U.S. Department
of Transportation
**Federal Aviation
Administration**

SEP 23 2014

Susan Fournier, Managing Director
Aviation Designee Association
111 Hunter Road
Freeport, ME 04032

Dear Ms. Fournier:

This letter responds to your May 19, 2014, request for legal interpretation regarding numerous aspects of the Federal Aviation Administration's (FAA's) designated airworthiness representative (DAR) and export certification regulations. Your request included several hypothetical situations and raised numerous issues, and we will respond to each in turn. Briefly, your questions are: whether the FAA may deny an application for a export approval; whether the FAA may issue such a denial if inspection of the aircraft is not an undue burden to the agency; whether the FAA requires an aircraft to be on United States soil for the agency to issue an export airworthiness approval; whether an aircraft is eligible for a special flight permit regardless of location; and whether an aircraft may be denied a special flight permit "simply because the aircraft is located outside" the United States. You also ask for the regulatory definition of "directly benefit" and "undue burden." Finally, you ask for clarification of certain aspects of the FAA's inspection regulations. In light of the number and complexity of the regulations and issues involved, it is useful to begin with a brief introduction.

Subpart L of part 21 of Title 14 of the Code of Federal Regulations (14 CFR) addresses export airworthiness approvals. Section 21.325 states that "if the FAA finds no undue burden in administering the applicable [statutes and regulations], an export airworthiness approval *may* be issued for a product or article located outside of the United States." (Emphasis added.) Although this regulation allows the FAA to issue an export airworthiness approval (commonly referred to as a an "export certificate of airworthiness," or "export C of A"), the regulation is written in permissive, rather than mandatory, language.

Our March 1, 2012 legal interpretation (2012 Interpretation) that responded to your prior inquiry also addressed regulations that are permissive rather than mandatory. *See* Legal Interpretation to Susan Fournier (Mar. 1, 2012). In the 2012 Interpretation, we agreed with your conclusion that §§ 21.329 and 21.331 "*permit* the issuance of an export certificate of airworthiness if the conditions of the [applicable] paragraphs are met." (Emphasis added.) The 2012 Interpretation did not state that the FAA will issue an export C of A in all cases. Whenever the FAA receives an application for a C of A, we will analyze the application to determine whether issuance is warranted.

Questions 1 & 2

In your May 19 inquiry, your first series of questions concerned a hypothetical pair of Airbus A319s, "located on foreign soil and registered to a U.S. based bank [and expected to] eventually be exported to another foreign country." Specifically, you asked whether the FAA may deny an export C of A for each of these aircraft, and furthermore whether the FAA may deny an export C of A for each of these aircraft "if the work presents no 'undue burden.'" In your hypothetical scenario, neither aircraft has been granted a standard C of A or an export C of A from the FAA. The foreign country expected to receive the aircraft has issued a letter, in accordance with § 21.329(b)(1), formally acknowledging and accepting that both aircraft lack the appropriate certificates or otherwise deviate from FAA airworthiness regulations. Finally, in your hypothetical scenario, the FAA declines to grant an export certificate on the grounds that the aircraft "must be on U.S. soil [for the agency] to make a determination of airworthiness."

Your first question is whether the FAA's denial of an export C of A is "plausible based on the current regulations." The short answer is yes. The FAA may deny an export C of A, or any C of A, if our regulations or the underlying Federal statutes do not support issuance. In particular, § 21.325(c) states, "[i]f the FAA finds no undue burden in administering the applicable [statutes and regulations], an export airworthiness approval may be issued for a product or article located outside of the United States." It logically follows that if the FAA *does* find an undue burden, the agency is permitted to *not* issue an export C of A for an aircraft outside the United States. Therefore, in the scenario you describe, the FAA could respond to your request by stating that the aircraft cannot be issued an export C of A in their current location, because doing so would constitute an undue burden.

Your second question focuses more specifically on whether the FAA may deny a request for an airworthiness certificate based on the aircraft's location, "if the work presents no 'undue burden' upon the FAA[.]" We presume this question is based on § 21.325(c), quoted above. Your question presumes that the use of a DAR imposes little or no burden on the agency. A DAR is an FAA designee authorized by statute (49 U.S.C. § 44702) and regulation (14 CFR part 183) to "act as representatives of the Administrator in examining, inspecting, and testing persons and aircraft for the purpose of issuing . . . aircraft certificates." 14 CFR § 183.1. Although the use of DARs does create cost-savings for the agency, they are not costless. Under § 183.33, a DAR is only authorized to work "under the general supervision of the [FAA] Administrator," and the FAA maintains substantial oversight responsibilities related to its DARs. *See Designated Airworthiness Representatives*, 48 Fed. Reg. 16176 (Apr. 14, 1983) (final rule creating the FAA's DAR program and describing the FAA's ongoing oversight responsibilities).

Your question also presumes that the location of an aircraft cannot itself constitute an "undue burden" on the FAA. We disagree. The FAA is not able to fulfill its designee oversight responsibilities at the same level in all locations worldwide. For example, in countries where the FAA has a large safety inspector presence, the FAA may be more able to allow DARs to issue an export or other C of A. On the other hand, in a location where the FAA has few or no resources, the agency may determine that allowing DARs to issue a

C of A constitutes an undue burden on the agency. For these reasons, when a DAR requests authorization to perform work on an aircraft located outside the United States, the FAA will determine the burden on the agency on a case-by-case basis.

Your question—whether the FAA may deny an export C of A based on the aircraft's location, if the work presents no undue burden—is phrased in a way that assumes its own conclusion. In reality, an aircraft's location may well be the reason for there being an undue burden on the FAA. Finally, the regulation makes clear that the FAA "may" issue an export C of A, which means, as discussed above, that it may not for other reasons. The answer, therefore, is yes; the agency may deny such a request for a C of A.

Question 3

Your third question asks, "[w]ould Chief Counsel agree . . . that the rules contained in part 21 Subpart L do not require the aircraft to be located on U.S. soil when a person [requests] an export certificate of airworthiness?" The answer to this question is yes. As described above, § 21.325(c) expressly provides that an export C of A may be issued "for a product or article outside of the United States"; but there is no requirement to grant it.

Question 4

Your fourth question asks whether the FAA may "deny an applicant's request for an export certificate of airworthiness by stating that the applicant is attempting to bypass the local aviation authority[.]" Without more context, we are unable to respond to this question. As described above, the decision of whether to allow a DAR to issue an export C of A for an aircraft located outside the United States is one that is made on a case-by-case basis.

Questions 5 & 6

Your fifth and sixth questions concern special flight permits. Your fifth question asks, "[w]ould Chief Counsel agree that eligible aircraft regardless of location could be issued a special flight permit . . . as long as the applicant . . . provides a valid reason?" We would agree that a special flight permit *may* be issued, as long as the applicant satisfies the requirements of §§ 21.197 and 21.199. You are correct that the regulations, including § 21.197, impose no explicit geographic limitations on special flight permits. Similarly, your sixth question asks whether a special flight permit may be denied "simply because the aircraft is located outside the U.S." We cannot answer this question directly, other than to reiterate that the regulations impose no explicit geographical limitations on special flight permits. Many factors may cause the request to be denied; location may be one of them.

Question 7

Your seventh question asks us to interpret the term "directly benefit," as it was used by FAA staff during past discussions between you and the agency. You are correct that "directly benefit" is not a regulatory term, and as such this office will not attempt to define that term. Its meaning is to be taken from the context in which it is used.

Question 8

Your eighth question asks us to interpret "undue burden" in the context of the issues and hypotheticals presented in your letter. As discussed above, determining whether an activity presents an undue burden is not a legal interpretation, and must take into account the particular circumstances and policies presented to the cognizant program office in each case.

Question 9

Your ninth question again concerns the availability of special flight permits. Your question asks, for an aircraft covered by § 91.409(e),[1] is it sufficient for the aircraft to "meet[] the intent of § 91.409(e)," rather than satisfying the express regulatory requirement?[2] The answer is no. To comply with the FAA's regulations you must satisfy the terms of those regulations. If you believe you qualify for an exemption, you may apply for one using the procedures outlined in 14 CFR §§ 11.61-103.

This response was prepared by Benjamin Jacobs, an attorney in the International Law, Legislation, and Regulations Division of the Office of the Chief Counsel, and was coordinated with the Aircraft Maintenance Division (AFS-300) and Regulatory Support Division (AFS-600) of the Flight Standards Service, and the Design, Manufacturing, and Airworthiness Division (AIR-100) of the Aircraft Certification Service. If you need further assistance, please contact our office at (202) 267-3073.

Sincerely,

Mark W. Bury
Assistant Chief Counsel for International Law,
Legislation, and Regulations, AGC-200

[1] Large airplanes (to which part 125 is not applicable), turbojet multiengine airplanes, turbopropeller-powered multiengine airplanes, and turbine-powered rotorcraft.
[2] Section 91.409(e) requires the aircraft's registered owner to select and identify an inspection program prior to issuance of a special flight permit.