

**United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

The Management Consulting Group

Petitioner

SBA No. BDP-300

Decided: October 7, 2008

ORDER DISMISSING APPEAL

Background

On July 11, 2008, Petitioner The Management Consulting Group (Petitioner) appealed a May 23, 2008 decision by Respondent Small Business Administration (SBA), denying Petitioner admission into the 8(a) Business Development Program.

The SBA determined that the individual upon whom Petitioner's eligibility is based, Van Corbin, is not economically disadvantaged under 13 C.F.R. § 124.104 because his two year average adjusted gross income (AGI) exceeded \$200,000.

Petitioner's appeal does not dispute the SBA's calculation of Mr. Corbin's AGI. Instead, Petitioner argues the SBA should not base its denial solely on this factor. Moreover, Petitioner asserts that this \$200,000 AGI ceiling is “not published in any of SBA's application checklists, or its online Small Business Suitability Assessment Tool, or stated in any part of [SBA's regulations]. . . .” In addition to the lack of public notice on the AGI threshold, Petitioner contends that SBA should have immediately rejected its application instead of “unnecessarily prolonging an inevitable decision” and wasting corporate and taxpayer money.

On September 24, 2008, the SBA filed its response. The SBA argues that its regulations are clear that the SBA considers the personal income of the individual claiming disadvantaged status. Moreover, the SBA states that Petitioner concedes that Mr. Corbin's AGI exceeds \$200,000 and does not proffer any alternative calculation of his income. Thus, the SBA requests that Petitioner's appeal be denied.

Discussion

“Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.” 13 C.F.R. § 124.104(a). In considering diminished capital and credit opportunities, the SBA examines the following three factors relating to the personal financial

condition of the individual claiming disadvantaged status: (1) the individual's personal income for the past two years; (2) the individual's personal net worth; and (3) the fair market value of all the individual's assets. 13 C.F.R. § 124.104(c). A finding of lack of economic disadvantage, under any one of these three factors, precludes a determination of economic disadvantage. *Matter of the Corvus Group, Inc.*, SBA No. BDP-180 (2002) (citing *Autek Systems Corp. v. United States*, 835 F. Supp. 13, 15 (D.D.C. 1993) (dismissing challenge to *Matter of Autek Systems Corporation*, SBA No. MSB-420, at 5 (1992)), *affd*, 43 F.3d 712 (D.C. Cir. 1994)). Accordingly, personal income for the past two years may be the only factor used to find an individual not economically disadvantaged. *Id.*

The SBA uses IRS statistics to evaluate whether a disadvantaged owner's personal income for the past two years is excessive and, therefore, the owner is not economically disadvantaged. For many years, the SBA has examined an owner's AGI as a basis for comparison with other taxpayers and the SBA has consistently found that an owner is not economically disadvantaged if the owner's AGI places him or her in the top percentiles of all U.S. taxpayers. *Matter of Tower Communications*, SBA No. MSB-587, at 6-7 (1997) (citing cases applying this methodology). Here, the SBA found Mr. Corbin's average AGI for 2005 and 2006 was over \$200,000. The SBA then compared Mr. Corbin's AGI to IRS statistics for tax year 2005 to find Mr. Corbin's AGI was in the top percentiles of all U.S. taxpayers.

The Small Business Act provides, “Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. . . . In determining the degree of diminished credit and capital opportunities the [SBA] shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual.” 15 U.S.C. § 637(a)(6)(A), Small Business Act, § 8(a)(6)(A).

This provision permits the SBA to examine other factors, including an individual's income, when determining economic disadvantage. For over twenty years the SBA regulations have provided that SBA will consider the personal income for the past two years of the individual claiming disadvantaged status. *See* 51 Fed. Reg. 36132-01 (Oct. 8, 1986). The regulation does not explain, however, how the SBA will evaluate income, even though Congress intended the SBA to “establish clear criteria for determining economic disadvantage.” S. REP. No. 100-394, at 43 (1988). In Petitioner's case, SBA's failure to provide clear guidance on income thresholds caused Petitioner unnecessary work, expense, and ultimately disappointment in its 8(a) eligibility denial.

Nonetheless, it has been held that the SBA's formula for determining excessive income is reasonable and not arbitrary, capricious, or contrary to law. *See Matter of M&M Technology, Inc.*, SBA No. BDP-192 (2003); *Matter of TAO of Systems Integration, Inc.*, SBA No. MSB-528 (1995). Thus, the law is settled. Accordingly, the SBA reasonably determined Petitioner's income did not meet SBA's standard.

Although SBA's current practice of determining income is the law, the practice results in unintended inequities because the SBA fails to (1) consider inflation, (2) distinguish between initial 8(a) eligibility income thresholds and continuing eligibility income thresholds to account

for business growth (as is done with net worth determinations, 13 C.F.R. § 124.104(c)(2)), (3) consider deductible expenses, such as medical expenses, and instead considers adjusted gross income, without exception, (4) evaluate geographical cost of living differences in assessing the value of income, and (5) treat each business similarly irrespective of its business organizational form.

Nonetheless I am compelled to “decline to accept jurisdiction” over any appeal that does not, on its face, allege facts that, if proven to be true, would warrant reversal of the SBA's determination. 13 C.F.R. § 134.405(a)(1).

By not denying that Mr. Corbin's average AGI exceeded \$200,000, Petitioner's appeal fails to allege any facts that, if proven true, would warrant reversal of the SBA's decision to deny Petitioner admission into the 8(a) program. Thus, I am required to “decline to accept jurisdiction” to hear this appeal.

Accordingly, because I must decline to accept jurisdiction, the appeal is DISMISSED.

Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* Small Business Act, § 8(a)(9)(D), 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

RICHARD S. ARKOW
Administrative Law Judge