

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

IN THE MATTER OF:

JAM Construction Services, Inc.,

Petitioner

SBA No. BDP-393

Decided: May 20, 2011

APPEARANCES

Jose A. Mantilla, President, Pro Se, for JAM Construction Services, Inc.

Timothy C. Treanor, Office of General Counsel, Small Business Administration

FINAL DECISION

I. Introduction and Jurisdiction

This proceeding arises under the authority of Section 8(a) of the Small Business Act (“Act”), 15 U.S.C. § 637(a) and is governed by the Rules of Procedure Governing Cases before the Office of Hearings and Appeals (“Rules”), 13 C.F.R. Part 134. On April 13, 2010, the Respondent Small Business Administration (SBA) graduated JAM Construction Services, Inc. (“Petitioner”) from the 8(a) Business Development (8(a) BD) program because the SBA determined that Jose A. Mantilla, the disadvantaged owner upon whom Petitioner's eligibility is based, is no longer economically disadvantaged, Petitioner appealed the determination on April 23, 2010

There is jurisdiction to decide this appeal. *See* Small Business Act § 8(a)(9)(A), (B)(ii), 15 U.S.C. § 637(a)(9)(A), (B)(ii); 13 C.F.R. § 134.201(j)(1). The appeal is timely. *See* 13 C. F. R. § 134.202(a)(1).

II. Issue

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

III. Background

On February 12, 2010 the SBA notified Petitioner that its owner, Jose A Mantilla, is no longer economically disadvantaged because his personal net worth of \$3,588,000 exceeds the regulatory limit of \$750,000 and because the total value of his personal assets (\$6,900,500) is at

a level indicative of an individual who is not economically disadvantaged based on SBA case precedent. The February 12 letter informed Petitioner that, pursuant to 13 C.F.R. § 124.304, it had 30 days from the date of receipt of the letter to provide SBA with information which would eliminate the grounds for the proposed early graduation. The SBA did not receive a response to the February 12, 2010 letter from Petitioner. On April 13, 2010, SBA notified Petitioner that it would be graduated early from the 8(a) BD program, effective forty-five days from the date of Petitioner's receipt of the notice, because Petitioner had failed to rebut the SBA's contention that Petitioner is no longer economically disadvantaged.

On April 23, 2010, Petitioner appealed SBA's determination graduating Petitioner early from the 8(a) BD program. Petitioner's Appeal Petition was (1) missing a copy of the SBA determination letter; (2) was not served upon the SBA; and (3) did not include a certificate of service.

On April 27, 2010, this matter was assigned to Administrative Law Judge Brenda P. Murray. By Notice and Order dated April 28, 2010, Petitioner was ordered to correct the deficiencies in its Appeal Petition; and the SBA was ordered to respond to the Petition, submit the Administrative Record, and contact the Petitioner to explore the possibility of settling this matter. The Notice and Order advised Petitioner that failure to correct the deficiencies as set forth in the Notice and Deficiency Order could result in dismissal of the appeal.

On April 30, 2010, Petitioner filed an Amended Appeal Petition. In its Amended Appeal Petition, Petitioner states that the SBA's early graduation decision was arbitrary, capricious, or contrary to law because “[a] mistake in the personal finance statement was made in the cash on hand & in banks. The number place was almost the same as the one for line on the stocks and bonds, which is the Companies [sic] stocks.” Petitioner attached a number of documents to its appeal petition, including bank account statements and an SBA Form 413 Personal Financial Statement, current as of December 8, 2009, as factual support for its appeal. Petitioner simply references the “revised Personal Finance Statement” as argument in support of its reasons why it alleges SBA's determination is arbitrary, capricious or contrary to law.

On June 11, 2010, the SBA filed both, its Response to Petition, Including Brief and Arguments of the United States Small Business Administration (“Response”) and a Status Report. SBA attached the Administrative Record to the Response. The SBA argues that its determination was justified by the law, facts, and the evidence before it at the time the determination was made. SBA further argues that, on October 30, 2009, Mr. Mantilla submitted a Personal Financial Statement that indicated he had assets of \$6,900,500 and liabilities of \$288,186.51, yielding a net worth of \$6,612,313.49. After subtracting the value of the stock in the Petitioner (\$2,900,000) and the value of his equity in his home (\$124,313.49), SBA argues that Mr. Mantilla's net worth of \$3,588,000 exceeds the \$749,999.99 regulatory maximum for continued 8(a) BD program eligibility. 13 C.F.R. §§ 124.104(c)(2), 124.302. SBA further argues that the undersigned may not consider the revised Personal Financial Statement because it is not part of the Administrative Record. SBA states that its February 12, 2010 letter informed Petitioner of the opportunity to provide information that would eliminate the grounds for early graduation but Petitioner did not respond to the letter. Moreover, SBA argues, the revised Personal Financial Statement does not reflect a mere error in categorizing funds but that

\$3,076,939.35 in includable assets has simply disappeared.

On June 14, 2010, Petitioner submitted a letter to the Office of Hearings and Appeals indicating that its president, lose Mantilla, would like to testify and submit document showing that he has never had over six million dollars in neither his personal nor company accounts.

On March 17, 2011, the undersigned Administrative Law Judge was designated to preside over this matter.

IV. Discussion

A. Preliminary Matters

Petitioner attached copies of bank account statements and a revised Personal Financial Statement to its Amended Appeal Petition. In its Response, SBA objected to Petitioner's new evidence. Petitioner's new evidence was not provided to SBA prior to the time SBA issued its determination on April 13, 2011 and, accordingly, is not a part of the Administrative Record. 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 and the copies of bank account statements and the revised Personal Financial Statement will not be considered.

If by attaching the new evidence to the Amended Appeal Petition, Petitioner intended to request that the record be supplemented with these materials, the request is denied. Section 134.406 of the Rules provides, in pertinent part, that “[a]ny [appeal proceeding] shall be decided solely on a review of the written Administrative Record, except as provided in § 134.407. . . .” 13 C.F.R. § 134.406(a). Section 134.407, in turn, provides, in pertinent part, that “the Administrative Law Judge may not admit evidence beyond the written administrative record unless he or she first determines that the Petitioner, upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.” 13 C.F.R. § 134.407(a). There has been no credible showing that the SBA's determination was the result of bad faith or improper behavior. The SBA provided Petitioner an opportunity to provide information that would eliminate the basis of its decision but the Petitioner did not take the opportunity to provide that information. *See* A.R. at P4-P5, early graduation letter dated April 13, 2010; A.R. at P17-P24, letter of proposed early graduation dated February 12, 2010.

If Petitioner intended to object to the Administrative Record, the objection is overruled, Section 134.406 of the Rules provides, in pertinent part, that the “petitioner may object to the absence of a document *previously submitted* to, or sent by, SBA, which the Petitioner believes was erroneously omitted from the administrative record. . . . The petitioner's objections must be filed and served no later than 10 days [after] receipt of the administrative record.” 13 C.F.R. § 134.406 (c)(2) (emphasis added). “In the absence of any objection by the Petitioner or a finding by the Judge . . . that the record is insufficiently complete . . . the administrative record . . . shall be deemed complete.” 13 C.F.R. § 134.406(c)(3). Petitioner has not claimed that it submitted its bank account statements and revised Personal Financial Statement to the SBA before the SBA decided to graduate Petitioner early from the 8(a) BD program. The Administrative Record does

not contain the documents attached to the Amended Appeal Petition. Furthermore, Petitioner did not object to the absence of these documents within 10 days of receiving the Administrative Record.

Petitioner also requested that Mr. Mantilla be allowed to testify and bring his documents that show he has never had over six million dollars in his personal account or in the company account. The Rules provide that a party may only obtain a hearing if it is required by regulation or the ALJ concludes that “there is a genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.” 13 C.F.R. § 134.220(a). An oral hearing is not required by the regulations and there is no genuine dispute as to a material fact that cannot be resolved except by the taking of testimony and the confrontation of witnesses.

B. Standard of Review

The SBA's determination must be sustained unless a review of the written Administrative Record demonstrates the SBA acted arbitrarily, capriciously, or contrary to law in deciding to graduate Petitioner from the 8(a) BD program based on its conclusion that the owner upon whom the Petitioner's eligibility is based is no longer economically disadvantaged. 13 C.F.R. § 134.406(b).

The Supreme Court defined the scope of review of an agency decision under the arbitrary and capricious standard in *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983):

The scope of review under the “arbitrary and capricious” standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a “rational connection between the facts found and the choice made.” *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962). In reviewing that explanation, we must “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, *supra*, at 285; *Citizens to Preserve Overton Park v. Volpe*, *supra*, at 416.

As long as the SBA's determination is reasonable, the Administrative Law Judge must uphold it on appeal. *See* 13 C.F.R. § 134.406(b).

C. SBA's Early Graduation Determination

SBA may graduate a participant from 8(a) BD program early where SBA determines that “[o]ne or more of the disadvantaged owners upon whom the Participant's eligibility is based are no longer economically disadvantaged.” 13 C.F.R. § 124.302(a)(2). SBA has determined that the disadvantaged owner upon whom the participant's eligibility is based must have a net worth of less than \$750,000 to be considered economically disadvantaged and remain eligible for the 8(a) BD program. 13 C.F.R. § 124.104(c)(2). In determining the disadvantaged owner's net worth,

“SBA will exclude the ownership interest in the . . . Participant and the equity in the primary personal residence. . . .” *Id.*

The material in the Administrative Record shows that several SBA employees examined the information that Petitioner presented and each one concurred in the recommendation to graduate Petitioner from the 8(a) BD program. Petitioner argues that a mistake was made in the “cash on hand & in banks” section of the Personal Finance Statement and that the “number place was almost the same as the one for line on the stocks and bonds, which is the Companies [sic] stocks.” Even if there was a mistake, it is not attributable to SBA. Petitioner had an opportunity to correct that mistake before the SBA ultimately decided to graduate Petitioner early by responding to the February 12, 2010 letter from SBA informing Petitioner why it was considering graduating Petitioner early from the 8(a) BD program. There is no indication in the Administrative Record that Petitioner attempted to provide information prior to SBA's determination on April 13, 2010. The undersigned finds that SBA's calculation of Mr. Mantilla's net worth to be reasonable and in accordance with the applicable regulations. *See* 13 C.F.R. § 124.104(c)(2).

For all the reasons stated, there is nothing in the record that shows that the SBA's determination was arbitrary, capricious, or contrary to law., Accordingly, the appeal is denied. *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).

SPENCER T. NISSEN
Administrative Law Judge