Federal Aviation Administration

Memorandum

DEC 9 2008

Date:

To: Manager, San Francisco International Field Office, WP-03

From: Assistant Chief Counsel for Regulations, AGC-200

Subject: Legal Interpretation of 14 C.F.R. §§ 145.51(c) and 145.55(b)

This is in response to your May 15, 2008, memorandum addressed to the Regional Counsel, Western Pacific Region, requesting a legal interpretation on whether the requirements prescribed in 14 C.F.R. § 145.51(c) (commonly referred to as the "showing of need") are applicable to a renewal (under 14 C.F.R. § 145.55(b)) of a U.S. repair station certificate for a repair station located outside the United States (foreign repair station). As you noted in your memorandum, Section 145.55(b) provides that a repair station certificate or rating issued to a repair station located outside the United States is effective from the date of issue until the last day of the 12th month after the date of issue unless the certificate is surrendered, suspended, or revoked. However, the FAA may renew the certificate or rating for 24 months if the repair station has operated in compliance with the applicable requirements of Part 145 within the previous certificate duration period.

The essence of your question is whether the initial *showing of need* requirement is contemplated in the renewal condition precedent that the repair station has to have operated in compliance with the applicable requirements of Part 145 during the preceding certificate duration period. A corollary question you raised is whether the showing of need applies only to an applicant at time of initial application for certification and, therefore, should not be considered in the renewal process. We believe that the showing of need requirement is a continuing qualification requirement, and our reasoning follows.

The requirements for obtaining a repair station certificate in the first instance are found in Section 145.51. Each applicant for a repair station certificate located outside the United States must meet the same initial qualification requirements that a domestic repair station must meet (*e.g.*, manuals, list of articles to be maintained, organizational chart, housing and facilities, training program, etc.), plus, the applicant must pay a prescribed fee and meet the following additional requirements:

> (1) The applicant must show that the repair station certificate and/or rating is necessary for maintaining or altering the following:

(i) U.S.-registered aircraft and articles for use on U.S.-registered aircraft, or

(ii) Foreign-registered aircraft operated under the provisions of part 121 or part 135, and articles for use on these aircraft.

While § 145.55(b) refers to a foreign repair station having "*operated* in compliance . . . ." as a condition precedent for renewal, it must be noted from the full text that the provision is discretionary, *i.e.*, "The FAA *may* renew . . . if . . . ." (Emphasis provided.) Thus, not only must the repair station have conducted its operations in compliance with the regulations, it is implicit that other basic qualification conditions are expected to be met as well, *i.e.*, a repair station must continue to meet its eligibility requirements for the issuance of the certificate in order to retain it.

The regulatory basis for foreign repair stations and the ancillary showing of need requirement are long-standing. The authorization for foreign repair stations originated in 1949 in an amendment to Part 52 of the Civil Air Regulations (CAR). (14 FR 623, February 11, 1949.) The amendment, adopted as 14 CAR § 52.38, became 14 CAR § 52.50 in 1952 when CAR part 52 was revised (17 FR 2981, April 5, 1952). The rule provided for the agency to issue foreign repair station certificates "only where the Administrator finds that such repair station is necessary to provide for the maintenance, repair, or alteration of United States registered aircraft outside of the United States." Section 52.50-1 (CAA interpretations which apply to § 52.50) explained: "The necessity for a U.S. certificated foreign repair station is based upon the need for service of U.S. registered aircraft. This need, potential or actual, will be determined by the inspecting advisor . . . ." When the Civil Air Regulations were recodified into the Federal Aviation Regulations in 1962, 14 CAR § 52.50 became14 C.F.R. § 145.71 (27 FR 6662, July 13, 1962).

On December 22, 1988, Amendment No. 145-21 became effective. This amendment revised § 145.71 (General requirements) to modify the requirement for a determination of need for the issuance of a certificate. It did this by eliminating the restriction that the U.S.-registered aircraft to be maintained or altered be "outside the United States." It also expanded the limitation of what could be maintained or altered from just U.S.-registered aircraft to include also engines, propellers, appliances, or component parts thereof for use on U.S.-registered aircraft. At the same time, in order to align with amended § 145.71, § 145.73 (Scope of work authorized) was also expanded to increase the scope of items that could be worked on by foreign repair stations. Eliminated was the restriction that work could be performed only on aircraft used in operations conducted in whole or in part outside the United States. Now, along with the change to § 145.71 that authorized work on products other than the complete aircraft, new § 145.73 permitted U.S.-registered aircraft and engines, propellers, appliances, and component parts for use on such aircraft to be flown or shipped from any location, whether or not in the United States, to the foreign repair station for the work, and then shipped to any location, including the United States. Through § 145.71, the showing of need requirement remained for this expanded scope of work.

While the showing of need requirement was not advanced as a safety requirement, strong practical reasons, *i.e.*, appropriate use of agency resources, supported its inclusion in the rule. In the preamble to the notice proposing amendment No. 145-21 (Notice No. 87-12), the agency elaborated:

> Notwithstanding the intention proposed herein to increase the availability of repair stations and to broaden the scope of work that can be performed by foreign repair stations, the FAA does not intend that U.S. foreign repair station certificates be used in a manner that does not relate to the support of U.S.-registered aircraft or U.S. operators. Further, it is necessary to retain a provision which requires a showing of need to avoid situations that could develop where certification is requested where no reasonable need could be expected to develop. This provision will ensure that foreign repair stations certificated by the FAA are needed to support U.S.-registered aircraft and would not extend U.S. resources for FAA certification of foreign repair stations that would not support any U.S.-registered aircraft.

(52 FR 45126, November 24, 1987). In the preamble to the final rule, the FAA addressed the showing of need requirement further, stating:

> The FAA has stated that U.S. foreign repair station certification should not be used in a manner that has no relationship to the support of U.S.-registered aircraft or U.S. operators. Further, it is necessary to retain a provision which requires a showing of need to avoid situations that could develop where certification is requested where no reasonable need to support U.S.-registered aircraft could be expected to develop. This provision will ensure that foreign repair stations that would not support U.S.-registered aircraft would not burden U.S. resources for FAA certification or recertification.

(53 FR47366, November 22, 1988). In declining to explain the word "necessary" in a more precise manner, the FAA noted that its use in the regulation had not led to difficulties. The agency stated further that the term would be retained, but it would "not be used to deny the issuance of foreign repair station certificates to otherwise qualified applicants provided such stations will work on U.S.-registered aircraft." (*Id.*)

Your request attached a copy of a memorandum issued by AFS-300 on December 5, 2007, and included discussion of issues raised by it. For example, you stated that the memorandum "describes 'rationale' and 'several areas' that provide the FAA and industry with flexibility in meeting the 'need' requirement, but does not specify if 145.51(c) is applicable to an applicant for the **renewal** of a foreign repair station certificate." (Emphasis in original.) You noted that the memorandum specifies that: "*The FAA elected to use the application form for certificate renewal of repair stations located outside the U.S. as an administrative tool in order to facilitate a standard method of renewing the certificate; it was not intended to treat each renewal as an*

initial certification." (Italics in original.) You concluded: "This suggests that 145.51(c) [showing of need requirement] may only be applicable to an 'initial certification'."

In view of the above-discussed regulatory history, and as further explained below, we believe such a reading would not be legally correct. The thrust of the AFS-300 memorandum appears to argue for flexibility when the FAA determines whether a foreign repair station seeking certificate renewal demonstrates a sufficient showing of need. No doubt the "need" for any given repair station to work on U.S. products at any point in time is a moving target. The memorandum noted the FAA's recognition that "contract maintenance is fluid and the contracts are constantly moving from repair station to repair station and 14 CFR 145.51(c) needed to be flexible enough to accommodate industry needs with no adverse impact on safety." Moreover, the memorandum noted further that, "[f]rom a managerial perspective, it did not make any sense to not renew a certificate because of the lack of need, and then have that same repair station obtain a contract with a U.S. operator again and have the FAA and applicant expend resources and go through an initial certification process." The memorandum referred to this need for flexibility as underpinning the development of the agency's current policy.

This current policy is found in FAA Order 8900.10, Section 2-1261, Paragraph A.2, also included as an attachment to your request, which states:

> If the repair station is unable to establish the continuing need requirement, the FAA will renew the repair station certificate based on its previous continuing need statement. However, the FAA will advise the repair station in writing that if the repair station is still unable to show a continuing need at the time of its next renewal, the FAA may issue restrictions or limitations to the repair station OpSpecs and/or certificate.

While this policy appears to provide for some flexibility in the renewal process, it is not clear whether the FAA's options of issuing restrictions or limitations would continue into subsequent years if the failure of a repair station to establish need continues unchecked. Also unclear is how such restrictions or limitations would relate to the underlying concern of expending FAA resources to surveil repair stations that currently do not and likely will not work on U.S products. In any event, clearly a balance must be struck to accommodate the needs of industry and the FAA in dealing with what the AFS-300 memorandum referred to as a "catch-22" situation in which a foreign repair station cannot obtain (or retain) its certificate "without a showing of need, while at the same time the repair station cannot obtain a contract for a U.S. registered product without having a 14 CFR 145 certificate."

In conclusion, it is our opinion that the showing of need requirement is not exclusively limited to the initial application phase provided for in 14 C.F.R. § 145.51(c). Rather it is an ongoing qualification requirement. Nothing in the regulations or their regulatory history suggests that the showing of need requirement or any other initial qualification requirement would not be an ongoing and continuing requirement. In a 1997 civil penalty case involving a different repair station regulation, the respondent, Alphin Aircraft, Inc. (Alphin) (a repair station certificated under 14 C.F.R. part 145), argued that regulations requiring an applicant for a repair station certificate to have an inspection system did not apply to Alphin because Alphin was no longer an

applicant but the *holder* of the certificate. *Alphin Aircraft, Inc.*, FAA Order No. 97-10 at 3 (1997). The Administrator rejected Alphin's argument, stating that it lacked persuasiveness. *Id.* The Administrator posited:

> Could the drafters of part 145 have intended that repair stations have inspection systems only as long as they hold 'applicant' status? No. Could Alphin Aircraft have believed reasonably that its obligation to have an inspection system ended in 1972 when it obtained its repair station certificate? No. The only reasonable conclusion one can reach is that the requirements in Section 145.45 for an inspection system are continuing in nature.

Id. Finally, the Administrator also held: "It would be contrary both to reason and the public interest in safety to rule that the regulations do not require Alphin aircraft to comply with its Inspection Procedures Manual. Though the requirement is implicit rather than explicit, it is clear." *Id.* at 4. While *Alphin* involved a different set of regulations and issues, its reasoning that, absent a provision to the contrary, initial qualification requirements are ongoing and continuing is persuasive here.

The regulatory history makes clear the FAA's rationale for requiring a showing of need as a qualification for issuing a certificate to a repair station located outside the United States. As noted above, this history emphasized the importance of not burdening the FAA's resources in certificating and recertificating such repair stations if they are not going to be supporting U.S.-registered aircraft and products. Implicit is the concern over expending those FAA resources in surveiling such repair stations. For the reasons discussed above, some flexibility is necessary in implementing this policy, and it must not be applied arbitrarily. As a matter of law, however, we believe the showing of need requirement is a continuing obligation.

This response was prepared by Edmund Averman, an Attorney in the Regulations Division of the Office of the Chief Counsel and coordinated with the Aircraft Maintenance Division (AFS-300) in the Office of Flight Standards. If you have additional questions regarding this matter, please contact us at your convenience at (202) 267-3073.

for Rebecca B. MacPherson Michael E. Chase