IN PURSUIT OF "SPECIALIZED KNOWLEDGE"

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When one examines the many visa categories through which a foreign national may lawfully enter or remain in our country, certain values are immediately evident. Categories which allow foreign nationals entry through U.S. Citizen or Lawful Permanent Resident relatives bespeak the value our nation places on family unity. Categories which allow foreign nationals to stay due to persecution in their home country or domestic abuse in our own country, speak to our nation's humanitarian values. And, of course, categories that allow foreign nationals to enter through employer sponsorship speaks to the value our nation places on capitalism within its own borders, and on its competitiveness in the global marketplace.

As a nation of immigrants, we recognize that foreign nationals have much to contribute to our marketplace. It is this recognition of foreign talent that lent itself to the creation of the L-1B "specialized knowledge" visa, a visa designed so that multinational business owners—business people with offices abroad and in the United States (or those who wish to open an office in the United States)—can bring foreign workers with "specialized knowledge" of the business's product or process into the U.S. temporarily, so that its workers can perform the necessary specialized services in the U.S.

Unfortunately, however, for many businesses petitioning for the L-1B "specialized knowledge" visa, procuring the benefit has become a tedious battle. Petitioners are often required to provide evidence of facts that are irrelevant for the purposes of demonstrating specialized knowledge, or worse, denied visas for failing to demonstrate that specialized knowledge is required in cases where overwhelming evidence has demonstrated that such knowledge is necessary for the job.

For example, take one case where a petitioner was denied an L-1B "specialized knowledge" visa for its employee because it failed to demonstrate that working on its product required "specialized knowledge". In the denial, USCIS acknowledged that the company had a proprietary product and that the employee had knowledge of its proprietary product. However, USCIS stated that this failed to meet the definition of "specialized knowledge" because the company had failed to demonstrate that it was the only company in the industry that provided its service. To the reasonable person, such a denial seems absurd; such a policy could render obsolete the entire category of specialized knowledge and certainly undermines the capitalist values that inspired the L-1B "specialized knowledge" visa category in the first place. If the L-1B "specialized knowledge" category requires a showing that a business is the only one in the industry to provide a service, no business with a competitor would be able to transfer a worker to the U.S. under the L-1B "specialized knowledge" category. Coca-Cola would be unable to bring in a worker with knowledge of its proprietary product because Pepsi provides a similar service. A showing that an industry is the only one of its kind to provide a service is clearly not a requirement for showing "specialized knowledge", but,

unfortunately, denials for failing to demonstrate the existence of “specialized knowledge” are often the result of absurd interpretations of the L-1B “specialized knowledge” category requirements.

One cannot entirely fault USCIS officers, however, for their sometimes absurd interpretations of “specialized knowledge”. The definition of “specialized knowledge” has long been the subject of contention in court cases due to its ambiguity in the regulations at 8 C.F.R. §214.2(l)(1)(ii)(D), which define specialized knowledge as “[S]pecial 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”.

Legacy INS attempted, multiple times, to provide guidance to the term “specialized knowledge” identifying knowledge of a proprietary product as an indicator that specialized knowledge exists (*See Matter of Sandoz Crop Protection Corp,* 19 I&N Dec. 666 [Comm. 1988], and *Matter of Penner,* 18 I&N Dec. 49 [Comm. 1982]), especially where the employee’s duties relating to the proprietary product are “necessary in order for the company to remain competitive.” (*Matter of Colley*, 18 I&N Dec. 117 [Comm. 1981]). However, the regulatory definition of “specialized knowledge” (born of the Immigration Act of 1990) did not require proprietary knowledge as a prerequisite for L-1B classification. In 1994, James A. Puleo issued a memorandum attempting to delineate what it is that makes up “specialized knowledge”, and included such factors as “knowledge that is valuable to an employer’s competitiveness in the marketplace” and “knowledge of a product or process which (could not) be easily transferred or taught to another individual”. (*Memorandum on Interpretation of Specialized Knowledge* from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, CO 214L-P [March 9, 1994]). In 2002, a memorandum issued by Fujie Ohata gave a broad interpretation of the term, defining “specialized knowledge” as “a type of specialized or advanced knowledge that is different from that generally found in the particular industry.” (*Memorandum on Interpretation of Specialized Knowledge* from Fujie O. Ohata, Associate Commissioner, Service Center Operations, Immigration Services Division, HQSCOPS 70.6.1 (Dec. 20, 2002). In 2011, the Department of State again attempted to issue guidance as to how adjudicators of L-1B visa petitions should define specialized knowledge. Referencing the earlier INS cases, it identified proprietary knowledge of a product as an indicator that “specialized knowledge” exists, especially where knowledge “would be difficult to impart to another without significant economic inconvenience.” (U.S. Department of State, Cable, “Guidance on L Visas and Specialized Knowledge, Reference Document: STATE: 002106, 01/11” January 2011.)

Most recently, as this blog elaborated, in October 2014 the United States Court of Appeals for the District of Columbia Circuit came down hard on USCIS for its “wooden” application of the law in denying a chef an L-1B specialized knowledge visa. (*See Fogo De Chao (Holdings) Inc. v. U.S. Dept. of Homeland Security, et al.* No. 1:10-cv-01024 [Court of Appeals for the District of Columbia, Filed on 10/21/2014]). The *Fogo* court declined to give the USCIS decision “Chevron” deference as the regulations circularly parrot the statute, rather than provide a definition of “specialized knowledge”. It held that specialized knowledge could be obtained through deep immersion in a culture and also identified “economic hardship” as key in identifying where “specialized knowledge” exists. The *Fogo* decision, while helpful to practitioners seeking legislative support for a broader definition of specialized knowledge, also serves to highlight the desperate need for a more concrete definition of “specialized knowledge”.

United States Secretary of Homeland Security Jeh Johnson recognized the need for guidance in his November 20, 2014 Memo to USCIS Director Leon Rodriquez and USCIS Acting Director Thomas S. Winkowski, *Policies Supporting U.S. High-Skilled Business and Workers*. Specifically, Section D, “Bringing Greater Consistency to the L-1B Visa Program”, directs USCIS to “issue a policy memorandum that provides clear, consolidated guidance on the meaning of ‘specialized knowledge’,” and acknowledges the critical importance of the L-1B Visa Program for multinational

companies as an “essential tool for managing a global workforce as companies choose where to establish new or expanded operations, research centers, or product lines, ***all of which stand to benefit the U.S. economy*.”** (emphasis added).

As USCIS drafts its guidance it should take care to note the capitalist values that inspired the creation of this visa category. This category was created, as noted by Secretary Johnson, “to benefit the U.S. economy”. To woodenly interpret this category so as to rule out many qualified workers, to create unnecessary limitations, all of this would only serve to hurt our own economy and to limit our own country’s competitiveness in the global marketplace. The *Fogo de Chao* decision, which allows for a broader interpretation of specialized knowledge, provides a good reference point as to how to interpret “specialized knowledge”. The guidance should be clear so that there can be no more ambiguity for USCIS officers attempting to interpret “specialized knowledge”.

“Specialized knowledge” should be found to exist where an employer would incur significant economic loss in training another individual to do the work required of an employee. “Specialized knowledge” should be found where the work requires knowledge of a proprietary product. Even if a company does not have a proprietary product, specialized knowledge should be found where an employee’s knowledge may be uncommon or advanced, and need not be narrowly drawn within the company and reserved for a select few. Specialized knowledge should also be found where a company may not have a product, but has developed a unique methodology for delivering services to customers. The guidance should state unambiguously the long-standing USCIS rule that was reiterated in the aforementioned Ohata memo, that “there is no test of the U.S. Labor Market in determining whether an alien possesses specialized knowledge. Only an examination of knowledge possessed by the alien is necessary”. USCIS should be reminded that our country desires the services of qualified L-1B individuals and it should be encouraged to interpret “specialized knowledge” broadly, so as not to preclude workers who qualify to benefit our country under this category. Essentially, a foreign national should be found eligible for the L-1B visa where it can be shown that the person’s set of skills or knowledge is complex, and has contributed to the success of the foreign entity, and will be replicated in the United States on this person’s transfer.

The United States of America takes great pride in its capitalist ideals, and strives to be the most competitive nation on earth. The L-1B visa allows the United States to do just that. USCIS should ensure that its guidance with relation to the L-1B “specialized knowledge” visa category comports with our nation’s values.

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