U.S. Department
of Transportation
**Federal Aviation
Administration**

800 Independence Ave., S.W.
Washington, D.C. 20591

Howard Turner
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Atlanta, Georgia 30309-3592

Dear Mr. Turner,

This is in response to your letter of September 15, 2005 concerning certain proposed operations by Central Charter de Colombia S.A. on behalf of Belcorp Limited. As counsel for Belcorp you asked the FAA to consider operations you describe in your letter and through a telephone conversation with a member of my staff, to be operations conducted under 14 C.F.R. part 91, instead of operations conducted under 14 C.F.R. part 129. Based on the information you provided, the operations you described must comply with part 129 and cannot operate under part 91. Our reasons are explained below.[1]

Factual Summary

You state that Belcorp Limited (Belcorp), a corporation engaged in business in the Republic of Columbia, seeks to hire Central Charter de Colombia S.A. (Central Charter) to operate a Cessna Citation Sovereign airplane exclusively on behalf of Belcorp. Belcorp executives, its affiliates, and their guests will be carried on the Citation. You describe Central Charter as a Colombian air taxi operator. The Citation will be leased by Central Charter from Cessna Finance Corporation. Belcorp will contract with Central Charter to operate the Citation exclusively on behalf of Belcorp.

Applicable Law

14 CFR 1.1 General Definitions and 49 USC §40102(a) General Definitions

Air Transportation means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

Foreign air carrier means any person other than a citizen of the United States, who undertakes directly, by lease or other arrangement, to engage in air transportation.

Foreign Air Transportation means the carriage by aircraft of persons or property as a common carrier for compensation or hire, or the carriage of mail by aircraft, in commerce between a place in

[1] This response concerns requirements related to safety regulations by the FAA. You should note that it does not address economic regulatory requirements, which are separate and under the purview of the Office of the Secretary of Transportation.

the United States and any place outside of the United States, whether that commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

Analysis

Based on the facts that you provided, the operations by a Columbian air taxi operator for a Columbian company for compensation from a place outside the United States to a place inside the United States must be conducted under part 129 not part 91. For purposes of this scenario, Central Charter is a foreign air carrier and is required to operate under part 129. A foreign air carrier is a person (which includes a company), other than a citizen of the U.S. who undertakes directly by lease or other arrangement to engage in air transportation.[2] Central Charter meets the definition of foreign air carrier because it is a Columbian company, engaging in air transportation. Air transportation includes operations conducted in foreign air transportation. The operations you describe qualify as foreign air transportation because they would carry people on a common carrier for compensation or hire, between a place outside the U.S. and a place within the U.S. The operations you describe are also conducted in common carriage.

As you already know, "common carriage," or a "common carrier" is not defined in an FAA statute or in FAA regulations. As you mentioned in your letter, the FAA published Advisory Circular 120-12A to provide general guidance in the area of "common" versus "private" carriage. As AC 120-12A states, "common carriage" is a common law term; the Federal courts developed its definition over many years. As you also point out, there are at least three essential elements to common carriage; they include (1) a holding out, (2) to carry people or property, (3) for compensation or hire.[3]

In your letter, you claim that the proposed operations do not meet the holding out element of the common carriage definition. Before we discuss holding out, we first address the other two elements of common carriage. It is clear from your letter that the operations will carry people, including executives and others from Belcorp. It is also clear that Belcorp will compensate Central Charter for the proposed operations, under the terms of the contract you describe in your letter. You do not appear to directly dispute the applicability of these other elements of common carriage in your letter.

In terms of holding out, you claim these operations do not constitute a holding out because the carriage is for one or several selected customers (including Belcorp personnel and its affiliates), generally on a long term basis. Although the number of customers an operator serves and the length of a contract can be factors in determining whether there is a holding out for purposes common carriage, the AC lists other factors. For example, the AC states, "…persons admittedly operating as common carriers in a certain field (for instance, in intrastate commerce) sometimes claim that transportation for hire which they perform in other fields (for instance, interstate or foreign commerce) is private carriage. To sustain such a claim, the carrier must show that the private carriage is clearly distinguishable from its common carriage business and outside the scope of its holding out. The claimed private carriage must be viewed in relation to and against the background of the *entire carrying activity*." (emphasis added). As noted in the AC, historically, only in rare

[2] See 14 C.F.R. 1.1 definition of foreign air carrier.
[3] See also, Woolsey v. National Transportation Safety Board, 993 F.2d 516, 522 (5th Cir. 1993).

circumstances did Civil Aeronautics Board decisions determine carriage engaged by a common carrier was legitimately classified as private.

Your letter did not clearly distinguish operations for Belcorp from other common carriage operations for other Central Charter customers. You claim that because Central Charter will provide carriage for one or several selected Belcorp customers, generally on a long-term basis, the operations for Belcorp should qualify as private. However, it appears you have incorrectly interpreted guidance in the AC concerning private carriage by an otherwise common carrier. The AC informs that the FAA will look at the "entire carrying activity" of an operator to determine if the common carrier is engaging in private carriage. Instead of examining the entire carrying activity you seek to have the FAA examine only the carriage for Belcorp, and ignore any other carriage in which Central Charter engages. The information you provided does not make it clear that operations for Belcorp are clearly distinguishable from Central Charters' common carriage business and outside the scope of Central Charters' holding out for its common carriage business.

The mere fact that Central Charter signs a contract to operate a particular airplane exclusively for Belcorp does not distinguish these operations as private. If the FAA examined operations in this manner, looking only at operations for each individual customer, every operator could claim that operations for each customer are private carriage.[4] Likewise, in 1995 the FAA amended its regulations to clarify that a common carrier cannot conduct non-common carrier operations, because "The FAA believes that an operator engaged in common carriage (holding out) cannot unequivocally claim that it can engage in a noncommon carriage operation that would not have benefited from the holding out activities of the common carriage operation." See 14 C.F.R. 119.5(h) and final rule preamble 60 FR 65832, 65881. See also, 125.11(b) prohibiting a private carrier from getting business from anybody holding out to the public at large. It appears that Central Charter holds out. In addition, it appears from your letter that the Columbian Aeronautica Civil also believes that Central Charters' operations are common carriage. Therefore, the operations you describe must be conducted under part 129.

We trust this interpretation has answered your questions. This was prepared by Douglas Mullen, Attorney, reviewed by Joseph Conte, Manager, Operations Law Branch of the Office of the Chief Counsel and coordinated with Flight Standards Service.

Sincerely,

Rebecca B. MacPherson
Assistant Chief Counsel, Regulations Division

[4] We also note that you although you state in your letter that you are aware of U.S. air carriers operating under part 121 that own and operate private business jets under part 91 for its executives, your situation is distinguishable. A U.S. air carrier or any company can operate an aircraft under part 91 if they meet various requirements that your client currently does not meet. Some of the factors include, if the company directly owns or leases the aircraft, the company directly employs the crew and retains operational control of aircraft, the flights only carry employees of the company (no holding out), and there is no charge to passengers traveling on a flight, etc.