

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

IN THE MATTER OF:

The VBP Group, LLC,  
  
Petitioner

SBA No. BDP-326

Decided: June 23, 2009

APPEARANCES

Flynn P. Carey, Esq., Gallagher & Kennedy, Phoenix, Arizona, for Petitioner.

Karen H. Holzen, Esq., David A. Fishman, Esq., and Sara Lipscomb, Esq., General Counsel, Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

FINAL DECISION

I. Introduction and Jurisdiction

On December 16, 2008, the Respondent U.S. Small Business Administration (SBA) terminated The VBP Group, LLC (Petitioner) from the 8(a) Business Development program (8(a) program) because Petitioner submitted false information to the SBA in Petitioner's 8(a) program application, 13 C.F.R. § 124.303(a)(1). Specifically, SBA determined Petitioner represented its owner was not a federal employee when he was and that Petitioner falsified invoices as evidence of contract performance.

On January 29, 2009, Petitioner appealed the determination claiming the SBA's determination is arbitrary, capricious, and contrary to law. I disagree. 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.

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).

II. 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).

### III. Facts

Petitioner was established on February 6, 2006, by its owner and president, Vernon B. Parker. Administrative Record (AR), Ex. 24 at 379 and 386. On February 17, 2006, Petitioner applied for the 8(a) program. AR, Ex. 24. On June 8, 2006, Petitioner was certified as a participant in the 8(a) program. AR, Ex. 13.

On July 3, 2008, SBA notified Petitioner of its intent to terminate Petitioner from the 8(a) program. AR, Ex. 8. Among the grounds for the proposed termination were:

1. Submission of false information in the concern's 8(a) program application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or other means. 13 C.F.R. § 134.303(a)(1);
2. Conduct by the concern, or any of its principals, indicating a lack of business integrity. Such conduct may be demonstrated by information related to a criminal indictment or guilty plea, a criminal conviction, or a judgment or settlement in a civil case. 13 C.F.R. § 124.303(a)(17);

AR, Ex. 8.

On August 21, 2008, Petitioner responded in writing to SBA's Intent to Terminate Letter. AR, Ex. 6. On September 4, 2008, Petitioner met with SBA to discuss SBA's Intent to Terminate Letter. AR, Ex. 5. At the request of SBA, Petitioner sent SBA a supplemental response on September 12, 2008. AR, Ex. 5. On November 26, 2008, SBA and Petitioner discussed outstanding concerns, specifically Mr. Parker's status as a consultant during the 8(a) certification process and the invoices Mr. Parker submitted as proof of Petitioner's work for the United States Department of Agriculture (USDA). AR, Ex. 2. Petitioner also followed-up on these issues in writing on December 2, 2008. *Id.*

On December 16, 2008, after considering the information and evidence in Petitioner's response, the SBA advised Petitioner that the response did not overcome two of the proposed grounds for termination. AR, Ex. 1. Therefore, the SBA terminated Petitioner from the 8(a) program. *Id.* The reason SBA cited for termination is: 13 C.F.R. § 124.303(a)(1), submission of false information in the concern's 8(a) program application, and 13 C.F.R. § 124.303(a)(17), lack of business integrity. AR, Ex. 1.

Documents in the record demonstrate:

1. Mr. Parker served as Assistant Secretary for Civil Rights for the USDA from 2003 to 2006 and was paid as a senior level federal employee, AR, Ex. 5 at 21-22 (Mr. Parker's Earnings and Leave Statements) and Ex. 19 (Mr. Parker's Standard Form 50 (SF-50));
2. Mr. Parker received his federal senior salary as Assistant Secretary for Civil Rights until March 19, 2006, AR, Ex. 16, 20, and 25 (Mr. Parker's bank statements);

3. On February 22, 2006, USDA issued Mr. Parker a consultant certificate, AR Ex. 6 at 49 (Consultant Certificate);

4. According to official records of employment, USDA converted Mr. Parker from Assistant Secretary for Civil Rights to a consultant, effective March 19, 2006, AR, Ex. 9 and 19 (Mr. Parker's SF-50s);

5. On March 20, 2006, a USDA Personnel Management Specialist informed Mr. Parker in writing that Mr. Parker was appointed to the consultant position on March 19, 2006, AR, Ex. 18 (Letter to Mr. Parker from USDA Personnel Management Specialist);

6. As a consultant, Mr. Parker received federal health benefits coverage, federal employee group life insurance coverage, federal employees retirement system coverage, and was paid at the hourly pay rate of a general schedule (GS) 15, step 10, federal employee, AR, Ex. 5 at 23-24 (Mr. Parker's Earnings and Leave Statements); and

7. On March 23, 2006, the USDA Chief of Staff recognized Mr. Parker's assistance with projects as a consultant, AR, Ex. 6 at 62 (Letter to SBA from USDA Chief of Staff).

#### A. Petitioner's Appeal

Petitioner timely appealed the SBA's determination to terminate Petitioner on January 29, 2009. Appeal Petition. Petitioner contends the SBA's determination to terminate its 8(a) certification is arbitrary, capricious, and contrary to law. Appeal Petition at 7. Petitioner asserts the record does not support SBA's finding that Mr. Parker was a federal employee at the time of filing Petitioner's 8(a) application or SBA's finding that Mr. Parker submitted falsified or misleading documents to the SBA to demonstrate contract performance in support of a waiver of the two-year requirement. *Id.*

Additionally, Petitioner argues SBA's assertion that Mr. Parker was a federal employee when Petitioner applied for certification into the 8(a) program fails to consider the totality of the circumstances. *Id.* at 10-11. Petitioner asserts SBA relies solely on the federal regulation, without consideration for the statute authorizing the regulation. *Id.* at 11. Petitioner argues the law is clear that the substance of the relationship and the totality of the circumstances are determinative, not simply the label attached by a party. *Id.* at 12. Petitioner asserts 5 U.S.C. § 3109, the controlling statute, states that not every individual hired under the provision is an employee. *Id.*

Petitioner argues a 5 U.S.C. § 3109 consultant's status as an independent contractor or federal employee should be analyzed pursuant to 5 U.S.C. § 2105's three-part test. *Id.* at 13. Petitioner states, under § 2105, an individual is an employee if he meets all three prongs: (1) Appointed by an enumerated federal official, acting in an official capacity; (2) engaged in the performance of a federal function; and (3) supervised by the appointing official. *Id.* citing *Lodge 1858 v. Webb*, 580 F.2d 496, 504 (D.C. Cir. 1978). Petitioner asserts SBA did not analyze the extent to which Mr. Parker was supervised and argues, if SBA had examined the supervision of Mr. Parker, SBA would have found the USDA lacked the supervision necessary for Mr. Parker

to qualify as a federal employee. Appeal Petition at 13-16. Petitioner also asserts a review of the totality of the circumstances demonstrates Mr. Parker was not an employee: USDA did not maintain supervisory control; Mr. Parker worked for other clients; Petitioner provided its own materials, equipment, and work location; Petitioner performed complex discrete tasks for USDA, not day-to-day tasks; Petitioner turned down USDA assignments; USDA and Mr. Parker both publicly held Mr. Parker out to be an independent contractor for USDA; Petitioner's salary varied; and Petitioner paid quarterly taxes as an independent contractor on payments from USDA. *Id.* at 16-23.

Finally, Petitioner states it submitted draft invoices in support of contract performance at the direction of an SBA representative who knew the invoices were not submitted to USDA. *Id.* at 24. Petitioner asserts Ms. Anita Gibson, an SBA Business Development Specialist, suggested Petitioner submit internal invoices to support Petitioner's 8(a) application. *Id.* at 24. Gary Marx, an attorney who assisted Petitioner, confirms the communication between Petitioner and SBA in an affidavit. *Id.* Petitioner asserts it should not be penalized for relying on a representative of the SBA. *Id.* at 26.

#### B. SBA's Response

On March 18, 2009, SBA responded to the Appeal. Response. SBA asserts Petitioner has failed to overcome two of the grounds for termination: submission of false information in the concern's 8(a) program application, 13 C.F.R. § 134.303(a)(1), and conduct indicating a lack of business integrity, 13 C.F.R. § 124.303(a)(17). *Id.* at 1.

SBA asserts Petitioner submitted false information in its 8(a) program application because Mr. Parker stated he was not a federal employee on the application even though he was a federal employee. *Id.* at 8. SBA argues that Petitioner's assertions that Mr. Parker was an independent contractor mischaracterize the facts and applicable law. *Id.* at 9. SBA states Mr. Parker was appointed as a federal employee to the consultant position under 5 C.F.R. §304 and that the regulation specifically applies to the appointment of "consultants as Federal employees under 5 U.S.C. §3109." *Id.* at 9 quoting 5 C.F.R. §304.101.

SBA asserts USDA personnel records evidence Mr. Parker was a federal employee. Response at 11. SBA states Mr. Parker's appointment to the consultant position is documented in his SF-50, which is "official documentation of federal employment." *Id.* at 11 quoting the Guide to Processing Personnel Actions, Chapter 1, p. 3, *available at* [www.opm.gov/feddata/gppa/gppa.asp](http://www.opm.gov/feddata/gppa/gppa.asp). SBA asserts an SF-50 is not used for an independent contractor. Response at 11. SBA also cites Mr. Parker's 2006 W-2, 2006 individual tax return, consultant certificate, pay stubs, bank statements, earnings and leave statements, and continued federal benefits as evidence Mr. Parker was a federal employee. Response at 12-14. SBA discounts Petitioner's affidavits from certified public accountants because they do not include a review of the applicable laws and regulations involved in Mr. Parker's appointment. *Id.* at 16-17.

SBA asserts the “overwhelming evidence” demonstrates the USDA considered Mr. Parker to be a federal employee and SBA does not have the ability to retroactively decide he was not a federal employee. *Id.* at 17-18. SBA states Mr. Parker was deemed a federal employee under U.S. Office of Personnel Management regulations and Petitioner was obligated to truthfully report Mr. Parker’s federal employment on its 8(a) program application. *Id.* at 19.

SBA asserts even under the 5 U.S.C. § 2105’s three-part test Mr. Parker was a federal employee. *Id.* at 20-21. SBA argues Mr. Parker undoubtedly meets the first two prongs of the 5 U.S.C. § 2105 test and he meets the third prong because as a professional he required less control in comparison to a non-professional. *Id.* at 20-21. Thus, USDA exercised the requisite supervision and direction over him as required for his position. *Id.*

Additionally, SBA asserts Petitioner submitted falsified invoices as evidence of contract support after Petitioner initially was denied participation in the 8(a) program. *Id.* at 21-22. SBA states the invoices were never submitted to the USDA and covered work performed by Mr. Parker in his capacity as a consultant. *Id.* at 22. SBA contests Petitioner’s assertion that SBA knew the invoices were never submitted to USDA. *Id.* at 22-23. Moreover, SBA states Petitioner was required to submit evidence of its record of performance in its industry, not Mr. Parker’s work. *Id.* at 23.

C. May 18, 2009 Order to Present Arguments  
on the Date of Mr. Parker’s Conversion to a Consultant

The parties’ arguments focused on whether a consultant is a federal employee. However, if Mr. Parker was converted from Assistant Secretary for Civil Rights to a consultant after February 17, 2006, and not paid as a consultant before February 17, 2006, the dispute concerning Mr. Parker’s status as a consultant is not decisionally material. Accordingly, on May 18, 2009, I ordered the parties to present arguments regarding the date Mr. Parker was converted to a consultant.

1. SBA’s Response to May 18, 2009 Order

SBA asserts the record is replete with information that Petitioner was converted to a consultant after the date of Petitioner’s application. SBA Response to May 18 Order at 1. SBA cites a March 20, 2006 letter from a USDA’s Personnel Management Specialist informing Mr. Parker that he was converted to a consultant effective March 19, 2006 and a May 17, 2007 email string from Rhonda Davis, Director of Planning and Performance, USDA, to Ray Sheehan, Director, Office of Ethics, USDA, confirming Mr. Parker was a consultant from March 19, 2006 to September 1, 2006. *Id.* citing AR, Ex. 18 at 358 and Ex. 23 at 376. SBA also references Mr. Parker’s SF-50s and consistent federal salary in January, February, and March. SBA Response to May 18 Order at 1; AR, Ex. 9, 19, 20, and 25. SBA argues the evidence seems incontrovertible that Mr. Parker became a consultant effective March 19, 2006. SBA Response to May 18 Order at 1.

## 2. Petitioner's Response to May 18, 2009 Order

Petitioner asserts the conversion date is not dispositive because Mr. Parker clearly performed the duties of an independent contractor beginning in early February before submitting Petitioner's 8(a) application. Petitioner's Response to May 18 Order at 1. Petitioner states Dale Moore, Chief of Staff of the USDA, recognized Mr. Parker for his work as a consultant on March 23, 2006, and the Chief of Staff was not praising just four days of service. *Id.* at 1-2. Petitioner argues Mr. Parker left "his position as Assistant Secretary in late January, or around February 6, 2006." *Id.* Petitioner notes an earlier email in the email string cited by the SBA indicates Mr. Parker left the position of Assistant Secretary in January 2006 and states Mr. Sheehan sent Mr. Parker a letter referencing Mr. Parker's intention to leave his position on February 3. *Id.* at 4-5. Petitioner states the change in pay from the Assistant Secretary position to the consultant position was "negligible" and would not have signaled to "Mr. Parker that he made a mistake on his 8(a) application." *Id.* at 6. Petitioner argues, based on the totality of the circumstances, Mr. Parker was not a federal employee when Petitioner submitted its 8(a) application and if Mr. Parker is found to be a federal employee on or after February 17, 2006, Mr. Parker's mistake about his employment status was reasonable and does not justify termination. *Id.* at 6-7. Petitioner attaches three exhibits to its response: Mr. Parker's affidavit, dated May 29, 2009; Mr. Parker's farewell message to employees of the Office of the Assistant Secretary of Civil Rights, and a January 20, 2006 Washington Post article, "USDA's Civil Rights Chief to Leave."

## 3. SBA's Reply

SBA notes Petitioner has attached three documents not in the record to its response. SBA's Reply at 1. SBA asserts OHA is limited to the material which was available and relied upon by the SBA at the time of the decision to terminate. *Id.* Accordingly, SBA argues the documents should be excluded. *Id.*

## 4. Petitioner's Reply

Petitioner asserts Mr. Parker resigned as Assistant Secretary for Civil Rights and flew out of Washington, D.C., on January 27, 2009. Petitioner's Reply at 1. Petitioner states everyone including the Office of the Ethics, the Chief of Staff, and the Washington Post knew Mr. Parker was no longer Assistant Secretary. *Id.* at 1-2. Petitioner asserts the USDA paperwork does not capture the reality of Mr. Parker's separation and must be viewed within the totality of the circumstances. *Id.* at 4. Additionally, Petitioner states Mr. Parker's work history does not establish his ability to determine complex questions of federal employment law. *Id.* at 4-5. Petitioner asserts Mr. Parker was not a federal employee when Petitioner submitted its 8(a) application and that "everyone involved proceeded under the assumption that Mr. Parker had resigned from his role as Assistant Secretary." *Id.* at 5.

Petitioner argues the three documents attached to its response to the order are relevant and demonstrate that Mr. Parker left federal employment in late January 2006. *Id.* at 2. Petitioner asserts the additional documents were submitted before the record closed and did not prejudice SBA because SBA had an opportunity to respond. *Id.* at 2-3.

#### D. Additional Briefs

At my direction, the parties presented extensive briefing on potential inconsistencies in the regulations with respect to the facts of this case. Due to the disposition of this case on other grounds, it is unnecessary to summarize the parties' filings. I did consider the entire record before reaching a decision.

#### IV. Analysis

##### A. 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).

##### B. 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:

1. Submission of false information in the concern's 8(a) program application, regardless of whether correct information would have caused the concern to be denied admission to the program, and regardless of whether correct information was given to SBA in accompanying documents or by other means, 13 C.F.R. § 124.303(a)(1); and
2. Conduct by the concern or any of its principals, indicating a lack of business integrity. 13 C.F.R. § 124.303(a)(17).

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).

### C. Preliminary Matters

On April 1, 2009, Petitioner filed a motion for leave to file a supplemental pleading. On April 3, 2009, the SBA filed an opposition to the motion. Supplemental pleadings are appropriate to set forth “relevant transactions or occurrences that have taken place since the filing of the original pleading.” 13 C.F.R. § 134.207(b). Petitioner’s motion for leave to file a supplemental pleading does not articulate “relevant transactions or occurrences that have taken place since the filing of the original pleading.” *Id.* Accordingly, Petitioner’s motion for leave to file a supplemental pleading is DENIED.

Petitioner also submitted additional documents not in the administrative record when SBA made its determination to terminate Petitioner. Because Petitioner did not present these facts to the SBA decision maker before the thirty-day deadline to respond to the notice of intent to terminate, 13 C.F.R. § 124.304(b), or during the additional opportunities SBA provided for Petitioner to respond to the allegations, I cannot consider them. In accordance with 13 C.F.R. §§ 134.406 and 134.407, this proceeding will be decided solely on a review of the written administrative record.

### D. Submission of False Information

The first ground for termination is that Petitioner submitted false information in Petitioner’s 8(a) program application. Specifically, SBA found that Mr. Parker provided false information about his employment with the federal government in violation of 13 C.F.R. § 134.303(a)(1).

There are two principal points that must be addressed to determine whether the SBA acted reasonably by terminating Petitioner from the 8(a) program. First, whether Mr. Parker had left his position as Assistant Secretary for Civil Rights before he submitted Petitioner’s application for admission into the 8(a) program. Second, if he left his position before he submitted his application, did he become an independent contractor or did he continue as a federal employee as a consultant.

The record demonstrates Petitioner’s 8(a) program application was submitted on February 17, 2006. Accordingly, February 17, 2006 is the operative date for determining if Mr. Parker falsely stated he was not a federal employee. The critical question is whether Mr. Parker was a federal employee on February 17, 2006 when he indicated he was not a federal employee on Petitioner’s 8(a) application.

#### 1. Was Mr. Parker Assistant Secretary for Civil Rights When Petitioner Submitted Its 8(a) Application?

It is undisputed that Mr. Parker was appointed to the position of Assistant Secretary for Civil Rights in 2003 and served as a federal employee. In that position he was paid as a senior level employee. The record includes Mr. Parker’s Notification of Personnel Action, SF-50, reporting he was converted from Assistant Secretary for Civil Rights to a Consultant on March 19, 2006. Mr. Parker’s September 1, 2006 termination as a consultant SF-50 reiterates

that Mr. Parker was converted from Assistant Secretary for Civil Rights to a consultant on March 19, 2006. Evidence in the record also indicates Mr. Parker continued to receive the same federal senior level salary on January 30, 2006, February 13, 2006, February 27, 2006, and March 13, 2006. Thereafter, as documented in the record on March 27, 2006, April 10, 2006, and pay period 9 (April 30 to May 13, 2006), Mr. Parker's pay was reduced to the consultant position, a GS-15, step 10.<sup>1</sup> Additionally, the record includes a March 20, 2006 letter from a USDA Personnel Management Specialist informing Mr. Parker that he was appointed to the consultant position on March 19, 2006. AR, Ex. 18.

Petitioner argues that the conversion date on USDA paperwork is not dispositive. Petitioner asserts that I should consider the totality of the circumstances, including the change in Mr. Parker's duties and relationship with the USDA and "the intent and actions of the USDA" in determining when Mr. Parker was converted to a consultant. Petitioner's Response to May 18, 2009 Court Order at 1. Petitioner cites a March 23, 2006 letter from the USDA Chief of Staff to SBA noting Petitioner's assistance with projects as a consultant which had to have been completed before March 19, 2006. Petitioner notes a January 29, 2006 memorandum from USDA Ethics Counsel, Raymond Sheehan, refers to Mr. Parker's status after February 3, 2006 as "post-employment." Petitioner also cites an email from Rhonda Davis stating her belief that Mr. Parker had left USDA in January 2006.

Although Petitioner presents much evidence to support its argument the USDA had decided to appoint Mr. Parker as a consultant before March 2006 and Mr. Parker performed some duties as a consultant before March 2006, there are no personnel records that support the argument that the conversion was effective before March 19, 2006. Mr. Parker's SF-50s, official records of employment, clearly state, effective March 19, 2006, USDA converted Mr. Parker from Assistant Secretary for Civil Rights to a consultant. Although an SF-50 is "not a legally operative document controlling on its face an employee's status and rights," *Grigsby v. United States Dept. of Commerce*, 729 F.2d 772, at 776 (Fed. Cir. 1984), an SF-50 "has been considered one 'of the usual indicia of civil service status.'" *Calvin v. United States*, 63 Fed. Cl. 468, 473 (2005) (quoting *Horner v. Acosta*, 803 F.2d 687, 694 (Fed. Cir. 1986) (holding that the absence of an SF-50 or other indicia of appointment supported the Merit Systems Protection Board's finding that certain contract employees were not appointed in the civil service)). Additionally, Mr. Parker continued to receive his federal senior salary as Assistant Secretary for Civil Rights until the effective date of his SF-50. There is no evidence that Petitioner contested or attempted to correct the SF-50s. Mr. Parker's salary was not reduced before March 19, 2006, and there is no evidence Mr. Parker returned any excess pay to the USDA. Accordingly, as documented by the official record of employment and the continued receipt of the benefits and emoluments of the position, Mr. Parker was a federal employee on February 17, 2006, when he submitted Petitioner's 8(a) program application and indicated he was not a federal employee.

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<sup>1</sup> As Assistant Secretary for Civil Rights, Mr. Parker received executive level pay for a total annual salary of \$143,000. AR, Ex. 19. As a consultant, Mr. Parker worked an intermittent schedule and received pay at the hourly rate of a GS-15, step 10, which carries an annual salary of \$118,957. *Id.*

I find the SF-50s and Mr. Parker's federal pay demonstrate Mr. Parker was a senior level federal employee when he submitted Petitioner's 8(a) application. There is nothing in the record that contradicts the effective date noted on the SF-50s. There is no documentation of a USDA official selecting an alternate date or any evidence that would support disturbing the SF-50s. In fact, Petitioner does not point to a specific date for the conversion. Petitioner just argues Mr. Parker's conversion occurred before Petitioner submitted its 8(a) application.

2. Did Mr. Parker Serve as a Consultant to USDA as an Independent Contractor or as a Federal Employee?

Even if Petitioner could prevail in its argument that the totality of the circumstances establish that Mr. Parker became a consultant before he submitted Petitioner's 8(a) application, Mr. Parker nonetheless continued as a federal employee because his consultant status was not as an independent contractor. A federal government consultant can be either a federal employee or an independent contractor.

The distinction is significant in this case because if Mr. Parker was an independent contractor before he completed Petitioner's 8(a) application his negative response to the "federal employee" question would be correct. Mr. Parker, however, served as a consultant to the USDA as a federal employee.

In *Hamlet v. United States*, 873 F.2d 1414 (Fed. Cir. 1989), the court relied on plaintiff's enrollment in the federal health benefits program and her participation in the federal retirement system, among other things, to conclude plaintiff held her position by appointment as a federal employee rather than by contract. *Id.* at 1101-02 (citing *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 735-37 (1982)); see *Federrico v. United States*, 70 Fed. Cl. 378 (2006) (holding a physician was employed by appointment, and not by contract, based on an SF-50 stating that the physician was granted an "Excepted Appointment" as a podiatrist and entitled to federal retirement and federal life insurance participation). Similarly, Mr. Parker received the benefits of a federal employee, including federal health benefits coverage, federal employee group life insurance coverage, federal employees retirement system coverage, and was paid at the hourly pay rate of a GS-15, step 10.

"Although a contract between the government and an individual employee is possible, it must be specifically spelled out as a contract by a person having authority to do so." *Federrico v. United States*, 70 Fed. Cl. at 384 (citations omitted). Petitioner does not present any contract or agreement with the USDA which sets forth the terms of Mr. Parker's employment. Rather, to support its contention that Mr. Parker was an independent contractor, Petitioner cites to a letter from the Chief of Staff of the USDA praising Petitioner's work on projects, the fact USDA issued Mr. Parker a consultant certificate, and that Mr. Parker made estimated tax payments, lacked an office at the USDA, and was compensated on an hourly rate. Mr. Parker's compensation for his work as a consultant for the USDA, including his federal health insurance, federal life insurance, and federal retirement benefits, was derived from federal employment statutes and regulations, not from any contract or agreement. Without a contract, Petitioner's claim that he was an independent contractor not a federal employee is not persuasive.

"[T]here is a 'well-established principle that, absent specific legislation, federal employees derive the benefits and emoluments of their positions from appointment rather than

from any contractual or quasi-contractual relationship with the government.” *Hamlet v. United States*, 63 F.3d at 1101 (quoting *Chu v. United States*, 773 F.2d 1226, 1229 (Fed.Cir.1985)), *cert. denied*, 517 U.S. 1155 (1996). “In other words, there is a ‘presumption that federal employees hold their positions pursuant to appointment[ ] rather than by contract.’” *Calvin v. United States*, 63 Fed.Cl. at 472 (quoting *Collier v. United States*, 56 Fed.Cl. 354, 357 (2003)) (alteration in original). Although these cases, *Hamlet*, *Federrico*, and *Calvin*, deal with Tucker Act claims and whether there is jurisdiction, the jurisdictional principles distinguishing independent contractors and employees apply to the facts of this case.

Accordingly, Petitioner’s argument that Mr. Parker is not a federal employee but rather an independent contractor is misplaced. The evidence presented by the Petitioner has not overcome the presumption that he continued as a federal employee after he left his position as the Assistant Secretary of Agriculture for Civil Rights. Although Mr. Parker was correct to say he was a consultant, he was nonetheless a federal employee not an independent contractor. Thus, his rationale for concluding he was truthful in stating he was not a federal employee is fallacious and the SBA reasonably concluded his response was false.

### 3. Summary

For these reasons, the SBA’s conclusion that Mr. Parker falsely responded that he was not a federal employee in his 8(a) program application was rational and based on the facts in the record. I find no clear error of judgment in the SBA’s determination. Further, the SBA’s determination that it had good cause to terminate Petitioner from the 8(a) program because of that false response was reasonable and not arbitrary, capricious, or contrary to law.

Because I have sustained the SBA’s termination on one of the grounds alleged, it is not necessary to review the allegations of lack of business integrity. *See Matter of Blind Detective Agency*, SBA No. BDP-163 at 8 (2001).

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

### V. Conclusion

Respondent Small Business Administration’s decision to terminate Petitioner from the 8(a) 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