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Crewmen Entitled to Enter the United States
Without Work Visas International Longshoremen's
and Warehousemen's Union v. Meese, 833 F.2d
1443 (9th Cir. 1989)

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ALIENS — IMMIGRATION AND NATIONALITY ACT — Foreign Logging Vessels' Crane Operators Are Not Alien Crewmen Entitled to Enter the United States Without Work Visas, *International Longshoremen's and Warehousemen's Union v. Meese*, 883 F.2d 1443 (9th Cir. 1989).

Under the Immigration and Nationality Act ("Act"), alien crewmen are entitled to enter the United States and work on board their vessels in any capacity required for normal operations, without the benefit of a visa.¹ In *International Longshoremen's and Warehousemen's Union v. Meese*,² the United States Court of Appeals for the Ninth Circuit reversed an advisory opinion issued by the Immigration and Nationality Service ("INS") which held that a Canadian ship's crane operators are crewmen within the meaning of the Act.³ The court narrowly defined crewmen as those whose duties primarily aid in the navigation of the ship.⁴

A Canadian company, Kingcome Navigation Company LTD. ("Kingcome"), transports logs between the United

1. Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(10)-(15)(D) (1988) (hereinafter "Act") (definition of non-immigrant crewman). The Act states:

[A]n alien crewman serving in good faith as such in any capacity required for normal operations and services on board a vessel (other than a fishing vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft . . .

8 U.S.C. § 1101 (a)(10) (1988). See also Mutharika, *The Alien Under American Law*, Chapter III, p.4 (1980) ("Mutharika") (employment rights of aliens under immigration laws). There are many classes of non-immigrants, under which a temporarily admitted alien has work authorization. *Id.*

2. 883 F.2d 1443 (9th Cir. 1989).

3. *Id.* at 1452.

4. *Id.* at 1453. See *In Re M/T "Rajendra Prasad,"* 16 I. & N. Dec. No. 2696, 705, 708 (BIA 1979) (crewmen's duties performed while ship is in navigation); *Williams v. Avondale Shipyards, Inc.*, 452 F.2d 955, 958 (5th Cir. 1971) (vessel on navigational waters); *Puget Sound Freight Lines v. Marshall*, 125 F.2d 876, 879 (9th Cir. 1942) (employee on board naturally and primarily to aid in navigation); *Diomedes v. Lowe*, 87 F.2d 296, 297 (2d Cir. 1937) (distinguishing seamen, naturally thought to aid navigation, from harbor workers); *Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966) (lack of permanent connection may require specific navigational purpose).

States and Canada by means of two specially designed vessels that are equipped with on-board, mounted cranes.⁵ Special training is required for crane operators.⁶ The crane operators sometimes travel with the ships on Canadian trips, but are always on board when the ships enter the United States and remain on board until the ships return to Canada.⁷ When on a trip to the United States, crane operators are listed on the ship's register of crew members.⁸

In an effort to comply with immigration laws, Kingcome sought an advisory opinion from the INS in 1985 as to whether its crane operators were alien crewmen entitled to work in the United States.⁹ The advisory opinion stated that the crane operators qualified as crewmen because they fell within the scope of the statutory language as persons "serving in any capacity on board a vessel."¹⁰ In addition, the INS issued a memorandum expressing its policy that the agency lacks jurisdiction over work performed by crewmen on board vessels.¹¹ As far as the INS was concerned, activities per-

5. 883 F.2d at 1445. The cranes allow loading and unloading of the logs to take place without requiring that the ship be in port at a dock. *Id.* If a ship is not equipped with cranes, logs are loaded onto barges from the shore, or towed. *Id.* The specially designed vessels carried logs on their decks, thereby reducing the manpower otherwise required to load and unload logs. *Id.* The ships are self-propelled and self-dumping; the weight of the logs holds the propeller down in the water and allows the ship to move forward. *Id.* Logs must be properly stacked on deck and failure to do so affects the ship's stability, risking a loss of logs at sea. 883 F.2d at 1445.

6. *Id.* Crane operators work on the job for ten to twelve months before becoming fully competent at loading the logs. *Id.*

7. 883 F.2d at 1445. On logging trips which take place solely within Canada the operators often fly to the vessel to unload or load logs and fly out when the job is complete. *Id.*

8. *Id.* See *Ex Parte Kogi Saito*, 18 F.2d 116, 117 (2d Cir. 1927) (holding alien not crew member because not listed on ship's register). Under immigration laws, in order to qualify as a seaman the individual must be registered in the ship's articles. *Id.*

9. 883 F.2d at 1445. See Act, *supra* note 1 (crewman is one serving in any capacity for normal operations).

10. 883 F.2d at 1445-46. In reaching its conclusion the INS looked to the fact that mess cooks qualified as crewmen even though not involved in the navigation of the ship, thus they reasoned crane operators must also be crewmen. *Id.*

11. 883 F.2d at 1446. The INS claimed its policy since 1964 was "that it had no jurisdiction under the immigration laws" to interfere with work performed by a crewman on board a vessel. *Id.*

formed on board a vessel which had a direct relationship to the "normal operations" of the ship were not regulated by the immigration laws.¹²

The International Longshoremen's and Warehousemen's Union ("ILWU") filed a complaint with the United States District Court for the Western District of Washington seeking a declaratory judgment that the INS' interpretation of the alien crewmen provision in the Act was unlawful and requesting an injunction to prohibit the INS from permitting alien workers to perform labor in the United States.¹³ The court denied the injunction for failure to show any probability of success on the merits and granted summary judgment in favor of the INS.¹⁴ The ILWU appealed.¹⁵

United States immigration law developed sporadically and immigration was relatively unrestricted until after World War II.¹⁶ The McCarren-Walter Act, passed in 1952, represented the first comprehensive attempt at regulating immigration.¹⁷ Most of the original provisions of the statute and its numerous amendments have been codified in the 1952 Immigration and Nationality Act.¹⁸ The 1965 Amendments to the Act include

12. *Id.* The INS distinguished activities performed on board ship and those performed on shore. *Id.* There was no express provision in the law prohibiting crewmen from handling cargo on board, thus these activities could not be prohibited. *Id.*

13. 883 F.2d at 1446. The ILWU also sought a writ of mandamus to compel the INS to enforce the immigration laws. *Id.*

14. 883 F.2d at 1446. The District Court found that the crane operators were crewmen required for the operation of the vessels and therefore were properly allowed in the United States as alien crewmen. *Id.*

15. 883 F.2d at 1446.

16. See C. Gorden & H. Rosenfield, *Immigration Law and Procedure*, 2.5b p.2-33 at 6 (tracks origin of federal control over immigration); Fuchs, *Immigration Policy and the Rule of Law*, 44 UNIV. OF PITT. L. REV. 433, 433 (1983) (principals of immigration reform).

17. Gorden & Rosenfield, *supra* note 16 and accompanying text (federal immigration control). See also Act, *supra* note 1 (statutory provisions). There was a need to consolidate all previous legislative acts aimed at immigration control. See Gorden & Rosenfield, *supra* note 16, at 8 (discussing prior legislative acts).

18. See Gorden & Rosenfield, *supra* note 16, at 10 (Immigration and Nationality Act of 1952 incorporated previous legislation). Prior legislation included the Anarchist Act of 1918 which provided for the exclusion and deportation of subversive aliens; the Quota Law of 1921 which placed numerical limitations on immigration; the Alien Registration Act of 1940 which set out requirements for deportation of criminals and subversive groups; the Displaced Persons Act of 1948 which established a humanitarian program for refugees; and the Internal Security Act of 1950

a provision which requires that aliens who seek to work in the United States obtain certification from the Secretary of Labor.¹⁹

Aliens can be classified either as immigrants who are subject to quotas and a system of preference, or as non-immigrants who are generally permitted to work for a limited time in a specific capacity.²⁰ The classification and certification system required by the Act is designed to protect the nation's interest in a sound labor market.²¹ This economic interest is supported by a policy that immigration should not cause a

which expanded the provisions for the exclusion of subversives. *Id.* at 8. *See generally* Fuchs, *supra* note 16 (principles of immigration reform).

19. *See* Gorden & Rosenfield, *supra* note 16, at 19 (1965 amendment adds labor certification requirement); Immigration and Nationality Act, 8 U.S.C. § 1182 (14) (1988) (provision to strengthen safeguards for American labor). *See also infra* note 21 and accompanying text (legislative history). Prior to 1965 the Secretary of Labor could exclude immigrants by certifying that they would displace American workers or adversely affect wages and working conditions. *Id.* Under current law an immigrant must obtain clearance from the Secretary of Labor prior to seeking a visa. S. REP. No. 748, 89th Cong., 1st Sess. (1965). *See* Wang v. Immigration and Naturalization Services, 602 F.2d 211, 213 (9th Cir. 1979) (requiring labor certification). The purpose served by the law is to keep alien workers from flooding the American labor market and to protect American jobs. *Id.*

20. *See supra* note 1 and accompanying text (statutory provisions). *See also* MUTHARIKA, THE ALIEN UNDER AMERICAN LAW, Chapter III, p. 4 (1980) (right to work authorization based on classification). "Work authorization may be inherent in the alien's classification, or he may have a classification in which he can request and receive employment permission from INS." *Id.*

21. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (14) (1988) (classes of aliens excluded from entrance and waiver of inadmissibility); Gorden & Rosenfield, *supra* note 16, at 2-42 (revisions of 1965 enactments). The provisions requiring certification by the Secretary of Labor give added protection to the American labor force. Gorden & Rosenfield, *supra* note 16, at 2-42. *See also* S. REP. No. 748, 89th Cong., 1st Sess., (1965) and H.R. REP. No. 1365, 82d Cong., 2nd Sess., (1952) (safeguards added to protect American economy from job competition and adverse working standards); Wang v. INS, 602 F.2d 211, 213 (9th Cir. 1979) (citing legislative intent in protecting job market). There has been much debate about the best immigration policy which would achieve the safeguards needed for the American economy and American jobs. Reubins, Temporary Admission of Foreign Workers: Dimensions and Policies, Special Report of National Manpower Policy, No. 34, March 1979 (Washington, D.C.). Several policy options exist. *Id.* One option promotes a policy of admitting foreign workers to fill residual vacancies. *Id.* Another option is a policy that promotes an all-American labor force. *Id.* Somewhere between these two opposite policies is the middle ground which is reached by improving present immigration programs. *Id.* In order to continue to accept immigrants and grant work permission, uncertified and improperly classified immigrants must be prevented from entering this country. Fuchs, *supra* note 16, at 433.

decline in the average income of the population.²²

Under the Act, non-immigrant crewmen are entitled to enter the United States to work.²³ The Act defines non-immigrant crewmen as alien crewmen functioning in any capacity associated with the vessel's normal operations.²⁴ If crane operators are alien crewmen, they are entitled to work aboard their vessel without certification.²⁵ If they are not alien crewmen, it must be certified that they are the only workers qualified to do the job.²⁶

The term "crewmen" has rarely been interpreted in the context of the Act, but has been interpreted in cases under both admiralty law and the Longshoremen and Harbor Worker's Compensation Act ("LHWCA").²⁷ The United States Supreme Court has distinguished those serving as laborers on vessels from those aiding in navigation, i.e., crewmen.²⁸ The

22. See Whelan, *Principles of United States Immigration Policy*, 44 UNIV. OF PITT. L. REV. 447, 474 (1983) (economic considerations under immigration law). Protection of the national interest in job security may not merely require exclusion of immigrants, but also allows for inclusion of immigrants to promote or even maximize "the rate of economic growth by filling in the labor shortages . . . through the contribution of especially needed skills." *Id.* See also *supra* note 21 (policy options for protection of American labor market); Immigration and Nationality Act, 8 U.S.C. § 1182 (1988) (labor certification requirement).

23. See Immigration and Nationality Act, 8 U.S.C. § 1182 (1988) (labor certification). A crewman whose services are required for the normal operations of his vessel and who enters the United States temporarily to perform such services would be classified as a non-immigrant crewman. Act, *supra* note 1, at § 1101 (a)(15)(D).

24. See Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(15)(D) (1988) (non-immigrant crewmen defined); see also *supra* note 1 and accompanying text (language of statute). There are very few cases interpreting the term crewman, whether defined as one engaged in "normal operations" or "primarily to aid in navigation." See generally *supra* note 4 and accompanying text (LHWCA and admiralty cases defining crewmen).

25. See Gorden & Rosenfield, *supra* note 16, at 23 (amendments changing certification); see also Mutharika, *supra* note 1 (classes of non-immigrants entitled to work authorization).

26. See *supra* notes 16 and 21 and accompanying text (labor certification and policy objectives).

27. See *supra* note 4 and accompanying text (cases defining crewmen under LHWCA and admiralty law).

28. See *South Chicago Co. v. Bassett*, 309 U.S. 251, 257 (1939) (decendent who performed duties on vessel and fell from deck and drowned, not crewman). Crew under the LHWCA Act means a company of seamen belonging to the vessel. *Id.* "Crewmen" usually referred to and is naturally thought of as those who are on board to aid in navigation. *Id.* See also *Puget Sound Freight Lines v. Marshall*, 125

Board of Immigration Appeals ("BIA") has held that to fit within the definition of a "crewman" under the Act a person must have a function on board the vessel.²⁹ The BIA reasoned that simply stating that those who aid in navigation are crewmen is inadequate to define the scope of the term.³⁰

In *International Longshoremen's and Warehousemen's Union v. Meese*,³¹ the court held that the Kingcome crane operators are not alien crewmen for purposes of the immigration laws.³² The court found that the INS' definition of "crewmen" construed the statute too broadly.³³ The court reasoned that such a definition ignored limitations expressly placed on the term in other sections of the Act, applicable regulations, and relevant case law.³⁴ These restrictions limit "crewmen" to those individuals who are on board to assist in the operation of the vessel, as distinguished from those on board to contribute to the overall mission of the vessel.³⁵ To look solely to whether activities are performed on board a vessel would, according to the court, create a definition so broad that it would

F.2d 876, 879 (1942) (stevedore who traveled with ship loading and unloading vessel was not crewman).

29. See Immigration and Nationality Act, 8 U.S.C. §§ 1101 (a)(10), 1101 (a) (15)(D) (1988) (crew person serving in any capacity for normal operations is a crewman); *In Re M/T "Rajendra Prasad,"* 16 I & N Dec. No. 2696, 705, 708 (BIA 1979) (serving in any capacity versus primarily for navigation).

30. See *In Re M/T "Rajendra Prasad,"* 16 I & N Dec. No. 2696, 705, 708 (BIA 1979) (board suggested that in practice the definition needs to be broader). See also *Immigration and Naturalization Serv. v. Stanisic*, 395 U.S. 62 (1969) (administrative procedure for review of agency's interpretation). "The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with regulation." *Id.* at 72. See also *Bresgal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1987) (considerable deference due agency's interpretation of statute); *United States v. Markgraf*, 736 F.2d 1179, 1183-84 (7th Cir. 1984) (where administrative agency has interpreted statute, deference should be given agency opinion).

31. 883 F.2d 1443 (9th Cir. 1989).

32. 883 F.2d at 1450. See Act, *supra* note 1 and accompanying text (statutory definition of crewmen).

33. *Id.* at 1450. *In Re M/T "Rajendra Prasad,"* 16 I & N Dec. No. 2696, 705, 708 (BIA 1979) (stresses serving in any capacity versus primarily for navigation).

34. 883 F.2d at 1450. See Act, *supra* notes 1 and 4 and accompanying text (statute and cases defining crewmen).

35. 883 F.2d 1452. Even if we accepted the court's limitations, that those on board be engaged primarily to "aid in navigation," the phrase included other workers with permanent connections to the ship. *Id.*

encourage aliens to circumvent the Act by merely insuring that all work is done on board.³⁶ This would frustrate Congress' purpose of protecting American jobs.³⁷

The court outlined three factors it found relevant to determining whether a ship's employee is an alien crewman able to qualify for non-immigrant status.³⁸ First, the court looked at the nature of the employee's duties and reasoned that the activities of the crane operators were more akin to work performed by longshore laborers than by traditional crewmen.³⁹ Second, the court considered when the duties are performed; while the vessel is underway or only when it reaches its destination.⁴⁰ Since the crane operator's main duty is to load and unload logs once the ship enters the United States, the court reasoned that employees who perform cargo handling functions are not crew members.⁴¹ Finally, the court considered whether the employees had a permanent connection with the vessel.⁴² Relying on the fact that the crane operators frequently flew to the ship merely to unload cargo on trips within Canada, and that the only reason they stayed with the ship on trips to the United States was to comply with immigration laws, the court concluded that in reality the operators do not have a permanent connection with the ship.⁴³ Limiting the

36. *Id.* at 1452-53. The court cited the INS' *Golden Alaska Memorandum*, which states fish processors were not crewmen required for normal operations of their vessel. *Id.*

37. 883 F.2d at 1453. The court reasoned that if you limit crewmen to those "primarily and substantially on board to aid in navigation," American jobs would be protected. *See also supra* note 21 and accompanying text (legislative purpose).

38. 883 F.2d at 1451. *See Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966) (suggests application of these principles).

39. 883 F.2d at 1451.

40. 883 F.2d at 1451. *See South Chicago v. Bassett*, 309 U.S. 251, 260 (1940) (distinguishing services of laborers from those on board who primarily aid in navigation).

41. 883 F.2d at 1451. *See Puget Sound Freight Lines v. Marshall*, 125 F.2d 876, 878 (9th Cir. 1942) (stevedores who traveled with ship for loading and unloading cargo are not crewmen). Here the stevedore had no responsibilities while the ship was underway, nor did the loading of the ship have any impact on its ability to navigate. *Id.*

42. 883 F.2d at 1452. *See also Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966) (lack of a permanent connection may require specific navigational purpose).

43. 883 F.2d at 1451-52.

employees who may qualify as non-immigrant alien crewmen to those who are primarily on the vessel to aid in navigation would, the court reasoned, further Congress' purpose of protecting American jobs.⁴⁴

The court's decision in this case fails to give deference to the INS' opinion.⁴⁵ The issue of deference exemplifies the entanglement of agencies and courts; the presumption is that Congress intends judicial review of administrative action.⁴⁶ In this case the presumption was overcome because the action was committed to agency discretion.⁴⁷ The Administrative Procedure Act provides for agency discretion by law in cases where statutes are drawn so broadly that there is no case law to apply.⁴⁸ The court reasoned, however, that there was law to apply to the definition of "crewmen" and that Congress' purpose of protecting American jobs lends direction in defining the term.⁴⁹ The court's search for meaning outside the body of immigration cases, and its reliance on admiralty law raise doubts as to whether there is appropriate law to apply.⁵⁰

The INS interpreted the statute, finding in favor of Cana-

44. 883 F.2d at 1452-53. *See supra* note 21 and accompanying text (policy of American job protection).

45. *See supra* note 30 and accompanying text (where agency has interpreted statute, deference is due). The court felt the agency memorandum was contrary to its prior interpretations. *Id.* The issue, however, was whether the INS action was committed to agency discretion and thus was not reviewable. *Id.* *See also* 5 U.S.C. § 701 (a)(2) (1988) (Administrative Procedure Act; agency action committed to agency discretion).

46. *See* *Bresgal v. Brock*, 843 F.2d 1163, 1166 (9th Cir. 1987) (objective is to ascertain Congress' purpose). *See also* *Federal Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 31-32 (1981) (Agency's interpretation should be given deference, but where inconsistent with congressional intent courts are final authority); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986) (judicial review of agency action will not be barred without clear showing of congressional intent).

47. 883 F.2d at 1447. *See also* 5 U.S.C. § 701 (a)(2) (1988) (government organizations and employees; judicial review). The section reads in pertinent part: "This chapter [5 U.S.C.A. §§ 701 et seq.] applies, according to the provisions thereof, except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701 (a)(2) (1988).

48. *See supra* note 4 and accompanying text (LHWCA and admiralty cases, no Immigration and Naturalization Act cases interpreted).

49. *See supra* note 4 and accompanying text (cases defining crewmen). *See also supra* note 21 (immigration policies and legislative intent).

50. *See supra* note 4 and accompanying text (LHWCA case law).

dian crane operators.⁵¹ The District Court correctly upheld the agency's decision.⁵² The Appellate Court found the legal standard used by the District Court to be incorrect, and objected to the court's performing the function of the Secretary of Labor.⁵³ The Appellate Court's objection would suggest that this case should not have been granted judicial review, but rather that the agency should advise Canadian crane operators to seek certification.⁵⁴

It is unclear how Congress' intent to protect American jobs is best achieved, and whether a broad or narrow interpretation of "crewmen" serves its legislative purpose.⁵⁵ Thus, with no case law on the point, and after examination of the statutory language and legislative history, the court ought to have given greater deference to the INS' interpretation.⁵⁶

In *International Longshoremen's and Warehousemen's*

51. See Act, *supra* note 1 (statutory language).

52. 883 F.2d at 1446.

53. 883 F.2d at 1446. See *infra* note 54 and accompanying text (agency construction sufficiently reasonable). See also *supra* note 30 and accompanying text (agency responsible for enforcement of statute due deference). The District Court reasoned that because of the unique design of the ships and the special training needed to operate the cranes, crane operators were properly allowed to enter the United States as alien crewmen. See *supra* notes 5 and 6 and accompanying text (discussing ship and crane operators' training). In addition the Appellate Court felt that the District Court by relying on this fact in essence engaged in the process of certification. See *supra* note 21 and accompanying text (provisions that provide for certification by Secretary of Labor).

54. See *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (agency interpretation of statute). "In determining whether the Commission's action was 'contrary to law', the task of the Court of Appeals was not to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was 'sufficiently reasonable' to be accepted by a reviewing court." *Id.* See also *supra* note 21 and accompanying text (certification process).

55. See *supra* note 21 (policy options).

56. See *supra* note 4 and accompanying text (LHWCA cases). See also *In Re M/T "Rajendra Prasad,"* 16 I & N Dec. No. 2696 at 708. The Board discussed varying interpretations of crewmen and the court's criteria which favored a narrower definition, but rejected the criteria, choosing a broader definition of crewman because different results can be reached based on the statutory framework in which the criteria is examined. *Id.* See also *Immigration and Naturalization Serv. v. Stanisic*, 395 U.S. 62 (1969) (administrative procedure for review of agencies' interpretations). "The ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with regulation." *Id.*

Union, the court held that Canadian crane operators were not alien crewmen within the meaning of the Act.⁵⁷ The court failed to give deference to the INS' definition of alien crewmen.⁵⁸ The court defined crewman for the purposes of complying with immigration laws, as someone whose primary duties occur while the ship is at sea, under navigation.⁵⁹ The court stated that this narrow definition of non-immigrant alien crewmen promotes job protection.⁶⁰ In so doing, the court misapplied the standard for review of administrative determinations, since the INS' definition was sufficiently reasonable for the purpose of protecting the status of alien crewmen.⁶¹

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57. *See supra* note 1 and accompanying text (statutory definition of crewmen).

58. *See supra* note 30 and accompanying text (agency interpretation entitled to deference).

59. 883 F.2d at 1453.

60. *See supra* note 21 and accompanying text (legislative history and policy considerations).

61. *See* *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981) (agency interpretation of statute entitled to deference).