

Order 2004-8-8  
Served: August 11, 2004



**UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.**

Issued by the Department of Transportation  
on the 11<sup>th</sup> day of August, 2004

Application of

**KONA ASSOCIATES, L.L.C.**

for an exemption pursuant to 49 U.S.C. § 40109 from  
the provisions of 49 U.S.C. § 41101 (indirect air  
transportation)

**DOCKET OST-2004-17689**

**ORDER GRANTING EXEMPTION**

**Summary**

By this order, we grant an exemption from 49 U.S.C. §41101 and applicable Department regulations to Kona Associates, L.L.C. (“Kona” or “the company”) to the extent necessary to permit it to engage in indirect air transportation, as described in this order.

**Background**

By application dated May 3, 2004, Kona requested an exemption from the requirements of 49 U.S.C. §41101 and certain sections of the Department’s economic regulations to the extent necessary to conduct indirect interstate air transportation of persons and property.<sup>1</sup> Kona proposes to contract, through an aviation consulting company, with a U.S. direct air carrier to provide air transportation to its members between the San Francisco Bay Area and Kailua-Kona, Hawaii, where the members maintain vacation homes. According to Kona, the aircraft will be owned or leased by the consulting company, refurbished to executive configuration with financing provided by Kona, and operated under a long-term contract with the air carrier exclusively for Kona.

In support of its application, Kona states that it is a Limited Liability Company formed in Delaware in 2003 by the developers and residents of Kukio, Hualalai, and Mauna Lani

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<sup>1</sup> Kona also requested expedited handling of its application and that all answers be filed by May 12, 2004. Only one response, from Ryan International Airlines, has been received, which supported Kona’s application. Since Ryan’s comment was filed on May 12 as requested by Kona, and we have moved as quickly as possible to resolve the novel issues presented here, we see no reason to rule on its request.

("community members"), which are adjoining communities of vacation homes on the coast near Kona, Hawaii. The purpose of the company is to arrange private jet transportation between the U.S. Mainland and Kona, Hawaii, for its members, who are all residents of the three residential and recreational compounds noted above and who must be members of the associations of these communities. Kona states that its members will each pay a substantial up-front initiation fee, plus substantial annual dues thereafter to Kona. These revenues will fund the air transportation operations and upkeep of the aircraft and associated management fees.

Kona states that flight privileges will be limited to the association's members, their family, household staff, and invited guests. The flights will not be held out to the public, and other than the initiation fees and annual dues paid by members to Kona, no sale, trade or any sort of compensation in exchange for air transportation will be permitted. Members will not be charged per flight and will not pay any additional amounts related to the extent of their aircraft use. Members will be guaranteed seats on a certain number of flights per year and will be eligible for stand-by status for others. Kona estimates that the membership will ultimately number between 80 and 120 and that membership will be restricted to U.S. citizens, except in very limited cases.

The aviation consulting company that will manage the operation for Kona is Aero Ventures (Aero), an Arizona Limited Liability Company. Under a five-year management contract with Kona, Aero will acquire the aircraft, which is expected to be an ETOPS-qualified Boeing 757-200, oversee its refurbishment to executive configuration, and manage its operation on behalf of Kona. Aero's role will be that of a management company and it will not have direct dealings with Kona's membership.

Aero will contract with a certificated U.S. air carrier to add the aircraft on the carrier's operations specifications and operate the flights for Kona. Aero will receive a fixed annual fee from Kona, plus all of the aircraft expenses and debt service and replacement reserves. All of the flights will be under the full operational control of the direct carrier. The entire operation will be overseen by Aero under its management contract. Apart from setting the schedule and essential terms of the service, Kona will not be directly involved in the operational aspects of the program.

Kona anticipates that the direct air carrier will operate flights between San Francisco/Oakland, California, and Kaliua-Kona, Hawaii, once or twice per week. Kona states that, while it does not anticipate allowing the use of the aircraft for any other purpose, under appropriate circumstances, it may contract with qualifying individuals and groups for operation of single-entity charters as an agent for the direct air carrier.

Kona believes that its proposed operation would constitute private carriage because, in its view, there would be no solicitation or holding out to a definable segment of the public. Kona further recognizes that, to the extent that it may contract with other individuals or entities to use the aircraft on a single-entity charter basis, it could be engaging in indirect air

transportation.<sup>2</sup> In order to resolve any issues about any service it may choose to operate under this proposal, Kona asks that it be exempted from the certification requirements of 49 U.S.C. §41101 to the extent necessary to permit it to operate as an indirect air carrier. Kona further requests relief from the relevant portions of 14 CFR Part 212 and any other provision of the regulations to the extent necessary to permit it to provide the services described herein. Specifically, Kona requests an exemption from the specifications of particular types of charters set forth in §212.4, the rules governing group formation and membership eligibility in §212.5 should these operations be deemed “pro-rata” or “mixed” charters, the provisions governing the protection of customer’s payments in §212.8, and the Public Charter provisions of 14 CFR Part 380.

On May 12, 2004, Ryan International Airlines, Inc. (Ryan) filed an answer in support of Kona’s application. Ryan argues that to the extent that Kona’s proposed activities qualify as those of an indirect air carrier holding out charters subject to the Department’s regulations, it should be exempted from the requirements of 49 U.S.C. §41101 and 14 CFR Part 212 so that Kona can provide the beneficial services it has proposed.<sup>3</sup>

## **Decision**

After careful consideration, we have decided to grant Kona the requested exemption from 49 U.S.C. §41101 and 14 CFR Parts 212 and 380 of the Department’s regulations to the extent necessary to enable it to engage in the transportation services and operating arrangements described in this order.

49 U.S.C. §41102(a)(2) provides that any person who engages directly or indirectly in air transportation is deemed to be an air carrier. Any air carrier holding out or providing air transportation must hold a certificate of public convenience and necessity from the Department under 49 U.S.C. §41101 or an exemption from that statute. (See, e.g., 49 U.S.C. §41109.) In the contractual arrangements that Kona describes in its application, Kona is acquiring access to aircraft and air services on behalf of its community members, as well as marketing those air services to community members. In effect, Kona is holding out and selling air transportation to its community members through membership fees and dues, which would be used to pay for air transportation. Under these circumstances, Kona is engaging in a type of indirect air carrier activity for which authority is required.

We believe that Kona has shown that the grant of an exemption to implement the arrangement described above is in the public interest, provided certain limited conditions are observed. As described in Kona’s application, its proposal would provide additional service options to community members, the pool of potential individuals eligible to participate is

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<sup>2</sup> If Kona arranged for such single-entity charters as the agent of either the carrier or the customer, it would not be engaged in air transportation as an indirect air carrier.

<sup>3</sup> Ryan also urges the Department to adopt simplified procedures, which would permit third-party indirect air carriers to secure appropriate waivers or exemptions from the charter rules and statutory requirements that currently preclude such intermediaries from arranging single-entity charters for sophisticated customers. Ryan’s suggestion would appear to require a *de novo* rulemaking proceeding and, in any event, is beyond the scope of Kona’s request.

narrowly defined and is not expected to exceed 120 members, there will be no advertising, mailings, or mass solicitations to the general public about the services, neither the memberships nor any seat on the aircraft may be sold to a third party, and the direct air transportation will be provided by a certificated air carrier under a long-term contract. The executive-configured aircraft used for providing the air transportation will be on the air carrier's operations specifications and all of the flights will be fully under the operational control of the direct air carrier. Furthermore, any additional charters with other groups or individuals would be provided in full accordance with Department regulations.

We are not prepared, however, to grant an open-ended exemption to Kona for its proposal. In all respects, the exemption granted by this order is limited to the transaction described above with respect to the three communities noted. In the event that Kona desires to expand the arrangement beyond that described above, especially with respect to the maximum number of 120 participants, or the addition of eligible members from other communities, or the use of additional aircraft beyond the single aircraft proposed here, it must first obtain approval from the Department. In addition, Kona will be required to use a certificated air carrier. Since the number of potential individuals eligible to participate is limited to 120 members and each participant will be a member of the Limited Liability Company, we are willing to waive any escrow requirements that would otherwise be applicable to Kona as an indirect air carrier, provided that adequate notice is given by Kona to each member or potential member of their rights and responsibilities with respect to the air transportation to be provided, including their rights, if any, to refunds of amounts paid.<sup>4</sup> Lastly, Kona must meet all applicable Transportation Security Administration requirements. With these conditions, we find no basis to be concerned that the arrangement proposed with respect to the members of the three communities would contravene any Department policies regarding licensing or consumer protection or would otherwise be contrary to the public interest.

We do not, however, believe it to be in the public interest similarly to exempt Kona from our requirements to the extent it desires to arrange charter flights on behalf of other entities or individuals. Kona does not need such an exemption so long as it acts either as the agent of the carrier, as it proposes in its filing, or of the customer. Moreover, Kona has not made an adequate showing why it is in the public interest to exempt it, and any direct air carrier with which it may contract, from our rules designed to protect purchasers of charter transportation, such as our rules requiring signed contracts and financial security protection for charter payments found in 14 CFR Parts 212 and 380.

**ACCORDINGLY:**

1. We grant Kona Associates, L.L.C. an exemption from the requirements of 49 U.S.C. §41101 and applicable economic regulations of the Department to the extent necessary to permit it to engage in indirect air transportation, as described above, *provided that* Kona Associates, L.L.C. meets the conditions described above.

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<sup>4</sup> We fully expect such notice to be provided in the normal course of signing up members, since we understand that members will be required to qualify as "accredited investors" under Regulation D of the 1933 Securities Act (17 CFR section 230.501).

2. We reserve the right to amend, modify, or revoke this authority at any time, in the public interest, without notice or hearing.
3. Kona Associates, L.L.C. must obtain approval from the Department, as described in this order of major changes in the program, including, but not limited to, additions of communities, or additions to the number of individual participants beyond 120, or the use of more than one aircraft under this exemption.
4. To the extent not granted by this order, we deny all other requests of Kona Associates, L.L.C. in its application dated May 3, 2004.

BY:

**KARAN K. BHATIA**  
Assistant Secretary for Aviation  
and International Affairs

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