6 I. & N. Dec. 255 (BIA), Interim Decision 626, 1954 WL 7855

United States Department of Justice

Board of Immigration Appeals

IN THE MATTER OF G-----

In EXCLUSION Proceedings

T-2680097

Decided by Board July 29, 1954

****1 *255 Nonimmigrant-Section 101 (a) (15) (B) of Immigration and Nationality Act-Resident of foreign contiguous country who works daily in United States not eligible.**

A resident of Canada who is paid by the Ford Motor Car Company of Canada for work in the United States 8 hours a day, five days a week, is not eligible for nonimmigrant status under section 101 (a) (15) (B) of the Immigration and Nationality Act. While such individual has a residence in a foreign country which he has no intention of abandoning, he earns his salary entirely while employed in the United States on work that is of a continuing nature at a fixed and permanent place and he must, therefore, be regarded as an immigrant.

BEFORE THE BOARD

Discussion: The case comes forward on appeal by the acting officer in charge of the port at Detroit, Mich., from a decision dated April 22, 1954, of the special inquiry officer admitting the applicant as a nonimmigrant visitor for business.

The applicant seeks admission as a nonimmigrant visitor for business under section 101 (a) (15) (B) of the Immigration and Nationality Act. He is a native of England and a citizen of Canada, 58 years old, and has resided in Canada with his wife and son since 1906 at Windsor, Ontario. He has been employed by the Ford Motor Car Co. of Canada since 1916 and for the past 8 or 9 years has been assigned to the work he is presently doing. He testified that he is paid entirely by the Ford Motor Car Co. of Canada but that he is engaged in work on the American side of the bridge 5 days a week.

The applicant testified that he rides from Windsor, Ontario, to the American side of the Ambassador Bridge, Detroit, Mich., where there are trucks of different transportation companies carrying automobile parts and materials destined to the Ford Motor Car Co. of Canada at Windsor. He testified that he works on the American side of the bridge as a receiving clerk and truck loader, loading two or three trucks a day. He spends the entire 8 hours ***256** of the working day on the American side and at the end of the day rides a company truck back to Windsor.

The applicant seeks to qualify as a nonimmigrant under section 101 (a) (15) (B) of the Immigration and Nationality Act which refers to an alien having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure. Regulations of the Department of State relating to temporary visitors are couched in the same phraseology as the statute, and do not define the term "temporarily." The term "business" is defined in 22 C. F. R. 41.40 (b) as referring to legitimate activities of a commercial or professional character, but does not include purely local employment or labor for hire. The question to be determined is whether the applicant qualifies as a temporary visitor for business.

**2 In the case of a Canadian dancer who had no intention of making her home in the United States but intended only to dance under a 6-month contract, it was held that the applicant was not a *bona fide* visitor for business, regardless of her intended temporary stay, inasmuch as the work she would engage in was of a permanent rather than of a temporary nature. [1] In the case of a Canadian citizen employed by the Canadian Pacific Railroad as a telegraph operator who was employed 3 days a week in Canada and 2 days a week in the United States as relief telegraph operator, it was held that the standard to be applied is not the expectancy of the appellant's employment because of a union seniority rule or the terminology used to describe his employment, but rather whether the work to be performed by the appellant in the United States is considered to be of a permanent duration at a fixed place of employment. [2]

An alien was found to be a temporary visitor for business who, while continuing to reside in Mexico, came across the border almost daily to pick up scrap paper here for which he paid, and who returned on the same day to Mexico where he sold the scrap *257 paper, earning his living by such transaction. [3] This case laid down the following significant considerations to be stressed: (1) there is a clear intent on the part of the alien applicant to continue the foreign residence and not abandon the existing domicile; (2) the principal place of business, and the actual place of eventual accrual of profits, at least predominantly, remains in the foreign country; (3) while the business activity itself need not be temporary, and indeed, may be long continued, the various entries into the United States made in the course thereof must be individually or separately of a plainly temporary nature, in keeping with existence of the two preceding considerations.

An alien helper on a moving van coming here from Canada merely to help load and unload the van as an incident to delivery of household goods was considered a nonimmigrant. [4] It was pointed out that the loading or unloading while in the United States was necessarily a function of delivery and merely incidental to the primary purpose of the delivery of household effects. The appellant was regarded as a duly qualified employee of a common carrier engaged in international trade and functioning as an operating crew member in the same manner as the driver *258 of a truck or the operating crews on trains or vessels crossing from contiguous territory.

In the instant case it is noted that the applicant boards a truck in Canada and rides to the United States where he is employed the entire day. No part of his labor is done in Canada. The applicant therefore earns his salary entirely while employed within the United States. His work in the United States furnishes not only the principal but the only source of his labor for his employer. He cannot be regarded as a truck driver's helper since it is clear that he is not engaged in any international trade similar to a common carrier but merely uses the truck to come to the United States to perform his work as a receiving clerk and loader. It is also to be noted that the work is of a continuing nature at a fixed and permanent place and that the work which he does in the United States provides the entire source of his income.

**3 Under the circumstances present in the case, it is concluded that the applicant does not qualify as a *bona fide* nonimmigrant and is not entitled to the status of a temporary visitor for business. On the contrary, he must be regarded as falling within the immigrant category and, therefore, is inadmissible under section 212 (a) (20) of the Immigration and Nationality Act because not in possession of a valid unexpired immigrant visa, reentry permit, border-crossing identification card and a valid unexpired passport or other suitable travel document or document of identity and nationality.

Order: It is ordered that the applicant be found inadmissible under the provisions of section 212 (a) (20) of the Immigration and Nationality Act as an immigrant not in possession of the required documents.

Footnotes

1 *Matter of M-----*, A-7728848, 2, I. & N. Dec. 240 (1945). This decision cited the following cases in which it was held that the alien was not a *bona fide* visitor for business: *Matter of G-----*, 56107/744, B.I.A., Oct. 9, 1942, alien crossing daily for purpose of buying and selling limes in the United States; *Matter of C----- R-----*, A-6022743 ((56158/342) Dec. 16, 1944), alien crossing periodically into the United States for the purpose of selling in this country magazines published and purchased in Mexico; *Matter of S-----*, 56172/204

(Sept. 2, 1944), alien desiring admission to accept permanent employment with an American concern irrespective of assertion that he did not intend to reside permanently.

2 *Matter of L-----*, A-7367939, 3, I. & N. Dec. 857 (1950).

3 *Matter of G----- P-----*, A-7828235, 4, I. & N. Dec. 217 (C.O., 1950). This case cited the following instances in which it was held that the alien was entitled to the status of a temporary visitor for business: *Matter of C-----*, A-7182159 (C.O., 1949), alien bought green peppers in Mexico and brought commodity to United States by truck, thereafter making deliveries in United States, performing the incidental manual labor as a sole operator since major portion of alien's time was not spent in the United States nor his major source of income earned in the United States; *Matter of S-----*, A-6877300 (C.O., 1948), sales representative of Canadian advertising firm was admitted as temporary visitor for business to solicit accounts of long-standing which would continue indefinitely in the future; *Matter of McC-----*, A-7134304 (C.O., 1949), Canadian proprietor of general trucking business who entered the United States to unload fish which he had been doing for eight years because relatively short part of work day was spent in the United States; *Matter of S-----*, A-7118993 (C.O., 1949), business activity by Canadian firm operating eleven trucks comprising the sale of Canadian bought fish in New York with return loads of fruit in New York at twice weekly intervals; *Matter of N----- Y-----*, A-6149811 (C.O., 1947), sales agent for Mexican banana exporting firm who entered frequently for 60-day periods to work with an American company to whom his firm sold bananas; *Matter of C-----*, A-6811403 (B.I.A., Dec. 15, 1948, 3, I. & N. Dec. 407), trucker and peddler who seasonably bought potatoes in Colorado for resale in Mexico; *Matter of A-----*, A-7176002 (July 28, 1949, B.I.A.), Mexican customs broker subleased part of an office in the United States and spent several hours a day in the United States as convenience to shippers in connection with exportation of United States goods to Mexico but maintained principal place of business as licensed Mexican customs broker in Mexico.

4 *Matter of R-----*, A-7177141, 3, I. & N. Dec. 750 (1949).

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