July 31, 2015

USCIS
RFE Project
Submitted via e-mail: scopsrfe@dhs.gov

Re: Draft RFE Template for Comment, Form I-129, Petition for a Nonimmigrant Worker, L-1B Intracompany Transferee Specialized Knowledge

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) jointly submit the following comments in response to the proposed USCIS Request for Evidence (RFE) template for Form I-129, Petition for a Nonimmigrant Worker, L-1B Intracompany Transferee Specialized Knowledge.[1]

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

[1] USCIS Request for Comments on Draft RFE Template for L-1Bs (July 17, 2015) (hereinafter referred to as "Draft L-1B RFE Template"), AILA Doc. No. 15071760, *available at* http://www.aila.org/infonet/uscis-draft-rfe-template-l-1bs.

USCIS Should Not Solicit Feedback Until the Memorandum Is Final

AILA and the Immigration Council object to USCIS's request for comments on an RFE template that is based on the March 24, 2015 draft of the *L-1B Adjudications Policy Memorandum*, PM-602-0111 (hereinafter "draft L-1B policy memo" or "draft policy memo").[2] In its request for comments on the draft L-1B RFE template, USCIS states that "[s]takeholder feedback on the memo is under review by USCIS. The final version of this template will reflect the final version of the memo."[3] Stakeholders are not being given the opportunity to comment on whether the draft RFE template is consistent with USCIS policy—and whether USCIS policy is consistent with the applicable laws and regulations—when they are being asked to comment on a draft based off of a draft. If USCIS is truly interested in feedback on its RFE template, it needs to issue a draft L-1B RFE template based on the final text of the L-1B policy memo.

At best, the proposed RFE template seems to be premature, given what we understand to have been substantial stakeholder commentary on the draft policy memorandum. At worst, moving forward with a revision to the L-1B RFE template at this time calls into question the value that USCIS is placing on the draft policy memo stakeholder comments and the stakeholder engagement process as a whole. AILA and the Immigration Council request that (1) USCIS withdraw this draft L-1B RFE template, (2) issue a draft L-1B RFE template after the final version of the policy memo has been issued that is based on the final memo, and (3) establish a new draft RFE comment period of at least thirty (30) days.

The Draft RFE Template Incorporates Problematic Language from the Draft Policy Memorandum

On May 8, 2015, AILA and the Immigration Council submitted detailed comments in response to the draft L-1B adjudications policy memorandum explaining a number of serious concerns about the proposed policy, and provided USCIS with recommendations to address those deficiencies.[4] The draft RFE template directly incorporates many of the same problematic concepts and approaches to adjudication of L-1B petitions that are found in the draft L-1B policy memo. Ultimately, USCIS again fails to outline a predictable, clear adjudicatory framework, and thus leaves the door open for adjudicators to continue to inappropriately increase the evidentiary burden and misinterpret the term "specialized knowledge." While we provide a few illustrative examples in these comments, the critiques are by no means exhaustive.[5]

The draft policy memo signals that adjudicators should give minimal weight to employer letters of support and insist on other kinds of documentary evidence for a petitioner to sustain the

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[2] USCIS Memo for Feedback, PM-602-0111, "L-1B Adjudications Policy," (Mar. 24, 2015), AILA Doc No. 15032403, *available at* http://www.aila.org/infonet/uscis-l-1b-adjudications-policy-memo.

[3] Draft L-1B RFE Template at 1.

[4] AILA/Immigration Council Comments on Draft Policy Memorandum: PM602-0111; Re: L-1B Adjudications Policy," (May 8 2015), (hereinafter referred to as "AILA/Immigration Council Memo Comments"), AILA Doc. No. 15051101, *available at* http://www.aila.org/infonet/comments-uscis-l-1b-adjudications-policy-memorandu and attached hereto.

[5] If, as requested, USCIS issues an RFE template for comment based on the final policy memo, AILA and the Immigration Council will submit full comments.

"preponderance of the evidence" burden of proof.[6] The draft L-1B RFE template ignores the fact that the preponderance standard is supposed to be generous and instead echoes the draft policy memo's problematic approach to adjudication, going so far on page 13 as to instruct adjudicators to include the following language in RFEs:

> Please note that merely stating the beneficiary's knowledge is somehow different from others or greatly developed does not, in and of itself, establish that he or she possesses specialized knowledge. Ultimately, it is the weight and type of evidence that establishes whether the beneficiary possesses specialized knowledge.

The draft RFE template implements this erroneous conclusion by actively providing language to adjudicators to allow voluminous additional documentation to be requested, notwithstanding credible statements and explanations from the petitioner regarding the specialized knowledge possessed by the beneficiary. For instance, on pages 12 and 13 of the draft L-1B RFE template, the list of potential additional evidence that can be submitted to show that an L-1B beneficiary has gained specialized knowledge abroad closely tracks the draft L-1B policy memo, and is equally focused on separate documentation rather than credible statements by the petitioner. The template suggests that adjudicators should ask for such documentation as:

- Documentation of training, work experience, or education;
- Contracts, statements of work, or other documentation that shows that the beneficiary possesses knowledge that is particularly beneficial to the organization's competitiveness in the marketplace;
- Evidence, such as correspondence or reports;
- Personnel or in-house training records;
- Curricula and training manuals for internal training courses, financial documents, or other evidence;
- Evidence of patents, trademarks, licenses, or contracts awarded to the organization based on the beneficiary's work; and
- Payroll documents, federal or state wage statements, resumes, organizational charts, or similar evidence.

As with the draft policy memo, this approach to RFEs will needlessly result in petitioners sending voluminous amounts of paperwork for cases that are easily approvable based on the detailed explanations of credible employers. USCIS should reconsider this approach taken by the draft policy memo and followed by the draft L-1B RFE template.

We also are concerned that the draft L-1B RFE template follows the draft L-1B policy memo in incorporating concepts and requirements in the L-1B adjudication process that have no basis in the statute or regulations. As we commented, the list of "non-exhaustive" L-1B factors USCIS provided in the draft policy memo is drawn from the Puleo memorandum but includes language that inappropriately heightens the "specialized knowledge" factors previously articulated in the

[6] AILA/Immigration Council Memo Comments at 3-6.

Puleo memorandum.[7] There is no requirement in the statute or regulations, for instance, that the beneficiary's employment abroad has "significantly enhanced the organization's productivity, competitiveness, image, or financial position," nor is there any requirement that "the beneficiary possesses knowledge that is particularly beneficial to the organization's competitiveness in the marketplace."[8] Nevertheless, these concepts are repeated verbatim in the draft RFE template.

Likewise, there is no statutory or regulatory basis for the statement in the draft policy memo that, "[w]here many employees within the organization's U.S. operations share the beneficiary's knowledge, yet the beneficiary will be paid substantially less than those similarly situated employees, [it] may indicate that the beneficiary lacks the requisite specialized knowledge."[9] Yet, this inappropriate guidance has nonetheless been implemented on page 13 of the draft L-1B RFE template, which lists "[p]ayroll documents, federal or state wage statements, resumes, organizational charts, or similar evidence documenting the positions held and the wages paid to the beneficiary and parallel employees in the organization" as suggested evidence to submit.[10]

The draft template underscores the concern we expressed in our comments to the draft policy memorandum about these types of concepts being executed through issuance of RFEs. We noted that such requirements could effectively become *de facto* necessities to obtain approval of an L-1B petition. The draft RFE template effectively institutionalizes these problematic concepts, along with many others from the draft policy memorandum that stakeholders identified as substantial concerns.

Conclusion

We respectfully request that USCIS withdraw the proposed L-1B RFE template at this time, evaluate and consider the stakeholder comments to the L-1B policy memorandum, and only propose modifications to the L-1B RFE template for public comment after issuing the final policy memo.

Sincerely,

THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
THE AMERICAN IMMIGRATION COUNCIL

[7] AILA/Immigration Council Memo Comments at 10.
[8] Draft L-1B RFE Template at 12.
[9] Draft L-1B Policy Memo at 10.
[10] Draft L-1B RFE Template at 13.

May 8, 2015

Department of Homeland Security
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Submitted via: ope.feedback@uscis.dhs.gov

Re: PM 602-0111: L-1B Adjudications Policy (Mar. 24, 2015)

To Whom It May Concern:

The American Immigration Lawyers Association (AILA) and the American Immigration Council (Immigration Council) jointly submit the following comments in response to the March 24, 2015 USCIS Policy Memorandum, "L-1B Adjudications Policy" (PM 602-0111).

AILA is a voluntary bar association of more than 14,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. AILA members regularly advise and represent businesses, U.S. citizens, lawful permanent residents, and foreign nationals regarding the application and interpretation of U.S. immigration laws.

The American Immigration Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Immigration Council has played an instrumental role in highlighting the important economic contributions of immigrants at the local and federal levels. In addition, through its work on the economic benefits of immigration reform, the Immigration Council has helped to establish baseline standards for understanding the important role immigration plays in shaping and driving a twenty-first century American economy.

We appreciate the opportunity to comment on this memorandum and believe that our collective expertise and experience makes us particularly well-qualified to offer views that will benefit the public and the government.

On January 29, 2015, USCIS published on its website an overview of its plans to implement program changes to effectuate President Obama's Executive Actions on Immigration.[1] On the topic of high-skilled immigration, USCIS stated that it would "modernize, improve and clarify immigrant and nonimmigrant visa programs to grow our economy and create jobs."[2] In particular, in connection with the L-1B nonimmigrant visa process, USCIS stated that it would "provide clear, consolidated guidance on the meaning of 'specialized knowledge' to bring greater clarity and integrity to the L-1B program, improve consistency in adjudications, and enhance companies' confidence in the program."[3] While we applaud USCIS for its commitment to this policy objective, we are concerned that the draft memorandum, in its current form, falls short of this goal and misses a critical opportunity to provide predictability to an adjudication process that has been problematic for many employers seeking to grow their U.S. operations.

For years, employers have faced uncertainties about the availability of the L-1B classification. Over the past decade, denial rates increased substantially, despite the fact that there have been no statutory or regulatory changes affecting the standards for adjudication. According to a March 2015 report by the National Foundation for American Policy (NFAP), the "denial rate for L-1B petitions increased to an historic high of 35 percent in FY2014."[4] This represents a "more than five-fold increase in the rate of denials," up from only six percent in FY2006.[5] This trend is troubling, particularly given that in 1990, Congress broadened the scope of the L-1B program when it enacted the Immigration and Nationality Act of 1990 (IMMACT90).[6]

As a result of the ever-increasing evidentiary burdens and continuing misinterpretation of the term "specialized knowledge," public confidence in the agency's adjudication of L-1B petitions has eroded. In the day-to-day adjudication of L-1B petitions, USCIS continues to impose evidentiary demands that are much stricter than the required "preponderance of the evidence" standard and issue requests for evidence (RFEs) and denials containing boilerplate language that fails to describe with particularity why the evidence submitted was insufficient. Despite congressional intent to liberalize the interpretation of the term "specialized knowledge," these evidentiary demands are tantamount to the continued application of the pre-IMMACT90 standards that were articulated in *Matter of Penner* and *Matter of Colley*.[7] While USCIS's RFE and denial templates no longer explicitly reference *Penner* or *Colley*, the agency implicitly relies on the terms and concepts from these cases in adjudicating petitions and issuing decisions.[8] Moreover, there is an unpredictability associated with L-1B adjudications that has had a negative impact on employers' ability to plan and execute personnel and business decisions. This will

[1] http://www.uscis.gov/immigrationaction.
[2] *Id*.
[3] http://www.uscis.gov/immigrationaction#4
[4] http://nfap.com/wp-content/uploads/2015/03/NFAP-Policy-Brief.L-1-Denial-Rates-Increase-Again.March-20151.pdf
[5] *Id*.
[6] Pub. L No. 101-649, 104 Stat. 4978 (Nov. 29, 1990); 56 Fed. Reg. 31553, 31554 (July 11, 1991).
[7] 18 I&N Dec. 49 (Comm. 1982); 18 I&N Dec. 117 (Comm. 1982).
[8] Training materials released by the agency in response to a 2012 Freedom of Information Act request guided examiners to apply "the reasoning" of non-binding AAO decisions that relied, expressly or implicitly, on *Penner* and/or *Colley* and the restrictive interpretation of what constitutes "specialized knowledge" that results from applying the *Penner-Colley* line of reasoning. AILA Doc. No. 12051670, at 320 (*posted* May 16, 2012).

continue to impede business development until USCIS implements a sound adjudications policy that is reflective of Congress's intent, and includes clear evidentiary guidelines and a robust training program for adjudicators.

Sections I and II: Introduction/Background

As noted in the memorandum, the nonimmigrant L-1 intracompany transferee classification was created with the passage of the Immigration Act of 1970.[9] We appreciate that the Introduction and Background sections of the memorandum very clearly set forth the history and evolution of the interpretation of "specialized knowledge" and include strong language regarding the purpose and intent of the L-1B classification. Noting the shifting "needs of multinational employers in an increasingly global marketplace," USCIS pointedly states that "Congress created the L-1B classification so that multinational companies could more effectively transfer foreign employees with specialized knowledge to their U.S. operations, enhancing such companies' ability to leverage their workforces"[10] and "to promote the United States as a global business destination."[11]

As discussed in detail below, while the draft memorandum very helpfully clarifies the appropriate standard of review and the definition of specialized knowledge, we are concerned that it does not outline a predictable, clear adjudicatory framework that is critical to consistency of adjudications, fidelity to congressional intent, and necessary to building and sustaining stakeholder confidence in the program. As such, small, but important changes to the memorandum are necessary to address these concerns. The memorandum presents USCIS with an opportunity to at long last bring predictability and consistency to the L-1B adjudication process. We hope that USCIS will incorporate the changes discussed in these comments, and believe that such changes will help USCIS better achieve the goals of the President's Executive Actions, including economic growth and job creation.

Section IV: "Preponderance of the Evidence" Standard and Section V.C: Evaluating Claims of Specialized Knowledge

We thank USCIS for stating that the appropriate standard of proof in L-1B adjudications is "preponderance of the evidence" and for explaining the meaning of this standard: "[T]he petitioner must show that what it claims is more likely the case than not. This is a lower standard of proof than that of 'clear and convincing evidence' or the 'beyond a reasonable doubt' standard. The petitioner does not need to remove all doubt from the adjudication."[12] Citing *Matter of Chawathe*, USCIS states that the petitioner must submit "relevant, probative, and credible evidence" which the adjudicator must assess both "individually and within the context of the totality of the evidence."[13]

[9] Pub. L. 91-225, Sec. 1(b), 84 Stat. 117 (Apr. 7, 1970).
[10] Policy Memorandum at 2.
[11] *Id*. at 3.
[12] *Id*. at 5.
[13] *Id.* at 5-6; citing 25 I&N Dec. 369, 375-376 (AAO 2010).

A review of requests for evidence, denials, and AAO decisions over the past several years indicate that the interpretation and application of the "preponderance of the evidence" standard in petition adjudication is perhaps the biggest obstacle for employers seeking to transfer specialized knowledge personnel to the United States. As a result of the ever-changing and increasingly onerous documentary demands that the agency has imposed over the past few years, the "preponderance" standard has effectively been transformed into a "clear and convincing" standard. For example, RFEs and denials insist that the employer must "at a minimum articulate with a high degree of specificity the nature of the beneficiary's knowledge; how such knowledge is typically gained within the organization; and how and when the beneficiary gained such knowledge." Following submission of evidence that appears to meet the burden of proof, the adjudicator then finds that the "evidence of record is insufficient" or "insufficient evidence was presented." This vague requirement to introduce evidence of "a high degree of specificity" has left the regulated community without any understanding of what is required to prove specialized knowledge. No matter how specific the employer is, USCIS can, and often does, find the evidence "insufficient."

The "preponderance of the evidence" standard is a generous standard intended to ease the burden on the employer, rather than make it more difficult. USCIS is quite clear about this in its Academy training materials, which carefully map out the various standards of proof from the most restrictive to the most expansive.[14] Indeed, "[i]n American law, preponderance of the evidence is rock bottom at the fact finding level of civil litigation."[15] We hope that the language setting forth and explaining the preponderance standard at the front of the memorandum will go far in bringing the evaluation of evidence back in line with the appropriate standard of proof.

We are concerned, however, that the guidance fails to recognize the significance of and weight to be accorded to the statement of the employer, which lies at the very core of every L-1B petition, and for that matter, every employment-based immigrant or nonimmigrant petition. In the introductory paragraph to Section V.C, USCIS cites 8 CFR §214.2(l)(3)(ii) stating, "To show that the offered position in the United States involves specialized knowledge, the petitioner must submit 'a detailed description of the services to be performed.'"[16] But several paragraphs later, the evidentiary weight of the employer letter is reduced significantly by the following language:

> *Merely stating that a beneficiary's knowledge is somehow different from others or greatly developed does not, in and of itself, establish the he or she possesses specialized knowledge. Ultimately, it is the weight and type of evidence that establishes whether the beneficiary possesses specialized knowledge*.[17]

While we agree that a petitioner must do more than restate the regulatory requirements and/or make conclusory statements of "specialized knowledge," many employment-based petition

[14] Training materials obtained through FOIA, available at AILA Doc. No. 13042663. For example, "beyond a reasonable doubt" is applicable to criminal trials and Adam Walsh Act determinations; "clear and convincing evidence" applies to denaturalization cases and marriage-based I-130s in proceedings, among others; "clearly and beyond doubt" applies to admissibility determinations; and "preponderance of the evidence" applies to most benefits petitions and applications, including L-1B petitions.
[15] *Charlton v. FTC*, 543 F.2d 903, 907(D.C. Cir. 1976).
[16] Policy Memorandum at 11.
[17] *Id*. at 12.

denials, including L-1B petitions, fail to afford proper weight to credible statements by the petitioner and improperly rely on *Matter of Treasure Craft* [18]as the authority for doing so. In *Treasure Craft*, the petitioner's assertions were not credible because they were not consistent with other facts and evidence in the record. Only in that context did the Regional Commissioner conclude it was "reasonable and proper to require the petitioner to do more" than rely solely on his statements. *Treasure Craft* does not stand for the principle that a statement of the petitioner is insufficient by itself; rather, it stands for the principle that statements, letters, and affidavits must be evaluated in the context of the entire case, and where a petitioner provides a detailed, reasonable, and logical explanation of the facts supporting eligibility for the benefit sought, that statement alone should be accepted, as long as there is no other evidence that contradicts or undermines it. To require separate documentation to corroborate every statement made in the employer letter is excessive and gives the appearance that USCIS is inherently skeptical of the ability of employers to articulate their legitimate personnel needs.

This adjudicatory principle finds additional support in administrative and federal case law. For example, in *Camphill Soltane v. DOJ*, the Third Circuit vacated the district court's decision upholding the denial of a special immigrant religious worker petition, finding that the denial was predicated in part, on improper findings of evidentiary deficiency.[19] In *Camphill*, the AAO cited *Treasure Craft* to reject a letter of support submitted by the petitioner to prove that the beneficiary had two years of continuous experience in the relevant occupation and that a qualifying job offer had been tendered. The court of appeals easily distinguished the case before it from *Treasure Craft*, noting that there was no evidence in the record to contradict the statements in the petitioner's letter of support, and that the AAO failed to explain or suggest *why* it rejected the letter of support. In remanding the case, the court explained that an agency is minimally obligated "to provide adequate reasons explaining why it has rejected uncontradicted evidence."[20]

In *Matter of E-M*, the Commissioner found that an applicant for temporary resident status under INA §245A who submitted only affidavits from acquaintances and employers to prove continuous residence since his arrival, along with an affidavit explaining why he was unable to submit other documentation, established continuous residence by a preponderance of the evidence.[21] Moreover, in *Matter of Chawathe*, the Commissioner gave great weight to the employer's statement and acknowledged that the employer representative is in the best position to attest to facts concerning the company and/or the position. The Commissioner stated, "[A]lthough the specific claim that [Saudi Arabia Texaco] is 'wholly-owned' is not supported by independent evidence, the letter from the applicant's employer is relevant, uncontroverted by any other evidence, and generally supported by the SEC Form 10-K. Furthermore … the author [of the letter] is in a position to have first-hand knowledge of the corporation's relationship with Chevron Texaco. As required under the applicable standard of proof, the evidence establishes that it is "probably true that SAT is a subsidiary of an American firm or corporation…."[22]

[18] 14 I&N Dec. 190 (Reg. Comm. 1972).
[19] 381 F.3d 143 (3d. Cir. 2004).
[20] *Id*. at 151; citing Richard J. Pierce, Jr., 2 Administrative Law Treatise §11.2 at 791 (2002); *Tieniber v. Heckler*, 720 F.2d 1251, 1254 (11th Cir. 1983).
[21] 20 I&N Dec. 77 (Comm. 1989).
[22] 25 I&N Dec. 369 at 376.

Thus, rather than signaling adjudicators to give minimal weight to employer letters of support without more, the guidance should reaffirm that adjudicators may accept credible statements by the petitioner without requiring corroborating evidence on each statement contained therein.

***Section IV and Section V.C Recommendations*:**

- Amend Part IV to add the following language at the end of the paragraph:

  A statement of the employer that includes detailed factual information regarding the nature of the beneficiary's employment and training abroad, the work the beneficiary will be undertaking in the United States, and what specifically makes that individual a specialized knowledge employee should be deemed credible absent contradictory evidence or statements. [Insert footnote citations to Matter of Treasure Craft, Matter of Chawathe, *and other case law]. Unless compelled by contradictory evidence, corroborating evidence of each statement contained in the employer's letter is not required. Section V.C of this memorandum includes a list of evidence that may be submitted to demonstrate that an individual's knowledge is special or advanced. This evidence listed is neither exhaustive, nor is each item required.*

- Amend Part V.C as follows:

  - Prior to commencing with the list of "other evidence" insert the following paragraph:

    A statement of the employer that includes detailed factual information regarding the nature of the beneficiary's employment and training abroad, the work the beneficiary will be undertaking in the United States, and what specifically makes that individual a specialized knowledge employee should be deemed credible absent contradictory evidence or statements. [Insert footnote citations to Matter of Treasure Craft, Matter of Chawathe, *and other case law]. Unless compelled by contradictory evidence, corroborating evidence of each statement contained in the employer's letter is not required.*

  - The sentence preceding the list of evidence should be amended to read:

    The following is a list of other evidence that a petitioner may submit to demonstrate that an individual's knowledge is special or advanced. ***This list of evidence is neither exhaustive nor is each item required.***

Section V(A): Definitions of "Special Knowledge" and "Advanced Knowledge"

We commend USCIS for reminding adjudicators that the definitions of "special knowledge" and "advanced knowledge" are derived from the statutory language in INA §214(c)(2)(B). Because 8

CFR §214.2(l)(1)(ii)(D), which USCIS describes as a "definition" of "specialized knowledge" is a virtual restatement of the statutory language, adjudicators are likely to rely heavily on the definitions provided in the memorandum. We are concerned, however, that the definitions will result in the type of undue restrictions on eligibility for this classification that the memorandum is intended to avoid. As with the March 9, 1994 Puleo memorandum,[23] USCIS first looks to common dictionary definitions of "special" and "advanced."[24] While we view these definitions as consistent with the statutory language, we take issue with USCIS's proposed application of the dictionary definitions.

USCIS has defined "special knowledge" as:

> [K]nowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably ***distinct or uncommon in comparison to*** that generally found in the particular industry or within the petitioning employer.[25]

This formulation is appropriate as far as assessing the employee's knowledge in the context of the industry in which the petitioning employer does business, but only if USCIS recognizes and gives proper weight to information provided by the petitioner about its own business and does not require corroborating evidence in the absence of contradictory evidence or statements, as discussed above. Over the years, USCIS has consistently stated that a beneficiary's knowledge is not "special" if the knowledge is common to the industry. However, the definition is flawed by the addition of the phrase "or within the petitioning employer." If, as the memorandum also recognizes, knowledge does not need to be "narrowly held" within the petitioning employer, then this phrase has no place in the "special knowledge" definition. What measure would an adjudicator who is told to look "within the petitioning employer" for "distinct or uncommon" knowledge be able to use other than the number of employees who hold such knowledge? This measure contradicts the longstanding interpretation that the beneficiary's knowledge of an aspect of the petitioner's business and its application in international markets be assessed with regard to the relevant industry.

USCIS has defined "advanced knowledge" as:

> [K]nowledge or expertise in the organization's specific processes and procedures that is not commonly found in the relevant industry and is ***greatly developed or further along in progress, complexity and understanding*** than that generally found within the petitioning employer.[26]

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[23] Memorandum of James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, INS, "Interpretation of Specialized Knowledge (CO 214L-P)" (Mar. 9, 1994).

[24] The memorandum states that the term "special" was defined by the Merriam-Webster dictionary, Dictionary.com, and the Oxford English Dictionary as "surpassing the usual," "distinct among others of a kind," "distinguished by some unusual quality," "uncommon," or "noteworthy." Policy Memorandum at 6. We note, however, that although each of these five definitions is also found in the Puleo memorandum, when we reviewed the three sources cited by USCIS, the term "special" was not defined as "surpassing the usual," "uncommon," or "noteworthy."

[25] Policy Memorandum at 7 (emphasis in original).

[26] *Id*. (emphasis in original).

The language that USCIS emphasizes in bold is vague and invites adjudicators to apply subjective standards, based on their personal experience, as to what it means for a beneficiary to be "greatly developed" or "further along" in a level of knowledge or expertise than other employees of the petitioner. Once again, adjudicators may resort to counting the number of employees in a same or similar job as the beneficiary and based on the total number of such employees, decide that the beneficiary's knowledge is not "advanced." Yet, as USCIS acknowledges, "advanced" does not equal "narrowly held." The Puleo memorandum does not define "advanced knowledge" by measuring the beneficiary against other employees of the petitioner. Rather, the Puleo memorandum again considers whether the knowledge is "not generally known in the industry" and is "of some complexity."[27]

Recommendations for Section V.A

The "special knowledge" definition should be amended to read:

> *[K]nowledge of the petitioning employer's product, service, research, equipment, techniques, management, or other interests and its applications in international markets that is demonstrably distinct or uncommon in comparison to that generally found in the particular industry.*

The "advanced knowledge" definition should be amended to read:

> *[K]nowledge or expertise of the organization's specific processes and procedures, which is of a sophisticated nature, although not unique to the organization, which is not commonly found in the relevant industry.*

Section V.B: Application of the Specialized Knowledge Definition

In Section V.B, USCIS lists the primary factors that will be considered by adjudicators in determining whether the beneficiary possesses special or advanced knowledge. We commend USCIS for providing clear headings in this section listing specific factors that should be considered, and for reiterating and emphasizing key components of the INA and underlying regulations governing L-1Bs. These include the fact that the L-1B classification does not require a test of the U.S. labor market, nor does specialized knowledge need to be narrowly held within the petitioning organization. However, we are concerned that the explanatory text following the headings in Section V.B, in several instances, may do more to confuse the adjudication process than to improve it.

When officers are adjudicating L-1B petitions, or any other immigration benefit, their review should be guided by the requirements set forth in the INA and the regulations. Page 3 of the memorandum correctly quotes the statutory definition of specialized knowledge at INA §214(c)(2)(B) and the regulation at 8 CFR §214.2(1)(l)(ii)(D). However, a number of the explanatory components of Section V.B reference concepts that fall outside the scope of the statute and regulations. For example, there is no requirement in the statute or regulations that the beneficiary's employment abroad has "significantly enhanced the employer's productivity,

[27] *See* Puleo Memo, *supra* note 23 at 4.

competitiveness, image, or financial position," nor is there any requirement that "the beneficiary possesses knowledge that is particularly beneficial to the employer's competitiveness in the marketplace."[28] While the memorandum includes these factors as part of a "non-exhaustive list" of what officers may consider in adjudicating L-1B petitions, we are concerned that these concepts – which have no basis in the statute or regulations – will become *de facto* requirements in the adjudication of L-1B petitions.

Recommendations for Section V.B

By making a few limited but important changes to the memorandum, USCIS could better ensure that it achieves its stated goal of providing clarity to the definition of "specialized knowledge." Therefore, we recommend the following specific changes be made with respect to Section V.B.

Clarify the Definition of "Specialized Knowledge" in the Introduction

In an effort to promote consistency in adjudications, the definition of specialized knowledge included in the introduction to Section V.B should be amended to more closely match the regulatory and statutory criteria, as well as established past memoranda. Therefore, we recommend that the fifth sentence in the opening paragraph to Section V.B be amended to read:

> *With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is* ***different from that which is generally found in the particular industry, but not necessarily proprietary or unique in nature, or narrowly held within the employer's organization.***

Furthermore, the second paragraph in Section V.B should remind officers of the preponderance of the evidence standard, and incorporate the amended definitions of "special knowledge" and "advanced knowledge" described above. This could be accomplished with the following revision:

> *Determining whether knowledge is "special" or "advanced" inherently requires a comparison of the beneficiary's knowledge against* ***knowledge generally known in the relevant industry****. The petitioner bears the burden of establishing,* ***by a preponderance of the evidence****, such a favorable comparison. Because "special knowledge" concerns knowledge of the petitioning organization's* ***product, service, research, equipment, techniques , management or other interests*** *and its application in international markets, the petitioner may meet its burden through evidence* ***of the distinct or uncommon character of the beneficiary's knowledge*** *in comparison to* ***that generally found in the particular industry****. Alternatively, because "advanced knowledge" concerns knowledge of a company's processes and procedures, the petitioner may meet its burden through evidence that the beneficiary has knowledge or expertise that is* ***of a sophisticated nature, although not unique to the organization, which is not commonly found in the relevant industry.***

[28] Policy Memorandum at 8.

Clarify and Expand the "Non-Exhaustive" List of L-1B Factors

While we appreciate the examples as to how a petitioner may establish specialized knowledge, we are concerned that the list, while "non-exhaustive," will be used as a strict measuring tool as opposed to guidance for officers to analyze different fact patterns. In addition, we note that five of the six factors are drawn from the Puleo memorandum, though four include language which inappropriately heightens the standards articulated in Puleo. In order to ensure the integrity of the L-1 program and to ensure that Congress's intent – to meet the workforce needs of multinational employers operating globally – is carried out, we offer the following clarifications to the examples provided, as well as other examples that are readily found in today's marketplace:

- *The beneficiary is qualified to contribute to the U.S. operation's knowledge of foreign operating conditions as a result of knowledge* ***gained with the employer which is different from that*** *generally found in* ***the particular industry****.*

- *The beneficiary possesses knowledge that* ***is beneficial*** *to the employer's competitiveness in the marketplace.*

- *The beneficiary has been employed abroad in a capacity involving assignments that* ***have benefitted*** *the employer's productivity, competitiveness, image, or financial position.*

- *The beneficiary's claimed specialized knowledge normally can be gained only through prior experience with that employer.*

- *The beneficiary possesses knowledge of a product or process that cannot be easily transferred or taught to another individual* ***or the employer might incur significant economic cost or inconvenience due to a stoppage of work or need for training, work experience, or education****.*

- *The beneficiary has knowledge of a process or a product that either is sophisticated or* ***complex, although*** *not necessarily unique to the firm.*

- ***(NEW): The beneficiary has developed a professional relationship with the clients who are served by his or her specialized knowledge, and as such, is able to efficiently and without business interruption provide the products or services that are produced by the company****.*

- ***(NEW): The beneficiary has actually customized or developed the product or service in accordance with company standards, and that product or service is what will increase the employer's productivity, competitiveness, image, or financial position****.*

- ***(NEW): The beneficiary has accrued many years of experience with the particular product or service and its benefits to the employer (in terms of sales, client relationships, and increased business).***

Section V.B.1: Specialized Knowledge Cannot be Easily Imparted to Other Individuals

Section V.B.1 states that a factor for consideration is whether the specialized knowledge can be easily imparted to other individuals. While this is an appropriate consideration, USCIS should more clearly identify the factor itself and confirm to adjudicators that the petitioner is not *required* to establish significant economic cost or inconvenience. We suggest that the passage be changed to state:

> *One of the several factors that may be considered in determining whether knowledge is specialized is the amount and type of training, work experience, or education required to develop that knowledge. See 8 CFR §214.2(l)(3)(iv) (requiring petitioner to submit evidence of the beneficiary's "prior education, training, and employment"). Knowledge therefore, will not generally be considered specialized if it can be easily imparted from one person to another.* ***If the petitioner demonstrates through credible and relevant evidence that the knowledge possessed by the beneficiary would be difficult to impart to another individual without incurring significant economic cost or inconvenience to the petitioning organization, the knowledge will generally be considered specialized. However, a petitioner is not required to establish significant economic cost or inconvenience in order to establish that the beneficiary's knowledge is specialized.***

Section V.B.2: Specialized Knowledge Need Not be Proprietary or Unique to the Petitioning Organization

As with the preceding section, adjudicators should not feel compelled to analyze cases based on factors that are not required. We suggest the following edits to Section V.B.2 to better emphasize the fact that specialized knowledge need not be proprietary or unique:

> ***A petitioner is not required to demonstrate that it is the only company where the beneficiary could have acquired the knowledge, or that it is the only company that trades in the technologies, techniques, products, services, or processes that are the subject of the beneficiary's knowledge. Although specialized knowledge cannot be knowledge that is generally possessed or easily transferrable, it need not be proprietary or unique to the petitioning organization.*** *Although a petitioner may provide evidence that knowledge is proprietary or unique in support of its claim that the knowledge is also special or advanced, and thus specialized,* ***there is no such requirement for the L-1B classification.***

Section V.B.3: L-1B Classification Does Not Require Test of the U.S. Labor Market

Section V.B.3 correctly states that the L-1B classification does not require a test of the U.S. labor market. However, we object to any attempt of the agency to make a determination of an

organization's business needs in the course of adjudicating a nonimmigrant visa petition. The petitioner's explanation as to why the employee is needed should be sufficient to prove its need. The following language would better clarify that there is no consideration of a labor market test in L-1B adjudications:

> *As noted above, the petitioning organization must ordinarily demonstrate that the beneficiary's knowledge is not generally or commonly held in the relevant industry. Such a determination, however, does not involve a test of the U.S. labor market. A petitioner is not required to demonstrate the lack of readily available workers to perform the relevant duties in the United States. The relevant inquiry is not whether workers with the beneficiary's knowledge are available to the employer; rather, it is whether there are so many such workers that the knowledge is generally or commonly held in the relevant industry, and thus not specialized. If there are numerous workers in the United States who possess knowledge that is generally similar to the beneficiary's,* ***the petitioner may demonstrate that the beneficiary's particular knowledge relates to the petitioner's specific products or services.***

Section V.B.4: Specialized Knowledge Need Not be Narrowly Held within the Petitioning Organization

We concur with the statement that specialized knowledge need not be narrowly held within the petitioning organization. The memorandum correctly states that "[t]he mere existence of other employees with similar knowledge should not, in and of itself, be a ground for denial."[29] However, in the next paragraph, USCIS appears to be imposing a requirement that is not supported by the statute or the regulations. The memorandum states:

> *[I]n cases where there are already many employees in the U.S. organization with the same specialized knowledge as that of the beneficiary,* ***officers generally should carefully consider the organization's need to transfer the beneficiary to the United States****. The officer may consider, for example, the need for another individual with similar specialized knowledge in the organization's U.S. operations and the difficulty in transferring or teaching the relevant knowledge to an individual other than the beneficiary.* (emphasis added)

USCIS adjudicators should not be placed in a position to second-guess an employer's legitimate business decisions. This is contrary to the very purpose of the L-1B program, which, as noted, was created to reflect "Congress's concerns with meeting the workforce needs of multinational employers operating in an increasingly global marketplace."[30] By providing adjudicators with the authority to overrule an employer's business decision regarding an employee who otherwise meets the statutory and regulatory requirements for L-1B status, USCIS is hindering, not helping multinational employers who seek to grow their operations in the United States. This approach stifles business growth, discourages employers from expanding operations in the United States, and slows the creation of American jobs.

[29] Policy Memorandum at 10.
[30] *Id*. at 1.

Assuming for a moment that this approach is permissible, it is unclear how an adjudicator would make such a determination. For example, if a company with 30,000 U.S. employees has 300 L-1B workers (just 1% of its workforce), would this be considered "*many* employees in the U.S. organization with the same specialized knowledge?" How would the adjudicator know whether those L-1Bs in the United States have the same specialized knowledge or different specialized knowledge? Moreover, this approach seems inconsistent with the statement in the immediately preceding paragraph that "[s]ome companies may use technologies or techniques that are so advanced or complex that nearly all employees working on the relevant products or services possess specialized knowledge."[31] If nearly all employees working on the relevant products possess specialized knowledge, how or why should an officer evaluate the company's decision that there is a need for one more?

There is also no statutory or regulatory basis for the following statement in Section V.B.4: "[w]here many employees within the organization's U.S. operations share the beneficiary's knowledge, yet the beneficiary will be paid substantially less than those similarly situated employees, this may indicate that the beneficiary lacks the requisite specialized knowledge."[32] It also contradicts the statement in Section V.B.5 that "[i]n creating the L-1B classification, Congress focused on the beneficiary's 'knowledge,' not his or her position on a company's organizational chart or pay scale."[33]

We therefore urge USCIS to remove, in its entirety, the second paragraph of Section V.B.4 of the memorandum. Doing so will ensure internal consistency within the memorandum, and will ensure that adjudicators understand that there is no requirement that specialized knowledge be narrowly held within the petitioning organization, rather than encouraging them to second-guess an employer's legitimate business decisions.

Section V.D: Demonstrating Qualifying Employment

The first sentence of this paragraph states, "To be eligible for L-1B classification, the beneficiary must have been employed abroad by the petitioning organization … on a full-time basis for one continuous year within the three years *preceding the filing of the petition*" (emphasis added).[34] Though this language comes from 8 CFR §214.2(l)(3)(iii), it conflicts with INA §101(a)(15)(L), which states that a beneficiary is eligible for L-1B status if he has been employed by the petitioning organization within three years preceding the time of his "application for admission into the United States." This sentence also conflicts with footnote 2 in the memorandum which explains that IMMACT90 expanded eligibility for L-1 classification by, *inter alia*, "expanding the 'one-year' foreign employment requirement to include employment within three years *prior to admission*…." (emphasis added).

Under the terms of the statute, a beneficiary who has accrued at least one year of specialized knowledge may initially enter the United States to work in TN status (for example) with an

[31] *Id*. at 10.
[32] *Id*.
[33] *Id*.
[34] *Id*. at 12.

affiliated employer and after three years, change to L status. In this case, even though the beneficiary has not been employed by the entity abroad within the three years preceding the filing of the L-1B petition, he is still eligible for L-1 status.

Recommendations for Section V.D

Revise the first sentence of this paragraph to read:

> *To be eligible for L-1B classification, the beneficiary must have been employed abroad by the petitioning organization (or affiliate, subsidiary, parent, or branch of the petitioning organization) on a full-time basis for one continuous year within the three years preceding the* ***time of his application for admission into the United States****.*

Section VI: Offsite L-1B Employment (L-1 Visa Reform Act).

We appreciate USCIS's efforts to provide adjudicators further guidance on the proper application of the provisions of the L-1 Visa Reform Act of 2004. The memorandum concisely restates the relevant provisions of the Act and provides clear guidance on when those provisions are triggered. The memorandum also explains that there are situations where an L-1B may be legitimately stationed at a third-party worksite, while also providing standards for satisfying the offsite L-1B employment provisions. However, in the last paragraph of this section, the memorandum states:

> *To satisfy section 214(c)(2)(F)(ii) (which requires that the placement not "essentially be an arrangement to provide labor for hire," but instead be "in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary"), the petitioner must show that* ***the purpose*** *of the offsite placement is for the beneficiary to use specialized knowledge that is specific to the petitioning organization.* (Emphasis added).

While the parenthetical accurately quotes the statute, the requirement that the petitioner must show that "the purpose" of the offsite placement is for the beneficiary to use specialized knowledge that is specific to the petitioning organization appears to apply a higher standard than that which is required by the statute. By stating that "the purpose" of the offsite placement must be to use specialized knowledge that is specific to the petitioning organization, adjudicators may be led to deny petitions solely because they are not convinced that the use of the specialized knowledge is the primary purpose of the placement even though it is integral to the provision of the petitioner's product or service.

Recommendations for Section VI

Amend the first sentence of the last paragraph in this section to read:

To satisfy section 214(c)(2)(F)(ii), ***which requires that the placement not "essentially be an arrangement to provide labor for hire," the petitioner must establish that the beneficiary will use specialized knowledge that is specific to the petitioning organization while stationed at the third-party worksite****.*

Section VII: Readjudication of L-1B Status

We greatly appreciate the reminder to adjudicators that when adjudicating L-1B extensions, deference should be given to a prior determination by USCIS approving the L-1B classification. In addition to the 2004 Yates memorandum cited in footnote 16, we note that 8 CFR §214.2(l)(14)(i) states in relation to L extensions, "Except in those petitions involving new offices, supporting documentation is not required, unless requested by the director."

In addition, in order to further enhance consistency and predictability for employers seeking to extend the L-1B status of their specialized knowledge employees, the guidance should be amended to instruct adjudicators to also give deference to prior L-1B determinations made by the Department of State and Customs and Border Protection. Deference to DOS and CBP determinations is appropriate because they are authorized to make such determinations which involve the additional component an in-person interview. From an equitable standpoint, employees who have obtained L-1B status through the blanket L process or by application for admission at the Canadian border should not be unfairly prejudiced or treated differently by being subjected to readjudication when those who applied initially through USCIS are given deference.

Finally, with regard to the parenthetical included in footnote 16 ("a change in offsite employment, for example, may constitute a substantial change in circumstances or new material information requiring re-adjudication by USCIS to ensure compliance with the L-1 Visa Reform Act"), we understand that if the employment under the initial petition was onsite, and then changed to offsite employment at the time of the extension, readjudication may be required. However, we suggest that the phrases "substantial change" and "new material information" be deleted as we are concerned that the current phrasing could be interpreted to require an amended L-1B petition in the case of a change in worksite. Such a requirement would contravene the 1992 INS memorandum by then Executive Associate Commissioner for Operations, James J. Hogan.[35]

Recommendations for Section VII

- Amend the paragraph to read:

  In matters relating to an extension of L-1B status involving the same parties (i.e., the same petitioning organization and beneficiary employee) and the same underlying facts, USCIS officers should give deference to the prior determination by USCIS, ***the Department of State (in blanket L visa applications), or CBP (in L-1B applications for admission by Canadian nationals)*** *approving L-1B classification. In such cases, USCIS officers should reexamine a finding of L-1B eligibility only where it is determined that:*

[35] INS Central Office Mem. CO 214h-C, CO 2141-C (Oct. 22, 1992), reprinted in 69 Interpreter Releases 1448 (Nov. 9, 1992).

(1) there was a material error with regard to the previous approval for L-1B classification; (2) there has been a substantial change in circumstances since that approval; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility. ***In cases involving an extension of L-1B status initially granted by USCIS, except in those petitions involving new offices, supporting documentation is not required, unless requested by the director.***

- Add a citation to 8 CFR §§214.2(l)(14)(i) at the end of the last sentence.

- Amend the parenthetical in footnote 16 to read:

  a change in offsite employment, for example, ***may require readjudication by USCIS*** *to ensure compliance with the L-1 Visa Reform Act.*

Training of USCIS Adjudicators

While we applaud USCIS for the publication of this long-awaited memorandum, we think all parties can agree that the concepts described therein are complex. Therefore, when all is said and done, the key to improving consistency and ensuring that the intent of Congress is carried out in the adjudication of L-1B petitions is comprehensive training and supervision of USCIS adjudicators and monitoring of decisions. Importantly, the training materials should enable USCIS employees to apply the statutory requirements and evidentiary standards explained in the memorandum, and not just reiterate the contents of the memorandum. Toward this end, training must include detailed guidance on the preponderance of evidence standard, and the application of the principles that distinguish special and/or advanced knowledge from knowledge that is "general." Training must also incorporate real-world fact patterns and examples of cases as to what constitutes "specialized knowledge" across a broad spectrum of industries, as well as examples where the evidence submitted should be deemed to satisfy the preponderance standard. These examples should reflect the L-1B classification's broad statutory and regulatory definitions. Finally, adjudicators must be required to attend regular, continuing education sessions that are focused specifically on real world global business concepts and practices, which are ever-evolving.

Again, we thank USCIS for taking important steps to improve L-1B adjudications and the interpretation of specialized knowledge and for giving us the opportunity to comment on the L-1B Policy Memorandum.

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