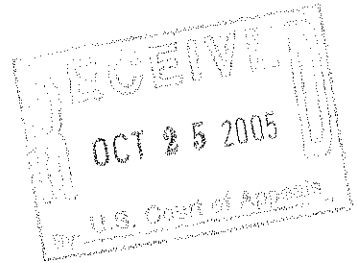


[REDACTED]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT



ROBERT GRAY,

Plaintiff,

v.

TRANSPORTATION SECURITY
ADMINISTRATION,

Defendant.

Civ. 05-2024

UNDER SEAL
EX PARTE SUBMISSION

DECLARATION OF JUSTIN P. OBERMAN

I, Justin P. Oberman, do hereby declare as follows:

1. (U) I am the Assistant Administrator for the Office of Transportation Threat Assessment and Credentialing (TTAC) for the Transportation Security Administration (TSA), United States Department of Homeland Security (DHS). While the office has had several names during this time period, since July 2003, I have been largely responsible for TSA's credentialing and threat assessment programs, with one exception. From April 2005 to July 2005, I was on special assignment to the Secretary of Homeland Security. In my absence, Rodney Turk served as Assistant Administrator for the then-named Office of Transportation Vetting and Credentialing (OTVC).

2. (U) I provide this declaration in order to give a detailed account of TSA's

[REDACTED]

decision to deny a request by Robert William George Mulryne Gray ("Gray") to receive flight training in the United States, based on TSA's determination that Gray poses a security threat within the meaning of 49 C.F.R. Part 1552. Although reflected in the administrative record supporting TSA's decision, this declaration provides details regarding the factors and information that TSA considered at the time it reached its decision, as well as additional information learned since that time, and explains the decision.

3. (U) The matters stated herein are based on my personal knowledge, my review and consideration of documents and information available to me in my official capacity, and my conclusions based thereon.

Legal Authority

4. (U) As the Assistant Administrator for TTAC, I am generally responsible for assisting and acting on behalf of the Assistant Secretary for Homeland Security for TSA ("Assistant Secretary") on security threat assessment and credentialing matters for all modes of transportation. These responsibilities include, but are not limited to, the following: managing TSA programs (a) that screen millions of private persons in the transportation industry, including truck drivers who transport hazardous materials and persons who work in secure and sterile areas of airports, (b) that conduct background checks on TSA employees, including the 45,000 airport security screeners; and (c) that assess security risks on aliens requesting flight training in the United States; and (d) carrying out such other duties and exercising such other powers related to transportation security that the Assistant Secretary deems appropriate.

[REDACTED]

5. (U) By the Aviation and Transportation Security Act (ATSA), Congress assigned to TSA responsibility for receiving, assessing, and distributing intelligence and other information in order to identify persons who are known to pose, or are suspected of posing, a threat to transportation security and to coordinate countermeasures with other Federal agencies to address such threats. See Pub. L. 107-71, § 101, 115 Stat. 597 (Nov. 19, 2001), codified at 49 U.S.C. §§ 114(f)(1)-(5), (h)(1)-(4).

6. (U) By the Vision 100-Century of Aviation Reauthorization Act (Vision 100 Act), Congress assigned to the Secretary of Homeland Security responsibility for conducting security threat assessments on all aliens who seek to obtain flight training on certain aircraft in the United States. See Pub. L. 108-176, § 612, 117 Stat. 2490 (Dec. 12, 2003), codified at 49 U.S.C. § 44939. The Secretary has delegated this authority to the Assistant Secretary. TSA's rules relating to its conduct of security threat assessments for alien flight training candidates are found at 49 C.F.R. Part 1552 et seq.

TSA's Review of Gray's Application for Flight Training

7. (U) On November 3, 2004, at the direction of CAE Simuflite, Inc., a flight school located in Texas, Gray, a British citizen and permanent legal resident of the United States, filed an online application with TSA requesting authorization to obtain flight training on aircraft of more than 12,500 pounds. By November 16, 2004, Gray's application was complete.

8. (U) By electronic message of December 16, 2004, after reviewing available information, including law enforcement sensitive and classified information, TSA notified CAE

[REDACTED]

[REDACTED]

Simuflite that it was unable to further process Gray's application and would not grant final approval for him to receive flight training due to derogatory information in its possession. See Email from Steve Geary to Guita McIlroy (Dec. 16, 2004), attached to Certified Index at Tab 1.

9. (U) By letter of January 27, 2005, after personally reviewing the available material, Tim Upham, Director for the OTVC Aviation and Analysis Directorate, issued Gray an Initial Notice of Threat Determination. By that Notice, TSA informed Gray, a resident alien, that TSA had determined that he posed a threat to aviation or national security and, therefore, had denied his training request (hereinafter "Initial Threat Determination"). The Notice further informed Gray that he could appeal TSA's Initial Threat Determination by submission of a written reply, or a written request for the releasable materials upon which the determination was based, within 30 days. See Letter from Tim Upham to Robert William George Mulryne Gray, conveyed by email (Jan. 27, 2005), attached to Certified Index at Tab 2.

10. (U) By letter of February 22, 2005, by his attorneys, Gray requested "all information, documents or data" upon which the Initial Threat Determination was based. See Letter from Paul Holtzmann to Steve Geary (Feb. 22, 2005), attached to Certified Index at Tab 3.

11. (U) By letter of March 24, 2005, TSA released to Gray, through his attorneys, certain of the releasable documents on which TSA's Initial Threat Determination was based: a page from Gray's British passport, with an issue date of December 19, 2001, and a copy of Gray's online application for flight training. TSA also informed Gray that he could further appeal the Initial Threat Determination by submission of a written reply within 30 days. See Letter of

[REDACTED]

Heather R. Epstein to Paul Holtzman (Mar. 24, 2005), with enclosures, attached to Certified Index at Tab 4.

12. (U) By letter of March 31, 2005, TSA released to Gray, through his attorneys, an additional releasable document on which TSA's Initial Threat Determination was based: a copy of an entry from the Treasury Enforcement Communications System (TECS) II database (hereinafter "TECS II record"). TSA informed Gray that the document had been redacted in part to protect privileged information. See Letter of Heather R. Epstein to Paul Holtzman (Mar. 31, 2005), with enclosure, attached to Certified Index at Tab 5.

13. (U) By letter of April 1, 2005, by his attorneys, Gray filed an appeal or challenge to the sufficiency of TSA's response to his request for documents and information. See Letter of Paul Holtzman to Heather R. Epstein (Apr. 1, 2005), attached to Certified Index at Tab 6.

14. (U) By letter of April 14, 2005, TSA confirmed to Gray, through his attorneys, that it had provided him with all releasable records on which it had based its Initial Threat Determination. The letter further informed Gray that if he wished to appeal the Initial Threat Determination, he must do so by April 24, 2005. See Letter of Heather R. Epstein to Paul Holtzman (Mar. 24, 2005), attached to Certified Index at Tab 7.

15. (U) By letter of April 14, 2005, by his attorneys, Gray appealed his Initial Threat Determination and denial of request for flight training. In support, Gray included a prior sent letter and questioned the appearance of the word "Hispanic" on a record, as Gray is not Hispanic. See Letter of Paul Holtzman to Heather R. Epstein (Apr. 14, 2005), attached to Index at Tab 8.

[REDACTED]

[REDACTED]

16. (U) By letter of May 11, 2005, after personally reviewing the available material, including all correspondence received from Gray, TSA Assistant Administrator for OTVC Rodney W. Turk issued Gray, through his attorneys, a Final Notice of Threat Determination (hereinafter "Final Threat Determination"). By that Notice, TSA informed Gray that TSA had determined he poses a security threat and, therefore, had appropriately denied his request for flight training. See Letter of Rodney W. Turk to Paul Holtzmann (May 11, 2005), attached to Certified Index at Tab 9.

Basis for Security Threat Assessment

17. (U) In the course of conducting the security threat assessment on Gray, TSA learned that he is [REDACTED] [REDACTED] Information from [REDACTED] filed herewith, formed the basis for TSA's determination that Gray poses a threat to aviation or national security and should not be permitted to obtain additional flight training in the United States.

18. (S) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]

[REDACTED]

19. (S) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

20. (U) Given the nature of the terrorist attacks of September 11, 2001, and the great danger that persons with flight training on large aircraft can pose to transportation and aviation security, TSA must err on the side of caution in making threat assessments related to requests by aliens for additional flight training. By his application, Gray sought to fly airplanes with a maximum certificated takeoff weight of 12,500 pounds or more, which are significantly larger than the ones he has flown in the past. In making its Initial and Final Threat Determinations, TSA considers the substantially greater threat Gray would pose by flying airplanes of the larger size.

21. (U) TSA examined the information provided to it by Gray during his administrative appeal, but found it insufficient to refute the evidence that supports its Initial

[REDACTED]

Threat Determination. In particular, TSA reexamined the TECS II record that includes the word "Hispanic" and concluded that it does not identify him as Hispanic. The TECS II record sent to Gray contains information regarding his Federal Aviation Administration (FAA) pilot's certificate and is in a database used by Customs and Border Protection for immigration and law enforcement purposes. All blank TECS records contain a field labeled "Hispanic," just as they contain fields labeled "race" and "height," for example. If the individual is Hispanic, the TECS II record would have a "Y" next to the word "Hispanic" in the record. The space next to "Hispanic" on Gray's TECS II record, like the space next to "height" is left blank, indicating that no information has been entered on this field. In addition, TSA confirmed that Gray's social security number and date of birth appear correctly on the record. Accordingly, the TECS II record does not suggest a case of mistaken identity, as Gray has suggested.

22. (S) [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

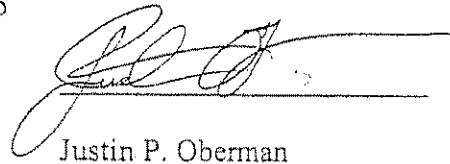
23. (U) In sum, based on its independent review of information [REDACTED]
[REDACTED] TSA continues to believe that Gray poses a threat to aviation or national security and that it properly denied his request for flight training in the United States.

[REDACTED]

24) (U) At this time, TSA is assessing whether it should request that the FAA
revoke Gray's pilot certificate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 24th day of October, 2005



Justin P. Oberman