

**COMMENTS OF THE
NATIONAL EMPLOYMENT LAW PROJECT**

**BEFORE THE
TRANSPORTATION SECURITY ADMINISTRATION
AND THE U.S. COAST GUARD**

**ON THE NOTICE OF PROPOSED RULEMAKING
TRANSPORTATION WORKER IDENTIFICATION CREDENTIAL**

**Docket Numbers TSA-2006-24191;USCG-2006-24196
(70 Federal Register 29396)**

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We appreciate this opportunity to comment on the proposed regulations (71 Federal Register 29396, May 22, 2006) implementing the new Transportation Worker Identification Credential, which is mandated by the Maritime Transportation Security Act of 2002 (49 U.S.C. Section 70105).

The National Employment Law Project (NELP) is a non-profit organization that promotes employment opportunities and labor protections for low-wage workers. NELP's Second Chance Labor Project works with advocates, policy makers and people with criminal records to ensure a more fair and effective system of employment screening for criminal records. The Project seeks to protect public safety and security while promoting the rehabilitative value of work and the basic employment rights of all workers, including those with criminal records.

Our comments address the over-breadth of the proposed disqualifying criminal offenses required of port workers who apply for a Transportation Worker Identification Credential (TWIC). We are especially concerned that thousands of workers who will be screened for certain drug and "dishonesty" offenses will be unfairly denied their livelihood without adequate justification that they pose a "terrorism security risk" as required by the maritime statute. African-American and Latino men, who now represent large segments of the maritime workforce, will be most severely penalized, thus requiring key reforms to TSA's proposed TWIC disqualifying offenses.

**The Proposed TWIC Regulations (49 C.F.R. Section 1572.103(b))
Exceed the MTSA's Narrow Disqualification Standards**

The Maritime Transportation Security Act (MTSA) of 2002 (P.L. 107-295) is unambiguous in both its intent and design to protect the nation's ports against the threat of terrorism. Specifically, the MTSA requires all workers employed in secured areas of maritime ports to be screened for a criminal record to qualify for the new TWIC. The MTSA then goes further and sets forth detailed standards to be applied by the Secretary of the Department of Homeland Security, which far exceed the level of specificity of most other federal laws regulating criminal background checks. The statute directs the Secretary to disqualify a worker from employment in a secured area of a maritime port based only on felony offenses dating back 7 years (or 5 years after release from incarceration) that "could cause the individual to be a *terrorism security risk*." (42 U.S.C. Section 70105(c)) (emphasis added).

In significant contrast to the MTSA's deliberate and measured scheme to screen for

individuals who pose a “terrorism security risk,” TSA’s proposed regulations broadly disqualify workers who have been convicted of many lower-level, non-violent felonies. Most importantly, the proposed regulations (49 C.F.R. Section 1572.103(b)) disqualifying those who have been convicted in the past seven years of non-violent drug crimes and as well as property offenses covered under the proposed disqualification for crimes involving “dishonesty, fraud and misrepresentation.” (49 C.F.R. Sections 1572.103(b)(6), (12)).¹

In doing so, the TSA merely incorporated its regulations that apply to commercial drivers transporting hazardous material (49 C.F.R. Section 1572.103) without accounting for the unique statutory scheme of the MTSA. In fact, the proposed TWIC regulations do not even reference the MTSA’s “terrorism security risk” standard regulating disqualification. (Emphasis added). Instead, the proposed TWIC regulations apply the more general “security threat” (Section 1572.5(a)) standard based on the limited language of the USA Patriot Act.² By fundamentally deviating from the MTSA’s narrow screening standards regulating the maritime ports, the proposed TWIC disqualifications undermine both the integrity and effectiveness of the TWIC screening process.

The Proposed Drug Crime & “Dishonesty” Disqualifications Apply to More than One-Third of All Felony Convictions

The two broad categories of non-violent disqualifying offenses proposed by TSA account for at least one-third of the over one million felony convictions handed down each year by state courts.³

Indeed, drug “trafficking” is the single largest category of the various state felony convictions, representing over 20% of all cases and over 200,000 individuals sentenced each year.⁴ “Fraud,” which includes embezzlement and other crimes of “dishonesty,” represents 9.5% of all felony convictions (over 100,000 individuals a year). Together, those convicted under these TWIC disqualifying offenses vastly exceed the numbers convicted under the other more specific disqualifying offenses adopted by TSA, including homicide, sexual assault, weapons possession, and robbery. In total, these additional offenses account for 11% of all state felony convictions.⁵

The magnitude of the TWIC disqualifying offenses raises the serious question whether TSA’s proposed regulations are carefully tailored to screen for a legitimate “terrorism security risk” or whether they are so unnecessarily expansive as to prove mostly ineffective. During the debate on the port security bill recently passed by the House of Representatives, the Chairman of

1 The proposed regulation covers any felony drug conviction, other than simple possession, including: “Distribution of, possession with intent to distribute, or importation of a controlled substance.” (Section 1572.103(b)(12).

2 According to the USA Patriot Act (Pub.L. 107-56, Section 1012), background checks are required of hazmat drivers to ensure that the “individual does not pose a *security risk* warranting denial of the license.” (Emphasis added). Also in contrast to the MTSA, the proposed TWIC regulations adopt several “permanent disqualifying criminal offenses,” not subject to the 5 to 7 year felony limit.

3 Bureau of Justice Statistics, *Felony Sentences in State Courts, 2002* (December 2004), Table 1.

4 Drug trafficking (20.2% of all state felony convictions) is followed far behind by drug possession (12.1%), and larceny (11.8%). *Id.*

5 *Id.* By comparison, murder accounts for 0.9% of state felony convictions, sexual assault 3.4%, robbery 3.7% and weapons offenses 3.1%.

the House Homeland Security Committee, Congressman Peter King (R-NY), also expressed serious reservations about the breadth of the TSA's disqualifying offenses:

I have discussed this issue with the Ranking Member, Mr. Thompson, and it is important to note today, as we consider the SAFE Port Act, that the Committee on Homeland Security is concerned that the list of criminal offenses that will initially disqualify a worker from holding a maritime transportation security card includes vague and overly broad crimes. *The proposed list of disqualifying offenses appears to go significantly beyond the already existing mandate of exclusion and we hope that TSA and the Coast Guard, as it finalizes its rules, will narrow and limit the list of disqualifying criminal offenses to more accurately identify individuals that pose a terrorism security risk and who are therefore unworthy to hold a maritime transportation security card.*⁶ (Emphasis added).

TSA's Broad Disqualifying Offenses Penalize the Large Population of African-American and Latino Port Workers

To properly evaluate the impact of TSA's disqualifying offenses, it is also critical to consider the diverse profile of the nation's port workers, including the exceptional racial and ethnic representation of the workforce. African Americans in particular have a long and distinguished history working in the nation's ports, where they have been drawn to good-paying port jobs in urban areas and in southern communities, including the Gulf Coast. For example, in Oakland's maritime port, African Americans account for 40% of the workforce, compared to 37% for Whites. Latinos represent another 22% of the Oakland port workforce, and fully 93% of Oakland's port workers are men.⁷

The remarkable racial and ethnic diversity of the nation's maritime port workers is especially significant given the disproportionate numbers of African-American and Latino men who have had contact with the criminal justice system compared to Whites. Indeed, one-third of African American men (32%) are likely to serve a prison sentence according to the Bureau of Justice Statistics, which is six times the rate of White men.⁸ Also significant for the purposes of the proposed TWIC regulations, three out of four individuals being released from prison have served time for non-violent offenses, including property crimes (40%) and drug offenses (37%). Nearly half of all non-violent offenders (48%) are African-American and another 25% are of Hispanic background.⁹

Because African-Americans and Latinos represent such a large proportion of port workers, TSA's expansive categories of disqualifying crimes will impose a devastating hardship on these minority communities. Recognizing the disproportionate impact against minorities of employment decisions based on a criminal record and the increased potential for discrimination, the Equal Employment Opportunity Commission (EEOC) has imposed a special burden in these cases. The EEOC requires that employment decisions based on criminal convictions bear a

⁶ 152 Cong. Rec. 2120 (daily ed. May 4, 2006) (statement of Rep. King).

⁷ Carol Zabin, et al., *Living Wages at the Port of Oakland* (Center for Labor Research & Education, December 1999), at page 45, Table 3.3b.

⁸ Bureau of Justice Statistics, *Prevalence of Imprisonment in the U.S., 1974-2001* (August 2003), at page 1.

⁹ *Id.*

“direct nexus” with the particular responsibilities of the job.¹⁰ By broadly equating most drug crimes and “dishonesty” offenses with a terrorism security risk, we seriously question whether TSA’s proposed regulations protect against discrimination as required by the EEOC’s standards.

TSA’s Broad Disqualifications Undermine Public Safety by Further Limiting the Employment Opportunities of People with a Criminal Record

TSA’s broad TWIC disqualifications also fail to account for the compelling evidence documenting the impact of gainful employment on those who have previously been convicted of a crime.

For example, a study of 1,600 individuals recently released from Illinois prisons found that only 8% of those who were employed for a year committed another crime, compared to the state’s 54% average recidivism rate.¹¹ More long-term studies have also found that those who have committed a crime are far less likely to do so again if they have since been employed, especially when they have been working in more stable and relatively good-paying jobs, not unlike the jobs of many port workers.¹² Certainly, the chances of someone employed in the ports committing an act of terrorism is even more remote than the likelihood of them again committing any of the disputed TWIC disqualifying crimes.

Moreover, by adopting broad categories of disqualifying offenses that cover more than one-third of all felonies committed in the United States, TSA’s regulations will have the counterproductive effect of actually undermining public safety rather than preventing terrorism. As President Bush stated in his 2004 State of the Union address, “We know from experience that if [former prisoners] can’t find work, or a home, or help, they are much more likely to commit more crimes and return to prison America is the land of the second chance, and when the gates of the prison open, the path ahead should lead to a better life.”

Consistent with the President’s support for “reentry” initiatives that reduce barriers to employment of people with criminal records, the bi-partisan Re-Entry Policy Council has recommended that federal and state policy makers conduct a “review of employment laws that affect employment of people based on criminal history, *and eliminate those provisions that are not directly linked to improving public safety.*”¹³ (Emphasis added). Similarly, the American Bar Association, adopting the recommendations of the Justice Kennedy Commission, has urged the federal government to “limit situations in which a convicted person may be disqualified from otherwise available benefits, including employment, to the greatest extent consistent with public

10 U.S. Equal Employment Opportunity Commission, *Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964* (EEOC Compliance Manual Section 604, February 4, 1987).

11 Presentation by Maurice Emsellem (National Employment Law Project), *New City Hiring Policies Promote Public Safety by Reducing Barriers to Employment of People with Criminal Records*, Before the 7th Annual Conference of the U.S. Conference of Mayors, featuring the results of follow-up data collected by Chicago’s Safer Foundation (June 4, 2006), at page 5. According to the leading longitudinal study, conducted by Sampson and Laub (*Crime in the Making*, 1993) (1993), “job stability is central in explaining adult desistance from crime. “ Indeed, “for all crime types, job stability has a significant negative effect on the hazard rate [of re-arrest].”

12 For example, in Oakland’s maritime port, while the majority of the workers are minorities, 98% are also unionized and their wages average \$38 an hour. *Living Wages at the Port of Oakland*, page 44, Table 3.2b.

13 Reentry Policy Council, *Charting the Safe & Successful Return of Prisoners to the Community* (2004), at page 299.

safety.”¹⁴

Employment opportunities in the transportation sector (including the maritime ports, rail and trucking in particular) are critically important to the population of people struggling to find and maintain gainful work despite a criminal record. In combination with TSA’s hazmat regulations,¹⁵ the proposed TWIC disqualifications will severely limit the few meaningful job prospects available to these individuals, in conflict with the ABA’s recommendation that federal policy makers limit such disqualifications “to the greatest extent consistent with public safety.”

TSA’s Proposed Drug Crime and “Dishonesty” Disqualifications Capture Lower Level Felonies that Do Not Rise to the Required Level of a “Terrorism Security Risk”

For the reasons described above, it is important to closely scrutinize TSA’s disqualifying drug and “dishonesty” offenses, especially where, as here, the intent of the screening law is to identify the most serious security threats.

Disqualifying Drug Crimes: With regard to drug felonies, TSA has included all drug crimes other than mere possession, thus including possession with intent to distribute drugs and other lesser offenses. To help illustrate how broad the nation’s drug trafficking laws have become, we have prepared two tables indicating the minimum amounts required in some of the major port states to be convicted of selling cocaine and marijuana, two of the most common substances that result in felony convictions.

As indicated in both Tables 1 and Table 2, there is no minimum amount required to be convicted of selling either cocaine or marijuana in California, Florida, New Jersey, New York, Virginia or Washington. In fact, in several of these states (California, New Jersey and Virginia), those convicted of selling especially small quantities of cocaine (which may include possession with intent to sell), the minimum prison sentence is three years or more. These state sentencing disparities in drug sales laws also demonstrate the inequitable treatment that results from TSA’s scheme, which applies to drug crimes dating back five years from when the individual was released from prison.

Recommendation: As a result of public comments submitted to the hazmat regulations, TSA correctly removed felony drug possession from its list of disqualifying offenses that apply to commercial drivers seeking a hazmat endorsement, concluding that “[s]imple drug possession generally does not involve violence against others or reveal a pattern of deception, as crimes like smuggling or bribery often do.”¹⁶

Here too, we urge TSA to revisit the broad category of drug crimes and in this case adopt a standard that only disqualifies those who have been convicted of the most serious level drug offenses designated by the individual state laws. TSA should only disqualify those convicted of

¹⁴ American Bar Association, Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates (August 2004), Recommendations at page 2 (adopted by the House of Delegates on August 4, 2004).

¹⁵ As a *New York Times* editorial recently concluded, “Requiring drivers to have background checks before receiving hazardous material certifications makes perfect sense. But the law, as interpreted by the Transportation Security Administration, singles out law-abiding ex-offenders whose criminal records have nothing to do with terrorism or national security.” “Barred from the Long Haul,” *New York Times* (June 6, 2005).

¹⁶ 69 Fed.Reg. 68720, 68723 (November 24, 2004).

trafficking especially large quantities of drugs and those who have a consistent pattern of serious drug convictions. At a minimum, those convicted of an isolated non-violent offense for the most limited quantity of drugs should no longer be designated a “terrorism security risk.”

Table 1
State Drug Crimes Regulating Sale of Cocaine
 (as of January 1, 2000)

State	Minimum Quantity	Minimum Sentence	Maximum Sentence
California	No Minimum	3 Years	5 Years
Florida	No Minimum	Not Specified	15 Years
New Jersey	No Minimum	3 Years	5 Years
New York	No Minimum	Not Specified	25 Years
Virginia	No Minimum	5 Years	40 Years
Washington	No Minimum	Not Specified	10 Years

Source: Andrews University, The MayaTech Corporation, RAND, *Illicit Drug Policies: Selected Laws from the 50 States* (January 2002), Appendix.

Table 2
State Drug Crimes Regulating Sale of Marijuana
 (as of January 1, 2000)

State	Minimum Quantity	Minimum Sentence	Maximum Sentence
California	No Minimum	Not Specified	Not Specified
Florida	No Minimum	Not Specified	5 Years
New Jersey	No Minimum	Not Specified	1.5 Years
New York	No Minimum	Not Specified	1 Year
Virginia	No Minimum	Not Specified	1 Year
Washington	No Minimum	Not Specified	5 Years

Source: Andrews University, The MayaTech Corporation, RAND, *Illicit Drug Policies: Selected Laws from the 50 States* (January 2002), Appendix.

Crimes of “Dishonesty”: The other especially broad category of disqualifying felony offenses that we urge TSA to revisit is the catch-all grouping of crimes involving “dishonesty, fraud and misrepresentation.” (49 C.F.R. Section 1572.103(b)(12)). As described earlier, the single category of felony “fraud” accounts for almost one in ten felony convictions, thus not including the many other crimes of “dishonesty” interpreted by TSA to be covered under the regulations.

By way of illustration , consider the laws of New Jersey, home to large numbers of port workers. In New Jersey, it is a felony to pass a bad check in an amount exceeding \$200 (N.J.S.A. 2c:21-5). Yet an isolated conviction for passing a bad check in the amount of \$200 could be considered by TSA as an offense of “dishonesty,” thus equating these individuals with a terrorism security risk. Welfare fraud is another especially common crime involving “dishonesty” that is, by definition, is an offense involving mostly low-income families. In New

Jersey, unauthorized use of public assistance or food stamps coupons worth \$150 or more is a felony that could be considered disqualifying for the purposes of the TWIC regulations (NJSA 2C:20-36).

Recommendation: *Accordingly, we urge TSA to abandon the unnecessarily broad category of crimes involving “dishonesty, fraud and misrepresentation,” and substitute more specific and serious disqualifying offenses, like perjury or a persistent pattern of felony fraud, that more accurately evidence a potential “terrorist security risk.”*

TSA’s Waiver Process is an Ineffective & Inefficient Substitute for Reforming the TWIC Disqualifications for Lower-Level Drug and “Dishonesty” Offenses

TSA has argued that calls to limit the list of disqualifying crimes are unnecessary because a worker can apply for a waiver under the TSA regulations (40 C.F.R. Section 1572.7).¹⁷ While the waiver process is a necessary and important feature of the MTSA and its implementing regulations, it is not an effective substitute for reform of TSA’s broad disqualifying crimes.

Given the large numbers of individuals with drug and fraud convictions, TSA’s misplaced reliance on the waiver process will impose an unfair hardship on those port workers disqualified due to lower-level non-violent crimes. Indeed, in our experience assisting hazmat drivers in accessing the TSA waiver process, it requires considerable preparation, including letters of support not only from parole and probation officers, but also from individual employers. Thus, many workers may even jeopardize their jobs (or risk not succeeding with the waiver) by having to notify their employer for the first time of their criminal conviction. In addition, as evidenced by the limited number of waivers requested by hazmat drivers, it is clear that many deserving workers will be convinced it is not worth applying once TSA has already made an initial determination that they pose a security risk.

If, on the other hand, the waiver process is accessed by the large numbers of otherwise qualified port workers with lower-level drug and fraud convictions (TSA estimates that more than one million port workers will have to make their way through the TWIC process over the next five years), then the integrity of the waiver process will be severely compromised. TSA will be forced to devote its already limited time and resources to processing cases of individuals who do not pose a terrorist security risk rather than the extra resources necessary to process those waivers involving more serious offenses where the individual has made a strong case based on mitigating evidence that justifies their waiver. We believe that TSA can make more efficient and strategic uses of its limited tax dollars devoted to the TWIC program.

Respectfully submitted,

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¹⁷ See Comments of the Transportation Trades Department, AFL-CIO, Before the Transportation Security Administration and the U.S. Coast Guard (Docket Nos. TSA-2006-34191; USCG-2006-24196), at page 5.