CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

WHAT KISOR V. WILKIE MEANS FOR AUER DEFERENCE AND USCIS'S INTERPRETATION OF ITS REGULATIONS RELATING TO H-1B VISA PETITIONS

Posted on December 20, 2019 by Cyrus Mehta

By Cyrus D. Mehta and Sonal Sharma*

In Wilkie v. Kisor, the Supreme Court issued a significant decision regarding whether courts should still be paying deference to the government's interpretation of its own regulations. Here's some background on how we got to this deference standard.

Over 35 years ago, the Supreme Court established a two-step analysis in *Chevron USA Inc. v. Natural Resources Defense Council* for evaluating whether an agency's interpretation of a statute it is entrusted to administer is lawful. Under Step One, the court must determine whether Congress has clearly spoken to the precise question at issue in the plain terms of the statute. If that is the case, there is no need for the reviewing court to delve any further. Under Step Two, if the statute is silent or ambiguous, the reviewing court must determine whether the agency's interpretation is based on a permissible construction of the statute. A permissible interpretation of the statute need not be the best interpretation or even the interpretation that the reviewing court would adopt. Step Two is commonly known as *Chevron* deference where the reviewing court grants deference to the agency's permissible interpretation of an ambiguous statute.

In *Auer v. Robins*, the Supreme Court held that the same Chevron type of deference applies to the agency's interpretation of its own regulations. However, even under the *Auer* concept of deference, which gives federal agencies the right to interpret their own regulations.

It was thought that *Kisor* would strike the death knell for the *Auer* deference,

but instead, the plurality provided more guidance on how to apply *Auer* and under what circumstances may a court not pay deference to the agency's interpretation of its regulations notwithstanding *Auer*. The *Kisor* court opinion holds that the *Auer* doctrine "*is potent in its place, but cabined in its scope*". Specifically, Justice Kagan noted that "*this Court has cabined Auer's scope in varied and critical ways-in exactly that measure, has maintained a strong judicial role in interpreting rule*." During oral arguments, Justice Gorsuch identified concerns of particular regulated classes such as "immigration lawyers" because it allows agencies to adopt binding interpretations without prior notice to the regulated entities. Justice Gorsuch touched the point at the heart of the opposition of *Auer* deference by noting that it comes in the way of courts performing their duty entrusted upon them under the Administrative Procedure Act (APA) "to 'decide all relevant questions of law' and 'set aside agency action'". Despite the doubts, the Court decided that *Auer* deference is not "unworkable" and hence not required to be abolished entirely. However, it is required to be confined in its application.

The question before the Supreme Court was how much weight courts should give to an agency's interpretation of its regulations. *Auer deference* rests on the presumption that even though not explicitly assigned, Congress intended that government agencies interpret regulations that have been crafted to implement the statute.

What happens when such a regulation itself is ambiguous? Who gets to decide what it means. For long, it has been established under *Auer* that administrative agencies are better suited to interpret such ambiguous gaps in their own regulations based on their "substantive expertise in the subject matter".

In *Kisor*, Justice Kagan noted that *the Supreme Court in Seminole Rock* (which later became *Auer* deference) declared that *" hen the meaning of is in doubt," the agency's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."*. Justice Gorsuch concurring in the opinion noted that under the APA, the courts are directed to "*determine the meaning of the any relevant agency action including any rule issued by the agency*". He further noted that under *Auer* deference, a court "*adopts something other than the best reading of a regulation*". Critics of *Auer* deference have said that it takes away the fundamental authority of the court to decide what the actual interpretation of the law is. Under *Kisor*, the Supreme Court announced that *Auer* deference is now a "general rule" which will need analysis and scrutiny before it applies in a

case.

The Supreme Court essentially "cabined the scope" of *Auer* deference, and set forth a three-step approach under *Kisor*. The court must determine that (i) the regulation is "genuinely ambiguous"- the court should reach this conclusion after exhausting all the "traditional tools" of construction; (ii) if the regulation is in fact genuinely ambiguous, whether the agency's interpretation is reasonable; and (iii) even if it is a reasonable interpretation, does it meet the "minimum threshold" to grant the *Auer* deference requiring the court to conduct an "an independent inquiry" into if (a) it is an authoritative or official position of the agency; (b) it reflects its substantive expertise; (c) if the agency's interpretation of the rule reflects "its fair and considered judgment".

What kind of impact will *Kisor* have on challenges to recent USCIS denials?

There has been a surge in denials of H-1B petitions mostly on the basis that either the position doesn't qualify as a specialty occupation or there is no employer-employee relationship because the beneficiary is placed at the third-party client location. AILA had filed an amicus curie brief in *Kisor* highlighting how *Auer* deference allows the agency to "circumvent the critical requirements of APA" especially by just changing the standards of review or interpretation of the regulations without public notice and comments. It also brought to the attention of the Court that *Auer* deference has been followed by courts, challenging the agency's arbitrary decisions, so liberally that the courts deferred to the agency interpretation "based on nothing more than a brief filed in court, a letter posted on a website, or an internal memorandum sent to agency staff." USCIS has been adopting a new interpretation of the regulations by just issuing internal memos and under the earlier deference standard, the courts have been allowing and accepting such interpretations.

Under the new *Auer* deference standard set forth in *Kisor*, a federal court will need to assess if that is the authoritative/official position of the agency. Because of these recent developments, it will be interesting to see how the agency will respond to the question regarding what has been their official position in approving these H-1B petitions for decades and how it has now changed without any change in the statute or regulations. All the recent policy memos shifting the USCIS's position are not aligned with its prior statements, memos, and opinions. One example of such a shift is the memo issued in February 2018 relating to third-party worksites placements. The policy has been

analyzed in detail in an earlier blog post here. With the issuance of this memo, USCIS rescinded three earlier memos, which provided guidance relating to supporting documents for H-1B petitions and also the itinerary requirements for the petitions involving more than one location. The USCIS issued this memo to be read as a supplementary guidance to the Employer-Employee Memo of 2010.

As to itineraries in case of placement at a location more than one, 8 CFR 214.2(h)(2)(i)(B) reads as follows:

> *Service or training in more than one location*. A petition which requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office which has jurisdiction over I-129H petitions in the area where the petitioner is located. The address which the petitioner specifies as its location on the I-129H petition shall be where the petitioner is located for purposes of this paragraph.

While interpreting the above mentioned regulation, the Itinerary memo of 1995 was issued which clearly stated that "since the regulation does not require that the employer provide the Service with the exact dates and places of employment" and that the "he itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States".

The Service followed this interpretation of the regulations for more than two decades. Precipitously, in February 2018, the USCIS issued the above mentioned new policy memorandum superseding the 1995 memo. Interestingly, the new February 2018 memo also interprets the same regulations quoted above and notes that "here is no exemption from this regulatory requirement. An itinerary with the dates and locations of the services to be provided must be included in all petitions that require services to be performed in more than one location, such as multiple third-party worksites. *The itinerary should detail when and where the beneficiary will be performing services*". (Emphasis added)

There is clearly a stark difference in the approach of the two memos interpreting the same regulations. The 2018 memo has already been challenged in court. *See IT Serve Alliance v USCIS*. It will be noteworthy if the Service would rely on *Auer* deference on this issue. Apparently, in their

supplemental response brief in this litigation, the USCIS raised an argument of *argumentum ad antiquitatem* which means "this is right because we've always done it this way". Does it mean that the USCIS essentially invoked the *Auer* deference (even if not in clear terms) arguing that this is agency practice to interpret its own regulations even if it is in contrast to its previous interpretation? Under the new standard, the court will have to make an independent inquiry as to reasonableness of the interpretation especially in this case when under the garb of it being an interpretive rule, the agency has tried to promulgate a legislative rule, which amends and adopts a new position inconsistent with the existing regulations. Under the new *Kisor* standard, the court will be equipped to delve into these inquiries and make a determinative finding if the deference is warranted.

With the surge in H-1B denials, there is also a rise in federal litigation challenging USCIS's arbitrary interpretation of the regulations. One such case is *Flexera Global Inc. v. USCIS*, in which the plaintiff has sued USCIS after receiving multiple short-term approvals. USCIS has been rigidly enforcing an itinerary requirement relying on the February 2018 memo to issue approvals ranging from only a few months or weeks to even a few days (as short as one (1) day), despite requesting a full three-year validity period as allowed under the regulations. USCIS filed a motion to dismiss in this case asking the court to rule if under the regulations USCIS has the authority to issue short-term H-1B approvals and whether it needs to explain itself when doing so. USCIS has relied on 8 C.F.R. § 214.2(h)(9)(iii)(A)(1), which authorizes the agency to approve a petition for "up to three years". The regulation reads as follows:

> *H-1B petition in a specialty occupation*. An approved petition classified under section 101(a)(15)(H)(i)(b) of the Act for an alien in a specialty occupation shall be valid for a period of up to three years but may not exceed the validity period of the labor condition application.

USCIS has argued that when reasonably interpreting "up to three years" in the regulations, it has the authority to issue approval less than three years based on the evidence submitted by the petitioner as to period of the specific work assignments.

The plaintiff in response to a motion to dismiss has argued that the plain language of the regulations requires the agency to approve the petition for full three years. It can only be less than three years when granting three years will

exceed the validity of the labor condition application. In 1998, USCIS proposed a rule, *Petitioning Requirements for H Nonimmigrant Classification, 63 Fed. Reg. 30419*, in an attempt to codify the prohibition on speculative/non-productive status through notice and comments rulemaking. It abandoned the proposed rule when Congress essentially denied its regulatory approach by passing the American Competitiveness and Workforce Improvement Act of 1998 ("ACWIA"), Title IV, Pub. L. 105-277 (October 21, 1998) codified at INA 212(n)(2)(C)(vii)(III).

Plaintiff has also argued that the requirement of demonstrating a specific work assignment for the requested validity is contradictory to INA 212(n)(2)(C)(vii)(III), which fixed the benching problem by expressly requiring employers to pay the prevailing wage to workers whether or not they are in productive status. Congress unequivocally entrusted DOL with the authority enforce the non-productive status provision through enforcement actions against employers.

The response to motion to dismiss also highlights a practical problem these short approvals are creating for the families of the H1-B beneficiaries which definitely was not the intention of the Congress. So, requesting specific work assignment evidence for a specific duration defies the Congressional mandate acknowledging the non-productive periods and DOL's authority to regulate it.

Hence, USCIS practically has requested the court to defer to its interpretation of the above referenced regulation. However, under *Kisor* now, the court will delve into three-prong test explained earlier in the post.

There are numerous examples where USCIS has either have issued policy memos contradictory to its earlier position or have attributed a new interpretation to the regulations, which is inconsistent with its long-standing practice. Another example is "employer-employee relationship" issue.

The 2010 Employer-Employee memo referred to 8 CFR 214.2(h)(4)(ii) noting that the regulations do not provide enough guidance on definition of employer-employee relationship. It is worth noting here that the regulations does provide a regulatory definition of an "Employer" at 8 C.F.R. 214.2(h)(4)(ii). The memo also specifically states that USCIS interprets it to be "conventional master-servant relationship as understood by common-law agency doctrine". Despite the clear definition in the regulations and the agency's official position that the common law standard applies, the agency has been interpreting the regulations much more restrictively and has been issuing the denials based on the lack of evidence of employer employee relationship even when it meets the

standard mentioned in the regulations and common law. If USCIS will raise the *Auer* deference for the restrictive interpretation of the regulatory definition of "employer", the court will have to go into a deep analysis of the regulations first to see if the definition of "employer" is ambiguous. Given the fact that the regulations recognize the possibility of employment at more than one location, argument that it is ambiguous as to the third party placement would not fly.

Under the new framework applicable for *Auer* deference, "Agency consistency" will play an important role. It will be hard for USCIS to explain how it has been changing its long-standing position and interpretation of the regulation without any statutory basis.

The regulated entities such as employers of H-1B workers have been deeply impacted by the earlier approach as it takes away the transparency from the process and deprives them of regulatory stability to plan for their business activities. For example, an H-1B holder has been working with a company for the last 10 years as software developer, which USCIS has long considered a specialty occupation. Suddenly, without any change in the statue or regulations and in blatant contrast to its earlier interpretation of the regulations under which it has approved multiple petitions for this candidate establishing that position of software developer qualifies as a specialty occupation, denies the petition declaring it not a specialty occupation. If that decision is challenged before the court and USCIS raises the *Auer* deference, the court now will first look at the definition of the "Specialty Occupation" and the criteria laid down in the regulations. At first step itself, the USCIS will have a challenge explaining the denial because the USCIS Adjudicator's Field Manual ("AFM") 31.3 (g) provides:

> lthough the definition of specialty occupation is included in the statute itself and the regulations are specific regarding the criteria for determining what qualifies as a specialty occupation...

Keeping this in mind coupled with the earlier decisions approving the same position as the specialty occupation, the court will now assess that if the statue and the regulations are not "genuinely ambiguous" then it should be interpreted "as is". Even if USCIS can pass muster at the first step and second step of reasonableness, it will be troublesome for USCIS to justify the third step of the analysis, where the a court will take into consideration if it is an authoritative or official position of the agency; (b) it reflects it substantive expertise; (c) if the agency's interpretation of the rule reflects "its fair and

considered judgment". As discussed in a prior blog, 8 C.F.R. § 214.2(h)(4)(iii)(A) combined with INA 214(i)(1) clearly provides a broader definition of specialty occupation. The definition and requirements for qualification as specialty occupation has been analyzed by the courts in multiple cases such as *Tapis International v INS*, 94 F. Supp. 2d 172 and *Residential Finance Corp. v. USCIS*, 839 F. Supp.2d. 985(S.D. Ohio 2012). Despite the fact that the four criteria's are in alternative, USCIS has been interpreting and applying the regulations in an erroneous way. The regulations nowhere mention that a bachelor's degree in a specific specialty is a "must". Rather, the regulations specifically mention that it is "normally" required or is a "common" requirement. If the USCIS were to raise *Auer* deference as to their interpretation of regulatory language "normally" or "common" to mean, "must", the court will not defer to the agency's interpretation of their own language. In most likelihood, under the first step of the *Kisor* analysis, the court will be able to establish the regulations are not ambiguous. It is as clear as it can be. Under the second step, it will be stimulating to see how the Service will justify the reasonableness of inventing a new meaning of simple words that gives away the legislative intent with the plain dictionary meaning.

A great example of a federal court applying *Kisor* in an immigration case is the recent Fourth Circuit decision *Romero v Barr*. The court in *Romero* overturned *Matter of Castro-Tum* where the Attorney General had issued an opinion that the IJ's and BIA do not have the authority under the regulations to close the cases administratively. The court first held the plain language of 8 C.F.R. §§ 1003.10(b) and 1003.1(d)(1)(ii) unambiguously confers upon IJs and the BIA the general authority to administratively close cases such that an Auer deference assessment is not warranted. Even if these regulations are ambiguous, the court citing *Kisor* noted that *Auer* deference cannot be granted when the new interpretation results in "unfair surprise" to regulated parties especially when agency's current "construction "conflict with a prior" one." The *Romero* court further identified that "*an agency may—instead of issuing a new interpretation that conflicts with an older one—set forth an interpretation for the first time that is contrary to an established practice to which the agency has never objected*." *Romero v Barr* is a great example of how and to what extent *Kisor* has narrowed the *Auer* deference restoring the authority of the court to analyze in detail if deference is warranted to agency interpretation. Specifically towards the "Agency Consistency" the court noted, "*numerous petitioners have relied on this*

long-established procedural mechanism to proceed through the immigration process. To suddenly change this interpretation of the regulation undermines the significant reliance interests such petitioners have developed".

Another case where the court has cited *Kisor* standard is *Sagarwala v L Francis Cissna*,. The court seemed to have dived straight into the second step of reasonableness deciding that such interpretation is "typically entitled to judicial deference" citing *Auer v Robins*. It appears that the court deferred to agency interpretation because it was not "plainly erroneous or inconsistent" with the regulations. Eventually, the court cited *Kisor* and agreed that the agency decision is "fair and considered judgment" under *Kisor* standard. The court noted "both the statutory and regulatory definitions of "specialty occupation" state that the position at issue must require the "attainment of a bachelor's or higher degree in specific specialty." It is important to note that the complete text in INA is attainment of a bachelor's or higher degree in a specific specialty *or its equivalent*. We have previously analyzed here that how USCIS does not consider the interpretation of "or its equivalent" as interpreted by the courts. At core of this case was whether the education requirements of the position were too broad. Perhaps, the plaintiff could not justify the requirements, which led the court to decide that USCIS reading is a reasonable one. Even if the result would have been same, it appears that the court did not conduct a comprehensive inquiry into the issue as required by the *Kisor* standard.

Further, the court in *Sagarwala* just assumed that the agency has the "substantive expertise". It would have been true under *Auer* deference; however, we believe that *Kisor* changes that notion. Now, if the court has to delve into specific inquiry about the ambiguity of the regulations and the reasonableness of the interpretation, we believe that it also will be under court's purview to assess if the agency truly has the substantive expertise, not generally as the regulating agency but on the specific technical requirements of the position to determine if the position is "complex enough" under one of the specialty occupation criteria especially when the agency always resort to discretion on a case to case basis.

We believe that under the *Kisor* standard, it will be hard for USCIS to argue that it has the substantive expertise over an opinion of an expert - in most cases a professor who has decades of experience in teaching and consulting in the specific field. In most cases, the USCIS wrongly disregards the opinion of a well-established expert with expertise through decades of years of demonstrated

relevant experience, research, and study in contravention of the AAO decision in *Matter of Skirball Cultural Center, ID 3752, 25 I&N Dec. 799 (AAO 2012)*, where it held that uncontroverted testimony of an expert is reliable, relevant and probative as to the specific facts of the issue. In fact, it does so without providing a cogent reason to reach the conclusion that the expert's review of the duties of the position was "limited". Often times, USCIS while disregarding the Expert Opinion relies on that the fact because the Expert did not visit the location and has only relied on the materials provided by the employer, the opinion is not credible enough. Under the Federal Rules of Evidence, Rule 702, a witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if:

1. The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
2. The testimony is based on sufficient facts or data;
3. The testimony is the product of reliable principles and methods; and
4. The expert has reliably applied the principles and methods to the facts of the case.

It is interesting to note that under these federal rules, an expert may base his/her opinions on facts or data that he has been made aware of (like providing detailed job duties to the expert for H-1B petitions) or upon using reliable principles and methods (like an expert's extensive knowledge and experience in the field). According to the USCIS that is not a good enough standard for an expert professor to opine on whether the duties and job responsibilities of the position would require having the knowledge that is generally imparted through a bachelor's degree in a specific field. Under the *Kisor* standard, the court should be able to analyze whether the expert opinion based on the detailed information provided by the employer is credible and sufficient to rule that the Expert has the substantive expertise on the matter than the agency where the adjudicating officer might not have the technical background to assess whether the duties are complex enough to meet the statutory and regulatory requirements.

Further, how will it justify the "fair and considered judgment" prong in *Kisor* when the agency blatantly disregard all the evidence presented under all the four regulatory prongs at 8 CFR 214.2(h)(4)(iii)(A) that establish a specialty occupation even though only one of the four criteria need to be met?

Under the 'Buy American Hire American' Executive Order, USCIS has been issuing new policies, based upon their current interpretation of regulations. The common denominator in challenging all these policy memos is that the regulations have not changed. Another example of a policy shift despite no change in statue or regulations is the new RFE and NOID memo. 8 CFR 103.2(b)(8) provides discretion to the adjudicating officer to issue RFEs and NOIDs in appropriate circumstances, OR to issue a denial without first issuing an RFE or a NOID in some circumstances. It is significant to note that the regulations (8 CFR 103.3(a)(i)) specifically mention that the *discretion* is not unfettered and the officer shall explain in writing the specific reasons for the denial. The regulations mention that the applicant or petitioner has to demonstrate the eligibility of the requested immigration benefit and demonstrating eligibility means each benefit request must be properly completed and filed with all initial evidence required by applicable regulations and other USCIS instructions. It also clarifies that the Burden of Proof lies with the applicant/petitioner to prove qualification for the requested benefit.

In June 2013, after the OIG published report requesting clarification as to when an RFE has to be issued, USCIS issued a memo clarifying to issue RFE or NOID unless denial is warranted by the statute. Under the 2013 memo, the emphasis was- an RFE is not to be avoided; it is to be used when the facts and the law warrant- to ask for more information and as to standard of discretion, it clarified that *if totality of the evidence submitted does not meet the applicable standard*- the officer should issue an RFE unless he or she determines there is *no possibility* that additional evidence available to the individual might cure the deficiency. The effect of the policy memo was only statutory denials could be issued without RFE. In July 2018, USCIS issued a new policy memo governing these issues, which superseded all earlier memos. The major turnaround on the policy under this memo was to restore the full discretion of the adjudicating officer to deny the cases not only when warranted statutorily but also due to a lack of initial evidence. It will be rousing to see if challenged in court how would USCIS defy that they have been reading and applying the regulations in a certain way and then suddenly decide to interpret it in a more restrictive way.

It is clear that the USCIS has been trying to override the legislative power of creating the law through expansive and erroneous interpretations of its own regulations rather than the delegated authority of implementing the law passed by the Congress. Multiple cases have been filed on grounds that USCIS

has abused its discretion and the authority under the *Auer* deference by issuing inconsistent guidance and raising the evidentiary standards. If the agency will rely on the *Auer* deference in future H-1B litigation, plaintiffs who challenge denials should definitely invoke *Kisor,* which hopefully will create an uphill battle for the agency to fight and justify the change in its interpretation of a regulation as not just reasonable but also official, consistent, fair and considered. Our blog has provided potential plaintiffs with an overview on how to invoke *Kisor* in limiting *Auer* deference when seeking review in federal court over arbitrary H-1B denials.

** Guest author Sonal Sharma is a Senior Attorney at Jethmalani & Nallaseth PLLC in New York. Her practice involves both temporary nonimmigrant visa and permanent employment cases. She represents and advises clients – medium to large multinational corporate entities – from a wide variety of industries on intricate and comprehensive immigration matters.*