

Guidance on L Visas and Specialized Knowledge

Reference Document: STATE 002016, 01/11

1. The following guidance is in response to a request [redacted] for specific guidelines for L visa adjudications, particularly in regard to evaluating claims of "specialized knowledge," and will be useful to all posts. There is a concern about the potential for inconsistent adjudicatory standards at different constituent posts and clear standards would allow for more consistent adjudication.

2. Unfortunately, the statutory language defining "specialized knowledge" is not simple or clear. Specialized knowledge is defined in INA 214(c)(2):

(B) For purposes of section 1101 (a)(15)(L) of this title, 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.

3. The phrase "specialized knowledge" is not otherwise defined in the law, and there have been few administrative or judicial opinions interpreting it. This statutory definition has been called tautological, in that it states an alien will serve in a capacity involving specialized knowledge if the alien has special knowledge. As the DHS/AAO noted, "the definition is less than clear, since it contains undefined, relativistic terms and elements of circular reasoning." A decision by a District Court in Washington, D.C. was even more critical: "Simply put, specialized knowledge is a relative and empty idea which cannot have a plain meaning."

4. Given the relative lack of statutory clarity or interpretative guidance, determinations as to specialized knowledge by necessity will often depend on the consular officer's expertise in the context of the specific case's circumstances. Again, this has been noted by the AAO: "By deleting this element in the ultimate statutory definition and further emphasizing the relativistic aspects of "special knowledge," Congress created a standard that requires USCIS to make a factual determination that can only be determined on a case-by-case basis, based on the agency's expertise and discretion. Rather than a bright-line standard that would support a more rigid application of the law, Congress gave legacy INS a more flexible standard that requires adjudication based on the facts and circumstances of each individual case.

5. Despite the lack of simple, bright-line, legal criteria, there are factors which have been cited by INS/DHS sources as valid for making specialized knowledge determinations. Post can use the following criteria to assist in making this adjudication:

6. The proprietary nature of the knowledge - While it is not strictly required that specialized knowledge involve knowledge of procedures or techniques proprietary to the petitioning company, the possession of significant proprietary knowledge can in itself meet the specialized knowledge requirement. This is expressly stated in INA 214(c)(2), which makes reference to "special knowledge of the company product and its application in international markets" or "advanced level of knowledge of processes and procedures of the company." Legacy INS has in the past indicated that proprietary knowledge will meet

the L requirement when it "would be difficult to impart to another without significant economic inconvenience." This knowledge can be acquired through on-the-job training.

7. If everyone is specialized, then no one is – The legislative history indicates that the specialized knowledge requirement was intended for "key" personnel. While it could be true in a small company that all experienced employees are "key," for a larger company there should be a distinction between "key" and normal personnel. This could be made based on length of experience, level of knowledge, or level of responsibility - e.g., the person has been made responsible for more complicated and/or sensitive projects. If a company is claiming that all the employees working on technical issues should be considered to have specialized knowledge, the company is probably employing too low a standard. On the other hand, there is no legal basis to require any specific limit on the number of employees that can be considered key. As indicated, for a small company, all employees with responsible positions may be key. A large company can have a large number of key employees who would meet the specialized knowledge criteria, but there should be a distinction between those employees and ordinary skilled workers.

8. The concept of "more than ordinary" - The use in the INA of the terms "special" and "advanced" implies that the employee has more skills or knowledge than the ordinary employee. This does not require an "extraordinary" level of skills, merely more than that of the ordinary employee in the company or the field. This could involve knowledge of special company projects or greater than normal experience and/or knowledge of software techniques.

9. [Redacted]

10. Job shops - In addition to specialized knowledge criteria, the issue of job shops is important to the determination of ineligibility and is of apparent concern to Post.

11. Employer/employee relationship - L is a status for persons being transferred to work within a company structure and not for another company, and the issue of employer/employee relations has always been critical to the L adjudication. The INA flags the importance of this issue in INA 214(c)(2):

(F) An alien who will serve in a capacity involving specialized knowledge with respect to an employer for purposes of section 1101 (a)(15)(L) of this title and will be stationed primarily at the worksite of an employer other than the petitioning employer or its affiliate, subsidiary, or parent shall not be eligible for classification under section 1101 (a)(15)(L) of this title if-

(i) the alien will be controlled and supervised principally by such unaffiliated employer; or

(ii) the placement of the alien at the worksite of the unaffiliated employer is essentially an arrangement to provide labor for hire for the unaffiliated employer, rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary.

12. The INA restrictions on job shops reflect general legal definitions of the employer/employee relationship. Standards on making employer/employee determinations can also be found in the L FAM notes:

9 FAM 41.54 N8 EMPLOYER-EMPLOYEE RELATIONSHIP (CT:VISA-1569; 10-04-2010)

The essential element in determining the existence of an "employer-employee" relationship is the right of control; that is, the right of the employer to order and control the employee in the performance of his or her work. Possession of the authority to engage or the authority to discharge is very strong evidence of the existence of an employer-employee relationship.

9 FAM 41.54 N8.1 Source of Remuneration and Benefits Not Controlling (CT:VISA-1569; 10-04-2010)

The source of the beneficiary's salary and benefits while in the United States (i.e., whether the beneficiary will be paid by the U.S. or foreign affiliate of the petitioning company) is not controlling in determining eligibility for L status. In addition, the employer-employee relationship encompasses a situation in which the beneficiary will not be paid directly by the petitioner, and such a beneficiary is not precluded from establishing eligibility for L classification.

9 FAM 41.54 N8.2 Employment in the United States Directly by Foreign Company Not Qualifying (CT:VISA-1569; 10-04-2010)

A beneficiary who will be employed in the United States directly by a foreign company and who will not be controlled in any way by (and thus, in fact, not have any employment relationship to) the foreign company's office in the United States does not qualify as an intra-company transferee.

13. The issue of control by the sending employer is critical. When the employment is off-site, there can be two ways of determining control, both indicated in the INA definition. The employee can be directly controlled by a supervisor from the sending company. The employee may also work off-site without direct supervision at that site, but in "connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary." This could mean, for example, that the employee would be working for an off-site, unaffiliated company that has no IT department, and therefore the employee would be using specialized knowledge that only the petitioning company can oversee or evaluate. It could also mean the employee is working on a proprietary project involving knowledge and skills specific to the petitioning employer and not possessed by the unaffiliated company. On the other hand, an off-site employee working in the IT section of an unaffiliated company who is not under the direct supervision of the petitioner or working on a proprietary project involving knowledge and skills specific to the petitioner would probably not qualify for L status based on job shop concerns.