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Order 2000-4-20

Served: April 19, 2000



**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 19th day of April, 2000

Applications of

TRANS BORINQUEN AIR, INC.

for certificates for interstate and foreign charter all-cargo air
transportation under 49 U.S.C. 41102

Dockets OST-99-6173 - 6
OST-00-6777 - 2

**ORDER TO SHOW CAUSE
PROPOSING DENIAL OF APPLICATIONS**

Summary

By this order, the Department tentatively finds that Trans Borinquen Air, Inc., fails to meet U.S. citizenship requirements of 49 U.S.C. 40102(a)(15), and that its applications for interstate and foreign charter all-cargo authority under 49 U.S.C. 41102 filed in Dockets OST-99-6173 and OST-00-6777 should be denied.

Background

Section 41102 of Title 49 of the United States Code (Transportation) ("the Statute") directs us to determine whether applicants for certificate authority to provide interstate and foreign charter transportation are "fit, willing, and able" to perform such transportation; and to comply with the statute and the regulations of the Department. In order to be eligible to hold a certificate, we must also find that the applicant is a U.S. citizen as defined in the Statute.

On August 27, 1999, Trans Borinquen Air, Inc., filed an application in Docket OST-99-6173 requesting interstate and foreign charter all-cargo certificate authority pursuant to section 41102.¹

¹ By letter dated September 17, 1999, the Department advised the applicant that we would treat the noted application as a request for interstate authority only and that, if as indicated by this application, Trans Borinquen also wished to conduct foreign charter operations, it would need to file a separate application for such authority as mandated by our rules. On January 11, 2000, Trans Borinquen filed its separate application for foreign charter authority in Docket OST-00-6777.

No answers opposing Trans Borinquen's applications were filed. However, as discussed below, the information before us does not demonstrate that Trans Borinquen is a U.S. citizen. Indeed, it shows the opposite. Therefore, we propose to deny the company's applications.² We will, however, give interested persons an opportunity to show cause why we should not adopt as final our tentative conclusion that Trans Borinquen is not a citizen of the United States as defined in 49 U.S.C. 40102(a)(15).

CITIZENSHIP

Section 41102 requires that certificates to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. In addition to meeting these specific numerical standards, we have also interpreted the Statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

Background

In its application filed on August 27, 1999, Trans Borinquen stated that it was a corporation registered under the laws of the Commonwealth of Puerto Rico, that its officers, directors, and key personnel were U.S. citizens, and that it was a citizen of the United States as defined in the Statute. The company provided an affidavit attesting to its citizenship dated August 24, 1999, and signed by Mr. Victor Matias as General Manager of Trans Borinquen. Information accompanying this application demonstrated that Trans Borinquen was incorporated under the laws of the Commonwealth of Puerto Rico on May 27, 1999, and that it was "authorized to issue" 100,000 shares of common stock. While on the one hand stating that none of the company's stock had yet been issued, Trans Borinquen also stated that 51 percent of the shares outstanding were held by Ms. Miriam Perez, a U.S. citizen, and 49 percent were held by "Mr. Jackues Cohen, a French/Dominican."³ Based on this ownership structure, Trans Borinquen was not a U.S. citizen in that at least 75 percent of the outstanding voting stock was not owned by U.S. citizens.

Moreover, other information in the application raised questions as to whether Trans Borinquen also failed the requirement that its president and two-thirds of its Board of Directors and other managing officers be U.S. citizens. No individual was identified as holding the position of

² We are not, by this order, making any tentative findings with regard to the applicant's fitness. No analysis of this matter has been conducted due to the company's failure to demonstrate that it is a U.S. citizen. Should the Department ultimately conclude that Trans Borinquen meets our citizenship requirements, we will proceed with a full evaluation of the company's fitness.

³ See p.7 of the August 27 application. It was unclear from this designation whether Mr. Cohen held dual citizenship with France and the Dominican Republic. Regardless, it was clear that he was not a citizen of the United States. In its August 27 application, Mr. Cohen's first name was spelled "Jackues." In its January 11 response, Mr. Cohen's name was spelled "Jackues" (pp.3 & 4) as well as "Jacques" (pp.11 & 12).

President, neither were any members of the Board of Directors identified as required by our rules (14 CFR 204.2(i)). However, according to the application, Trans Borinquen's management team consisted of the following individuals: Victor Matias--General Manager, Leonte A. Bernard--Director of Safety/Director of Operations, Luis A. Valette--Chief Inspector, Joaquin Sanchez--Director of Maintenance, and Jack Maynin--Chief Pilot

Trans Borinquen identified all of these individuals, with the exception of Mr. Valette, as U.S. citizens (p.16). Mr. Valette was identified as having USA/Dominican citizenship. However, other information contained in the application raised questions as to the stated citizenship of Mr. Maynin and no other information supporting the seemingly dual citizenship of Mr. Valette was supplied. If both Mr. Maynin and Mr. Valette were not, in fact, U.S. citizens, then Trans Borinquen also failed to meet the two-thirds U.S. citizen management requirement of section 40102(a)(15).

As a result, by letter dated September 17, 1999, the Department advised Trans Borinquen that it did not appear to meet the U.S. citizenship requirements of the Statute.

On September 23, 1999, Trans Borinquen filed a response to our letter. In this response, Trans Borinquen stated that its ownership structure now consisted of Ms. Perez with 51 percent of the outstanding voting shares, Mr. Cohen with 19 percent, and Ms. Lydia Adela Rodriguez with 30 percent. Ms. Rodriguez was identified as a U.S. citizen and, hence, Trans Borinquen stated that it was in compliance with the citizenship requirements of the Statute (p.1). In addition, while presenting the same organizational chart as was contained in its initial application, Trans Borinquen stated that Ms. Perez, a U.S. citizen, served as its President (p.2). Further, the company stated again that, "all key management are U.S. citizens" (p.2). However, it proceeded to list Mr. Maynin not as a U.S. citizen, but as a U.S. resident,⁴ and failed to provide any evidence as to the citizenship of Mr. Valette.⁵

Therefore, by letter dated November 17, 1999, we advised Trans Borinquen that the information provided in its September 23 filing still did not clearly demonstrate that Trans Borinquen now met the U.S. citizenship requirement of the Statute. Hence, we asked Trans Borinquen to provide detailed responses to a number of questions that were designed to elicit information relative to the company's ownership and management structure.

On January 11, 2000, Trans Borinquen filed a response to our November 17 request for additional information. In its response, the applicant stated that while no shares of its stock have yet been issued, Ms. Perez will be issued 153,000 shares for which she will pay an unstated dollar amount using funds from her savings, while Mr. Cohen, who was to have been

⁴ In its September 23 letter, Trans Borinquen gave the name of its Chief Pilot as "Jack Magning," not "Jack Maynin." However, this individual appears to be the same person, whose name is correctly spelled as "Magning" (according to his resume), or "Magnin" (according to his FAA-issued Air Transport Pilot license). Also according to these documents, Mr. "Maynin" is a citizen of Switzerland.

⁵ Trans Borinquen subsequently provided evidence that Mr. Valette was a U.S. citizen. (See Trans Borinquen response submitted January 11, 2000, p.7.)

issued 147,000 shares at the time of Trans Borinquen's initial application will instead be issued only 57,000 shares, having transferred 90,000 of his unissued shares to Ms. Rodríguez on September 23.⁶ These transferred shares are represented as a gift to Ms. Rodríguez from Mr. Cohen (p.2).

In response to our request for a description of any officerships, directorships, or other positions held by each of Trans Borinquen's owners in the company, Trans Borinquen stated that Ms. Perez served as its President, Secretary and Treasurer, positions she assumed on September 30, 1999 (p.4). No mention was made of any positions held by Mr. Cohen or Ms. Rodríguez. However, in response to our request that Trans Borinquen identify each member of its Board of Directors, the applicant listed each of its owners as directors and stated that Ms. Perez had served as its Chairman since September 1999 (p.4).

With respect to our request that Trans Borinquen describe any family relationship (whether by blood, marriage, or adoption) between and among the shareholders of Trans Borinquen, the company first stated there are none, but proceeded to note that Ms. Rodríguez is the sister-in-law of Mr. Cohen (p.3).

With respect to our request that Trans Borinquen describe any past or present business relationship between and among the shareholders of Trans Borinquen or businesses under their ownership and control, the applicant noted that Mr. Cohen is the co-owner of Aero Chago, S.A., a Dominican corporation in business as a cargo broker, and that Ms. Perez has been "the General Manager (employee) of Aero Chago for the last 10 years" (p.3).

Analysis

Based on the information supplied by Trans Borinquen, it appears that actual control of the applicant resides in Mr. Cohen, who is a non-U.S. citizen. We reach this position based on a number of factors.

First, at the time of its application, Trans Borinquen clearly failed to meet the specific numerical standards for citizenship with 49 percent of its stock held (or to be held) by Mr. Cohen. While Trans Borinquen has (or intends to) take steps to reduce Mr. Cohen's ownership interest to 19 percent, all available information indicates that the carrier will continue to be under Mr. Cohen's control. Indeed, it appears that Mr. Cohen will transfer a substantial portion of this ownership interest to his U.S.-citizen sister-in-law without any financial consideration being given. Absent any evidence to the contrary, and no evidence that Ms. Rodríguez has a financial interest in the company, or brings particular expertise, we believe that this transfer (or proposed transfer), which occurred after we advised the company that it did not meet the numerical requirements for U.S. stock ownership under the Statute, does not reduce Mr. Cohen's influence in the company, and would still allow Mr. Cohen to exercise full control over the company's operations.

⁶ Despite being authorized to issue only 100,000 shares of common stock as noted in its original application, it appears that Trans Borinquen's ownership will involve the issuance of 300,000 shares.

Second, while the applicant did not disclose the amount that Ms. Perez is to pay for her shares of Trans Borinquen's stock, we can not conclude that she will exercise her votes of these shares, or her duties as President and Chairman of Trans Borinquen, free of Mr. Cohen's influence. Ms. Perez has been a long-term employee of Mr. Cohen. Indeed, Mr. Cohen has been her only employer. In addition, nothing in Ms. Perez's resume demonstrates that she has had prior experience running an airline or other business.⁷

Third, while the Certificate of Incorporation presented for Trans Borinquen identifies Ms. Perez as its incorporator, this incorporation took place in April 1999 while Ms. Perez was still an employee of Mr. Cohen's and, indeed, the address listed on this document for Trans Borinquen is identical to that of Aero Chago's San Juan cargo offices.⁸

Fourth, Ms. Perez was apparently named Trans Borinquen's President and Chairman after we initially advised the company that it did not appear to meet the U.S. citizenship requirements of the Statute and set forth for the company those requirements. No information was provided as to who held the positions as Trans Borinquen's President and Chairman prior to September 1999.

Finally, Trans Borinquen's General Manager, Mr. Matias, and its Director of Safety and Operations, Mr. Bernard, are also long-term employees of Mr. Cohen at Aero Chago. According to his resume, Mr. Matias served as Aero Chago's Operations Manager from 1991 until joining the applicant in 1999; and, as recently as August 26, 1999, Aero Chago identified Mr. Bernard as its Director of Operations, a position he has held since early 1996.

All of the information presented thus far indicates that Trans Borinquen is the alter ego of Mr. Cohen and Aero Chago. Hence, we tentatively find that Mr. Cohen exercises, and will continue to exercise, control over the applicant. As a result, we tentatively conclude that Trans Borinquen is not a citizen of the United States as required by section 41102 of the Statute and, therefore, may not be issued certificates of public convenience and necessity authorizing it to engage in interstate and foreign charter all-cargo air transportation.⁹

⁷ The resume supplied for Ms. Perez does not reflect any position as General Manager of Aero Chago. Rather, Ms. Perez lists herself as having served from 1986-1992 as a traffic manager and from 1992-1999 as a station manager with Aero Chago.

⁸ P.O. Box 37067, San Juan, P.R. 00937.

⁹ While the aircraft Trans Borinquen intended to operate appear to exceed the size limitations for the conduct of operations as an air taxi under Part 298 of our rules, should the applicant propose to operate smaller aircraft (i.e., with no more than 18,000 pounds payload), our citizenship requirements would continue to apply. As a result, if our tentative findings here with respect to Trans Borinquen's citizenship are finalized, the company may not register as an air taxi operator.

OBJECTIONS

We will give interested persons 14 days following the service date of this order to show cause why the tentative findings and conclusions set forth here should not be made final; answers to objections will be due within 7 days thereafter. We expect such persons to direct their objections, if any, to the application and points at issue and to support such objections with detailed economic analyses. If an oral evidentiary hearing or discovery procedures are requested, the objector should state in detail why such a hearing or discovery is considered necessary, and what material issues of decisional fact the objector would expect to establish through a hearing or discovery that cannot be established in written pleadings. The objector should consider whether discovery procedures alone would be sufficient to resolve material issues of decisional fact. If so, the type of procedure should be specified (*See* Part 302, Rules 25 and 26); if not, the reasons why not should be explained. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will issue an order that will make final our tentative findings and conclusions with respect to Trans Borinquen's U.S. citizenship and deny its applications in Dockets OST-99-6173 and OST-00-6777 for interstate and foreign charter authority. If, however, Trans Borinquen is able to demonstrate that it is, in fact, owned and controlled by U.S. citizens, we will reconsider our proposed action.

ACCORDINGLY,

1. We direct all interested persons to show cause why we should not issue an order finding that Trans Borinquen Air, Inc., does not meet the U.S. citizen requirements of the Statute, and denying it the section 41102 certificate authority it seeks.
2. We direct any interested persons having objections to the issuance of orders making final the proposed findings and conclusions stated above to file them with Department of Transportation Dockets, 400 Seventh Street, SW, Room PL-401, Washington, D.C. 20590, in Dockets OST-99-6173 and OST-00-6777, and serve them upon all persons listed in Attachment A no later than 14 days after the service date of this order; answers to objections shall be filed no later than 7 days thereafter.
3. If timely and properly supported objections are filed, we will accord full consideration to the matters or issues raised by the objections before we take further action.¹⁰
4. In the event that no objections are filed, we will consider all further procedural steps to be waived and we will enter orders making final our tentative findings and conclusions.
5. We will serve a copy of this order on the persons listed in Attachment A.

¹⁰ Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

6. We will publish a summary of this order in the Federal Register.

By:

A. BRADLEY MIMS
Deputy Assistant Secretary for
Aviation and International Affairs

(SEAL)

*An electronic version of this document is available on the World Wide Web at:
http://dms.dot.gov/reports/reports_aviation.asp.*

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