U.S. Department of Homeland Security
Administrative Appeals Office
20 Massachusetts Avenue, NW, Room 3000
Washington, D.C.

BRIEF OF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

On certification to the Administrative Appeals Office
from a decision of the California Service Center

File No.: WAC-07-277-53214 (Motion to Reopen/Reconsider)
File No.: WAC-07-277-53214 (Form I-129)
Petitioner: GSTechnical Services, Inc.
Beneficiary

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector and geographical region of the country. The Chamber's members range from large Fortune 500 companies to small businesses, with 96% of the Chamber's membership encompassing businesses with fewer than 100 employees. A principal function of the Chamber is to represent the interests of its members by filing briefs in cases implicating issues of vital concern to the nation's business community.

Our member companies file significant numbers of L-1 petitions each year with U.S. Citizenship and Immigration Services ("USCIS"), in order to facilitate the international transfer of managerial, executive, and "specialized knowledge" personnel. If allowed to stand, the erroneous decision in this case will inappropriately limit the transfer of specialized personnel not only in the information technology industry, but for all multinational corporations among our membership needing to transfer specialized information technology professionals. Moreover, because it marks a generalized departure from long-established agency standards, USCIS's misapplication of the "specialized knowledge" standard in this case threatens the availability of the L-1B visa for specialized knowledge workers in any field. The L-1B visa has long served as a powerful engine driving the international competitiveness of U.S. employers, and as a powerful engine for employment-generating investment in the U.S. economy by foreign corporations. Accordingly, we are keenly interested in the outcome of this case and in helping to ensure that USCIS does not depart from its longstanding interpretation of the term "specialized knowledge." The Chamber appreciates the opportunity to present to the Administrative Appeals Office (AAO) its views on this important national issue.

STATEMENT OF THE ISSUE

We defer to the petitioner's brief for the facts and procedural history of the certified case. Our interest as amicus curiae relates to one critical issue raised by the decision of the California Service Center (CSC): whether the CSC erred in its interpretation of "specialized knowledge" as it is defined in section 214(c)(2)(B) of the Immigration and Nationality Act (8 U.S.C. § 1184(c)(2)(B)) and in agency regulations at 8 CFR 214.2(*l*)(1)(ii)(D).

STATEMENT OF THE ARGUMENT

We will argue that the CSC inappropriately based its decision only on cases decided under a prior version of the statute, departed from longstanding agency guidelines issued after the current version of the statute was passed, and erred in its restrictive new interpretation of the statutory and regulatory standard for determining "specialized knowledge."

A. The Current and Governing Standard for "Specialized Knowledge" is Outlined in IMMACT 90, and Subsequent Agency Memoranda.

As amicus curiae, we endorse and support the arguments on specialized knowledge made by the petitioner in its appeal. The CSC decision fails to assess the evidence of record against the appropriate legal standard. CSC's failure to follow the proper standard, as embodied in the statute, in agency regulations, and in agency guidelines interpreting the statute and regulations, is the central issue for the Chamber and, if accepted by the AAO, puts the interests of our membership at risk.

Congress enacted the current definition of "specialized knowledge" in the Immigration Act of 1990 ("IMMACT"). When it did so, Congress replaced the prior definition that had existed by agency regulation, and emphasized the need to avoid having a standard that was too narrow and rigid. Congress specifically noted that the "L 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."[1]

In July 1991, following IMMACT, USCIS's predecessor agency, the Immigration and Naturalization Service, issued a proposed rule that addressed the new statutory definition of "specialized knowledge." It stated, "The intent of Public Law 101-649 as it relates to the L classification was to broaden its utility for international companies. 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."[2]

The regulatory standard that resulted, and that governs today, is as follows:

> "special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures."[3]

INS and USCIS have issued a number of memoranda to further define the standard for L-1B petitions under current law.

The decisive agency guidance on adjudicating L-1B petitions under the current, more liberalized definition of "specialized knowledge" appears in a 1994 memorandum from the then-Acting Executive Associate Commissioner of the INS, entitled "Interpretation of

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[1] *See* P.L. 101-649, H.R.Rpt. 101-723(I) at 6749 (Sept. 19, 1990).
[2] *See* 56 Fed. Reg. 31553-01 (July 11, 1991).
[3] 8 CFR § 214.2(*l*)(1)(ii)(D).

Specialized Knowledge" (the "Puleo memo").[4] The resounding theme of that agency guidance is that knowledge must clearly be advanced and uncommon in order to qualify as "specialized," but that it cannot be interpreted so restrictively as to exceed the new and "lesser but still high" standard. Thus the guidance provides that specialized knowledge is "different from that generally found in the particular industry. The knowledge need not be proprietary or unique, but it must be different or uncommon." The guidance further elucidates that knowledge is "advanced" where it is "highly developed or complex; at a higher level than others," and "beyond the elementary or introductory; greatly developed beyond the initial stage." The statute does not require that the knowledge "*be narrowly held throughout the company, only that the knowledge be advanced.*"[5] (emphasis added).

The Puleo memorandum also lists possible characteristics of a worker with specialized knowledge, noting "[t]he common theme ... that the knowledge which the beneficiary possesses, whether it is knowledge of a process or a product, would be difficult to impart to another individual without significant economic inconvenience to the United States or foreign firm. The knowledge is not generally known and is of some complexity." Under the agency's list of possible characteristics, a USCIS adjudicator should assess whether the 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 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; or
- Possesses knowledge of a product or process which cannot be easily transferred or taught to another individual."[6]

The continuing validity of this guidance has been reaffirmed repeatedly by both the INS and USCIS,[7] most recently in 2006.[8]

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[4] Memorandum, James A. Puleo, Acting Exec. Assoc. Comm'r, INS Office of Operations (CO 214L-P), Mar. 9, 1994, posted at AILA InfoNet Doc. No. 03020548.

[5] *Id.*

[6] Memorandum, James A. Puleo, Acting Exec. Assoc. Comm'r, INS Office of Operations (CO 214L-P), Mar. 9, 1994, posted at AILA InfoNet Doc. No. 03020548.

[7] The first was issued on December 20, 2002 and was entitled, "Interpretation of Specialized Knowledge," Memorandum, Fujie O. Ohata, Assoc. Comm., "Interpretation of Specialized Knowledge" (Dec. 20, 2002),HQSCOPS 70/6.1, posted at AILA InfoNet Doc. No. 03020548. The second was issued on September 9, 2004 and was entitled," Interpretation of Specialized Knowledge for Chefs ad Specialty Cooks Seeking L-1B status," Memorandum, Fujie O. Ohata, Assoc. Comm.(Sept. 9, 2004), posted at AILA InfoNet Doc. No. 04091666.

[8] Letter, Robert Divine, Acting Director of USCIS, to Robert L. Ashbaugh, Assistant Inspector General, "Comments on OIG Draft Report: A Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program," January 10, 2006 (OIG06-22, January 2006, available at http://www.dhs.gov/xoig/assets/katovrsght/OIG_06-22_Jan06.pdf).

Despite having been in force for the last fourteen years, the factors set out in these definitive agency guidelines *were never evaluated in the L-1B denial now on appeal.* Instead, the agency relies on a series of administrative decisions, as well as one federal district court decision, that predate the change to the statute and the extensive agency guidance under the new statutory definition: Matter of Colley, 18 I. & N. Dec. 177 (Comm'r 1981); Matter of Penner, 18 I. & N. Dec. 49 (Comm'r 1982); Matter of Sandoz Crop Protection, 19 I. & N. Dec. 666 (Comm'r 1988); and 1756, Inc. v. Attorney General, 745 F. Supp. 9, 16 (D.D.C. 1990) (quoting the legislative history of the statute as it existed before it was amended in 1990).[9]

B. USCIS Failed to Analyze the Evidence of the Employee's Qualifications Against the Appropriate Standard.

The chief flaw in the decision issued by CSC with regard to specialized knowledge is that it failed to assess the evidence of record against the agency's own regulatory standard and against longstanding agency guidance. USCIS dismissed the evidence relating to the employee's specialized knowledge and concluded in the CSC's initial decision that "the petitioner is merely seeking admission of employees at any level of knowledge" and that the employees skill set is "common among IT consultants" employed by the IBM subsidiary abroad. USCIS failed to take account of the evidence that the beneficiary has an advanced combination of expertise involving two different proprietary IBM systems that are integral to IBM's provision of information technology systems solutions and that are unique to IBM.

The reasoning in this denial, and the pattern that it signals, pose a broad threat to the ability of U.S. employers to make appropriate use of this crucial visa category. The Chamber is concerned with this threat on several levels. Of particular concern initially is the impact of this erroneous denial on the information technology and information technology services industries. The decision suggests that expertise in customized and, in many cases, proprietary applications based on commonly-used software packages such as SAP,[10] can never form the basis of specialized knowledge. Customized applications of industry standard software, such as SAP, are a distinguishing feature of information technology service companies. These complex customizations in turn drive internally-designed implementation methodologies, intricate training modules and proprietary processes for different business sectors. These companies build entire operations on these exclusive customizations.

The USCIS decision misfocuses on the fact that SAP is widely used software. It is not simply knowledge of SAP itself that is specialized in this case; it is the *highly customized application of SAP and methodology based on SAP – particular to, meticulously developed by, and closely held within the company* – that is specialized. This is what distinguishes the company from others in the marketplace. It is what makes a customer choose the company over its

[9] California Service Center certified decision to the Administrative Appeals Office (WAC-07-277-53214), dated January 30, 2008, pp. 7, 8.

[10] SAP stands for "Systems, Applications and Products in Data Processing" and is a product of SAP AG, the largest European software enterprise.

competition. It is what distinguishes workers who have mastered the complex and customized application from others, both within and outside of the company.

Yet the CSC trivializes this, dismissing it in the initial decision as "just good business," and in the denial on reopening as "mere familiarity"[11] with IBM's product or service. Nowhere in either decision does the CSC address the evidence that it takes at least two years of additional training and experience for a regular SAP consultant to achieve proper expertise in the two IBM-trademarked, proprietary applications at issue here. Nowhere does the decision explain why the beneficiary, having attained that level of knowledge, does not possess an "advanced level of knowledge" of the company's processes and procedures, as both the statute and the regulation contemplate. Nowhere does the decision explain why the beneficiary's particular experience in these two complex IBM methodologies for IBM's overseas affiliate, on this very project and on similarly complex projects for other international clients, is not "a special knowledge of the company product and its application in international markets," as both the statute and the regulations contemplate.

This analytical gap extends not just to the actual language of the statute and regulations, but to the longstanding and definitive agency guidance as well. Nowhere does the decision address why the beneficiary's knowledge is not "valuable to the employer's competitiveness in the market place." Nowhere does it assess whether the beneficiary's considerable experience overseas demonstrates that he has "been utilized abroad in a capacity involving significant assignments which have enhanced the employer's competitiveness, image, or financial position." Nowhere does it explain why the two-year process for gaining expertise in IBM's two trademarked and proprietary methodologies does not demonstrate "knowledge of a product or process which cannot be easily transferred or taught to another individual," or knowledge that "normally can be gained only through prior experience with that employer." In addition, the decision focuses on the fact that twelve other L-1B employees will make up the project team on this particular project site.[12] This is in direct conflict with the specific admonition in the agency guidance that specialized knowledge need not be "narrowly held" within the company.

C. USCIS's Failure to Analyze the Employee's Qualifications Against the Appropriate Standard Threatens the Specialized Knowledge Category Not Only in the Information Technology Sector, but also in Contexts Far Beyond the Boundaries of This Case.

By departing from its own guidelines and from the language of the statute and regulations, USCIS has reached a result that improperly constricts the "specialized knowledge" classification. This improper analysis is a very serious threat to the proper use of the L-1B visa within the information technology and information technology services industries. It is

[11] *Id.*, p. 8.

[12] *Id.*, p.7.

not only possible, but quite common for numerous employees to work for a particular information technology or information technology services company, and for these employees each to have specialized knowledge based upon experience with and training in the particular company's products or services, its specific implementation methodologies, and its particular client and business sector expertise.

This erroneous interpretation of "specialized knowledge" has implications reaching far beyond the IT industry as well. The reasoning in this case, if adopted by the AAO, would adversely affect all organizations, including manufacturing and financial services companies, among others, that employ individuals in the information technology field, and that seek to transfer individuals to the US for specialized purposes. Consider the example of a major multinational manufacturing company seeking to localize its best practices developed abroad through an enterprise-wide SAP software conversion, with a view toward advancing overall technology, process improvement, and strategic initiatives. Under the standard adopted by CSC, an employee who has been integral in testing and troubleshooting the implementation of such initiatives abroad would not be determined to have specialized knowledge because the underlying software supporting these initiatives, SAP, is an off-the-shelf product, and because others in the company abroad may have this knowledge. Under the CSC's reasoning, the petition could be denied even if there were evidence of significant difficulty to impart this knowledge to others without significant economic inconvenience to the U.S. or foreign firm. It could be denied even though the knowledge is valuable to the employer's competitiveness in the market place and it has been utilized abroad in a capacity involving significant assignments that have enhanced the employer's productivity, competitiveness, image, or financial position. It could be denied even if the knowledge could not be easily transferred or taught to another individual. Yet these are all factors specifically outlined in the Puleo memo.

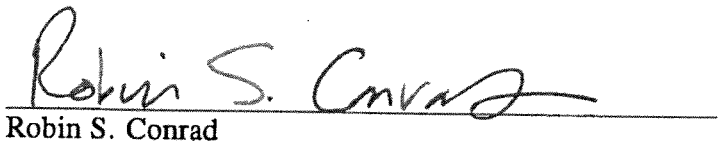
Moreover, the erroneous interpretation of the "specialized knowledge" standard, if not overturned, will almost certainly affect all "specialized knowledge" adjudications, not just those involving information technology employees. USCIS would deny, for example, the L-1B petition for a specialized financial reporting analyst coming to the U.S. to impart specific processes and methodologies used by the employer abroad to the U.S. qualifying entity, as the group seeks to streamline financial reporting policies and to consolidate reporting for all its subsidiaries around the world in the U.S. Under the reasoning in the CSC decision, USCIS could determine that business sector customizations and internally-developed standards cannot contribute to specialized knowledge, merely because financial reporting activities are based on industry standards. Yet this is clearly the sort of knowledge transfer that is in the interest of the U.S. economy, and should fall squarely within the statutory and regulatory standard. Nor are these sorts of problems limited to multinational conglomerates; they would be equally limiting to small companies with operations abroad.

CONCLUSION

The reasoning of the CSC decision certified to the AAO threatens to undercut severely the legislative objective of facilitating the international transfer of specialized personnel into the United States. If the CSC decision is allowed to stand, it would contradict the clear legislative

purpose in liberalizing the specialized knowledge standard; it would contradict the frequently-repeated agency guidance; and it would contradict literally thousands of decisions that the agency has correctly made in specialized knowledge cases. We urge the AAO to reject this reasoning; to reaffirm the longstanding agency guidance on interpreting specialized knowledge; to sustain the petitioner's appeal; and to remand this matter to the CSC with instructions to approve the petition.

Respectfully submitted,



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