

§ 768.5

submitting a Foreign Availability Submission (FAS) within 90 days after denial of the license. As part of its submission, the claimant must request that the specified license application be approved on the grounds of foreign availability. The evidence must relate to the particular export as described on the license application and to the alleged comparable item. If foreign availability is found, the Secretary will approve the license for the specific items, countries, and quantities listed on the application. The denied license assessment procedure, however, is not intended to result in the removal of the U.S. export control on an item by incrementally providing a country with amounts that, taken together, would constitute a sufficient quantity of an item. The Secretary will not approve on foreign availability grounds a denied license if the approval of such license would itself render the U.S. export control ineffective in achieving its purpose. In the case of a positive determination, the Secretary will determine whether a decontrol assessment is warranted. If so, then BIS will initiate a decontrol assessment.

(c) *Decontrol assessment.* (1) Any claimant may at any time request that BIS initiate a decontrol assessment by a FAS to BIS alleging foreign availability to any country or countries.

(2) A TAC may request that BIS initiate a decontrol assessment at any time by submitting a TAC Certification to BIS that there is foreign availability to a controlled country for items that fall within the area of the TAC's technical expertise.

(3) The Secretary, on his/her own initiative, may initiate a decontrol assessment.

(d) *BIS mailing address.* All foreign availability submissions and TAC certifications should be submitted to: Department of Commerce, Bureau of Industry and Security, Room H-1093, 14th Street and Pennsylvania Avenue, NW, Washington, DC 20230.

[61 FR 12915, Mar. 25, 1996, as amended at 72 FR 25196, May 4, 2007]

15 CFR Ch. VII (1-1-12 Edition)

§ 768.5 Contents of foreign availability submissions and Technical Advisory Committee certifications.

(a) All foreign availability submissions must contain, in addition to information on product or technology alleged to be available from foreign sources, at least:

- (1) The name of the claimant;
- (2) The claimant's mailing and business address;
- (3) The claimant's telephone number; and
- (4) A contact point and telephone number.

(b) Foreign availability submissions and TAC certifications should contain as much evidence as is available to support the claim, including, but not limited to:

- (1) Product names and model designations of the items alleged to be comparable;
- (2) Extent to which the alleged comparable item is based on U.S. technology;
- (3) Names and locations of the non-U.S. sources and the basis for claiming that the item is a non-U.S. source item;
- (4) Key performance elements, attributes, and characteristics of the items on which a qualitative comparison may be made;
- (5) Non-U.S. source's production quantities and/or sales of the alleged comparable items and marketing efforts;
- (6) Estimated market demand and the economic impact of the control;
- (7) Product names, model designations, and value of U.S. controlled parts and components incorporated in the items alleged to be comparable; and
- (8) The basis for the claim that the item is available-in-fact to the country or countries for which foreign availability is alleged.

(c) Supporting evidence of foreign availability may include, but is not limited to, the following:

- (1) Foreign manufacturers' catalogs, brochures, operation or maintenance manuals;
- (2) Articles from reputable trade and technical publications;
- (3) Photographs;

(4) Depositions based on eyewitness accounts; and

(5) Other credible evidence.

NOTE TO PARAGRAPH (C) OF THIS SECTION: See Supplement No. 1 to part 768 for additional examples of supporting evidence.

(d) Upon receipt of a FAS or TAC certification, BIS will review it to determine whether there is sufficient evidence to support the belief that foreign availability may exist. If BIS determines the FAS or TAC certification is lacking in supporting evidence, BIS will seek additional evidence from appropriate sources, including the claimant or TAC. BIS will initiate the assessment when it determines that it has sufficient evidence that foreign availability may exist. Claimant and TAC certified assessments will be deemed to be initiated as of the date of such determination.

(e) Claimants and TACs are advised to review the foreign availability assessment criteria described in § 768.6 of this part and the examples of evidence described in Supplement No. 1 to part 768 when assembling supporting evidence for inclusion in the FAS or TAC certification.

§ 768.6 Criteria.

BIS will evaluate the evidence contained in a FAS or TAC certification and all other evidence gathered in the assessment process in accordance with certain criteria that must be met before BIS can recommend a positive determination to the Secretary. The criteria are defined in § 768.1(d) of this part. In order to initiate an assessment, each FAS and TAC certification should address each of these criteria. The criteria are statutorily prescribed and are:

- (a) Available-in-fact;
- (b) Non-U.S. source;
- (c) Sufficient quantity; and
- (d) Comparable quality.

§ 768.7 Procedures.

(a) *Initiation of an assessment.* (1) Once BIS accepts a FAS or TAC certification of foreign availability, BIS will notify the claimant or TAC that it is initiating the assessment.

(2) BIS will publish a FEDERAL REGISTER notice of the initiation of any assessment.

(3) BIS will notify the Departments of Defense and State, the intelligence community, and any other departments, agencies and their contractors that may have information concerning the item on which BIS has initiated an assessment. Each such department, agency, and contractor shall provide BIS all relevant information concerning the item. BIS will invite interested departments and agencies to participate in the assessment process (See paragraph (e) of this section).

(b) *Data gathering.* BIS will seek and consider all available information that bears upon the presence or absence of foreign availability, including but not limited to that evidence described in § 768.5 (b) and (c) of this part. As soon as BIS initiates the assessment, it will seek evidence relevant to the assessment, including an analysis of the military needs of a selected country or countries, technical analysis, and intelligence information from the Departments of Defense and State, and other U.S. agencies. Evidence is particularly sought from: industry sources worldwide; other U.S. organizations; foreign governments; commercial, academic and classified data bases; scientific and engineering research and development organizations; and international trade fairs.

(c) *Analysis.* BIS will conduct its analysis by evaluating whether the reasonable and reliable evidence that is relevant to each of the foreign availability criteria provides a sufficient basis to recommend a determination that foreign availability does or does not exist.

(d) *Recommendation and determination.* (1) Upon completion of each assessment, BIS, on the basis of its analysis, will recommend that the Secretary make a determination either that there is or that there is not foreign availability, whichever the evidence supports. The assessment upon which BIS bases its recommendation will accompany the recommendation to the Secretary.

(2) BIS will recommend on the basis of its analysis that the Secretary determine that foreign availability exists