

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

IN THE MATTER OF:

Best Technology Services, Inc.,

Petitioner

SBA No. BDP-435

Decided: July 5, 2012

APPEARANCES

Bryant S. Banes, Esq., Neel, Hooper & Banes, P.C., for Petitioner Best Technology Services, Inc.

Laura M. Foster, Esq., Office of General Counsel, for Respondent Small Business Administration

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS FOR LACK OF
JURISDICTION

I. Introduction

This proceeding arises under the authority of Section 8(a) of the Small Business Act (hereinafter the “Act”), 15 U.S.C. § 637(a), and is governed by the Rules of Procedure Governing Cases before the Office of Hearings and Appeals, 13 C.F.R. Part 134.

On March 9, 2012, Best Technology Services, Inc. (“Petitioner”) appealed a determination of the Small Business Administration (“SBA”) denying Petitioner admission into the 8(a) Business Development Program. *See* 13 C.F.R. pts 124 & 134. Pursuant to 13 C.F.R. § 134.404, this appeal was filed timely.

By Order dated April 19, 2012, the undersigned was designated to preside over this appeal.

II. Appeal Petition

In its final denial letter dated January 24, 2012, SBA determined, among other things, that Petitioner had “not met the potential for success management/technical requirements” because its president, Mr. Joshi, was unable “to demonstrate the level of management and technical background of the extent and complexity necessary to meet the . . . potential for success management/technical area. . . .” Pet. Encl. 1 at 2. SBA found that Petitioner's

reconsideration package did not provide “any of the specific information demonstrating how and where [Mr. Joshi] obtained management/technical background identified on his new resume. Pet. Encl. 1 at 2. SBA noted that the new resume indicated that Mr. Joshi was employed by a former 8(a) firm but that the entry otherwise did not reflect any management/technical exposure. Pet. Encl. 1 at 2. Further, SBA noted that Petitioner provided a one-day certification from “AIIM Enterprise Content Management dated June 8, 2011.” Pet. Encl. 1 at 2.

Petitioner alleges that SBA failed to consider and address significant evidence relevant to Petitioner's application for admission into the 8(a) BD program. Pet. at 2. Specifically, Petitioner alleges that, on reconsideration, SBA disregarded: i) Petitioner's information that shows Mr. Joshi devotes full time to the applicant firm; ii) Mr. Joshi's expanded resume which shows that he has the requisite management/technical knowledge and experience to control Petitioner; and iii) Mr. Joshi's explanations regarding both the signatories to Petitioner's bank account and the reasons why it appeared that Mr. Joshi was not Petitioner's highest paid employee. Pet. at 3-5. Petitioner alleges that SBA's failure to consider this information was done in bad faith and is arbitrary, capricious and contrary to law requiring a remand to SBA for reconsideration. Pet. at 5. As to its potential for success, Petitioner asserts that it may demonstrate its potential for success by showing that it was “in business in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD application. Pet. at 2 (*citing* 13 C.F.R. § 124.107).

III. Motion to Dismiss

On April 19, 2012, the SBA filed a Motion to Dismiss for Lack of Jurisdiction (“Motion”). In the Motion, SBA made reference to certain exhibits to the Motion but neglected to attach those exhibits. SBA also stated in the Motion that counsel for Petitioner had not responded to SBA's email inquiry as to whether Petitioner would oppose the Motion. Mot. at 1. That same day, SBA filed a second Motion to Dismiss for Lack of Jurisdiction (“Amended Motion”), amending the initial Motion to include the omitted exhibits and to reflect that the Petitioner opposes the Motion. *See* cover email dated April 19, 2012 to Amended Motion.

SBA argues that its determination was based, in part, on Petitioner's failure to establish its potential for success. Am. Mot. at 2. SBA asserts that, pursuant to 13 C.F.R. § 134.405(a)(1), Office of Hearing and Appeals (“OHA”) lacks “jurisdiction to hear appeals . . . that are based in whole, or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control.” Am. Mot. at 2. Thus, SBA argues, OHA lacks jurisdiction to hear this appeal because the denial of Petitioner's admission into the 8(a) BD program that was based, in part, on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control. Am. Mot. at 1, 2.

Further, SBA argues that, when assessing an applicant's potential for success, the regulations require SBA to consider a number of factors in addition to the fact that the applicant was in business in its primary industry classification for at least two full years immediately prior to the date of its 8(a) BD program application. Most notably, the regulations require SBA to consider the applicant's “technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations” and “the technical and managerial

expertise of the applicant concern's managers.” Am. Mot. at 3 (quoting 13 C.F.R. § 124.107(d)) (internal quotations and emphasis omitted). SBA argues that, contrary to Petitioner's allegations that it disregarded Petitioner's information regarding Mr. Joshi's managerial and technical experience, the decline letter shows that SBA conducted a detailed review of this information. Am. Mot. at 3.

Petitioner submitted its Response to SBA's Motion to Dismiss for Lack of Jurisdiction (“Response”) on May 4, 2012. Petitioner argues that “it is impossible that the applicant lacks potential for success.” Resp. at 2. SBA's position is not supported by evidence. Resp. at 2. Petitioner argues that Respondent should not be permitted to mischaracterize or completely disregard evidence to support an improper justification for denial. Resp. at 1. Further, SBA's failure to consider Petitioner's evidence is grounds for appeal. Resp. at 1. (citing *D.L. King and Associates, Inc.*, BDP-177 (2002)). Petitioner argues that SBA's utter failure to perform its duties, its complete disregard for evidence, and its failure to request documents from petitioner prior to making a determination demonstrate that SBA has engaged in a bad faith attempt to avoid an appeal. Resp. at 1-2.

IV. Discussion

The 8(a) BD program exists “to assist eligible small disadvantaged business concerns compete in the American economy through business development,” 13 C.F.R. § 324.1. Before a business concern may be admitted to the 8(a) BD program, it must demonstrate that it is controlled by a socially and economically disadvantaged individual. *See* 13 C.F.R. § 124.106. The business concern must also show that it “possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program.” 13 C.F.R. § 124.107. Among the criteria that SBA evaluates under the “potential for success” requirement is whether the applicant has demonstrated “both technical knowledge in its primary industry category and management experience sufficient to run its day-to-day operations.” 13 C.F.R. § 124.107(d).

An applicant may appeal a denial of its application to OHA only if the denial is based solely upon a negative finding of social disadvantage, economic disadvantage, ownership, or control. 15 U.S.C. § 637(a)(9); 13 C.F.R. § 124.206(a). A denial decision based at least in part on the failure to meet any other eligibility criterion is not appealable to OHA. *Id.* Moreover, an administrative law judge must decline to accept jurisdiction over any appeal of a denial of 8(a) BD program admission based in whole or in part on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control. 13 C.F.R. § 134.405(a)(1).

Here, SBA's determination was based, in part, on its finding that Petitioner had not met the potential for success requirement. Petitioner's reliance on *D.L. King & Associates, Inc.*, BDP-177 (2002) for the proposition that OHA has jurisdiction over an appeal where the SBA is alleged to have acted in bad faith by mischaracterizing or disregarding evidence is misplaced. In *D.L. King & Associates, Inc.*, the petitioner appealed SBA's determination that the petitioner was ineligible for participation in the 8(a) BD program because petitioner's owner was not socially and economically disadvantaged. That issue was clearly appealable under the Act and the relevant regulations. 15 U.S.C. § 637(a)(9); 33 C.F.R. § 124.206(a). The administrative law judge found that SBA had failed to consider evidence relevant to that issue and remanded the

case to SBA to evaluate that evidence. Here, SBA clearly made a determination that is not appealable under the Act or the regulations and Petitioner's allegations of bad faith do not give OHA jurisdiction over this appeal. *See* 15 U.S.C. § 637(a)(9); 13 C.F.R. § 124.206(a); 13 C.F.R. § 134.405(a)(1).

V. Conclusion

There is no jurisdiction to hear this appeal because the SBA's determination was based, in part, on a negative finding of potential for success pursuant to 13 C.F.R. § 124.107. The SBA's Motion to Dismiss for Lack of Jurisdiction is **GRANTED**, and the Petition appealing the SBA's denial of admission of Best Technology Services, Inc. into the 8(a) BD program 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).

BARBARA A. GUNNING
Administrative Law Judge