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Immigration Update: Visa Waiver Program Increases Security Through ESTA; Culturally Acquired "Specialized Knowledge" May Be a Route to L-1B

Authors: Melanie Colvert Walker

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Snapshots of both big picture and meaningful small-scale developments in the world of immigration.

This month: More questions for travelers, and carving through the definition of "Specialized Knowledge" for Brazilian chefs

Visa Waiver Program Increases Security Through ESTA

The Department of Homeland Security (DHS) recently implemented security measures for the application for Electronic System for Travel Authorization (ESTA) required for those traveling to the United States under the Visa Waiver Program (VWP). ESTA was implemented in August 2008 to add security to the VWP whereby the U.S. Customs and Border Protection (CBP) can conduct security vetting of prospective VWP travelers to assess security or law enforcement risk before the traveler boards an airplane heading to the United States. The enhancements and additional fields on the ESTA application are designed to more accurately screen and identify security risks and include these additional questions: Other Names/Aliases or Other Citizenship(s); Parents' name(s); National Identification Number; Contact Information (email, phone, points of contact); Employment Information; and City of Birth. Those with a currently valid, approved ESTA application do not need to reapply, but will need to do so upon expiration of the current ESTA or upon expiration of the underlying passport. The existing ESTA fees are not expected to increase.

Travelers should take their responses seriously and answer thoroughly and truthfully. Certain fields have flexibility to allow for an "unknown" response, but all mandatory fields must be completed. CBP cautions that "[i]f erroneous information is entered this will not result in an automatic denial, but it may require manual adjudication and additional time." Of more critical importance is that any answers given on an ESTA application may later be compared to answers provided in subsequent immigration or related government filings and inconsistencies or inaccuracies could result in severe consequences.

For the full release and FAQs on the new ESTA see: <http://www.cbp.gov/travel/international-visitors/esta/enhancements-to-esta-faqs>

Culturally Acquired "Specialized Knowledge" May Be a Route to L-1B

Can you become a specialized knowledge worker based purely on knowledge cultivated in your traditions, culture and upbringing? The U.S. Court of Appeals for the D.C. Circuit found that prohibiting consideration of culturally-based skills to fulfill the "specialized knowledge" requirement for L-1B classification was in error, reversing and remanding the district court's entry of summary judgment. The *Fogo de Chao* decision, issued October 21, 2014, involved the national restaurant chain's practice hiring of Brazilian gaucho chefs, "churrasqueros," in the United States under the L-1B intracompany transferee classification. The L-1B category provides a temporary nonimmigrant visa for an individual who was employed continuously by a company abroad in a managerial, executive or specialized knowledge role for at least one year (in the last three years preceding the application) and seeks to continue working for the company (or an affiliate) in the

United States in a managerial, executive or specialized knowledge role. (L-1A classification applies to managers and executives while L-1B applies to specialized knowledge workers). After previously granting more than 200 of Fogo de Chao's L-1B applications for its churrasqueiros, the United States Citizenship and Immigration Service (USCIS) denied the L-1B application for a Brazilian chef, Mr. Rones Gasparetto. Although there was discussion of whether the training and qualifying year of employment abroad had been met, the crux of the decision and resulting appeal was whether the culturally unique culinary skills acquired through tradition and life experience of the chef could be enough to constitute "specialized knowledge."

The D.C. Court of Appeals, after analyzing the statutory, regulatory and even dictionary definitions of specialized knowledge and looking at the integral role these particular chefs bring to the Brazilian steakhouse business and the skills unique to the churrasqueiros vital to its success, determined that although status of being from a culture or region is not enough to constitute knowledge, "nothing in the regulations or previous guidance explains why information knowledge, experience, and skills that would otherwise be considered specialized, lose that status just because they were originally acquired through one's upbringing, family traditions, and life experience outside the workplace."

The L-1 classification, specifically the L-1B, has become increasingly challenging for employers to successfully navigate due to the frequent and extensive Requests For Evidence USCIS has been known to issue. This case provides a useful tool in tackling what may be considered "specialized knowledge" even if you aren't an employer who plans to serve large skewers of various meats.