

## § 1515.11

## 49 CFR Ch. XII (10–1–10 Edition)

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 Security Threat for an individual engaged in air cargo operations who works for certain aircraft operators, foreign air carriers, IACs, certified cargo screening facilities, or validation firms.

[72 FR 3588, Jan. 25, 2007, as amended at 74 FR 47695, Sept. 16, 2009]

### **§ 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 individual engaged in air cargo operations who works for certain aircraft operators, foreign air carriers, IACs, certified cargo screening facilities, or validation firms 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.

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(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

**Transportation Security Administration, DHS**

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Final Decision Maker as provided in 49  
U.S.C. 46110.

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