

UNITED STATES DEPARTMENT OF COMMERCE
OFFICE OF THE UNDERSECRETARY FOR INDUSTRY AND SECURITY
WASHINGTON, DC 20230

In the Matter of:

Southwind Airlines,

Appellant.

Docket Number: 23-BIS-TDO2

FINAL DECISION AND ORDER

Before me for my final decision is a Recommended Decision (RD) issued by Administrative Law Judge (ALJ) Tommy Cantrell on August 24, 2023, and received by my office on August 25, 2023. The RD recommends that this appeal filed by Cortex Havacilik ve Turizm Ticaret Anonim Sirketi d/b/a Southwind Airlines (Southwind) be dismissed. As further discussed below, I accept the findings of fact and conclusions of law made by the ALJ in his RD.

I. Background

Southwind appeals a Temporary Denial Order (TDO) temporarily denying the export privileges of Nordwind Airlines (Nordwind), first issued by the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) of the Bureau of Industry and Security (BIS or the Agency) on June 24, 2022, 87 Fed. Reg. 38704. The Export Administration Regulations (EAR or Regulations) at 15 C.F.R. § 766.24 authorize the Assistant Secretary to issue a TDO for a period of up to 180 days to prevent an “imminent violation” of the Regulations. 15 C.F.R. § 766.24(b)(1), (b)(4). Moreover, a TDO may be made applicable to “related persons” in accordance with § 766.23 of the Regulations.

The Agency subsequently renewed the TDO against Nordwind twice, on December 20, 2022, 87 Fed. Reg. 79725, and June 15, 2023, 88 Fed. Reg. 40202. Upon the second renewal, the Agency added OOO Pegas Touristik (Pegas) as a related person to the TDO, then modified the TDO on June 27, 2023, to remove Pegas as a related person, 88 Fed. Reg. 42290.

On August 8, 2023, Southwind, through counsel, filed an appeal with the U.S. Coast Guard ALJ Docketing Center (Docketing Center) pursuant to 15 C.F.R. § 766.23(c) of the EAR. After assignment of the matter to an ALJ by the Docketing Center on August 14, 2023, BIS filed a response to the appeal on August 21, 2023. On August 24, 2023, ALJ Cantrell issued the RD, which my office received on August 25, 2023. On August 31, 2023, the BIS Appeals Coordinator requested views from the parties on an extension of time to issue my Final Decision in this appeal. Both parties consented, and on August 31, 2023, I issued an Order extending the period of time to issue this Final Decision to September 29, 2023.

II. Standard

As described above, § 766.24(b) of the Regulations addresses the Assistant Secretary's authority to issue TDOs. To issue a TDO, BIS must make a showing that the order is necessary in the public interest to prevent an "imminent violation" of the Regulations. 15 C.F.R. § 766.24(b)(1). The Regulations authorize the issuance of a TDO on an *ex parte* basis but require that the order define the imminent violation and state why it was issued without a hearing. *Id.* at § 766.24(b)(2). BIS also has the authority to renew the TDO for additional periods. *Id.* at § 766.24(d)(1).

To prevent evasion of the TDO, the Assistant Secretary may apply the terms of the TDO to "related persons," that is, "other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of

trade or business.” *Id.* at § 766.23(a). When seeking to add a related person to a denial order, “BIS shall, except in an ex parte proceeding under § 766.24(a) of this part,” give that person notice and an opportunity to oppose such an action. *Id.* at § 766.23(b).

“Related persons” may not oppose the issuance or renewal of a TDO, but may file an appeal with an ALJ, who issues an RD for the review of the Under Secretary in accordance with § 766.24(e) of the Regulations. *See id.* at §§ 766.23(c)(2)(ii), 766.24(d)(3)(ii). For appeals by related persons, the Regulations provide that the “sole issues to be raised and ruled on in any such appeal are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.” *Id.* at § 766.23(c).

III. Discussion

Southwind’s appeal specifically requests that an Order be issued “that the [Nordwind] TDO Renewal be withdrawn and that BIS issue an order affirmatively reinstating the status quo as it existed prior to June 15, 2023, and making it clear that companies may continue to transact with Southwind Airlines.” Southwind Appeal at 18. The limited scope of the appeal under § 766.23 (c) of the Regulations prevents me from doing as Southwind requests.

The ALJ makes twelve recommended findings of fact in the RD. RD at 3-4. I accept these recommended findings of fact.

Regarding the first conclusion of law in the RD, I agree that Southwind is not a “related person” with standing to bring an appeal pursuant to 15 C.F.R. § 766.23. Southwind alleges that it suffered harm as a result of the June 15, 2023, TDO, which stated, in relevant part, that BIS’s Office of Export Enforcement “has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a Turkish airline that started shortly after the imposition of stringent Russia-related export controls [. . .] for

international flights into Russia on U.S. origin aircraft without the required BIS authorization.” BIS Ex. 1 at 7. This language was removed in the June 27, 2023, modified TDO issued against Nordwind only.

Southwind concedes that BIS did not name Southwind Airlines as a related person subject to the terms of the TDO but alleges that the language in the TDO was sufficiently detailed to identify Southwind as the “Turkish airline” that “entered into charter agreements” with Pegas in support of its efforts to evade U.S. export controls on Russia. Southwind Appeal at 12. According to Southwind, this language has had the same effect on Southwind as if it had actually been named as a related person. Southwind states that the interpretation of this language by a key business partner, Pratt & Whitney, led Pratt & Whitney to cease support of engines aboard aircraft leased by Southwind, jeopardizing its business operations. *Id.* at 2. Nevertheless, BIS has never named Southwind as a related person subject to the Nordwind TDO. Nor, as observed in the RD, does a mere inference by a business partner that Southwind is the unnamed “Turkish airline” described in the TDO render Southwind a related person with standing to appeal the Nordwind TDO. RD at 5. As such, Southwind does not have appeal rights under § 766.23(c), which provides only “persons named by BIS in an order as related to the respondent” an avenue for appeal.

Regarding the second conclusion of law in the RD, I agree that Southwind seeks relief outside the scope of 15 C.F.R § 766.23. The Regulations limit the scope of the appeal to two issues: whether the related person is indeed related to the respondent subject to the TDO—Nordwind in this case—and whether the TDO is justified to prevent evasion. 15 C.F.R. § 766.23(c). Southwind’s request that BIS withdraw the June 15, 2023, TDO and issue an order removing the reference to the “Turkish airline” and clarifying that Southwind did not engage in

any EAR violations does not fall within the scope of appeal as outlined in § 766.23(c). The ALJ has concluded that he cannot direct BIS to provide this requested relief to Southwind; I agree.

IV. Conclusion and Order

Based on my review of the record, I accept the findings of fact and conclusions of law made by the ALJ in his RD. I also confirm that Southwind has never been a party to the Nordwind TDO, and therefore has never been subject to the license requirements and prohibitions in the Nordwind TDO. Moreover, I confirm that as of the date of issuance of this Final Decision and Order, Southwind is not listed on the BIS Denied Persons List. Accordingly, it is therefore **ORDERED**:

FIRST, that this appeal is DISMISSED.

SECOND, that this Final Decision and Order shall be served on Appellants and on BIS and shall be published in the *Federal Register*. In addition, the ALJ's Recommended Decision shall also be published in the *Federal Register*.

This Order, which constitutes the Department's final decision with regard to this appeal, is effective immediately.



ALAN F. ESTEVEZ
Under Secretary of Commerce for
Industry and Security

Dated: September 29, 2023

**UNITED STATES DEPARTMENT OF COMMERCE
BUREAU OF INDUSTRY AND SECURITY
WASHINGTON, D.C. 20230**

In The Matter of:

Southwind Airlines,

Appellant.

Docket No.: 23-TDO-0002

RECOMMENDED DECISION

Issued by: Honorable Tommy Cantrell, Administrative Law Judge

Issued: August 24, 2023

On August 8, 2023, Cortex Havacilik ve Turizm Ticaret Anonim Sirketi d/b/a Southwind Airlines (Southwind) filed an appeal pursuant to 15 C.F.R. § 766.23(c) of the Export Administration Regulations (EAR).¹ Specifically, Southwind asks that I issue an order directing BIS to withdraw a June 15, 2023, Temporary Denial Order (TDO) issued to Nordwind Airlines. Southwind also asks that I issue an order “removing the reference to the Turkish airline and clarifying it has no reason to believe this Company is engaged in any violations of the EAR.” (Appeal at 3). For the reasons set forth herein, I recommend this appeal be **DISMISSED**.

Background

On June 15, 2023, the Assistant Secretary of Commerce for Export Enforcement (Assistant Secretary) renewed a TDO to Russian airline Nordwind Airlines pursuant to 15 C.F.R.

¹ I note Southwind also submitted an appeal to the Undersecretary of Commerce for Industry and Security pursuant to 15 C.F.R. § 756.2 on August 7, 2023. (Appeal at 8).

§ 766.24. (BIS Ex. 1).² The renewed TDO added the corporation Pegas Touristik a/k/a Pegas Touristik OOO (Pegas) as a related person in accordance with 15 C.F.R. § 766.23. *Id.* Furthermore, the TDO stated the Office of Export Enforcement (OEE) “has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a *Turkish airline that started shortly after the imposition of stringent Russia-related export controls.*” *Id.* (emphasis added). However, nothing in the TDO named the Turkish airline.

Thereafter, on June 27, 2023, the Assistant Secretary removed Pegas from the Nordwind TDO. (BIS Ex. 2). On July 28, 2023, Southwind contacted BIS and informed BIS, Pratt & Whitney, a business partner, inferred that Southwind was the “Turkish airline” described in the TDO. (Ex. 1).³ In response to this exchange, BIS provided Southwind with an email confirming it was not “on the BIS Entity List or Denied Persons List.” (Exs. 15, 16, 17). However, according to Southwind, this did not resolve the misunderstanding regarding its operations. (Ex. 14 at 3).

On August 8, 2023, Southwind filed this appeal with the United States Coast Guard Administrative Law Judge Docketing Center (Docketing Center).⁴ The appeal letter includes 25 exhibits. On August 14, 2023, the Docketing Center assigned this case to me for adjudication. BIS submitted its response to the appeal on August 21, 2023, and included 3 exhibits. The record is now closed and the appeal is ripe for decision.

² “BIS Ex.” references the exhibits attached to BIS’s response dated August 21, 2023.

³ “Ex.” refers to the exhibits attached to Southwind’s appeal dated August 8, 2023.

⁴ Pursuant to an interagency agreement, United States Coast Guard Administrative Law Judges are permitted to adjudicate BIS cases.

Recommended Findings of Fact

1. On June 15, 2023, the Assistant Secretary renewed a Temporary Denial Order (TDO) issued to Russian airline Nordwind Airlines. (BIS Ex. 1). BIS renewed the Nordwind TDO pursuant to 15 C.F.R. § 766.24 to prevent an “imminent violation” of the Export Administration Regulations (EAR). *Id.*
2. The renewed TDO added Pegas as a related person and stated the OEE “has reason to believe that Pegas has made additional efforts to evade export controls on Russia in part by entering into charter agreements with a Turkish airline that started shortly after the imposition of stringent Russia-related export controls . . . for international flights into Russia on U.S.-origin aircraft without the required BIS authorization.” (BIS Ex. 1).
3. Southwind’s business partner Pratt & Whitney inferred Southwind was the “Turkish airline” referenced in the TDO and stopped providing support to Southwind’s aircraft engines. (Ex. 1).
4. On June 27, 2023, following discussions between Pegas and BIS, the Assistant Secretary issued a modified TDO removing Pegas as a related person. (BIS Ex. 2).
5. The modified TDO states “Pegas Touristik should be removed from the TDO to allow the opportunity for additional administrative process under Part 766 of the Regulations.” (BIS Ex. 2).
6. On June 28, 2023, counsel for Southwind informed BIS “problems are mounting for the company given the language in the [modified] TDO.” (Ex. 14, p. 3). Counsel noted Pegas’ removal from the TDO did not “resolve the misunderstanding” regarding Southwind’s operations. (Ex. 14, p. 3).
7. Southwind reiterated its issues to BIS on multiple occasions in late July 2023. (Ex. 16). It requested BIS provide an email Southwind could forward to Pratt & Whitney to “assuage their concerns that BIS would find a violation if they serviced the engines.” (Ex. 16).
8. On July 24, 2023, Southwind responded to a number of questions from BIS regarding the ownership and operation of the company. (Ex. 15).
9. On July 28, 2023, the Office of Chief Counsel for Industry and Security sent Southwind an email confirming “neither Southwind nor Cortex Havacilik VE TUR TIC. A.C. are on the BIS Entity List or Denied Persons List.” (Ex. 17).
10. The email further states: “[N]o Southwind aircraft are currently on the list of aircraft identified on BIS’s website as having operated in apparent violation of U.S. export controls on Russia. However, this list of aircraft is not exhaustive, and the restrictions also apply in any situation in which a person has knowledge that a violation of the EAR has occurred, is about to occur, or is intended to occur in connection with an aircraft or

other item that is subject to the EAR, whether or not such aircraft or other item is included on BIS's website." (Ex. 17).

11. Southwind forwarded the BIS email to Pratt & Whitney on July 28, 2023. (Ex. 18).
12. On August 2, 2023, Pratt & Whitney restored access to the "P&W Engine Wise Connect Portal and the applications accessed through the portal" but noted "the Engine Health Monitoring/ADEM application will again be functional, however, no engine data is being transmitted." (Ex. 18).

Opinion and Recommended Conclusions of Law

BIS regulations related to export administration are issued "under laws relating to the control of certain exports, reexports, and activities." 15 C.F.R. § 730.1.⁵ These export control provisions "are intended to serve the national security, foreign policy, nonproliferation of weapons of mass destruction, and other interests of the United States." 15 C.F.R. § 730.6. To prevent an imminent violation of the EAR, the Assistant Secretary may issue a TDO on an *ex parte* basis. 15 C.F.R. § 766.24(a). The TDO "will deny export privileges to any person named in the order as provided for in § 764.3(a)(2) of the EAR." 15 C.F.R. § 766.24(a). The order is valid for 180 days, but the Assistant Secretary may renew it, more than once, in additional 180-day increments. 15 C.F.R. §§ 766.24(b)(4), 766.24(d)(4). The Assistant Secretary may also modify or amend a TDO. 15 C.F.R. §§ 766.24(d), 766.23(b).

To prevent evasion of the TDO, the Assistant Secretary may apply the order "not only to the respondent, but also to other persons then or thereafter related to the respondent by ownership, control, position of responsibility, affiliation, or other connection in the conduct of trade or business." 15 C.F.R. §§ 766.23(a), 766.24(c). When adding a related person to an order affecting export privileges, "BIS shall, except in an *ex parte* proceeding under § 766.24(a)" give that person notice and an opportunity to oppose the action. 15 C.F.R. § 766.23(b).

⁵ The EAR primarily relate to the implementation of the Export Administration Act of 1979. 15 C.F.R. § 730.2.

Where the Assistant Secretary issues or renews a TDO on an *ex parte* basis pursuant to 15 C.F.R. § 766.24, persons “designated as a related person may not oppose the issuance or renewal of the temporary denial order, but may file an appeal in accordance with § 766.23(c).” 15 C.F.R. § 766.24(d)(3)(ii). In such an appeal, the “sole issues to be raised and ruled on . . . are whether the person so named is related to the respondent and whether the order is justified in order to prevent evasion.” 15 C.F.R. § 766.23(c). An administrative law judge then submits a recommended decision to the Under Secretary for Industry and Security “recommending whether the issuance or the renewal of the temporary denial order should be affirmed, modified, or vacated.” 15 C.F.R. § 766.24(e)(4).

Having outlined the relevant regulations governing this appeal, I now turn to the facts of the case and conclude Southwind has no standing to bring this appeal pursuant to 15 C.F.R. § 766.23(c) as it was not named by BIS as a related person. I also conclude the relief Southwind seeks is outside the scope of an appeal as set forth in 15 C.F.R. § 766.23(c).

1. Southwind is not a “related person” with standing to bring an appeal pursuant to 15 C.F.R. § 766.23.

As a preliminary matter, BIS did not name Southwind as a related person when it renewed the Nordwind TDO on June 15, 2023. It simply did not apply the Nordwind TDO to Southwind. Pratt & Whitney *inferred* Southwind was the “Turkish airline” associated with Pegas, a corporation designated by BIS as related to Nordwind. But this inference does not render Southwind a related person with standing to appeal the Nordwind TDO. *See* 15 C.F.R. § 766.23(c)(“Any person *named by BIS* in an order as related to the respondent may appeal that action”)(emphasis added).⁶

⁶ It also follows that because Southwind was not named as a related person, the regulations did not require BIS to give it notice and an opportunity to oppose the renewal of the TDO. 15 C.F.R. § 766.23(b). This is especially true in the present case, where BIS issued and renewed the TDO on an *ex parte* basis pursuant to 15 C.F.R. § 766.24.

2. Southwind seeks relief outside the scope of 15 C.F.R. § 766.23.

Even if BIS had named Southwind as a related person with standing to bring this appeal, Southwind seeks relief outside the scope of such an appeal. 15 C.F.R. § 766.23(c). The regulations specifically limit the appeal to two issues: whether Southwind is related to Nordwind and whether the TDO is justified in order to prevent evasion. 15 C.F.R. § 766.23(c). Southwind does not ask me to rule on either issue, and even so, the record shows there is no current TDO naming Southwind as a related person that I could affirm, modify, or vacate as part of this appeal.⁷

Southwind instead asks that I direct BIS to (1) withdraw the June 15, 2023, TDO, and (2) issue an order removing the reference to the “Turkish airline” and clarifying Southwind did not engage in any violations of the EAR. Southwind seeks to reinstate “the status quo prior to June 15, 2023, making it clear that companies may continue to transact with Southwind Airlines.” (Appeal, p. 12). I cannot direct BIS to provide this relief to Southwind.

I note, however, BIS emailed Southwind on July 28, 2023, definitively stating the company is not on the BIS Entity List or Denied Persons List, and none of Southwind’s aircraft are “on the list of aircraft identified on BIS’s website as having operated in apparent violation of U.S. export controls on Russia.” (Ex. 17). Furthermore, the current version of the Nordwind TDO, published on the Federal Registry on July 30, 2023, does not prohibit any company from transacting with Southwind. (BIS Ex. 2).

See 15 C.F.R. § 766.24(d)(3)(ii)(where TDO is issued or renewed on *ex parte* basis, related persons “may not oppose the issuance or renewal of the TDO but may file an appeal in accordance with § 766.23(c)”; 15 C.F.R. § 766.23(b).

⁷As noted above, the June 28, 2023, modification removed Pegas as a related person. (BIS Ex. 2). I cannot rule on whether the June 15, 2023, TDO, which is no longer in effect and which did not name Southwind as a related party, was justified to prevent evasion of the Nordwind TDO.

In light of the above, I recommend Southwind's appeal be **DISMISSED**.

Done and dated this 24th day of August 2023, at
Galveston, Texas

A handwritten signature in black ink that reads "Tommy Cantrell". The signature is written in a cursive style with a large, sweeping initial 'T'.

TOMMY CANTRELL
ADMINISTRATIVE LAW JUDGE
UNITED STATES COAST GUARD

CERTIFICATE OF SERVICE

I hereby certify that I have served by electronic mail the foregoing Recommended

Decision to Dismiss Appeal upon the following:

Gregory Michelsen, Esq.
Andrea Duvall, Esq.
Attorneys for Bureau of Industry and Security
Office of Chief Counsel for Industry and Security
U.S. Department of Commerce
(Sent via electronic mail)

Wendy Wysong, Esq.
Ali Burney, Esq.
Steptoe & Johnson HK LLP
Attorneys for Respondent
(Sent via electronic mail)

U.S. Coast Guard
ALJ Docketing Center
Attn: Hearing Docket Clerk
(Sent via electronic mail)

I hereby certify that I have forwarded by Express Courier the foregoing Recommended

Decision to Dismiss Appeal and the case file upon the following:

Alan F. Estevez
Under Secretary for Industry and Security
Bureau of Industry and Security
U.S. Department of Commerce
(Sent via Fed Ex)

Done and dated August 24, 2023, at
Galveston, Texas



Ericka J. Pollard
Paralegal Specialist to
Tommy Cantrell
Administrative Law Judge
United States Coast Guard