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DEPARTMENT OF JUSTICE

28 CFR Part 105

[OAG 104; AG Order No. 2656-2003]

RIN 1105-AA80

Screening of Aliens and Other Designated Individuals Seeking Flight Training

AGENCY: Department of Justice.

ACTION: Final rule.

SUMMARY: Under section 113 of the Aviation and Transportation Security Act, certain aviation training providers subject to regulation by the Federal Aviation Administration are prohibited from providing training to aliens and other designated individuals in the operation of aircraft with a maximum certificated takeoff weight of 12,500 pounds or more, unless the aviation training provider notifies the Attorney General of the identity of the candidate seeking training and the Attorney General does not notify the aviation training provider within 45 days that the candidate presents a risk to aviation or national security. On June 14, 2002, the Department issued two rulemaking documents, a proposed rule and an interim final rule, requesting comments on both documents.

This final rule implements the Flight Training Candidate Checks Program, by which aviation training providers will provide the required notification for specific categories of flight training candidates. The final rule also sets forth how aviation training providers may begin or resume instruction for candidates whom the Attorney General has determined do not present a risk to aviation and national security as a result of the risk assessment conducted pursuant to section 113 of the Aviation and Transportation Security Act.

DATES: *Effective date:* This rule is effective March 17, 2003.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On November 19, 2001, Congress enacted the Aviation and Transportation

Security Act ("ATSA"), Pub. L. No. 107-71. Upon enactment, section 113 of ATSA, 49 U.S.C. 44939, imposed notification and reporting requirements on certain persons who provide aviation training (hereinafter referred to as "Providers") to aliens and other specified individuals. The Department recognized that section 113 of ATSA became immediately effective upon enactment and that Providers had been forced to suspend the training of aliens covered by ATSA pending the implementation of a process for notification to the Attorney General and a determination whether the individual seeking training presents a risk to aviation or national security. The Department issued a notice on January 16, 2002 ("First Advance Consent Notice"), that stated that the Department was granting provisional advance consent for the training of three categories of aliens, based on an initial determination that persons in these categories did not appear to present a risk to aviation or national security. 67 FR 2238 (Jan. 16, 2002). The First Advance Consent Notice was superseded and the categories of advance consent modified in a notice published on February 8, 2002 ("Second Advance Consent Notice"). 67 FR 6051 (Feb. 8, 2002). The Second Advance Consent Notice was rescinded as of June 14, 2002, with the publication of the interim final rule, which instituted "expedited processing" in lieu of advance consent for certain alien pilots. 67 FR 41140 (June 14, 2002).

The Department also issued a proposed rule on the same date. 67 FR 41147 (June 14, 2002). The proposed rule set forth the manner in which candidates not eligible for expedited processing would be able to seek aviation training in compliance with section 113 of ATSA. Comments were invited on both the interim final rule and the proposed rule.

The Department received numerous comments from concerned individuals and organizations, including over 20 lengthy submissions. These comments covered numerous areas and all comments were considered. Many recommendations were adopted or taken into account in the preparation of this final rule. In addition, the Department made several stylistic changes to improve the clarity of the rule. A discussion of the comments follows.

1. Advance Consent

A number of commenters expressed the view that the Department should institute the former "advance consent" provisions, under which candidates

who were both fully licensed and qualified pilots of large aircraft could obtain training without being subject to any risk assessment or background check. It was the opinion of these commenters that checks of these particular candidates serve no legitimate national security interest and merely create a deterrent for foreign candidates to train in the United States.

While the congressionally mandated requirements may have the unintended consequence of deterring some foreign nationals from seeking training from U.S. Providers, section 113 of ATSA requires the Department to conduct the risk assessments and the Department has no authority to waive this requirement. Moreover, the Department believes that the burden of complying with the regulations is comparatively small in relation to the benefits to security. During the brief time in which the expedited processing checks have been in effect, the process has resulted in the discovery and arrest of a number of persons for violations of the immigration and nationality laws, or on the basis of outstanding criminal warrants. The Department believes that the discovery of numerous immigration-related and criminal offenders among the expedited process candidates militates in favor of a thorough check system for all training candidates.

2. Expedited Processing

With regard to the expedited processing regulations that were issued after the advance consent notice, one commenter suggested that "[a]ir carrier employees under employment contracts with U.S. air carriers that are issued FAA Operations Specifications should be handled differently than those not employed by U.S. air carriers." In support of this comment, the commenter noted that an individual hired by an American air carrier must provide detailed professional, medical, and other information to satisfy Federal Aviation Administration ("FAA") requirements.

The commenter also suggested that the requirement that training dates be specified in advance denied Providers and pilots much-needed flexibility in complying with continuing training requirements. The commenter stated that "to force the air carriers to list an individual training date, to insist on an individual training course, to specify the exact time and date that a training event will be conducted * * * is not in the intent, or the letter of the Law."

The Department notes that while the FAA's system does contain certain security features, it is not focused on terrorism prevention in the same way as