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Cover Page Footnote

J.D., The Catholic University of America, Columbus School of Law, 2017; B.A., The University of Vermont, 2009. The author would like to thank Professor Lisa Martin for her guidance and expertise throughout the writing of this Comment. The author is also incredibly grateful to the staff of the Catholic University Law Review for their assistance in publishing this Comment. Finally, the author sends her sincere gratitude to her friends and family for their support.

IT'S TIME TO OPEN UP THE L-1B: HOW THE EMERGENCE OF OPEN SOURCE TECHNOLOGY WILL IMPACT THE L-1B VISA PROGRAM

Elizabeth K. Ottman⁺

Many U.S. citizens are wary of foreigners coming to the United States to work on nonimmigrant visas.¹ Generally, they worry that foreign workers will displace American workers by accepting lower wages.² Much of the anger surrounding this controversy is directed at employers who assume there are no qualified U.S. citizens capable of performing highly skilled information technology (IT) jobs³ and bring foreign workers to the United States to perform the roles instead.⁴ However, few Americans are aware (and would likely be quite happy to learn) that employers face many difficulties when seeking to bring foreign workers to the United States.⁵

In recent years, one nonimmigrant visa in particular has proven practically impossible to get approved: the L-1B.⁶ The L-1 visa program allows multinational companies to transfer both managerial and executive employees, as well as employees who hold “specialized knowledge” to work in the United States.⁷ The term specialized knowledge is defined as:

⁺ J.D., The Catholic University of America, Columbus School of Law, 2017; B.A., The University of Vermont, 2009. The author would like to thank Professor Lisa Martin for her guidance and expertise throughout the writing of this Comment. The author is also incredibly grateful to the staff of the *Catholic University Law Review* for their assistance in publishing this Comment. Finally, the author sends her sincere gratitude to her friends and family for their support.

1. See Ryan Lovelace, *IT Worker Replaced by Foreign National Regrets Voting for Obama*, NAT'L REVIEW (Mar. 17, 2015), <http://www.nationalreview.com/node/415535/print>; see also *Immigrant Visas vs. Nonimmigrant Visas*, U.S. CUSTOMS & BORDER PROT., https://help.cbp.gov/app/answers/detail/a_id/72/~/~immigrant-visas-vs.-nonimmigrant-visas (last updated Aug. 29, 2016) (“A nonimmigrant visa is the visa issued to persons with a permanent residence outside the U.S. but who wishes to be in the U.S. on a temporary basis[,] i.e. Tourism, medical treatment, business, temporary work, or study.”).

2. Josh Harkinson, *How H-1B Visas Are Screwing Tech Workers*, MOTHER JONES (Feb. 22, 2013, 6:01 AM), <http://www.motherjones.com/print/216806>.

3. See, e.g., Tony Lee, *Study Finds No Shortage of High-Tech Workers in U.S.*, BREITBART (May 20, 2014), <http://www.breitbart.com/big-government/2014/05/20/report-u-s-has-surplus-not-shortage-of-high-tech-workers/>.

4. Harkinson, *supra* note 2.

5. Eileen M.G. Scofield, *Immigration Voices: What the “L” Is Going on with USCIS?*, NATION OF IMMIGRATORS (Feb. 4, 2014), <http://www.nationofimmigrants.com/employment-based-immigration/immigration-voices-what-the-l-is-going-on-with-uscis/>.

6. See *id.*

7. Austin T. Fragomen, Jr. & Nancy H. Morowitz, *Fragomen on Immigration: Toward a Workable Standard of L-1B Specialized Knowledge*, FRAGOMEN (May 15, 2015), <http://www.fra>

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.⁸

It has become increasingly difficult to get non-executive/managerial workers approved for intra-company transfer because of the way U.S. Citizenship and Immigration Services (USCIS)⁹ narrowly interprets the above definition of specialized knowledge for petitioners in the IT industry.¹⁰ Although USCIS has issued memoranda indicating knowledge "need not be proprietary [or] unique," in practice, knowledge of proprietary software is the most effective way to prove an employee in the IT industry has specialized knowledge.¹¹ For instance, a company would argue employee X needs to transfer to the United States to work on the company's proprietary software because employee X developed a specific component of the proprietary software offshore. Employee X is, therefore, the only employee who has the knowledge and expertise needed to execute the position in the United States. Moreover, the company would argue that no other workers in the industry have the requisite knowledge and experience to perform this role because the software is proprietary to the company.

gomen.com/knowledge-center/articles/fragomen-immigration-toward-workable-l-1b-specialized-knowledge.

8. Aliens and Nationality, 8 C.F.R. § 214.2(l)(1)(ii)(D) (2016).

9. Since 1891, the agencies in charge of immigration have changed dramatically. See *Organizational Timeline*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/history-and-genealogy/our-history/organizational-timeline> (last visited Feb. 3, 2017). In 1891, the office was placed in the Treasury Department and remained there until 1903 when it moved to the Department of Commerce and Labor. In 1913, the functions were divided into a Bureau of Immigration and a Bureau of Naturalization, and both bureaus were moved to the Department of Labor. In 1933, the government reunited the two bureaus back into one agency and called it the Immigration and Naturalization Service (INS). *Id.* In 1940, INS was moved yet again under the Department of Justice. Finally, in what is now the current system, INS was abolished in 2003 and all of the immigration functions were transferred to three agencies: USCIS, Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). All three agencies are housed under the Department of Homeland Security. *Id.*

10. See Scofield, *supra* note 5; see also Paul L. Samartin, *The Empire Strikes Back: A Discussion on the Evolving and Narrowing Standard of the L-1B Specialized Knowledge Classification*, in 11TH ANNUAL AILA NEW YORK CHAPTER IMMIGRATION LAW SYMPOSIUM HANDBOOK 69 (2008) ("One area in particular that feels like the tightening Darth Vader death grip is USCIS's narrowing interpretation of 'specialized knowledge' in the adjudication of L-1B petitions.").

11. U.S. CITIZENSHIP & IMMIGRATION SERVS., PM-602-0111, L-1B ADJUDICATIONS POLICY 4 (2015), <http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Memorandum%20for%20Comment/2015-0324-Draft-L-1B-Memo.pdf> [hereinafter 2015 USCIS MEMO].

In the last few years, there has been a large shift away from the creation of proprietary products and software and toward open source technologies and platforms within the IT industry.¹²

Generically, *open source* refers to a program in which the source code is available to the general public for use and/or modification from its original design free of charge, i.e., open. Open source code is typically created as a collaborative effort in which programmers improve upon the code and share the changes within the community. Open source sprouted in the technological community as a response to proprietary software owned by corporations.¹³

By definition, open source is the opposite of proprietary software.¹⁴ Any developer with access to the code can use the code to build his or her own product.¹⁵ In fact, collaboration is one of open source software's most attractive characteristics.¹⁶

This Comment explores how the shift from proprietary technology to open source technology within the IT industry will affect the L-1B visa program. It begins by discussing the history of the L-1B visa program, including a detailed review of the evolution of the definition of specialized knowledge.¹⁷ Next, this Comment discusses how the definition of specialized knowledge disparately impacts the IT industry.¹⁸ Further, this Comment explores the shift within the IT industry towards open source technologies, paying particular attention to the benefits open source platforms offer companies.¹⁹ In light of the unique difficulties the IT industry has encountered applying for L-1Bs, this Comment analyzes how the shift to open source will make it even more difficult for multinational IT companies to obtain L-1B approvals, which will deter multinational companies from opening offices in the United States and inhibit our ability to compete in an increasingly global marketplace.²⁰ Finally, this Comment recommends that USCIS must either: (1) adopt a new way of analyzing IT worker applications under the specialized knowledge standard; or (2) create a new visa category specifically designed to deal with the intricacies of the IT industry.²¹

12. Neha Alawadhi, *India Doubles Down on Use of Open Source Software*, ETCIO.COM (Mar. 30, 2015, 8:34 AM), <http://cio.economicstimes.indiatimes.com/news/corporate-news/india-doubles-down-on-use-of-open-software/46740745>.

13. Vangie Beal, *Open Source*, WEBOPEDIA, http://www.webopedia.com/TERM/O/open_source.html (last visited Feb. 3, 2017).

14. *Id.*

15. Stephen M. Maurer, *The Penguin and the Cartel: Rethinking Antitrust and Innovation Policy for the Age of Commercial Open Source*, 2012 UTAH L. REV. 269, 273 (2012).

16. *See id.*

17. *See infra* Part I.

18. *See infra* Sections II.A–B.

19. *See infra* Sections II.C., III.A.

20. *See infra* Section III.B.

21. *See infra* Part IV.

I. THE EVOLUTION OF THE L-1 VISA PROGRAM AND “SPECIALIZED KNOWLEDGE”

A. *The Origin of the L-1B Visa Category*

Immigration is a complex, and often confusing, area of the law.²² Although immigrants have entered the United States since it became a sovereign nation, the Immigration and Nationality Act (“INA” or “the Act”) was not enacted until 1952.²³

The INA “is the foundation of U.S. immigration law, establishing government authority over foreign nationals’ entry into, residence in, and departure from the [United States] and setting forth the classes of individuals who are subject to immigration control.”²⁴ One of those classes, the L-1, was not introduced until Congress amended the INA in 1970.²⁵

The L-1 visa program was created after Congress “conclude[ed] that immigration laws . . . unduly restricted the transfer and development of foreign personnel vital to the interests of U.S. businesses.”²⁶ Congress’s intent in creating the category was to expand international companies’ ability to transfer their workers to the United States for a temporary period of time.²⁷ This would, in turn, help entice international companies to open offices in the United States, stimulating the U.S. economy.²⁸

Title 8, section 1101(a)(15)(L) of the U.S. Code sets out the requirements for an L-1 intra-company transferee.²⁹ In order to qualify for L-1 visa status, the applicant must: (1) have been “employed [with the transferring entity]

22. 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 2.01 (Matthew Bender rev. ed. 2015).

23. *See id.*; *see also* FRAGOMEN GLOBAL, GLOBAL BUSINESS IMMIGRATION HANDBOOK § 20:2, Westlaw (database updated May 2017).

24. FRAGOMEN GLOBAL, *supra* note 23, § 20:2.

25. H.R. REP. NO. 91-851, at 3 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2751.

26. *See* 2015 USCIS MEMO, *supra* note 11, at 2. As legislators noted:

The testimony of witnesses clearly establishes that existing law restricts and inhibits the ability of international companies to bring into the United States foreign nationals with management, professional, and specialist skills and thereby enable American business to maintain and improve the management effectiveness of international companies to expand U.S. exports and to be competitive in overseas markets.

H.R. REP. NO. 91-851, at 3 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2751.

27. *See* 2015 USCIS MEMO, *supra* note 11, at 2–3.

Congress’s intent in developing the L classification was to provide a nonimmigrant vehicle for U.S. companies to transfer “key personnel” to the United States on temporary assignments from affiliated companies abroad. By creating an intracompany transferee category, Congress concluded that the L classification would provide a solution to and eliminate problems faced by certain companies, which at the time included long immigrant visa wait times and a growing number of immigrant visa cap spaces.

Samartin, *supra* note 10, at 69 (footnotes omitted).

28. H.R. REP. NO. 91-851, at 5–6 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2754.

29. 8 U.S.C. § 1101(a)(15)(L) (2012).

continuously for one year” within the three years preceding that alien’s application for admission; (2) “seeks to enter the United States temporarily in order to continue to render his [or her] services to the same employer or a subsidiary or affiliate thereof”; and (3) work “in a capacity that is managerial, executive, or involves specialized knowledge.”³⁰

The legislative history notes, “[t]he class of persons eligible for such nonimmigrant visas [should be] narrowly drawn and . . . carefully regulated and monitored by the Immigration and Naturalization Service.”³¹ In other words, these nonimmigrant workers were intended to be the *crème de la crème* of their organizations.³² Unfortunately, the 1970 amendments to the Act failed to provide the Immigration and Naturalization Service (INS)³³ with clear criteria to identify these workers, particularly those with “specialized knowledge.”³⁴

1. The L-1 Application Process

A company (or petitioner) seeking to transfer an employee to the United States must first submit a visa petition to USCIS on behalf of its employee (or the beneficiary).³⁵ Within that petition, the employer must explain how and why the employee meets the standard for the visa.³⁶ If approved, USCIS forwards notice to the foreign consulate, and the employee can then apply for the physical visa.³⁷ The physical visa in the passport allows a foreign national to travel to the United States.³⁸ Sometimes, USCIS will find an application wanting of information and will request additional information from the company.³⁹ If the company is able

30. *Id.*; AUSTIN T. FRAGOMEN, JR., ET AL., *IMMIGRATION LAW & BUSINESS* § 5:1 (2d ed., 2016).

31. H.R. REP. NO. 91-851, at 6 (1970), as reprinted in 1970 U.S.C.C.A.N. 2750, 2754.

32. *Id.*

33. See GORDON ET AL., *supra* note 22, § 3-01 (providing an overview of the history of immigration agencies from the INA to USCIS).

34. See 2015 USCIS MEMO, *supra* note 11, at 3; see also Samartin, *supra* note 10, at 69 (“Concerned more with creating an intracompany category than actually defining elements of the classification, Congress neglected to expressly define the term ‘specialized knowledge’ when drafting and debating the Act. Indeed, . . . the term ‘specialized knowledge’ is sparsely used[.]”).

35. See RICHARD A. BOSWELL, *ESSENTIALS OF IMMIGRATION LAW* 112 (4th ed. 2016).

36. See *supra* notes 29–30 and accompanying text for details on eligibility criteria.

37. See BOSWELL, *supra* note 35, at 112. Employers can also seek to bring employees over on the L-1 by filing a blanket petition. See *L-1A Intracompany Transferee Executive or Manager*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager> (last updated June 17, 2013). The L-1 Blanket program allows companies to circumvent the normal application process by establishing the required intracompany relationship prior to filing an application. *Id.* Once a company has a Blanket Approval, employees can go straight to the consulate to apply for the L-1. *Id.* This Comment only focuses on the L-1 applications adjudicated through USCIS and not on the L-1 Blanket program writ large.

38. See *What is a Visa?*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/visas/en/general/frequently-asked-questions/what-is-a-u-s-visa.html> (last visited Feb. 3, 2017).

39. See *infra* Section I.B.5.

to sufficiently respond to USCIS's questions, the petition can still be approved; however, if the petition is denied, the employee cannot travel to the United States.⁴⁰

B. Developing Definitions of Specialized Knowledge

1. Early Explanations

Because Congress did not provide a clear definition of "specialized knowledge" in the 1970 amendments of the Act, the definition was shaped over time through "agency regulations and precedent decisions, which generally imposed new and increasingly restrictive requirements" on visa applicants.⁴¹ During this time, the concept that specialized knowledge required *proprietary* knowledge was born.⁴² The only guidance Congress gave adjudicators concerning the L-1 was its desire to promote international business in the United States and that the pool for possible applicants be "narrowly drawn."⁴³ With no further direction, the immigration adjudicating agencies created a definition of what specialized knowledge meant in order to grant status to L-1 visa applicants. By requiring applicants to possess *proprietary* knowledge, adjudicators created clear and definitive criteria to narrow the seemingly broad category of "specialized knowledge" and distinguish candidates for the L-1B visa.⁴⁴

2. Issues with "Proprietary" Specialized Knowledge

Between 1970 and 1990, the agencies continued to adjudicate cases using the proprietary standard when approving L-1B petitions.⁴⁵ It took twenty years, but

40. *See id.*

41. *See* 2015 USCIS MEMO, *supra* note 11, at 3.

42. *Id.*

The immediately prior definition [of "specialized knowledge"] contained in the legacy INS regulations specified an "advanced level of expertise and proprietary knowledge . . . [that] are not readily available in the United States labor market," the proprietary knowledge to be of "the organization's product, service, research, equipment, techniques, management, or other interests of the employer . . ."; it is not enough to have "general knowledge or expertise which enables [persons] merely to produce a product or provide a service."

GORDON ET AL., *supra* note 22, § 24.05 (quoting 8 C.F.R. § 214.2(l)(1)(ii)(D) (1991)).

43. H.R. REP. NO. 91-851, at 6 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 2750, 2754.

44. *See generally* Frank A. Novak, *The Life and Times of the L-1B*, IMMIGR. BRIEFINGS (Thomson West, Rochester, N.Y.), Nov. 2008, at 1, 5–6.

45. *See* *Fogo de Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1130 (D.C. Cir. 2014) ("By 1987, the formal regulatory definition of 'specialized knowledge' was '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.'" (quoting 8 C.F.R. § 214.2(l)(1)(ii)(D) (1988))); *see also* *Matter of Colley*, 18 I. & N. Dec. 117, 119–20 (B.I.A. 1981) ("[I]t cannot be concluded that all employees with specialized knowledge or performing highly technical duties are eligible for classification as intracompany transferees."); *see*

Congress finally defined the term specialized knowledge in the 1990 amendments to the INA.⁴⁶ In the Immigration Act of 1990 (IMMACT), Congress determined that an alien has specialized knowledge within the context of his employment “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.*”⁴⁷

Interestingly, this definition did not include any mention of the proprietary standard previously utilized by immigration agencies. Congress omitted this requirement and added the “advanced knowledge” component to the definition to “allow professional services firms—including accounting and consulting organizations—to participate in [the L-1B program].”⁴⁸ Congress anticipated emerging marketplaces, particularly in the information technology industry, and modified the definition to make room for the growing need for foreign workers.⁴⁹ In order for the United States to remain competitive in an international marketplace, companies needed options that would allow them to expand their business and bring their workers to the United States.⁵⁰

3. *Post-IMMACT Agency Guidance on Specialized Knowledge*

Since 1990, USCIS, the federal agency that reviews and adjudicates immigration benefits and visas,⁵¹ issued three important policy memoranda to

also Matter of Penner, 18 I. & N. Dec. 49, 53 (B.I.A. 1982) (narrowing the definition of “specialized knowledge” by finding that workers on an oil rig were “highly technical” but still “not unique in the industry”).

46. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

47. Immigration Act of 1990, sec. 206(b), § 24(c), 104 Stat. 4978, 5023 (1990) (emphasis added); *see also* 8 C.F.R. § 214.2(l)(1)(ii)(D) (2016) (“*Specialized knowledge* means special knowledge possessed by an individual of the petitioning organization’s product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization’s processes and procedures.”).

48. Memorandum from Austin T. Fragomen, Jr., Fragomen, Del Rey, Bernsen & Loewy, LLP, to the Office of Pub. Engagement, U.S. Citizenship & Immigration Servs. 2 (May 7, 2015), https://www.fragomen.com/sites/default/files/Comments_USCIS_L1B_Adjudications_Policy_2015.pdf [hereinafter Fragomen Memo].

49. *See id.* (“Congress intentionally enlarged the definition of L-1B specialized knowledge to include ‘advanced knowledge of the processes and procedures of the company.’ This definition facilitated the entry of professional services specialists”); *see also* Nursing Relief for Disadvantaged Areas Act of 1999, Pub. L. No. 106-95, 113 Stat 1312 (1999) (amending § 206(a) of the Immigration Act of 1990 (8 U.S.C. § 1101) to specifically include information technology consulting firms).

50. *See* Samartin, *supra* note 10, 71–72 (“[IMMACT] broadened the L visa category to ‘accommodate changes in the international arena’ and revised the definition of ‘specialized knowledge’ by eliminating the need for specialized knowledge to be ‘proprietary’ or not readily available in the U.S. job market.” (footnotes omitted)).

51. Since 2002, the majority of immigration functions are under the control of the U.S. Department of Homeland Security. *See* BOSWELL, *supra* note 35, at 11 (“DHS includes U.S. Citizenship and Immigration Services (USCIS), U.S. Customs and Border Protection (CBP), and U.S. Immigration and Customs Enforcement (ICE).”) This paper will primarily be looking at the

its adjudicating officers to assist them in determining who qualifies as having specialized knowledge: the Puleo Memorandum,⁵² the Ohata Memorandum,⁵³ and the 2015 L-1B Adjudications Policy Memorandum.⁵⁴

In 1994, James A. Puleo, the Acting Executive Associate Commissioner of INS, penned a memorandum titled “Interpretation of Special Knowledge,” which sought to “provide field offices with guidance on the proper interpretation of the new statutory definition [of specialized knowledge from the 1990 IMMACT].”⁵⁵ Puleo recommended that field offices utilize the dictionary definitions of “special” and “advanced” to adjudicate L-1B petitions.⁵⁶ Further, the memorandum concluded it was not enough for an employer to simply demonstrate how the applicant’s knowledge is different from others. Instead, the employer must show that “the alien’s knowledge is uncommon, noteworthy, or distinguished by some unusual quality and not generally known by practitioners in the alien’s field of endeavor.”⁵⁷

Eight years later, in 2002, Fujie O. Ohata, Associate Commissioner of Service Center Operations for INS, issued another memorandum on the topic of specialized knowledge titled “Interpretation of Specialized Knowledge.”⁵⁸ Ohata first reiterated that the guidance provided in the 1994 Puleo Memorandum was still accurate and should be followed when adjudicating L-1B petitions.⁵⁹ Ohata then provided limited additional guidance on the factors to consider when determining whether specialized knowledge exists.⁶⁰ Ohata noted, “[w]here the alien has specialized knowledge of the company product, the knowledge must

adjudicating power of USCIS, which “is responsible for adjudicating immigration benefits such as change and extension of visas; granting green cards; naturalization; and asylee and refugee matters.” *Id.*

52. James A. Puleo, Immigration & Naturalization Serv., CO 214L-P, Memorandum on Interpretation of Special Knowledge (Mar. 9, 1994) [hereinafter Puleo Memo].

53. Fujie O. Ohata, Immigration & Naturalization Serv., HQSCOPS 70/6.1, Memorandum on Interpretation of Specialized Knowledge (Dec. 20, 2002) [hereinafter Ohata Memo].

54. 2015 USCIS MEMO, *supra* note 11.

55. *See* Puleo Memo, *supra* note 52, at 1.

56. *See id.* As Mr. Puleo explained:

Webster’s II New Riverside University Dictionary defines the term “special” as “surpassing the usual; distinct among others of a kind.” Also, *Webster’s Third New International Dictionary* defines the term “special” as “distinguished by some unusual quality; uncommon; noteworthy.”

....

Further, *Webster’s II New Riverside University Dictionary* defines the term “advanced” as “highly developed or complex; at a higher level than others.” Also, *Webster’s Third New International Dictionary* defines the term “advanced” as “beyond the elementary or introductory; greatly developed beyond the initial stage.”

Id. at 1–2.

57. *See id.* at 4.

58. *See* Ohata Memo, *supra* note 53, at 1.

59. *See id.*

60. *See generally id.*

be noteworthy or uncommon. Where the alien has knowledge of company processes and procedures, the knowledge must be advanced. Note, the advanced knowledge need not be narrowly held throughout the company.”⁶¹ The Ohata Memorandum further emphasized that “[t]he knowledge need not be proprietary or unique.”⁶²

Needless to say, this guidance invited confusion. Although the knowledge need not be unique, it must be uncommon and noteworthy.⁶³ A simple search of “unique” in a thesaurus lists both “uncommon” and “noteworthy” as synonyms or related words.⁶⁴ Yet, this is where the adjudicating government agencies are drawing a distinction when deciding who comes in and who stays out.⁶⁵ Understandably, after this guidance was issued, immigration attorneys and employers alike struggled to find the right set of facts to establish the confusing standard.⁶⁶

4. The Rise of the Request for Evidence and Denials

Despite the confusing and paradoxical guidance on specialized knowledge issued by USCIS, many L-1B petitions were being approved.⁶⁷ Up until Fiscal Year (FY) 2007, the denial rate for L-1B petitions was only seven percent of all cases.⁶⁸ By 2012, merely five years later, the denial rate rose to thirty percent.⁶⁹ Moreover, the denials disparately impacted applicants from India.⁷⁰

One of the reasons immigration adjudicating agencies became more critical of L-1B petitions was due to a study by the Department of Homeland Security (DHS), which found employers were overusing and abusing the L-1B visa

61. *Id.* at 1.

62. *Id.*

63. *See id.*

64. *See Unique*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/thesaurus/unique> (last visited Feb. 1, 2017).

65. *See, e.g.*, 1756, Inc. v. Att’y Gen. of the U.S., 745 F. Supp. 9, 16–17 (D.D.C. 1990) (“The phrase ‘specialized knowledge’ is meaningless by itself, undefined by statute, unclear from the context and barely mentioned in the legislative history.”).

66. *See generally* Denise C. Hammond, *L-1B Specialized Knowledge: Lessons Learned in Making the Case*, in IMMIGRATION & NATIONALITY LAW HANDBOOK 134 (AILA 2007–08 ed. 2007) (making suggestions to practitioners on ways to improve chances of approval in L-1B petitions, such as being specific in explaining the company’s technologies and beneficiary’s specific knowledge-base, providing company literature to show on the technologies are different from those in the industry, and explaining how the company’s technology is competitive in the international market).

67. *See generally* NAT’L FOUND. FOR AM. POLICY, L-1 DENIAL RATES INCREASE AGAIN FOR HIGH SKILL FOREIGN NATIONALS (Mar. 2015), <http://nfap.com/wp-content/uploads/2015/03/NFAP-Policy-Brief.L-1-Denial-Rates-Increase-Again.March-20151.pdf> [hereinafter NFAP REPORT].

68. *See id.* at 2.

69. *Id.* at 4.

70. *See id.* at 3 (“Between FY 2012 and FY 2014, employers experienced an L-1B denial rate of [fifty-six] percent for employees transferred from India . . . compared to an average denial rate of [thirteen] percent for employees from all countries in the world other than India.”).

program.⁷¹ DHS noted that “the [L-1B] program allows for the transfer of workers with ‘specialized knowledge,’ but the term is so broadly defined that adjudicators believe they have little choice but to approve almost all petitions.”⁷² This study was conducted and published in 2006.⁷³ By 2008, the rate of denials skyrocketed from six percent to twenty-two percent.⁷⁴

In addition to denials, USCIS also increasingly issued Requests for Evidence (RFEs).⁷⁵ USCIS uses RFEs to gain more information regarding an applicant’s alleged knowledge to better deduce whether he or she qualifies for the L-1B.⁷⁶ During FY 2006, only nine percent of cases received an RFE.⁷⁷ By FY 2011, sixty-three percent of applications received RFEs.⁷⁸ The National Foundation for American Policy highlighted the strain RFEs put on employers, explaining that “an RFE can result in months of delays for an application, affecting costs

71. See OFFICE OF INSPECTOR GEN., U.S. DEP’T OF HOMELAND SEC., OIG-06-22, REVIEW OF VULNERABILITIES AND POTENTIAL ABUSES OF THE L-1 VISA PROGRAM 7–13 (2006), https://www.oig.dhs.gov/assets/Mgmt/OIG_06-22_Jan06.pdf [hereinafter DHS REPORT]. Another reason that the L-1B has received additional scrutiny is the “suspicion by USCIS that the L-1B visa could be improperly used as a substitute for unavailable H-1B visas.” LORNA A. DE BONO ET AL., SEYFARTH SHAW LLP, SUCCESS WITH L-1BS IN AN ERA OF INCREASED USCIS SCRUTINY 7–8 (2008), http://www.seyfarth.com/dir_docs/publications/AttorneyPubs/L-1B%20article%202008%20for%20Mondaq.pdf. In FY 2004, “the H-1B cap reverted to 65,000 visas per year.” *Id.* at 8. Some argue that because there were limited numbers of H-1B visas available, companies attempted to secure their employees’ visas using the L-1B. This is problematic because the H-1B includes a test of the labor market to decrease the chance of taking a job away from an eligible American worker. *Id.* at 7–8. The L-1 does not require such a test, which some feel makes it more vulnerable to fraud and abuse. A third reason for the heightened scrutiny stems from the September 11, 2001 terrorist attacks on the United States. *Id.* at 7.

72. DHS REPORT, *supra* note 71, at 1.

73. See generally *id.*

74. See NFAP REPORT, *supra* note 67, at 1 tbl.1. In a 2012 memorandum to USCIS Director Alejandro N. Mayorkas, the American Immigration Lawyers Association (AILA) noted:

Reacting to what some view as the improper overuse of the L-1B category and a perceived “spike” in . . . 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.”

Memorandum from Am. Immigration Lawyers Ass’n to Alejandro N. Mayorkas, Dir., U.S. Citizenship & Immigration Servs. 1 (Jan. 24, 2012), www.aila.org/infonet/aila-memo-uscis-interprets-l-1b-specialized-know.

75. See Timothy Payne, *Reconciling L-1 RFEs with Agency Guidance—The Drama Behind and the Strategies for Dealing with the 15-Year High in L-1 RFE Rates*, in IMMIGRATION PRACTICE POINTERS 207 (AILA 2011–12 ed. 2011) (“The *Adjudicators Field Manual* (AFM) instructs adjudicating officers to carefully consider how and when to use their RFE power. Yet in the context of L-1 filings, the indiscriminate use of RFEs appears to be the rule rather than the exception. Adjudicators frequently appear to be using the RFE as an investigative tool to request voluminous amounts of data with little attention paid to the evidence already in the record.” (footnotes omitted)).

76. See NFAP REPORT, *supra* note 67, at 1–2.

77. *Id.* at 6.

78. *Id.*

and potentially delaying projects and harming the ability to fulfill terms of a contract.”⁷⁹ Moreover, gathering the evidence requested can be quite onerous and time-consuming for the companies, if not ultimately impossible to provide.⁸⁰ Many practitioners also criticized the new scrutiny of L-1B petitions because it commenced without a substantive change to the written law governing the admission of this class of visa applicants.⁸¹

5. *A Beacon of Hope from Fogo de Chao*

In October 2014, the U.S. Court of Appeals for the District of Columbia decided a case that provided hope for many practitioners and employers having trouble obtaining approval under the L-1B: *Fogo de Chao (Holdings), Inc. v. U.S. Department of Homeland Security*.⁸²

Fogo de Chao is a popular Brazilian steakhouse restaurant with many locations throughout the United States.⁸³ The company often relied on the L-1B to bring in highly skilled and specialized chefs from Brazil.⁸⁴ The company argued that “a critical component of its success has been the employment in each of its restaurants of genuine gaucho chefs, known as *churrasqueiros*, who have been raised and trained in the particular culinary and festive traditions of traditional barbecues in the Rio Grande do Sul area of Southern Brazil.”⁸⁵ The chefs’ cultural upbringing and experience played a large role in Fogo de Chao’s argument that these chefs had specialized knowledge.⁸⁶ Despite having previously approved many chefs with similar qualifications, in 2010, DHS denied the application of Ronés Gasparetto, concluding “Gasparetto’s cultural

79. *Id.*

80. *Id.* at 1; *see, e.g., Draft Template for Comment: L-1B RFE Notice*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 17, 2015), [http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Request%20for%20Evidence%20\(RFE\)%20Template%20for%20Comment/PED-Specialized-Knowledge-L1B-RFE-Template-2015.pdf](http://www.uscis.gov/sites/default/files/USCIS/Outreach/Draft%20Request%20for%20Evidence%20(RFE)%20Template%20for%20Comment/PED-Specialized-Knowledge-L1B-RFE-Template-2015.pdf).

81. *See* Michael D. Patrick, *H-1B and L-1B: Staying Nimble in Times of Unprecedented Change*, N.Y. L.J., May 21, 2015, col.1 (Expert Analysis), at 3 (“Proponents of the L-1B have also been frustrated by the fact that during this period, and without congressional guidance, USCIS has promulgated L-1B policy change without the notice and comment period afforded by the Administrative Procedure Act.”). As one preeminent immigration lawyer explained:

Practitioners have noted recent RFEs . . . follow a standard more closely related to the “key personnel” standard than the current statutory standard created by [IMMACT of 1990] and pertinent agency policy memoranda. While certain aspects of RFEs stay within the realm of the prevailing interpretation of current legislation and guidance, a large number of observed requests relate directly to the beneficiary’s proprietary knowledge of the petitioning company and whether the knowledge is readily available in the U.S. labor market.

Samartin, *supra* note 10, at 74 (footnote omitted).

82. 769 F.3d 1127 (D.C. Cir. 2014).

83. *Id.* at 1129.

84. *Id.*

85. *Id.*

86. *Id.* at 1130.

background, knowledge, and training could not, as a matter of law, constitute specialized knowledge.”⁸⁷ In turn, Fogo de Chao challenged the adjudication all the way to the Court of Appeals for the District of Columbia.⁸⁸

In the opinion, Circuit Judge Patricia Millet criticized USCIS, noting that “[n]o deference [was] due . . . to [the] agency’s interpretation of its own regulation when, ‘instead of using its expertise and experience to formulate a regulation, it [had] elected merely to paraphrase the statutory language.’”⁸⁹ Further, the court reversed the Agency’s determination and held that a “categorical prohibition on any and all culturally acquired knowledge supporting a ‘specialized knowledge’ determination” was error.⁹⁰

After this opinion, many in the industry wondered whether this ruling would expand the definition of “specialized knowledge.”⁹¹ Not until 2015, however, did USCIS repeat its attempt to clarify the criteria for “specialized knowledge.”⁹²

6. 2015 Guidance from USCIS Does Little to Alleviate the Confusion Surrounding the Definition of “Specialized Knowledge”

In March 2015, USCIS issued a policy memorandum titled “L-1B Adjudications Policy” (2015 Memorandum).⁹³ The memorandum was intended to supersede prior guidance (including the Puleo and Ohata Memoranda) by providing “consolidated and authoritative guidance on determining whether specialized knowledge has been established in L-1B petitions.”⁹⁴

The 2015 Memorandum emphasized that the standard of proof requires an applicant to show that he or she has specialized knowledge by a *preponderance of the evidence*.⁹⁵ Many immigration professionals applauded this reassertion of

87. *Id.* at 1130, 1140 (“Rather than address the dictionary definitions embraced by the agency’s Puleo Memorandum, the Appeals Office tried to tether its exclusion of such cultural knowledge to the requirement that ‘specialized knowledge’ be ‘of the company product and its application in international markets,’ or ‘of processes and procedures of the company.’”).

88. *Id.* at 1134–35.

89. *Id.* at 1135 (quoting *In re* Polar Bear Endangered Species Act Listing & Section 4(d) Litig., 709 F.3d 1, 18 (D.C. Cir. 2013)).

90. *Id.* at 1139.

91. *See generally* *Could Fogo De Chao Expand L-1B Eligibility?*, BASHYAM SPIRO: IMMIGR. MEDITATION (Nov. 28, 2014, 4:16 PM), <http://www.bashyamspiro.com/immigration-meditation/2014/11/28/fogo-de-chao-expand-l-1b-eligibility/>.

92. *See generally* 2015 USCIS MEMO, *supra* note 11.

93. *See id.* at 1.

94. *See id.* at 5 (explaining that the 2015 Memorandum supersedes and rescinds the 1994 Puleo Memorandum, the 2002 Ohata Memorandum, the 2004 Ohata Memorandum, and the 2005 Yates Memorandum, as well as relevant chapters in the Adjudicator’s Field Manual).

95. *See id.* at 5–6 (“[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.”).

the preponderance-of-the-evidence standard because USCIS often seemed to apply a much stricter burden of proof when adjudicating cases.⁹⁶

The 2015 Memorandum also sought to provide further clarification on the definition of “specialized knowledge”; however, it simply reaffirmed the definitions expressed in both the Puleo and Ohata Memoranda.⁹⁷ Specifically, the memorandum explained:

[F]or knowledge to be “special” or “advanced,” there must be a comparison of the beneficiary’s knowledge against that of other workers. To be “special,” the knowledge must be “distinct or uncommon” in comparison to that normally found in the employer/industry, whereas to be “advanced” the knowledge must be “greatly developed or further along in progress, complexity and understanding” than generally found with the employer.⁹⁸

Despite the proffered clarifications, “the devil is in the details.”⁹⁹ Within the 2015 Memorandum, “[w]ise immigration lawyers saw plenty of fodder for restrictive adjudications.”¹⁰⁰ Similar to the confusing and paradoxical language from the preceding Puleo and Ohata Memoranda, the 2015 Memorandum included contradictory language that will inevitably continue the restrictive adjudication practices occurring today.¹⁰¹

II. THE HISTORY OF THE L-1B AND THE IT CONSULTANCY INDUSTRY

As one of the main petitioners for the L-1 visa category, IT consulting firms have disproportionately experienced the brunt of denials and RFEs due to strict L-1B regulations.¹⁰² Some have even called the L-1 “the Computer visa.”¹⁰³

96. See Fragomen & Morowitz, *supra* note 7 (“[T]he guidance reminds adjudicators that the appropriate burden of proof for L-1B cases is the preponderance of the evidence standard, implicitly directing adjudicators to stop employing a de facto ‘clear and convincing’ standard for L-1B petitions.”).

97. See 2015 USCIS MEMO, *supra* note 11, at 6–7.

98. Ian Macdonald, *Long-Awaited Guidance on L-1B Visa Category Released*, CORP. COUNS. (Law Journal Newsletters, Phila., Pa.), May 2015, at 1, 9.

99. See Fragomen & Morowitz, *supra* note 7.

100. See *id.*

101. See *id.*

102. See DE BONO ET AL., *supra* note 71, at 7–8. Based on the belief that many IT companies were misusing the L-1, Congress enacted the L-1 Visa and H-1B Visa Reform Act of 2004 to limit the number of visas that may be granted. See Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, tit. IV, 118 Stat. 2809, 3351–61 (codified as amended in scattered sections of 8 U.S.C.); see also Jan Pederson et al., *Whither Thy Intra-company Transferee?*, in AILA MIDYEAR CONFERENCE HANDBOOK 59 (2014) (“The state of unrest in the L-1 world climaxed in 2004, with the enactment of the ‘L-1 Visa and H-1B Visa Reform Act of 2004.’ This legislation targeted specialized knowledge workers who primarily worked offsite, enacting punitive filing fees and voluminous document requirements for third-party placements.”).

103. See Todd H. Goodsell, *On the Continued Need for H-1B Reform: A Partial, Statutory Suggestion to Protect Foreign and U.S. Workers*, 21 BYU J. PUB. L. 153, 170 n.118 (2007); DHS REPORT, *supra* note 71, at 4.

The DHS found that “[f]rom 1999 to 2004, nine of the ten firms that petitioned for the most L-1 workers were computer and IT related outsourcing service firms that specialized in labor from India.”¹⁰⁴ Currently, there are two visa categories foreign IT workers generally apply under: the L-1 and the H-1B.¹⁰⁵ Because the H-1B is subject to limited numbers, the L-1B has risen in popularity out of sheer necessity.¹⁰⁶ Once the H-1B numbers run out (which this past fiscal year occurred in one week),¹⁰⁷ companies have no choice but to file under the L-1B despite their dismal chances of approval.¹⁰⁸

A. USCIS Scrutinizes IT Worker Applications

One of the issues USCIS has with L-1B applicants from IT companies is it considers the applicants’ knowledge to be generally held throughout the industry and, therefore, *not* specialized or advanced.¹⁰⁹ For example, many IT companies utilize software like Oracle’s PeopleSoft applications to build their own products or to build products for their clients.¹¹⁰ As a result, most IT workers generally gain a fine-tuned knowledge of Oracle products during college or university because the industry requires it.¹¹¹

Because knowledge of Oracle’s PeopleSoft applications is prevalent throughout the industry, USCIS would challenge an L-1B petition basing an applicant’s specialized knowledge on Oracle software or PeopleSoft

104. DHS REPORT, *supra* note 71, at 4.

105. See Patrick Thibodeau & Sharon Machlis, *Charting H-1B Users, as Attention Shifts to L-1*, COMPUTER WORLD (Mar. 28, 2012, 7:00 AM), <http://www.computerworld.com/article/2501424/it-outsourcing/charting-h-1b-users—as-attention-shifts-to-l-1.html>. The H-1B allows companies to transfer employees who work in specialty occupations. See BOSWELL, *supra* note 35, at 125. A specialty occupation position is one that requires “‘the [t]heoretical and practical application of a body of highly specialized knowledge’ and a bachelor’s or higher degree (or its equivalent) for entry into the field.” *Id.* (alteration in original) (quoting 8 U.S.C. § 1101(a)(15)(H)(i)(b)).

106. See Thibodeau & Machlis, *supra* note 105.

107. *USCIS Reaches FY 2018 H-1B Cap*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Apr. 7, 2017), <https://www.uscis.gov/news/news-releases/uscis-reaches-fy-2018-h-1b-cap> [hereinafter *H-1B Cap FY 2018*] (explaining that the filing cap for fiscal year 2018 was reached on April 7, 2017).

108. See John Ainsworth, *L-1B “Specialized Knowledge” for IT Companies: Think Your Employee has “Specialized Knowledge?” Think Again*, BUS. IMMIGR. BLOG (Nov. 16, 2012), <http://www.businessimmigrationblog.com/l-1b-specialized-knowledge-for-IT-companies-think-your-employee-has-specialized-knowledge-think-again/>. See Thibodeau & Machlis, *supra* note 105.

109. See Ainsworth, *supra* note 108.

110. *In re* [Redacted], AAU WAC 07 277 53214 (DHS), 2008 WL 5063578, at *32–33 (July 22, 2008) (describing how the agency views software that is commonly utilized throughout the IT industry: “SAP software described by the petitioner is ‘common place and the industry standard’ rather than advanced or specialized in nature.”).

111. See, e.g., *Computer Science Courses*, American University College of Arts & Sciences, <http://www.american.edu/cas/cs/courses.cfm> (last visited May 3, 2017) (offering “CSC-570 Database Management Systems,” an advanced undergraduate class teaching computer science students how to use Oracle software).

specifically.¹¹² It would not matter that the company may have used the third-party software to build their own unique product. USCIS would argue that another IT worker within the company—or any IT worker in the industry—could perform that role because the knowledge needed is *not* specialized and is widely held throughout the industry.¹¹³ USCIS often justifies its stringent standards by noting “if everyone is special, then no one is special.”¹¹⁴

B. Practitioners Backtrack to Pre-IMMACT “Proprietary” Knowledge Standard to Obtain L-1 Approvals for IT Workers

Multinational IT companies and immigration attorneys have been struggling with the question of how to get approvals for IT workers.¹¹⁵ Interestingly, the most effective approach is to find workers who meet the heightened standard that was in effect prior to the 1990 IMMACT amendments.¹¹⁶ To satisfy the specialized knowledge requirement, practitioners argue that these workers have proprietary knowledge.¹¹⁷

If an IT company creates proprietary products, then they inevitably have a much stronger argument for specialized knowledge than IT companies who only utilize third-party software.¹¹⁸ Proprietary software is generally owned and operated solely by the employing entity.¹¹⁹ As such, the only way to gain knowledge of proprietary software is to be an employee of the company.¹²⁰

112. See generally Ainsworth, *supra* note 108.

113. See, e.g., *In re* [Redacted], 2008 WL 5063578, at *13 (“[T]he director [who denied petitioner’s L-1B petition] noted that upon a review of publicly available internet websites for software similar to that used by the beneficiary, it appeared that the SAP software described by the petitioner is ‘commonplace and the industry standard’ rather than advanced or specialized in nature.”).

114. Minnie Fu & Michael H. Neifach, *L-1 Specialized Knowledge—Where Do We Go From “If Everyone is Special Then No One Is Special”?*, JACKSON LEWIS: IMMIGR. BLOG (Feb. 14, 2012), <http://www.globalimmigratioblog.com/2012/02/1-1-specialized-knowledge-where-do-we-go-from-if-everyone-is-special-then-no-one-is-special/>.

115. See Ainsworth, *supra* note 108.

116. See *In re* [Redacted], 2008 WL 5063578, at 17.

117. *Id.* at 20 (“[A]n employee with many years of experience and advanced training who developed a proprietary process that is limited to a few people within the company . . . would clearly meet the statutory standard for specialized knowledge.”).

118. See *id.* (discussing an employee of a company who developed a proprietary process as a clear example of an individual who meets the statutory standard for specialized knowledge); see also Hammond, *supra* note 66, at 134–41 (describing strategies practitioners use to gain approvals, but particularly noting the need to show how a company’s technology is different than other technologies in the industry).

119. See *Proprietary Software*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/proprietary-software.html> (last visited Feb. 3, 2017).

120. Robert Herreria, *Overview of the Application Process for an L-1 Work Visa*, ALLLAW.COM, <http://www.alllaw.com/articles/nolo/us-immigration/application-process-l-1-work-visa.html> (last visited Feb. 3, 2017) (“In recent years, U.S. immigration has taken a severely restrictive stance towards what it considers ‘specialized knowledge.’ For example, if you personally developed a proprietary technology or tool used exclusively by your company or

Accordingly, knowledge of the proprietary software is more specialized and unique because others in the industry cannot readily gain knowledge of it.¹²¹

This is problematic because it holds all IT visa applicants to a higher standard than visa applicants from other industries. Moreover, because the IT industry requires its workers to be “trained in the same development techniques and processes,” it is difficult to find IT workers with a “specific set of skills regarding the company product or service,” much less knowledge that is proprietary.¹²² Practitioners agree, “[t]he result [of USCIS’s strict guidelines] is that USCIS looks at most IT developers and programmers [as] people who do not qualify for an L-1B visa.”¹²³

Even more problematic is that this particular class of applicants comes from an industry that is slowly moving away from proprietary products and towards a type of software that is arguably more common than third-party software: open source technology.¹²⁴

C. Emergence of Open Source Technology

As previously noted, open source technology “refers to a program in which the source code is available to the general public for use and/or modification from its original design free of charge, i.e. *open*.”¹²⁵ This type of technology emerged in the early 1990s and was “organized around noncommercial, ‘fun’ motives like altruism, hobbyist interest, and the like.”¹²⁶ As of 2015, IT industry experts agreed that “[o]pen source is now the default.”¹²⁷

Although initially industry experts thought open source was driven by idealistic motives, the many financial and commercial advantages to the platform slowly emerged.¹²⁸ For instance, the open source platform provides opportunities for “contribution and cooperation” from the public.¹²⁹ Furthermore, open source can lower operational costs by “reducing the burden of regressions, improving the flow of innovation and sharing the task of security review.”¹³⁰

organization, and you can document your work, immigration officials would consider this specialized knowledge.”)

121. See *id.* (stating that specialized knowledge cannot be acquired outside of an organization “through education, training, or publicly available knowledge”).

122. Ainsworth, *supra* note 108.

123. *Id.*

124. See discussion *infra* Section II.C.

125. Beal, *supra* note 13.

126. Maurer, *supra* note 15, at 269.

127. Simon Phipps, *The Rise and Rise of Open Source*, INFOWORLD.COM (May 8, 2015), <http://www.infoworld.com/article/29146343/open-source-software/rise-and-rise-of-open-source.html>.

128. See Maurer, *supra* note 15, at 270–72.

129. See Phipps, *supra* note 127.

130. *Id.*

Due to the many benefits of open source technology,¹³¹ many large companies have adopted open source platforms, including Google, Facebook, Microsoft, and IBM.¹³² In fact, in March 2015, India—a main hub of the IT industry—declared that its government would be adopting “open source software, which [made] it mandatory for all software applications and services of the government [to] be built using open source software,” so that projects would be efficient, transparent and reliable, and available at affordable costs.¹³³

Although much momentum exists behind the open source movement, some feel “[p]roprietary software will always be with us . . . [And,] [e]xecutives will continue to put off the inevitable day when they will need to . . . move to modern, modular, open source solutions.”¹³⁴ In other words, proprietary software will continue to be available as long as it is profitable for owners;¹³⁵ however, with all of the cost-saving benefits of open source platforms, it is possible proprietary technologies will be virtually obsolete in the foreseeable future.¹³⁶

III. THE SHIFT TO OPEN SOURCE TECHNOLOGY WILL ADVERSELY IMPACT IT WORKERS' ABILITY TO UTILIZE THE L-1B VISA PROGRAM

A. Open Source Versus Third-Party Software

The guidance from 2015 Memorandum indicated specialized or advanced knowledge will be based on a comparison of the applicant's knowledge to similar workers both within the industry and within the employing entity.¹³⁷ This comparison is inherent in any analysis to determine whether someone has advanced or specialized knowledge.¹³⁸ The petitioning company must demonstrate that the knowledge of the applicant stands apart from, and is more special and/or advanced, than anyone else in the industry or within the employing entity.¹³⁹

As previously mentioned, this poses a unique problem for the IT industry because it relies heavily on standardized, industry-wide software, platforms,

131. See Maurer, *supra* note 15, at 270–72 (discussing ideological and financial benefits of open source technology).

132. See Erin Richey, *5 Things to Know About the Rise of Open Source*, FORBES (Apr. 9, 2015, 4:53 PM), <http://www.forbes.com/sites/centurylink/2015/04/09/5-things-to-know-about-the-rise-of-open-source/print/>; see also Maurer, *supra* note 15, at 270–71.

133. Alawadi, *supra* note 12.

134. Phipps, *supra* note 127.

135. See *id.*

136. See *id.*; see also Maurer, *supra* note 15, at 270–71.

137. See 2015 USICS MEMO, *supra* note 11, at 7 (“With respect to either special or advanced knowledge, the petitioner ordinarily must demonstrate that the beneficiary's knowledge is not commonly held throughout the particular industry or within the petitioning employer.”).

138. See *id.*

139. *Id.*

techniques, and processes.¹⁴⁰ If the applicant has a specialized knowledge based on expertise with third-party software, which includes the vast majority of IT worker applicants, he or she has a very low chance of approval.¹⁴¹

With the emergence of open source technologies, this unique problem will become more acute because open source technologies are available to everyone, and virtually anyone could theoretically gain knowledge of the software.¹⁴² If USCIS is focusing on comparing workers' knowledge against each other to determine who is more specialized or advanced, how will they adjudicate a case where a worker's knowledge is based on open source platforms?

B. USCIS Unlikely to Reconcile Current Definition of "Specialized Knowledge" with Open Source Technologies

The present definition of specialized knowledge in use by USCIS is too narrow to be applicable to IT workers with knowledge of open source technologies. Currently, providing objective evidence that an applicant has special and/or advanced knowledge of a *proprietary* product is the most effective means of obtaining L-1B approval.¹⁴³ This argument is successful because knowledge of a proprietary product is inherently specialized due to the unavailability of the product in the general IT community and the inability to gain knowledge of the product without working directly for the company.¹⁴⁴ On the other hand, if an employer makes an argument that it built its technology using open source, how could it prove that the applicant is special? When any other computer programmer, software developer, or quality analyst can access and learn how to use the same open source platform, how can you distinguish one person from all the rest?

Unfortunately, given the current L-1B denial and RFE rates, it seems that any argument in favor of open source IT workers would surely fail.¹⁴⁵ Without substantial policy changes within USCIS or changes to the law, it would be very difficult to make a successful argument for an L-1B applicant with specialized knowledge of an open source technology.

140. See Ainsworth, *supra* note 108 (explaining that in the IT industry "most developers are trained in the same development techniques and processes").

141. See *id.*

142. See Beal, *supra* note 13.

143. Companies that can effectively make this argument are more likely to be successful in obtaining L-1B visas for its workers. See *L-1B Visa: Specialized Knowledge Professional*, IMMIHELP.COM, <http://www.immihelp.com/11-visa/11-b-specialized-knowledge-professional.html> (last visited Feb. 3, 2017); see also Ainsworth, *supra* note 108.

144. See *id.*

145. See generally NFAP REPORT, *supra* note 67.

C. Importance of Preserving Means for IT Companies to Transfer Employees to the United States

As briefly mentioned, many Americans are staunchly opposed to any foreign workers coming into the country at all.¹⁴⁶ The media often covers troubling stories of American workers losing their employment and being replaced by nonimmigrant workers.¹⁴⁷ One such article reported the pharmaceutical giant Pfizer told hundreds of IT employees that they would “soon be laid off.”¹⁴⁸ However, before receiving their final paycheck from Pfizer, the soon-to-be ex-employees needed “to train their replacements: guest workers from India.”¹⁴⁹ As a result of the perception that Americans are losing jobs to foreign labor, many argue the definition for “specialized knowledge” is, if anything, applied too liberally.¹⁵⁰

It is difficult to determine how often Americans lose their jobs to foreign workers because the federal government does not collect such data.¹⁵¹ Still, many employers favor bringing in foreign workers as a way to promote economic growth.¹⁵² Those employers argue that the initial hardship of displacing U.S. workers is a small price to pay for more efficient and streamlined processes that will lead to larger growth in the future.¹⁵³ The hope (or, at least, the argument) is that outsourcing now will create more jobs for Americans later.

The arguments for limiting the number of foreign workers are important to discuss. However, they often overshadow the reasons this visa category was

146. See Lovelace, *supra* note 1.

147. See, e.g., *id.*

148. Harkinson, *supra* note 2.

149. *Id.*

150. Memorandum from Daniel Costa & Ron Hira, Econ. Policy Inst., to Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration 2 (Mar. 26, 2012), <http://www.epi.org/publication/epi-open-letter-uscis-director-mayorkas/> (“It is clear to us that the definition of L-1B specialized knowledge is already overly broad.”).

151. See Julia Preston, *Toys ‘R’ Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, N.Y. TIMES (Sept. 29, 2015), http://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html?_r=0 (“The federal government does not track how often American workers are displaced by workers with temporary visas, but this year, employees at a variety of companies report losing jobs to foreign workers.”). In 2017, however, a draft of an executive order was leaked to the public, indicating the possibility that the Trump administration will begin scrutinizing the L-1 visa category; thus, metrics concerning the L-1 program’s impact on U.S. workers could be forthcoming. See Matthew Yglesias & Dara Lind, *Read leaked Drafts of 4 White House Executive Orders on Muslim Ban, End to DREAMer Program, and More*, VOX.COM (Jan. 25, 2017, 5:43 PM), <https://www.vox.com/policy-and-politics/2017/1/25/14390106/leaked-drafts-trump-immigrants-executive-order>.

152. See, e.g., Preston, *supra* note 151.

153. See, e.g., *id.* (“‘We know there will be pain along the way,’ [a company spokesman] said. But he said that with new innovative technology, the company could rapidly expand despite the job cuts. He said it planned to hire 1,000 employees and 3,500 agents this year alone.”).

created, and why it is important to provide multinational companies with a means of bringing employees to the United States.¹⁵⁴

1. Congressional Intent

It is important to revisit the initial reasons Congress created the L-1B visa category. Congress was concerned that large, multinational companies lacked a means of expanding foreign business into the United States.¹⁵⁵ To assist with that effort, they created the L-1.¹⁵⁶ Although Congress always intended the new category to vet workers immigrating to the United States on the L-1 visa,¹⁵⁷ there is no evidence to suggest they wanted the rigid standards currently imposed, especially with respect to one category of workers.

2. Effect on the H-1B Visa

One of the worst consequences resulting from the strict standards imposed by USCIS on IT workers seeking L-1B status is the effect on the H-1B category. Despite being costlier and less flexible than the L-1B visa,¹⁵⁸ the H-1B visa has become exceedingly favored by the IT industry, with the vast majority of all H-1B petitions filed by IT workers.¹⁵⁹ However, as noted, the H-1B visa is subject to an annual cap of 65,000 applications.¹⁶⁰ Once 65,000 applications are received, applicants can no longer apply for the H-1B visa during that fiscal year. In fiscal year 2018, USCIS reached the application cap within the first filing week.¹⁶¹

It logically follows that the disproportionate number of petitions filed by IT companies is a direct result of the stringent standards imposed by USCIS for L-1B status.¹⁶² Thus, regardless of the unfavorable odds, the H-1B category

154. See *supra* notes 22–34 and accompanying text.

155. See *supra* notes 26–28 and accompanying text.

156. *Id.*

157. See generally H.R. REP. NO. 91-851 (1970), as reprinted in 1970 U.S.C.C.A.N. 2750.

158. See Ainsworth, *supra* note 108.

159. See Patrick Thibodeau, *H-1B Cap is Reached with 'High Number' of Visa Requests* COMPUTER WORLD (Apr. 7, 2015, 1:07 PM), <http://www.computerworld.com/article/2907056/h-1b-cap-is-reached-with-high-number-of-visa-requests.html> (“A majority of visas are typically requested by IT services companies that use H-1B workers to provide outsourcing services.”).

160. *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, U.S. CITIZENSHIP & IMMIGR. SERVS., <http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperativeresearch-and-development-project-workers-and-fashion-models> (last visited Feb. 3, 2017) (“The H-1B visa has an annual numerical limit ‘cap’ of 65,000 visas each fiscal year.”).

161. See *H-1B Cap FY 2018*, *supra* note 107 (“USCIS received nearly 233,000 H-1B petitions during the filing period, which began April 1, including petitions filed for the advanced degree exemption.”).

162. See Ainsworth, *supra* note 108.

remains a reliable means of getting highly skilled IT workers into the United States.¹⁶³

The impact on the H-1B program is problematic, however, because “it takes away H-1B approvals from other workers attempting to qualify under the H-1B category.”¹⁶⁴ For instance, foreign students who are educated in the United States and wish to stay and work must compete with thousands of petitions filed by IT workers.¹⁶⁵ In a visa category, like the H-1B, with a lottery system, large companies that can file thousands of petitions have an advantage over smaller companies with limited resources. The result of that advantage is many worthy applicants, including students, are unable to remain in the United States because they do not receive a cap number.¹⁶⁶

In many cases, the H-1B is the only visa category for which foreign students are eligible.¹⁶⁷ But, logically, if the United States educates a smart and talented individual, having him or her remain and work in the United States allows us, as a country, to benefit from his or her education.¹⁶⁸ It is counterproductive to educate these individuals only to have them return to their home country or

163. See *H-1B Cap Filing 2014*, BROWN IMMIGR. L. (Jan. 18, 2014), <http://www.brownimmigrationlaw.com/h-1b-cap-filing-2014/> (describing the H-1B cap lottery process).

164. See Ainsworth, *supra* note 108.

165. See, e.g., Ethan Baron, *H-1B Visa Cap Making It More Difficult for International MBAs to Land U.S. Jobs*, POETS & QUANTS (June 21, 2015), <http://poetsandquants.com/2015/06/21/h-1b-visa-cap-making-it-more-difficult-for-international-mbas-to-land-u-s-jobs/>. In an article profiling the difficulty faced by accomplished business students in securing nonimmigrant visas, the story of Sudhanshu Shekhar, “an all-star business student at Northwestern University’s Kellogg School of Management,” illustrated the issue of the H-1B visas program. *Id.* at 1.

Like many international students who come to a U.S. school for an MBA degree, [Subhanshu Shekhar] had hoped to land a job that would allow him to stay and work in the U.S. But Shekhar did not win the H-1B visa lottery, that this year saw 233,000 applications for only 85,000 of the “specialty occupation” visas for foreign nationals with bachelor’s degrees or higher. Instead, Shekhar will be leaving for Amsterdam to start work there for Strategy& as soon as his Dutch work permit comes through.

Id.

166. See *id.*

167. See Evangeline M. Chan, *Our Immigration Policies Are Telling Foreign Students to “Get Out” After They Graduate*, FORBES (June 8, 2015, 12:15 PM), <http://www.forbes.com/sites/realspin/2015/06/08/graduating-congratulations-now-get-out/> (“Most [students] will subject themselves to the H-1B ‘lottery,’ although the odds are greatly stacked against them.”).

168. See Baron, *supra* note 165, at 3. Journalist Ethan Baron reports:

It may seem a no-brainer that talented foreign MBAs should be welcomed into the U.S. economy. “Denying companies access to the skilled workers they need is like asking them to work with one hand tied behind their backs,” Robert Atkinson, president of the Information Technology and Innovation Foundation, argued last month in a Gannett op-ed calling for a higher cap on H-1B visas. Microsoft executive VP Brad Smith in 2013 told a Senate committee that the limited number of visas had a deterrent effect on foreign talent. “Some potential hires are unwilling to jump over all of the hurdles presented by the H-1B cap and will simply walk away from the offer of employment in the U.S., opting to instead pursue alternative options in their home countries,” Smith testified.

Id.

immigrate somewhere with a more flexible immigration system.¹⁶⁹ Thus, it is important to expand the definition of specialized knowledge to eliminate the burden on the H-1B visa, thereby making cap numbers available for other eligible candidates.

3. *If IT Companies Cannot Get into the United States, Where Will They Go?*

Another unfortunate consequence of applying rigid L-1B standards is that it drives IT companies to expand their businesses in countries with more favorable immigration laws.¹⁷⁰ It has become so difficult and inefficient to obtain non-immigrant visas for workers in the United States that IT companies are changing tactics altogether and moving their businesses to other countries.¹⁷¹ Canada and Australia are two such countries with attractive immigration policies for IT workers.¹⁷²

Returning to Congress's intent in creating the L-1 visa category, this consequence squarely contradicts legislators' wishes.¹⁷³ Legislators wanted the L-1 category to facilitate the expansion of new markets in the United States—not act as a hindrance.¹⁷⁴

IV. RECOMMENDATIONS ON HOW TO MOVE FORWARD

A. *Will the L-1B Visa Remain a Viable Option for IT Workers?*

Based on how USCIS currently interprets and adjudicates L-1B petitions, and that the IT industry is moving toward open source technology as the industry standard, it is likely the benefits of the L-1B visa will soon be foreclosed to the IT industry entirely.

169. See, e.g., *id.* at 2 (“Canada has put in place a ‘startup visa’ and aggressively promoted it to failed U.S. H-1B applicants—most dramatically by putting up a billboard ad along the freeway between the San Francisco airport and Silicon Valley in 2013. ‘H-1B Problems?’, the billboard read. ‘PIVOT to CANADA.’”).

170. See, e.g., Pat Spracklin, *Top 10 Immigration Friendly Countries*, IMMIGROUP (Aug. 26, 2015), <http://www.immigroup.com/news/top-10-immigration-friendly-countries?variation=tabs#> (noting Canada and Australia as the top 2 most immigration-friendly countries); see also Ed Frauenheim, *U.S. Firms Move IT Overseas*, CNET.COM (Feb. 20, 2003, 5:37 PM), <https://www.cnet.com/news/u-s-firms-move-it-overseas/>.

171. For example, Karen Jones, the Deputy General Counsel for Microsoft, reported that the company only received half of the H-1B visas it applied for in 2015. “The U.S. laws clearly did not meet our needs,” said Jones. “We have to look to other places.” Karen Weise, *Vancouver, the New Tech Hub*, BLOOMBERG (May 27, 2014, 9:54 AM), <http://www.bloomberg.com/bw/articles/2014-05-22/vancouver-welcomes-tech-companies-hampered-by-u-dot-s-dot-work-visa-caps> (reporting that Microsoft opened a small office in Vancouver in 2007 and in 2014 announced plans to “more than double its roughly 300-employee office in Vancouver”).

172. See Spracklin, *supra* note 170.

173. See *supra* note 27 and accompanying text.

174. *Id.*

If the L-1B is to remain a viable option for IT workers, USCIS will need to reevaluate its interpretation of specialized knowledge in relation to the IT industry. Despite the language of the statute and internal agency guidance, only a very specific type of IT worker—one with proprietary knowledge—can effectively meet the standard of what constitutes specialized knowledge.¹⁷⁵ With the growing popularity of open source software, this number will continue to shrink. To ensure the L-1B is utilized in the manner Congress intended, USCIS must find a way to determine the specialness in the context of the IT industry, or exclude IT workers altogether.

B. Congress Can Create a New Visa Category for IT Workers

USCIS could attempt to broaden its definition of specialized knowledge to make special exceptions for IT workers; however, such accommodations may still be insufficient to remedy the problem. Additionally, broadening the definition of specialized knowledge to help IT workers gain access to the American labor market will heighten criticism by those who disfavor the use of foreign workers.¹⁷⁶

The stark reality is the progression of the L-1B specialized knowledge interpretation cannot keep up with the evolution and nature of the IT industry.¹⁷⁷ The two just might be incompatible. If so, it is futile to twist the definition of specialized knowledge to include IT workers using open source technologies.¹⁷⁸ Instead, it might be time to try something radical: a new IT worker visa.

Disgruntled American workers, IT companies, and immigration attorneys alike would agree the current situation needs revision. On the one hand, many Americans are unsettled by the notion that foreign workers can come to the United States and take American jobs by working at a lower rate of pay.¹⁷⁹ IT companies, on the other hand, are frustrated by the lack of available H-1B visas

175. See discussion *supra* Section II.B.

176. See Harkinson, *supra* note 2; see also Lovelace, *supra* note 1.

177. See Ainsworth, *supra* note 108 (explaining that in the IT industry, “most developers are trained in the same development techniques and processes”).

178. See Pederson et al., *supra* note 102, at 64–65 (explaining the fact that the L-1B is on the verge of being unusable for IT companies).

Absent organized efforts of impacted employers, the L-1B specialized knowledge category may become unusable. It is clearly a needed visa category as repeatedly recognized by Congress. It has been before Congress so many times that had Congress wanted to abolish the L-1B, it has had sufficient opportunity to do so. . . . We must debunk the myths and present the facts on the need for L workers and demonstrate that the overwhelming majority of employers are compliant with the rules.

Id. at 65.

179. See Harkinson, *supra* note 2; see also Lovelace, *supra* note 1.

and the strict regulations for L-1B visas.¹⁸⁰ A new category could potentially address these grievances.

Many people worry that IT consulting firms are abusing the employment-based immigrant visa system in the United States.¹⁸¹ Such abuses involve the allegation that foreign IT workers are “approved to be hired at wages below those paid to American-born workers for comparable positions.”¹⁸² To combat this notion, a new IT worker visa could impose a minimum wage requirement. Many also argue the L-1 application process should include a test of the labor market,¹⁸³ which would alert American workers to a potential job opening, giving them a chance to apply. A new visa category could remedy this problem by including specific requirements for approval to ensure jobs are not being taken from qualified American workers.¹⁸⁴ Moreover, similar to the H-1B, Congress could impose a cap on the number of IT workers allowed to work in the United States. This proposed visa could include many requirements the L-1 category currently lacks, thereby resolving many of the issues the L-1B visa presents to Americans and multinational employers.

The possibilities for regulating an IT worker visa are vast; however, the proposed visa category should not have a requirement of specialized knowledge. The category should be narrowly tailored to deal with the intricacies of the IT industry and to deal with the evolving software and technology standards that continue to emerge and change over time.

V. CONCLUSION

Within the bubble that is the IT industry, the L-1B visa program has persisted as a hindrance to the very purpose for which it was created: to facilitate the expansion of international business into the United States. Currently, the IT industry is at a standstill due to the restrictive adjudication policies enacted by USCIS. With the entire industry attempting to move to the more collaborative and communal open source platform, it is only going to become more difficult to argue that IT workers have “specialized knowledge” as defined by USCIS.

Despite the challenges, the IT industry is booming and there needs to be a more reliable way to get workers into the United States. It is time for USCIS and Congress to acknowledge the L-1B is not working for a large percentage of

180. See Miriam Jordan, *Demand for Skilled-Worker Visa Exceeds Annual Supply*, WALL ST. J. (Apr. 7, 2015, 8:11 PM), <http://www.wsj.com/articles/u-s-demand-for-skilled-worker-visas-exceeds-annual-supply-1428431798>.

181. See DHS REPORT, *supra* note 71, at 9 (“One southeast Asian post we surveyed reported: ‘Host country software companies appear to be using the L visa to get around H quotas, and relocate individuals who may not meet the specialized knowledge requirement.’”).

182. Harkinson, *supra* note 2.

183. See generally 8 U.S.C. § 1101(a)(15)(L) (2012).

184. Cf. Pederson et al., *supra* note 102, at 64–65 (explaining that the L-1B will likely begin to more closely resemble H-1B standards over time as USCIS continues to restrict use of the L-1B).

applicants. A new visa category specifically tailored to meet the needs of the ever-changing IT industry would relieve many issues employers and immigration attorneys face today. Moreover, it would also likely pacify a disgruntled American workforce.

