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FOGO DE CHAO V. DHS: A SIGNIFICANT DECISION FOR L-1B SPECIALIZED FOREIGN CHEFS AND BEYOND

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The best way for a great nation of immigrants such as America to showcase its richness and diversity is through fine ethnic restaurants. A better appreciation of different cuisines can also foster tolerance and social harmony. Cities and towns become more interesting and thrive if they have restaurants with diverse cuisines. For such restaurants to exist, though, there needs to be an immigration policy that would allow restaurants to access foreign specialty chefs. This unfortunately is not the case. The United States Immigration and Citizenship Services (USCIS) views applications for chefs under the limited and narrowly drawn nonimmigrant visa categories with a jaundiced eye. One such pathway for chefs is the L-1B visa for specialized knowledge employees who are being transferred from a foreign entity to a qualifying US entity. The Brazilian restaurant chain Fogo de Chao successfully brought in 200 specialty chefs on the L-1B visa, when the USCIS changed its mind and denied one of their visas. The restaurant appealed the denial.

On October 21, 2014, the United States Court of Appeals for the District of Columbia Circuit in *Fogo de Chao v. DHS*, No. 13-5301, skewered the USCIS for denying the L-1B visa to a Brazilian churrasqueiro or gaucho chef. Fogo de Chao contended that it sought to recreate for its customers in the United States an authentic churrascaria experience, and it did so by employing a number of gaucho chefs from Brazil who learned this style of cooking first hand by growing up in the Rio Girande do Sul region and through training and at least two years of experience in Fogo de Chao's Brazilian restaurants. A gaucho chef who possessed this knowledge would be capable of i) preparing and cooking five to six skewers of meat on an open grill; ii) circulating through the dining room to carve meats for guests; iii) educating those guests about both the cuts of meat being served and gaucho culinary and cultural traditions, and iv)

monitoring the estimated future demand for food over the course of the evening.

The key issue in *Fogo* was whether a foreign national chef could gain such specialized knowledge through one's own cultural traditions, upbringing or life experience. The USCIS, including its Administrative Appeals Office, held that one's own cultural upbringing falls within the realm of general knowledge rather than specialized knowledge, and thus such a chef would not qualify for an L-1B visa. The Court of Appeals in *Fogo* disagreed with the USCIS's rather wooden application of the law. (Many immigration practitioners like me will take great delight in the scolding given to the USCIS for being so wooden as we have experienced this tendency first hand!) The *Fogo* Court held that there was nothing in INA section 214(c)(2)(B) which precludes culturally acquired knowledge as a form of specialized knowledge. That INA section defines specialized knowledge in a rather circular way, as follows:

...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

A government agency's interpretation of an ambiguous statute is entitled to deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)*—often abbreviated as "Chevron deference". Most are deterred from seeking review of a "wooden" decision in federal court to challenge an erroneous decision of the USCIS because of the *Chevron* deference the court will give to the government's interpretation of a particular visa statutory provision. The *Fogo* Court gave no such deference because the USCIS regulation at 8 CFR section 214.2(l)(1)(ii)(D) merely parroted the statutory L-1B definition in the same circular manner, and a parroting regulation deserves no deference. *Gonzales v Oregon*, 546 US 243, 257 (2006). Instead, the Court applied the lower standard under *Skidmore v. Swift & Co*, 323 U.S. 134 (1944) where the weight accorded to an administrative interpretation or judgment "depends upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those facts which give it power to persuade, if lacking power to control." Even under the lower *Skidmore* standard, the *Fogo* Court held that the Administrative Appeals Office lacked the power to persuade that it could categorically exclude cultural knowledge as a basis for specialized knowledge.

Also noteworthy in *Fogo* was the government's dismissal of the relevance of the economic hardship the restaurant would suffer if it had to train another employee to perform the gaucho chef's proposed duties. The *Fogo* Court disagreed, emphasizing that economic inconvenience is sometimes the most concrete evidence that can be used to determine whether knowledge is specialized. According to the *Fogo*Court: "Consideration of evidence of this type provides some predictability to a comparative analysis otherwise relatively devoid of settled guideposts....That specialized knowledge may ultimately be a 'relative and empty idea which cannot have plain meaning'...is not a feature to be celebrated and certainly not a license for the government to apply a sliding scale of specialness that varies from petition to petition without explanation. Suddenly departing from policy guidance and rejecting outright the relevance of Fogo de Chao's evidence of economic inconvenience threatens just that." *Id.*at 28 (citations omitted).

Although *Fogo* applied to a Brazilian gaucho chef, it can arguably be applied to other occupations involving specialized knowledge. Skills gained through certain cultural practices may be relevant in determining specialized knowledge in other settings, such as Japanese management techniques. Similarly, acquiring deep knowledge in a particular software application through another employer can equip the L-1B visa applicant with specialized knowledge that can stand out in comparison to others. Moreover, demonstrating economic hardship as a way to prove specialized knowledge has gained more force after *Fogo*. The 1994 Puleo Memorandum was resurrected in *Fogo*, which endorsed a dictionary definition of the terms "special" and "advance" rather than solely tether specialized knowledge to the company's products or processes. *Fogo* has also paved the way to argue that the USCIS's interpretation of specialized knowledge does not deserve *Chevron* deference. Finally, *Fogo* ought to potentially have more precedential value than other circuit court decisions since under 28 U.S.C. §1391(e)(1)(B) a petitioner could seek review in the U.S. District Court for the District of Columbia as the Administrative Appeals Office is located in the District of Columbia.

In recent times, the USICS has had the upper hand in L-1B visa adjudications by literally reading specialized knowledge out of the statute. *Fogo* thus comes as a breath of fresh air and should hopefully temper the USCIS's zeal in "woodenly" debarring specialized knowledge workers who can otherwise bring great value to America. We all need to forcefully deploy the hidden nuggets in *Fogo*to

restore the more commonsensical definition of specialized knowledge.