

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

IN THE MATTER OF:

H Squared Industries, Inc.

Petitioner

SBA No. BDP-349

Decided: April 19, 2010

ORDER GRANTING MOTION FOR SUMMARY DECISION¹

On October 23, 2009, the U.S. Small Business Administration (SBA) terminated H Squared Industries, Inc. (Petitioner) from the 8(a) Business Development (BD) program. SBA cited seven violations of 13 C.F.R. § 124.303(a), including submitting false information in Petitioner's 8(a) BD program application, 13 C.F.R. § 124.303(a)(1). Specifically, SBA alleged Petitioner's co-owners Herman Ybarra and Irene Perez,² the individual applicants claiming social and economic disadvantage in section three of the 8(a) BD program application, indicated in question 10 that no principal of Petitioner had received an SBA loan. In fact, Ms. Perez had obtained a loan guaranteed by the SBA in 1979. The loan was never completely paid and the amount of \$215,888.33 was charged off by the SBA on May 13, 1981.

On December 17, 2009, Petitioner appealed SBA's termination. Petitioner argues SBA's determination to terminate Petitioner based on false information in Petitioner's 8(a) BD program application is arbitrary and contrary to the law. Petitioner argues Mr. Ybarra was not aware of the loan made to his wife before they were married and 26 years before Petitioner's 8(a) BD program application. Petitioner states Ms. Perez honestly forgot about the loan and Mr. Ybarra should not be penalized due to her forgetfulness. Moreover, Petitioner asserts neither Mr. Ybarra nor Ms. Perez knowingly submitted false information.

Because there is no genuine issue of a material fact relevant to my decision, I may decide this case summarily.

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

¹ This appeal petition is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 124 and 134.

² At the time of the 8(a) BD program application in 2005, Ms. Perez was married to Mr. Ybarra and signed the application with her married name, Irene Ybarra. In 2008, the Ybarras divorced. Irene Ybarra resumed use of the name Irene Perez and that is how she will be identified throughout this decision.

I. Motion to Dismiss or for Summary Decision

A. SBA

On March 9, 2010, SBA moved to dismiss or, in the alternative, for summary decision.

SBA asserts Petitioner does not dispute that Ms. Perez co-owned Petitioner at the time of the 8(a) BD program application or that Ms. Perez received an SBA loan. SBA states, despite Ms. Perez's SBA loan, neither Ms. Perez nor Mr. Ybarra disclosed the SBA loan information when specifically asked on Petitioner's 8(a) BD program application whether any of Petitioner's principals had received an SBA loan. SBA asserts that Petitioner's claims that Ms. Perez forgot about the loan and that Mr. Ybarra had no knowledge of the loan do not dispute a material fact in SBA's decision to terminate Petitioner from the 8(a) BD program. Thus, SBA argues there are no genuine issues as to any material fact because Petitioner fails to assert any evidence that it did not submit false information on Petitioner's 8(a) BD program application and the regulations provide that submission of false information in the 8(a) BD program application is grounds for termination.

Accordingly, as Petitioner has admitted that its 8(a) BD program application included false information and termination for false statements is authorized by 13 C.F.R. § 124.303(a)(1), SBA argues the appeal should be dismissed or, in the alternative, that summary decision be awarded to SBA.

B. Petitioner

On March 30, 2010, Petitioner responded to SBA's motion to dismiss or, in the alternative, for summary decision and Petitioner requested remand. Petitioner argues SBA's motion should be denied. Petitioner recounts that Ms. Perez received a \$100,000 loan in 1979 to open an ice cream store. Petitioner states in 1981: Ms. Perez's husband at the time, Danny Perez, was diagnosed with lung cancer and died; her father died; she had two small children; she fell behind on loan payments; she was forced to close the business; and SBA sold the assets of the ice cream store and wrote off the loan. Petitioner asserts after 1981 Ms. Perez was not contacted about the SBA loan. Petitioner states in 1983 Ms. Perez married Mr. Ybarra and she forgot about the loan. Petitioner argues Mr. Ybarra was the 8(a) BD program applicant, not Ms. Perez, and Mr. Ybarra never knew about the SBA loan. Petitioner argues terminating Petitioner for its response to question 10 in the 8(a) BD program application requires that a false statement be knowingly submitted and Petitioner asserts neither Mr. Ybarra, who had no knowledge of the loan, nor Ms. Perez, who honestly forgot about the SBA loan, knowingly made a false statement in the 8(a) BD program application.

Petitioner also requests that the case be remanded. Petitioner states that SBA's motion to dismiss or, in the alternative, for summary decision raises new grounds for termination that were not identified in SBA's February 20, 2009 notice of intent to terminate or in SBA's October 23, 2009 termination notice. Petitioner argues it did not receive notice that SBA's termination was based on the grounds raised in SBA's motion: (1) a violation of paragraph 3.s of

the participation agreement; (2) a violation of 13 C.F.R. § 124.303(a)(19) relating to Ms. Perez's loan; or (3) that false information was submitted on the 8(a) BD program application regarding delinquent Federal obligations of Ms. Perez.

II. Discussion

To prevail on a motion for summary decision, the SBA must establish both the absence of a genuine issue of any material fact and the SBA's entitlement to a decision in its favor as a matter of law. 13 C.F.R. §§ 134.212(a), 134.408(a). I find the SBA has met these requirements and is entitled to a decision in its favor as a matter of law.

SBA regulations permit the SBA to terminate a participant from the 8(a) BD program for good cause. 13 C.F.R. § 124.303(a). Good cause includes submitting false information in the applicant's 8(a) BD program application, regardless of whether correct information would have caused the SBA to deny the applicant admission to the 8(a) BD 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).

Mr. Ybarra and Ms. Perez both completed Petitioner's 8(a) BD program application. Mr. Ybarra and Ms. Perez are listed as co-owners on the 8(a) BD program application with Mr. Ybarra owning 51% and Ms. Perez owning 49%. In section three of the 8(a) BD program application, Mr. Ybarra and Ms. Perez are listed as the individual applicants who claim social and economic disadvantage. Mr. Ybarra and Ms. Perez both certified that the information provided in the 8(a) BD program application was true and accurate.

In response to question 10 on Petitioner's 8(a) BD program application, Mr. Ybarra and Ms. Perez indicated that neither the firm nor any principal of the firm had received an SBA loan. However, Mr. Ybarra and Ms. Perez admit Ms. Perez previously received an SBA loan. There is no dispute on the SBA loan. Instead, Petitioner argues Mr. Ybarra was not aware of the loan and Ms. Perez honestly forgot about the SBA loan.

If Ms. Perez forgot about the SBA loan and her forgetfulness was reasonable, then Petitioner would not have violated 13 C.F.R. § 124.303(a)(1). Petitioner justifies Ms. Perez's forgetfulness on the passage of time between her dealings with SBA, twenty-five years, and on extenuating circumstances at the time she defaulted on the SBA loan. However, a business owner forgetting about receiving a \$100,000 SBA loan that went into default when her business failed when directly asked if she ever had an SBA loan is unreasonable.

In the record, Ms. Perez describes the trying time when she defaulted on the SBA loan in great detail. Ms. Perez explains that an SBA representative came to her home and they sat at her kitchen table discussing repayment plans. Ms. Perez describes the representative's appearance and explains that he advised her that her business equipment would be sold at a liquidation sale and whatever was collected would be used to pay the balance on the loan. It is understandable that Ms. Perez does not dwell on this challenging period, but it is unreasonable that a business owner would not remember a defaulted SBA loan when seeking SBA 8(a) BD program certification, especially when specifically asked about previous SBA loans.

Thus, Petitioner's assertion that Ms. Perez's response was the result of honestly forgetting receiving a \$100,000 SBA loan she defaulted on is unreasonable and does not raise a defense to the grounds for termination. *See Matter of Puente One Construction Group, Inc.*, SBA No. BDP-318 (2009) (holding Petitioner's mistaken interpretation that the 8(a) BD program application question regarding arrests pertained only to felony arrests to be unreasonable); *Matter of Clemens Brothers Construction*, SBA No. BDP-200 (2003) (holding Petitioner's mistaken reading of the 8(a) BD program application as inquiring only about crimes involving the operation of the business to be unreasonable). Accordingly, no genuine issue of material fact exists because Petitioner acknowledges the false statement on its 8(a) BD program application and Ms. Perez's forgetfulness is unreasonable. Thus, the SBA is entitled to judgment in its favor as a matter of law.

If the SBA bases the termination on more than one ground, and at least one such ground is not arbitrary, capricious, or contrary to law, the SBA's decision to terminate must be upheld. 13 C.F.R. § 134.408(b)(1); *Matter of Blind Detective Agency*, SBA No. BDP-163 at 8 (2001). Because I have sustained the SBA's termination on one of the grounds raised in SBA's intent to terminate and notice of termination, it is unnecessary to review the SBA's additional grounds for termination or, as Petitioner requests, to remand the case.

III. Conclusion

Accordingly, the SBA's Motion for Summary Decision is GRANTED, and the appeal is DISMISSED.

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).

BRENDA P. MURRAY
Administrative Law Judge