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POSITION PAPER

When is a "Settled Matter" Not Actually "Settled"? Is it "Collateral Estoppel" or "Collateral Topple"?

I. Introduction

I am troubled by something that I see far too often for my liking. In fact, one might call it "unsettling".[1] While it is technically correct that each application or petition requires a separate "adjudication" and "decision" and therefore comprises its own "record of proceeding" (ROP), USCIS also has a general policy of "deference to prior decisions" (with specific exceptions). This dichotomy must be recognized and reconciled. No adjudicator can afford to *turn-a-blind-eye* to the *bigger-picture* of the individual alien's immigration journey. I will offer a few specific scenarios that shed light on this general topic, but first, a blurb.

[1] Sorry for the bad pun. I just couldn't resist, especially in light of the title of this paper.

> "…. The approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g.*, ***Q Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25 (D.D.C. 2003)***; ***IKEA US v. US Dept. of Justice, 48 F. Supp. 2d 22 (D.D.C. 1999)***; ***Fedin Brothers Co. Ltd. v. Sava, 724 F. Supp. 1103 [E.D. NY 1989]***. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g.*, ***Matter of Church Scientology International, 19 I&N Dec. 593, 597 (Comm. 1988).***"

JUN082015_02B4203.pdf, at p. 10.

I need to make it clear that the concept expressed in *Matter of Church Scientology*, might no longer hold water. Back in 1988, the mere thought of a computer on every desk was still relegated to the realm of fantasy at INS. Since then, our reality has changed immensely; and so must USCIS, AAO, IJs, EOIR, and the BIA, *among others*. Also, in the "L" intracompany transferee to EB-1C multinational manager or executive transition scenario, I challenge any assertion that the scrutiny for the **nonimmigrant** classification remains *markedly less* than for the roughly corresponding EB-1C **immigrant** classification. The processes and procedures employed in adjudication have advanced, *in part*, due to mandates from Congress and paid for with extra anti-fraud fees also mandated via legislation. Lastly, let us not forget the technological advances that allowed it to happen or might more likely have spurred it along in its wake. For example, USCIS routinely checks business viability and relationships in the system known as VIBE, for employer/petitioners filing I-129s **and** I-140s. *What's the difference*?

II. Prior Decision Deference Memos

USCIS has long recognized and applied a policy of deference to prior decisions in the normal course of events, since its creation, as had Legacy INS before that. However, as of August 23, 2004, USCIS memorialized the practice in a memorandum entitled: ***The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity (HQOPRD 72/11.3)***. The impetus for formalizing a policy of deference was initially spurred by a barrage of "*second guessing*" nearly all prior determinations, "*as a matter of routine*", in the context of subsequent extension petitions for nonimmigrant workers. More recently, on May 30, 2013, USCIS formally extended a policy of what I will call *graduated deference* in the EB-5 immigrant visa and Regional Center context. That memorandum is entitled simply: ***EB-5 Adjudications Policy (PM-602-0083)***.

III. "L" New Office Exception

The earlier deference memo has a major exception. That exception is confined to the extension of intracompany transferees who were allowed a sort of "*conditional*" one-year initial status in order to open a new office. That initial status was granted on easier terms with the *proviso* that the business being done by the end of that first year would be *substantial enough* to allow the **position** to meet the applicable

statutory definition at the time of review of the required extension petition.

IV. EB-5's Graduated Scale of Deference

USCIS does not use the term *graduated deference* nor do they reference any *scale*. Those are my terms which I prefer for the sake of clarity. The EB-5 policy memo refers to varied levels of verifiable detail needed to obtain deference. These levels of project detail must naturally correspond with levels of deference. The memo, *supra*, includes this useful discussion and accompanying footnotes on pages 14-15:

> "The level of verifiable detail required for a Form I-924 to be approved and provided deference may vary depending on the nature of the Form I-924 filing. If the Form I-924 projects are "hypothetical" projects,[2] general proposals and general predictions may be sufficient to determine that the proposed regional center will more likely than not promote economic growth, improved regional productivity, job creation, and increased domestic capital investment. Determinations based on hypothetical projects, however, will not receive deference and the actual projects on which the Form I-526 petitions will be based will receive de novo review during the subsequent filing (e.g., an amended Form I-924 application including the actual project details or the first Form I-526 petition filed by an investor under the regional center project). Organizational and transactional documents submitted with a Form I-924 hypothetical project will not be reviewed to determine compliance with program requirements since these documents will receive de novo review in subsequent filings. If an applicant desires review of organizational and transactional documents for program compliance, a Form I-924 application with a Form I-526 exemplar should be submitted.
>
> Form I-924 applications that are based on actual projects may require more details than a hypothetical project in order to conclude that the proposal contains verifiable details and is supported by economically or statistically sound forecasting tools.[3] Determinations based on
>
> _____

[2] An "actual project" refers to a specific project proposal that is supported by a *Matter of Ho* compliant business plan. A "hypothetical project" refers to a project proposal that is not supported by a *Matter of Ho* compliant business plan. The term "exemplar" refers to a sample Form I-526 petition, filed with a Form I-924 actual project proposal, that contains copies of the commercial enterprise's organizational and transactional documents, which USCIS will review to determine if they are in compliance with established EB-5 eligibility requirements.

[3] In cases where the Form I-924 is filed based on actual projects that do not contain sufficient verifiable detail, the projects may still be approved as hypothetical projects if they contain the requisite general proposals and predictions. The projects approved as hypotheticals, however, will not receive deference. In cases where some projects are approvable as actual projects, and others are not approvable or only approvable as hypothetical projects, the approval notice should contain a statement identifying which projects have been approved as actual projects and will be accorded deference and those projects that have been approved as hypothetical projects but will not be accorded deference.

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actual projects, however, will be accorded deference to subsequent filings under the project involving the same material facts and issues. While an amended Form I-924 application is not required to perfect a hypothetical project once the actual project details are available, some applicants may choose to file an amended Form I-924 application with a Form I-526 exemplar in order to obtain a favorable determination which will be accorded deference in subsequent related filings, absent material change, fraud, willful misrepresentation, or a legally deficient determination (discussed in more detail below)."

Allow me to rephrase a little bit of that for that clarity I mentioned earlier. First of all, most EB-5 visas are issued for job-creating investments through Regional Centers. These are usually large projects involving dozens and perhaps hundreds of investors. These projects are coordinated through the Regional Center based upon highly complex and sophisticated packages of evidence comprised of business plans, economic impact analyses, offering memorandum, and various legal documents relating to organization and transactions.

The amount of the aforementioned materials presented to USCIS for an ***advance vetting*** before the investors are allowed to file immigration paperwork with USCIS; controls deference levels, *thus*:

- ***"Exemplar or Dummy Petition***" refers to a sample Form I-526 petition, filed with a Form I-924 ***Actual Project Proposal*** (see below), ***and*** contains copies of the commercial enterprise's organizational and transactional documents, which USCIS *will review* to determine if they are in compliance with established EB-5 eligibility requirements. This application can be perfected after filing but a real I-526 petition cannot. ***This is the cream of the crop with the highest level of deference afforded.***
- An "***Actual Project Proposal***" refers to a specific project proposal that is supported by a *Matter of Ho* compliant business plan and a "*reasonable methodology*" for determining job creation (an Economic Impact Analysis (EIA)). This EIA will be supported by "*verifiable details*". ***This is the second highest level of deference afforded. While the "project" will have been checked, the deal documents have not and that is where problems can happen if you're not careful.***
- A "***Hypothetical Project***" refers to a project proposal that is not supported by a *Matter of Ho* compliant business plan, or any of the other necessary supporting documentary evidence. It does contain a sufficient amount of "general information" to earn a chance to try ***This is the bottom of the pile with no deference afforded.***

The above determinations are made in the course of the adjudication of USCIS Form I-924, a form filed by *USCIS-Designated* Regional Centers or *would-be* Regional Center *applicants*. Entrepreneurs

investing directly do not affiliate with any Regional Center and do not utilize an I-924 Application, they file only the I-526 Petition, instead. If the reader will recall the title of this piece, you may remember that I played with the concept of *collateral estoppel*, and here is where it fits.

- How many times will USCIS make you prove the same thing?
- At what point will you have to put your money where your mouth is?
- In what manner will the various "proceedings" come together ***or*** conflict with one another?
- When, where, and how will deference be afforded or declined?

In the EB-5 context, there are Regional Centers, Project developers, non-EB-5 domestic institutional and individual investors, and EB-5 alien investors and entrepreneurs. There are many people involved in multiple phases, tiers, and tranches of development projects. This complexity is reflected via multi-step adjudications. While the various form filings will comprise individual "records of proceeding" (ROPs), they are highly interrelated, interdependent, and comingled. None can be viewed in a void unto itself, alone. At some point in the process, certain *hyper-technical details* will be affirmatively decided, and *specific facts* will be *found* and accepted as true. Without cause, certain *findings-of-fact* and agreed upon *details*, *processes*, or *procedures* should not be revisited. This leads directly to the next topic.

V. ***Collateral Estoppel*** **in the Immigration Context**

I am partial to a case from the Ninth Circuit Court of Appeals that explains how collateral estoppel applies in the immigration context. I have used this case to make this point on prior articles. It goes like this

Oyeniran v. Holder, No. 09-73683(9th Cir. March 6, 2012), explains:

> "**IV.** ***Discussion***
>
> **A.** ***Collateral Estoppel Applies in Immigration Proceedings***
>
> **[1]** It is beyond dispute that the doctrine of *collateral estoppel* (or issue preclusion) applies to an administrative agency's determination of certain issues of law or fact involving the same alien in removal proceedings. ***Allen v. McCurry*, 449 U.S. 90, 94 (1980)**; ***Ramon-Sepulveda v. INS*, 824 F.2d 749, 750 (9th Cir. 1987)** (per curiam) (doctrine applies even when the agency reopens a removal proceeding for new evidence); ***Matter of Fedorenko*, 19 I. & N. Dec. 57, 57 (BIA 1984)** (doctrine conclusively establishes the ultimate facts of a subsequent deportation proceeding and precludes reconsideration of issues of law resolved by the prior judgment —absent a change in the controlling law).
>
> *Collateral estoppel* applies to a question, issue, or fact when four conditions are met:
>
> (1) the issue at stake was identical in both proceedings;
> (2) the issue was actually litigated and decided in the prior proceedings;
> (3) there was a full and fair opportunity to litigate the issue; and
> (4) the issue was necessary to decide the merits.
>
> ***Montana v. United States*, 440 U.S. 147, 153-54 (1979); *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)**." [Slight reformatting for clarity.]

Collateral estoppel is very easily illustrated in EB-5 cases and in jobs depicted as in either a *managerial* or an *executive capacity*. In the EB-5 context, as discussed in **Section IV.**, above, such investments start as an idea for a *business*, a *project*, and/or a *deal*. They grow and progress and as they roll along gathering steam, certain matters become "settled" and thereafter "reasonably relied upon". INS was quite sloppy when EB-5 Regional Centers were new. Many mistakes were made and fraud was more easily accomplished in those early days. But as more experience was gained, INS slammed on the brakes. Since EB-5 was revitalized beginning around 2007, more care and caution have been utilized.

Settled facts are not easy to come by in EB-5 and are now *very hard fought* and thereby they must be accorded *due deference* absent *just cause* to do otherwise. EB-5 involves Regional Centers in the *vast majority* of cases (mid to high 90s as a percentage). Project details must be hammered out up front by the Regional Center before affiliated alien investors file their I-526 Petitions. In the Regional Center context, the Regional Center uses the I-924 in order to obtain the highly desired *Provisional Approval* attendant upon successful advance vetting by USCIS of a *Project-Specific Exemplar/Dummy I-526*. That process affords the Regional Center the added flexibility of being able to perfect the application's hyper-technical details after filing the I-924. Such flexibility is not available in the adjudication of a real I-526 Petition filed by a real alien entrepreneur or investor. The latter must be like *Mary Poppins —> Practically Perfect in Every Way*! The filing date of an approved I-526 is transformed into a priority date for visa allocation and issuance purposes so any petition that is not "approvable when filed" cannot be used to secure that priority date. In other words, the initially denied petitioner must fix the problems and file a new I-526. *Come back later and get to the back of the line with your corrected visa petition*.

The other area where I can see a place for *collateral estoppel* is when the *same statutory definition is utilized* in successive steps of a process or in subsequent proceedings. The nonimmigrant intracompany transferee or the immigrant multinational manager or executive both utilize the same definitions of managerial capacity and executive capacity as follows.

8 U.S.C. § 1101 Definitions.

(a) As used in this chapter-

(44)(A) The term "managerial capacity" means an assignment within an organization in which the employee primarily-

> (i) manages the organization, or a department, subdivision, function, or component of the organization;
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) or, if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority.

A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

(B) The term "executive capacity" means an assignment within an organization in which the employee primarily-

> (i) directs the management of the organization or a major component or function of the organization;
> (ii) establishes the goals and policies of the organization, component, or function;
> (iii) exercises wide latitude in discretionary decision-making; and
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

(C) If staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, the ~~Attorney General~~ [**DHS Secretary**] shall take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function. An individual ***shall not be considered to be*** acting in a managerial or executive capacity (as previously defined) merely on the basis of the number of employees that the individual supervises or has supervised or directs or has directed.

VI. A Study in Contradictions: *Goose v. Gander*

There is an old saying: "What's good for the goose is good for the gander." It means more if you know that gander is the word for an adult male goose. I looked online for a more precise explanation for the saying and found the following.

> ***What is good for a man is equally good for a woman; or, what a man can have or do, so can a woman have or do. This comes from an earlier proverb "What's sauce for the goose is sauce for the gander."*** [2]

That saying smacks of an early prayer for gender equality. I am using that saying as it is most often used at the present time, rather than Dickensian England. I am using it to point out that *fairness* means that we apply rules *equally* to both parties in a negotiation or both sides to a case or controversy. However, if truth be told, it is **not** *exactly* true and it is especially **not** always true that rules apply equally to government agencies or agents against a private party.[3]

The title of this section plays towards that aforementioned exception to a degree but it is more of a qualitative difference. In the following excerpt, please notice that USCIS and AAO are being sticklers for precision about what was claimed ***at time of filing*** versus ***in response to an RFE***, even in the face of assertions that business has been good and grown ***since filing***.

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[2] The American Heritage® New Dictionary of Cultural Literacy, Third Edition Copyright © 2005 by Houghton Mifflin Company. Published by Houghton Mifflin Company. All rights reserved. **See here**: *http://dictionary.reference.com/browse/what's+good+for+the+goose+is+good+for+the+gander*

[3] *Qualified Immunity* is saved for some other discussion.

It seems that you can't win for winning with some folks, can you? On the other hand, the petitioner is not allowed to play fast and loose with the truth or help the truth to bend in the wind. When claiming that some permissible change has occurred post-filing, it must not only be *fully* explained but must also be *fully* supported with credible evidence.

> "In response to the RFE, the petitioner stated that its [-----] branch office had expanded since the filing of the petition, and noted that, at the time the petition was filed, the branch office's general manager had been temporarily assigned to the company's new [-----] office. The petitioner explained that the beneficiary had temporarily served as the general manager of the [-----] office until the petitioner was able to transfer an employee from China. Turning to the U.S. job description the petitioner provided in response to the RFE, we note that the petitioner claimed that 12% of the beneficiary's time would be allocated to supervising "up to five" direct subordinates, who are managerial and professional employees, as well as more than 50 indirect subordinates, including contractors and others performing the petitioner's daily operational tasks. The petitioner claimed that another 12% of the beneficiary's time would be allocated to overseeing subordinates charged with logistics tasks pertaining to cargo and passenger flights departing from [-----] Washington. We note, however, that neither of the petitioner's claims regarding these time allocations is corroborated in the organizational chart that depicts the North American branch operations at the time the petition was filed. Namely, the beneficiary was shown as overseeing the work of four subordinate employees - a revenue manager, two account managers, and one sales support employee. The chart depicted no indirect subordinates within the beneficiary's specific department. While further review of the chart shows that the [-----] branch employs both a cargo manager and a manager of airport operations, neither individual was depicted as being within the supervisory purview of the beneficiary's position at the time of filing. Therefore, the claim that the beneficiary would oversee the cargo and flight logistics through employees charged with executing the underlying tasks is not supported in the chart that was intended to illustrate the petitioner's [-----] branch operation at the time the petition was filed. The

> petitioner stated at the time of filing that the beneficiary's responsibilities are focused on sales, marketing and the [----], rather than the overall operation of the branch office.
>
> While the petitioner's June 2014 organizational chart depicts a more developed staffing structure, showing a [-----] manager as the beneficiary's direct subordinate overseeing two account managers and a sales support employee, this staffing composition did not exist at the time the petition was filed and thus lacks probative value to establish eligibility as of the priority date. Similarly, while the updated organizational chart depicts the beneficiary as overseeing other managerial positions, including an airport station manager, a cargo manager, and a public relations specialist, such organizational growth took place sometime after October 2013 and thus does not establish eligibility at the time of filing. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. ***Matter of Katigbak, 14 I&N Dec. 45, 49 (Comm'r 1971***).

JUN082015_02B4203.pdf, at pp. 6-7.

VII. Official Obfuscation

Confusion begets confusion. If an adjudicator has difficulty understanding the law and the facts of the case then the applicant or petitioner and their counsel may not understand what went wrong or what they needed to do and to prove in order to get the benefit (or relief) sought. AAO has stressed that USCIS adjudicators have an affirmative duty to explain reasons for denial. *See:* ***OCT072014_01D7101.pdf***, wherein we find the following (emphasis added).

> "In denying the petition, the director recited a portion of the beneficiary's job description and acknowledged receipt of the petitioner's response to the RFE. However, in reaching a conclusion that the beneficiary was not employed by the

> foreign entity in a specialized knowledge capacity, the director did not address any of the specific evidence submitted or why that evidence was insufficient to meet the petitioner's burden of proof.
>
> On appeal, counsel asserts that the evidence of record was sufficient to establish eligibility and contends that the director failed to explain how she reached her decision based on the evidence.
>
> Counsel's contention that the director's decision lack [*sic*] sufficient analysis of the petitioner's evidence is persuasive. When denying a petition, a director has an affirmative duty to explain the specific reasons for the denial; this duty includes informing a petitioner why the evidence failed to satisfy its burden of proof pursuant to section 291 of the Act, 8 U.S.C. § 1361. See 8 C.F.R. § 103.3(a)(1)(i). Here, the director's discussion of the petitioner's evidence was limited to two or three sentences in the notice of denial and did not provide sufficient grounds for the petitioner to address any evidentiary deficiencies on appeal. Accordingly, the director's decision dated January 24, 2014 will be withdrawn and the matter will be remanded to the director for entry of a new decision."

Id. at p. 4. And so it is that the open and obvious position of AAO is that every USCIS adjudicator "*has an affirmative duty to explain the specific reasons for the denial*" (or whatever). I cannot imagine anyone objecting to such a position, can you? Not to say that it will never happen. AAO has previously stressed the necessity not to hamper the applicant's or petitioner's *opportunity to make a meaningful appeal*. In short, be precise in writing RFEs, NOIDs, NOITs, NOIRs, etc..., and especially, Denials!

VIII. Conclusion

That was quite a "*build-up*" in order to get this far! *Phew*! I did mention at the beginning that I believe that the basic premise

underlying the *unequal-scrutiny-during-adjudication* "**argument**" between **nonimmigrant** intracompany transferee manager or executive, and the **immigrant** multinational manager or executive; no longer holds water. That issue is often addressed by citing ***Matter of Church Scientology International, 19 I&N Dec. 593 (Comm. 1988)***, which is used to support the standard mantra that "*approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary*".

To that, I say: "Wow! What a cop out!" The current year is 2015, which is over a quarter century since the *Church Scientology* decision. The most recent case consistently cited in support of this proposition is a dozen years old. *See:* ***Q Data Consulting, Inc. v. INS, 293 F. Supp. 2d 25 (D.D.C. 2003)***. Please, think about it. It seems to me that once an affirmative conclusion is reached on the *managerial* or *executive capacity* of a **position** is reached in an earlier proceeding that *that* decision should not be overturned without clear and just cause. Granted that there may be instances when a particular position has changed significantly over time which justifies a reversal but these should be among an ever diminishing minority.

If an adjudicator challenges earlier *findings-of-fact* in either one or the other of an "L-1A to EB-1C" or the "progressive EB-5 filings" *scenarios* by utilizing the **four prong test for *collateral estoppel*** shown above in **Section V.**, then (s)he has a lot of work ahead. The decision to overturn and reverse the prior *case critical determinations* must be fully explained, supported by credible evidence, and must

demonstrate that either there has been a significant change in circumstances since the prior decision or fraud has been uncovered.

A mere *subjective disagreement* is not sufficient cause, *without more*. In the course of an extension petition for a nonimmigrant worker or a transition to a substantially similar immigrant classification the prior adjudicator exercised **judgment** in *finding facts* to conclude that the position met one of the two statutory definitions involved. While DHS Officers have general authority to challenge another Officer's decisions, it must be wielded wisely.

EB-5 involves many steps and many people. Once a hard fought *fact is found* or *an assumption is accepted as probable*; tread softly because it will take time to either bear fruit, or wither and die on the vine. The final stage of EB-5 is results driven and controlled by a different section of the INA. All the hard work put forth upfront is used merely to get *a chance to invest and create jobs*. The I-526 can be viewed as an audition. The subsequent actions will determine if it was all worth it or not. Even if the project plans and job count methodology changes, it is the results shown in the I-829 that count regardless of any material changes.

Dated this 19th day of July, 2015

Digitally signed by Joseph P. Whalen
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/s/ Joseph P. Whalen

That's my two-cents, for now!
