



## AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

535 HERNDON PARKWAY □ P.O. BOX 1169 □ HERNDON, VIRGINIA 20172-1169 □ 703-689-4326  
888-FLY-ALPA (888-359-2572) □ FAX 703-481-2478

August 4, 2005

### VIA INTERNET FILING

Richard A. Hertling  
Deputy Assistant Attorney General  
Office of Legal Policy  
United States Department of Justice  
4234 Robert F. Kennedy Building  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Re: Criminal History Background Checks – Request for Comments  
Docket No. OLP 100

Dear Mr. Hertling:

On behalf of the 64,000 pilots employed at 41 airlines in the United States and Canada represented by the Air Line Pilots Association, International (ALPA), ALPA submits these comments regarding the above referenced docket.

Section 6403(d) of the Intelligence Reform and Terrorism Prevention Act of 2004 required the Attorney General to make recommendations for improving, standardizing, and consolidating the existing statutory authorizations, programs and procedures for the conduct of criminal history record checks for non-criminal justice purposes. ALPA's pilot members first became subject to the requirement for a criminal history records check when, citing a risk of terrorism and the recommendations of the White House Commission on Aviation Safety and Security, Congress added certain security mandates to the 1996 Federal Aviation Reauthorization Act, Pub. L. 104-264, 110 Stat. 3213 (1996).

The Federal Aviation Administration (FAA) drafted a rule that specified 25 (later expanded to 28) categories of criminal convictions that would disqualify a pilot from unescorted access to the secured area of an airport, and thus effectively terminate the pilot's career. 66 Fed. Reg. 37330 (July 17, 2001). On January 4, 2002, ALPA filed comments in support of the FAA's final rule on Aircraft Operator Security stating, in part, that "ALPA supports the criminal history record checks for pilots who are hired after the effective date of the rule . . ." See TSA docket 2001-10999-5 (Comments of Duane E. Woerth, ALPA President). The agency ultimately elected to require the criminal history background check of all pilots, not just new hires. ALPA's comments argued that "[t]he rule should provide some due process for pilots . . . to show [even though technically disqualified under §108.229 of the rule] that past conduct does not impact airport security." *Id.* ALPA gave the example of a pilot who had been convicted

of a disqualifying crime some eight years prior to the criminal history record check but was not believed by his employer to pose any realistic security threat. The pilot had reported the conviction to his employer at the time, but was later suddenly found disqualified from his chosen career.

The administration of the FAA's Aircraft Operator Security Rule was transferred to the Transportation Security Administration (TSA) on February 22, 2002, where the Department of Homeland Security now administers the rule. 67 Fed. Reg. 8340; 49 CFR 1544.229. To date, neither the FAA nor TSA has addressed ALPA's concerns about the lack of any due process review for disqualified pilots.

The risk remains that a pilot can be disqualified under the rule, even when an independent adjudicatory review might conclude there is no actual security threat. In cases where there is no realistic security threat, it is fundamentally unfair to deprive individuals of their careers. ALPA believes it is appropriate to urge Congress to improve the existing criminal history background check process to allow appeals based on individual merit that would permit disqualified pilots to show that they do not present an actual security threat and to enable such pilots to avoid losing their livelihood for the 10-year minimum period specified by the rule.

In the case of a revocation of the *license* of a pilot determined to be a security threat, Congress has authorized a due process appeal of any such revocation decision of the FAA and the Department of Homeland Security. See 49 USC §46111. A similar appeal procedure should be permitted for airline pilots with disqualifying offenses under 49 CFR 1544.229, to enable pilots to challenge the propriety of the disqualification.

Finally, ALPA has continuing concerns that information disseminated for purposes of the criminal history records check be tightly controlled when such information related to criminal convictions is provided to non-governmental agencies, such as employers. 49 CFR §1542.209(j) currently provides that "criminal record information provided by the FBI may be used only to carry out this section and §1544.229 of this chapter." The use of criminal history information for other than statutory purposes (e.g., employee discipline) should continue to be strictly proscribed.

We appreciate the opportunity to comment and respectfully request that our concerns be addressed in the recommendations made to Congress to standardize and improve the existing rules.

Sincerely,

A handwritten signature in black ink, appearing to read "Duane E. Woerth". The signature is fluid and cursive, with a long horizontal stroke at the end.

Captain Duane E. Woerth, President