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Immigration

USCIS Wrongly Excluded Cultural Knowledge From 'Specialized Knowledge,' D.C. Cir. Says

The U.S. Citizenship and Immigration Services Administrative Appeals Office wrongly concluded that knowledge obtained through cultural traditions or life experience can never be considered ''specialized knowledge'' for purposes of obtaining an L-1B intracompany transferee visa, the U.S. Court of Appeals for the District of Columbia Circuit ruled Oct. 21 (*Fogo de Chao (Holdings) Inc. v. DHS*, 2014 BL 294881, D.C. Cir., No. 13-5301, 10/21/14).

Reversing the district court's grant of summary judgment to the Department of Homeland Security in a lawsuit brought by Fogo de Chao (Holdings) Inc., a 2-1 majority of the court determined that the AAO ''has not offered a reasoned analysis of why the statutory phrase 'specialized knowledge' would woodenly debar any and all knowledge acquired through one's cultural traditions, upbringing, or 'life experience.' ''

''To be sure, the Appeals Office could logically conclude that the mere status of being from a particular region or culture and any 'authenticity' derived from that status alone is not 'knowledge' within the meaning of'' the Immigration and Nationality Act, Judge Patricia A. Millett wrote for the majority. ''But the Appeals Office's wooden refusal to even consider culturally acquired knowledge, skills and experience as relevant to the 'specialized knowledge' inquiry went far beyond that.''

Judge Robert L. Wilkins joined the opinion.

Judge Brett M. Kavanaugh dissented, arguing that the AAO followed long-standing USCIS guidance that country of origin or cultural background isn't ''specialized knowledge'' justifying an L-1B visa.

''Ultimately, Fogo de Chao's argument is that American chefs either can't learn to cook or won't cook Brazilian steaks,'' but that is a ''factually unsupported stereotype,'' he said. Rather, Kavanaugh said, what ''seems to be at least part of what is going on in this case'' is ''Fogo's desire to cut labor costs masquerading as specialized knowledge.''

Surge in Denial Rates. The decision comes in the wake of a recent surge in USCIS denials and requests for evidence in response to L-1 petitions. A March report from the National Foundation for American Policy, for example, found that L-1B denial rates climbed from 6 percent in fiscal year 2006 to 30 percent in FY 2012 and 34 percent in FY 2013 (49 DLR A-10, 3/13/14).

''This case kind of fits within that whole framework,'' report author and NFAP Executive Director Stuart Anderson told Bloomberg BNA Oct. 22. Not only is it an example of how long it takes to appeal a denial—Fogo de Chao's petition was filed in January 2010—but also ''how difficult the federal government often makes it for businesses to operate or expand in the United States,'' he said.

USCIS leadership ''needs to exert itself to make sure that adjudicators are following the law and not issuing excessive denials or requests for evidence based on personal perception as opposed to what the law says,'' Anderson said.

According to Anderson, L-1B denial rates started going up in 2008 around the time the economy worsened, and USCIS adjudicators ''took it upon themselves to play a role as job protector'' for U.S. workers. But denying visas actually harms job growth, he said, because if companies can't bring in the workers they need, they either will locate more employees outside the U.S. or limit their expansion within the country.

The appeals office ''could logically conclude that the mere status of being from a particular region or culture and any 'authenticity' derived from that status alone is not 'knowledge' within the meaning of'' the INA, Judge Millett wrote for the majority, but its ''wooden refusal to even consider culturally acquired knowledge, skills and experience as relevant to the 'specialized knowledge' inquiry went far beyond that.''

'Absolutely No Predictability.' David Grunblatt, an immigration attorney with Proskauer Rose in Newark, N.J., said the D.C. Circuit decision is ''creating quite a stir'' because it is ''so rare'' for denials of employment visa petitions to get this far through the judicial process.

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But while he said it was good to know that practitioners' concerns about how USCIS is treating petitions ''concern the court as well,'' Grunblatt told Bloomberg BNA that ''we don't get any answers from this decision.''

All the court did was say the AAO erred in rejecting cultural knowledge as a basis for specialized knowledge, he said Oct. 22. ''They haven't given us the criteria for judging it and they haven't really addressed what the definitions for specialized knowledge should be and when you're overstepping the line,'' he said.

''Global businesses want to be able to transfer their personnel with some predictability,'' Grunblatt said, and ''right now there's absolutely no predictability.''

He said the ''core issue'' is the lack of specific criteria and standards for specialized knowledge, but it is ''wishful thinking'' to believe the D.C. Circuit's decision will spur USCIS to issue additional L-1B guidance.

''My only hope is that, despite the fact that on a specific level the case doesn't change the law in any dramatic way,'' someone ''will take notice of it and maybe start to melt the glacier'' that is preventing a middle ground on a standard for L-1B visas, Grunblatt said. ''It's a wish. Maybe just a dream,'' he said.

Another immigration attorney familiar with the case told Bloomberg BNA Oct. 22 that the decision did ''knock a couple of holes'' in the way the USCIS adjudicates L-1B petitions, and that he was ''cautiously optimistic'' it could affect USCIS decision making going forward.

''It's a good message that they should treat our cases properly,'' he said.

Petition Denied After 200 Gaucho Chef Approvals. Fogo de Chao, a company that operates numerous Brazilian steakhouse restaurants in the U.S. and Brazil, claimed that between 1997 and 2006, USCIS approved more than 200 of its petitions for L-1B visas for churrasqueiros—gaucho chefs who were raised and trained in the culinary and festive traditions of traditional barbecues in the Rio Grande do Sul area of southern Brazil.

''[A]t least part of what is going on in this case,'' Judge Kavanaugh wrote in dissent, is ''Fogo's desire to cut labor costs masquerading as specialized knowledge.''

The company sued in the U.S. District Court for the District of Columbia when the agency's Vermont Service Center denied its 2010 petition for an L-1B visa for churrasqueiro Rones Gasparetto.

USCIS reopened the case on its own motion after the lawsuit was filed, but again denied the petition, certifying the decision to the AAO. The AAO affirmed, holding that cultural knowledge and life experiences don't count as specialized knowledge and that Fogo de Chao failed to show that Gasparetto obtained the training and experience the company said is needed for the position. The AAO also determined that the churrasqueiro position generally doesn't require specialized knowledge.

The district court granted summary judgment to the agency after granting *Chevron* deference to USCIS's interpretation of the INA. It also agreed that Fogo de Chao failed to show that Gasparetto completed the required training.

***Chevron* Deference Not Warranted.** But the D.C. Circuit majority said deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), isn't warranted where agency regulations—as here—merely paraphrase rather than interpret statutory language. And a nonprecedential AAO decision doesn't trigger such deference, it said.

Although USCIS's decision is entitled to some respect, the court said, ''the agency's conclusion regarding the categorical irrelevance of culturally acquired knowledge was insufficiently reasoned to be sustained.''

According to the court, the AAO argued that the INA requires specialized knowledge to be knowledge of the petitioning company's product and its application in international markets or knowledge of the company's processes and procedures—and that these don't encompass cultural knowledge.

But the court said Fogo de Chao presented evidence that its product ''is defined by the cuisine, serving style, and culinary ethos associated with a particular cultural practice in Southern Brazil.'' The company also listed several ''concrete skills vital to its *churrascaria* business'' and demonstrated that Gasparetto obtained these skills ''in material part through experience gained growing up in the south of Brazil and participating frequently in the *churrasco* tradition,'' it said.

That the INA establishes other visa categories related to culture doesn't preclude cultural knowledge from being considered part of specialized knowledge in the L-1B context, the court added.

'Substantial Discretion' on Remand. At the same time, the D.C. Circuit said the USCIS retains ''substantial discretion'' on remand in considering the question of whether cultural knowledge is part of specialized knowledge.

''The statutory definition provides little guidance on this specific issue, and it is for the agency in the first instance to formulate a rule that articulates whether and when cultural knowledge can be a relevant component of specialized knowledge,'' Millett wrote. ''It likewise is for the agency to articulate, if deemed appropriate, a line between, on the one hand, actual skills and knowledge derived from an employee's traditions and upbringing, and, on the other hand, the simple status of being from a particular region.''

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The D.C. Circuit also credited Fogo de Chao's argument that it was economically harmed by the petition denial, considering that it trains its chefs for 18 to 24 months and non-Brazilian chefs don't perform a majority of the duties the company requires.

The court said the AAO's consideration of the economic issue ''was infected by its legally erroneous, categorical dismissal of culturally acquired skills and knowledge.''

However, the court held that Fogo de Chao failed to prove that USCIS's decision on Gasparetto's petition was inconsistent with previous decisions or other precedent, and that 1990 changes to the INA's L-1B provisions make the specialized knowledge standard broad.

Evidence on Training Presented. The D.C. Circuit did agree with Fogo de Chao that the AAO improperly found that there wasn't evidence that Gasparetto had completed the required training, stating that the AAO's ''reasoning on this point is hard to understand.''

''While the substantial-evidence standard of review is generous, it is not boundless; it does not allow an agency to close its eyes to on-point and uncontradicted record evidence without any explanation at all,'' Millett wrote.

Fogo de Chao also challenged the AAO's conclusion that Gasparetto held the same position during his entire time with the company, and so either could perform the job of churrasqueiro without training or hadn't actually worked in a specialized knowledge capacity for a year before the company sought a visa.

The court said the record supports the argument that, while preexisting knowledge and skills allow for the performance of the required duties, the training still is necessary for the chefs to apply their skills in the company's business in international markets.

Finally, the D.C. Circuit found that Fogo de Chao failed to prove that the USCIS had prejudged its petition.

In dissent, Kavanaugh wrote that Fogo de Chao failed to show that Brazilian chefs possess skills that can't be taught to U.S. chefs in a reasonable period of time. ''Indeed, Fogo de Chao already employs *some* American chefs in its U.S. steakhouses, which belies Fogo's contention that Americans cannot do the job,'' he said.

''To maintain otherwise, as Fogo de Chao does, is to imply that Brazilian chefs are essentially born with (or somehow absorb during their formative years) a cooking skill that cannot be acquired through reasonable training, which seems an entirely untenable proposition,'' Kavanaugh wrote.

Carl W. Hampe of Fragomen, Del Rey, Bernsen & Loewy and Steve Chasin of Baker & McKenzie, both in Washington, represented Fogo de Chao. Gisela A. Westwater, Stuart F. Delery, Aram A. Gavoor and R. Craig Lawrence of the Justice Department in Washington represented the DHS.

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Text of the opinion is available at http://www.bloomberglaw.com/public/document/Fogo_de_Chao_Holdings_Inc_v_DHS_No_135301_2014_BL_294881_DC_Cir_O.