Eligibility of Foreign Nationals to be a Borrower under the Farm Credit Act

Since 1976, Farm Credit Act (FCA) regulations have allowed certain foreign nationals to be a borrower. These foreign nationals generally fall into two classes: Lawful Permanent Residents and Temporary Visa Holders. The Farm Credit Administration has noted in rulemaking that the Administration "rejects arguments that loans to foreign nationals are inherently unsafe and unsound." However, the agency does acknowledge that such loans "may expose System banks and associations to different risks," lenders "should have the capability to identify and manage" those risks. The following discussion is intended to help a lending association manage these risks.

Definition of a Person

The regulations under the Farm Credit Act, 12 CFR Part 613, provide a definition of a person eligible as a potential lendee under the FCA. In pertinent part the definition of 12 CFR 613.3000(a)(3) provides:

> (3)Person means a legal entity or an individual who is a citizen of the United States or a foreign national who has been *lawfully admitted into the United States* either for **permanent residency pursuant to 8 U.S.C. 1101(a)(20) or on a visa pursuant to a provision in 8 U.S.C. 1101(a)(15) that authorizes such individual to own property or operate or manage a business or a legal entity.** (Emphasis added).

Permanent Residents

The first part of this definition of a person under the regulation is relatively straight-forward: Permanent residency pursuant to 8 USC 1101(a)(20) means that the individual, natural person is a lawful permanent resident (an "LPR"). This is typically evidenced by the customer by possession of a "Green Card" which is a Form I-551, Lawful Permanent Residence Card issued by the Department of Homeland Security (DHS) that bears a photograph showing the likeness of the person presenting the card. This card is acceptable for identification purposes and constitutes prima facie evidence that the person in possession of the card is an LPR.

Note that there are other forms of acceptable evidence of LPR status – common ones include a "Temporary I-551 stamp in a foreign passport" in combination with an endorsement from Customs and Border Protection, a letter from the DHS in conjunction with an expired Form I-551, or a Form I-797 Approval Notice on Adjustment of Status (this form prominently bears the words "Welcome to the United States of America" at the top of the form). Other documentary evidence of LPR status exist, but often in conjunction with other evidence that is best reviewed on a case-by-case basis due to the complexity of this issue.

Understand that a person who is an LPR is still considered to be a "non-citizen" under the FCA regulations. They will possess a foreign passport, however they are Lawful Permanent Residents and are protected by a myriad of anti-discrimination laws. For all practical purposes, they should be treated in an analogous manner to U.S. Citizens.

Non-Immigrants (Visa holders)

The second class of persons in the definition is more problematic to approach. The regulation asserts that a "person" includes a natural person "on a visa pursuant to a provision in 8 U.S.C. 1101(a)(15) that authorizes such individual to own property or operate or manage a business or a legal entity." 8 USC 1101(a)(15) is a definitional section of the Immigration and Nationality Act (INA) listing all non-immigrant visas available in the United States. Each of these visa types are considered to be a "temporary" visa, but temporariness varies from only a few days to theoretically a lifetime. Some of the most common visas one could encounter in the FCA context are:

B visas (B-1/B-2) – "visitor visas"
H-1B visas – specialty occupation worker visas
E visas – treaty trader/investor visas
L visas – intracompany transferee visas

*None of the visas listed under INA 101(a)(15) [8 U.S.C. 1101(a)(15)] specifically authorize, nor do they prohibit, the ownership of property or the management or operation of a business in the United State*s. Many, many natural persons who own property, own a business, and manage or operate businesses in the United States are foreign nationals lawfully present and admitted on an non-immigrant visa. A tremendous amount of investment in the U.S. is made by foreign nationals, and that is one of the policies behind the INA – to encourage investment into the United States. As such, *there is no need for a blanket or specific "authorization" under the INA to own property or to run a business in the U.S. for a foreign national.*

However, that being said, *there are certain non-immigrant visa types included in INA 101(a)(15) that, by their nature, limit operation or management of a business, other than the business(es) for which their non-immigrant visa has authorized their activities in*. For example, a person on an H-1B visa has lawful presence in the U.S. for a temporary period to work in a specific specialty occupation for a specific employer. There is no prohibition on their ownership of property. There is generally no prohibition on their investment activities – as long as these investment activities are generally passive investments. If the H-1B non-immigrant makes an active investment into a business where they are operating or managing the business, in a manner that is inconsistent with their activities approved by the DHS by their H-1B visa, then they would not be authorized to be engaged in that business operation. From a lender's viewpoint, this operation/management of the outside business could constitute a potential serious risk – the person could have their H-1B visa revoked for their non-authorized business activities and they could be placed in removal (deportation) proceedings.

Some of the visa types listed in INA 101(a)(15), may appear to prohibit investment, management, and/or operation of a business in the U.S., but in fact legally do not. For example, a B-1/B-2 visitor's visa for business/pleasure is commonly used by sophisticated business persons to own, manage and operate U.S.-based businesses in certain ways that are entirely legal. A similar category that cogently could also be argued to fall within the gambit of INA 101(a)(15) is that known as a "VWP" – a Visa Waiver Program entrant, sometimes incorrectly called an "ESTA" visa – these individuals have no "visa" at all and are lawfully present in the same shoes as one with a B-1/B-2 visa.

Further, the final prong of the FCA's regulation requires a person to be have been "lawfully admitted to the United States." Usually, this means that the person had presented himself or herself to an immigration officer at a port of entry for inspection and had been admitted into the United States (think of the immigration line at the airport). This proof element is satisfied by the possession of a Form I-94, which is commonly available electronically – in many cases the non-citizen may not even know what an I-94 is, but they have one that can be found on the Internet using their passport.

For Lawful Permanent Residents, the term "lawfully admitted to the United States" typically (but not always) has a slightly different meaning – the "admission" refers to the granting of the lawful permanent residence status, not necessarily the physical act of entering the United States at a port of entry. The proof element would be the document presented by the person showing LPR status such as their "Green Card," formally known as a Form I-551 Lawful Permanent Resident Card. Other documents may also be prima facie proof of LPR status. If a person possesses such proof, there is a rebuttable presumption that they have been "lawfully admitted" to the United States.

Ascertaining Admission, LPR Status, and Determination of Risk

The following flow chart is intended to be an aid in determining, as an initial matter, whether the person presenting themselves as a Person under the FCA falls within the gambit of 12 CFR 613.3000(a)(3). In some cases further inquiry would be advisable, and the flow chart is designed to guide the association in determining whether additional inquiry could be beneficial to managing risk.

The Farm Credit Administration has expressed its opinion regarding extending credit to noncitizens of the United States:

> Foreign nationals and foreign national legal entities that lawfully engage in agricultural or aquatic production in the United States invest their capital, labor, time, and effort in the American agricultural economy. In this context, these persons contribute primarily to the economy of the United States, not their country of origin. Contrary to the comments of commercial bankers, the United States benefits from the endeavors of these farmers, just as it does from any other farmer who helps supply abundant and affordable food to the American consumer. 61 FR 42092 (Aug. 13, 1996).

Further, many noncitizens are protected by a myriad of complex anti-discrimination laws. As such, the association should evaluate prospective loans carefully when assessing risk. Lawful Permanent Residents have the most protection (they are a member of a "protected class"), while those who are foreign nationals on a temporary visa have much less protections (they are not a member of a "protected class" by virtue of their visa status alone, but may be in a protected class for other reasons). As such, additional questions of someone on a visa are generally allowable.

FCA Eligibility Flowchart for Non-US Citizens

Is the person a Lawful Permanent Resident?

Also known as a "Green Card." **If yes, then FCA eligible**.

Acceptable forms of Identification:

a. Current Permanent Resident Card (Form I-551)

b. Previous Version of Permanent Resident Card (Form I-551)

c. Older Versions of Permanent Resident Card (Form I-551)

d. Unexpired Foreign Passport with Temporary Form I-551 MRIV and I-551 Stamp in the passport:

Stamp may be red or blue

e. Some Lawful Permanent Residents may present other documents establishing they are lawful permanent residents, such as a USCIS Form I-797 Notice of Action that includes the prominent words "Welcome to the United States of America." If other documents are presented, seek guidance.

If the person is not a Lawful Permanent Resident - Does the person have a visa?

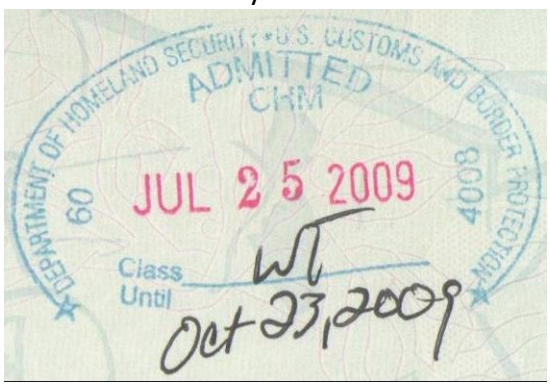
Common visas:

B-1/B-2 Visas ("Visitor Visas"). Visitor visas are granted to visit the U.S. for business or for pleasure. Many countries (list attached) participate in the Visa Waiver Program (VWP), where a visa is not necessary to enter the U.S., in this case the "visa" is a B-1/B-2 visa valid for 90 days of travel in the United States. Many business owners enter the U.S. for short periods of time using a B-1/B-2 visa. VWP entries are frequently referred incorrectly as an "ESTA visa." Some countries, such as Canada and Bermuda, have no Visa requirement for entry to the United States.

Proof:

1. Foreign passport with B-1/B-2 visa:

2. Foreign passport with admission stamp: The Class line may or may not be completed (frequently marked WT or VWP), but a date is almost always included.



3. Form I-94. Usually an electronic form obtainable at https://i94.cbp.dhs.gov/I94/#/home

Or in paper form:

(I-94 samples of a F-1 visa and L-1 visa)

3. BCC (Border Crossing Card)

Risk Considerations. Applicants on B-1/B-2, or the VWP, may be considered to be bona fide depending on their purposes and activities in the United States. Carefully consider the stated purposes of their visit(s) to the U.S. to ascertain their business and investment activities in the United States. Risk levels will vary from applicant to applicant.

H-1B Visas (Specialty Occupation Worker Visa): A person on an H-1B visa has authorization to work for a specific employer in a specialty occupation. There is no prohibition on ownership of property. There is no prohibition on investment activities, as long as the investment is generally passive. If the H-1B visa holder is operating or managing an investment (such as a business) in a manner that is inconsistent with their H-1B visa, then they would not be authorized to be engaged in that business operation. It is necessary to determine whether the operation or management of the business operation for which they are seeking funding is an allowable activity under their visa type.

Follow up questions:

1. What company do you work for?
2. What position do you hold at the company?
3. Is the company related to the borrower? If so, how?

Risk Considerations. Generally, unless the H-1B visa is related to the borrower's company, then the applicant may be violating the terms of their H-1B visa. A "passive investment" may be allowable under the terms of their visa, however in such case they should not be operating or managing any operation other than those activities they have received their H-1B visa to perform. From a lender's viewpoint, operation or

management of an outside business could be a potentially serious risk because they could have their visa revoked for their non-authorized business activities and placed in removal (deportation) proceedings.

E Visas (treaty trader/investor visas). E visas are issued pursuant to a treaty between the foreign national's home country and the United States. These treaties allow the foreign national to (a) create, operate and invest in a business located in the United States, or (b) allow them to manage or be an executive of a foreign-owned business in the U.S., or be a specialized knowledge worker for a foreign-owned business in the United States. It is necessary to determine whether the operation or management of the business operation for which they are seeking funding is an allowable activity under their visa type.

Follow up questions:

1. Is your E visa related to trade with your home country, or an investment made into the U.S?
2. What position do you hold at the company?
3. Is your management or operation of the business operation for which you are seeking funding related to the company for which you received your visa?

Risk Considerations. If the applicant is working as a manager for, or is an investor in, a U.S. company related to the funding request, and for which the applicant received the E visa, the applicant is likely to be a Person as defined by the FCA. Otherwise, if they are actively invested in, or operating or managing a company not the focus of their E visa, they may be violating the terms of their visa. From a lender's viewpoint, operation or management of an outside business could be a potentially serious risk because they could have their visa revoked for their non-authorized business activities and placed in removal (deportation) proceedings.

L Visas (Intra-company transferee visas). L visas are for people who have transferred employment from a qualifying company abroad to work in the United States at a related company. L visas come in two pertinent variants: (a) Executive/Management personnel (an L-1A visa), and (b) Specialized Knowledge Workers (an L-1B visa). It is necessary to determine whether the operation or management of the business operation for which they are seeking funding is an allowable activity under their visa type.

Follow up questions:

1. Do you have an L-1A visa or an L-1B visa?
2. What position do you hold at the company?
3. Is your management or operation of the business operation for which you are seeking funding related to the company for which you received your visa?

Risk Considerations. L-1A visa holders are more likely than L-1B visa holders to be a Person under the FCA. The entity for which they are seeking funding should be the same company for which they received their L-1A visa. Otherwise, if they are actively

invested in, or operating or managing a company not the focus of their L visa, they may be violating the terms of their visa. From a lender's viewpoint, operation or management of an outside business could be a potentially serious risk because they could have their visa revoked for their non-authorized business activities and placed in removal (deportation) proceedings.

Other Work-Authorized Foreign Nationals as Persons under the FCA.

Anyone presenting an Employment Authorization Document (an EAD), commonly called a "work permit" may be a Person under the FCA. These foreign nationals will have permission to work for any employer – including a company they own – as an incident to their lawful stay in the United States. An EAD must be unexpired, but even if their EAD will be expiring soon, they could be considered a Person under the FCA. In some cases the EAD will be "auto-extended" by either a notice published in the Federal Register or by a combination of the expired EAD accompanied with a Form I-797 Receipt Notice for an extension of the EAD. These cases should always be reviewed by an immigration attorney if the applicant otherwise would be considered a reasonable funding risk.

Proof:

The bottom of the EAD may be marked either as "NOT VALID FOR REENTRY TO U.S." or it may say "ADVANCE PAROLE GRANTED UNTIL" or have other notations along the bottom. These notations do not affect the validity of the work authorization.