



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

Issued by the Department of Transportation
On the Twenty-Second day of November, 2013

VIH Cougar Helicopters, Inc.

**Violations of 14 CFR Part 298
and 49 U.S.C. § 41101**

Docket OST 2013-0004

Served November 22, 2013

CONSENT ORDER

This order concerns unauthorized interstate and foreign air transportation by VIH Cougar Helicopters, Inc., (VIH Cougar) which, while under the actual control of a non-U.S. citizen, engaged in air services as a common carrier between points in the United States and between points in the United States and points abroad. VIH Cougar's conduct in this regard violated 49 U.S.C. § 41101 and 14 CFR Part 298. This order directs VIH Cougar to cease and desist from future violations of those provisions and assesses the carrier \$300,000 in civil penalties, subject to footnote 6 below.

Applicable Law

In order to engage directly or indirectly in air transportation, air carriers must hold economic authority from the Department of Transportation (Department), either in the form of a certificate of public convenience and necessity issued pursuant to 49 U.S.C. §§ 41101 and 41102, or in the form of an exemption from the certificate requirement, such as those applicable to direct air carriers operating as air taxis under 14 CFR Part 298 or to indirect air carriers acting as air freight forwarders under 14 CFR Part 296. (This economic authority is in addition to any safety authority necessary under applicable Federal Aviation Administration (FAA) requirements.) Part 298 exempts qualified air

taxis from section 41101, but only if they comply with the requirements of Part 298, including the requirement that they remain citizens of the United States at all times.¹

Under 49 U.S.C. § 40102(a)(15), as amended by Vision 100 – Century of Aviation Reauthorization Act (P.L. 108-176, 117 Stat. 2490, Dec. 12, 2003), a “citizen of the United States” includes a corporation organized in the United States that 1) meets certain specified standards regarding the citizenship of its president, officers and directors, and holders of its voting interests and 2) is under the actual control of citizens of the United States.² The Department has customarily looked at the totality of the circumstances to determine whether a carrier was under the actual control of U.S. citizens.³

Facts

VIH Cougar was a registered air taxi operating under 14 CFR Part 298.⁴ It held Part 133 and 135 operating authority from the FAA. The air carrier provided a diverse range of services including seismic monitoring, firefighting, and passenger and cargo operations using a fleet of helicopters. VIH Cougar’s headquarters was located in Bellingham, Washington, and it maintained bases in Galliano, Louisiana, and Boise, Idaho. The air carrier’s passenger and cargo operations were primarily conducted from its Galliano operating base, while its seismic monitoring and firefighting operations were primarily conducted from its Boise operating base.

From 2012 to the present, VIH Cougar’s ownership and management structure has undergone numerous changes. On March 12, 2012, when the Department issued an order to show cause why it should not issue an order finding that VIH Cougar did not meet the U.S. citizenship requirements set forth at 49 U.S.C. § 40102(a)(15), ownership was divided between VIH Western, LLC, and VIH USA, which owned 76 and 24 percent of VIH Cougar, respectively. VIH Western was wholly owned by a U.S. citizen, while VIH USA was wholly owned by a Canadian corporation that was in turn wholly owned by a Canadian citizen. The Department tentatively found that VIH Cougar was not a U.S.

¹ 14 CFR 298.11. We also note that section 298.21 requires applicants for the exemption authority set forth in section 298.11 to certify that they are U.S. citizens.

² Section 40102(a)(15) states that a U.S. citizen corporation is one in which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States and at least 75 percent of the voting interest is owned or controlled by persons who are citizens of the United States. An actual control test for citizenship historically was applied by the Department before Vision 100’s enactment.

³ See, e.g., *In the Matter of the Citizenship of DHL Airways, Inc., n/k/a ASTAR Air Cargo, Inc.*, Order 2004-5-10 at 6 (May 13, 2004) (assessment of actual control based on “totality of the circumstances”), and at 8, quoting *Acquisition of Northwest Airlines by Wings Holdings*, Order 89-9-51 at 5 (Sept. 29, 1989) (“control standard is a de facto one”).

⁴ After an investigation, on June 11, 2013, the Department made final its decision that VIH Cougar was not a U.S. citizen corporation and therefore cancelled the air carrier’s air taxi exemption authority. See *In the Matter of the Cancellation of the Air Taxi Authority Issued to VIH Cougar Helicopters, Inc.*, Order 2013-6-8 (June 11, 2013). On August 7, 2013, VIH Cougar filed a Petition for Review of the Department’s final decision with the U.S. Court of Appeals for the District of Columbia Circuit.

citizen because it was under the actual control of a Canadian citizen.⁵ In May 2012, in response to the Department's tentative findings, VIH Cougar provided documentation to the Department indicating that it was restructuring its company. In June 2012, VIH Cougar provided a report stating that it had entered into a letter of intent with a U.S. citizen purchaser in an attempt to comply with the citizenship requirement. A majority of the ownership interest in VIH Cougar was subsequently sold to Turner Aviation Holdings, LLC ("Turner Aviation"), a U.S. citizen, pursuant to a Share Purchase Agreement dated June 27, 2012.

Nevertheless, after reviewing the previous changes to VIH Cougar's management structure, the Department issued Order 2013-6-8 (June 11, 2013) ("Final Order"), where it determined that the changes made in response to the Department's 2012 show cause order were insufficient and that the Canadian citizen still had the ability to exert substantial influence over VIH Cougar's operations and its management. The Department found that VIH Cougar was under the actual control of VIH Group, a citizen of Canada, and its Canadian citizen owner; and therefore was not a U.S. citizen under the statute or otherwise eligible for exemption authority under Part 298 of the Department's rules.⁶ VIH Cougar's operations while under the control of the Canadian citizen were in violation of 49 U.S.C. § 41101 and 14 CFR Part 298.

Mitigation

VIH Cougar notes that the Department first began its inquiry into VIH Cougar in April 2008, but did not initiate the Show Cause proceedings until nearly four years later in March 2012. VIH Cougar maintains that during this time, it cooperated fully with the Department's review, including providing thousands of pages of responsive documents in response to its numerous requests for information and detailed explanations of VIH Cougar's corporate structure, management, and operations. VIH Cougar also met with Department officials to further explain these matters and discuss the agency's concerns. VIH Cougar states that throughout this process, it explained to the Department that VIH Cougar, in accordance with the applicable statutory requirements, has always been 76 percent owned by U.S. citizens and all of its officers and directors have always been U.S. citizens. VIH Cougar maintains that there were no voting or other similar agreements

⁵ See *In the Matter of the Cancellation of the Air Taxi Authority Issued to VIH Cougar Helicopters, Inc.*, Order 2012-3-7 (Mar. 12, 2012).

⁶ On July 2, 2013, VIH Cougar surrendered its air carrier certificate. At that time, a majority of shares had been acquired by Turner Aviation, which is owned by Christopher G. Turner who also owns Construction Helicopters, Inc. ("Construction"), a U.S. commercial helicopter operator based in Howell, Michigan. VIH Cougar is currently majority owned by Turner Aviation. Turner Aviation and Construction (including their present or former officers, directors, employees, shareholders, and affiliates), and any present or former officers, directors, employees, shareholders, and affiliates of VIH Cougar, are not and will not be the subject of Department enforcement proceedings in connection with this matter. VIH Cougar has represented to the Department that VIH Cougar has no assets, and the Department will not take any action to pursue payment of the penalties assessed by this order against Turner Aviation or Construction (their present or former officers, directors, employees, shareholders, and affiliates), or against any present or former officers, directors, employees, shareholders, and affiliates of VIH Cougar.

providing any minority foreign shareholders with any rights to control the company, that all of VIH Cougar's aircraft leases were arm's length, commercial agreements that complied with the standard industry practices approved by the Federal Aviation Administration ("FAA"), and that, at all relevant times, VIH Cougar has operated under the actual control of its U.S. citizen officers and directors. VIH Cougar states that despite these facts, and in response to the Department's stated concerns, it voluntarily agreed to restructure its business operations beginning in 2011 and concluding in 2012. VIH Cougar notes that notwithstanding its efforts, the Department issued its Final Order on June 11, 2013, finding that VIH Cougar is under foreign control.

As asserted in its filings in DOT-OST-2012-0022, VIH Cougar strongly disagrees with the Department's Final Order. VIH Cougar states that there is no evidence to support the Department's determination that the new VIH Cougar has ceded control of nearly all aspects of its operations through the use of pervasive contracts and agreements to VIH Group or a Canadian citizen. VIH Cougar asserts that it alone controls its management and strategic decision-making, including all day-to-day operational decisions. VIH Cougar further asserts that there are no employment or contracting relationships between VIH Cougar, Turner Aviation, or Construction (or any affiliate thereof) and VIH Group or any Canadian citizen. VIH Cougar asserts that there are no ownership or management interests by, or any other control or decision-making relationships between, any Canadian citizen and Turner Aviation or Construction.

VIH Cougar notes that even before the Final Order was issued, it voluntarily began wind down efforts, including voluntarily surrendering its operating licenses. VIH Cougar has since wound down its business after the Final Order was issued.

Decision

The Enforcement Office has carefully considered the information provided by VIH Cougar but continues to believe that enforcement action is warranted. The Office of Aviation Enforcement and Proceedings and VIH Cougar have reached a settlement of this matter in order to avoid litigation. VIH Cougar consents to the issuance of this order to cease and desist from future violations of 49 U.S.C. § 41101 and 14 CFR Part 298 and to the assessment of \$300,000 in compromise of potential penalties otherwise due and payable pursuant to 49 U.S.C. § 46301. Within five business days of the execution of this Consent Order, VIH Cougar agrees to withdraw its petition for reconsideration of the Department's June 11, 2013, Final Order and to dismiss with prejudice its petition for review of that Final Order, *VIH Cougar v. DOT*, No. 13-1234, filed in the U.S. Court of Appeals for the District of Columbia Circuit.

This compromise assessment is appropriate considering the nature and extent of the violations described herein and serves the public interest. It represents a strong deterrent to future noncompliance with the statutory citizenship requirement and 14 CFR Part 298.

This order is issued under the authority contained in 49 CFR Part 1.

ACCORDINGLY,

1. Based on the above discussion, we approve this settlement and the provisions of this order as being in the public interest;
2. We find that VIH Cougar Helicopters, Inc., for a significant period of time, engaged in interstate and foreign air transportation while it was under the actual control of foreign citizens and, therefore, was not a citizen of the United States as defined at 49 U.S.C. § 40102(a)(15);
3. We find that by engaging in the conduct described in ordering paragraph 2, above, VIH Cougar Helicopters, Inc., violated 49 U.S.C. § 41101 and 14 CFR Part 298;
4. We order VIH Cougar Helicopters, Inc., and all other entities owned or controlled by, or under common ownership and control with VIH Cougar Helicopters, Inc., and its successors, affiliates, and assignees, to cease and desist from future violations of 49 U.S.C. § 41101 and 14 CFR Part 298. Failure to comply with this cease and desist provision shall subject VIH Cougar Helicopters, Inc., and its successors, affiliates, and assignees to further enforcement action;
5. We assess VIH Cougar Helicopters, Inc., \$300,000 in lieu of civil penalties that might otherwise be assessed for the violations described in ordering paragraph 3, above. Subject to footnote 6, this amount shall be due and payable 30 days after the issue date of this order; and
6. We order VIH Cougar Helicopters, Inc., to pay the penalty through Pay.gov to the account of the U.S. Treasury. Payments shall be made in accordance with the instructions contained in the Attachment to this order. Failure to pay the compromise penalty assessment as ordered shall subject VIH Cougar Helicopters, Inc., to an assessment of interest, penalty, and collection charges under the Debt Collection Act and to possible enforcement action for failure to comply with this order.

This order will become a final order of the Department ten days after its service date unless a timely petition for review is filed or the Department takes review on its own initiative.

BY:

SAMUEL PODBERESKY

**Assistant General Counsel for
Aviation Enforcement and Proceedings**

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