

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

IN THE MATTER OF:

Vastec Group, Inc.

Petitioner

SBA No. BDP-316

Decided: March 30, 2009

APPEARANCES

Vanessa Flournoy, Esq., Augusta, Georgia, for Petitioner.

William L. Gery, Esq., Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

FINAL DECISION

ARKOW, Administrative Law Judge:

On October 20, 2008, the Respondent U.S. Small Business Administration (SBA) terminated Vastec Group, Inc. (Petitioner) from the 8(a) Business Development (BD) Program (8(a) Program or the Program) because Petitioner (1) failed to maintain its eligibility for Program participation; (2) submitted false information to the SBA; (3) failed to maintain full-time day-to-day management and control by disadvantaged individuals; and (4) materially breached the terms of its Participation Agreement. Petitioner appealed the determination on December 10, 2008.

I agree with the SBA and conclude the SBA's decision terminating Petitioner from the 8(a) Program is supported in the record, reasonable, and not arbitrary, capricious, or contrary to law.

Jurisdiction

There is jurisdiction to decide this appeal. *See* Small Business Act, § 8(a)(9)(A), (B)(ii); 13 C.F.R. § 134.102(j)(1). The appeal is timely. *See* 13 C.F.R. § 134.202(a)(1).

Issue

Whether the SBA's termination of Petitioner from the 8(a) Program is arbitrary, capricious, or contrary to law. *See* Small Business Act, § 8(a)(9)(C), 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

Facts

1. On March 23, 2005, Petitioner was approved for participation in the 8(a) Program. Administrative Record (AR), Ex. 21. Jerome Hartfield is Petitioner's owner and President.
2. On July 11, 2006, the SBA approved a mentor-protégé agreement between Petitioner and Protech Contractors, Inc. (Protech).<sup>1</sup> On July 9, 2007, Petitioner and Protech signed a letter terminating their mentor-protégé agreement effective August 6, 2007. AR, Ex. 17. The letter stated, "Over the past year, [Petitioner] has benefited from [Protech's] interest in [Petitioner] through sharing of software, lessons learned, resources and other financial support." AR, Ex. 17.
3. On March 27, 2008, Petitioner submitted its 8(a) Annual Update to SBA. AR, Ex. 15. Petitioner responded "not applicable" when asked to list any loans or other sources of capital available to Petitioner. AR, Ex. 15, Questions 8 and 9. Attachment A to Petitioner's Annual Update, Mr. Hartfield's Individual Compensation Worksheet, stated Mr. Hartfield had an annual salary of \$0 and Petitioner did not have any outstanding loans. AR, Ex. 15.
4. Attachment B to Petitioner's Annual Update, Petitioner's Mentor-Protégé Worksheet, stated there were no loans from Petitioner's mentor. Petitioner stated Protech provided Petitioner with "accounting support, bonding capacity, project management support, estimating software, personnel support, and points of contact with potential clients." AR, Ex. 15.
5. Petitioner's Annual Update also contained Mr. Hartfield's March 27, 2007 Personal Financial Statement (AR, Ex. 18) and Mr. Hartfield's 2006 (AR, Ex. 20) and 2007 IRS Form W-2 from Protech (AR, Ex. 19). Mr. Hartfield listed his salary as "-0-" and did not list any liability to Protech in his Personal Financial Statement; Mr. Hartfield's 2006 and 2007 Form W-2s, however, list \$42,500.12 in wages, tips, and other compensation from Protech.
6. Mr. Hartfield also supplied his 2007 personal income tax return, which listed the \$42,500 received from Protech as income. AR, Ex. 16. There is no salary or business income from Petitioner listed. AR, Ex. 16, line 12.
7. On May 10, 2008, Mr. Hartfield responded to SBA inquiries regarding Petitioner's work for Protech. Mr. Hartfield stated, "Regarding the compensation from [Protech], this was done as part of their financial commitment to support [Petitioner] and was agreed to by both parties. We felt it was best to assist this way not to burden [Petitioner] with a note payable . . . which would create a tax burden....Under no circumstance did I perform any work directly for Protech." AR, Ex. 14.
8. On May 12, 2008, Mr. Hartfield sent another explanatory letter to the SBA, which stated:  
  
[Protech] had made a commitment to support [Petitioner] with resources, software, hardware, equipment and financial support. In an effort to honor this

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<sup>1</sup> The only evidence in the AR of the date Petitioner's mentor-protégé agreement was approved is Petitioner's Mentor-Protégé Worksheet. AR, Ex. 15.

commitment it was agreed that a portion of the financial support would be in the form of a salary instead of giving revenue and/or a loan directly to [Petitioner]. I made this decision to avoid the burden of a loan to the company, falsely inflating revenue and because it is less of an expense to pay personal tax as opposed to corporate tax. Under no circumstance was I ever an actual employee . . . of Protech.

AR, Ex. 13.

9. On August 14, 2008, the SBA notified Petitioner of its intent to terminate Petitioner from the 8(a) Program. AR, Ex. 8. The SBA explained:

[Mr. Hartfield] submitted W-2s for 2006 and 2007 which indicated [Mr. Hartfield was] working for [Petitioner's] former mentor, Protech Contractors, Inc. Later [Mr. Hartfield] insisted the W-2s were a ruse to avoid tax consequences for a loan from [Petitioner's] former mentor. Initially, the W-2s were submitted as proof of income which supported your 2006 and 2007 Tax Returns. Whether this is true or not, false information was submitted. Also, in order for a firm to be controlled by a disadvantaged individual, that individual must devote full time to the business during normal working hours. If the disadvantaged manager wishes to engage in outside employment, it must be approved by SBA (13 C.F.R. § 124.106(a)(4)).

10. On October 20, 2008, SBA terminated Petitioner from the 8(a) Program because Petitioner (1) failed to maintain its eligibility for Program participation; (2) submitted false information to the SBA; (3) failed to maintain full-time day-to-day management and control by disadvantaged individuals; and (4) materially breached the terms of its Participation Agreement.

#### Petitioner's Appeal

Petitioner asserts that Mr. Hartfield is the full-time manager of Petitioner, managing Petitioner during the regular work hours of 7:30 a.m. to 4:00 p.m. Petitioner argues that it did not submit false information because Mr. Hartfield's Form W-2s from Protech were accurate records of the payments received from Protech. Petitioner maintains Protech, as its mentor, was allowed to provide financial assistance to Petitioner.

In the alternative, Petitioner argues that even if the Form W-2s establish Mr. Hartfield was employed by Protech, Petitioner's failure to obtain permission for outside employment is not good cause for termination because such employment did not adversely affect Petitioner's business operations.

#### SBA's Response

On March 9, 2009, the SBA filed its response and the administrative record, arguing the SBA's termination of Petitioner was reasonable and in accordance with the law. First, the SBA argues that Petitioner's submission of W-2 forms indicating that Mr. Hartfield was employed by Protech was, by Mr. Hartfield's own admission, false information and thus good cause for

termination. 13 C.F.R. § 124.303(a)(15).

The SBA asserts that if it takes Mr. Hartfield's W-2 forms at face value, it must assume that he was an employee of Protech and that he was submitting false information to SBA when he listed no income on his Personal Financial Statement and claimed in his letters to have never been a Protech employee. Alternatively, the SBA argues that if it believes Mr. Hartfield's claim that he never worked for Protech and that the W-2s were merely a ruse to pay less taxes on a loan, then Mr. Hartfield submitted false information on his W-2s, which involves defrauding the IRS.

The SBA also asserts the submission of false information indicates a lack of good character under 13 C.F.R. § 124.108(a) and thus Petitioner has failed to maintain eligibility for Program participation under 13 C.F.R. § 124.303(a)(2). Moreover, Petitioner's submission of false information is also a material breach of the terms of the 8(a) Participation Agreement and thus good cause for termination under 13 C.F.R. § 124.303(a)(19).

The SBA also argues that Mr. Hartfield failed to maintain full-time management and control of Petitioner in violation of 13 C.F.R. § 124.303(a)(3) because Mr. Hartfield was employed by Protech without seeking permission from the SBA or demonstrating a lack of conflict with Mr. Hartfield's duties at Petitioner.

## Discussion

### I. Standard of Review

The SBA determination must be sustained unless a review of the written administrative record demonstrates that the SBA's determination, that Petitioner should be terminated from the 8(a) Program, is arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(a), (b). My review of the case is narrow and does not permit me to substitute my own judgment for that of the SBA. Here, I must examine whether the SBA correctly applied its laws and regulations to the facts in deciding to terminate Petitioner. Then, I must determine that the SBA made a clear error of judgment in its decision before I may find the SBA acted arbitrarily, capriciously, or contrary to law. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A clear error of judgment may be found if the SBA fails to properly apply the law and regulations to the facts of the case. The SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its determination. *See id.* As long as the SBA determination is reasonable, it must be upheld on appeal. 13 C.F.R. § 134.406(b).

### II. Termination Requirement

The SBA may terminate an 8(a) Program participant prior to completion of its Program term for good cause. 13 C.F.R. § 124.303(a). The SBA alleges that it has good cause to terminate Petitioner. Good cause includes (a) failure to maintain 8(a) Program eligibility;

13 C.F.R. § 124.303(a)(2); (b) failure, for any reason, to maintain ownership, full-time day-to-day management, and control by a disadvantaged owner, 13 C.F.R. § 124.303(a)(3); (c) submission of false information to the SBA where responsible officials of the 8(a) BD Participant knew or should know the submission to be false, 13 C.F.R. § 124.303(a)(15); and (d) a material breach of the 8(a) Program Participation Agreement, 13 C.F.R. § 124.303(a)(19).

The SBA's termination will be sustained on appeal if the administrative record establishes the SBA reasonably determined there is good cause to terminate the participant on at least one of the grounds alleged, as long as that ground is not arbitrary, capricious, or contrary to law. *Matter of Blind Detective Agency*, SBA No. BDP-163, at 8 (2001).

### III. Analysis

#### A. Preliminary Matters

Petitioner's appeal contains six exhibits. Petitioner's Exhibits 3 to 6 are not in the administrative record and cannot be considered in deciding this appeal. 13 C.F.R. § 134.406(a).<sup>2</sup> Petitioner has not objected to the absence of any documents from the administrative record and I deem it complete. *See* 13 C.F.R. § 134.406(c).

#### B. Material Breach of 8(a) Participation Agreement

The administrative record does not contain a copy of Petitioner's 8(a) Participation Agreement. Accordingly, the SBA's allegation that Petitioner breached that agreement has no evidentiary support. Thus, the SBA's conclusion is unreasonable and is arbitrary, capricious and contrary to law.

#### C. Failure by the Disadvantaged Owner to Manage Petitioner Full-Time

The SBA alleges that Mr. Hartfield did not manage Petitioner full-time. To support that allegation, SBA points to Mr. Hartfield's W-2s for 2006 and 2007 that indicate Mr. Hartfield received wages or other compensation from Petitioner's former mentor, Protech. AR, Ex. 19 and 20. In addition, there is no evidence Mr. Hartfield received any compensation from Petitioner. *See* AR, Ex. 16 (IRS Form 1040) and Ex. 18. Also absent from the administrative record is any evidence of the extent of Mr. Hartfield's efforts at Petitioner. The SBA did not ask him about his work hours or what work he performed.

The fact that an individual receives salary or wages from an employer in no way sheds light on how many hours that individual works during a pay period, what those hours are (*i.e.*, weekdays between 9 and 5, at night, on weekends, etc.), or how many pay periods the individual works during the year. *Matter of Environmental Technology, Inc.*, SBA No. BDP-232, at 10 (2006). Thus, Mr. Hartfield's Form W-2s from Protech only support the conclusion that he worked for Protech. Without knowing the extent of his work at Protech and his work at

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<sup>2</sup> The exception found at 13 C.F.R. § 134.407 does not apply in this case.

Petitioner, the SBA cannot reasonably conclude Mr. Hartfield did not manage Petitioner full-time.

Thus, the facts only support the SBA's finding that Mr. Hartfield works or worked for Protech, not the extent of that employment. *Id.* The record does not support the SBA's conclusion that Mr. Hartfield did not manage Petitioner full-time. Accordingly, the SBA acted arbitrarily and capriciously in determining Petitioner's owner violated 13 C.F.R. § 124.303(a)(3).

#### D. Submission of False Information

Mr. Hartfield submitted IRS Form W-2s for 2006 and 2007, which show Mr. Hartfield received wages from Protech in the amount of \$42,500.12 in 2006 and 2007. AR, Ex. 19 and 20. Mr. Hartfield's March 27, 2007 Personal Financial Statement, however, states that Mr. Hartfield received no salary from any entity. AR, Ex. 18. Thus, the W-2 forms prepared by Protech and reported by Mr. Hartfield on his 2006 and 2007 Federal tax returns conclusively establish that Mr. Hartfield did, in fact, receive taxable compensation, which is contrary to the information he provided the SBA on his Personal Financial Statement. Accordingly, Petitioner supplied false information in his Personal Financial Statement to the SBA, in violation of 13 C.F.R. § 124.303(a)(15).

I find Petitioner's argument that Mr. Hartfield's Form W-2s from Protech represented a loan from Protech, not wages or income, to be without merit. The IRS website states that employers must file a Form W-2 for wages paid to each employee from whom income, social security, or Medicare tax was withheld. *See* IRS General Instructions for Forms W-2 and W-3, *available at* <http://www.irs.gov/instructions/iw2w3/ch01.html> (last visited March 24, 2009). The Form W-2 is not utilized to evince a loan paid from one company to another. Moreover, Petitioner's Annual Update stated it did not receive any loans from Protech. AR, Ex. 15. Nor did Petitioner provide the SBA any evidence from Protech to support the contention that Protech loaned only money to Petitioner.

Accordingly, I agree with the SBA and conclude the SBA's decision to terminate Petitioner from the 8(a) Program for submitting false information is supported in the record, reasonable, and not arbitrary, capricious, or contrary to law.

#### Conclusion

Respondent Small Business Administration's decision to terminate Petitioner from the 8(a) BD Program IS NOT ARBITRARY, CAPRICIOUS, OR CONTRARY TO LAW. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

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

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RICHARD S. ARKOW

Administrative Law Judge