

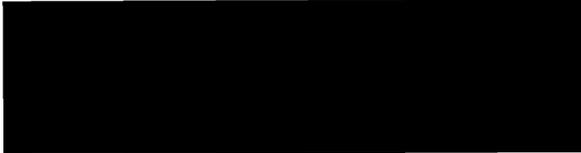


U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
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Washington, D.C. 20536



PUBLIC COPY

JAN 31 2001

File: EAC 00 161 51015 Office: Vermont Service Center Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

identification data deleted to
prevent clearly unwarranted
invasion of personal privacy

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The director certified his decision to the Associate Commissioner for Examinations for review. The decision of the director will be affirmed and the petition will be denied.

The petitioner, an airline company, seeks to extend its authorization to employ the beneficiary temporarily in the United States as a customer service coordinator and flight attendant. The director determined that the petitioner had established neither that the beneficiary possesses specialized knowledge nor that the intended employment required the possession of specialized knowledge. The director also held that the proper classification for this beneficiary is the classification for nonimmigrant crewmembers. See Immigration and Nationality Act § 101(a)(15)(D), 8 U.S.C. § 1101(a)(15)(D).

In response to the notice of certification, the petitioner argues, first, that the director erred in holding that the proper nonimmigrant classification for the beneficiary is the D nonimmigrant classification. Second, the petitioner argues that the evidence of record establishes both that the beneficiary possesses specialized knowledge and that the intended employment requires the possession of specialized knowledge.

The effect of prior proceedings on this case

As noted, the petitioner seeks the extension of the earlier decision approving L-1B classification for this beneficiary. In its brief, the petitioner claims that the service center did approve four extension petitions similar to this one. Brief at p. 7. Even assuming that this claim is correct, those decisions do not bind the Administrative Appeals Office (AAO) to approve the petition filed for this beneficiary. Those four petitions are not before the AAO, and the AAO must decide this case only on the basis of the record of this case. 8 C.F.R. § 103.2(b)(16). The Service, moreover, is not bound by any prior Service decision, unless the Service itself has designated that decision as a precedent. 8 C.F.R. § 103.3(c).

It is also important to note that the AAO is never bound by a service center decision. The AAO has jurisdiction over appeals from denials of L-1B visa petitions. 8 C.F.R. § 103.1(f)(3)(iii)(J). By designating an AAO decision as a precedent, the Service can bind the AAO and all other service center and district directors to follow the reasoning of the decision. *Id.* § 103.3(c). But it is the AAO, in the exercise of its appellate jurisdiction, that decides whether a precedent decision should be overruled or modified. The AAO, moreover, is not bound by a decision of a service center or district director. Indeed, the AAO could not exercise the error-correcting function

that is central to its appellate jurisdiction, if, when an issue first came before the AAO, the AAO could be held to be bound to a service center or district director's decision of which the AAO may not even be aware. To say this would be akin to saying that, when an issue comes before a court of appeals for the first time, the court of appeals would be bound by a decision of a district court, even though the court of appeals has jurisdiction to reverse the district court. See Louisiana Philharmonic Orchestra v. INS, No. Civ. A 98-2855, 2000 WL 282785 at 2 (E.D.La. 2000). On the basis of the record of proceeding in this case, it is clear that the beneficiary does not qualify for L-1B classification. Any Service decision approving a similar L-1B petition was in error.

The AAO is also aware of the judgment of the United States District Court for the District of Columbia in Delta Air Lines v. United States Department of Justice, Immigration and Naturalization Service, Memorandum, No. 98-3050-LFO (D.D.C. 1999). The district court held that the AAO had erred in revoking, on the grounds of gross error, L-1B visa petitions that the Service had approved for [REDACTED] flight attendants. Id. at 10. This judgment may well mean that the Service could not revoke the erroneous approval of a visa petition similar to this petition now before the AAO. It is important to note, however, that the district court expressly refrained from deciding that the flight attendants in that case actually qualified as L-1B nonimmigrants. Id. at 9. The case now before the AAO does present for decision the issue the district court did not address: whether the beneficiary actually qualifies as an L-1B nonimmigrant.

The propriety of the D classification

The director held that, on the basis of the record, the proper nonimmigrant classification for this beneficiary is the D nonimmigrant classification. The petitioner claims that this conclusion was erroneous because the beneficiary is not an "ordinary" flight attendant. Instead, she also participates in ground training and, when functioning as a flight attendant, also "mentors" other flight attendants concerning Eastern European passengers. The petitioner also argues that the D classification does not meet the petitioner's needs, because of the restrictions that apply to D nonimmigrant crewmembers, -- in particular the restriction against service on domestic flights. See 8 C.F.R. § 214.2(d)(1).

It is clear from the text of the Act, however, that the director's conclusion is correct. Section 101(a)(10) of the Act, 8 U.S.C. § 1101(a)(10), defines a crewman as a "person serving in any capacity on board a vessel or aircraft." The record shows that the beneficiary's primary duty is that of a flight attendant. Even her "training" and "mentoring" tasks are directly tied to that occupation. When she serves on a [REDACTED] flight she is, without

question, "serving in any capacity on board [the] aircraft." That is to say, she serves as a member of the crew. As an alien crewmember, it is the D nonimmigrant classification that applies to her. INA § 101(a)(15)(D)(i), 8 U.S.C. § 1101(a)(15)(D)(i). Neither she nor the petitioner can seek to avoid the restrictions on nonimmigrant crewmembers by claiming that her duties also qualify her for some other nonimmigrant classification.

Crewmembers are not so much aliens brought to the United States as they are the instrumental causes of the vessel's or aircraft's coming to the United States. Osaka Shosen Kaisha Line v. United States, 300 U.S. 98, 102 (1937). The texts of the crewmember provision, INA §§ 251 through 258, 8 U.S.C. §§ 1281 through 1288, and the restrictions on a crewmember's eligibility for other immigration benefits, Id. §§ 240A(c)(1) and 245(c)(1), 8 U.S.C. §§ 1229b(c)(1) and 1255(c)(1), make it clear that Congress intended there to be strict controls on nonimmigrant crewmembers -- so that the humanitarian provision for shore leave does not become a means of avoiding immigration controls. The petitioner does not want the beneficiary to be subject to these restrictions. But by including nonimmigrants serving in any capacity aboard a vessel or aircraft in the statutory definition of "crewman," INA § 101(a)(10), 8 U.S.C. § 1101(a)(10), it is clear that Congress intended any and all nonimmigrant crewmembers to be subject to these restrictions. To admit a nonimmigrant crewmember, who is actually performing crewmember duties, in another nonimmigrant classification would frustrate this carefully designed regimen. Given the beneficiary's duties, the director correctly held that, if she is to come to the United States as a nonimmigrant performing flight attendant duties (even the "enhanced" duties that Delta claims are hers), she may do so only as a D nonimmigrant.

Eligibility for the L-1B classification

Even assuming that it is legally permissible for a nonimmigrant crewmember to qualify for admission as something other than a D nonimmigrant classification, a petitioner filing a visa petition must still prove that the crewmember qualifies for that other classification. To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

When a petitioner files a petition seeking the extension of the approval of an earlier L-1B petition, the petitioner is not required, as a matter of course, to present supporting evidence. 8 C.F.R. § 214.2(l)(14)(i). The director may, however, ask for evidence proving that the alien qualifies for classification as an L-1B nonimmigrant. Id. In this case, the director did request supporting documentation. The regulation relating to an initial petition, 8 C.F.R. § 214.2(l)(3), specifies the sort of evidence that establishes the beneficiary's eligibility:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, a managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive, or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States.

The U.S. petitioner, [REDACTED], Inc., states that it was established in 1967, and that it is a branch of the foreign office of [REDACTED], Inc., located in London. The petitioner declares 74,000 employees and a gross annual income of approximately \$14.7 billion. It seeks to extend its authorization to employ the beneficiary for two years at an annual salary of \$22,560.

This case presents two related, but distinct, issues. The first is whether the beneficiary possesses specialized knowledge. The second is whether the intended employment is in a capacity that requires specialized knowledge. In order to prevail in this appeal, the petitioner must prove, by a preponderance of the evidence, that each of these requirements is satisfied. That is to say, the petitioner must establish both that the beneficiary possesses specialized knowledge and that the employment requires a person who possesses this specialized knowledge.

Section 214(c)(2)(B) of the Act, 8 U.S.C. § 1184(c)(2)(B), provides:

(A)n alien is considered to be serving in a capacity involving specialized knowledge with respect to a company if the alien has a 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.

8 C.F.R. § 214.2(l)(1)(ii)(D) states:

Specialized knowledge means special knowledge possessed by an individual of the petitioning organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.

Before discussing the evidence, it is necessary to note that the petitioner has presented evaluations from five individuals whom the petitioner considers to be "expert" witnesses concerning the cross-cultural training program. Drawing an analogy from the Federal Rules of Evidence, the determination whether to admit testimony as "expert" testimony depends on whether the testimony will "assist the trier of fact to understand the evidence or to determine a fact in issue." FRE 702. There is no dispute, however, concerning whether the beneficiary has skills that are useful to the petitioner. The question is the legal question whether these skills qualify as "specialized knowledge." None of the statements provide any foundation for concluding that the proffered "experts" are actually qualified to give expert opinions on what qualifies as "specialized knowledge" for purposes of the L-1B nonimmigrant visa classification. It is for the AAO to resolve this legal issue, and the AAO concludes that the information from the proposed experts does not aid the AAO in resolving the factual issues that must be resolved to answer the legal question. For these reasons, the AAO declines to recognize the individual evaluators as expert witnesses.

Turning now to the evidence, the petitioner stated that the beneficiary is a customer service coordinator and flight attendant and that her duties are to:

Ensure passenger safety and provide on board transatlantic and domestic flight services, apply specialized knowledge of [REDACTED] European inflight services product to serve as flight attendant, crew trainer and on-board mentor.

The petitioner explained that the beneficiary serves as a subject matter expert who participates in training and mentoring U.S.-based flight attendants, and further described the beneficiary's duties as follows:

The flight attendants relocated by ██████████ from Warsaw to JFK are the only employees in its work force who possess specialized knowledge of that unique service product. These flight attendants have been ██████████ front line customer service providers for leisure and business travelers for Eastern and Southern Europe since ██████████ acquired the European routes. This flight base was ██████████ only flight attendant base in Europe, and the Warsaw-based flight attendants located there applied the particular procedures, regulations, norms, service techniques and customers that are the components of ██████████ proprietary, European in-flight service product. Indeed, it is their provision of that product that is a significant factor leading customers in Europe to select ██████████ over other foreign flag (or U.S. flag) carriers. . . .

As a group, these flight attendants have achieved exceptional performance levels, and specialized knowledge and skills, including the following:

1. Our Warsaw flight attendants have successfully serviced our international customers throughout Europe and are highly skilled in managing the service challenges of working with diverse cultural and language groups.
2. Our Warsaw flight attendants are exceptionally adept at recognizing the potential impact our on-board product can have on the international customer who has limited or no understanding the English language and U.S. culture.
3. Many have earned up to eleven years of flying experience (including flying time with Pan Am), with a majority of their flying time serving our German and Russian passengers, including flying to and from Moscow and St. Petersburg, as well as to other Southern and Eastern European cities.

In view of their specialized experience and proven skills in providing the distinctive Eastern European in-flight service product, ██████████ is relying on the formerly Warsaw-based flight attendants to assist the company in three critical ways:

* * *

- they are a resource for the ongoing development and refinement of that unique product and the Eastern European cross-cultural training and mentoring program that corresponds to it;
- they are implementing the multi-faceted cross-cultural training program for its JFK-based flight attendants that ultimately will be rolled out to all [REDACTED] flight attendants who service international routes; and
- they are continuing to provide the Eastern European in-flight service product on transatlantic and domestic feed flights, during which they advise and guide U.S.-based flight attendants in the nuances and requirements of that product.

The petitioner explained that the beneficiary will be part of a team of flight attendants who will serve as facilitators in an Eastern European Cross-Cultural Training Program.

In a letter dated June 15, 2000, the petitioner was requested to respond to the following:

Submit a detailed description of "[REDACTED] proprietary, European in-flight service product" referred to in your letter. Submit a detailed description of the beneficiary's specialized knowledge of "[REDACTED] proprietary, European in-flight service product."

Submit [REDACTED] corporate job description, including education, training, and experience requirements, for customer service coordinators.

What percentage of the beneficiary's time is spent as a Module 5 facilitator? A subject matter expert? An on-board mentor? A customer service coordinator? Submit documentary evidence, such as personnel and payroll records, to corroborate your answers. Submit copies of all on board mentor program monthly reports written by the beneficiary in the last year.

What percentage of the beneficiary's time is spent on international flights to Eastern Europe? Other international flights? Domestic flights? Submit documentary evidence, such as personnel and payroll records, to corroborate your answers.

In a letter dated September 6, 2000, [REDACTED] Director of Flight Attendants argued that the beneficiary and the other Warsaw-based flight attendants "are the only flight attendants who in fact know

how to apply the ██████ in-flight service product to the special needs of our Eastern European passengers."

The petitioner submitted a subject matter expert program guide for Eastern Europe showing that the beneficiary will assist an instructor during a four-hour training session for other flight attendants. According to the program guide, the beneficiary's primary duties as a subject matter expert will be as a flight attendant. The beneficiary will serve as an onboard mentor "when time and situation permit." (*Eastern Europe Subject Matter Expert Program Guide*, p. 11). The beneficiary's qualifications as a subject matter expert are said to include:

- Knowledge of historical and current cultural, political, economic, and social norms
- First hand experience and knowledge of the region
- Experience working ██████ Eastern European routes
- Knowledge of the distinctive cultural norms as applied to business and leisure travel

There is no discussion as to how the petitioner tested or measured the beneficiary's qualifications based on her knowledge of historical and current cultural, political, economic and social norms.

The director found that the beneficiary is "just an experienced customer service coordinator with a native knowledge of Eastern European languages, cultures, and customs" and is not employed in a specialized knowledge capacity.

On appeal, counsel argues that the beneficiary performs an essential function by serving as a subject matter expert, that she devotes "100% of [her] time to training and mentoring ██████ U.S. flight attendants in this proprietary Eastern European passenger service," and that the "training and mentoring program...focuses on allowing real-world situations to serve as learning experiences for ██████ New York-based flight attendants, a group of some 3,600."

The beneficiary serves as one of several team facilitators in a module for training other flight attendants, and is not the primary instructor. In February 2000, the petitioner conducted 2 four-hour training sessions. There were then 11 four-hour classes each month from March through June 2000. The beneficiary served as co-facilitator for only 11 four-hour classes in March of 2000. As noted by the director, the beneficiary spent, at most, 44 hours out of the five-month period of February 2000 to June 2000 as a training co-facilitator. Accordingly, it is reasonable to infer from the evidence of record that the remainder of her duties -- actually, the bulk of her time -- must have been devoted to functioning as a mentor and flight attendant. To the extent that her duties as a mentor include preparing the monthly mentoring

report, it is noted that the report is a simple one-page format consisting of five questions asking the beneficiary to discuss situations encountered in the past month, and to make suggestions. The beneficiary's responses include "Eastern Europeans [were] drinking too much alcohol," "[f]or Russians, flying is a very special event in their life [sic] and they celebrate this," "Russian men don't like to listen to any orders/suggestions made by women about drinking," and passengers from formerly communist countries "were not used to having their names be known to the crewmembers." The beneficiary's reports also cite solution-oriented techniques such as speaking Russian to newly-adopted Russian children to calm them and "translat[ing] almost anything possible." From these reports, it is clear that much of the "mentoring" simply involves the beneficiary's own linguistic abilities and cultural background in performing her primary duties as flight attendant. The petitioner's own subject matter expert training manual indicates that the beneficiary will serve as a mentor to the extent that her duties as a flight attendant permit. There is no evidence that the beneficiary possesses specialized knowledge or that her duties involve specialized knowledge as defined by 8 C.F.R. § 214.2(l)(1)(ii)(D).

The director found that the beneficiary's skills as a subject matter expert appear to consist of little more than the fact that she is a flight attendant and customer service coordinator who happens to be from Eastern Europe. Counsel argues that the beneficiary and the other Warsaw Flight Attendants spend "100% of their time as subject matter experts." This is true only to the extent that the beneficiary and the other Warsaw Flight Attendants may be considered to be natives of Eastern Europe. The knowledge of foreign customs, cultures, and history possessed by the beneficiary as the result of her multicultural life experiences does not constitute an advanced level of knowledge of the processes and procedures of the petitioning organization, and has no bearing on the beneficiary's eligibility for classification as an intracompany transferee on the basis of specialized knowledge. Even if it were established that the beneficiary has an appreciable amount of worldly experience and cultural awareness as a result of her background and her experience as an international flight attendant, such knowledge cannot be considered as special knowledge of the company product or an advanced level of knowledge of company processes and procedures.

The record does not establish that the beneficiary has advanced or special knowledge of the petitioning organization's product and its application in international markets. The beneficiary's origins in Eastern Europe and her employment experience with the foreign organization may have given her knowledge that is useful in performing her duties, but it cannot be the case that any useful skill is to be considered to constitute special or advanced knowledge. One's native knowledge of a language and culture is

not, by itself, specialized knowledge. Nor is experience as a flight attendant specialized knowledge. Nor, however useful it may be, does the combination of these skills qualify as specialized knowledge. In fact, contrary to counsel's assertions, the beneficiary's knowledge of the company product, or of the processes and procedures of the foreign company, has not been shown to be substantially different from, or advanced in relation to, that of any airline attendant of any airline company. Counsel argues that the beneficiary's training and experience have given her knowledge which is special because it is specific to [REDACTED]. However, it is to be expected that job training offered by [REDACTED] would pertain to [REDACTED] procedures exclusively. Not all in-house training can be considered to qualify as specialized knowledge.

Nor does the evidence of record establish that the intended employment requires possession of specialized knowledge. In essence, the beneficiary's position is that of a flight attendant. She spends a relatively small amount of time (44 hours total in the five months from February to June 2000) "facilitating" training. Most of her "mentoring," as noted, involves her use of her language skills to perform flight attendant duties. Even the "mentoring" occurs only as "circumstances permit." Again, as useful as those skills may be, they are not specialized knowledge.

It is also important to note that Congress created the L-1 nonimmigrant classification to facilitate the transfer to the United States of aliens who did not fit within any pre-existing classifications. H. Rep. No. 91-851 at 3, (1970), reprinted in 1970 U.S.C.C.A.N. 2750, 2751-52. The actual duties that the beneficiary performs, however, are those of a flight attendant. That the beneficiary has language and cultural skills that aid her greatly in providing this service does not alter this critical fact. As the director noted in his decision, the evidence of record supports the conclusion that the proper classification for this nonimmigrant flight attendant is the classification for alien crewmembers, under section 101(a)(15)(D) of the Act, 8 U.S.C. § 1101(a)(15)(D).

Based on the evidence presented, it is concluded that the petitioner has not established that the beneficiary has specialized knowledge or that she would be employed in a capacity involving specialized knowledge. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The decision of the director dated December 7, 2000 is affirmed. The petition is denied.