

Memorandum



HQ 319-C

Subject Interpretation of "Foreign Trade and Commerce" for Purposes of Section 319(b) of the Act	Date FEB 23 1993
To Lawrence J. Weinig Assistant Commissioner Office of Adjudications	From Office of the General Counsel

Question Presented

Whether trade in services and trade in technology are activities which fall within the phrase "trade and commerce" contained in section 319(b)(1)(B) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1430(b)(1)(B)?

Summary Conclusion

Yes. The phrase "trade and commerce" contained in section 319(b)(1)(B) of the Immigration and Nationality Act, as amended (the "Act") should be construed broadly to cover trade in services or technology.¹

Factual Background

An alien spouse of a United States citizen seeks expedited naturalization under section 319(b), which exempts the alien from the normal residence requirements for naturalization. The alien wishes to depart from the country with her husband, who will be relocating to the United Kingdom to engage in the acquisition of license rights to musical compositions which will be included in a musical album. While abroad, the United States citizen will be working for the fully-owned British "sister company" of his similarly fully-owned United States company.

¹Our interpretation of the term "trade and commerce" applies equally to section 316(b) of the Act, 8 U.S.C. § 1427(b), which utilizes the identical term with respect to the requirements for preservation of residence for naturalization purposes.

Legal Background

A. "Trade and commerce" under section 319(b) of the Act

Under section 319(b) of the Act, certain spouses of United States citizens regularly employed abroad who wish to be naturalized may be exempted from all resident and physical presence requirements. Section 319(b) of the Act provides, in pertinent part, that

Any person ... whose spouse is ... a citizen of the United States ... in the employment of ... an American firm or corporation engaged in whole or in part in the development of foreign trade and commerce of the United States ... or a subsidiary thereof, ... who declares before the Attorney General in good faith an intention to take up residence within the United States immediately upon the termination of such employment [shall be eligible for expedited naturalization].

Section 319(b) of the Act, 8 U.S.C. § 1430(b) (emphasis provided).

Congress's intent in enacting section 319(b) and its predecessor statutes was to eliminate the inequitable situation created when an alien spouse who, by reason of enforced absence from this country occasioned by his or her citizen spouse's employment in certain occupations abroad could not meet the normal residency requirements for naturalization. See Petition of Gray, 369 F. Supp. 1049, 1051 (S.D. Miss. 1973). Section 319(b) is designed to provide generous relief from the stringent residency requirements for naturalization of spouses of American citizens who are employed abroad in occupations believed to inure to the benefit of the United States. Tien Lop Lee v. United States, 549 F.2d 154, 155 (9th Cir. 1977). Although the Immigration Act of 1990 ("IMMACT90") brought substantial revisions to Title III of the Act, it left intact the language of section 319(b) regarding "trade and commerce."

Neither the Immigration and Naturalization Service's ("Service") regulations nor its Interpretations define the term "trade and commerce" as used under section 319(b). In a 1984 opinion, however, this office determined that the term "trade and commerce" should be broadly construed to include trade in goods or services. See Opinion of the General Counsel, 83-0202 (July 9, 1984), reproduced in 61 Int. Rel. 642 (Aug. 9, 1984) (spouses of U.S. citizen employees of a U.S.-based subsidiary providing services to its Saudi parent company eligible for expedited naturalization benefits under section 319(b) of the Act). In

reaching this conclusion, the General Counsel relied on In Re Fang Lan Dankowski, 478 F. Supp. 1203 (D. Guam 1979), which appears to be the only reported case which directly addresses this issue. In Dankowski, the court adopted an extremely broad definition of the term "trade and commerce" as used in section 319(b). The court explained that the word "trade" as used in section 319(b) includes "not only the business of exchanging commodities by barter, but the business of buying and selling for money, or commerce and traffic generally." 478 F. Supp. at 1207, citing May v. Sloan, 101 U.S. 231 (1879). The court, quoting Webster's dictionary, stated that the term "trade" means "to engage in commerce or business transactions of bargain and sale; barter; exchange; traffic; hence, to deal in something," while the word "[c]ommerce is defined as the exchange of goods, productions, or property of any kind; especially, exchange on a large scale, as between states or nations." Id. at 1208, quoting Jeu Jo Wan v. Nagle, 9 F.2d 309 (9th Cir. 1925) (emphasis provided).

B. "Trade" under section 101(a)(15)(E)(i)

Prior to IMMACT90, an alien could be classified as an E-1 nonimmigrant treaty trader if he entered the United States

under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national ... solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national.

Former section 101(a)(15)(E)(i) of the Act, 8 U.S.C. § 1101(a)(15)(E)(i).

On March 10, 1989, after close consultation with the Department of State, the Service promulgated a final rule reading:

The term "trade," as used in [section 101(a)(15)(E)(i)] means the exchange, purchase, or sale of goods and/or services. Goods are tangible commodities or merchandise having intrinsic value. Services are economic activities whose outputs are other than tangible goods. Such service activities include, but are not limited to, banking, insurance, transportation, communications and data processing, advertising, accounting, design and engineering, management consulting, tourism, and technology transfer.

8 C.F.R. § 214.2(e)(2).

The Service deemed this expansive definition necessary in light of the evolving concept of trade and the vastly changed nature of international commerce since the forerunner to section 101(a)(15)(E)(i) first appeared in the Immigration Act of 1924. Preamble to 8 C.F.R. § 214.2(e)(2), 54 Fed. Reg. 10978.² Significantly, this regulation does not limit the types of services which could constitute trade, but instead, merely provides guidance and allows for case-by-case judgment. Id. at 10979.

Under IMMACT90, Congress amended section 101(a)(15)(E) to provide that an alien was entitled to E-1 classification if he entered the United States:

under and in pursuance of the provisions of a treaty of commerce and navigation between the United States and the foreign state of which he is a national... solely to carry on substantial trade, including trade in services or trade in technology, principally between the United States and the foreign state of which he is a national.

8 C.F.R. § 1101(a)(15)(E) (emphasis provided).

In codifying existing Service and Department of State policy, Congress explained:

[V]arious technological advances have rendered the treaty trader visa ("E-visa") unavailable to several categories of workers. ... The bill addresses these problems by expanding access to the E visa to allow transfer of technology and services.

H.R. Rep. No. 101-723, Part 1, 101st Cong., 2d Sess. 43.

Legal Analysis

In construing the language of section 319(b) of the Act, we do not attach legal significance to the fact that Congress amended the definition of "substantial trade" in section 101(a)(15)(E)(i) but left intact the language of section 319(b) with respect to the term "trade and commerce." Our review of the legislative history of IMMACT90 fails to indicate that Congress considered, and subsequently rejected, amending the term "trade and commerce" found in section 319(b). Absent any

²The Service noted as an example of the evolution of the term "trade," the Trade and Tariff Act of 1984, wherein the term "international trade" is described as including trade in goods and services. Id. at 10978.

indication that Congress, by this omission, intended to narrow the scope of the statute, we therefore conclude that the broad construction given to the term "trade and commerce" under pre-IMMACT90 case law and Service policy continues to be valid.

This conclusion is consistent with Congress's overall intent in enacting IMMACT90. It is clear that a major concern of Congress in enacting IMMACT90 was to conform the immigration laws to meet the realities of modern business, thereby improving the competitiveness of the United States in the international marketplace. To this end, Congress, among other things, greatly increased the annual allocation of employment-based immigrant visas, extended use of the L-1 nonimmigrant visa category to certain employees of international accounting firms, and, most significantly, amended section 101(a)(1)(E)(i). We therefore believe that defining the term "trade and commerce" under section 319(b) in the same manner as the term "trade" is defined under section 101(a)(1)(E)(i) and 8 C.F.R. § 214.2(e)(2), *i.e.*, to include trade in services or technology, is consistent with Congress's intent in enacting IMMACT90.

Defining the term "trade and commerce" in this broad manner is also consistent with Congress's original rationale for granting expedited naturalization benefits to spouses of U.S. citizen employees of American companies abroad -- to remedy the inequitable situation caused by the "enforced absence" of alien spouses of U.S. citizens employed abroad in furtherance of American economic interests. See Petition of Gray, 369 F. Supp. at 1051. Interpreting section 319(b) too narrowly would unfairly penalize spouses of citizens engaged in economically important areas of service and technology.

Finally, we note that, in enacting IMMACT90, Congress clearly intended to facilitate naturalization for qualified persons. See e.g., Remarks of Congressman Bruce Morrison, 135 Cong. Rec. at H 4542-43. Among other things, Congress created a "one-step" administrative naturalization process designed to give persons more control over the time and manner of their naturalization. Section 310(a) of the Act, 8 U.S.C. § 1421(a). In addition, Congress reduced the in-state residence requirement of section 310 from six to three months. Section 316(a)(1) of the Act, 8 U.S.C. § 1427(a)(1). Liberally defining the term "trade and commerce" to include the exchange of services and technology is therefore consistent with Congress's intent to streamline the process for qualified persons seeking naturalization.

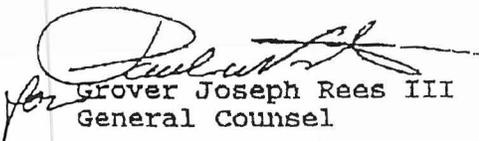
In the instant case, the U.S. citizen appears to fully own a Delaware corporation as well as its sister company in the United Kingdom. Both companies are engaged in the management of artists in their respective countries, and serve as an interface for the negotiation of personal appearances, recording contracts, film

and television contracts, and the exploitation of intellectual property rights owned by client-artists on a reciprocal basis. The U.S. company performs these services for foreign artists in the United States and the British company renders identical services for U.S. artists in the United Kingdom.

To determine whether the alien spouse in this case is eligible for expedited naturalization benefits under section 319(b), your office should conduct an analysis similar to the one performed with respect to determining whether an alien seeking E-1 nonimmigrant classification will be engaged in trade. Among other things, your office must determine whether management of artists in the entertainment business constitutes trade in services for purposes of section 319(b) of the Act. In making this determination, it should be remembered that Congress intended the term "trade and commerce" to be interpreted liberally.³

Conclusion

The term "trade and commerce" as used in section 319(b) of the Act should be liberally construed to include trade in services or trade in technology. In deciding whether the alien spouse in this case is eligible for expedited naturalization benefits under section 319(b), your office must determine, among other things, whether a person engaged in the management of artists in the entertainment business both in the United States and abroad is engaged in trade in services.


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³Should your office determine that the United States citizen will be engaged in the trade of services or technology, it must still determine whether his alien spouse is otherwise eligible for expedited naturalization benefits. In this regard, we note that section 319(b) requires, among other things, that the United States citizen be "in the employment of ... an American firm or corporation ... or a subsidiary thereof, ... regularly stationed abroad in such employment." Because here, the United States citizen fully owns the British company where he will be employed, the nationality of this firm, for section 319(b) purposes, is American, regardless of its place of incorporation. See Legal Opinion of General Counsel, 83-0202 (July 9, 1984), citing Matter of Warrach, 17 I&N Dec. 285, 287 (Reg. Comm'r 1979) (section 316(b) case).