 (D.D.C., Aug. 23, 1990).
[10] *Satyam, supra* note 6, at FN1.

Revealing in this footnote is how the AAO quotes and treats the passage in the IMMACT 90 Committee Report that discusses the enactment of a statutory definition of the term "specialized knowledge." Though the passage in the Committee Report simply states that Congress enacted a statutory definition of "specialized knowledge" due to "varying interpretations" by legacy INS, the AAO concludes that by using the term "varying," Congress did not mean that the narrow interpretations of "specialized knowledge" by legacy INS, tied as they were to the concept that the knowledge must be narrowly held within the petitioner's company and had to relate to a proprietary interest of the petitioner, were "not specifically incorrect." This interpretation of the Committee Report is the foundation upon which the AAO builds its argument that the term "specialized knowledge" should be "narrowly construed" and the category should be "strictly limited."

A full review of the history of the L-1 "specialized knowledge" category and an analysis of IMMACT 90 that considers all the changes impacting multinational businesses and intracompany transferees that this legislation effectuated exposes the serious flaws in the AAO's approach.

I. History of the Intracompany Transferee Classification

a. *Immigration Act of 1970, Precedent Decisions, Legacy INS Regulations, and Policy Guidance*

The L-1 intracompany transferee nonimmigrant classification was introduced into the Immigration and Nationality Act (INA) with the passage of the Immigration Act of 1970.[11] Congress created the L-1 intracompany transferee classification to provide a visa status for executives, managers, and employees with specialized knowledge to "...help eliminate problems now faced by American companies having offices abroad in transferring key personnel freely within the organization."[12]

Congress did not define the term "specialized knowledge," and between 1970 and 1983, definitions evolved through a body of administrative law and practice. The principal precedent decisions that interpreted the term "specialized knowledge" are *Matter of Raulin*,[13] *Matter of Leblanc*,[14] *Matter of Michelin Tire*,[15] *Matter of Penner*,[16] and *Matter of Colley*.[17] These decisions, all rendered prior to the passage of IMMACT 90, which substantially revised the intracompany transferee provisions in the INA, found that "specialized knowledge" involved knowledge that had, in essence, a characteristic propriety to the petitioner.

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[11] Pub. L. 91-225, Sec. 1(b), 84 Stat. 117 (April 7, 1970).
[12] *See generally*, H.R. REP. No. 91-851 (1970).
[13] 13 I&N Dec. 654 (RC 1970).
[14] 13 I&N Dec. 816 (RC 1971).
[15] 17 I&N Dec. 248 (RC 1978).
[16] *Supra* note 8.
[17] 18 I&N Dec. 1 7 (Comm. 1982).

For example, in *Colley*, the Commissioner, citing *Raulin* and *Leblanc*, noted that "[b]oth decisions rested on a finding that the beneficiaries had essential knowledge of the business's product or service, management operations, decision making process, or similar elements. In other words, the specialized knowledge related to the proprietary interests of the business, its management, and concerned skills or knowledge not readily available in the job market."[18]

In 1983, legacy INS published a regulatory definition of the term "specialized knowledge" at 8 CFR §214.2(l)(1)(ii)(C), explicitly drawing on the precedent decisions.[19] The 1983 regulation defined "specialized knowledge" as "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 marketplace."

In a proposed revision to the regulations in 1986, legacy INS sought to modify the definition of the term "specialized knowledge." The proposal noted that "Congress expected the number of persons in this category to be small...," and stated "The Service is concerned that current Service policy, on the one hand, restricts businesses and organizations in transferring and maintaining key personnel needed in the United States and, on the other hand, permits a number of organizations and beneficiaries to qualify under section 101(a)(15)(L) that were not contemplated by Congress when section 101(a)(15)(L) was enacted."[20] The proposed regulation defined "specialized knowledge" as "...knowledge possessed by an individual in an organization which is narrowly held within the organization and relates directly to the product or service of an organization or to the equipment, techniques, management, or other proprietary interests of the employer."[21]

The proposed formulation met with strong objection. In the Supplementary Information accompanying the final rule, legacy INS said:

> Fifteen commenters objected to the proposed definition of specialized knowledge and preferred to see the current definition retained. They stated that requirements that knowledge be unique and narrowly held in the organization are too rigid and very few personnel would qualify, which is contrary to Congressional intent."[22]

In response to the comments, legacy INS modified the definition, stating that the revised definition "...will not require that the knowledge be unique or narrowly held." Moreover, the Service agreed with commenters and "...reinstated the standard that

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[18] *Id.* at 120. *See* also *Penner*, 18 I&N Dec. at 52.
[19] *See* 48 Fed. Reg. 41142, 41143 (Sept. 14, 1983).
[20] 51 Fed. Reg. 18591 (May 21, 1986).
[21] 51 Fed. Reg. at 18596.
[22] 52 Fed. Reg. 5738, 5740 (Feb. 26, 1987).

knowledge which is not readily available in the United States labor market should be considered in determining specialized knowledge."[23]

The 1987 final rule set forth the following definition:

> (D) "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.[24]

In May 1988, *Matter of Sandoz Crop Protection Corp.* was published.[25] Interpreting the 1987 regulations, the Commissioner said: "Specialized knowledge, as now described in 8 CFR §214.2(l)(1)(ii)(D) (1988), involves advanced knowledge and an advanced level of expertise not readily available in the United States job market, with the petitioner having a proprietary right to the knowledge or its product."[26] The Commissioner went on to note that "In order to qualify, the beneficiary must be a key person with materially different knowledge and expertise which are critical for the performance of the 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."[27]

The formulation in the 1987 regulations, and in *Sandoz* itself, was problematic, leading legacy INS Associate Commissioner Richard E. Norton to issue, a short six months after the publication of *Sandoz*, a clarifying memorandum.[28] The Norton memo explained that the Service's "...interpretation and application of the definition of specialized knowledge may, in some cases, be more restrictive than Congress or the Service intended." As described in the Norton memo, "The problem stems from using 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." According to the memo, "It is an appropriate interpretation of specialized knowledge to also consider 'proprietary knowledge' as 'special knowledge possessed by an employee of the organization's product, service, research, equipment, techniques, management, or other interests that is different from or surpasses the ordinary or usual knowledge of an employee in the particular field.'" The Norton memo also reminded adjudicators that "...a 'specialized knowledge' employee must have an advanced level of expertise in his or her field...."

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[23] 52 Fed. Reg. at 5741.
[24] 52 Fed. Reg. at 5752.
[25] 19 I&N 666 (Comm. 1988).
[26] *Id.* at 667.
[27] *Id.* at 668 (emphasis in original).
[28] INS Memorandum, R.E. Norton, INS Associate Commissioner, "Interpretation of Specialized Knowledge under the L Classification," CO 214.2L-P (Oct. 27, 1988) (hereinafter "Norton memo"). *Reprinted at* AILA InfoNet Doc. 11102730 (Oct. 27, 1988); *see* also 65 Interpreter Releases 1194 (Nov. 7, 1988).

b. *The Immigration Act of 1990, Legacy INS Regulations, and Legacy INS and USCIS Policy Guidance*

The efforts by Norton to moderate the impact of the 1987 regulations and the precedent decision in *Sandoz* did not satisfy Congress, which examined the treatment of intracompany transferees, both immigrant and nonimmigrant, and enacted the following statutory definition of the term "specialized knowledge" in IMMACT 90, Section 206(b)(2) (INA §214(c)(2)(B)):

> 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.[29]

In this definition, Congress removed any requirement that "specialized knowledge" relate to a petitioner's "proprietary" interest, let alone "relate *exclusively*" to the petitioner's proprietary interest, as *Sandoz* held, and eliminated the requirement that a "specialized knowledge" employee "have an advanced level of expertise in his or her field." Congress only required that the knowledge be "special knowledge of the company product and its application in international markets," or that the knowledge be "an advanced level of knowledge" of the company's processes and procedures.

The House Committee Report accompanying H.R. 4300, the bill that ultimately became IMMACT 90, observed that the L-1 visa had allowed "multi-national 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." The Committee Report further stated that the category should be "broadened."[30]

The full text of the Committee Report discussing changes to the L-1 category reads:

> (e) Intracompany transferees.–The L visa has provided multinational corporations the opportunity to rotate employees around the world and broaden their exposure to various products and organizational structures. This visa has been a valuable asset in furthering relations with other countries but the Committee believes it must be broadened to accommodate changes in the international arena. First, the bill allows accounting firms access to the intracompany visa. Long-established international firms providing accounting services along with consulting and managerial expertise adhere to the same quality standards, techniques and methodology which are associated with an intracompany transferee, but because of the different ownership structures have been denied use of the L visa. This provision would allow the benefits of the L Visa for this particular industry, based

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[29] IMMACT 90, Section 206(b)(2)

[30] H.R. Rep. 101-723(I), 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6710, 1990 WL 200418 (hereinafter "IMMACT 90 Committee Report").

on agreements which indicate participation in the control of the worldwide coordinating organization, thus allowing the smoother interchange of personnel. Second, the streamlined blanket petition available under current regulations is placed into the statute for maximum use by corporations. Third, the requirement of employment with the company within the one-year period immediately prior to admission is expanded so that the one year may be within three years prior to admission. Fourth, the bill's seven-year period of admission for managers and executives provides greater continuity for employees.

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."[31]

In the Supplementary Information accompanying the proposed regulations implementing IMMACT 90, legacy INS observed that the changes in the L classification reflected the desire of Congress "...to broaden its utility for international companies."[32] Accordingly, legacy INS revised the regulations to adopt "...the more liberal definitions of manager and executive now specified in section 101(a)(44)(A) and (B) of the Act."[33] Significantly, legacy INS recognized that Congress intended a more liberal definition of "specialized knowledge," stating: "The L regulations have also been modified to include a more liberal interpretation of specialized knowledge as defined in section 214(c)(2)(B) of the Act."[34]

In 1994, legacy INS issued the Puleo memo, policy guidance on IMMACT 90 amendments and implementing regulations.[35] The Puleo memo reminded adjudicators that 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 Puleo memo states that 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 Puleo memo provides the following as examples of characteristics of a specialized knowledge worker:

- 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

[31] IMMACT 90 Committee Report, at 6749.
[32] 56 Fed. Reg. 31553, 31554 (July 11, 1991).
[33] *Id.*
[34] *Id.*
[35] *Supra* note 7.

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.

In discussing the definition of the term "special," the Puleo memo states that the knowledge "need not be proprietary or unique, but it must be different or uncommon." Similarly, in discussing the term "advanced," the Puleo memo reiterates that "the alien's knowledge need not be proprietary or unique, merely advanced." Moreover, the memo confirms that the statute does not require the specialized knowledge to be narrowly held within the company.

The Puleo memorandum was followed by a December 20, 2002 memorandum to all Service Center directors from Fujie Ohata, Associate Commissioner, Service Center Operations.[36] In the 2002 Ohata memo, INS reaffirmed the Puleo memo:

> Service Center employees are reminded to follow the procedures concerning specialized knowledge as outlined in the March 9, 1994 James Puleo memo on the Interpretation of Specialized Knowledge. That memo outlines the criteria for adjudicating Specialized Knowledge cases... Requests for additional evidence for specialized knowledge cases should not run contrary to the 1994 Memorandum on specialized knowledge.

The 2002 Ohata memo also succinctly summarized the general standards for specialized knowledge as follows:

> The alien should possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry. The knowledge need not be proprietary or unique. Where the alien has specialized knowledge of the company product, the knowledge must be noteworthy or uncommon. Where the alien has knowledge of company processes or procedures, the knowledge must be advanced. Note, the advanced knowledge need not be narrowly held throughout the company.

In addition, a September 2004 memorandum from Fujie Ohata, then serving as Director, USCIS Service Center Operations, addressed the issue of specialized knowledge for chefs and cooks.[37] The 2004 Ohata memo confirmed the continuing applicability of the Puleo

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[36] INS Memorandum, F. O. Ohata, Associate Commissioner, Service Center Operations, "Interpretation of Specialized Knowledge," HQSCOPS 70/6.1 (Dec. 20, 2002), (hereinafter "2002 Ohata memo"). *Reprinted on* AILA InfoNet at Doc. No. 03020548 (Feb. 5, 2003).

[37] USCIS Memorandum, F. O. Ohata, Director, Service Center Operations, "Interpretation of Specialized Knowledge for Chefs and Specialty Cooks," (Sept. 9, 2004), (hereinafter "2004 Ohata memo") *reprinted on* AILA InfoNet at Doc. No. 04091666 (*posted* Sep. 16, 2004).

memo. Further, the 2004 Ohata memo reiterated the importance to the analysis of specialized knowledge of determining whether "the petitioning entity would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed. In other words, an important factor for L-1B purposes is the degree to which the alien's knowledge contributes to the uninterrupted operation *of the specific business* for which the alien's services are sought."[38] Finally the 2004 Ohata memo also reiterated that advanced knowledge "need not be narrowly held throughout the company."

Reading the Puleo and Ohata memos in conjunction with each other, a "specialized knowledge" employee would have some combination of the following characteristics:

- Possesses knowledge that is valuable to the employer's competitiveness in the market place (whether "the petitioning entity would suffer economic inconvenience or disruption to its U.S. or foreign-based operations if it had to hire someone other than the particular overseas employee on whose behalf the petition was filed");
- 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;
- Need not be proprietary or unique, but it must be different or uncommon;
- Possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry;
- If special knowledge of the company product, the knowledge must be noteworthy or uncommon; or,
- If knowledge of company processes or procedures, the knowledge must be advanced. The advanced knowledge need not be narrowly held throughout the company.

This interpretation of the statutory definition of "specialized knowledge" that the Service had adopted through regulation and policy guidance and applied in the adjudication of L-1B petitions was well known to Congress at the time it was considering the 2004 reforms.

c. *The L-1 Visa (Intracompany Transferee) Reform Act of 2004*

In 2004, Congress passed The L-1 Visa (Intracompany Transferee) Visa Reform Act of 2004 to address a specific concern that companies were "outsourcing" L-1B

[38] Emphasis in original.

intracompany transferees.[39] When he introduced S. 1635,[40] the bill that was ultimately enacted,[41] Senator Saxby Chambliss (R-GA) stated:

> The L-1 is an important tool for our multi-national corporations, however, some companies are making an end-run around the visa process by bringing in professional workers on L-1 visas and then outsourcing those workers to a third party company. ...The problem occurs only when an employee with specialized knowledge is placed offsite at the business location of a third party company. In this context, if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee. ...The bill I am introducing today clarifies Congress' intent and restricts the inappropriate use of the L-1 visa. The bill does so without forcing unnecessary restrictions on the visa that would only result in adverse effects on legitimate L-1 users. ... One year is a reasonable amount of time to require an employee to have attained the specialized knowledge of the company's products, services or processes to qualify for the visa. ... We need the best people in the world to come to the United States, to bring their skills and innovative ideas, and to support our business enterprises. The L-1 visa is an important tool to achieve these purposes. But we must ensure that American workers are not displaced by foreign workers, particularly when we have safeguards in place albeit a loophole in law. The L-1 Visa Reform Act will close that loophole for the benefit of U.S. workers and for U.S. businesses that use the visa as it is intended.[42]

It is clear from his statement that Senator Chambliss had a very narrow focus when introducing S. 1635. First, he stated that he only wishes to close the outsourcing "loophole" for third party placement of specialized knowledge workers and has no desire to force "unnecessary restrictions on the visa that would only result in adverse effects on legitimate L-1 users." Second, he believed that one year is a reasonable time to attain the requisite specialized knowledge to qualify for an L-1B visa.[43] Third, he viewed the L-1

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[39] Division J, Title IV, Subtitle A of the Consolidated Appropriations Act of 2005, Pub. L. 108-447, 118 Stat. 2809, Sections 411-417 (hereinafter "L-1 Reform Act").

[40] *See* http://www.gpo.gov/fdsys/pkg/BILLS-108s1635is/pdf/BILLS-108s1635is.pdf

[41] *See* http://www.gpo.gov/fdsys/pkg/BILLS-108s1635rs/pdf/BILLS-108s1635rs.pdf

[42] *See* http://www.gpo.gov/fdsys/pkg/CREC-2003-09-17/html/CREC-2003-09-17-pt1-PgS11649.htm.

[43] In 2002, Congress reduced the required period of employment abroad from one year to six months for employees of importing employers who have approved blanket petitions. "An Act to provide for work authorization for nonimmigrant spouses of intracompany transferees, and to reduce the period of time during which certain intracompany transferees have to be continuously employed before applying for admission to the United States." Pub. L. 107-125, 115 Stat. 2403 (Jan. 16, 2002).

House Report 107-188 accompanying H. R. 2278, the bill that became Public Law 107-125, explained the necessity for the change in the period of qualifying employment abroad as follows:

> [C]urrent law requires that a beneficiary of a L visa have been employed for at least 1 year overseas by the petitioning employer. In many situations, this is an overly restrictive requirement. For example, consultancies recruit and hire individuals overseas with specialized skills to meet the needs of particular clients. The 1 year prior employment requirement can result in long delays before they can

program as an important tool to advance American competitiveness that should be available to employers who do not use it as a disguised "job shop."

This focus was reaffirmed when S. 1635 was considered by the Senate Judiciary Committee. When the Judiciary Committee reported the bill on October 4, 2004, it found that a "... key purpose of the [L-1] visa ... is to provide multinational companies with a means to transfer into the United States, foreign workers whose presence is necessary because of the specialized knowledge those workers have gained with respect to the products, processes, or procedures of their employer." Other findings made it clear that the focus of the L-1 Reform Act was to address issues relating to third-party placement.[44]

The interpretation of the statutory definition of "specialized knowledge" that the Service had adopted through regulation and policy guidance, and applied in the adjudication of L-1B petitions, was well known to Congress at the time it was considering the 2004 reforms. In a July 2003 hearing before the Senate Judiciary Immigration Subcommittee, substantial testimony on the "specialized knowledge" category was heard.[45] Nonetheless, Congress enacted no legislative changes to the definition of "specialized knowledge." A well-established principle of statutory construction holds that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[46]

d. *The DHS OIG "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program"*

Mention should be made of the DHS Office of Inspector General (OIG) report "Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program."[47] Section 415 of the L-1 Reform Act, discussed above, directed the OIG to examine the "vulnerabilities and potential abuses in the L-1 visa program."[48] In January 2006, the DHS OIG issued a report in compliance with the mandate. Though the OIG found that the definition of the term "specialized knowledge" is so broad that "adjudicators believe that they have little choice but to approve almost all petitions[],"[49] the OIG did not find that the L-1B

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bring such employees to the U.S. on L visas. A shorter prior employment period would allow companies to more expeditiously meet the needs of their clients. House Report 107-188, at 3.

The 2004 L-1 Visa Reform Act restored the one-year period of service abroad for all intracompany transferees, including specialized knowledge employees on blanket petitions.

[44] *Supra*, note 41.

[45] S. Hrg. 108–327, "The L–1 Visa And American Interests In The 21st Century Global Economy," Hearing Before The Subcommittee on Immigration, Border Security and Citizenship of The Committee On The Judiciary, United States Senate, 108th Congress, First Session July 29, 2003, Serial No. J–108–31.

[46] *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974); *Commodity Futures Trading Com. v. Schor*, 478 U.S. 833, 846 (1986).

[47] DHS Office of Inspector General, "Review of Vulnerabilities and Potential Abuses of the L-1 Visa program," Office of Inspections and Special Reviews, OIG-06-22, (Jan. 2006) (hereinafter "DHS OIG L-1 Report"). *See* http://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf.

[48] *See supra* note 39.

[49] DHS OIG L-1Report at 1.

category had been the subject of misuse, or that it was improperly used as a substitute for the H-1B category.[50] Moreover, when examining whether there was a basis for a concern that L-1B workers were displacing U.S. workers, the OIG concluded that displacement "does not seem to represent a significant national trend."[51] Additionally, the OIG opined that the perception that the L-1 program is larger and more significant is because beneficiaries are grouped together in certain areas of the country."[52]

In the USCIS "Comments on OIG Draft Report," USCIS Acting Deputy Director Robert C. Divine reaffirmed the central principles guiding L-1B adjudication found in the Puleo memo and the 2002 Ohata memo,[53] and stated that IMMACT 90 had the effect of "broadening the scope of the specialized knowledge category."[54] Divine also stated that "despite recent increases in the usage of the L-1B category, there continues to be a relatively low number of aliens granted L-1B classification annually."[55]

II. The AAO's Erroneous Analysis of IMMACT 90

a. *The "Varying Interpretations"*

Congress acted in 1990 in order to put to rest the "varying" restrictions imposed on the "specialized knowledge" category by legacy INS in the two decades of administrative jurisprudence, regulations, and policy guidance prior to the enactment of INA §214(c)(2)(B). When the legislative history of INA §214(c)(2)(B) is read in conjunction with the Supplementary Information accompanying the July 1991 proposed rule, there is no doubt that legacy INS properly interpreted the intent of Congress in IMMACT 90 to liberalize the definition of the term "specialized knowledge," and the AAO's reintroduction of pre-IMMACT 90 law is unsupportable.

A thread common to the "[v]arying interpretations" by legacy INS that Congress sought to address in IMMACT 90 was the narrow definition of "specialized knowledge" that the Service had developed over the years through precedent decisions, regulations, and interpretive memoranda. The *Penner/Colley* formulation focused on "essential" knowledge and the requirement that the specialized knowledge relate to the "proprietary" interests of the business and its management, and involve skills "not readily available in the job market." The 1983 regulations adopted and perpetuated the narrow definition of "specialized knowledge" that tied the knowledge closely to the petitioner's "proprietary interests."

The proposed regulations in 1986 unsuccessfully sought to restrict further the definition by imposing requirements that the knowledge be unique and narrowly held, and again tied to proprietary interests of the petitioner. As finally adopted in 1987, the regulations did not require that the knowledge be unique or narrowly held, but still required an

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[50] *Id.* at 11.
[51] *Id.* at 10.
[52] *Id.* at 11.
[53] *Id.* at 31.
[54] *Id.*
[55] *Id.*

"advanced level of expertise and proprietary knowledge" which is "not readily available in the United States labor market."

The Norton memo of October 1988, which attempted to relax the "too literal definition of the term 'proprietary knowledge'" that the Service was applying in the adjudication of L-1B "specialized knowledge" petitions, was insufficient to allay Congress's concern that the agency's "varying interpretations," all of which were varying formulations of the requirement that the "specialized knowledge" have some proprietary character or quality and in which some test of the availability of the knowledge in the labor market was required, were problematic. The IMMACT 90 definition of specialized knowledge was meant to repudiate the "varying interpretations" of the term.

b. ***"Elevated" or "Key" Employees***

In its decisions, the AAO relies on the legislative history of the 1970 immigration act, on *Colley* and *Penner*, precedent decisions interpreting the 1970 law, and on *1756*, to support the conclusion that "specialized knowledge" employees must be "key" to the petitioner's enterprise. The AAO attributes great significance to the inclusion of "specialized knowledge" employees in the same nonimmigrant category as executives and managers. The court in *1756* described the 1987 regulation as adopting the "natural reading that a specialized knowledge capacity should be analogous to a managerial or executive capacity." Relying on *1756*, the AAO draws the following erroneous conclusion:

> [L]ooking 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.[56]

While one could argue that it may have been appropriate under the pre-IMMACT 90 law to equate "key" with "elevated," Congress changed that when it enacted the statutory definition of "specialized knowledge" in IMMACT 90. Where previously under legacy INS interpretations the "specialized knowledge" had to relate to a proprietary interest of the petitioner, and the specialized knowledge alien had to have an "advanced level of expertise," the definition found in IMMACT 90 imposed no such requirements.

c. ***Consideration of the Full Range of Changes for Intracompany Transferees in IMMACT 90***

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[56] *GST*, *supra*, FN 1, at 23. *See also*: *Matter of [name not provided]*, EAC-07-013-52342 (AAO, Aug. 23, 2010), at 21.

In its attempt to minimize the impact of the changes on intracompany transferees made by IMMACT 90, the AAO fails to consider the full range of changes applicable to intracompany transferees, both nonimmigrant and immigrant, enacted in IMMACT 90, and to weigh the significance of those changes. The enactment by Congress of a definition of "specialized knowledge" was one of five changes to the nonimmigrant L-1 program enacted by Congress with IMMACT 90. The five revisions addressed changes in the evolving worldwide economy and changes in the structure of businesses:

- Accounting and consulting firms, whose ownership structures were not compatible with the prior L-1 law, were given access to the L-1 category;
- Blanket petitions were made available to high-volume L-1 users;
- The one-year period of prior employment could be satisfied if it took place in a three-year period prior to admission;
- The period of stay for L-1 aliens was made statutory, with a five-year period for "specialized knowledge" employees, and a seven-year period of stay provided for executives and managers;[57] and,
- A definition of "specialized knowledge" was enacted that eliminated the requirement that the knowledge have a characteristic "proprietary" to the petitioner, but rather, that the knowledge have a "special" characteristic relevant to the company product and its application in international markets, or be advanced knowledge of the company's processes or procedures.

When read in combination, the five changes to the L-1 program reveal a clear intent by Congress to substantially broaden the L-1 program, particularly to include accounting and consulting firms by specifically including those businesses,[58] by making processing of L-1 petitions easier for high-volume users, by enlarging the timeframe during which the one-year of qualifying employment could take place, by defining by statute periods of stay for L-1 aliens, and, by eliminating the requirement that "specialized knowledge" be closely tied to a proprietary interest of the employer. Whether Congress had found that the prior interpretation of "specialized knowledge" was "specifically incorrect" is not the issue. Congress re-defined the term to make it consistent with the other changes.

Moreover, IMMACT 90 made changes with respect to the treatment of intracompany transferee executives and managers, both nonimmigrant and immigrant, which reveal that Congress did, in fact, view executives and managers differently from "specialized knowledge" employees, whose treatment by Congress in the IMMACT 90 changes indicate that they were not so "elevated" in the eyes of Congress as the AAO claims.

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[57] Regulations limited the period of admission for aliens under INA §101(a)(15)(L) to five years, except for aliens who do not reside continuously in the United States and whose employment in the U.S. is intermittent, seasonal, or an aggregate of six months or less per year, or who reside abroad and who are employed part-time in the U.S. 8 CFR §214.2(l)(12) (1-1-90 Edition).

[58] In response to changes in ownership structures of accounting and management consulting firms subsequent to the enactment of IMMACT 90, Congress amended Section 206(a), "Clarification of Treatment of Certain International Accounting Firms," in Section 6 of the Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. 106-95, 113 Stat. 1312, (Nov. 12, 1999), to clarify the applicability of INA §101(a)(15)(L) and INA §203(b)(1)(C) to the restructured firms.

First, for nonimmigrant intracompany transferees, Congress provided in Section 214(c)(2)(D)(i) that executives and managers would be entitled to a seven-year period of admission, whereas in Section 214(c)(2)(D)(ii), "specialized knowledge" employees would remain limited to a five-year period of stay. Second, IMMACT 90 introduced immigrant "priority workers" in Section 203(b)(1). Congress created three categories of "priority workers," "aliens with extraordinary ability" under Section 203(b)(1)(A), "outstanding professors and researchers" under Section 203(b)(1)(B), and "certain multinational executives and managers" under Section 203(b)(1)(C). Congress included intracompany transferee executives and managers among the highest classes of aliens for permanent residence, and provided to them the streamlined pathway to permanent residence that does not involve the labor certification process required under INA §212(a)(5).

"Specialized knowledge" employees were afforded neither the seven-year period of stay nor the "priority worker" permanent residence classification and streamlined permanent residence processing. The disparate treatment of "specialized knowledge" employees points to the conclusion that Congress did not consider them to be among an "elevated class of workers" along with executives and managers.

The same changes to the intracompany transferee classification -- amendments to make the visa category available to accounting and consulting firms, the enactment of a definition of "specialized knowledge," the limitation on periods of stay for "specialized knowledge" workers, and the exclusion of "specialized knowledge" workers from the "priority worker" permanent resident category – also support a reexamination of how "key" Congress viewed this class of employees to be, or, said another way, supports a reexamination of the kind and level of skill a worker would need to possess to be considered "key." If it remains appropriate to consider a "specialized knowledge" employee "key," then what constitutes "key" is the possession of special knowledge of a company's product and its application in international markets, or advanced knowledge of a company's processes or procedures, not hierarchical ranking on a corporate organization chart.

III. Righting the Course of L-1B Adjudications

Though the AAO's flawed analysis of the changes to the L-1B category in IMMACT 90 has resulted in a number of erroneous conclusions, three areas stand out: the "baseline" against which "special" and "advanced" should be measured, the time needed to acquire specialized knowledge, and how widespread the knowledge can be within the company.

a. *The "Baseline" Against Which "Special" and "Advanced" Should be Measured*

The AAO correctly states that "to determine what is special, USCIS must determine the baseline of ordinary."[59] The Puleo memo and *GST* both referenced common dictionary definitions of "special" and "advanced" when discussing how to interpret the terms. Puleo, for example, suggests that "special" can mean "surpassing the usual; distinct

[59] *GST*, *supra* note at 20.

among others of a kind" or "distinguished by some unusual quality; uncommon; noteworthy." For "advanced," Puleo suggests "highly developed or complex; at a higher level than others" or "beyond the elementary or introductory; greatly developed beyond the initial stage."[60] In *GST*, the AAO offers similar dictionary definitions of "special" and "advanced:"

> ...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.[61]

The AAO, however, relies on its finding that a "specialized knowledge" employee is among a "key" or elevated class of employees, along with executives and managers, to move the "baseline" from that established by the dictionary definitions, and to conclude that the qualities of "special" or "advanced" for a "specialized knowledge" employee must be compared to the "special" or "advanced" qualities of "elevated" employees. This flawed analysis of IMMACT 90 leads the AAO to incorrectly establish "baselines" for "special" and "advanced" that are far beyond what Congress intended with the 1990 amendments, to the point that knowledge must not just be "specialized," but must be "super-specialized."

The Puleo memo makes it clear that the "baseline" against which "specialized knowledge" is to be measured is whether the "...knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien's field of endeavor."[62]

The "baseline" for "special" knowledge is whether the knowledge possessed by the beneficiary is not general knowledge held commonly throughout the industry. The "baseline" for "advanced" knowledge does not require that the knowledge be narrowly held within the petitioning company, only that the knowledge be advanced. In neither case, however, is the starting point anything beyond knowledge that is considered "ordinary" to the industry, field, or company.

b. *The Time Needed to Acquire the Specialized Knowledge*

Flowing also from the AAO's flawed analysis of the changes to the multinational transferee programs is the AAO's insistence that a "specialized knowledge" intracompany transferee must have experience beyond the statutory minimum of one year of qualifying employment abroad. In *GST*, the AAO says:

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[60] Puleo Memo, *supra* note 7.
[61] *GST*, *supra* note 1 at 23.
[62] Puleo Memo, *supra* note 7.

> 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.[63]

Congress considered the duration of qualifying employment in the 1990 amendments, providing that the one year of qualifying employment could take place in a three-year period prior to the admission of the intracompany transferee. When the 2004 reforms were introduced by Senator Chambliss in 2003, he said "One year is a reasonable amount of time to require an employee to have attained the specialized knowledge of the company's products, services or processes to qualify for the visa."[64] Congress had ample opportunity when considering the 2004 reforms to enlarge the period of qualifying employment, and did not do so. It is simply impermissible for the AAO to do so in its adjudication of L-1B petitions.

c. ***The Number of Employees Who Can Possess Specialized Knowledge***

The AAO rejects the principle, found in the Puleo memo, that "the statute does not require that the advanced knowledge be narrowly held throughout the company, only that the knowledge be advanced."

In *GST*, the AAO says:

> 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."[65]

Elsewhere in *GST*, the AAO quotes *Colley*:

> Most employees today are specialists and have been trained and given specialized knowledge. However, in view of the [legislative history], it cannot be concluded that all employees with specialized knowledge or performing highly technical

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[63] *GST*, *supra* note 1 at 39.
[64] *See supra* note 42.
[65] *GST*, *supra* note 1 at 38.

> duties are eligible for classification as intracompany transferees. The House Report indicates the employee must be a "key" person and associates this employee with "managerial personnel." *Matter of Colley*, 18 I&N Dec. at 119-20.[66]

While the AAO's conclusion that "not all employees with specialized knowledge ... are eligible for classification as intracompany transferees" may have been appropriate under the law based on the 1970 statute, the same cannot be said under the law as amended by IMMACT 90. Under the 1990 statutory definition, any employee who has "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" is eligible for classification as a "specialized knowledge" employee under INA §101(a)(15)(L) and INA §214(c)(2)(B). And, under the 1990 amendment, that knowledge can be widely held.

IV. CONCLUSION

The Immigration Act of 1990 brought watershed reforms to the treatment of multinational companies and their employees. Congress amended the Immigration and Nationality Act to provide access to intracompany transferee visas, immigrant and nonimmigrant, to multinational enterprises and business structures that barely existed, or did not exist at all, in 1970, and expanded access to the L-1 category for a new kind of "specialized knowledge" employee, the kind who were providing services that were virtually nonexistent in 1970. In comments during the 2003 Senate Judiciary Committee hearing on the L-1 visa, Senator Edward M. Kennedy noted that "[i]n 1970 ... we had the beginning of internationalization...."[67]

In 2012, we clearly have a global economy, and global businesses. USCIS must abandon its misplaced reliance on precedent decisions and federal case law interpreting the term "specialized knowledge" that is based on the Immigration Act of 1970, repudiate the reasoning adopted by the AAO in L-1B decisions as embodied in *GST* and other AAO decisions that substantially repeat the rationale found in *GST*, and return to applying the sound reasoning found in the regulations and policy memoranda that properly interpreted the intent of Congress with respect to the treatment of "specialized knowledge" intracompany transferees in the Immigration Act of 1990.

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[66] *GST*, *supra* note 1 at 26.
[67] *See supra* note 45, at 22.