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VIA FEDERAL EXPRESS AND ELECTRONIC MAIL

Blane A. Workie, Esq.
Assistant General Counsel for
Aviation Enforcement and Proceedings
United States Department of Transportation
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

Re: Kuwait Airways

Dear Ms. Workie:

We are writing in response to your letter of September 30, 2015 (September 30 letter), regarding the U.S. Department of Transportation (Department or DOT)'s investigation into the policies and practices of Kuwait Airways Company (KAC). By this letter, KAC respectfully requests that the Department reconsider the positions it has taken in the September 30 letter. The Department's determination is inconsistent with the Department's statutory authority, relevant Civil Aeronautics Board (CAB) and/or DOT precedent, international agreements and law, and well-settled U.S. case law related to discrimination. As such, KAC requests the Department rescind the September 30 letter and revert to its original determination of March 25, 2014, that KAC "is not in violation of U.S. anti-discrimination laws," including 49 U.S.C. § 41310.

Kuwaiti law does not permit KAC to sell tickets to, or transport, Israeli citizens / passport holders.[1] As DOT itself acknowledged in the September 30 letter, KAC's policy with respect to this law distinguishes passengers based upon their citizenship. Courts have consistently held that distinctions based upon citizenship are allowed. The US Supreme Court has ruled that the government may bar foreign citizens from voting, serving as jurors, working as police or probation officers, or working as public school teachers. *See Cabell v. Chavez-Salido*, 454 U.S. 432, 102 S. Ct. 735, 70 L. Ed. 2d 677 (1982) (upholding a law barring foreign citizens from working as probation officers); *Ambach v. Norwick*, 441 U.S. 68, 99 S. Ct. 1589, 60 L. Ed. 2d 49 (1979) (upholding a law barring foreign citizens from teaching in public schools unless they intend to apply for citizenship); *Foley v. Connelie*, 435 U.S. 291, 98 S. Ct. 1067, 55 L. Ed. 2d 287 (1978) (upholding a law barring foreign citizens from serving as police officers); *Perkins v. Smith*, 370 F.

[1] KAC incorporates by reference its submissions to the Department on January 22, 2014, July 28, 2014, August 29, 2014, September 24, 2014, in which it provided significant background to the Department on the Kuwaiti law at issue.

Supp. 134 (D. Md. 1974), aff'd 426 U.S. 913, 96 S. Ct. 2616, 49 L. Ed. 2d 368 (1976) (upholding a law barring foreign citizens from serving as jurors); *Sugarman v. Dougall*, 413 U.S. 634, 641-42 (1973) ("citizenship is a permissible criterion for limiting" the "right to vote or to hold high public office"). The Court has further indicated that aliens' First Amendment rights might be less robust than those of citizens in certain discrete areas. *See Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92, 72 S. Ct. 512, 96 L. Ed. 586 (1952) (First Amendment does not protect aliens from deportation because of membership in the Communist Party).

Further, it is well settled, for example, that actions based upon citizenship should be afforded different treatment under Title VII of the Civil Rights Act and other similar statutes. *See Nyunt v. Tomlinson*, 543 F. Supp. 2d 25 (D.D.C. 2008) ("To the extent that Nyunt is actually complaining about disparate treatment based upon citizenship, Title VII provides no protection for such a claim."); *E.E.O.C. v. United Air Lines, Inc.*, 287 F.3d 643, 650 (7th Cir. 2002) ("There is no question that, if the charge alleged only citizenship discrimination, it would be outside the scope of Title VII."); *Kalantar v. Lufthansa German Airlines*, 402 F. Supp. 2d 130 (D.D.C. 2005) ("Section 1981 does not prohibit national origin discrimination per se," but only when such discrimination is "'based on racial or ethnic characteristics associated with the national origin in question'") (citations omitted). It follows that the same distinction be accorded to citizenship under 49 U.S.C. § 41310.

In fact, in a November 6, 2013 letter to Senator Christopher S. Murphy (D-CT) related to this issue, the Department itself acknowledged this position when it specifically stated that "U.S. courts have recognized that the U.S. may discriminate based on citizenship at least in certain contexts."[2] DOT further reminded Senator Murphy that the U.S. has similar restrictive citizenship-based determinations for citizens of countries the U.S. does not recognize, such as North Korea. The same logic behind these policies also extends to the U.S. embargo against Iran and other sanctioned countries.

Notably, the September 30 letter fails to cite a single instance of an administrative or judicial interpretation that 49 U.S.C. § 41310 prohibits citizenship-based distinctions. The cases cited by DOT all involve determinations of the predecessor statutes to 49 U.S.C. § 41310 related to a carrier's purported discrimination based upon a protected class (race) or based upon safety and security considerations. *Mitchell v. U.S.*, 3131 U.S. 80 (1941) (racial classifications constituted unlawful discrimination under the I.C.A.); *Fitzgerald v. Pan Am. World Airways*, 299 F.22d 499 (2d Cir. 1956) (racial classifications were unlawful discrimination under 49 U.S.C. § 1374 (b)); *Williams v. Trans World Airlines*, 509 F.2d 942 (2d Cir. 1975) (airline could refuse passage to passenger it believed to be a safety risk when based upon a rational and reasonable view of facts and circumstances); *Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669 (9th Cir 1982) (airline could refuse passage to passenger it believed to be a safety risk when based upon a rational

[2] *See* Letter from Samuel Podberesky to Senator Christopher S. Murphy, dated November 6, 2013.

and reasonable view of facts and circumstances). It is telling that the Department could not cite a single instance of the CAB or its successor, DOT, making a determination, as an administrative agency, of discrimination under 49 U.S.C. § 41310 and in this context the Department's attempt to equate a policy that distinguishes persons on the basis of citizenship (not a protected class) as illegal discrimination is contrary to all prior legal precedent and unsupported by law.[3]

In the September 30 letter, the Department argues that the foreign air carrier permit authority granted by it to KAC includes a stipulation that the carrier is "subject to the provisions of Title 49 of the U.S. Code and the orders, rules and regulations of the Department of Transportation" and "with such other reasonable terms, conditions, and limitations required by the public interest as may be prescribed by the Department."[4] KAC is in full compliance with all orders, rules and regulations of the Department as well as with all of the terms of its foreign air carrier permit. KAC notes that it has operated the JFK-LHR route with a foreign air carrier permit or exemption authority since it instituted service to the United States in 1980 and at no time during this period has the CAB or DOT suggested that KAC was not in compliance with the terms of its operating authorizations to the United States. The Department's rapid reversal of its earlier determination and new-found reliance on a previously undisclosed argument relating to KAC's foreign air carrier permit is indicative of the weakness in the Department's legal analysis.

Furthermore, DOT's statutory authority does not authorize the Department to enforce its consumer protection determinations in this manner. There are no international agreements nor is there any Presidential or Congressional action that has authorized DOT to enforce its consumer protection determinations against carriers that operate in foreign air transportation with a *de minimus* impact on U.S. commerce. Congress could have provided DOT with such authority but did not. To the contrary, Congress explicitly directed the Department to consider principles of international comity when exercising its functions generally. 49 U.S.C. § 40105 (B)(1) states that:

> "In carrying out this part, the Secretary of Transportation and the Administrator—
> (A) shall act consistently with obligations of the United States Government under an international agreement;
> (B) shall consider applicable laws and requirements of a foreign country."

[3] Moreover, the legal support cited in the September 30 letter clearly provides air carriers may refuse passage if "the carrier decides [a passenger] is, or might be inimical to safety," and that carriers can exercise their discretion to refuse passage to passengers deemed to be safety risks so long as the carrier's decision is "rational and reasonable" and that any such requirement of reasonableness is "for the benefit and protection of persons using the facilities of the air carrier."[3] KAC reiterates it is legally prohibited from transporting Israeli citizens under Kuwaiti law. Moreover, as referenced by DOT, it is permissible for KAC to refuse passage of such individuals based upon a rational and reasonable concern for the safety of its passengers and aircraft, which ostensibly applies here.

[4] September 30 letter at 3.

The statute that initially gave rise to this action mandates that the Secretary specifically consider 49 U.S.C. § 40105 (b), and does not mention any other factors for the Secretary to consider. There are very strong reasons for the Department, consistent with a specific Congressional mandate, to consider the applicable laws and requirements of the State of Kuwait while exercising the Department's regulatory functions.

KAC cannot lawfully comply with the terms of the September 30 letter and the decision therefore could have significant and far-reaching policy implications. Further, KAC notes that the determination undermines the U.S.-Kuwait Open-Skies Agreement, which Kuwait has steadfastly honored since its inception. At least one U.S. passenger air carrier currently exercises 5th-freedom rights under the Agreement and the State of Kuwait relies on the United States to provide reciprocal rights to Kuwaiti carriers.

Moreover, the guidance provided by DOT to KAC in the September 30 letter would, if implemented, impact KAC's operations on a global scale and cannot be limited to the U.S. market alone. Putting the above-referenced legal support aside, from a purely operational standpoint, it would be impossible for KAC to transport Israeli citizen passport holders on one specific route but not throughout its entire network. Thus, practically, DOT's September 30 letter equates to an unlawful and improper extra-territorial application of 49 U.S.C. § 41310. As the Department is aware, it is well established that the U.S. cannot impose its laws on an extra-territorial basis.[5] The statute cited by the Department as authority for its decision does not provide for such extraterritorial application.[6] To the extent DOT is seeking to, or in practical effect will, apply 49 U.S.C. § 41310 to conduct outside of the United States, the Department is disregarding the principle that a law, without an authorizing express provision of Congress, or an international agreement, shall not have extraterritorial effect. This principle is rooted in a nation's limited power to make laws governing only conduct applicable within its borders, as well as the practical considerations of comity, that is, that this nation should not try to impose its laws abroad, any more than a foreign nation should legislate conduct in this country absent agreement between the nations involved.

If DOT were to act in a manner perceived by the international community to be extra-territorial, its arguments against European Union extra-territorial application of laws in the context of both

[5] U.S. law cannot be imposed on conduct where there is no substantial effect from such conduct in the United States or on United States' foreign commerce, or where Congress has not expressly provided that the law or regulation shall have extraterritorial effect. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010); *Hartford Fire Insurance Co., v. California*, 509 U.S. 764 (1993); *Foley Bros., Inc. v. Filardo*, 336 U.S. 281 (1949); *United States v. Pendelton*, 658 F.3d 299, 308, 311 n.7 (3d Cir. 2011).

[6] The limit of the Department's authority to regulate abroad is imbedded in § 40120(b) of Title 49 of the U.S. Code, which provides that the President may extend (in the way and for periods the President considers necessary) the application of this part to outside the United States when (1) an international arrangement gives the United States Government authority to make the extension; and (2) the President decides the extension is in the national interest. *See* 49 U.S.C. §40120(b).

the Emissions Trading Scheme (ETS) and the proposed modifications of consumer protection rules in EC Regulation 261/2004 could be compromised, thus negatively impacting U.S. air carrier interests and operations abroad. If the Department is encouraging international aviation partners to limit the extra-territorial application of laws, it should follow that the Department itself would limit enforcement of its own laws to instances that fall squarely within its jurisdiction, which is certainly not the case here.

As a final matter, the September 30 letter does not state that its action is a preliminary or final agency order and, thus, it is unclear what form the Department intends its September 30 letter to take. KAC notes that the letter does not contain compulsory language or specifically order KAC to take any action, rather, it uses permissive language regarding the Department's expectations. Based upon the language of the September 30 letter alone it is clear to KAC that this is not a final order. Further, the letter appears similar to the "guidance letters" issued by the Department to Southwest Airlines in the Love Field case. In that case, the Department argued to the D.C. Circuit that one of the letters in question was not final as it did not "mark the consummation of the agency's decision-making process" and was "also not final agency action because it does not determine rights or have legal consequences." If the Department considers the September 30, 2015 letter to be anything other than its informal interpretation of 49 U.S.C. § 41310, KAC requests that the Department promptly communicate in writing its views about the legal nature and status of the September 30 letter. Should the Department not provide a timely response, KAC will have no choice but to act in an manner to preserve its ability to challenge any adverse determination in the Court of Appeals for the D.C. Circuit.[7]

For the reasons described above, KAC requests reconsideration of the Department's determination in the September 30 letter. KAC also requests the Department immediately clarify the nature and scope of the September 30 letter. We look forward to speaking with you further about this matter after you have had an opportunity to evaluate the above arguments.

Sincerely,

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Edward J. Longosz, II Esq.
Counsel for Kuwait Airways Corporation

[7] In an abundance of caution, KAC has served this request reconsideration within thirteen (13) days of the September 30 letter in order to comply with the dictates of 14 C.F.R. Part 302.14.