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News & Types: Immigration Update

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Practices: Immigration

COURT OF APPEALS REVERSES AND REMANDS FOGO DE CHAO L-1B CASE

A legal battle over the delineation of what constitutes "specialized knowledge" one of the requirements of the L-1B Intracompany Transferree work visa as it applies to specialty chefs reached a culmination recently with the U.S. Court of Appeals for the DC Circuit reversing the U.S. District Court's ruling in favor of the Department of Homeland Security and remanding the case for further adjudication. The case stems from a 2010 denial by the US Citizenship and Immigration Services Vermont Service Center of an L-1B petition filed by the Brazilian-themed Fogo de Chao chain of steakhouses for a gaucho chef, Rones Gasparetto.

The L-1B Intracompany Transferee visa allows foreign workers with specialized knowledge to be transferred to the United States to work at a U.S. entity that is affiliated with the worker's foreign employer. Unfortunately, this visa classification suffered disproportionately from the recession that hit the United States in 2008 as U.S. workers lost their jobs, it became increasingly difficult for U.S. companies to transfer foreign workers to the United States. A report released in March 2014 by the National Foundation for American Policy, a non-profit, non-partisan research organization cited the many misfortunes of the L-1 Program. For example, although no new rule-making or laws had been enacted for the L-1B program, the USCIS denied 34 percent of L-1B petitions in Fiscal Year 2013, up from six percent in Fiscal Year 2006. The report also provided data on the USCIS rates for issuance of Requests for Evidence (RFE). The USCIS rate, which had been at 10 percent, rose abruptly in 2008 to almost 50 percent. This rise coincided with the collapse of the U.S. economy. Remarkably, the figure continued to climb to 63 percent in fiscal year 2011 and remained at a robust 43 percent and 46 percent for fiscal years 2012 and 2013, respectively. Certain countries and industries were more adversely affected than others, for example, petitions requesting L-1B status on behalf of Indian nationals had a denial rate of 0.9 percent in fiscal year 2007 rising to 22.5 percent in fiscal year 2009.

The Fogo de Chao litigation is a clear example of the unpredictability of USCIS adjudication. For example, prior to the denial of the company's L-1B petition for Gasparetto, the USCIS had approved over 200 approvals from 1997 to 2006 for other Fogo de Chao gaucho chefs. In its denial, among other factors, the USCIS indicated that cultural skills, such as an individual's cultural background and experience in cooking traditional ethnic meals did not constitute specialized knowledge. The Court of Appeals rejected this severe definition of specialized knowledge and scolded the Administrative Appeals Office (the DHS appellate body) for ignoring documentation that Gasparetto had completed the Fogo de Chao training program in Brazil which served to support the assertion that Gasparetto gained specialized knowledge that could only be obtained in Brazil at the

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foreign employer. This case is a breath of fresh air for immigration counsel and stakeholders that have been receiving denials on cases that were previously approved without an RFE including extensions of stay where the USCIS completely ignored its prior adjudications and there were no changes from the original petition.

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