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CONTENTS

AN OVERVIEW OF THE CHANGING DEFINITION OF SPECIALIZED KNOWLEDGE

MINOR CRIMINALITY A BIG HEADACHE FOR INTERNATIONAL BUSINESS

ITALY AND MALTA AND MIGRATION, THE TENSION BETWEEN HUMAN RIGHTS, RESCUE AT SEA AND HUMAN TRAFFICKING IN THE MEDITERRANEAN

EFFECT OF THE WHTI ON THE RIGHT OF CANADIAN-BORN INDIANS TO FREE ACCESS TO THE UNITED STATES

An Overview of the Changing Definition of Specialized Knowledge

By: Kate Kalmykov[1]

Over the past year, there has been a rise in the number of Requests for Evidence ("RFEs") and denials issued by the United State Citizenship and Immigration Service ("USCIS") for L-1B visas. In July, the Administrative Appeals Office (AAO) issued an unpublished decision[2] that restricted eligibility for the L-1B category causing alarm amongst employers.

The L-1B classification is available to companies that seek to transfer employees with specialized knowledge of their operations to the United States.[3] The L-1 category was created by Congress in 1970 to

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[2] United States Citizenship and Immigration Service, Administrative Appeals Office, WAC-07-277-53214, July 22, 2008

[3] INA §101(a)(15)(L)

facilitate international business by permitting the transfer of non-U.S. managers and executives (L-1A) or foreign nationals in a specialized knowledge capacity (L-1B) to the U.S. by companies with operations in the U.S. and abroad.[4] The manager, executive or foreign national with specialized knowledge being transferred must have been employed abroad continuously for one year within the three years just before applying for admission to the U.S. Additionally, the foreign employer must be a parent, subsidiary, branch or affiliate of the U.S. company to which he/ she is being transferred. Finally, he/ she must intend to work in a managerial, executive or specialized knowledge capacity for the related U.S. entity.

The L-1B worker is allowed to remain in the U.S. up to five years in the specialized knowledge category. This classification is often attractive to companies as there is no limit to the number of L-1B visas issues annually, as there is with the H-1B category. Additionally, employers do not have to file a labor certification application with the U.S. Department of Labor ("DOL"), meet a prevailing wage requirement or make attestations to the DOL regarding working conditions, wages and employment terms. Moreover, the L-1 category permits "dual intent," allowing employers to file for permanent residency for foreign nationals without jeopardizing their nonimmigrant status. The flexibility of this category not only allows multinational businesses to transfer key employees to the U.S., but it also promotes business expansion and investment in the U.S.

One of the most difficult aspects of preparing an L-1B case is to determine what is "specialized knowledge" and whether the transferee possesses it. In the 1980's the term was quite restrictive. In 1983, the regulations stated that specialized knowledge was "uniquely and narrowly held" knowledge related to the petitioner's product, service, management or "other property interests not readily available in the job market." In 1987, the "uniquely and narrowly held" clause was removed from the regulations. In 1988, the precedent decision Matter of Sandoz Crop Protection Corp., held that an employee with specialized knowledge was considered to be a "key person with materially different knowledge and expertise which are critical for performance of the job duties; which are critical to, and relate exclusively to, the [employer's] proprietary interest; and which are protected from disclosure through patent, copyright, or company policy."[5]

In 1988, in response to Sandoz, the legacy INS issued a policy memorandum written by Associate Commissioner Richard Norton relaxing the specialized knowledge standard.[6] In the Norton Memo, the INS acknowledged that the agency's interpretations may have been "more restrictive than Congress or the Service intended."[7] The Norton Memo, set forth a much broader interpretation stating that an employee would be eligible for this visa classification if "special knowledge possessed by an employee [that] is different from or surpasses the ordinary or usual knowledge of an employee in the particular field."[8] In addition, the Norton Memo provided examples of characteristics that a

[4] *Id.*

[5] Matter of Sandoz Crop Protection Corp., 19 I & N Dec. 66 (Comm'r May 20, 1988).

[6] Memorandum, "Interpretation of Specialized Knowledge Under the L Classification," Richard Norton, Associate Commissioner, INS Office of Examinations, CO 214.2 L-P (October 27, 1988)

[7] *Id.*

[8] *Id.*

specialized knowledge employee would possess which include:

- Possessing knowledge that is valuable to the employer's competitiveness;
- Uniquely qualified to contribute to the U.S. company's knowledge of foreign operating conditions;
- Served as a key employee abroad with significant assignments enhanced the employer's productivity, competitiveness, image or financial position; and
- Possessing knowledge that can only be gained through extensive experience with the employer.[9]

In response to restrictive interpretations imposed on the L-1B classification in the 1980s, Congress significantly relaxed the specialized knowledge definition in the 1990 Immigration Act ("IMMACT 1990"). The current statute defines an employee with specialized knowledge as one that has *"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."*[10] Following enactment of IMMACT 1990, legacy INS and its successor USCIS issued a series of policy memorandums that recognized what Congress had done and provided guidance on factors that should be considered in a more "liberal" interpretation of the term "specialized knowledge."

In 1994, the Acting Executive Associate Commissioner of the INS, James Puleo issued a memorandum entitled "Interpretation of Special Knowledge"[11] which states that specialized knowledge exists when the alien *"possesses knowledge, which, normally, can be gained only through prior experience with that employer"* or the employee *"possesses knowledge of a project or process which cannot be easily transferred or taught to another individual."*[12] It further explains that the L-1B regulations do not require that advanced knowledge be held narrowly in the company but rather only that the knowledge is advanced. The Puleo Memo concludes by stating that an L-1B transferee possesses "knowledge of the foreign firm's business procedures or methods of operation to the extent that the United States firm would experience a significant interruption of business in order to train a United States worker to assume those duties."[13]

Commissioner Puleo's position was reiterated in a 1996 Department of State (DOS) cable which added that specialized knowledge is considered to be "knowledge that is not general knowledge held commonly throughout the industry" although, "knowledge held widely within the company does not preclude it from being specialized."[14] The cable also noted that the beneficiary did not have to work for a lengthy period of time with the sponsoring employer in order to gain specialized knowledge. Specifically, the cable stated the "significance of experience does not necessarily equate to length of experience," rather applicants can still qualify for the

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[9] *Id.*

[10] INA §214(c)(2)(B)

[11] Memorandum on Interpretation of Special Knowledge from James A. Puleo, Acting Executive Associate Commissioner, Office of Operations, CO 214 L-P (March 9, 1994)

[12] *Id.*

[13] *Id.*

[14] U.S. Department of State cable No. 95-State-222894

category even if they have only worked for one year in the preceding three for the foreign entity.[15]

In 2002, Associate Commissioner for Service Center Operations Fujie Ohata reiterated the positions of the Puleo Memo in an Agency memorandum.[16] With regards to specialized knowledge the Ohata Memo states *"The alien should possess a type of specialized or advanced knowledge that is different from that generally found in the particular industry. The knowledge need not be proprietary or unique . . . where the alien has knowledge of company processes or procedures, the knowledge must be advanced."*[17]

In July of 2008, the USCIS Administrative Appeals Office (AAO) handed down a decision involving, among other things, the appropriate standard to apply in determining whether the prospective beneficiary of an L-1B nonimmigrant petition qualifies as an intracompany transferee who has been and will be employed in a specialized knowledge capacity. The decision restricts the definition of specialized knowledge and notes that *"USCIS is not legally bound to follow the Puleo memorandum or any other the successive legacy INA memoranda"*[18] in adjudicating L-1B petitions. Rather, the AAO states that in determining eligibility for the L-1B classification they will rely on statutes, regulations, dictionary definitions, precedent decisions and legislative history to define specialized knowledge. In reinterpreting the visa classification requirements the AAO has posited that the L-1B should be for transferees with unusual duties, skills or knowledge beyond that of a skilled worker and that the standards for this knowledge will be narrowly construed. The decision notes that work experience and knowledge of a company's technical processes or products do not alone constitute specialized knowledge. Moreover, the AAO noted that the Agency should look beyond the stated job duties to determine the importance of the transferee's knowledge of the company's products, services or operations.[19] Likewise, the decision states that the L-1B was not intended to remedy a shortage of U.S. workers.[20]

In the instant case, the beneficiary of the L-1B petition was to serve as a SAP ERP Consultant providing guidance and assistance with a client's implementation of an integrated Enterprise Resource Planning (ERP) software system produced by SAP AG and modified for specific client needs. The Petitioner refused to respond to an RFE and to provide the documentary evidence necessary to support its claim that the beneficiary would be employed in a specialized knowledge capacity. In denying the L-1B petition, the AAO held that the petitioner had failed to satisfy its burden of proof. The AAO notes that unsupported assertions by petitioner's counsel do not constitute evidence but went on to point out a number of the key assertions made by petitioner's counsel which were undercut by the facts. For example, petitioner's counsel stated that an employee needed two to three years experience in SAP information technology to qualify for the specialized knowledge position but the beneficiary, in

[15] *Id.*
[16] Memorandum on Interpretations of Specialized Knowledge from Fujie O. Ohata, Associate Commissioner, Service Center Operations, Immigration Services Division, HQSCOPS 70-6.1 (Dec. 20, 2002).
[17] *Id.*
[18] United States Citizenship and Immigration Service, Administrative Appeals Office, WAC-07-277-53214, July 22, 2008
[19] *Id.*
[20] *Id.*

fact, had only 18 months of relevant experience. He also stated that petitioner provides its SAP staff with two to three years training in the company's implementation methodology. The AAO found that this assertion completely undercut counsel's argument that the beneficiary's knowledge was "special" and "advanced." Instead, it supported a conclusion that such knowledge was common and generally held by a large number of similarly employed workers. The AAO rejected as "facially unpersuasive" the argument that an alien is unique among a small subset of petitioner's workers. Finding that the Appellant failed to prove the specialized knowledge of the potential beneficiary in this decision, the AAO writes, *"Overall, the record does not establish that the beneficiary's knowledge is substantially different from the knowledge possessed by similar workers generally throughout the industry or by other employees of the petitioning organization. The fact that the beneficiary and a select group of workers possess a very specific set of skills does not alone establish that the beneficiary's knowledge is indeed special or advanced…Rather, the petitioner must establish that qualities of the unique process or product require this employee to have knowledge beyond what is common in the industry. This has not been established in this matter."* [21]

Despite the AAO's assertions that it is not bound by USCIS memoranda, in Chapter 3.4, the Adjudicator's Field Manual states that unpublished AAO decisions are not considered as binding and are to be treated as correspondence.[22] USCIS guidance on the other hand is indeed considered binding and when there is a conflict the "higher authority" controls.[23] But what does this mean in practice? In the past year, there has been a significant increase in the number of RFEs and an inclination on the part of the Agency to construe specialized knowledge narrowly. In the wake of the AAO decision, practioners have reported seeing denials citing the AAO standards.

The American Immigration Lawyers Association ("AILA") has brought this to the attention of the USCIS which responded to concerns that it was deviating from the policy articulated in the Puleo memo by stating that "adjudicators are trained to consider all applicable statutes, regulations and current policy memorandums pertaining to the L-1B classification when adjudicating L-1B petitions.[24] However, until clarifying guidance is issued by the Agency burdensome RFEs may continue to be the norm.

L-1B applicants should be prepared to see increased issuances of RFEs and greater scrutiny of applications. It is critical to invest time and effort in preparing well-documented submissions that clearly outline the transferee's duties in the U.S. and why they are needed. In these troubling economic times, it is critical for employers to be able to transfer personnel to the U.S.

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[21] *Id.*
[22] Adjudicator's Field Manual, Chapter 3.4, United States Citizenship and Immigration Service http://www.uscis.gov/propub/DocView/afmid/1
[23] *Id.*
[24] American Immigration Lawyer's Association, Vermont Service Center Liaison Meeting Minutes, (1/21/2009), AILA Infonet Doc. No. 09012768.

Minor Criminality A Big Headache For International Business

By: Sergio Karas[25]

Traveling to Canada on business has become trickier over the past few years. Under the *Immigration and Refugee Protection Act (IRPA)* which came into force in 2002, a 'foreign national' applicant with a criminal record, even a minor one, can be denied entry to Canada.[26] Consider an applicant who is a business person from the USA and has a weeks' work in Canada which involves meeting customers or attending meetings. The applicant has been convicted in the USA, sometime in the past, of the offence of driving under the influence of alcohol, pleaded guilty, paid a small fine and has put the matter behind him. Until recently, the applicant could easily obtain a permit at the Canadian Port of Entry, meet his customers and drive back after his work was done, all with a minimum amount of trouble. In fact, sometimes the minor offence was not even noticeable at the border. However, with the advent of the *IRPA*, and in particular section 36(2), it is no longer easy for an applicant with a conviction to enter Canada. This presents a challenge to employers and employees alike.

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[26] "[The IRPA" marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security." *Medovarski v. Canada,* (Minister of Citizenship and Immigration) 2005 SCC 51 (S.C.R. June 7 2005), S.C.R. LEXIS 47, 32, 33.

Section 36(2) of the IRPA

Under section 36 (2) of the IRPA a foreign national can be deemed "inadmissible" and can be refused entry into Canada if he or she has been convicted:

- of an offence punishable by way of indictment,
- of two summary offences not arising out of a single occurrence;
- of a "hybrid offence", one which could be prosecuted either summarily or by indictment.

An indictable offence is one which is generally more serious and carries a longer sentence; and is somewhat similar to felonies in the USA. Summary offences are generally less serious, carry shorter sentences or smaller fines and are somewhat similar to misdemeanors in the USA.

Hybrid offences in Canada are those that can be prosecuted either through indictments or through summary convictions depending on the nature and circumstances of the offence. Driving under the influence of alcohol (D.U.I) is one example of such an offence. However, under section 36(3) (a) of the *IRPA* a hybrid offence is considered an indictable offence even if it has been prosecuted summarily.[27]

Canadian equivalency of the offence

How does a conviction in a foreign country affect the applicant's ability to enter Canada? Immigration officers determine the inadmissibility of an applicant convicted of

[27] *Cha v. Canada* (Minister of Citizenship and Immigration), 2006 FCA 126, [2006] F.C.J. No. 491 (QL).

an offence in a foreign country by equating the offence with its Canadian equivalent.[28]

For instance, the offence of "driving under the influence" of alcohol is a criminal offence in most countries around the world. In the USA, the different offences which constitute "driving under the influence' are generally considered a misdemeanor and are punishable by a range of sentences that can vary from small fines to significant jail terms. Such an offence may become a felony with a longer sentence only if it causes serious injury or other aggravating factors, and the punishment varies widely from State to State.

Under Canadian criminal law, however, a drinking and driving charge or conviction is considered a hybrid offence and therefore potentially indictable, and is sufficient to render an applicant inadmissible by reason of criminality.

What must be considered as the governing principle is what would be the status of the offence if it had been committed in Canada. A lenient or harsh treatment of the offence in a foreign country is irrelevant for the purposes of equivalency, while the nature of the offence and penalty range under Canadian law governs the determination of its equivalence.

Port of entry checks and applicant's duty to disclose

Canada Border Services Agency (CBSA) officers have authority to permit or deny entry into Canada.[29] Canadian border officers have access to computerized information of criminal records of US citizens intending to enter Canada.[30] It is therefore advisable to disclose any prior offences or charges when applying for a Canadian visa or entry to Canada at a border regardless of whether an applicant was actually convicted for these offences.

How to overcome "inadmissibility"

An applicant who has been barred from entering Canada for a past conviction has a number of options to overcome inadmissibility. The applicant can apply for a Temporary Resident Permit (TRP) either at the border or at the Canadian consulate in his host country. Generally speaking, the former is dependant on the CBSA officer's discretion and the latter takes a considerable amount of time to process at a visa post abroad.

In case more than five years have passed since the completion of the applicant's sentence, payment of fine and conclusion of probation, the applicant can apply for "criminal rehabilitation". Rehabilitation removes the question of inadmissibility and is recommended if the applicant seeks to enter Canada whether for business or pleasure. The decision to grant rehabilitation is again dependent on other

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[28] *Wang v Ca*nada, 2007 FC 1188, holding that the visa officer is under an obligation to conduct an equivalency analysis to show that the act "if committed in Canada, would constitute an indictable offence under an Act of Parliament", as set out in paragraph 36(2) (c) of the Act before deeming a person "criminally inadmissible".

[29] Immigration law is based on the fundamental principle that non-citizens do not have an unqualified right to enter or remain in Canada. *Chiarelli v. Canad*a, (Minister of Employment and Immigration), [1992] 1 S.C.R. 711,733.

[30] 'Americans say Canadian border is tightening for those with minor criminal past', By Les Perreaux, The Canadian Press Online, Feb. 17.2008.

factors, the documentation involved is extensive and processing can take time.

Another way to overcome inadmissibility is if more than ten years have passed since the completion of an applicant's sentence where the offence can be considered indictable or hybrid in Canada, or five years when the offence is punishable by summary conviction. In such an event, rehabilitation does not happen automatically but the applicant may be "deemed rehabilitated" by immigration officials at a port of entry to Canada. [31] It must be noted that "deemed rehabilitation" does not apply to those who have been convicted of "serious criminality", which requires a formal rehabilitation application.

Thousands of US citizens and other foreign nationals have been turned away from the border since the *IRPA* came into force. This has become a serious problem for individuals who have minor convictions dating back several years. Businesses that have customers or operations in Canada and who want their employees to travel to Canada will find the practical effects of this provision frustrating, if their employees have ever been convicted of any offence. It is therefore advisable to obtain the necessary documentation to overcome 'inadmissibility" before seeking to enter Canada.

31 Paragraph 36(3)(c) of the IRPA.

Italy and Malta and Migration: The Tension Between Human Rights, Rescue at Sea and Human Trafficking in the Mediterranean

By: Peter H. Matson[32]

A Turkish cargo ship rescued a small boat containing 140 illegal migrants at sea south-west of Malta on 17 April 2009. The location of the rescue was 41 nm South of Lampadusa, Italy and 114 nm South-West of Malta. What followed was a dispute between Italy and Malta over which nation would accept these individuals for purposes of repatriation or determinations on possible claims of political asylum. The Turkish cargo ship did not have the resources to handle 140 people. Italy claimed that the rescue took place within the Search and Rescue area of responsibility of Malta and therefore the migrants should be taken to Valletta. The Maltese claimed that the closest safe port was Lampadusa and therefore the migrants were the responsibility of the Italians. Both nations were correct in part, but each has failed to address the primary problem that they share and there appears to be no political, legal or diplomatic effort to resolve the issue of illegal cross-border trafficking in desperate individuals leaving Africa for Europe. The flood of African migrants cannot be stopped at sea, that much is certain.

Lampadusa is a transit point for migrants rescued at sea. It is primarily a tourist destination and a quiet Italian Island. There are Italian military assets located on the Island. It has only a limited facility for housing migrants. It was built to house 850

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but in 2008 it had a population of more than 1800. In January 2009 migrants broke out of the detention center to protest conditions that have reportedly included sleeping outside during winter.[33] Reports have also indicated that as many as 31,000 migrants landed on Lampadusa in 2008. The United Nations has pressured Italy to alleviate the conditions of migrants on Lampadusa. When migrants arrive in Lampadusa, Italy is required to evaluate any asylum claims, and in many cases the migrants are moved to either Sicily or mainland Italy where they would be processed and then released pending final determinations. Lampadusa cannot become a "prison island" for migrants. Neither can Malta.

Malta has a large Search and Rescue ("SAR") area of responsibility – far larger than its small size and limited Armed Forces deserve. The size of its SAR area is probably a legacy of its colonial past as a staging location for assets of the United Kingdom.[34] Malta has several overcrowded and poorly equipped detention facilities. Illegal migrants are detained in Malta for 18 months pending decisions on any applications for relief. Both Italy and Malta are destinations for large numbers of migrants primarily from horn of Africa nations and the situation has gone beyond crisis implicating human rights requirements of both nations. Malta has neither the facilities, nor the available space to house the number of migrants that are certain to continue to report distress at sea in Malta's SAR area of responsibility.[35] This situation will get worse before a resolution is compelled, either by the current necessity, the European Union, or the United Nations. The European Union is entertaining debate on a burden-sharing plan that may temporarily reduce the impact on Italy and Malta but will surely fuel increased migration by human traffickers or worse if conditions in Africa do not improve. The primary transit route for migrants from Africa is by way of Sudan and Egypt, and many boats containing refugees leave Africa from ports in Libya. The numbers of refugees fleeing may well increase as the summer months provide better weather for transit and desperation in Africa increases.

Italy and Malta have enjoyed thousands of years of cooperation and good relations, have similar religious and social beliefs and enjoy a lucrative trading relationship. The dispute threatened the fabric of this long-standing relationship, and was rapidly resolved after some surprisingly vitriolic commentary, through the efforts of their prime ministers and an interesting appeal to the European Union.

The international law of the sea agreement and European rules require a nation that rescues those in distress at sea to provide some form of relief to prevent imminent death.[36] Overcrowded boats are inherently

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33 See http://www.nytimes.com/2009/01/25/world/europe/25italy.html?_r=2&ref=world.

34 See Derek Lutterbeck, Mediterranean Quarterly, Volume 20, Number 1, Winter 2009, pages 119-144, "Small Frontier Island: Malta and the Challenge of Irregular Immigration."

35 Comparing the SAR area of the major countries in the region, Malta is responsible for an area the size of Turkey, while Turkey is responsible for a limited area that includes only its border Islands.

36 See Law of the Sea Convention, Article 98, ("Duty to render assistance 1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost; (b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be

dangerous and unseaworthy. They often sink and thousands have died attempting to flee poor economic and political conditions in African countries. Malta is required both to rescue and to establish an adequate and effective SAR capability to prevent the loss of life, however, the conditions of imminent loss are created by those who arrange for this transit. No nation can be compelled by international agreement to open its borders to illegal migrants. That is the reason for passports, visas, and the complicated world of immigration and nationality. This is in tension with the recognition that conditions in some nations are so bad that other nations must humanely offer assistance and temporary refuge, either as a humanitarian form of temporary residence or the formal grant of asylum to those who are or likely will be persecuted in their homelands.

On Thursday, 30 April 2009, the crisis that arose over the Turkish cargo ship was concluded through the efforts of the Prime Ministers of the two nations and Italy agreed to accept the migrants. Despite this temporarily pleasing state of affairs a new event triggered another dispute. On Friday, 1 May 2009, another boat of migrants sent a distress signal prompting a response from Malta and Italy. Italy claimed to have no assets available and a Maltese Naval Ship was dispatched to effect the rescue. After rescuing the migrants the ship proceeded towards Lampadusa, the closest safe port, but was intercepted by Italian Patrol Boats and entry into Italy was blocked.

Subsequent to these events, the Italian Government and the Government of Libya have reportedly reached an agreement on the forced return by the Italian military of any migrants "rescued" at sea by the Italians to the territory of Libya. The apparent conflict between the international agreements on non-refoulment of asylum seekers and the right of a sovereign nation to restrict access has reached a point where considerable effort may be required to resolve this dispute.

expected of him; (c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call. 2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and, where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose." (emphasis added.))

Effect of the WHTI on the Right of Canadian-Born Indians to Free Access to the United States

By: Jordana A. Hart

Starting June 1, 2009, the Western Hemisphere Travel Initiative ("WHTI") requires U.S. and Canadian citizens to present passports or other secure documents when seeking entry to the United States from within the Western Hemisphere.[37]

The effect of the WHTI, being implemented in an attempt to further secure the U.S. border, may abrogate a little known treaty from the 1700s that allows Native Canadians, or Canadian-born Indians, virtually unfettered access to the United States.

37 The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) mandated that the U.S. Departments of Homeland Security and State develop and implement a plan to require U.S. citizens and foreign nationals to present a passport or other appropriate identity and citizenship documentation when entering the United States.

Provisions of the Jay Treaty of 1794, codified in U.S. immigration law, allow Canadian-born Indians to visit, work and reside permanently in the United States.[38] Native Canadians seeking employment or permanent residence in the U.S. do not require sponsorship, application, or approval by the U.S. Citizenship and Immigration Service ("USCIS") or any other U.S. government agency.

However, the requirements of WHTI may prove to be the first significant impediment to the continued free movement of native Canadians, known under the Immigration and Nationality Act ("INA") as "American Indians born in Canada."[39] Native Canadians have had the right under the Jay Treaty, and later under the INA, to freely cross the U.S-Canada border by proving that they have at least a 50% quantum of native blood.[40] Although not required, some Native Canadians, for efficiency, apply for a U.S. permanent residence card to avoid having to carry their blood quantum documents.

About 1.2 million of Canada's 33.5 million inhabitants identify as Aboriginal or First Nation.[41] Canada has 615 First Nation Communities representing more than 50 cultural groups and 50 languages.[42] The free passage right and the WHTI, therefore, have potentially deep consequences for Canada's Indian population. Hundreds of thousands of Canadians have a background that potentially leads to U.S immigration benefits.

The Canada Border Services Agency (CBSA) announced that Canadian Indians would be able to continue presenting certain tribal documents after June 1, including the current INAC card, as long as it has a photo affixed to it, and that INAC was planning to issue a new card for Canadian Indians.[43] CBSA states that INAC received recent notification that the U.S. Customs and Border Protection (CBP) approved the "Secure Certificate of Indian Status" and is in the process of designating the card as a WHTI-compliant document for U.S. entry by land or water.[44]

Many U.S. tribes and Canadian bands say these documentary requirements violate the Jay Treaty and the INA and are demanding a full exemption from the photo identification and passport requirement for their members. But there have yet to be legal challenges to the WHTI.

Authority

The free passage right for American Indians born in Canada is protected by treaty, the INA, and common law.

Following the American Revolutionary War, sovereign Indian land was split by the new U.S.-Canada border. The U.S. and Great Britain drafted Article III of the Jay Treaty as follows: "It is agreed that it shall at all times be free to his majesty's subjects, and the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass

[38] See first page of original treaty at http://www.earlyamerica.com/earlyamerica/milestones/jaytreaty/1.html. See entire text at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=008/llsl008.db&recNum=130

[39] See Immigration and Nationality Act Sect. 289 in general

[40] 8 CFR Sect. 289.1

[41] Statistics Canada (March 2009)

[42] Indian and Northern Affairs Canada (INAC)

[43] Canada Border Services Agency (CBSA) at http://www.ainc-inac.gc.ca/br/is/scs/index-eng.asp

[44] Id.

by land and inland navigation, into the respective territories and countries of the two parties, on the continent of America…"[45]

The INA, meanwhile, provides in Sect. 289:

> "Nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race."

8 C.F.R. Sections 289.1 through 289.3 are devoted to the subject of American Indians born in Canada. The U.S. Department of State at 22 CFR Section 41.1 (b) states that Canadians with at least 50 percent Indian blood are exempt from INA 212(a)(7)(B)(i)(I), (i)(II), which requires non immigrants to possess visas and passports when entering the U.S.

In brief fashion, the procedure to register American Indians born in Canada for U.S. Lawful Permanent Residence is stated at 8 CFR Section 289.3: "The lawful admission for permanent residence of an American Indian born in Canada shall be recorded on Form I-181." The INA does not provide for how to prove blood quantum.

Background

Following the signing of the Jay Treaty, the U.S. continued to recognize the right of free passage of Canadian Indians until the enactment of the INA of 1924. Soon after, the U.S. began deporting Canadian Indians who failed to register as aliens or obtain immigrant visas based on the fact that they were deemed inadmissible as not qualifying for U.S. citizenship under provisions of the INA of 1924.

A Canadian Indian arrested in the U.S. and ordered deported for not complying with U.S. immigration laws provided the first legal challenge in district court to the apparent abrogation of the Jay Treaty. The court found for the Canadian Indian plaintiff. On appeal, in *McCandless v. United States ex rel. Diablo*, 25 F2d 71, 72 (3rd Circ. 1928), the government stated that the War of 1812 fully abrogated the Indians' rights under the Jay Treaty and also that war between nations cuts prior treaty rights, which only return with the enactment of a new treaty.

But the 3rd Circuit affirmed the lower court, reasoning that treaties that stipulate a right in perpetuity do not end because of war, but are suspended until the war's end and revive when peace returns. In 1928, Congress codified the free border passage entitlement for Canadian Indians at 8 USC Sect. 226a, which remained in effect until 1952 when Congress enacted the current statute.

Unlike U.S. law, Canadian common law restricts free passage to Canada to U.S-born Indians who can demonstrate a historical right and practice to the border land, thereby excluding all U.S. Indians whose tribes were not traditionally located near the U.S.-Canada border.[46]

INA Definition of Indian

To qualify for free passage under INA Sect. 289, a Canadian Indian must establish having at least 50 per cent "American

[45] Note 2 supra

[46] Bryan Nickels, *Native American Free Passage Rights under the 1794 Jay treaty; Survival Under United states Statutory law and Canadian Common Law,* Boston College International and Comparative Law Review, Vol. 24, No. 2 (2001) pg. 313-340

Indian" bloodline. The test therefore involves more than showing an unspecified amount of Indian blood and it is also not sufficient that an individual is considered Indian by his community or himself.[47] Canada's statutes do not impose a blood quantum requirement, so Canadian government-issued documents, such as Indian Status registration cards, are not necessarily sufficient to meet the INA's blood quantum requirement. A further twist is that Canadians who do not "look" sufficiently Indian are often required to present more copious documentation at the border than others who "look" Indian.[48]

Unlike many immigration benefits that accrue to dependents, the free passage right is not available to the spouse or child of a Canadian Indian, or an adopted tribal or family member, unless that person has at least 50% quantum of Indian blood.[49] But since a Canadian Indian residing in the U.S. under INA Sect. 289 is regarded as lawfully admitted for permanent residence,[50] he or she can petition for permanent resident status for his or her spouse and unmarried children as do other U.S. permanent residents.

The Jay Treaty right of free passage versus the WHTI requirement will likely be fought again in court as many Canadian-born Indians will likely resist carrying an ID card or Canadian passport because it infringes on their sovereign border-crossing rights as enshrined in the Jay Treaty and the INA.

Welcome!

We are pleased to bring you the ABA International Law and Practice Section: Immigration and Naturalization Committee Newsletter. Please send all future submissions and/or suggestions to Susan Cohen at scohen@mintz.com

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[47] *United States v. Curnew, 788 F2d 1335, 1337 (8th Circ. 1986)*

[48] "Immigration case hinges on degree of Indian Blood" and "Canadian Indian wonders why U.S yanking back welcome mat," The Seattle Times, Jan. 15 and Jan. 19, 2008.

[49] Note 4 supra

[50] 8 CFR Sect. 289.2