

FLIGHT-WATCH

VOLUME 250

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FEBRUARY 2013

How Can a Foreign Citizen Own an American Corporation And Fly an Airplane in the United States With American Registration?

I. How This Subject Came to My Attention

In this article, we will discuss how foreign citizens could have avoided legal proceedings that could have resulted in forfeiting ownership in their aircraft.

At the time this article was originally dictated, the author was representing foreign citizens in forfeiture proceedings initiated by the Drug Enforcement Administration and/or U.S. Customs and Border Protection against four aircraft registered with American registration to a limited liability company owned by foreign citizens. Because the registration does not comply with United States law, agencies of the United States government seized the aircraft, and forfeiture proceedings were brought. Complaints to Contest Forfeiture and Petitioners for Remission of Forfeiture were filed with the Drug Enforcement Administration and U.S. Customs and Boarder Protection.

II. The General Rule

Generally, aircraft in the United States must be owned by a citizen of the United States. (49 U.S.C. §40102(a)(15). For purposes of our discussion and analysis, a United States citizen includes an individual who is a United States citizen, 49 U.S.C. §40102(a)(15)(A), a partnership whose partners are individually United States citizens, 49 U.S.C. §40102(a)(15)(B), or “a corporation or association organized under the laws of the United States or a state, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States and in which at least seventy-five percent of the voting interest is owned or controlled by persons that are citizens of the United States.” 49 U.S.C. §40102(a)(15)(C).

Recognizing that the president and two-thirds of the board of directors or managing officers must be American citizens and that seventy-five percent of the voting interest in the corporation must be owned by American citizens, how can a corporation organized in the United States but owned by foreign citizens own and operate an airplane in America with United States registration?

III. The Foreign Corporation Exception

While aircraft owned and operated in America are generally owned by American citizens, if the aircraft is not registered under the laws of a foreign country, it may be registered in the United States by “a corporation, not a citizen of the United States when the corporation is organized and doing business under the laws of the United States or a state, and the aircraft is based and is primarily used in the United States.” 49 USC §44102(a)(1)(C). It is noteworthy that the foreign corporation exception does not appear to embrace limited liability companies. The seasoned aviation practitioner will recall that when filing an application to register an aircraft under the name of a limited liability company, proof of American ownership is required attendant to the filing.

While there is statutory authority for a foreign corporation to own and operate an aircraft in the United States, some consideration should be given to the regulatory requirements promulgated by the Federal Aviation Administration to implement this statutory authority.

IV. The Regulatory Requirements to Follow by a Foreign Corporation In Registering an Aircraft in America

Unlike an American corporation, a foreign corporation must, attendant to submitting its application for registration, submit a certified copy of its certificate of incorporation. 14 CFR §47.9(a)(1). The foreign corporation must certify that it is lawfully qualified to do business in one or more states. 14 CFR §47.9(a)(2). The foreign corporation must certify that the aircraft will be based primarily and used in the United States. 14 CFR § 47.9(a)(3).

While the statutory authority for a foreign corporation owning and operating an aircraft in the United States declares that the aircraft will primarily be based and used in the United States, the regulation promulgated by the FAA in the furtherance of this statutory authority requires that at least sixty percent of the total flight hours of the aircraft during each six month reporting period shall be in the United States. 14 CFR §47.9(b)(1), (2).

While one might imagine that a flight commencing in the United States and terminating in Canada might satisfy the sixty percent rule discussed previously, that is not the case. The requirement that sixty percent of the total flight hours be flown in the United States requires that the flight be between two points in the United States. 14 CFR §47.9(c). A foreign corporation operating an aircraft in the United States based upon American registry must maintain and make available for inspection by the FAA upon their request records containing the total flight hours in the United States of the aircraft for three calendar years after the year in which the flight hours were accumulated. 14 CFR §47.9(c).

Finally, as indicated above, the foreign corporation must send to the FAA Aircraft Registry every six months a signed report stating the total time in service of the airframe, 14 CFR §47.9(f)(1)(i), the total flight hours accumulated on the aircraft in the United States during that report period, 14 CFR §47.9(f)(1)(ii), or a signed statement must be submitted to the FAA that during the reporting period in question, the aircraft was flown exclusively in the United States. 14 CFR §47.9(f)(2).

In the case under discussion here, the problem with that registration was that since a limited liability company was employed, the registration form declared that the principals of the company were Americans when they were not. The aircraft were seized on the theory that the registration was fraudulent. We will now discuss the statutes and regulations employed to remit the forfeiture and regain custody of the aircraft, a process that was underway when this article was originally drafted.

V. Claims to Contest Forfeiture and Petitions for Remission of Forfeiture

One of the aircraft was seized by the Drug Enforcement Administration (the “DEA”). The notice of seizure letter from the DEA referred to 19 U.S.C. §1618 and 18 U.S.C. §983.

19 U.S.C. §1618 deals with petitions for remission of forfeiture. Essentially, the code section says that if the forfeiture of the property occurred without willful negligence and with no intention on the part of the petitioner to defraud or violate the law, then the forfeiture can be remitted upon terms that are just and reasonable or the forfeiture can be discontinued.

There are regulations to be followed with regard to administrative forfeitures, and these are found in 28 C.F.R. §9.1, et seq. Under 28 C.F.R. §9.1(b)(1), remission or mitigation of forfeitures within the Federal Bureau of Investigation is delegated to the Forfeiture Counsel who is the Unit Chief, Legal Forfeiture Unit, Office of the General Counsel. Within the DEA, authority to grant remission or mitigation of forfeitures is delegated to Forfeiture Counsel, Office of the Chief Counsel.

In the matter that I handled, the decision was made to simultaneously and concurrently file both a petition for remission of forfeiture and also a notice of claim to contest the forfeiture. The claim provisions are found in 18 USC §983 and require that the claim be filed within 30 days after the final publication of a notice of seizure. 18 USC §983(a)(2)(A), (B). The claim to contest forfeiture must identify the property, state the claimant’s interest, and be made under oath and subject to penalty of perjury. See 18 USC §983(2)(A), (C)(i),(ii),(iii). The claim of forfeiture does not require the posting of a bond. 18 USC §983(2)(A), (E).

My clients had about five days within which to file the claim to contest forfeiture due to a delay in the transmittal of the notice of seizure. It was not possible to file a sworn notice of claim timely. The undersigned spoke with counsel at the DEA, and he advised to go ahead and file a claim to contest forfeiture even if it was not verified. He had indicated that the claim to contest forfeiture would be defective and would be rejected, but that would give my client thirty additional days within which to amend the claim and file it properly. In fact, that is the procedure we followed, and it worked.

In due course, the DEA in Washington referred the case to the United States Attorney’s Office in Tampa, Florida for a resolution. At or about the same time, the two aircraft seized by United States Customs were the subject of a notice from Customs officials indicating that the forfeiture of the aircraft would be remitted on four conditions:

The claimants would execute hold harmless agreements in favor of U.S. Customs;

The claimants would pay U.S. Customs, as a penalty, thirty percent of the appraised value of the aircraft;

The claimants would pay U.S. Customs all the storage fees incurred while storing the seized aircraft; and

The claimants would properly register their aircraft with the FAA.

CONCLUSION

The matter handled by the undersigned involved two aircraft seized by U.S. Customs and one aircraft seized by the DEA. Essentially, the procedures followed were very similar with regard to both government agencies. The aircraft owners did succeed in avoiding forfeiture of their aircraft. However, they were required to pay stiff penalties as outlined above. It is extremely important to properly structure the ownership of aircraft to be operated by foreign nationals under the authority of the United States registration. Citizens of foreign countries who live in the United States and desire to own and operate an aircraft in America should carefully follow the statutory authority and regulations promulgated by the FAA to ensure that they do not run afoul of the DEA or the U.S. Customs and Border Protection and be subjected to proceedings to confiscate aircraft illegally registered. This article should underscore the importance of properly registering aircraft to avoid the potential loss of the aircraft and the imposition of large fines and penalties as a condition to having possession of the aircraft restored to the owner.



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