CASE NOT YET SCHEDULED FOR ORAL ARGUMENT
RECORD NO. 09-1095

In The
United States Court of Appeals
For The District of Columbia Circuit

LEWIS L. BONIFACE,

Petitioner,

v.

UNITED STATES DEPARTMENT OF HOMELAND SECURITY; TRANSPORTATION SECURITY ADMINISTRATION,

Respondents.

ON PETITION FOR REVIEW FROM THE TRANSPORTATION SECURITY ADMINISTRATION

BRIEF OF APPOINTED *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amicus

Petitioner: Lewis L. Boniface

Respondents: United States Department of Homeland Security
Transportation Security Administration (TSA)
United States

The following amicus was appointed by this Court and did not appear below:

Amicus: Sean Andrussier, with the assistance of James E. Coleman, both with Duke University School of Law. They were assisted by third-year law students in Duke's Appellate Litigation Clinic: Samuel Burness, Kristin Collins Cope, Meghan Ferguson, and Lisa Hoppenjans.

Disclosure Required by Circuit Court Rule 26.1

The certifying amicus curiae is an individual and therefore there is no company with a ten percent or greater ownership interest to report.

(B) Rulings under Review

Under review is a TSA final order declaring that Petitioner is a "security threat"—a designation which bars him from renewing his hazardous materials endorsement ("HME")—and that Petitioner is ineligible for a waiver of TSA's threat assessment. TSA's unpublished order is at page 90 of the Joint Appendix. That order upheld the decision of an Administrative Law Judge (ALJ), which is unpublished and which is available at page 72 of the Joint Appendix. The ALJ

upheld TSA's initial decision denying petitioner's request for a waiver. The initial decision is unpublished, and it is available at page 43 of the Joint Appendix.

Also under review is TSA's regulation that permanently disqualifies individuals from holding an HME if they have ever been convicted for possession of explosives. 49 C.F.R. § 1572.103(a)(7); *see id.* § 1572.5(a). That regulation, which TSA applied to Petitioner, was initially published as an Interim Final Rule. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License, 68 Fed. Reg. 23,852 (May 5, 2003).

(C) Related Cases

This case has not previously come before this Court or any other court. We are aware of no related cases currently pending in any court.

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GLOSSARY

ALJ	Administrative Law Judge
FDTA	Final Determination of Threat Assessment
HME	Hazardous Materials Endorsement
IAD	Interstate Agreement on Detainers
IDTA	Initial Determination of Threat Assessment
J.A.	Joint Appendix
PATRIOT Act	Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"). Pub. L. No. 107-56, 115 Stat. 272.
TSA	Transportation Security Administration

STATEMENT OF JURISDICTION

This appeal arises from a decision by the Transportation Security Administration ("TSA") forbidding Petitioner Lewis Boniface's renewal of a state-issued hazardous materials endorsement ("HME") based on TSA's determination that he is a security threat. (J.A. 1-2, 43, 90) TSA relied on Boniface's 1975 criminal conviction for possession of unregistered explosives, *id.*, which, under TSA's regulations, automatically renders him a "security threat warranting denial of an HME," 49 C.F.R. § 1572.5(a)(1) (citing *id.* § 1572.103). On January 7, 2009, TSA's Deputy Administrator issued a final order (J.A. 90), which is judicially reviewable. *See* 49 C.F.R. 1515.11(h). On March 6, 2009, Boniface timely filed a petition for judicial review in this Court under 49 U.S.C. § 46110(a), which allows "a person disclosing a substantial interest in an order issued by" TSA to petition for review to this Court within sixty days. 49 U.S.C. § 46110(a). Boniface appeals two TSA orders within the scope of § 46110(a). The first is TSA's decision that he is a security threat ineligible to hold an HME. (J.A. 90, 43) The second is TSA's promulgation of the regulation that TSA applied to him, which permanently disqualifies an individual from holding an HME if he has ever been convicted for possession of explosives.[1] 49 C.F.R. § 1572.103(a)(7); *id.* § 1572.5(a).

[1] A regulation is within § 46110(a)'s concept of "order." This Court has noted that "the term 'order' in this provision should be read 'expansively,'" *City of Dania*

While Boniface filed his *pro se* petition for judicial review more than sixty days after the regulation was promulgated, a party may challenge a rule outside of the sixty-day period as part of a challenge to agency action applying the rule. *See Natural Res. Defense Council v. EPA*, 513 F.3d 257, 260 (D.C. Cir. 2008) (observing that it is an "established doctrine that parties claiming substantive invalidity of a rule for which direct statutory assault is time-barred are nonetheless free to raise their claims in actions against agency decisions *applying* the rule").

Finally, § 46110(d) says this Court may consider an objection to a TSA order "if the objection was made in the [agency proceeding] or if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 46110(d). In the underlying administrative proceedings, Boniface objected to TSA's "permanent disqualifying offense" regulation, 49 C.F.R. § 1572.103, as impermissibly retroactive. (J.A. 49-50) He also objected to TSA's use of his 1975 conviction on the ground that it violated the Interstate Agreement on Detainers. (J.A. 6-12, 38-41) And he objected to TSA's decision that he poses a security threat who is ineligible to hold an HME. (J.A. 48-49, 85)

Beach v. FAA, 485 F.3d 1181, 1187 (D.C. Cir. 2007) (citation omitted), and this Court has treated final rules as orders under § 46110(a), *see United States Air Tour Ass'n v. FAA*, 298 F.3d 997, 1012 (D.C. Cir. 2002) ("The FAA does not dispute that the Limitations Rule is a final order reviewable under that section.").

STATEMENT OF THE ISSUES

1. Has TSA engaged in impermissible retroactive rulemaking by making certain past criminal convictions "disqualifying offenses" that automatically bar an occupational license, *see* 15 C.F.R. § 1572.103?

2. Because the United States (through TSA) be permitted to rely on and give effect to Boniface's 1975 conviction by barring him from renewing his HME, when the United Sates violated the Interstate Agreement on Detainers in obtaining that conviction, rendering the underlying indictment without force or effect?

3. Did TSA fail to abide by its own regulations, act arbitrarily and capriciously, and deprive Boniface of procedural due process by converting his appeal into a waiver request without adequate notice?

4. Did TSA act arbitrarily and capriciously and without substantial evidence in deciding that Boniface is ineligible for a waiver of TSA's security-threat determination?

STATUTES AND REGULATIONS

The relevant statutes and regulations are included in the addendum to this brief.

STATEMENT OF FACTS

I. INTRODUCTION

Lewis Boniface is a 61-year-old U.S. citizen who makes his living as a heavy-duty commercial truck driver operating with a state-issued commercial driver's license. (J.A. 31, 47, 59) His employment has included hauling hazardous materials under the authority of a hazardous materials endorsement ("HME"). (J.A. 47-48) An HME is a state-issued license. *See*, *e.g.*, Cal. Veh. Code §§ 15250(a)(2), 15275(a); 49 C.F.R. § 383.93(b). To obtain an HME, a driver must pass a special test on hazardous materials regulations and handling. *See* 49 C.F.R. § 383.93(c). The category of "hazardous materials" is broad and includes basic commodities like paint, nail polish, and soft drink syrup. *See* note 5, *infra*.

In 2008 Boniface was notified by his licensing state that his HME was due for renewal. But TSA thwarted the renewal by determining that Boniface is a "security threat" based on a 33-year-old criminal conviction that occurred on May 19, 1975, when Boniface was in his twenties. (J.A. 90) The conviction was for possession of an unregistered explosive. (J.A. 1, 34, 90)

By thwarting the renewal of Boniface's HME, TSA has hindered Boniface's ability to earn a living by "denying him a significant portion of his earnings, and numerous employment opportunities." (J.A. 48) As of August 2008, TSA's action had reduced Boniface's income by one-third to one-half. (J.A. 47)

II. IN 2003, TSA PROMULGATED A REGULATION CLASSIFYING TRUCKERS WITH CERTAIN CRIMINAL CONVICTIONS AS "SECURITY THREATS" INELIGIBLE TO HOLD HME LICENSES

On October 26, 2001, in response to the September 11th terrorist attacks, President Bush signed into law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act ("PATRIOT Act"). Pub. L. No. 107-56, 115 Stat. 272. Section 1012 of the Act provides that a state may not issue an HME to any individual deemed a "security risk" by the Secretary of Transportation. *Id.* § 1012.[2] Section 1012 apparently arose from "concerns about reports that terrorists may have been seeking licenses to drive trucks carrying hazardous materials." S. Rep. No. 107-241, at 2 (2002).

Under that statute, which is codified at 49 U.S.C. § 5103a, the Department of Justice conducts a criminal background check when an applicant applies for or renews an HME. 49 U.S.C. § 5103a(d).[3] After receiving the background check, the Secretary must determine if the individual poses a security risk warranting denial of the HME:

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[2] After passing the PATRIOT Act, Congress later amended § 5103a, among other ways, by adding subsection (g) in 2004 and replacing the reference to the Secretary of Transportation with a reference to the Secretary of Homeland Security. Authority under this statute had earlier been delegated to TSA. *See* Organization and Delegation of Powers and Duties, Update of Secretarial Delegations, 68 Fed. Reg. 10,988 (Mar. 7, 2003).

[3] Before the PATRIOT Act, "there were no Federal employment or criminal background checks required of drivers seeking a license and endorsement to transport hazardous materials." S. Rep. No. 107-241, at 4 (2002).

> A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary . . . has first determined, upon receipt of a notification under subsection (d)(1)(B), that the individual does not pose a security risk warranting denial of the license.

Id. § 5103a(a)(1). This requirement of an individualized security-threat assessment extends to HME renewals. *Id.* § 5103a(a)(2).

In May 2003, TSA promulgated an Interim Final Rule to implement § 5103a. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Drivers License, 68 Fed. Reg. 23,852 (May 5, 2003) (hereinafter, "*May 5, 2003 IFR*"). In November 2004, TSA made substantive changes to that rule through another Interim Final Rule. *See* Security Threat Assessment for Individuals Applying for a Hazardous Materials Endorsement for a Commercial Driver's License, 69 Fed. Reg. 68,720 (Nov. 24, 2004) (hereinafter, "*Nov. 24, 2004 IFR*").

Through this rulemaking, TSA established a regime that uses certain past criminal convictions to disqualify truckers from holding HMEs, on the theory that a trucker with one of these convictions is a "security threat." 49 C.F.R. § 1572.5(a) ("TSA determines that an applicant poses a security threat warranting denial of an HME . . . if . . . [t]he applicant has a disqualifying criminal offense described in 49 C.F.R. 1572.103[.]").

TSA promulgated two lists of "disqualifying criminal offenses." *Id.* § 1572.103. One list contains "interim disqualifying offenses." *Id.* § 1572.103(b). This list includes, among other offenses, unlawful transporting of weapons, extortion, arson, and fraud. *Id.* These are "interim" disqualifying offenses in that disqualification is not permanent: a trucker with one of these offenses is disqualified for seven years from the date of conviction or five years from the date of release from incarceration, whichever occurs later. *Id.* After that point, the trucker is eligible to hold an HME.

The regulation's other list contains "permanent disqualifying offenses." *Id.* § 1572.103(a). Anyone who has ever been convicted of an offense on this list is permanently disqualified from holding an HME. *Id.* The offenses include not only terrorism, treason, sedition, espionage, and crimes involving transportation security incidents, but also any unlawful possession of explosives. *Id.*

III. TSA USED A 33-YEAR-OLD CONVICTION TO DISQUALIFY BONIFACE FROM RENEWING HIS HME

In 2008, when Boniface's HME came up for renewal, he was required to submit to a fingerprint-based background check. *See id.* § 1572.11(c); *Nov. 24, 2004 IFR*, 69 Fed. Reg. at 68,732 (fingerprint-based background check requirement implemented for existing HME holders beginning May 31, 2005, based on the date of a trucker's HME renewal). On May 13, 2008, after reviewing Boniface's background check, TSA sent Boniface an Initial Determination of

Threat Assessment ("IDTA"). (J.A. 1) The IDTA informed him that he had a "permanent disqualifying offense": a 33-year-old conviction for possession of unregistered explosives in 1975.[4] (J.A. 34) There is no information in the record describing the facts of that conviction.

A. After TSA Issued An IDTA Based On Boniface's 1975 Conviction, He Timely Appealed The IDTA

TSA informed Boniface that he could appeal the IDTA if the criminal conviction TSA referenced in the IDTA was "incorrect." (J.A. 26) Boniface timely commenced an appeal by requesting the materials on which TSA based the IDTA. (J.A. 3-5, 25); *see* 49 C.F.R. § 1515.5(b)(1) ("An applicant initiates an appeal by submitting a . . . written request for materials from TSA" within 60 days of the IDTA). TSA responded by sending him the only materials it considered: his criminal background check. (J.A. 25)

[4] TSA's IDTA mistakenly referenced the conviction date as March 31, 1976. (J.A. 1) That was the date when Boniface began serving the federal sentence after a contemporaneous state conviction was overturned. (J.A. 64) The conviction actually occurred in May 1975 (J.A. 63), as TSA later acknowledged. (J.A. 90) TSA's initial error evidently resulted from the fact that the FBI background check posts a separate entry whenever a citizen is "arrested *or received.*" (J.A. 34 (emphasis added)) An "arrested or received" entry on the background check does not necessarily denote a conviction. Entries for being "received" may recite previous convictions that should not be confused with new convictions.

The IDTA also referenced a purported 1981 supervised-release violation (J.A. 1), but that is not a disqualifying offense, *see* 49 C.F.R. § 1572.103(a), and TSA ultimately did not rely on that purported violation in the final order. (J.A. 90)

Boniface advanced his appeal by filing a written reply to the IDTA, which he titled "APPEAL." (J.A. 38-41, 6-12); *see* 49 C.F.R. § 1515.5(b)(5) (an individual appealing an IDTA may "serve upon TSA a written reply to the [IDTA]"). In his appeal, Boniface maintained that under the Interstate Agreement on Detainers ("IAD"), 18 U.S.C. App. 2, § 2 (1970), his 1975 conviction was unlawful, and thus could not be used as a disqualifying conviction. (J.A. 38-41, 7-12) Specifically, Boniface argued that the United States in 1975 violated the IAD's anti-shuttling provision, 18 U.S.C. App. 2, § 2, art. IV(e) (1970), because the United States lodged a detainer against him with Arizona state officials and transferred him to federal custody for trial, but then returned him to Arizona authorities without trying him. (J.A. 38-41, 7-12) A violation of the IAD's anti-shuttling provision renders an indictment without "further force or effect," requiring dismissal of the indictment "with prejudice." 18 U.S.C. App. 2, § 2, art. IV(e) (1970). Thus, in his appeal, Boniface contended that his 1975 conviction was "invalid" and could not be used to deny him an HME. (J.A. 11-12, 40)

Under TSA's regulations, if TSA denies an appeal, the agency is required to issue a Final Determination of Threat Assessment ("FDTA"). *See* 49 C.F.R. § 1515.5(b)(6), (c). TSA, however, never issued an FDTA in response to Boniface's appeal (none is in the certified record). Instead, as explained below, TSA decided to convert Boniface's appeal into a waiver request.

B. TSA Converted Boniface's Appeal Into A Waiver Request

TSA converted Boniface's appeal into a request for a waiver. (J.A. 43, 90) The waiver process, however, is separate from an appeal under TSA's regulations. *Compare* 49 C.F.R. § 1515.5 (appeal process) *with id.* § 1515.7 (waiver process). Under TSA's regulations, an applicant may first pursue the appeal route; if TSA denies the appeal, the agency must issue an FDTA. *Id.* § 1515.5(b)(6), (c)(1). Then, after the FDTA issues, the unsuccessful appellant has up to sixty days to initiate a waiver request. *Id.* § 1515.7(c)(1). In support of a waiver request, the applicant can submit evidence and information indicating that he is not a security threat. *See id.* § 1515.7(c)(2).

Upon converting Boniface's appeal into a waiver request, TSA declared him ineligible for a waiver. (J.A. 43) By regulation, TSA is supposed to consider the following factors (insofar as they are applicable) in determining whether to grant a waiver:

> (i) The circumstances of the disqualifying act or offense.
> (ii) Restitution made by the applicant.
> (iii) Any Federal or State mitigation remedies.
> (iv) Court records or official medical release documents indicating that the applicant no longer lacks mental capacity.
> (v) Other factors that indicate the applicant does not pose a security threat warranting denial of the HME . . . .

49 C.F.R. § 1515.7(c)(2). In denying Boniface a waiver, TSA said it relied on the following: "the severity of [the 1975] disqualifying conviction for Possession of

Unregistered Explosives and Conspiracy, pattern of recidivism, and the absence of adequate documentation demonstrating that [Boniface is] rehabilitated notwithstanding TSA's reasonable effort to obtain such information from [him]." (J.A. 43) TSA added, "Without substantial evidence of rehabilitation, TSA cannot establish that [he is] eligible." *Id.*

Because that order was not judicially reviewable, 49 C.F.R. § 1515.7(d)(4), Boniface had to seek review from an ALJ to exhaust administrative remedies. *See id.* § 1515.11. However, an ALJ is forbidden to consider evidence or information that was not presented to TSA. *Id.* § 1515.11(b)(1)(i). In his pleading to the ALJ, Boniface challenged TSA's decision and its "permanent disqualifying offense" regulation. (J.A. 48-54) He also took issue with TSA's statement that the agency had made a reasonable effort to obtain rehabilitation information from him (J.A. 48-49), adding that if TSA had requested such information, he would have submitted information showing, for example, that he purchased a home, worked six to seven days a week, owns his own vehicle, has obtained excellent credit, is financially supporting his family, and has had no contact with authorities in years except for two minor traffic citations. *Id.* (His last conviction of record was for a drug offense fifteen years earlier, in 1993. (J.A. 36)) Boniface protested that he "has worked very hard to be a decent citizen, and to make amends for his past," yet the government is now "brand[ing] him a 'threat' to his country." (J.A. 48-49)

Boniface insisted he has "never has been a 'threat' to the security of his country," an accusation he deemed "an affront and demeaning." *Id.* He maintained that his 1975 conviction should not be used to deny him "a significant portion of his earnings, and numerous employment opportunities." (J.A. 48; *see also* J.A. 47)

The ALJ denied him relief. (J.A. 79-80) The ALJ declined to "make legal conclusions or findings regarding the federal statutes . . . or regulations." (J.A. 79)

On January 7, 2009, TSA's Deputy Administrator issued a Final Order Denying Waiver, ruling that Boniface is not eligible to hold an HME because of the 1975 conviction. (J.A. 90) Boniface timely petitioned for judicial review.[5]

[5] On June 4, 2009, after Boniface petitioned for judicial review, the U.S. House of Representatives passed a bipartisan transportation security bill, H.R. 2200, 111th Cong. (2009), by a vote of 397-25. 155 Cong. Rec. H6216 (daily ed. June 4, 2009). H.R. 2200, which has been referred to the Senate, would repeal 49 U.S.C. § 5103a, the enabling legislation under which TSA established the "disqualifying crimes" regime that divested Boniface of his HME. H.R. 2200, § 434 (as passed by House, June 4, 2009). The bill would significantly narrow the regime: instead of targeting HMEs, it would require background checks only for drivers who haul a narrow category of materials known as "security sensitive materials," H.R. 2200, § 435, such as radioactive materials, explosives, and poisons, *see* 6 U.S.C. § 1151. The bill would "eliminate background checks for most commercial drivers who haul hazardous materials" and instead "require[] background checks only for a small subset of drivers—as few as five percent—who haul 'security sensitive materials.'" 155 Cong. Rec. H6170-02 (June 4, 2009) (statement of Rep. Oberstar). The House Committee on Homeland Security explained that this change results from a "recogni[tion] that hazardous materials are a broad category of substances regulated for safety and environmental purposes, including paint, soda syrup, and hairspray"; by focusing on "security sensitive materials," "the Committee believes that section 5103a is no longer necessary." H.R. Rep. No. 111-123, at 58 (2009).

SUMMARY OF ARGUMENT

I. TSA has engaged in impermissible retroactive rulemaking by making past criminal convictions "disqualifying offenses" that bar an occupational license, the HME. A law operates retroactively if it attaches new legal consequences to events completed before its enactment, attaches a new disability with respect to past acts, or gives a quality or effect to conduct that was not present when the conduct was performed. TSA's regulation operates in those ways. It identifies certain criminal convictions to which TSA automatically attaches a new disability: a "security threat" designation and a permanent disqualification from holding an HME license. The regulation attaches this new legal consequence to past conduct—in Boniface's case, to conduct that occurred several decades earlier (his 1975 conviction).

An administrative agency may not promulgate retroactive rules unless Congress expressly authorizes the agency to do so. Courts do not construe statutory language to authorize retroactive application unless the language is so clear that it could sustain only one interpretation. Here, the plain language of 49 U.S.C. § 5103a does not provide TSA with express authority to promulgate retroactive rules. Therefore, TSA's regulation is impermissibly retroactive. Because TSA's order relies on that regulation to hold Boniface ineligible to renew his HME, the order should be vacated.

II. Because the United States violated the Interstate Agreement on Detainers ("IAD") in obtaining Boniface's 1975 conviction, the United States (through TSA) should not be permitted to give effect to the conviction now. The IAD, an interstate compact with the status of federal law, is triggered when a "receiving state" (which includes the United States) lodges a detainer against the prisoner of another state (the "sending state"). The IAD's anti-shuttling provision provided that if the prisoner is transferred to the receiving state for trial, but the receiving state returns the prisoner without trying him, the indictment is without "further force or effect," and the court must dismiss it "with prejudice." 18 U.S.C. App. 2, § 2, art. IV(e).

In 1975, the United States lodged a detainer against Boniface with Arizona authorities while he was incarcerated in Arizona and transferred him to federal custody for trial on a federal indictment. But the United States returned him to Arizona authorities without trying him, thus violating the IAD. As a consequence, the federal indictment was, by operation of federal law, without "further force or effect." 18 U.S.C. App. 2, § 2, art. IV(e).

Yet the United States ultimately used that void indictment in 1975 to secure Boniface's guilty plea for possession of unregistered explosives. By relying now on the 1975 conviction to disqualify Boniface from holding his HME license, the United States is giving "further force or effect" to the void indictment, in violation

of the IAD. Boniface cannot in this proceeding overturn the 1975 conviction based on ineffective assistance of counsel or otherwise. However, he need not overturn his conviction to prevail here, because the United States is *now* committing an independent IAD violation by giving further force and effect to the invalid indictment through a collateral use of the conviction. To enforce the IAD and prevent the agency from issuing an order that is not in accordance with that federal law, this Court should order the agency to disregard the 1975 conviction.

III. TSA's decision that Boniface is a security threat ineligible for a waiver should be set aside. The decision is procedurally and substantively flawed.

A. TSA's decision is procedurally flawed because TSA converted Boniface's appeal of the Initial Determination of Threat Assessment ("IDTA") into a waiver request, contrary to TSA's rules and in violation of due process.

TSA's regulations establish separate processes—an appeal process and a waiver process—by which an applicant can challenge TSA's security-threat assessment and secure an HME. Under TSA's regulations, an individual with a disqualifying conviction may first pursue an appeal before initiating a waiver request. An appellant need not file a waiver request unless and until TSA denies his appeal by issuing a Final Determination of Threat Assessment ("FDTA").

Boniface filed an appeal to challenge the validity of the 1975 conviction on which TSA relied in the IDTA. But TSA did not address his appeal or issue an

FDTA. Instead, TSA converted his appeal into a waiver request. This conversion was contrary to TSA's regulations. Moreover, the record contains no prior notice from TSA apprising Boniface that the agency was converting his appeal into a waiver request. The conversion was significant because an appeal is a narrow proceeding for challenging the validity of a past conviction used in TSA's IDTA, whereas the waiver process is an evidentiary proceeding in which an applicant has the opportunity to submit evidence and information to show that he poses no threat to security. TSA's conversion of Boniface's appeal into a waiver request left him without an evidentiary record for the agency to assess his eligibility for a waiver, a void that TSA then used against him to hold him ineligible for a waiver. Had Boniface been adequately apprised of the fact and significance of the conversion, he could have submitted evidence in support of a waiver. On review below, the ALJ was prohibited by regulation from considering information or evidence that had not been submitted to TSA.

TSA's conversion of the appeal into a waiver request not only violated TSA's regulations, it also violated procedural due process. TSA deprived Boniface of property and liberty interests without adequate notice and a meaningful opportunity to be heard. Boniface had a property interest in the continued possession of his HME license. And he had a liberty interest in avoiding the reputational harm attendant to being branded a "security threat."

B. TSA's waiver-ineligibility decision is also substantively flawed because it is arbitrary and capricious and unsupported by substantial evidence.

1. First, TSA said it relied on the purported "severity" of Boniface's 1975 conviction, without citing any facts about the 1975 conviction to conclude that it was severe. Moreover, while TSA is by regulation supposed to consider the circumstances of the disqualifying conviction, the agency failed to consider a key circumstance of Boniface's conviction: it happened 33 years ago. Numerous areas of law recognize that the age of a conviction is highly relevant in assessing the offender's criminal predisposition and current dangerousness.

2. Second, TSA said it relied on a purported "pattern of recidivism." TSA's statutory mandate, however, is to identify and weed out individuals who pose a security threat with an HME, not to assess generic recidivism. In the 30-plus years since his 1975 conviction, Boniface had no other "disqualifying offense" that (under TSA's regulation) could disqualify him from holding an HME at the time TSA issued the IDTA below. TSA should not be permitted to bootstrap non-disqualifying offenses into this proceeding. Finally, if the agency is purporting to assess generic recidivism, then it surely must account for Boniface's advanced *age*—he is in his sixties—because recidivism risk decreases with advancing age. But TSA failed to take this into account.

3. Third, TSA relied on the "the absence of adequate documentation" of rehabilitation, concluding that there was no "substantial evidence of rehabilitation." (J.A. 43) The lack of evidence, however, is TSA's fault; because TSA converted Boniface's appeal into a waiver request, he was left without an evidentiary record for a waiver. TSA's claim that it made a "reasonable effort to obtain [rehabilitation] information" from Boniface, *id.*, is not supported by the record. Finally, TSA was wrong to say there was no substantial evidence of rehabilitation: TSA had evidence that Boniface had not been arrested for years and had previously hauled hazardous materials without incident. TSA did not consider these facts.

Because TSA's decision that Boniface is ineligible for a waiver is flawed, the Court should vacate TSA's order and remand the matter to TSA for a proper waiver proceeding even if the Court rejects Boniface's other challenges.

STANDING

Boniface has standing to seek review of TSA's decision and the underlying regulations because the decision and regulations deprived him of an occupational license, his HME, thus limiting his employment opportunities and reducing his income. (J.A. 47-48) TSA's order also brands him a security threat, which is stigmatizing. (J.A. 48) He thus has a substantial interest in TSA's decision and in the regulations that TSA applied in declaring him a security threat.

STANDARD OF REVIEW

This Court reviews a constitutional challenge de novo. *J.J. Cassone Bakery, Inc. v. N.L.R.B.*, 554 F.3d 1041, 1044 (D.C. Cir. 2009). Whether a law is impermissibly retroactive is also reviewed de novo. *See Trout v. Secretary of Navy*, 317 F.3d 286, 289 (D.C. Cir. 2003); *Camins v. Gonzales*, 500 F.3d 872, 880 (9th Cir. 2007). The interpretation of the IAD (a federal law) and the effect of the IAD violation present questions of law, and thus the standard of review is de novo. *See Arizona v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (questions of law, including questions of what statute requires are reviewed de novo).

Otherwise, the Court may declare an agency action invalid if the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In considering whether an action is arbitrary or capricious, the Court must determine whether the agency's decision was "based on a consideration of the relevant factors and whether there had been a clear error in judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). The agency must articulate "a rational connection between the facts found and the choice made." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105-06 (1983). *See also Western Area Power Admin. v. FERC*, 525 F.3d 40, 51 (D.C. Cir. 2008); *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 736 (D.C. Cir. 2001).

Finally, insofar as any aspect of TSA's order constitutes a finding of fact, factual findings are sustained if supported by substantial evidence. *See* 49 U.S.C. § 46110(c). Substantial evidence "includes such evidence as a reasonable person may accept as proof of a conclusion." *DTE Energy Co. v. FERC*, 394 F.3d 954, 962 (D.C. Cir. 2005).

ARGUMENT

This brief addresses three of Boniface's challenges to TSA's security-threat determination: his challenge to the retroactive operation of TSA's underlying regulation, which makes pre-PATRIOT Act convictions permanently disqualifying; his challenge to TSA's use of his 1975 conviction, on the ground that it was procured with an indictment that was without "force or effect" under the IAD; and his challenge to TSA's decision that he is not eligible to obtain a waiver from the agency's security-threat determination.

If Boniface prevails on either one of the first two challenges, TSA's use of his 1975 conviction to label him a "security threat" cannot stand. This would obviate any review of his challenge to TSA's decision that he is ineligible for a waiver, since the waiver process applies only if the individual has been designated a "security threat" based on a disqualifying conviction. Therefore, the first arguments addressed below are Boniface's challenge to TSA's rule as impermissibly retroactive (Part I) and his IAD-based challenge to TSA's use of his

1975 conviction (Part II). Part III addresses the infirmities in the waiver-ineligibility process and decision and explains why that decision is both procedurally and substantively flawed.

I. BY MAKING PAST CRIMINAL CONVICTIONS "DISQUALIFYING OFFENSES" THAT BAR AN OCCUPATIONAL LICENSE, TSA HAS ENGAGED IN IMPERMISSIBLE RETROACTIVE RULEMAKING

As explained below in Part A, TSA's regulation making past criminal convictions "disqualifying offenses" is retroactive in operation because it attaches a new legal consequence—a disqualification that bars a trucker from holding a license—to events completed before the regulation's enactment. As explained in Part B, because Congress did not expressly authorize TSA to promulgate a retroactive regulation, the regulation is invalid.

A. TSA's Regulation Operates Retroactively

TSA's regulation is retroactive. To determine whether a new law with application to past conduct operates retroactively, what matters is "whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994); *White v. Shinseki*, 329 F. App'x 285, 287 (D.C. Cir. 2009). A law is retroactive when it "sweep[s] away settled expectations suddenly and without individualized consideration," *id*. at 266, "attaches a new disability, in respect to transactions or considerations already past," *id*. at 269; *see also Marrie v. S.E.C.*, 374 F.3d 1196,

1207 (D.C. Cir. 2004), "gives a quality or effect to acts or conduct which they did not have . . . when they were performed," *Landgraf*, 511 U.S. at 269, or "increase[s] a party's liability for past conduct," *id.* at 280.

Ultimately, the retroactivity inquiry "demands a commonsense, functional judgment" about the true consequences of the law with regard to "events completed before its enactment." *Martin v. Hadix*, 527 U.S. 343, 357-58 (1999). Here, a commonsense, functional judgment reveals that TSA's regulation operates retroactively. The regulation attaches new legal consequences to completed events, it attaches a new disability with respect to past acts, and it gives a quality or effect to conduct that was not present when the conduct was performed.

TSA's regulation identifies certain criminal convictions as "permanent disqualifying offenses" for HME licenses. 49 C.F.R. § 1572.103(a). The regulation attaches a new disability to these convictions: permanent disqualification from holding an HME license. Truckers like Boniface are disqualified by the regulation from renewing an occupational license that they already possessed or obtaining one they were qualified to possess under state law before the regulation was enacted. In Boniface's case, the regulation attaches a new legal consequence to conduct that occurred several decades earlier. Before this regulation came into existence, a truck driver like Boniface with a conviction for unregistered possession of explosives faced no bar to receiving an HME

license. *See* note 3, *supra.* TSA's regulation, however, bars these truck drivers from holding an HME, without regard to the specific conduct constituting the offense. The regulation thus changes the consequences of past conduct. TSA's regulation is not merely prospective. It disqualifies current license holders who, based on the requirements of state law, otherwise would be entitled to renew their licenses.

Courts have found that a new law can have retroactive effect even when it concerns conduct that was unlawful before the law's enactment. *See, e.g., Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (1997); *Landgraf*, 511 U.S. at 283−84 (construing a compensatory damages provision added to Title VII not to apply to a case pending at the time of its enactment because this would make the provision retroactive, even though the conduct at issue—intentional racial discrimination—was unlawful when it occurred). "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Id.* at 283 n.35.

Even if a state's grant of an HME could be characterized as a discretionary act, that would not alter the fact that TSA's regulation operates retroactively. In *INS v. St. Cyr*, the Supreme Court invalidated a rule that prospectively eliminated *the possibility* of discretionary deportation relief for convicted aliens for whom

such relief previously was available at the time of their guilty pleas. 533 U.S. 289, 325 (2001). The Court held that the rule attached a new disability to the underlying convictions, thus rendering the rule retroactive; the discretionary nature of deportation relief did not affect the conclusion. *Id.* at 321 ("[T]here is a clear difference, for the purposes of retroactivity analysis, between facing possible [harmful consequences] and facing certain [harmful consequences]."); *see also Lindsey v. Washington*, 301 U.S. 397, 401 (1937) (the "removal of the *possibility*" of a lesser sentence sufficed to find retroactive effect) (emphasis added).

"The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Landgraf*, 511 U.S. at 270. Here, the extent of the change is drastic, and the degree of connection could not be greater. Before TSA's regulation existed, Boniface's conviction posed no obstacle to obtaining an HME and did not brand him a "security threat." Now, the conviction makes him a security threat permanently disqualified from holding an HME.

The revocation of Boniface's HME has reduced his income and employment opportunities and stigmatized him by branding him a "security threat." Under any "commonsense, functional judgment," the regulation has attached a new legal consequence to his conviction for unlawful possession of explosives.

B. Congress Did Not Expressly Authorize TSA To Promulgate Retroactive Rules

An administrative agency may not promulgate retroactive rules unless expressly authorized to do so by Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (holding that because "[r]etroactivity is not favored in the law, congressional enactments . . . will not be construed to have retroactive effect unless their language requires this result"); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (holding that "express congressional authority" is required for an agency to promulgate retroactive rules). The standard for finding adequate retroactive authorization is "a demanding one." *St. Cyr*, 533 U.S. at 316. Courts do not construe statutory language to authorize retroactive application unless the language is "so clear that it could sustain only one interpretation." *Id.* at 317 (quoting *Lindh v. Murphy*, 521 U.S. 320, 328, n.4 (1997)). The Supreme Court has found statutes to authorize retroactive rule application when they speak explicitly of "retroactivity," *see*, *e.g.*, *Automobile Club of Mich. v. Comm'r*, 353 U.S. 180, 184 (1957) (statute's language and legislative history explicitly empowered the Treasury Commissioner to correct any ruling, regulation, or Treasury decision retroactively), and when they necessarily require retroactive enforcement, *see*, *e.g.*, *Graham & Foster v. Goodcell*, 282 U.S. 409, 416-20 (1931).

Importantly, in assessing whether statutory language clearly authorizes an agency to promulgate retroactive regulations, courts do not afford *Chevron* deference to an agency's interpretation of the statute's language. *St. Cyr*, 533 U.S. at 320 n.45 ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective . . . , there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.") (citations omitted).

Here, the plain language of 49 U.S.C. § 5103a does not expressly authorize TSA to promulgate retroactive rules. When TSA designated all explosives convictions as permanently disqualifying offenses in 2003, the statute did not authorize TSA to engage in rulemaking, much less did it authorize TSA to promulgate a rule attaching a disqualification penalty to past criminal convictions. Section 5103a(a)(1) of the statute provides that "[a] state may not issue to any individual [an HME license]" unless the Secretary "has first determined," upon receipt of a criminal background check, that "the individual does not pose a security risk warranting denial of the license." 49 U.S.C. § 5103a(a)(1). That language does not even mention rulemaking and does not unequivocally require TSA to promulgate rules to automatically disqualify truckers based on their past criminal convictions predating the statute's effective date. At no point does the statute use the term "retroactive" or "retroactively." While the statute requires

TSA to determine whether an individual applicant poses a security risk after TSA reviews the individual's criminal history, the statute does not with "unmistakable clarity," *St. Cyr*, 533 U.S. at 318, require the agency to make a rule that categorically and automatically attaches the "security threat" stigma and the disability of disqualification to pre-PATRIOT Act criminal offenses.

Four years after the PATRIOT Act was enacted, and more than a year after TSA promulgated the Interim Final Rule creating the list of disqualifying offenses that disqualified Boniface, Congress amended § 5103a to add subsection (g). Subsection (g) authorizes rulemaking but does not authorize TSA to enact rules to disqualify HME applicants based on past convictions. Rather, subsection (g)(1)(B)(ii) directs TSA to initiate a rulemaking proceeding to determine whether other federal background checks are "equivalent to or less stringent than" the HME background checks. 49 U.S.C. § 5103a(g)(1)(B)(ii). And subsection (g)(1)(A)(ii), which deals with TSA's notification to employers of the results of a background check, says TSA must develop a process to notify employers if TSA, in a threat assessment, determines "that the applicant does not meet the standards set forth in regulations issued to carry out this section." *Id.* § 5103a(g)(1)(A)(ii) (emphasis added). None of these subsections expressly authorized TSA to make a rule that categorically attaches the "security threat" stigma and the disability of disqualification to a past criminal offense.

In sum, TSA's regulation is impermissibly retroactive. Because TSA's order relies on that regulation to hold Boniface ineligible to renew his HME, the order should be vacated.

II. BECAUSE THE UNITED STATES VIOLATED THE IAD IN OBTAINING BONIFACE'S 1975 CONVICTION, THE UNITED STATES SHOULD NOT BE PERMITTED TO GIVE EFFECT TO THE CONVICTION NOW

Boniface's 1975 conviction for possession of explosives was unlawful because, pursuant to the IAD, the conviction was based on a void indictment that lacked force or effect. If the Court agrees that the IAD violation should bar TSA from using the 1975 conviction in this proceeding, the remedy is to vacate the order below and instruct TSA to withdraw its threat-assessment decision.

A. An IAD Violation Renders An Indictment Void

The IAD is an interstate compact within the Compact Clause of the U.S. Constitution and treated as federal law. *Carchman v. Nash*, 473 U.S. 716, 719 (1985). The IAD establishes procedures by which one state (the "receiving state") may obtain temporary custody of another state's (the "sending state's") prisoner for the purpose of bringing the prisoner to trial. *Cuyler v. Adams*, 449 U.S. 433, 436 n.1 (1978). The United States is a "state" under the IAD, 18 U.S.C. App. 2, § 2, art. II, which has been federal law since 1970. *Id.*, § 8.

The IAD's purpose is to establish a uniform process for transferring prisoners between jurisdictions and to avoid interference with prisoner

rehabilitation by facilitating the "expeditious" disposition of outstanding detainers.[6] *United States v. Mauro*, 436 U.S. 340, 351 (1978); *Reed v. Farley*, 512 U.S. 339, 348 (1994). The IAD's policy of avoiding interference with rehabilitation has long been documented. *See Carchman*, 473 U.S. at 719-20 (explaining that a prisoner subject to a detainer often must be kept in close custody and barred from treatments and opportunities available to other prisoners, defeating rehabilitation); *United States v. Cogdell*, 585 F.2d 1130, 1135-36 (D.C. Cir. 1978), *rev'd on other grounds sub nom. United States v. Bailey*, 444 U.S. 394 (1980).

The IAD is triggered when, on the basis of an outstanding indictment, the receiving state lodges a detainer against a prisoner who is serving a term of imprisonment in the sending state. *See* 18 U.S.C. App. 2, §2, art. III. Under IAD Article IV, the receiving state's criminal justice agency is entitled to transfer the prisoner to the receiving state for trial, subject to two restrictions. The first is a speedy-trial restriction which requires the receiving state to try the prisoner within 120 days of his arrival. *Id.* art. IV(c). That right, however, is qualified: for "good cause," the court may grant "any necessary or reasonable continuance." *Id.*

[6] A detainer is used when one state's prosecuting agency seeks to bring charges against a prisoner in another state's custody; the prosecution files the detainer with the institution in which a prisoner is incarcerated, and the detainer serves as a request to hold the prisoner for the prosecuting agency or to notify the agency when the prisoner's release is imminent. *Carchman,* 473 U.S. at 719.

The second restriction on the receiving state is the "anti-shuttling" bar, and it is unqualified; it requires the receiving state to try the prisoner before returning him to the sending state. *Id.* art. IV(e). Significantly, IAD Article IV(e) provides that if the receiving state violates the anti-shuttling bar by returning a prisoner to the sending state before trying him, the indictment is a nullity:

> If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of employment, such indictment, information, or complaint *shall not* be of *any further force or effect*, and the court *shall* enter an order dismissing the same *with prejudice*.

Id. (emphasis added).[7]

A unanimous Supreme Court stressed the categorical mandate and "absolute" terms of the anti-shuttling provision, holding that it uncompromisingly mandates dismissal of the indictment. *Alabama v. Bozeman*, 533 U.S. 146, 153 (2001) ("[T]he language of the [IAD] militates against an implicit exception, for it is absolute."). In *Bozeman*, the Court rejected the receiving state's argument that its pre-trial return of a prisoner the same day he was transferred did not require dismissal of the indictment. *Id.* at 153-54. The Court held that there is no

[7] Thirteen years after Boniface's 1975 conviction, Congress amended the IAD by modifying the anti-shuttling provision to provide that a federal court may dismiss an indictment without prejudice, if the court makes certain findings. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7059, 102 Stat. 4403 (Nov. 18, 1988), codified at 18 U.S.C. App. 2, §9. Because the amendment was enacted well after Boniface's conviction and sentence, it has no bearing on him.

"harmless" or "technical" or "de minimus" violation of the anti-shuttling bar, given its categorical language. *Id.*

In sum, when the United States (as a receiving state) violates the IAD's anti-shuttling bar by returning a prisoner to the sending state before holding a trial, as a matter of federal law the indictment is of no "further force or effect." 18 U.S.C. App. 2, § 2, art. IV(e).

B. The United States Violated The IAD By Failing To Try Boniface Before Returning Him To State Prison In 1975

In January 1975, Arizona officials arrested Boniface on state charges, and he was convicted on March 13, 1975. (J.A. 61-62) Meanwhile, the United States had obtained an indictment against Boniface on a federal explosives charge. (J.A. 61) For that indictment, the United States lodged a detainer against Boniface (with Arizona authorities) while he was serving his sentence in an Arizona prison. (J.A. 62) This triggered the IAD. In accordance with the IAD, the United States issued a writ for Boniface to appear in federal court for trial, pursuant to which Boniface was transferred from the custody of Arizona authorities to the custody of the United States for trial. (J.A. 62-63) This transfer triggered the no-return requirement of IAD Article IV(e). *See Bozeman*, 533 U.S. at 154 ("*[E]very* prisoner arrival in the receiving State, whether followed by a very brief stay or a very long stay in the receiving State, triggers IV(e)'s 'no return' requirement.") (emphasis in original).

Upon being transferred to federal custody, Boniface appeared in federal court on March 27, 1975, and pleaded "not guilty." (J.A. 63) Instead of trying Boniface as the IAD required, however, the United States returned him to Arizona authorities. (J.A. 63) This pretrial return violated the IAD's anti-shuttling bar. 18 U.S.C. App. 2, Art. IV(e). At that point, as a matter of federal law, the indictment was of no "further force or effect." *Id.*; *see Bozeman*, 533 U.S. at 153-54.

The United States thus had no authority to continue to prosecute Boniface. Yet the United States did just that. In May 1975, six weeks after Boniface pleaded "not guilty," the United States again removed him from Arizona state prison. (J.A. 63-64) The United States then used the indictment that no longer had legal "force or effect" to secure a guilty plea for possession of unregistered explosives. *Id*.

Boniface has never been heard on the merits of the IAD violation despite the evident ineffective assistance of his counsel. Counsel advised him to plead guilty, *see United States v. Boniface*, 601 F.2d 390, 393 (9th Cir. 1979), to an indictment that was without legal "force or effect." Boniface did file a habeas petition raising the IAD violation and contending that his counsel rendered ineffective assistance in violation of the Sixth Amendment. *Id.* at 392-94. But the Ninth Circuit held that an IAD violation is not reviewable in a habeas corpus proceeding. *Id.* at 394. The Ninth Circuit did not specifically address whether Boniface's counsel rendered

ineffective assistance by failing to raise the IAD violation and advising his client to plead guilty to an indictment that had no force or effect. *See id.* at 392-94.

C. By Relying Now On The 1975 Conviction To Disqualify Boniface, The United States Is Giving "Further Force Or Effect" To The Void Indictment, In Violation Of The IAD

Boniface cannot in this proceeding overturn the 1975 conviction based on ineffective assistance of counsel or otherwise. However, he need not overturn his conviction to prevail here, because the United States (through TSA) is *now* committing an independent IAD violation by giving further force and effect to the invalid indictment through a collateral use of the conviction. By using the 1975 conviction to brand Boniface a "security threat" and thereby disqualify him from fully pursuing his livelihood, the United States is *today* giving renewed force and effect to the invalid indictment. To enforce the IAD and prevent TSA from issuing an order not in accordance with federal law, *see* 5 U.S.C. § 706(2)(A), this Court should direct TSA to disregard the 1975 conviction.

The United States will likely argue that, by pleading guilty, Boniface waived his right to assert an IAD violation.[8] A discussion of the waiver issue is therefore warranted.

[8] *Amicus* acknowledges that a number of lower courts have found IAD violations waived and have ruled that an IAD violation does not pose a jurisdictional defect. *See*, *e.g.*, *Camp v. United States*, 587 F.2d 397, 399-400 (8th Cir. 1978).

Boniface's ill-informed guilty plea to the void indictment should not be construed as a waiver of his IAD rights. Although a guilty plea generally waives the pleading defendant's ability to challenge the validity of his conviction, *see, e.g.*, *United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000), there are two recognized exceptions to this rule. The first is that a plea does not waive a defendant's claimed right "not to be haled into court at all," which is known as the *Blackledge-Menna* exception. *See United States v. Delgado-Garcia*, 374 F.3d 1337, 1341 (D.C. Cir. 2004) (quoting *Blackledge v. Perry,* 417 U.S. 21, 30-31 (1974) (explaining that a due process claim conferred a right not to be haled into court), and citing *Menna v. New York*, 423 U.S. 61, 62-63 & n.2 (1975) (per curiam) (explaining that a double jeopardy claim confers a right not to be haled into court at all)). Boniface had an analogous statutory right "not to be haled into federal court at all" once the United States violated the IAD by returning him to Arizona before trying him, which rendered the indictment without "further force or effect." The practical result of IAD Article IV(e) is to prevent a trial from taking place at all. *Cf. Blackledge*, 417 U.S. at 31 ("The 'practical result' dictated by the Due Process Clause in this case is that North Carolina simply could not permissibly require Perry to answer to the felony charge. That being so, it follows that his guilty plea did not foreclose him from attacking his conviction . . . .").

The second exception to the waiver-by-guilty-plea presumption is when the court that accepted the plea lacked subject-matter jurisdiction to adjudicate the case. *See United States v. Cotton*, 535 U.S. 625, 630 (2002) (a claim of subject-matter jurisdiction, "because it involves a court's power to hear a case, can never be forfeited or waived"); *see also The Protector*, 78 U.S. 82, 85 (1870) (parties cannot confer subject matter jurisdiction by "consent, stipulation, or waiver"). Thus, Boniface's plea could not have waived his ability to challenge his conviction as an IAD violation if the court that accepted his guilty plea and entered a judgment of conviction exceeded its jurisdiction.

The court that accepted Boniface's plea exceeded its jurisdiction because once the anti-shuttling violation occurred, the indictment was of no "further force or effect." 18 U.S.C. App. 2, §2, art. IV(e). If by operation of law an indictment has no force or effect, the indictment is void. *Cf.* Black's Law Dictionary 1411 (1979) ("'void,' in its strictest sense, means that which has *no force or effect*") (emphasis added). If a federal indictment is void, the United States has no power to prosecute the criminal case. *See* Fed. R. Crim. P. 7 (a felony punishable by at least one year of imprisonment "must be prosecuted by an indictment," or "by information" if the defendant in open court waives prosecution by indictment). Without the existence of a prosecutable case, it is difficult to understand how the federal court (which had jurisdiction over "offenses" against the United States,

18 U.S.C. § 3231) could have had jurisdiction to adjudicate Boniface's criminal case on the merits by accepting his plea and entering a judgment of conviction. *Cf. United States v. Choate*, 276 F.2d 724, 728 (5th Cir. 1960) ("lack of indictment goes to the court's jurisdiction" under Article III of the Constitution because judicial power is limited to "cases" and "controversies"); 8A *Federal Procedure, Lawyers Ed.* § 22:39 (2009) ("A grand jury's issuance of an indictment is what gives the federal courts jurisdiction to hear a criminal case and impose a sentence.") (footnote omitted).[9]

The court that entered the conviction had jurisdiction only to dismiss the indictment "with prejudice" pursuant to IAD Article IV(e); the court acted in excess of its jurisdiction when it proceeded to adjudicate the merits of the criminal case, by accepting a guilty plea and entering a judgment of conviction.

[9] A situation like this, in which an indictment is void by operation of law, leaving the prosecution with no criminal case, is distinguishable from one where an indictment is merely defectively written; the latter situation does not impair the court's power to adjudicate a criminal case. *See Cotton*, 535 U.S. at 632 (where the indictment failed to state a sentencing element that was required to be submitted to the jury, the Court held that a substantively defective indictment does not deprive court of jurisdiction); *Delgado-Garcia*, 374 F.3d at 1342 ("[T]he substantive sufficiency of the indictment is a question that goes to the merits of the case, rather than the district court's subject-matter jurisdiction."). The 1975 indictment against Boniface, however, was not defectively written or processed. Rather, Boniface contends the indictment was void by operation of law, based on the IAD's absolute mandate that the indictment was to be of no "further force or effect."

Finally, even if the court that accepted his plea retained jurisdiction despite the void indictment, that should not matter for the present purpose of TSA's security-threat decision. The waiver rule for guilty pleas is a rule that prevents a defendant from attacking his plea and thus overturning his conviction, but Boniface does not really seek to overturn his conviction in this administrative proceeding; he simply seeks to prevent the United States (through TSA) from giving further force and effect to the invalid indictment by attaching a disability to a conviction unlawfully arising from the void indictment. Even when a defendant waives a challenge to the conviction itself by pleading guilty, his plea does not necessarily waive an antecedent violation of a right that may be given effect outside the confines of a criminal proceeding. *Cf. Haring v. Prosise*, 462 U.S. 306, 320 (1983) (holding that a defendant who pleaded guilty after an alleged Fourth Amendment violation did not waive his ability to later seek redress for the violation through a 42 U.S.C. § 1983 civil action since "a guilty plea is not a 'waiver' of . . . claims that may be given effect outside the confines of a criminal proceeding"). Just as the waiver doctrine does not bar a defendant who pleaded guilty from later vindicating a violation of a right in a non-criminal proceeding, *id.*, Boniface should be able in this proceeding to vindicate his IAD right.

In sum, by treating Boniface's 1975 conviction as a disqualifying offense, the United States (through TSA) is giving further force and effect to the indictment

on which that conviction was based, contrary to the IAD. This Court should order that TSA may not use the 1975 conviction as a disqualifying offense and that therefore the agency's security-threat assessment of Boniface should be withdrawn.

III. THE COURT SHOULD SET ASIDE TSA'S DECISION THAT BONIFACE IS INELIGIBLE FOR A WAIVER BECAUSE IT IS PROCEDURALLY AND SUBSTANTIVELY FLAWED

TSA's decision that Boniface is ineligible for a waiver, and thus bound by TSA's security-threat determination, should be set aside because the decision is procedurally and substantively flawed. As shown in Part A below, the decision is procedurally flawed because, contrary to both TSA's rules and due process, TSA converted Boniface's appeal into a waiver request; this left Boniface without an evidentiary submission to support a waiver, a void that TSA then used against Boniface. As shown in Part B, TSA's decision is substantively flawed. It is arbitrary and capricious and not supported by substantial evidence.

Before explaining these flaws, it is critical to emphasize the importance of the waiver process for truckers like Boniface who have stale explosives convictions. The waiver process is the only opportunity for an individualized assessment to determine whether such an individual, in fact, poses a security threat warranting denial of an HME.

The importance of the waiver process is underscored by TSA's arbitrary and overbroad rule that makes *any* explosives conviction a "permanent disqualifying offense" that automatically renders a trucker a "security threat" ineligible to hold an HME. 49 C.F.R. §§ 1572.5(a), 1572.103(a)(7). In promulgating that rule (which TSA did without notice-and-comment rulemaking) the agency failed to provide a reasoned explanation as to why a single explosives conviction under all circumstances, no matter how long ago, indicates that an individual poses a permanent security threat. According to TSA, the intent of the "disqualifying offenses" regulation is to decrease the likelihood of terrorist incidents related to the misuse of hazardous material. *See Nov. 24, 2004 IFR*, 69 Fed. Reg. at 68,740. TSA explained that it developed its list of disqualifying felony convictions "to include those offenses that are reasonably indicative of an individual's predisposition to engage in violent or deceptive behavior that may be predictive of a security threat." *Id.* at 68,723. Thus, TSA "believes that an individual who has one of these disqualifying criminal offenses poses an ongoing security threat, and should not be allowed to transport hazardous materials." *May 5, 2003 IFR*, 68 Fed. Reg. at 23,861. These are conclusory statements about predisposition, with no empirical basis or explanation *why* any individual who has committed an explosives offense (e.g., possession of unregistered explosive material) is

permanently predisposed to engage in "violent or deceptive behavior" posing a security threat.[10]

In fact, in the aviation-security context, convictions for explosives offenses are *not* permanently disqualifying; aviation personnel with such convictions, including flightcrew operators, baggage screeners, and those with unescorted access to security-sensitive areas are disqualified for ten years from the date of conviction; after ten years, these felons may work in security-sensitive aviation areas. *See* 49 U.S.C. § 44936(b)(1)(B); 49 C.F.R. § 1542.209(d)(20); *id.* § 1544.229(d)(20); *id.* § 1544.230(b). These aviation rules presuppose that an individual with an explosives conviction more than ten years old is *not* predisposed to engage in "violent or deceptive behavior" posing a security threat. It is arbitrary to conclude that the *same* individual is predisposed to act in "violent or deceptive behavior" that threatens security if he is a trucker transporting hazardous materials.

In addition, TSA failed to provide a reasoned explanation why an explosives conviction reveals a greater predisposition to commit violence or deception than convictions for unlawfully transporting weapons, extortion, or arson—offenses that

[10] As noted, the U.S. House of Representatives recently passed, by a vote of 397-25, a transportation bill, H.R. 2200, that would repeal the enabling statute, § 5103a. *See* note 5, *supra.* H.R. 2200 requires the Secretary to "establish a task force to review the lists of crimes that disqualify individuals from transportation-related employment under current regulations of the [TSA] and assess whether such lists of crimes are accurate indicators of terrorism security risk." H.R. 2200, § 436(a). The bill requires the Secretary to explain "the rationale for the inclusion of each [disqualifying] crime on the list." *Id.* § 436(c).

TSA has made disqualifying for a limited term, not permanently for truckers with HMEs. *Id.* § 1572.103(b). By declining to make the latter offenses permanently disqualifying, TSA implicitly concluded that a trucker who unlawfully transported weapons or intentionally burned down a building decades earlier does not pose a security threat now. There is no reasoned basis for reaching a different conclusion for a trucker with an explosives conviction. *Cf.* Brent E. Turvey, Criminal Profiling: An Introduction to Behavioral Evidence Analysis 391 (2002) (grouping arsonists and explosives offenders together for purposes of behavioral analysis).

In promulgating the rule, TSA explained that it does not treat arson as a permanently disqualifying offense because "arson is not always an act of terrorism," and "[a]lthough an arson conviction may be indicative of a very dangerous individual who should not have control of hazardous material shipments, [TSA] do[es] not believe that it rises to the same level of threat as espionage and treason do." *Nov. 24, 2004 IFR*, 69 Fed. Reg. at 68,724. The same logic applies to explosives offenses: possession of unregistered explosives does not in every case "rise[] to the same level of threat as espionage and treason"; and it "is not always an act of terrorism."[11] *Id.* TSA thus defied its own logic by making all explosives convictions permanently disqualifying.

[11] Indeed, the range of felony explosives convictions included within TSA's list of permanently disqualifying convictions is very broad and includes convictions for the possession of explosives unlikely to bear any relationship to

Given the arbitrariness and overbreadth of TSA's rule making all explosives convictions permanently disqualifying, the waiver process is critical for individuals like Boniface who have explosives convictions on their criminal records. Unfortunately, as shown below, TSA deprived Boniface of a meaningful opportunity to participate in a proper waiver process and produced a waiver-ineligibility decision that is arbitrary and capricious and not supported by substantial evidence.

A. TSA Unlawfully Converted Boniface's Appeal Into A Waiver Request

1. By converting his appeal into a waiver request, TSA violated the procedures in its own regulations

A basic precept "of the modern administrative state is that agencies must abide by their rules and regulations." *Reuters, Ltd. v. FCC*, 781 F.2d 946, 947 (D.C. Cir. 1986). Failure to do so invalidates the agency's action. *Fla. Inst. of Tech. v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992). This rule promotes orderliness and predictability, which are the "hallmarks of lawful administrative action."

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terrorism or transportation security. The regulation includes within its definition of explosives (but is not limited to) any explosive material covered by 18 U.S.C. 841(c)-(f). 49 C.F.R. § 1572.103(a)(7). Under § 841, an explosive covers a wide range of materials as defined annually by the Attorney General, including display fireworks. 18 U.S.C. 841(d); Commerce in Explosives; List of Explosive Materials (2008R−17T), 73 Fed. Reg. 80,428 (Dec. 31, 2008). Explosives offenses "can occur in a variety of contexts and satisfy or can be motivated by multiple offender needs." Brent E. Turvey, Criminal Profiling: An Introduction to Behavioral Evidence Analysis 391 (2002).

Reuters, 781 F.2d at 950-51. "[W]here the rights of individuals are affected," it is particularly important for agencies to adhere to their own procedures. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974).

TSA failed to follow its own regulations when it converted Boniface's appeal into a waiver request. This deprived Boniface of a meaningful opportunity to be heard on his eligibility for a waiver.

TSA's regulations establish two separate processes by which an individual can challenge TSA's threat assessment and secure an HME: an appeal process and a waiver process. *See* 49 C.F.R. § 1515.5 (appeal); *id.* § 1515.7 (waiver). An applicant pursuing an appeal may also request a waiver, but the regulations enable an individual to invoke these processes separately and in sequence. The regulations say that, before initiating a waiver request, a party "*may first pursue some or all of the appeal procedures* in 49 CFR 1515.5 to assert that he or she does not have a disqualifying condition." *Id.* § 1515.7(c)(1)(iii) (emphasis added).

The purpose of the appeal process is to challenge the conviction on which the IDTA is based. 49 C.F.R. § 1515.5(b); J.A. 26. TSA must make a final determination on the appeal within sixty days of receiving the appellant's written reply to the IDTA; if the TSA rejects the appeal, TSA must serve on the appellant an FDTA. 49 C.F.R. §§ 1515.5(b)(6), (c)(1). The FDTA concludes the appeal process. *See id.* § 1515.5(g).

Once the FDTA issues, the unsuccessful appellant *then* has sixty days "*after the date of service of the [FDTA]*" to initiate the waiver process. *Id.* § 1515.7(c)(1)(iii) (emphasis added); *see also id.* § 1515.15(g) (the denial of an appeal "is not a final TSA order to grant or deny a waiver, the procedures for which are in 49 CFR 1515.7 and 1515.11"). Thus, an individual has a right to wait until the appeal process concludes—after receiving an FDTA—before initiating a waiver request.

Unlike the appeal process, which focuses on the validity of the conviction on which TSA relied in the IDTA, the waiver process entails an individualized assessment of the applicant to determine whether "the applicant does not pose a security threat warranting denial of the HME." *Id.* § 1515.7(c)(2)(v). Upon initiating a waiver request, the applicant may submit information or evidence to TSA in support of a waiver. *Id.* § 1515.7(c). TSA says it will accept "any" information that the individual believes is helpful in showing he is not a security threat, including paperwork demonstrating completion of the sentence, a letter from a probation officer, and a letter of reference. (J.A. 28)

Here, TSA served Boniface with the IDTA and notified him that he could file an appeal to show that the 1975 conviction was "incorrect." (J.A. 26) Boniface thus commenced an appeal and timely submitted a written reply to the IDTA. (J.A. 38, 6) In this document, titled "APPEAL," Boniface stated:

> I, Lewis L. Boniface, . . ., a U.S. Citizen, never being adjudicated as lacking mental capacity or committed to a mental facility, who poses no threat to national security, transportation security, or to terrorism, ***do hereby appeal and challenge the 'Basis For Initial Determination Of Threat Assessment***,' dated May 13, 2008.

(J.A. 38 (emphasis added)) In support of his appeal, Boniface argued that his 1975 conviction was invalid and thus could not be used to disqualify him. (J.A. 38-41, 6-12) Since he was challenging the validity of the 1975 conviction, Boniface understood his appeal to be proper.

Regardless of the merits of Boniface's appeal, TSA failed to process the appeal as its regulations required. The agency did not evaluate the merits of his appeal. Nor did TSA issue an FDTA. Instead, TSA unilaterally and without adequate notice converted Boniface's appeal into a waiver request, which it then denied in part based on Boniface's failure to submit supporting evidence.[12] (J.A. 43) TSA notified Boniface of the conversion when it notified him that it had denied him a waiver. *Id.* There is no pre-waiver-denial document in the record notifying Boniface that the agency was converting his appeal into a waiver request, much less advising him that the conversion had evidentiary implications.

[12] TSA later acknowledged that it "processed" his appeal as a waiver request. (J.A. 90) When TSA's August 6, 2008 decision denying a waiver said that TSA received Boniface's "request for a waiver" on June 20, 2008 (J.A. 43), TSA was referencing his *appeal* submission, mailed two days earlier. (J.A. 24)

As a result of TSA's conversion without adequate notice, Boniface never had a meaningful opportunity to submit evidence showing that he "does not pose a security threat warranting denial of the HME." 49 C.F.R. § 1515.7(c)(2)(v). TSA's conversion of his appeal into a waiver request left him without an evidentiary submission on the circumstances of his 1975 offense and his rehabilitation. TSA then used that deficiency against him: the agency explicitly relied on "the absence of adequate documentation showing that [he is] rehabilitated." (J.A. 43) While Boniface complained about this to the ALJ and discussed the type of evidence he would have submitted had he received adequate notice, the ALJ ignored that information, as the ALJ was required to do, since an ALJ is prohibited from considering evidence or information that had not previously been submitted to TSA. 49 C.F.R. § 1515.11(b)(1)(i).

Had TSA followed its regulations below, it would have issued an FDTA disposing of Boniface's appeal; he then would have had sixty days to gather evidence to contest the notion that he is a security threat. By failing to issue an FDTA in Boniface's appeal and converting his appeal into a waiver request, TSA acted arbitrarily and capriciously and contrary to its regulations.

Boniface is a trucker, not a lawyer. He was appearing *pro se* to defend himself in a proceeding against a federal agency. What happened to Boniface is analogous to the situation where a district court converts a motion to dismiss into a

motion for summary judgment without adequately apprising the *pro se* litigant of the conversion's consequences—i.e., without advising that a failure to submit evidence may be fatal. Courts require that "*pro se* parties must have 'unequivocal' notice of the meaning and consequences of conversion to summary judgment" because otherwise they "may be unaware of the consequences of [their] failure to offer evidence bearing on triable issues." *Hernandez v. Coffey*, 582 F.3d 303, 307-08 (2d Cir. 2009); *accord Neal v. Kelly*, 963 F.2d 453, 456 (D.C. Cir. 1992) (recognizing that, on a summary-judgment conversion, the court must give a *pro se* litigant adequate notice of the consequences of failing to submit evidence, so the litigant may have an adequate opportunity to be heard).

In sum, by converting Boniface's appeal into a waiver request, TSA failed to abide by its regulations and acted arbitrarily and capriciously.

2. TSA's conversion of Boniface's appeal into a waiver request deprived him of procedural due process

TSA's conversion of the appeal into a waiver request also deprived Boniface of procedural due process. A due process violation occurs when the government interferes with a protected liberty or property interest without affording sufficient procedural protections. *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454, 460 (1989). Boniface had a cognizable property interest in maintaining his HME. The continued possession of a government-issued license is an important property interest that the government cannot take away or deny without providing

procedural due process. *See Bell v. Burson*, 402 U.S. 535, 539 (1971) ("Once licenses are issued . . . their continued possession may become essential in the pursuit of a livelihood. . . . In such cases, licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."); *see also Illinois v. Batchelder*, 463 U.S. 1112, 1116 (1983) (noting that continued possession of a drivers license is a cognizable property interest); *Barry v. Barchi*, 443 U.S. 55, 64 (1979) (holding continued possession of a horse training license to be a cognizable property interest triggering procedural due process); *Tur v. FAA*, 4 F.3d 766, 769 (9th Cir. 1993) (continued possession of an airman's certificate is a protectable property interest). By depriving Boniface of his HME, TSA deprived him of a constitutionally protected property interest.

In addition to implicating Boniface's property interest in maintaining his HME, TSA's branding of Boniface as a security threat implicates his interest in preserving his reputation. While reputational harm standing alone does not rise to the level of a constitutionally cognizable liberty interest, reputational harm plus damage to a more tangible interest gives rise to a due process claim. *Paul v. Davis*, 424 U.S. 693, 701, 705 (1976) (an individual has a liberty interest in being free from a "badge of infamy" and stigma harmful to his reputation, when accompanied by a more "tangible interest," such as "an attendant foreclosure from other employment opportunity"); *see also Nat'l Council of Resistance of Iran v. Dep't of*

State, 251 F.3d 192, 203-05 (D.C. Cir. 2001); *Dee v. Borough of Dunmore*, 549 F.3d 225, 233-35 & n.11 (3d Cir. 2008). TSA has branded Boniface a "security threat" under an antiterrorism statute, the PATRIOT Act. This badge of infamy creates a stigma that harms Boniface's reputation. Thus, TSA has deprived Boniface of a liberty interest—namely his interest in being free from a "badge of infamy"—that both harms his reputation and also denies him his HME and attendant employment opportunities.

Because TSA deprived Boniface of a constitutionally protected interest, the agency was required to provide him with procedural due process, including notice and an opportunity to be heard. *See Nat'l Council*, 251 F.3d at 200, 205 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976)); *Sloan v. HUD*, 231 F.3d 10, 18 (D.C. Cir. 2000). The "fundamental requirement" of procedural due process is "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (internal quotation marks omitted). To satisfy this requirement, the government must provide a meaningful opportunity to present evidence. *Id.* at 325 n.4 (citing *Goldberg v. Kelly*, 397 U.S. 254, 266-71 (1970)); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972). This includes an opportunity to prove or disprove facts relevant to the legal determination at issue. *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 7 (2003); *Goss v. Lopez*, 419 U.S. 565 (1975).

Here, TSA's conversion of Boniface's appeal into a waiver request without adequate notice denied him of a meaningful opportunity to be heard on his eligibility for an HME. TSA did not resolve his appeal, and he had no meaningful evidentiary hearing on a waiver because TSA's conversion left him without an evidentiary submission to show that he is not a "security threat." Again, Boniface complained to the ALJ about this evidentiary void (J.A. 43), but it was too late; the ALJ was forbidden to consider new evidence or information that had not already been submitted to TSA. 49 C.F.R. § 1515.11(b)(1)(i) (2008).

In sum, by converting Boniface's appeal into a waiver request, TSA violated his right to procedural due process.

B. TSA's Waiver-Ineligibility Decision Is Arbitrary And Capricious And Unsupported By Substantial Evidence

In addition to being procedurally suspect, TSA's waiver-ineligibility decision is substantively flawed. Below we examine the three prongs of TSA's decision: (1) the purported "severity" of the 1975 conviction; (2) a "pattern of recidivism"; and (3) a purported absence of evidence of rehabilitation. (J.A. 43)

1. TSA's waiver regulation provides that the agency "will consider" the "circumstances" of the disqualifying conviction. 49 C.F.R. § 1515.7(c)(2)(i). One circumstance of a conviction is its *age*. Yet there is no indication that TSA considered the age of Boniface's 1975 conviction in determining whether he poses a security threat, decades after the offense. (J.A. 43)

There should be no question that a conviction's vintage is highly relevant in assessing criminal predisposition and current dangerousness. *See Sherman v. United States*, 356 U.S. 369, 375-76 (1958) (entrapment; holding that two prior drug convictions, dating nine and five years earlier, were alone "insufficient to prove petitioner had a readiness to sell narcotics at the time [the informant] approached him," where the court assumed he was trying to overcome his drug habit); *United States v. Watson*, 489 F.2d 504, 508 n.5 (3d Cir. 1973) ("We do not find the 17 year old sales conviction to be of significant probative value in showing a present predisposition to sell."). Under the U.S. Sentencing Guidelines, courts consider the age of a prior conviction in evaluating the seriousness of criminal history and determining whether the defendant is likely to commit other crimes. *See* U.S.S.G. § 4A1.2(e); *United States v. Shoupe*, 988 F.2d 440, 447 (3d Cir. 1993). The Federal Rules of Evidence, too, recognize the relevance of a conviction's age in assessing one's character: Rule 609(b) prohibits the use of a prior conviction to attack a witness's character if the conviction or the date of his release from confinement is more than ten years old (whichever is later), unless the court determines in the interests of justice that the probative value of the conviction substantially outweighs its prejudicial effect. Fed. R. Evid. 609(b). Yet, despite the relevance of a conviction's age, and even though TSA's waiver regulation

provides that TSA will consider the circumstances of the conviction, TSA failed to consider the remoteness of Boniface's 33-year-old conviction.

TSA's only consideration of the 1975 offense was the agency's statement that its decision was based "on the severity of [Boniface's] disqualifying conviction." (J.A. 43) But TSA failed to cite any evidence about the circumstances of that conviction warranting a finding of "severity," and there is no such evidence in this record. TSA did not find, for example, that the offense caused or risked injury to any person, much less that it threatened transportation or national security. Because the circumstances of explosives offenses vary greatly, *see* note 11, *supra*, TSA could not simply assume that Boniface's was "severe." That was arbitrary and unsupported by substantial evidence in the record.[13]

2. TSA's decision below also said that TSA relied on a "pattern of recidivism." (J.A. 43) TSA's waiver regulation, however, does not mention recidivism. *See* 49 C.F.R. § 1515.7(c)(2). More importantly, TSA is narrowly tasked under the PATRIOT Act with identifying and weeding out *security threats*,

[13] TSA's regulations do not allow a finding that explosives convictions *per se* are too severe to warrant a waiver. After all, TSA's waiver regulation presupposes that the applicant has committed a disqualifying offense, such as an explosives offense, but nonetheless requires TSA to consider the "circumstances of the disqualifying act or offense" in determining whether the disqualifying feature may be waived. 49 C.F.R. § 1515.7(c)(2)(i). The only disqualifying convictions that TSA has deemed too severe *per se* to warrant a waiver are for terrorism, treason, espionage, and sedition. *See id.* § 1515.7(a)(1) (providing that the waiver process does not apply to applicants who have been convicted of disqualifying offenses in 49 C.F.R. § 1572.103(a)(1)-(4)).

not with assessing generic recidivism (i.e., repeated criminal behavior), as if the agency were acting as a parole board or sentencing court. Indeed, in the 30-plus years since his 1975 conviction, Boniface has not committed another explosives offense or any other permanently disqualifying offense. And his post-1975 convictions (the last of which was a 1993 drug offense) are sufficiently old that none of them constitutes an interim disqualifying offense. *See* 49 C.F.R. § 1572.103(b). In other words, under TSA's own regulation, Boniface's post-1975 "recidivism" does not make him a "security threat." *See id.* § 1572.5(a). TSA should not be permitted to use "recidivism" to bootstrap non-disqualifying offenses into this proceeding to deprive Boniface of the HME he has used for years without incident.

Moreover, it is not clear on this record if TSA's "pattern of recidivism" was based on arrests or charged offenses, and not just convictions. If so, this is particularly improper, because TSA's regulations are linked to *convictions*, not arrests or charges, 49 C.F.R. § 1572.103, and there obviously is a difference. *Cf. Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 241 & n. 6 (1957) (noting that "[a]rrest, by itself, is not considered competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts").

Finally, if the agency is purporting to assess generic recidivism, then surely the agency must account for Boniface's *age*, since TSA's decision renders him

ineligible to hold an HME *in his sixties*. *See United States v. Hunt*, No. 07-12063-JLT, 2009 WL 2512836, at *11 (D. Mass. Aug. 18, 2009) (citing expert testimony regarding "findings in criminology indicating that criminal behavior generally declines with age"). The "correlation between age and recidivism is impossible to deny." *United States v. Nellum*, No. 2:04-CR-30-PS, 2005 WL 300073, at *3 (N.D. Ind. Feb. 3, 2005) (holding that, under the Sentencing Guidelines, "the age of the offender is plainly relevant to 'protect[ing] the public from further crimes of the defendant'"; because the defendant there was 57, the court concluded the risk was low based on data showing correlation between recidivism and age) (citation omitted). The U.S. Sentencing Commission has found that recidivism rates decline steadily as age increases. *See* U.S.S.C., Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines 12 (2004), available at http://www.ussc.gov/publicat/Recidivism_General.pdf. Yet, despite the inverse correlation between advancing age and recidivism, and even though TSA's waiver regulation says that TSA will consider "factors that indicate the applicant does not pose a security threat warranting denial of the HME," 49 C.F.R. § 1515.7(c)(2)(v), TSA did not even consider Boniface's age—that he was seeking to renew his HME for continued use in his sixties.

3. TSA also told Boniface that it relied on the "the absence of adequate documentation demonstrating that you are rehabilitated notwithstanding TSA's

reasonable effort to obtain such information from you." (J.A. 43) Notably, TSA did not conclude that Boniface is *not* rehabilitated, but instead that the agency lacked "adequate documentation" to make this determination. But this lack of documentation was TSA's fault. As explained in Part III.A above, it was TSA's improper conversion of Boniface's appeal into a waiver request that created an evidentiary void in the record.

Moreover, TSA overlooked certain evidence of rehabilitation that was before it. TSA failed to consider the passage of time (six years) without an arrest since Boniface's release from incarceration after his last offense, which occurred 15 years before TSA's threat assessment. "Most recidivism occurs within three years after return to the community. Hence, after this period of time, a rebuttable presumption of rehabilitation may be established." Neal Miller, *Criminal Convictions, "Off-Duty Misconduct," and Federal Employment: the Need for Better Definition of the Basis for Disciplinary Action*, 39 Am. U. L. Rev. 869, 908 (1990) (citing Bureau of Justice Statistics, Special Report: Examining Recidivism 2 (1985) (using rearrest as measure of recidivism)).

Furthermore, there was evidence of rehabilitation in the fact that Boniface had driven with an HME without incident before TSA intervened. TSA was aware that Boniface was seeking to *renew* his HME, meaning he already held an HME, hauling hazardous materials as a commercial truck driver. There is nothing in the

record indicating he had any problems or incidents while driving with his HME that would render him dangerous if he continues to hold the license.

In sum, TSA's decision that Boniface is ineligible to obtain a waiver of the agency's security-threat determination is not based on substantial evidence and is arbitrary and capricious.

* * *

In conclusion, TSA's security-threat decision is procedurally and substantively flawed. Therefore, even if Boniface's other challenges fail (his challenge to the rule and to the IAD violation), the Court should vacate TSA's order, remand the matter to TSA, and direct the agency to let Boniface initiate a proper waiver proceeding, giving him sufficient time to gather and submit evidence in support of a waiver. The Court should further order that, in evaluating Boniface's waiver request, TSA must consider, among other factors, the remoteness of his 1975 conviction and Boniface's advanced age, as well as his incident-free record of driving with an HME. In addition, the Court should direct TSA not to consider, under the banner of "recidivism," other convictions that are not themselves disqualifying under 49 C.F.R. § 1572.103. Finally, the Court should order TSA to notify Boniface's issuing state to reinstate his HME so that he may earn a decent living until the conclusion of the waiver proceeding and subsequent administrative review.

CONCLUSION

TSA's "disqualifying offense" regulation is impermissibly retroactive. Even if it is not, TSA should not be permitted to use Boniface's 1975 conviction in its threat assessment because of the IAD violation. If the Court agrees with either of those arguments, the Court should vacate TSA's order and direct the agency to withdraw its security-threat determination and notify the issuing state to reinstate his HME. At the very least, the matter should be remanded so that Boniface may initiate a waiver proceeding and gather and submit evidence in support of a waiver; and TSA should be ordered to notify Boniface's issuing state to reinstate his HME until the waiver proceeding and subsequent administrative review is completed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS

Pursuant to Fed. R. Ap. P. 32(A)(7)(C) and D.C. Circuit Rule 32(a)(3)(C):

I certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 13,811 words.

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A), as varied by D.C. Circuit Rule 32(a)(1), because it has been prepared in a proportionally spaced, typeface, 14-point Times New Roman, using Microsoft Word.

/s/ Sean E. Andrussier
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of November, 2009, I caused this Brief of *Amicus Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 23rd day of November, 2009, I caused this Brief of *Amicus Curiae* to be served by U.S. mail, first class, postage prepaid, on the Petitioner at the following address:

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ADDENDUM

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

PATRIOT ACT Section 1012 (as enacted Pub. L. No. 107-56, 115 Stat. 272)

SEC. 1012. LIMITATION ON ISSUANCE OF HAZMAT LICENSES.

(a) LIMITATION.--

<< 49 USCA § 5103a >>

(1) IN GENERAL.--Chapter 51 of title 49, United States Code, is amended by inserting after section 5103 the following new section:

"§ 5103a. Limitation on issuance of hazmat licenses
"(a) LIMITATION.--
"(1) ISSUANCE OF LICENSES.--A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of *397 Transportation has first determined, upon receipt of a notification under subsection (c)(1)(B), that the individual does not pose a security risk warranting denial of the license.
"(2) RENEWALS INCLUDED.--For the purposes of this section, the term 'issue', with respect to a license, includes renewal of the license.
"(b) HAZARDOUS MATERIALS DESCRIBED.--The limitation in subsection (a) shall apply with respect to--
"(1) any material defined as a hazardous material by the Secretary of Transportation; and
"(2) any chemical or biological material or agent determined by the Secretary of Health and Human Services or the Attorney General as being a threat to the national security of the United States.
"(c) BACKGROUND RECORDS CHECK.--
"(1) IN GENERAL.--Upon the request of a State regarding issuance of a license described in subsection (a)(1) to an individual, the Attorney General--
"(A) shall carry out a background records check regarding the individual; and
"(B) upon completing the background records check, shall notify the Secretary of Transportation of the completion and results of the background records check.
"(2) SCOPE.--A background records check regarding an individual under this subsection shall consist of the following:
"(A) A check of the relevant criminal history data bases.
"(B) In the case of an alien, a check of the relevant data bases to determine the status of the alien under the immigration laws of the United States.
"(C) As appropriate, a check of the relevant international data bases through Interpol-U.S. National Central Bureau or other appropriate means.
"(d) REPORTING REQUIREMENT.--Each State shall submit to the Secretary of Transportation, at such time and in such manner as the Secretary may prescribe, the name, address, and such other information as the Secretary may require, concerning--
"(1) each alien to whom the State issues a license described in subsection (a); and
"(2) each other individual to whom such a license is issued, as the Secretary may require.
"(e) ALIEN DEFINED.--In this section, the term 'alien' has the meaning given the term in section 101(a)(3) of the Immigration and Nationality Act."

49 U.S.C. § 5103a Limitation on issuance of hazmat licenses

(a) Limitation.--

(1) Issuance of licenses.--A State may not issue to any individual a license to operate a motor vehicle transporting in commerce a hazardous material unless the Secretary of Homeland Security has first determined, upon receipt of a notification under subsection (d)(1)(B), that the individual does not pose a security risk warranting denial of the license.

(2) Renewals included.--For the purposes of this section, the term 'issue', with respect to a license, includes renewal of the license.

(b) Hazardous materials described.--The limitation in subsection (a) shall apply with respect to any material defined as hazardous material by the Secretary of Transportation for which the Secretary of Transportation requires placarding of a commercial motor vehicle transporting that material in commerce.

(c) Recommendations on chemical and biological materials.--The Secretary of Health and Human Services shall recommend to the Secretary of Transportation any chemical or biological material or agent for regulation as a hazardous material under section 5103(a) if the Secretary of Health and Human Services determines that such material or agent poses a significant risk to the health of individuals.

(d) Background records check.--

(1) In general.--Upon the request of a State regarding issuance of a license described in subsection (a)(1) to an individual, the Attorney General--

(A) shall carry out a background records check regarding the individual; and

(B) upon completing the background records check, shall notify the Secretary of Homeland Security of the completion and results of the background records check.

(2) Scope.--A background records check regarding an individual under this subsection shall consist of the following:

(A) A check of the relevant criminal history data bases.

(B) In the case of an alien, a check of the relevant data bases to determine the status of the alien under the immigration laws of the United States.

(C) As appropriate, a check of the relevant international data bases through Interpol-U.S. National Central Bureau or other appropriate means.

(e) Reporting requirement.--Each State shall submit to the Secretary of Homeland Security, at such time and in such manner as the Secretary of Homeland Security may prescribe, the name, address, and such other information as the Secretary of Homeland Security may require, concerning--

(1) each alien to whom the State issues a license described in subsection (a); and

(2) each other individual to whom such a license is issued, as the Secretary of Homeland Security may require.

(f) Alien defined.--In this section, the term "alien" has the meaning given the term in section 101(a)(3) of the Immigration and Nationality Act.

(g) Background checks for drivers hauling hazardous materials.--

(1) In general.--

(A) Employer notification.--Not later than 90 days after the date of enactment of this subsection, the Director of the Transportation Security Administration, after receiving comments from interested parties, shall develop and implement a process for notifying hazmat employers designated by an applicant of the results of the applicant's background record check, if--

(i) such notification is appropriate considering the potential security implications; and

(ii) the Director, in a final notification of threat assessment, served on the applicant determines that the applicant does not meet the standards set forth in regulations issued to carry out this section.

(B) Relationship to other background records checks.--

(i) Elimination of redundant checks.--An individual with respect to whom the Transportation Security Administration--

(I) has performed a security threat assessment under this section; and
(II) has issued a final notification of no security threat, is deemed to have met the requirements of any other background check that is required for purposes of any Federal law applicable to transportation workers if that background check is equivalent to, or less stringent than, the background check required under this section.

(ii) Determination by director.--Not later than 60 days after the date of issuance of the report under paragraph (5), but no later than 120 days after the date of enactment of this subsection, the Director shall initiate a rulemaking proceeding, including notice and opportunity for comment, to

determine which background checks required for purposes of Federal laws applicable to transportation workers are equivalent to, or less stringent than, those required under this section.

(iii) Future rulemakings.--The Director shall make a determination under the criteria established under clause (ii) with respect to any rulemaking proceeding to establish or modify required background checks for transportation workers initiated after the date of enactment of this subsection.

(2) Appeals process for more stringent State procedures.--If a State establishes its own standards for applicants for a hazardous materials endorsement to a commercial driver's license, the State shall also provide--

(A) an appeals process similar to and to the same extent as the process provided under part 1572 of title 49, Code of Federal Regulations, by which an applicant denied a hazardous materials endorsement to a commercial driver's license by that State may appeal that denial; and

(B) a waiver process similar to and to the same extent as the process provided under part 1572 of title 49, Code of Federal Regulations, by which an applicant denied a hazardous materials endorsement to a commercial driver's license by that State may apply for a waiver.

(3) Clarification of term defined in regulations.--The term “transportation security incident”, as defined in part 1572 of title 49, Code of Federal Regulations, does not include a work stoppage or other nonviolent employee-related action resulting from an employer-employee dispute. Not later than 30 days after the date of enactment of this subsection, the Director shall modify the definition of that term to reflect the preceding sentence.

(4) Background check capacity.--Not later than October 1, 2005, the Director shall transmit to the Committee on Commerce, Science, and Transportation of the Senate and the Committees on Transportation and Infrastructure and Homeland Security of the House of Representatives a report on the implementation of fingerprint-based security threat assessments and the adequacy of fingerprinting locations, personnel, and resources to accomplish the timely processing of fingerprint-based security threat assessments for individuals holding commercial driver's licenses who are applying to renew hazardous materials endorsements.

(5) Report.--

(A) In general.--Not later than 60 days after the date of enactment of this subsection, the Director shall transmit to the committees referred to in paragraph (4) a report on the Director's plans to reduce or eliminate redundant background

checks for holders of hazardous materials endorsements performed under this section.

(B) Contents.--The report shall--

(i) include a list of background checks and other security or threat assessment requirements applicable to transportation workers under Federal laws for which the Department of Homeland Security is responsible and the process by which the Secretary of Homeland Security will determine whether such checks or assessments are equivalent to, or less stringent than, the background check performed under this section; and

(ii) provide an analysis of how the Director plans to reduce or eliminate redundant background checks in a manner that will continue to ensure the highest level of safety and security.

[Omitted: subsection (h) addressing commercial motor vehicle operators registered to operate in Mexico or Canada]

49 U.S.C. § 46110 Judicial review

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

TITLE 18.—APPENDIX

UNLAWFUL POSSESSION OR RECEIPT OF FIREARMS

Pub. L. 90-351, title VII, §§ 1201-1203, June 19, 1968, 82 Stat. 236, as amended.

§ 1201. Congressional findings and declaration.

The Congress hereby finds and declares that the receipt, possession, or transportation of a firearm by felons, veterans who are discharged under dishonorable conditions, mental incompetents, aliens who are illegally in the country, and former citizens who have renounced their citizenship, constitutes—

(1) a burden on commerce or threat affecting the free flow of commerce,

(2) a threat to the safety of the President of the United States and Vice President of the United States,

(3) an impediment or a threat to the exercise of free speech and the free exercise of a religion guaranteed by the first amendment to the Constitution of the United States, and

(4) a threat to the continued and effective operation of the Government of the United States and of the government of each State guaranteed by article IV of the Constitution.

(As amended Pub. L. 90-618, title III, § 301(a)(1), Oct. 22, 1968, 82 Stat. 1236.)

AMENDMENTS

1968—Pub. L. 90-618 substituted "discharged under dishonorable conditions" for "other than honorably discharged."

EFFECTIVE DATE OF 1968 AMENDMENT

Section 302 of Pub. L. 90-618 provided that: "The amendments made by paragraphs (1) and (2) of subsection (a) of section 301 [amending this section and section 1202 (a)(2), (b)(2) of this Appendix] shall take effect as of June 19, 1968."

§ 1202. Receipt, possession, or transportation of firearms.

(a) Persons liable; penalties for violations.

Any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(b) Employment; persons liable; penalties for violations.

Any individual who to his knowledge and while being employed by any person who—

(1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or

(2) has been discharged from the Armed Forces under dishonorable conditions, or

(3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or

(4) having been a citizen of the United States has renounced his citizenship, or

(5) being an alien is illegally or unlawfully in the United States,

and who, in the course of such employment, receives, possesses, or transports in commerce or affecting commerce, after the date of the enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(c) Definitions.

As used in this title—

(1) "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country;

(2) "felony" means any offense punishable by imprisonment for a term exceeding one year, but does not include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a State and punishable by a term of imprisonment of two years or less;

(3) "firearm" means any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; or any firearm muffler or firearm silencer; or any destructive device. Such term shall include any handgun, rifle, or shotgun;

(4) "destructive device" means any explosive, incendiary, or poison gas bomb, grenade, mine, rocket, missile, or similar device; and includes any type of weapon which will or is designed to or may readily be converted to expel a projectile by the action of any explosive and having any barrel with a bore of one-half inch or more in diameter;

(5) "handgun" means any pistol or revolver originally designed to be fired by the use of a single hand and which is designed to fire or capable of firing fixed cartridge ammunition, or any other firearm originally designed to be fired by the use of a single hand;

(6) "shotgun" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed shotgun shell to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger;

(7) "rifle" means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of the explosive in a fixed metallic cartridge to fire only a single projectile through a rifled bore for each single pull of the trigger.

(As amended Pub. L. 90–618, title III, § 301(a)(2), (b), Oct. 22, 1968, 82 Stat. 1236.)

REFERENCES IN TEXT

Date of enactment of this Act, referred to in subsecs. (a) and (b) means June 19, 1968, the date of enactment of Pub. L. 90-351.

AMENDMENTS

1968—Subsec. (a)(2), Pub. L. 90-618, § 301(a)(2), substituted "dishonorable" for "other than honorable".

Subsec. (b)(2), Pub. L. 90-618, § 301(a)(2), substituted "dishonorable" for "other than honorable".

Subsec. (c)(2), Pub. L. 90-618, § 301(b), restricted definition of the term "felony" so as not to include any offense (other than one involving a firearm or explosive) classified as a misdemeanor under the laws of a state and punishable by a term of imprisonment of two years or less.

EFFECTIVE DATE OF 1968 AMENDMENT

Amendment by section 301(a)(2) of Pub. L. 90-618 effective June 19, 1968, see section 302 of Pub. L. 90-618, set out as a note under section 1201 of this Appendix.

§ 1203. Exemptions.

This title shall not apply to—

(1) any prisoner who by reason of duties connected with law enforcement has expressly been entrusted with a firearm by competent authority of the prison; and

(2) any person who has been pardoned by the President of the United States or the chief executive of a State and has expressly been authorized by the President or such chief executive, as the case may be, to receive, possess, or transport in commerce a firearm.

INTERSTATE AGREEMENT ON DETAINERS

Pub. L. 91–538, §§ 1–8, Dec. 9, 1970, 84 Stat. 1397–1403

[§ 1. Short title.]

That this Act may be cited as the "Interstate Agreement on Detainers Act".

§ 2. Enactment into law of Interstate Agreement on Detainers.

The Interstate Agreement on Detainers is hereby enacted into law and entered into by the United States on its own behalf and on behalf of the District of Columbia with all jurisdictions legally joining in substantially the following form:

"The contracting States solemnly agree that:

"ARTICLE I

"The party States find that charges outstanding against a prisoner, detainers based on untried indictments, informations, or complaints and difficulties in securing speedy trial of persons already incarcerated in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party States and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainers based on untried indictments, informations, or complaints. The party States also find that proceedings with reference to such charges and detainers, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

"ARTICLE II

"As used in this agreement:

"(a) 'State' shall mean a State of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

"(b) 'Sending State' shall mean a State in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to article III hereof or at the time that a request for custody or availability is initiated pursuant to article IV hereof.

"(c) 'Receiving State' shall mean the State in which trial is to be had on an indictment, information, or complaint pursuant to article III or article IV hereof.

"ARTICLE III

"(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party State, and whenever during the continuance of the term of imprisonment there is pending in any other party State any untried indictment, information, or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred and eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information, or complaint: *Provided*, That, for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by a certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decision of the State parole agency relating to the prisoner.

"(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections, or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail, return receipt requested.

"(c) The warden, commissioner of corrections, or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

"(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner from the State to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections, or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the State to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information, or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving State to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending State. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

"(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

"ARTICLE IV

"(a) The appropriate officer of the jurisdiction in which an untried indictment, information, or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party State made available in accordance with article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the State in which the prisoner is incarcerated: *Provided*, That the court having jurisdiction of such indictment, information, or complaint shall have duly approved, recorded, and transmitted the request: *And provided further*, That there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the Governor of the sending State may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

"(b) Upon request of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the State parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving State who has lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

"(c) In respect of any proceeding made possible by this article, trial shall be commenced within one hundred and twenty days of the arrival of the prisoner in the receiving State, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

"(d) Nothing contained in this article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending State has not affirmatively consented to or ordered such delivery.

"(e) If trial is not had on any indictment, information, or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to article V(e) hereof, such indictment, information, or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

"ARTICLE V

"(a) In response to a request made under article III or article IV hereof, the appropriate authority in a sending State shall offer to deliver temporary custody of such prisoner to the appropriate authority in the State where such indictment, information, or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in article III of this agreement. In the case of a Federal prisoner, the appropriate authority in the receiving State shall be entitled to temporary custody as provided by this

agreement or to the prisoner's presence in Federal custody at the place of trial, whichever custodial arrangement may be approved by the custodian.

"(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

"(1) Proper identification and evidence of his authority to act for the State into whose temporary custody this prisoner is to be given.

"(2) A duly certified copy of the indictment, information, or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

"(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information, or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in article III or article IV hereof, the appropriate court of the jurisdiction where the indictment, information, or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

"(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations, or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

"(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending State.

"(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

"(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending State and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

"(h) From the time that a party State receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending State, the State in which the one or more untried indictments, informations, or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping, and returning the prisoner. The provisions of this paragraph shall govern unless the States concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies, and officers of and in the government of a party State, or between a party State and its subdivisions, as to the payment of costs, or responsibilities therefor.

"ARTICLE VI

"(a) In determining the duration and expiration dates of the time periods provided in articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

"(b) No provision of this agreement, and no remedy made available by this agreement shall apply to any person who is adjudged to be mentally ill.

"ARTICLE VII

"Each State party to this agreement shall designate an officer who, acting jointly with like officers of other party States, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the State, information necessary to the effective operation of this agreement.

"ARTICLE VIII

"This agreement shall enter into full force and effect as to a party State when such State has enacted the same into law. A State party to this agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any State shall not affect the status of any proceedings already initiated by inmates or by State officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

"ARTICLE IX

"This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence, or provision of this agreement is declared to be contrary to the constitution of any party State or of the United States or the applicability thereof to any government, agency, person, or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person, or circumstance shall not be affected thereby. If this agreement shall be held contrary to the constitution of any State party hereto, the agreement shall remain in full force and effect as to the remaining States and in full force and effect as to the State affected as to all severable matters."

§ 3. Definition of term "Governor" for purposes of United States and District of Columbia.

The term "Governor" as used in the agreement on detainers shall mean with respect to the United States, the Attorney General, and with respect to the District of Columbia, the Commissioner of the District of Columbia.

§ 4. Definition of term "appropriate court".

The term "appropriate court" as used in the agreement on detainers shall mean with respect to the United States, the courts of the United States, and with respect to the District of Columbia, the courts of the District of Columbia, in which indictments, informations, or complaints, for which disposition is sought, are pending.

§ 5. Enforcement and cooperation by courts, departments, agencies, officers, and employees of United States and District of Columbia.

All courts, departments, agencies, officers, and employees of the United States and of the District of Columbia are hereby directed to enforce the agreement on detainers and to cooperate with one another and with all party States in enforcing the agreement and effectuating its purpose.

§ 6. Regulations, forms, and instructions.

For the United States, the Attorney General, and for the District of Columbia, the Commissioner of the District of Columbia, shall establish such regulations, prescribe such forms, issue such instructions, and perform such other acts as he deems necessary for carrying out the provisions of this Act.

§ 7. Reservation of right to alter, amend, or repeal.

The right to alter, amend, or repeal this Act is expressly reserved.

§ 8. Effective date.

This Act shall take effect on the ninetieth day after the date of its enactment [Dec. 9, 1970].

(2) 49 CFR part 1540, Subpart C, for air cargo workers.

(b) *Waivers.* This part applies to applicants for an HME or TWIC who undergo a security threat assessment described in 49 CFR part 1572 and are eligible to request a waiver of certain standards.

§1515.3 Terms used in this part.

The terms used in 49 CFR parts 1500, 1540, 1570, and 1572 also apply in this part. In addition, the following terms are used in this part:

Administrative law judge means an administrative law judge appointed pursuant to the provisions of 5 U.S.C. 3105.

Applicant means an individual who has applied for one of the security threat assessments identified in 49 CFR 1515.1. This includes an individual who previously applied for and was found to meet the standards for the security threat assessment but TSA later determined that the individual poses a security threat.

Date of service means—

(1) In the case of personal service, the date of personal delivery to the residential address listed on the application;

(2) In the case of mailing with a certificate of service, the date shown on the certificate of service;

(3) In the case of mailing and there is no certificate of service, 10 days from the date mailed to the address designated on the application as the mailing address;

(4) In the case of mailing with no certificate of service or postmark, the date mailed to the address designated on the application as the mailing address shown by other evidence; or

(5) The date on which an electronic transmission occurs.

Day means calendar day.

Final Agency Order means an order issued by the TSA Final Decision Maker.

Decision denying a review of a waiver means a document issued by an administrative law judge denying a waiver requested under 49 CFR 1515.7.

Mail includes U.S. mail, or use of an express courier service.

Party means the applicant or the agency attorney.

Personal delivery includes hand-delivery or use of a contract or express messenger service, but does not include the use of Government interoffice mail service.

Properly addressed means a document that shows an address contained in agency records, a residential, business, or other address submitted by a person on any document provided under this subpart, or any other address shown by other reasonable and available means.

Substantial Evidence means such relevant evidence as a reasonable person might accept as adequate to support a conclusion.

Security threat assessment means the threat assessment for which the applicant has applied, as described in 49 CFR 1515.1.

TSA Final Decision Maker means the Administrator, acting in the capacity of the decision maker on appeal, or any person to whom the Administrator has delegated the Administrator's decision-making authority. As used in this subpart, the *TSA Final Decision Maker* is the official authorized to issue a final decision and order of the Administrator.

§1515.5 Appeal of Initial Determination of Threat Assessment based on criminal conviction, immigration status, or mental capacity.

(a) *Scope.* This section applies to applicants appealing from an Initial Determination of Threat Assessment that was based on one or more of the following:

(1) TSA has determined that an applicant for an HME or a TWIC has a disqualifying criminal offense described in 49 CFR 1572.103.

(2) TSA has determined that an applicant for an HME or a TWIC does not meet the immigration status requirements as described in 49 CFR 1572.105.

(3) TSA has determined that an applicant for an HME or a TWIC is lacking mental capacity as described in 49 CFR 1572.109.

(b) *Grounds for appeal.* An applicant may appeal an Initial Determination of Threat Assessment if the applicant is asserting that he or she meets the standards for the security threat assessment for which he or she is applying.

(1) *Initiating an appeal.* An applicant initiates an appeal by submitting a written reply to TSA, a written request for materials from TSA, or by requesting an extension of time in accordance with § 1515.5(f). If the applicant does not initiate an appeal within 60 days of receipt, the Initial Determination of Threat Assessment becomes a Final Determination of Threat Assessment.

(i) In the case of an HME, TSA also serves a Final Determination of Threat Assessment on the licensing State.

(ii) In the case of a mariner applying for TWIC, TSA also serves a Final Determination of Threat Assessment on the Coast Guard.

(iii) In the case of a TWIC, TSA serves a Final Determination of Threat Assessment on the appropriate Federal Maritime Security Coordinator (FMSC).

(2) *Request for materials.* Within 60 days of the date of service of the Initial Determination of Threat Assessment, the applicant may serve upon TSA a written request for copies of the materials upon which the Initial Determination was based.

(3) *TSA response.* (i) Within 60 days of receiving the applicant's request for materials, TSA serves the applicant with copies of the releasable materials upon the applicant on which the Initial Determination was based. TSA will not include any classified information or other protected information described in paragraph (f) of this section.

(ii) Within 60 days of receiving the applicant's request for materials or written reply, TSA may request additional information or documents from the applicant that TSA believes are necessary to make a Final Determination.

(4) *Correction of records.* If the Initial Determination of Threat Assessment was based on a record that the applicant believes is erroneous, the applicant may correct the record, as follows:

(i) The applicant contacts the jurisdiction or entity responsible for the information and attempts to correct or complete information contained in his or her record.

(ii) The applicant provides TSA with the revised record, or a certified true copy of the information from the appropriate entity, before TSA determines that the applicant meets the standards for the security threat assessment.

(5) *Reply.* (i) The applicant may serve upon TSA a written reply to the Initial Determination of Threat Assessment within 60 days of service of the Initial Determination, or 60 days after the date of service of TSA's response to the applicant's request for materials under paragraph (b)(1) of this section, if the applicant served such request. The reply must include the rationale and information on which the applicant disputes TSA's Initial Determination.

(ii) In an applicant's reply, TSA will consider only material that is relevant to whether the applicant meets the standards applicable for the security threat assessment for which the applicant is applying.

(6) *Final determination.* Within 60 days after TSA receives the applicant's reply, TSA serves a Final Determination of Threat Assessment or a Withdrawal of the Initial Determination as provided in paragraphs (c) or (d) of this section.

(c) *Final Determination of Threat Assessment.* (1) If the Assistant Administrator concludes that an HME or TWIC applicant does not meet the standards described in 49 CFR 1572.103, 1572.105, or 1572.109, TSA serves a Final Determination of Threat Assessment upon the applicant. In addition—

(i) In the case of an HME, TSA serves a Final Determination of Threat Assessment on the licensing State.

(ii) In the case of a TWIC, TSA serves a Final Determination of Threat Assessment on the Coast Guard.

(2) The Final Determination includes a statement that the Assistant Administrator has reviewed the Initial Determination, the applicant's reply and any accompanying information, and any other materials or information available to him or her, and has determined that the applicant poses a security threat warranting denial of the security threat assessment for which the applicant has applied.

(d) *Withdrawal of Initial Determination.* If the Assistant Administrator or Assistant Secretary concludes that the applicant does not pose a security threat, TSA serves a Withdrawal of the

Initial Determination upon the applicant, and the applicant's employer where applicable.

(e) *Nondisclosure of certain information.* In connection with the procedures under this section, TSA does not disclose classified information to the applicant, as defined in E.O. 12968 sec. 1.1(d), and reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure under law.

(f) *Extension of time.* TSA may grant an applicant an extension of time of the limits for good cause shown. An applicant's request for an extension of time must be in writing and be received by TSA within a reasonable time before the due date to be extended; or an applicant may request an extension after the expiration of a due date by sending a written request describing why the failure to file within the time limits was excusable. TSA may grant itself an extension of time for good cause.

(g) *Judicial review.* For purposes of judicial review, the Final Determination of Threat Assessment constitutes a final TSA order of the determination that the applicant does not meet the standards for a security threat assessment, in accordance with 49 U.S.C. 46110. The Final Determination is not a final TSA order to grant or deny a waiver, the procedures for which are in 49 CFR 1515.7 and 1515.11.

(h) *Appeal of immediate revocation.* If TSA directs an immediate revocation, the applicant may appeal this determination by following the appeal procedures described in paragraph (b) of this section. This applies—

(1) If TSA directs a State to revoke an HME pursuant to 49 CFR 1572.13(a).

(2) If TSA invalidates a TWIC by issuing an Initial Determination of Threat Assessment and Immediate Revocation pursuant to 49 CFR 1572.21(d)(3).

[72 FR 3588, Jan. 25, 2007; 72 FR 14049, Mar. 26, 2007]

§ 1515.7 Procedures for waiver of criminal offenses, immigration status, or mental capacity standards.

(a) *Scope.* This section applies to the following applicants:

(i) An applicant for an HME or TWIC who has a disqualifying criminal offense described in 49 CFR 1572.103(a)(5) through (a)(12) or 1572.103(b) and who requests a waiver.

(ii) An applicant for an HME or TWIC who is an alien under temporary protected status as described in 49 CFR 1572.105 and who requests a waiver.

(iii) An applicant applying for an HME or TWIC who lacks mental capacity as described in 49 CFR 1572.109 and who requests a waiver.

(b) *Grounds for waiver.* TSA may issue a waiver of the standards described in paragraph (a) and grant an HME or TWIC if TSA determines that an applicant does not pose a security threat based on a review of information described in paragraph (c) of this section.

(c) *Initiating waiver.* (1) An applicant initiates a waiver as follows:

(i) Providing to TSA the information required in 49 CFR 1572.9 for an HME or 49 CFR 1572.17 for a TWIC.

(ii) Paying the fees required in 49 CFR 1572.405 for an HME or in 49 CFR 1572.501 for a TWIC.

(iii) Sending a written request to TSA for a waiver at any time, but not later than 60 days after the date of service of the Final Determination of Threat Assessment. The applicant may request a waiver during the application process, or may first pursue some or all of the appeal procedures in 49 CFR 1515.5 to assert that he or she does not have a disqualifying condition.

(2) In determining whether to grant a waiver, TSA will consider the following factors, as applicable to the disqualifying condition:

(i) The circumstances of the disqualifying act or offense.

(ii) Restitution made by the applicant.

(iii) Any Federal or State mitigation remedies.

(iv) Court records or official medical release documents indicating that the applicant no longer lacks mental capacity.

(v) Other factors that indicate the applicant does not pose a security threat warranting denial of the HME or TWIC.

(d) *Grant or denial of waivers.* (1) The Assistant Administrator will send a written decision granting or denying

the waiver to the applicant within 60 days of service of the applicant's request for a waiver, or longer period as TSA may determine for good cause.

(2) In the case of an HME, if the Assistant Administrator grants the waiver, the Assistant Administrator will send a Determination of No Security Threat to the licensing State within 60 days of service of the applicant's request for a waiver, or longer period as TSA may determine for good cause.

(3) In the case of a mariner applying for a TWIC, if the Assistant Administrator grants the waiver, the Assistant Administrator will send a Determination of No Security Threat to the Coast Guard within 60 days of service of the applicant's request for a waiver, or longer period as TSA may determine for good cause.

(4) If the Assistant Administrator denies the waiver the applicant may seek review in accordance with 49 CFR 1515.11. A denial of a waiver under this section does not constitute a final order of TSA as provided in 49 U.S.C. 46110.

(e) *Extension of time.* TSA may grant an applicant an extension of the time limits for good cause shown. An applicant's request for an extension of time must be in writing and be received by TSA within a reasonable time before the due date to be extended; or an applicant may request an extension after the expiration of a due date by sending a written request describing why the failure to file within the time limits was excusable. TSA may grant itself an extension of time for good cause.

§ 1515.9 Appeal of security threat assessment based on otber analyses.

(a) *Scope.* This section applies to an applicant appealing an Initial Determination of Threat Assessment as follows:

(1) TSA has determined that the applicant for an HME or TWIC poses a security threat as provided in 49 CFR 1572.107.

(2) TSA had determined that an air cargo worker poses a security threat as provided in 49 CFR 1540.205.

(b) *Grounds for appeal.* An applicant may appeal an Initial Determination of Threat Assessment if the applicant is asserting that he or she does not pose a security threat. The appeal will be conducted in accordance with the procedures set forth in 49 CFR 1515.5(b), (e), and (f) and this section.

(c) *Final Determination of Threat Assessment.* (1) If the Assistant Administrator concludes that the applicant poses a security threat, following an appeal, TSA serves a Final Determination of Threat Assessment upon the applicant. In addition—

(i) In the case of an HME, TSA serves a Final Determination of Threat Assessment on the licensing State.

(ii) In the case of a TWIC, TSA serves a Final Determination of Threat Assessment on the Coast Guard.

(iii) In the case of an air cargo worker, TSA serves a Final Determination of Threat Assessment on the operator.

(2) The Final Determination includes a statement that the Assistant Administrator has reviewed the Initial Determination, the applicant's reply and any accompanying information, and any other materials or information available to him or her, and has determined that the applicant poses a security threat warranting denial of the security threat assessment for which the applicant has applied.

(d) *Withdrawal of Initial Determination.* If the Assistant Administrator concludes that the applicant does not pose a security threat, TSA serves a Withdrawal of the Initial Determination upon the applicant, and the applicant's employer where applicable.

(e) *Further review.* If the Assistant Administrator denies the appeal, the applicant may seek review in accordance with §1515.11 of this part. A Final Determination issued under this section does not constitute a final order of TSA as provided in 49 U.S.C. 46110.

(f) *Appeal of immediate revocation.* If TSA directs an immediate revocation, the applicant may appeal this determination by following the appeal procedures described in paragraph (b) of this section. This applies—

(1) If TSA directs a State to revoke an HME pursuant to 49 CFR 1572.13(a).

(2) If TSA invalidates a TWIC by issuing an Initial Determination of Threat Assessment and Immediate Revocation pursuant to 49 CFR 1572.21(d)(3).

(3) If TSA withdraws a Determination of No Threat issued for an air cargo worker.

§1515.11 Review by administrative law judge and TSA Final Decision Maker.

(a) *Scope.* This section applies to the following applicants:

(1) An applicant who seeks review of a decision by TSA denying a request for a waiver under 49 CFR 1515.7.

(2) An applicant for an HME or a TWIC who has been issued a Final Determination of Threat Assessment on the grounds that he or she poses a security threat after an appeal as described in 49 CFR 1515.9.

(3) An air cargo worker who has been issued a Final Determination of Threat Assessment after an appeal as described in 49 CFR 1515.9.

(b) *Request for review.* No later than 30 calendar days from the date of service of the decision by TSA denying a waiver or of the Final Determination of Threat Assessment, the applicant may request a review. The review will be conducted by an administrative law judge who possesses the appropriate security clearance necessary to review classified or otherwise protected information and evidence. If the applicant fails to seek review within 30 calendar days, the Final Determination of Threat Assessment will be final with respect to the parties.

(1) The request for review must clearly state the issue(s) to be considered by the administrative law judge (ALJ), and include the following documents in support of the request:

(i) In the case of a review of a denial of waiver, a copy of the applicant's request for a waiver under 49 CFR 1515.7, including all materials provided by the applicant to TSA in support of the waiver request; and a copy of the decision issued by TSA denying the waiver request. The request for review may not include evidence or information that was not presented to TSA in the request for a waiver under 49 CFR 1515.7. The ALJ may consider only evidence or information that was presented to TSA in the waiver request. If the applicant has new evidence or information, the applicant must file a new request for a waiver under §1515.7 and the pending request for review of a denial of a waiver will be dismissed.

(ii) In the case of a review of a Final Determination of Threat Assessment, a copy of the Initial Notification of Threat Assessment and Final Notification of Threat Assessment; and a copy of the applicant's appeal under 49 CFR 1515.9, including all materials provided by the applicant to TSA in support of the appeal. The request for review may not include evidence or information that was not presented to TSA in the appeal under §1515.9. The ALJ may consider only evidence or information that was presented to TSA in the appeal. If the applicant has new evidence or information, the applicant must file a new appeal under §1515.9 and the pending request for review of the Final Determination will be dismissed.

(2) The applicant may include in the request for review a request for an in-person hearing before the ALJ.

(3) The applicant must file the request for review with the ALJ Docketing Center, U.S. Coast Guard, 40 S. Gay Street, Room 412, Baltimore, Maryland 21202–4022, ATTN: Hearing Docket Clerk.

(c) *Extension of Time.* The ALJ may grant an extension of the time limits described in this section for good cause shown. A request for an extension of time must be in writing and be received by the ALJ within a reasonable time before the due date to be extended; or an applicant may request an extension after the expiration of a due date by sending a written request describing why the failure to file within the time limits was excusable. This paragraph does not apply to time limits set by the administrative law judge during the hearing.

(d) *Duties of the Administrative Law Judge.* The ALJ may:

(1) Receive information and evidence presented to TSA in the request for a waiver under 49 CFR 1515.7 or an appeal under 49 CFR 1515.9.

(2) Consider the following criteria to determine whether a request for an in-person hearing is warranted:

(i) The credibility of evidence or information submitted in the applicant's request for a waiver; and

(ii) Whether TSA's waiver denial was made in accordance with the governing

regulations codified at 49 CFR part 1515 and 49 CFR part 1572.

(3) Give notice of and hold conferences and hearings;

(4) Administer oaths and affirmations;

(5) Examine witnesses;

(6) Regulate the course of the hearing including granting extensions of time limits; and

(7) Dispose of procedural motions and requests, and issue a decision.

(e) *Hearing.* If the ALJ grants a request for a hearing, except for good cause shown, it will begin within 60 calendar days of the date of receipt of the request for hearing. The hearing is a limited discovery proceeding and is conducted as follows:

(1) If applicable and upon request, TSA will provide to the applicant requesting a review an unclassified summary of classified evidence upon which the denial of the waiver or Final Determination was based.

(i) TSA will not disclose to the applicant, or the applicant's counsel, classified information, as defined in E.O. 12968 section 1.1(d).

(ii) TSA reserves the right not to disclose any other information or material not warranting disclosure or protected from disclosure by law or regulation.

(2) The applicant may present the case by oral testimony, documentary, or demonstrative evidence, submit rebuttal evidence, and conduct cross-examination, as permitted by the ALJ. Oral testimony is limited to the evidence or information that was presented to TSA in the request for a waiver or during the appeal. The Federal Rules of Evidence may serve as guidance, but are not binding.

(3) The ALJ will review any classified information on an ex parte, in camera basis, and may consider such information in rendering a decision if the information appears to be material and relevant.

(4) The standard of proof is substantial evidence on the record.

(5) The parties may submit proposed findings of fact and conclusions of law.

(6) If the applicant fails to appear, the ALJ may issue a default judgment.

(7) A verbatim transcript will be made of the hearing and will be provided upon request at the expense of the requesting party. In cases in which classified or otherwise protected evidence is received, the transcript may require redaction of the classified or otherwise protected information.

(8) The hearing will be held at TSA's Headquarters building or, on request of a party, at an alternate location selected by the administrative law judge for good cause shown.

(f) *Decision of the Administrative Law Judge.* (1) The record is closed once the certified transcript and all documents and materials have been submitted for the record.

(2) The ALJ issues an unclassified written decision to the applicant no later than 30 calendar days from the close of the record and serves the decision on the parties. The ALJ may issue a classified decision to TSA.

(3) The ALJ's decision may be appealed by either party to the TSA Final Decision Maker in accordance with paragraph (g).

(i) In the case of review of a waiver denial, unless appealed to the TSA Final Decision Maker, if the ALJ upholds the denial of the applicant's request for waiver, TSA will issue a Final Order Denying a Waiver to the applicant.

(ii) In the case of review of a waiver denial, unless appealed to the TSA Final Decision Maker, if the ALJ reverses the denial of the applicant's request for waiver, TSA will issue a Final Order granting a waiver to the applicant; and

(A) In the case of an HME, send a Determination of No Security Threat to the licensing State.

(B) In the case applicant for a TWIC, send a Determination of No Security Threat to the Coast Guard.

(C) In the case of an air cargo worker, send a Determination of No Security Threat to the operator.

(iii) In the case of review of an appeal under 49 CFR 1515.9, unless appealed to the TSA Final Decision Maker, if the ALJ determines that the applicant poses a security threat, TSA will issue a Final Order of Threat Assessment to the applicant.

(iv) In the case of review of an appeal under 49 CFR 1515.9, unless appealed to the TSA Final Decision Maker, if the

ALJ determines that the applicant does not pose a security threat, TSA will issue a Withdrawal of the Final Determination to the applicant, and to the applicant's employer where applicable.

(g) *Review by the TSA Final Decision Maker.* (1) Either party may request that the TSA Final Decision Maker review the ALJ's decision by serving the request no later than 30 calendar days after the date of service of the decision of the ALJ.

(i) The request must be in writing, served on the other party, and may only address whether the decision is supported by substantial evidence on the record.

(ii) No later than 30 calendar days after receipt of the request, the other party may file a response.

(2) The ALJ will provide the TSA Final Decision Maker with a certified transcript of the hearing and all unclassified documents and material submitted for the record. TSA will provide any classified materials previously submitted.

(3) No later than 60 calendar days after receipt of the request, or if the other party files a response, 30 calendar days after receipt of the response, or such longer period as may be required, the TSA Final Decision Maker issues an unclassified decision and serves the decision on the parties. The TSA Final Decision Maker may issue a classified opinion to TSA, if applicable. The decision of the TSA Final Decision Maker is a final agency order.

(i) In the case of review of a waiver denial, if the TSA Final Decision Maker upholds the denial of the applicant's request for waiver, TSA issues a Final Order Denying a Waiver to the applicant.

(ii) In the case of review of a waiver denial, if the TSA Final Decision Maker reverses the denial of the applicant's request for waiver, TSA will grant the waiver; and

(A) In the case of an HME, send a Determination of No Security Threat to the applicant and to the licensing State.

(B) In the case of a TWIC, send a Determination of No Security Threat to the applicant and to the Coast Guard.

(C) In the case of an air cargo worker, send a Determination of No Security Threat to the applicant and the operator.

(iii) In the case of review of an appeal under 49 CFR 1515.9, if the TSA Final Decision Maker determines that the applicant poses a security threat, TSA will issue a Final Order of Threat Assessment to the applicant.

(iv) In the case of review of an appeal under 49 CFR 1515.9, if the TSA Final Decision Maker determines that the applicant does not pose a security threat, TSA will issue a Withdrawal of the Final Determination to the applicant, and to the applicant's employer where applicable.

(h) *Judicial Review of a Final Order Denying a Waiver.* A person may seek judicial review of a final order of the TSA Final Decision Maker as provided in 49 U.S.C. 46110.

[72 FR 3588, Jan. 25, 2007; 72 FR 5633, Feb. 7, 2007]

transportation eligible to receive Federal assistance under chapter 53 of title 49, United States Code.

Railroad has the meaning that term has in section 20102 of title 49, United States Code.

Railroad carrier has the meaning that term has in section 20102 of title 49, United States Code.

Security background check means reviewing the following for the purpose of identifying individuals who may pose a threat to transportation security, national security, or of terrorism:

(i) Relevant criminal history databases;

(ii) In the case of an alien (as defined in sec. 101 of the Immigration and Nationality Act (8 U.S.C. 1101(a)(3)), the relevant databases to determine the status of the alien under the immigration laws of the United States; and

(iii) Other relevant information or databases, as determined by the Secretary of Homeland Security.

(c) *Prohibitions.* (1) A public transportation agency or a contractor or subcontractor of a public transportation agency may not knowingly misrepresent to an employee or other relevant person, including an arbiter involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary of Homeland Security related to security background check requirements for covered individuals when conducting a security background check.

(2) A railroad carrier or a contractor or subcontractor of a railroad carrier may not knowingly misrepresent to an employee or other relevant person, including an arbiter involved in a labor arbitration, the scope, application, or meaning of any rules, regulations, directives, or guidance issued by the Secretary of Homeland Security related to security background check requirements for covered individuals when conducting a security background check.

[73 FR 44669, July 31, 2008]

PART 1572—CREDENTIALING AND SECURITY THREAT ASSESSMENTS

Subpart A—Procedures and General Standards

Subpart B—Qualification Standards for Security Threat Assessments

Subpart C—Transportation of Hazardous Materials From Canada or Mexico To and Within the United States by Land Modes

Subpart D [Reserved]

Subpart E—Fees for Security Threat Assessments for Hazmat Drivers

AUTHORITY: 46 U.S.C. 70105; 49 U.S.C. 114, 5103a, 40113, and 46105; 18 U.S.C. 842, 845; 6 U.S.C. 469.

SOURCE: 72 FR 3595, Jan. 25, 2007, unless otherwise noted.

Subpart A—Procedures and General Standards

§ 1572.1 Applicability.

This part establishes regulations for credentialing and security threat assessments for certain maritime and land transportation workers.

§ 1572.3 Scope.

This part applies to—

(a) State agencies responsible for issuing a hazardous materials endorsement (HME); and

(b) An applicant who—

(1) Is qualified to hold a commercial driver's license under 49 CFR parts 383 and 384, and is applying to obtain, renew, or transfer an HME; or

(2) Is applying to obtain or renew a TWIC in accordance with 33 CFR parts 104 through 106 or 46 CFR part 10; is a commercial driver licensed in Canada or Mexico and is applying for a TWIC to transport hazardous materials in accordance with 49 CFR 1572.201; or other individuals approved by TSA.

[72 FR 3595, Jan. 25, 2007, as amended at 72 FR 55048, Sept. 28, 2007]

§ 1572.5 Standards for security threat assessments.

(a) *Standards.* TSA determines that an applicant poses a security threat warranting denial of an HME or TWIC, if—

(1) The applicant has a disqualifying criminal offense described in 49 CFR 1572.103;

(2) The applicant does not meet the immigration status requirements described in 49 CFR 1572.105;

(3) TSA conducts the analyses described in 49 CFR 1572.107 and determines that the applicant poses a security threat; or

(4) The applicant has been adjudicated as lacking mental capacity or committed to a mental health facility, as described in 49 CFR 1572.109.

(b) *Immediate Revocation/Invalidation.* TSA may invalidate a TWIC or direct a State to revoke an HME immediately, if TSA determines during the security threat assessment that an applicant poses an immediate threat to transportation security, national security, or of terrorism.

(c) *Violation of FMCSA Standards.* The regulations of the Federal Motor Carrier Safety Administration (FMCSA) provide that an applicant is disqualified from operating a commercial motor vehicle for specified periods, if he or she has an offense that is listed in the FMCSA rules at 49 CFR 383.51. If records indicate that an applicant has committed an offense that would disqualify the applicant from operating a commercial motor vehicle under 49 CFR 383.51, TSA will not issue a Determination of No Security Threat until the State or the FMCSA determine that the applicant is not disqualified under that section.

(d) *Waiver.* In accordance with the requirements of §1515.7, applicants may apply for a waiver of certain security threat assessment standards.

(e) *Comparability of Other Security Threat Assessment Standards.* TSA may determine that security threat assessments conducted by other governmental agencies are comparable to the threat assessment described in this part, which TSA conducts for HME and TWIC applicants.

(1) In making a comparability determination, TSA will consider—

(i) The minimum standards used for the security threat assessment;

(ii) The frequency of the threat assessment;

(iii) The date of the most recent threat assessment; and

(iv) Whether the threat assessment includes biometric identification and a biometric credential.

(2) To apply for a comparability determination, the agency seeking the determination must contact the Assistant Program Manager, Attn: Federal Agency Comparability Check, Hazmat

Threat Assessment Program, Transportation Security Administration, 601 South 12th Street, Arlington, VA 22202–4220.

(3) TSA will notify the public when a comparability determination is made.

(4) An applicant, who has completed a security threat assessment that is determined to be comparable under this section to the threat assessment described in this part, must complete the enrollment process and provide biometric information to obtain a TWIC, if the applicant seeks unescorted access to a secure area of a vessel or facility. The applicant must pay the fee listed in 49 CFR 1572.503 for information collection/credential issuance.

(5) TSA has determined that the security threat assessment for an HME under this part is comparable to the security threat assessment for TWIC.

(6) TSA has determined that the security threat assessment for a FAST card, under the Free and Secure Trade program administered by U.S. Customs and Border Protection, is comparable to the security threat assessment described in this part.

§ 1572.7 [Reserved]

§ 1572.9 Applicant information required for HME security threat assessment.

An applicant must supply the information required in this section, in a form acceptable to TSA, when applying to obtain or renew an HME. When applying to transfer an HME from one State to another, 49 CFR 1572.13(e) applies.

(a) Except as provided in (a)(12) through (16), the applicant must provide the following identifying information:

(1) Legal name, including first, middle, and last; any applicable suffix; and any other name used previously.

(2) Current and previous mailing address, current residential address if it differs from the current mailing address, and e-mail address if available. If the applicant prefers to receive correspondence and notification via e-mail, the applicant should so state.

(3) Date of birth.

(4) Gender.

(5) Height, weight, hair color, and eye color.

(6) City, state, and country of birth.

(7) Immigration status and, if the applicant is a naturalized citizen of the United States, the date of naturalization.

(8) Alien registration number, if applicable.

(9) The State of application, CDL number, and type of HME(s) held.

(10) Name, telephone number, facsimile number, and address of the applicant's current employer(s), if the applicant's work for the employer(s) requires an HME. If the applicant's current employer is the U.S. military service, include branch of the service.

(11) Whether the applicant is applying to obtain, renew, or transfer an HME or for a waiver.

(12) Social security number. Providing the social security number is voluntary; however, failure to provide it will delay and may prevent completion of the threat assessment.

(13) Passport number. This information is voluntary and may expedite the adjudication process for applicants who are U.S. citizens born abroad.

(14) Department of State Consular Report of Birth Abroad. This information is voluntary and may expedite the adjudication process for applicants who are U.S. citizens born abroad.

(15) Whether the applicant has previously completed a TSA threat assessment, and if so the date and program for which it was completed. This information is voluntary and may expedite the adjudication process for applicants who have completed a TSA security threat assessment.

(16) Whether the applicant currently holds a federal security clearance, and if so, the date of and agency for which the clearance was performed. This information is voluntary and may expedite the adjudication process for applicants who have completed a federal security threat assessment.

(b) The applicant must provide a statement, signature, and date of signature that he or she—

(1) Was not convicted, or found not guilty by reason of insanity, of a disqualifying crime listed in 49 CFR 1572.103(b), in a civilian or military jurisdiction, during the seven years before the date of the application, or is applying for a waiver;

(2) Was not released from incarceration, in a civilian or military jurisdiction, for committing a disqualifying crime listed in 49 CFR 1572.103(b), during the five years before the date of the application, or is applying for a waiver;

(3) Is not wanted, or under indictment, in a civilian or military jurisdiction, for a disqualifying criminal offense identified in 49 CFR 1572.103, or is applying for a waiver;

(4) Was not convicted, or found not guilty by reason of insanity, of a disqualifying criminal offense identified in 49 CFR 1572.103(a), in a civilian or military jurisdiction, or is applying for a waiver;

(5) Has not been adjudicated as lacking mental capacity or committed to a mental health facility involuntarily or is applying for a waiver;

(6) Meets the immigration status requirements described in 49 CFR 1572.105;

(7) Has or has not served in the military, and if so, the branch in which he or she served, the date of discharge, and the type of discharge; and

(8) Has been informed that Federal regulations, under 49 CFR 1572.11, impose a continuing obligation on the HME holder to disclose to the State if he or she is convicted, or found not guilty by reason of insanity, of a disqualifying crime, adjudicated as lacking mental capacity, or committed to a mental health facility.

(c) The applicant must certify and date receipt the following statement:

Privacy Act Notice: Authority: The authority for collecting this information is 49 U.S.C. 114, 40113, and 5103a. Purpose: This information is needed to verify your identity and to conduct a security threat assessment to evaluate your suitability for a hazardous materials endorsement for a commercial driver's license. Furnishing this information, including your SSN or alien registration number, is voluntary; however, failure to provide it will delay and may prevent completion of your security threat assessment. Routine Uses: Routine uses of this information include disclosure to the FBI to retrieve your criminal history record; to TSA contractors or other agents who are providing services relating to the security threat assessments; to appropriate governmental agencies for licensing, law enforcement, or security purposes, or in the interests of national security; and to foreign and international governmental authorities in accordance with law and international agreement.

(d) The applicant must certify and date receipt the following statement, immediately before the signature line:

The information I have provided on this application is true, complete, and correct, to the best of my knowledge and belief, and is provided in good faith. I understand that a knowing and willful false statement, or an omission of a material fact on this application can be punished by fine or imprisonment or both (*See* section 1001 of Title 18 United States Code), and may be grounds for denial of a hazardous materials endorsement.

(e) The applicant must certify the following statement in writing:

I acknowledge that if the Transportation Security Administration determines that I pose a security threat, my employer, as listed on this application, may be notified. If TSA or other law enforcement agency becomes aware of an imminent threat to a maritime facility or vessel, TSA may provide limited information necessary to reduce the risk of injury or damage to the facility or vessel.

§ 1572.11 Applicant responsibilities for HME security threat assessment.

(a) *Surrender of HME.* If an individual is disqualified from holding an HME under 49 CFR 1572.5(c), he or she must surrender the HME to the licensing State. Failure to surrender the HME to the State may result in immediate revocation under 49 CFR 1572.13(a) and/or civil penalties.

(b) *Continuing responsibilities.* An individual who holds an HME must surrender the HME as required in paragraph (a) of this section within 24 hours, if the individual—

(1) Is convicted of, wanted, under indictment or complaint, or found not guilty by reason of insanity, in a civilian or military jurisdiction, for a disqualifying criminal offense identified in 49 CFR 1572.103; or

(2) Is adjudicated as lacking mental capacity, or committed to a mental health facility, as described in 49 CFR 1572.109; or

(3) Renounces or loses U.S. citizenship or status as a lawful permanent resident; or

(4) Violates his or her immigration status, and/or is ordered removed from the United States.

(c) *Submission of fingerprints and information.* (1) An HME applicant must submit fingerprints and the information required in 49 CFR 1572.9, in a form acceptable to TSA, when so notified by the State, or when the applicant applies to obtain or renew an HME. The procedures outlined in 49 CFR 1572.13(e) apply to HME transfers.

(2) When submitting fingerprints and the information required in 49 CFR 1572.9, the fee described in 49 CFR 1572.503 must be remitted to TSA.

§ 1572.13 State responsibilities for issuance of hazardous materials endorsement.

Each State must revoke an individual's HME immediately, if TSA informs the State that the individual does not meet the standards for security threat assessment in 49 CFR 1572.5 and issues an Initial Determination of Threat Assessment and Immediate Revocation.

(a) No State may issue or renew an HME for a CDL, unless the State receives a Determination of No Security Threat from TSA.

(b) Each State must notify each individual holding an HME issued by that State that he or she will be subject to the security threat assessment described in this part as part of an application for renewal of the HME, at least 60 days prior to the expiration date of the individual's HME. The notice must inform the individual that he or she may initiate the security threat assessment required by this section at any time after receiving the notice, but no later than 60 days before the expiration date of the individual's HME.

(c) The State that issued an HME may extend the expiration date of the HME for 90 days, if TSA has not provided a Determination of No Security Threat or a Final Determination of Threat Assessment before the expiration date. Any additional extension must be approved in advance by TSA.

(d) Within 15 days of receipt of a Determination of No Security Threat or Final Determination of Threat Assessment from TSA, the State must—

(1) Update the applicant's permanent record to reflect:

(i) The results of the security threat assessment;

(ii) The issuance or denial of an HME; and

(iii) The new expiration date of the HME.

(2) Notify the Commercial Drivers License Information System (CDLIS) operator of the results of the security threat assessment.

(3) Revoke or deny the applicant's HME if TSA serves the State with a Final Determination of Threat Assessment.

(e) For applicants who apply to transfer an existing HME from one State to another, the second State will not require the applicant to undergo a new security threat assessment until the security threat assessment renewal period established in the preceding issuing State, not to exceed five years, expires.

(f) A State that is not using TSA's agent to conduct enrollment for the security threat assessment must retain the application and information required in 49 CFR 1572.9, for at least one year, in paper or electronic form.

§ 1572.15 Procedures for HME security threat assessment.

(a) *Contents of security threat assessment.* The security threat assessment TSA completes includes a fingerprint-based criminal history records check (CHRC), an intelligence-related background check, and a final disposition.

(b) *Fingerprint-based check.* In order to conduct a fingerprint-based CHRC, the following procedures must be completed:

(1) The State notifies the applicant that he or she will be subject to the security threat assessment at least 60 days prior to the expiration of the applicant's HME, and that the applicant must begin the security threat assessment no later than 30 days before the date of the expiration of the HME.

(2) Where the State elects to collect fingerprints and applicant information, the State—

(i) Collects fingerprints and applicant information required in 49 CFR 1572.9;

(ii) Provides the applicant information to TSA electronically, unless otherwise authorized by TSA;

(iii) Transmits the fingerprints to the FBI/Criminal Justice Information Services (CJIS), in accordance with the

FBI/CJIS fingerprint submission standards; and

(iv) Retains the signed application, in paper or electronic form, for one year and provides it to TSA, if requested.

(3) Where the State elects to have a TSA agent collect fingerprints and applicant information—

(i) TSA provides a copy of the signed application to the State;

(ii) The State retains the signed application, in paper or electronic form, for one year and provides it to TSA, if requested; and

(iii) TSA transmits the fingerprints to the FBI/CJIS, in accordance with the FBI/CJIS fingerprint submission standards.

(4) TSA receives the results from the FBI/CJIS and adjudicates the results of the check, in accordance with 49 CFR 1572.103 and, if applicable, 49 CFR 1572.107.

(c) *Intelligence-related check.* To conduct an intelligence-related check, TSA completes the following procedures:

(1) Reviews the applicant information required in 49 CFR 1572.9.

(2) Searches domestic and international Government databases described in 49 CFR 1572.105, 1572.107, and 1572.109.

(3) Adjudicates the results of the check in accordance with 49 CFR 1572.103, 1572.105, 1572.107, and 1572.109.

(d) *Final disposition.* Following completion of the procedures described in paragraphs (b) and/or (c) of this section, the following procedures apply, as appropriate:

(1) TSA serves a Determination of No Security Threat on the State in which the applicant is authorized to hold an HME, if TSA determines that an applicant meets the security threat assessment standards described in 49 CFR 1572.5.

(2) TSA serves an Initial Determination of Threat Assessment on the applicant, if TSA determines that the applicant does not meet the security threat assessment standards described in 49 CFR 1572.5. The Initial Determination of Threat Assessment includes—

(i) A statement that TSA has determined that the applicant poses a security threat warranting denial of the HME;

(ii) The basis for the determination;

(iii) Information about how the applicant may appeal the determination, as described in 49 CFR 1515.5 or 1515.9, as applicable; and

(iv) A statement that if the applicant chooses not to appeal TSA's determination within 60 days of receipt of the Initial Determination, or does not request an extension of time within 60 days of receipt of the Initial Determination in order to file an appeal, the Initial Determination becomes a Final Determination of Security Threat Assessment.

(3) TSA serves an Initial Determination of Threat Assessment and Immediate Revocation on the applicant, the applicant's employer where appropriate, and the State, if TSA determines that the applicant does not meet the security threat assessment standards described in 49 CFR 1572.5 and may pose an imminent threat to transportation or national security, or of terrorism. The Initial Determination of Threat Assessment and Immediate Revocation includes—

(i) A statement that TSA has determined that the applicant poses a security threat warranting immediate revocation of an HME;

(ii) The basis for the determination;

(iii) Information about how the applicant may appeal the determination, as described in 49 CFR 1515.5(h) or 1515.9(f), as applicable; and

(iv) A statement that if the applicant chooses not to appeal TSA's determination within 60 days of receipt of the Initial Determination and Immediate Revocation, the Initial Determination and Immediate Revocation becomes a Final Determination of Threat Assessment.

(4) If the applicant does not appeal the Initial Determination of Threat Assessment or Initial Determination of Threat Assessment and Immediate Revocation, TSA serves a Final Determination of Threat Assessment on the State in which the applicant applied for the HME, the applicant's employer where appropriate, and on the applicant, if the appeal of the Initial Determination results in a finding that the applicant poses a security threat.

(5) If the applicant appeals the Initial Determination of Threat Assessment

or the Initial Determination of Threat Assessment and Immediate Revocation, the procedures in 49 CFR 1515.5 or 1515.9 apply.

(6) Applicants who do not meet certain standards in 49 CFR 1572.103, 1572.105, or 1572.109 may seek a waiver in accordance with 49 CFR 1515.7.

§ 1572.17 Applicant information required for TWIC security threat assessment.

An applicant must supply the information required in this section, in a form acceptable to TSA, when applying to obtain or renew a TWIC.

(a) Except as provided in (a)(12) through (16), the applicant must provide the following identifying information:

(1) Legal name, including first, middle, and last; any applicable suffix; and any other name used previously.

(2) Current and previous mailing address, current residential address if it differs from the current mailing address, and e-mail address if available. If the applicant wishes to receive notification that the TWIC is ready to be retrieved from the enrollment center via telephone rather than e-mail address, the applicant should state this and provide the correct telephone number.

(3) Date of birth.

(4) Gender.

(5) Height, weight, hair color, and eye color.

(6) City, state, and country of birth.

(7) Immigration status, and

(i) If the applicant is a naturalized citizen of the United States, the date of naturalization;

(ii) If the applicant is present in the United States based on a Visa, the type of Visa, the Visa number, and the date on which it expires; and

(iii) If the applicant is a commercial driver licensed in Canada and does not hold a FAST card, a Canadian passport.

(8) If not a national or citizen of the United States, the alien registration number and/or the number assigned to the applicant on the U.S. Customs and Border Protection Arrival-Departure Record, Form I–94.

(9) Except as described in paragraph (a)(9)(i) of this section, the reason that the applicant requires a TWIC, including, as applicable, the applicant's job description and the primary facility, vessel, or maritime port location(s) where the applicant will most likely require unescorted access, if known. This statement does not limit access to other facilities, vessels, or ports, but establishes eligibility for a TWIC.

(i) Applicants who are commercial drivers licensed in Canada or Mexico who are applying for a TWIC in order to transport hazardous materials in accordance with 49 CFR 1572.201 and not to access secure areas of a facility or vessel, must explain this in response to the information requested in paragraph (a)(9) of this section.

(10) The name, telephone number, and address of the applicant's current employer(s), if working for the employer requires a TWIC. If the applicant's current employer is the U.S. military service, include the branch of the service. An applicant whose current employer does not require possession of a TWIC, does not have a single employer, or is self-employed, must provide the primary vessel or port location(s) where the applicant requires unescorted access, if known. This statement does not limit access to other facilities, vessels, or ports, but establishes eligibility for a TWIC.

(11) If a credentialed mariner or applying to become a credentialed mariner, proof of citizenship as required in 46 CFR chapter I, subchapter B.

(12) Social security number. Providing the social security number is voluntary; however, failure to provide it will delay and may prevent completion of the threat assessment.

(13) Passport number, city of issuance, date of issuance, and date of expiration. This information is voluntary and may expedite the adjudication process for applicants who are U.S. citizens born abroad.

(14) Department of State Consular Report of Birth Abroad. This information is voluntary and may expedite the adjudication process for applicants who are U.S. citizens born abroad.

(15) Whether the applicant has previously completed a TSA threat assessment, and if so the date and program for which it was completed. This information is voluntary and may expedite the adjudication process for applicants

§§ 1572.24—1572.40 [Reserved]

Subpart B—Standards for Security Threat Assessments

§ 1572.101 Scope.

This subpart applies to applicants who hold or are applying to obtain or renew an HME or TWIC, or transfer an HME. Applicants for an HME also are subject to safety requirements issued by the Federal Motor Carrier Safety Administration under 49 CFR part 383 and by the State issuing the HME, including additional immigration status and criminal history standards.

§ 1572.103 Disqualifying criminal offenses.

(a) *Permanent disqualifying criminal offenses.* An applicant has a permanent disqualifying offense if convicted, or found not guilty by reason of insanity, in a civilian or military jurisdiction of any of the following felonies:

(1) Espionage or conspiracy to commit espionage.

(2) Sedition, or conspiracy to commit sedition.

(3) Treason, or conspiracy to commit treason.

(4) A federal crime of terrorism as defined in 18 U.S.C. 2332b(g), or comparable State law, or conspiracy to commit such crime.

(5) A crime involving a transportation security incident. A transportation security incident is a security incident resulting in a significant loss of life, environmental damage, transportation system disruption, or economic disruption in a particular area, as defined in 46 U.S.C. 70101. The term "economic disruption" does not include a work stoppage or other employee-related action not related to terrorism and resulting from an employer-employee dispute.

(6) Improper transportation of a hazardous material under 49 U.S.C. 5124, or a State law that is comparable.

(7) Unlawful possession, use, sale, distribution, manufacture, purchase, receipt, transfer, shipping, transporting, import, export, storage of, or dealing in an explosive or explosive device. An explosive or explosive device includes, but is not limited to, an explosive or explosive material as defined in 18 U.S.C. 232(5), 841(c) through 841(f), and 844(j); and a destructive device, as defined in 18 U.S.C. 921(a)(4) and 26 U.S.C. 5845(f).

(8) Murder.

(9) Making any threat, or maliciously conveying false information knowing the same to be false, concerning the deliverance, placement, or detonation of an explosive or other lethal device in or against a place of public use, a state or government facility, a public transportations system, or an infrastructure facility.

(10) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*, or a comparable State law, where one of the predicate acts found by a jury or admitted by the defendant, consists of one of the crimes listed in paragraph (a) of this section.

(11) Attempt to commit the crimes in paragraphs (a)(1) through (a)(4).

(12) Conspiracy or attempt to commit the crimes in paragraphs (a)(5) through (a)(10).

(b) *Interim disqualifying criminal offenses.* (1) The felonies listed in paragraphs (b)(2) of this section are disqualifying, if either:

(i) the applicant was convicted, or found not guilty by reason of insanity, of the crime in a civilian or military jurisdiction, within seven years of the date of the application; or

(ii) the applicant was incarcerated for that crime and released from incarceration within five years of the date of the TWIC application.

(2) The interim disqualifying felonies are:

(i) Unlawful possession, use, sale, manufacture, purchase, distribution, receipt, transfer, shipping, transporting, delivery, import, export of, or dealing in a firearm or other weapon. A firearm or other weapon includes, but is not limited to, firearms as defined in 18 U.S.C. 921(a)(3) or 26 U.S.C. 5 845(a), or items contained on the U.S. Munitions Import List at 27 CFR 447.21.

(ii) Extortion.

(iii) Dishonesty, fraud, or misrepresentation, including identity fraud and money laundering where the money laundering is related to a crime described in paragraphs (a) or (b) of this section. Welfare fraud and passing bad

checks do not constitute dishonesty, fraud, or misrepresentation for purposes of this paragraph.

(iv) Bribery.

(v) Smuggling.

(vi) Immigration violations.

(vii) Distribution of, possession with intent to distribute, or importation of a controlled substance.

(viii) Arson.

(ix) Kidnapping or hostage taking.

(x) Rape or aggravated sexual abuse.

(xi) Assault with intent to kill.

(xii) Robbery.

(xiii) Fraudulent entry into a seaport as described in 18 U.S.C. 1036, or a comparable State law.

(xiv) Violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961, *et seq.*, or a comparable State law, other than the violations listed in paragraph (a)(10) of this section.

(xv) Conspiracy or attempt to commit the crimes in this paragraph (b).

(c) *Under want, warrant, or indictment.* An applicant who is wanted, or under indictment in any civilian or military jurisdiction for a felony listed in this section, is disqualified until the want or warrant is released or the indictment is dismissed.

(d) *Determination of arrest status.* (1) When a fingerprint-based check discloses an arrest for a disqualifying crime listed in this section without indicating a disposition, TSA will so notify the applicant and provide instructions on how the applicant must clear the disposition, in accordance with paragraph (d)(2) of this section.

(2) The applicant must provide TSA with written proof that the arrest did not result in conviction for the disqualifying criminal offense, within 60 days after the service date of the notification in paragraph (d)(1) of this section. If TSA does not receive proof in that time, TSA will notify the applicant that he or she is disqualified. In the case of an HME, TSA will notify the State that the applicant is disqualified, and in the case of a mariner applying for TWIC, TSA will notify the Coast Guard that the applicant is disqualified.

[72 FR 3595, Jan. 25, 2007; 72 FR 5633, Feb. 7, 2007; 72 FR 14050, Mar. 26, 2007]

§ 1572.105 Immigration status.

(a) An individual applying for a security threat assessment for a TWIC or HME must be a national of the United States or—

(1) A lawful permanent resident of the United States;

(2) A refugee admitted under 8 U.S.C. 1157;

(3) An alien granted asylum under 8 U.S.C. 1158;

(4) An alien in valid M–1 nonimmigrant status who is enrolled in the United States Merchant Marine Academy or a comparable State maritime academy. Such individuals may serve as unlicensed mariners on a documented vessel, regardless of their nationality, under 46 U.S.C. 8103.

(5) A nonimmigrant alien admitted under the Compact of Free Association between the United States and the Federated States of Micronesia, the United States and the Republic of the Marshall Islands, or the United States and Palau.

(6) An alien in lawful nonimmigrant status who has unrestricted authorization to work in the United States, except—

(i) An alien in valid S–5 (informant of criminal organization information) lawful nonimmigrant status;

(ii) An alien in valid S–6 (informant of terrorism information) lawful nonimmigrant status;

(iii) An alien in valid K–1 (Fianco(e)) lawful nonimmigrant status; or

(iv) An alien in valid K–2 (Minor child of Fianco(e)) lawful nonimmigrant status.

(7) An alien in the following lawful nonimmigrant status who has restricted authorization to work in the United States—

(i) B1/OCS Business Visitor/Outer Continental Shelf;

(ii) C–1/D Crewman Visa;

(iii) H–1B Special Occupations;

(iv) H–1B1 Free Trade Agreement;

(v) E–1 Treaty Trader;

(vi) E–3 Australian in Specialty Occupation;

(vii) L–1 Intracompany Executive Transfer;

(viii) O–1 Extraordinary Ability;

(ix) TN North American Free Trade Agreement;

(x) E–2 Treaty Investor; or

(xi) Another authorization that confers legal status, when TSA determines that the legal status is comparable to the legal status set out in paragraph (a)(7) of this section.

(8) A commercial driver licensed in Canada or Mexico who is admitted to the United States under 8 CFR 214.2(b)(4)(i)(E) to conduct business in the United States.

(b) Upon expiration of a nonimmigrant status listed in paragraph (a)(7) of this section, an employer must retrieve the TWIC from the applicant and provide it to TSA.

(c) Upon expiration of a nonimmigrant status listed in paragraph (a)(7) of this section, an employee must surrender his or her TWIC to the employer.

(d) If an employer terminates an applicant working under a nonimmigrant status listed in paragraph (a)(7) of this section, or the applicant otherwise ceases working for the employer, the employer must notify TSA within 5 business days and provide the TWIC to TSA if possible.

(e) Any individual in removal proceedings or subject to an order of removal under the immigration laws of the United States is not eligible to apply for a TWIC.

(f) To determine an applicant's immigration status, TSA will check relevant Federal databases and may perform other checks, including the validity of the applicant's alien registration number, social security number, or I–94 Arrival-Departure Form number.

[72 FR 3595, Jan. 25, 2007, as amended at 72 FR 55049, Sept. 28, 2007; 73 FR 13156, Mar. 12, 2008]

§ 1572.107 Other analyses.

(a) TSA may determine that an applicant poses a security threat based on a search of the following databases:

(1) Interpol and other international databases, as appropriate.

(2) Terrorist watchlists and related databases.

(3) Any other databases relevant to determining whether an applicant poses, or is suspected of posing, a security threat, or that confirm an applicant's identity.

(b) TSA may also determine that an applicant poses a security threat, if the search conducted under this part reveals extensive foreign or domestic criminal convictions, a conviction for a serious crime not listed in 49 CFR 1572.103, or a period of foreign or domestic imprisonment that exceeds 365 consecutive days.

§ 1572.109 Mental capacity.

(a) An applicant has mental incapacity, if he or she has been—

(1) Adjudicated as lacking mental capacity; or

(2) Committed to a mental health facility.

(b) An applicant is adjudicated as lacking mental capacity if—

(1) A court, board, commission, or other lawful authority has determined that the applicant, as a result of marked subnormal intelligence, mental illness, incompetence, condition, or disease, is a danger to himself or herself or to others, or lacks the mental capacity to conduct or manage his or her own affairs.

(2) This includes a finding of insanity by a court in a criminal case and a finding of incompetence to stand trial; or a finding of not guilty by reason of lack of mental responsibility, by any court, or pursuant to articles 50a and 76b of the Uniform Code of Military Justice (10 U.S.C. 850a and 876b).

(c) An applicant is committed to a mental health facility if he or she is formally committed to a mental health facility by a court, board, commission, or other lawful authority, including involuntary commitment and commitment for lacking mental capacity, mental illness, and drug use. This does not include commitment to a mental health facility for observation or voluntary admission to a mental health facility.