

Canopy Improvements, Westport Access Road, ADA/Maintenance Elevator, Reconstruct/Repair Runway 17R-35L, Westport Apron and Taxiway Expansion, Taxiway B-1, and ADA Aircraft Access.

Proposed class or classes of air carriers to be exempted from collecting PFC's: FAR Part 135 air charter operators who operate aircraft with a seating capacity of less than 10 passengers.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, 2601 Meacham Blvd., Fort Worth, Texas 76137-4298.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Lubbock International Airport.

Issued in Fort Worth, Texas on May 7, 1999.

**Naomi L. Saunders,**  
Manager, Airports Division.

[FR Doc. 99-12515 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-13-M

## DEPARTMENT OF TRANSPORTATION

### Federal Highway Administration

[FHWA DOCKET NO. FHWA-99-5473]

#### Qualification of Drivers; Exemption Application; Vision

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of petition and intent to grant application for exemption; request for comments.

**SUMMARY:** This notice announces the FHWA's preliminary determination to grant the application of James F. Durham for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations (FMCSR). Granting the exemption will enable Mr. Durham to qualify as a driver of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

**DATES:** Comments must be received on or before June 17, 1999.

**ADDRESSES:** Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room

PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

**FOR FURTHER INFORMATION CONTACT:** For information about the vision exemption in this notice, Ms. Sandra Zywockarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about the legal issues related to this notice, Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

#### SUPPLEMENTARY INFORMATION:

##### Electronic Access

Internet users can access all comments received by the U.S. DOT Dockets, Room PL-401, by using the universal resource locator (URL): <http://dms.dot.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512-1661. Internet users may reach the **Federal Register's** home page at: <http://www.nara.gov/fedreg> and the Government Printing Office's database at: <http://www.access.gpo.gov/nara>.

##### Background

On July 18, 1997, Mr. Durham applied for a waiver of the vision requirement in 49 CFR 391.41(b)(10), which applies to drivers of CMVs in interstate commerce. The FHWA denied his application on September 11, 1998, because Mr. Durham did not have three years of recent experience driving with his vision deficiency. He appealed the agency's decision to the United States Court of Appeals for the Sixth Circuit on November 6, 1998. (Case No. 98-4331, *James F. Durham, Jerry W. Parker v. United States Department of Transportation, Federal Highway Administration, and the United States of America*). The FHWA and Mr. Durham have agreed to settle the case without further litigation. In accordance with that agreement, the FHWA has

reconsidered Mr. Durham's waiver application and determined that it should be granted for the reasons discussed in this notice.

When Mr. Durham's application was filed on July 18, 1997, the FHWA was authorized by 49 U.S.C. 31136(e) to waive application of the vision standard if the agency determined the waiver was consistent with the public interest and the safe operation of CMVs. Because the statute did not limit the effective period of a waiver, the agency had discretion to issue waivers for any period warranted by the circumstances of a request. On June 9, 1998, the FHWA's waiver authority changed with enactment of the Transportation Equity Act for the 21st Century (TEA-21), Public Law 105-178, 112 Stat. 107 (1998). Section 4007 of TEA-21 amended the waiver provisions of 49 U.S.C. 31315 and 31136(e) to change the standard for evaluating waiver requests, to distinguish between a waiver and an exemption, and to establish term limits for both. Under revised sections 31315 and 31136(e), the FHWA may grant a waiver for a period of up to 3 months or an exemption for a renewable 2-year period. Mr. Durham's application falls within the scope of an exemption request under the revised statute.

The amendments to 49 U.S.C. 31315 and 31136(e) also changed the criteria for exempting a person from application of a regulation. Previously, an exemption was appropriate if it was consistent with the public interest and the safe operation of CMVs. Now the FHWA may grant an exemption if it finds "such exemption would likely achieve a level of safety that is equivalent to, or greater than, the level that would be achieved absent such exemption." According to the legislative history, Congress changed the statutory standard to give the agency greater discretion to consider exemptions. The previous standard was judicially construed as requiring an advance determination that absolutely no reduction in safety would result from an exemption. Congress revised the standard to require that an "equivalent" level of safety be achieved by the exemption, which would allow for more equitable resolution of such matters, while ensuring safety standards are maintained. (See H.R. Conf. Rep. No. 105-550, at 489 (1998)).

Although Mr. Durham's application was filed before enactment of TEA-21, the FHWA is required to apply the law in effect at the time of its decision unless (1) its application will result in a manifest injustice or (2) the statute or legislative history directs otherwise. *Bradley v. School Board of the City of*

*Richmond*, 416 U.S. 696 (1974). Insofar as the new standard is concerned, nothing in the statute, its history, or the facts in this proceeding meets either of these two tests. In fact, the new standard is more equitable as it allows an exemption to be based on a reasonable expectation of equivalent safety, rather than requiring an absolute determination that safety will not be diminished. In addition, the "public interest" finding required under the previous standard is not necessary under the new exemption standard. These changes enhance the FHWA's discretion to consider exemptions, thus benefitting Mr. Durham rather than causing an injustice.

Although applying TEA-21's new exemption standard does not adversely affect Mr. Durham, subjecting his application to the new procedural requirements would unfairly affect him. Section 4007 requires the Secretary of Transportation to promulgate regulations specifying the procedures by which a person may request an exemption. The statute lists four items of information an applicant must submit with an exemption petition and gives the Secretary 180 days to implement the new procedural regulations. In accordance with that requirement, the FHWA published interim final rules in Docket No. FHWA-98-4145, *Federal Motor Carrier Safety Regulations; Waivers, Exemptions, and Pilot Programs; Rules and Procedures*, 63 FR 67600, December 8, 1998, establishing procedures for requesting an exemption under Section 4007. As the new procedures differ from those in effect when Mr. Durham filed his exemption request, it would be manifestly unjust to further delay resolution of Mr. Durham's application by requiring him to submit information that conforms to the new procedures. To avoid this delay and injustice, we will not apply the new procedural requirements of section 4007 to Mr. Durham's exemption petition.

Accordingly, the FHWA has evaluated Mr. Durham's exemption request on its merits, as required by the decision in *Rauenhorst v. United States Department of Transportation, Federal Highway Administration*, 95 F.3d 715 (8th Cir. 1996), applying the new exemption standard in 49 U.S.C. 31315 and 31136(e). Based on our evaluation, we have determined that exempting him from the vision requirement in 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption.

#### **Qualifications of Mr. Durham**

Mr. Durham is 49 years old and has driven CMVs in various capacities since 1971. From 1974 to 1989, he worked for Yellow Freight System, Inc., in its maintenance department, driving and maintaining company equipment. He became a full-time driver for the carrier in July 1989 and drove approximately 520 miles per week in the Middle Tennessee area until April 1996. At that time, the carrier disqualified him from driving because his vision did not meet the standard in 49 CFR 391.41(b)(10) and he lacked a waiver of the vision requirement.

Mr. Durham's vision deficiency was caused by a penetrating trauma to the right eye in 1992. Corneal scarring, aphakia, and retinal scarring resulted from the injury and has reduced vision in his right eye to finger counting. The uncorrected vision in his left eye measures 20/15, well within regulation standards. According to his doctor, Mr. Durham has variable eye pressure changes in his right eye, but otherwise vision is stable in both eyes. The doctor attests that Mr. Durham is capable of performing tasks related to driving a CMV notwithstanding the limited vision in his right eye.

Following his injury in 1992, Mr. Durham continued to drive for Yellow Freight and was presented a "Safe Driver Award" in 1994 recognizing 13 years of safe driving with the company. After four years of driving with his limited vision, he was disqualified as a driver by the carrier in April 1996 for failing to meet the Federal vision standard. He applied for a waiver in July 1997 and drove part-time for TravelCenters of America from October 1997 until July 1998. At that time, Mr. Durham stopped driving and returned to Yellow Freight where he presently works on the loading docks.

Mr. Durham's driving record since 1994 contains no traffic violations. He was involved in a CMV accident in 1995 that caused property damage but no bodily injury. The accident was judged non-preventable.

#### **Analysis of Mr. Durham's Qualifications**

The *Rauenhorst* decision requires the FHWA to evaluate Mr. Durham's application under criteria applied in the vision waiver program. Among other things, that criteria required drivers to have at least 3 years of experience driving a CMV with their vision deficiency and a safe driving record, as reflected by State records, for the 3 years preceding the waiver application. In fact, one basis for adopting the 3-year

requirement was that it corresponds to the period of time for which driver records are maintained by the States. (59 FR 50887, October 6, 1994.)

Mr. Durham drove a CMV with his vision deficiency from 1992 until April 1996, approximately 4 years. He did not drive for 18-months between April 1996 and October 1997, but resumed driving part-time from October 1997 until July 1998. Thus, Mr. Durham has approximately 5 years of experience driving with his vision deficiency overall (1992-April 1996; October 1997-July 1998).

The FHWA previously denied Mr. Durham an exemption due to the 15-month gap in his driving experience during the 3 years immediately preceding his application (April 1996-July 1997). In our decision, we concluded that Mr. Durham's driving experience was too remote to reflect his current ability to drive safely, as driving records are not readily available beyond 3 years. Further, physical conditions change over time, and current driving ability with the vision deficiency may not be reflected in driving experience from 4 or 5 years ago. Thus, we declined to accept Mr. Durham's remote experience as a basis for projecting future ability to drive safely.

We have reconsidered our analysis of Mr. Durham's application and experience, however, and concluded that unique circumstances related to his case enable us to accept his past driving experience as evidence of his ability to drive safely in the future. First, we do have a copy of Mr. Durham's driving record from 1994 through January 28, 1999, reflecting a safe driving record over a 5 year period rather than a 3 year period. As the record reflects no traffic violations and only one accident in a CMV (judged non-preventable) during that 5 year period, it supports the conclusion that Mr. Durham is able to drive safely with his vision deficiency.

Next, Mr. Durham's driving record shows that the gap in his driving experience did not affect his ability to drive safely. Following his 18-month driving break between April 1996 and October 1997, Mr. Durham drove for 10 months without having an accident or committing a traffic violation. That record demonstrates he still has the ability to adapt his driving skills to accommodate his limited vision, just as he had before the break in experience.

Finally, medical statements from 1997 and 1998 indicate Mr. Durham's vision is stable. As he has driven without an accident or traffic violation since October 1997, we think he has demonstrated that his physical ability to

drive safely now is equivalent to his ability 4 to 5 years ago.

Based upon these factors, the FHWA has determined that Mr. Durham has more than three years of creditable safe-driving experience with his vision deficiency to satisfy the *Rauenhorst* criteria and qualify for a vision exemption.

#### **Basis for Preliminary Determination to Grant Exemption**

Independent studies support the principle that past driving performance is a reliable indicator of an individual's future safety record. The studies are filed in FHWA Docket No. FHWA-97-2625 and discussed at 63 FR 1524, 1525 (January 9, 1998). We believe we can properly apply the principle to monocular drivers because data from the vision waiver program clearly demonstrates the driving performance of monocular drivers in the program is better than that of all CMV drivers collectively. (See 61 FR 13338, March 26, 1996.) That monocular drivers in the waiver program demonstrated their ability to drive safely supports a conclusion that other monocular drivers, with qualifications similar to those required by the waiver program, can also adapt to their vision deficiency and operate safely.

Mr. Durham has qualifications similar to those possessed by drivers in the waiver program. His experience and safe driving record operating CMVs demonstrate that he has adapted his driving skills to accommodate his vision deficiency. For that reason, the FHWA believes exempting him from 49 CFR 391.41(b)(10) is likely to achieve a level of safety equal to, or greater than, the level that would be achieved without the exemption as long as vision in his better eye continues to meet the standard specified in 49 CFR 391.41(b)(10). As a condition of the exemption, therefore, the FHWA proposes to impose requirements on Mr. Durham similar to the grandfathering provisions in 49 CFR 391.64(b) applied to drivers who participated in the agency's former vision waiver program.

These requirements are (1) that he be physically examined every year (a) by an ophthalmologist or optometrist who attests that vision in his better eye meets the standard in 49 CFR 391.41(b)(10), and (b) by a medical examiner who attests he is otherwise physically qualified under 49 CFR 391.41; (2) that he provide a copy of the ophthalmologist's or optometrist's report to the medical examiner at the time of the annual medical examination; and (3) that he provide a copy of the annual medical certification to his

employer for retention in its driver qualification file or keep a copy in his driver qualification file if he becomes self-employed. He must also have a copy of the certification when driving to present to a duly authorized Federal, State, or local enforcement official.

In accordance with revised 49 U.S.C. 31315 and 31136(e), the proposed exemption will be valid for 2 years unless revoked earlier by the FHWA. The exemption will be revoked if: (1) Mr. Durham fails to comply with the terms and conditions of the exemption; (2) the exemption results in a lower level of safety than was maintained before it was granted; or (3) continuation of the exemption would not be consistent with the goals and objectives of 49 U.S.C. 31315 and 31136(e). If the exemption is effective at the end of the 2-year period, Mr. Durham may apply to the FHWA for a renewal under procedures in effect at that time.

#### **Request for Comments**

In accordance with 49 U.S.C. 31315 and 31136(e), the FHWA is requesting public comment from all interested parties on the exemption petition and the matters discussed in this notice. All comments received before the close of business on the closing date indicated above will be considered and will be available for examination in the docket room at the above address. Comments received after the closing date will be filed in the docket and will be considered to the extent practicable, but the FHWA may issue an exemption to Mr. Durham and publish in the **Federal Register** a notice of final determination at any time after the close of the comment period. In addition to late comments, the FHWA will also continue to file in the docket relevant information which becomes available after the closing date. Interested persons should continue to examine the docket for new material.

A copy of this notice will be mailed to compliance and enforcement personnel in the State of Tennessee, in accordance with 49 U.S.C. 31315(b)(7) and 31136(e), and we welcome comments from State officials.

**Authority:** 49 U.S.C. 31315 and 31136; 23 U.S.C. 315; 49 CFR 1.48.

Issued on: May 12, 1999.

**Kenneth R. Wykle,**

*Federal Highway Administrator.*

[FR Doc. 99-12464 Filed 5-17-99; 8:45 am]

BILLING CODE 4910-22-P

## **DEPARTMENT OF TRANSPORTATION**

### **Federal Highway Administration**

[FHWA DOCKET NO. FHWA-99-5578]

#### **Qualification of Drivers; Exemption Applications; Vision**

**AGENCY:** Federal Highway Administration (FHWA), DOT.

**ACTION:** Notice of petitions and intent to grant applications for exemption; request for comments.

**SUMMARY:** This notice announces the FHWA's preliminary determination to grant the applications of 32 individuals for an exemption from the vision requirements in the Federal Motor Carrier Safety Regulations (FMCSRs). Granting the exemptions will enable these individuals to qualify as drivers of commercial motor vehicles (CMVs) in interstate commerce without meeting the vision standard prescribed in 49 CFR 391.41(b)(10).

**DATES:** Comments must be received on or before June 17, 1999.

**ADDRESSES:** Your written, signed comments must refer to the docket number at the top of this document, and you must submit the comments to the Docket Clerk, U.S. DOT Dockets, Room PL-401, 400 Seventh Street, SW., Washington, DC 20590-0001. All comments will be available for examination at the above address between 9 a.m. and 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped envelope or postcard.

**FOR FURTHER INFORMATION CONTACT:** For information about the vision exemptions in this notice, Ms. Sandra Zywockarte, Office of Motor Carrier Research and Standards, (202) 366-2987; for information about legal issues related to this notice, Ms. Judith Rutledge, Office of the Chief Counsel, (202) 366-0834, Federal Highway Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

##### **Electronic Access**

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