



US Registration Of Non-US Owned Aircraft

This is to provide you with an explanation of the various ways for a non-US corporation to obtain or maintain US registration for an aircraft under the United States Transportation Code ("the Code"), 49 USC §§ 44102(a) and 40102(a)(15), and the implementing regulations contained in the Federal Aviation Regulations, 14 CFR Part 47. An aircraft is eligible for US registration only if it is owned by one of the following:

- An individual who is a US citizen or a resident alien, 14 CFR § 47.7(a) and (b); or
- General or limited partnership composed solely of individuals who are US citizens, 14 CFR § 47.7(d); or
- Corporation organized under the laws of one of the states, territories or possessions of the US, and its president and $\frac{2}{3}$ or more of its other managing officers and directors are US citizens, and at least 75 % of its stock is owned or controlled by US citizens, 49 USC § 44102(a)(15)(C), 14 CFR § 47.9(a); or
- The aircraft is based and primarily used in the US (i.e., at least 60% of its flight hours in each six month period are on flights between two points within the US), 14 CFR § 47.9; or
- A trust with a US citizen or resident alien trustee and not more than 25 % of the beneficial interest is controlled by those who are neither US citizens nor US resident aliens, 49 USC § 44102(a); 14 CFR § 47.7(c)(iii).

While "owner" is not defined in the Code, the FAA consistently has applied general property law concepts in making determinations as to the party who is deemed to be the owner of an aircraft for registration purposes. Generally, the owner is the holder of legal title, provided, however, a nominee holding bare legal title as an accommodation for the true owner is not considered to be the owner. In addition, the purchaser under a conditional sale contract and the lessee under a "finance lease" are deemed to be the owner of the subject aircraft for purposes of US registration even though they do not have legal title.

A "finance lease" includes the following types of leases:

- the lessee is obligated to purchase the aircraft at the end of the lease term;
- the lessee has an option to purchase the aircraft for a sum not exceeding 10 % of its cost or value; or
- although the option price exceeds 10% of the lessor's cost or the value of the aircraft, the lessee can be expected to exercise the option because provisions of the lease make it more expensive for the lessee not to exercise the purchase option.

However, a lease will not be treated as a finance lease if the lessee can terminate the lease without substantial penalty.

How can US registration be accomplished?

There are a number of ways in which a transaction can be structured to achieve US registration of an aircraft without its non-US owner having to relinquish the benefits of ownership. The following are examples of transactional forms that satisfy the registration requirements of the Code even though a non-US citizen retains a substantial interest in the aircraft.

Operating lease with a US citizen lessor.

The simplest method by which a non-US citizen, whether a corporation or individual, can operate a US registered aircraft is to vest title to the aircraft in a US citizen as lessor and lease the aircraft to the non-US lessee under an "operating lease." By this method, the non-US citizen obtains the use of the aircraft for the specified term and may even have an option to purchase it for more than 10% of its cost or value. There are a number of US financing institutions that will act as lessors of aircraft. It should be kept in mind that the lease cannot be a "finance lease" if the lessor is to be treated as the owner for registration purposes.

A variation on this structure is to have the non-US owner lease the aircraft to a US citizen under a "finance lease", then have the lessee sublease the aircraft to the user under an "operating lease." In this structure, the US citizen lessee will be treated as the owner for registration purposes. The sublessee user should not be the lessor. However, the FAA has not objected to transactions in which the lessor and the sublessee are affiliates.

Non-US citizen corporations

A non-US citizen corporation which is organized under the laws of one of the States, territories or possessions of the US may register its aircraft under the provision in Section 44102(a)(1)(C) of the Code so long as such aircraft is "based and primarily used in the US...." An owner whose aircraft is registered under the provision must submit to the FAA at the end of each six month period a statement of the flight hours operated during the period and total number of such hours operated on flights in the US. Some 60% of such flight hours must be non-stop flights between two points within the US (flights

into or out of the US do not count). As a result, this may not be an acceptable alternative for owners whose anticipated international flights will mean it cannot satisfy the flight hours requirement or who find it inconvenient to comply with the reporting requirements. Failure to provide the FAA with the flight hours information to satisfy the US flight hours requirement will result in the revocation of the registration of the aircraft. The "based and primarily used" provision of the Code is available only to corporations organized under US law. To register an aircraft under the "based and primarily used" provisions of the Code and 14 CFR § 47.9, a certified copy of the corporations's certificate of incorporation must be filed with the FAA. In addition, the corporations's AC Form 8050-1, Aircraft Registration Application, must show in the appropriate blanks its state of incorporation and the address where its records of flight hours are maintained. These are the only additional requirements applicable to this type of registration.

Voting trusts

By becoming a US citizen through the use of a voting trust, a corporation can operate its aircraft internationally without the limitations imposed by the "based and primarily used" type of registration. Thus, a corporation that does not meet the US citizen requirements of the Code solely because of foreign ownership or control of more than 25 % of its stock can become a US citizen for purposes of registration by placing the offending stock in a voting trust with an independent US citizen as voting trustee. In this instance, the corporation must be organized under the laws of a state, territory or possession of the US and its president and $\frac{2}{3}$ or more of its other managing officers and directors must be US citizens.

The Code does not define "managing officers" and the $\frac{2}{3}$ requirement is subject to various interpretations. It may be that the $\frac{2}{3}$ test is applied to managing officers as one category and to directors as a separate category. However, if the $\frac{2}{3}$ test is applied to a combined group of managing officers and directors, it is unclear how many times a person is counted who is in both categories. The best way to avoid any question is to elect only US citizens as officers and directors.

In a multi-tiered corporate structure the corporation owning the aircraft and each corporation above it must be US citizens within the meaning of the Code for the owning corporation to be a US citizen. Thus, if there is any non-US citizen corporation in the corporate hierarchy above the corporation that owns the aircraft, the owning corporation cannot register the aircraft under the Code as a US citizen unless a voting trust is used.

To register an aircraft in the name of a corporation as a US citizen using a voting trust agreement, a copy of the voting trust agreement and an affidavit of independence by the voting trustee must be submitted to the FAA. The affidavit must state: (i) the voting trustee is a US citizen; (ii) the voting trustee is not a past, present or prospective director, officer, employee, attorney or agent of any other party to the voting trust agreement; (iii) the voting trustee is not a present or prospective beneficiary, creditor, debtor, supplier or contractor of any other party to the voting trust agreement; and (iv) the voting trustee is not aware of any reason, situation or relationship under which any other party to the voting trust agreement might influence the exercise of the voting trustee's totally independent judgment under the voting trust agreement. 14 CFR § 47.8.

The voting trust agreement must provide for the succession of a voting trustee in the event of death, disability, resignation, loss of US citizenship or any other event leading to the replacement of the voting trustee. Removal of the voting trustee can only be for cause such as gross negligence or willful misconduct. However, the FAA will allow the voting trust agreement to be terminated at any time by the shareholder, which should provide substantially the same result as removal of the voting trustee. The voting trust agreement may not authorize the voting trustee to act through a proxy. 14 CFR 47.8(c).

The use of a voting trust normally will require the payment of fees if a commercial trustee is appointed. The FAA does not require a commercial trustee, only that the voting trustee be independent. This arrangement is useful when US registered aircraft are to be bought and sold frequently over short periods of time.

Grantor trusts

US registration of aircraft owned by US citizens as trustees under grantor trusts is a frequent occurrence. If one or more of the beneficiaries is not a US citizen, the agreement creating the trust must provide that such beneficiaries will not have more than 25% of the aggregate power to direct or remove the trustee, although they may have more than 25% of the beneficial interest in the trust. The effect of such a provision is to transfer to the US citizen beneficiaries sufficient voting rights to give them 75 % of the total voting rights. 49 USC § 44102(a)(1)(A); 14 CFR § 47.7(c)(iii).

The most common way of satisfying the requirement for control of the beneficial interest by US citizens is to make the trustee's powers totally discretionary. This is accomplished by providing in the trust agreement that the non-US citizen beneficiaries will have no right to direct or control the trustee.

As another solution, beneficial interests owned by non-US citizens can be subject to a separate agreement (often referred to as Voting Powers Trust Agreement) with an independent US citizen trustee (other than the owner trustee) who has the right to exercise voting rights and make other decisions affecting the aircraft. Such an agreement and the affidavit of independence of the person holding such control must be submitted to the FAA.

In any transaction in which a trustee is to be the registered owner of an aircraft, a copy of the trust agreement must be submitted to the FAA. In addition, when there are non-US citizen beneficiaries, the trustee must submit an affidavit that the trustee is not aware of any reason, situation or relationship as a result of which the non-US citizen beneficiaries have more than 25% of the right to influence or limit the exercise of the trustee's authority. 14 CFR § 47.7(c)(2)(i).

The registration of the aircraft by a commercial trustee (e.g., Wells Fargo Bank Northwest, N.A.) will result in the payment of organizational and annual fees. Although the FAA does not require the use of commercial trustees, applicable local law may place restrictions on the types of entities that can serve as trustee.

Conclusion

I have made no attempt here to discuss the tax consequences of the various structures described above, only the requirements for registration under US federal law and regulation. These consequences may

include US federal and state income taxes, state and local sales and use taxes, state franchise and property taxes and annual aircraft registration fees levied by state and local authorities.

It should be noted that any aircraft which is subject to US registration is required to be maintained and operated in accordance with US federal laws and regulations even if the aircraft is based and operated outside the US. Thus, the crew members must hold licenses issued by the FAA, the radio station on board the aircraft must be licensed by the US Federal Communications Commission (FCC), the crew members must hold FCC radio station operator licenses and any maintenance or repairs on the aircraft must be done by FAA licensed mechanics at FAA licensed facilities.

If a voting trust or a grantor trust is used, the respective agreement and affidavit are subject to review and approval by the Assistant Chief Counsel for the FAA Aeronautical Center. Problems noted by the FAA in these instruments can result in delays in registering the aircraft involved. To avoid them, drafts should be submitted to the FAA prior to the filing of the completed instruments to obtain a written opinion approving their form.

Note: There are additional requirements for a US citizen limited liability company (LLC) to register an aircraft with the FAA. An LLC may not register an aircraft as a non-citizen corporation. FAA Aircraft Registry Memorandum, Subject: Office Procedures, Limited Liability Companies (LLCs), 23 August 1999.