

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

IN THE MATTER OF:

Career Personnel, Inc.,

Petitioner

SBA No. BDPE-462

Decided: January 11, 2013

ORDER GRANTING AGENCY'S MOTION TO DISMISS & FINAL ORDER

The U.S. Small Business Administration (“SBA” or “Agency”) brought a Motion to Dismiss Career Personnel, Inc.'s (“Petitioner”) appeal of SBA's denial of admission into the 8(a) Business Development Program (“Program”). SBA counsel asserted that the Office of Hearings and Appeals (“OHA”) lacks jurisdiction to consider Petitioner's appeal because the Agency made the denial, in part, on grounds not appealable to OHA. Having fully considered the parties' arguments, the law, and the record before me, the Agency's Motion to Dismiss is **GRANTED** and Petitioner's Appeal is **DISMISSED**.¹

I. Procedural History

On May 15, 2012, the SBA notified Petitioner that it was denied admission to the 8(a) Business Development Program (“Program”). *See* Motion to Dismiss at Exh. 1. The SBA asserted four bases for the denial: (1) the individual upon whom eligibility was to be based was not socially and economically disadvantaged due to gender as defined by 13 C.F.R. § 124.103; (2) the individual upon whom eligibility was to be based was not economically disadvantaged as defined by 13 C.F.R. § 124.104; (3) the individual upon whom eligibility was to be based did not meet the character requirements for the Program as defined under 13 C.F.R. § 124.108; and (4) there was no reasonable assurance that Petitioner had the necessary business integrity for participation in the Program as defined under 13 C.F.R. § 124.108. *Id.* at Exh 1, 1-5.

On June 14, 2012, Petitioner asked SBA to reconsider its initial determination, and on September 25, 2012, SBA again denied Petitioner's admission to the Program. *Id.* at Exh. 2. However, based upon a review of the materials submitted by Petitioner in support of its request for reconsideration, the SBA withdrew the third asserted reason concerning the nondisclosure of a tax lien. *Id.*

¹ Pursuant to a Memorandum of Agreement between the SBA and the United States Coast Guard (“USCG”), USCG Administrative Law Judges are providing judicial services to the SBA in accordance with the OPM Administrative Law Judge loan program.

On October 30, 2012, Petitioner filed a preliminary request to file an appeal, which for the purposes of this Order is considered Petitioner's operative Appeal.

On November 30, 2012, Petitioner filed a Motion to Amend Appeal pursuant to 13 C.F.R. § 134.207. Petitioner's counsel attached a proposed Amended Appeal to that Motion.

On December 13, 2012, SBA counsel filed a Motion to Dismiss for Lack of Jurisdiction. Agency counsel argued that the filing of the Motion to Dismiss instituted a stay of these proceedings under 13 C.F.R. 134.211(e).

On December 18, 2012, I issued an Order staying the time for the Agency to respond to Petitioner's Motion to Amend pending my ruling on the Agency's Motion to Dismiss. That Order also gave Petitioner the opportunity to respond to the Agency's Motion to Dismiss.

On December 18, 2012, Petitioner filed a Response to the Agency's Motion to Dismiss.

II. The Agency's Motion to Dismiss

Agency counsel argued that OHA does not have jurisdiction over Petitioner's Appeal because SBA's denial was based, at least in part, on grounds non-appealable in this forum. Agency counsel asserted that a Program applicant denied admission to the Program may only appeal the denial if it is solely based on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria. Motion to Dismiss at 2 (*citing* 15 U.S.C. § 637(a)(9); 13 C.F.R § 124.206(a)). Agency counsel farther argued that the judge, under 13 C.F.R § 134.405(a), must decline jurisdiction in any such case where other grounds are asserted as the basis for denial, as was done in Petitioner's case. *Id.* at 2-3 (*citing* OHA appeal decisions).

III. Petitioner's Response

Petitioner responded that the Agency acted in a manner that was arbitrary, capricious, and an abuse of its discretion in denying Petitioner admission in violation of 5 U.S.C. § 706(2)(A). Response at 1. To support this argument, Petitioner's counsel incorporated by reference the materials submitted in the Motion to Amend Appeal as part of the Response. *Id.* These materials have been reviewed to fully evaluate Petitioner's opposition.

Petitioner further argued: (1) that SBA's grounds for denial (i.e., the failure to disclose the existence of a trust) was false because Petitioner disclosed the existence of the trust in May of 2012; (2) that the Agency was guilty of at least negligence by falsely asserting that Petitioner withheld critical information to determine Petitioner's eligibility for the Program; (3) that the Appeal was sufficient and timely filed despite arguable procedural deficiencies in Petitioner's then-pro se filing; (4) that remanding the case to SBA is appropriate if the record indicates the SBA made an erroneous factual finding (*citing* 13 C.F.R § 134.406(c)(2)); and (5) that the SBA acted with unchecked power that requires review by OHA.

IV. Analysis

Agency rules limit the judge's jurisdiction in these appeals. Specifically, 13 C.F.R § 124.206(a) provides that a Program applicant may only appeal a denial of Program admission if the denial “is based solely on a negative finding of social disadvantage, economic disadvantage, ownership, control, or any combination of these four criteria.” (emphasis added). Furthermore, the regulations provide that “[a] denial decision that is based at least in part on the failure to meet any other eligibility criterion is not appealable and is the final decision of SBA.” *Id.*; *see also* 15 U.S.C. § 637(a)(9).

Under SBA's jurisdictional rules, the Administrative Law Judge shall decline to accept jurisdiction over any 8(a) Program appeal if:

- (1) The appeal does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification of the determination, including appeals of denials 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). Section 134.405(a) is mandatory and leaves very little, if any, room for the judge to exercise jurisdiction over matters specifically excluded.

OHA has regularly dismissed appeals where the Agency's denial for admission to the Program rest, at least in part, on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control, even when such grounds appear for the first time in decisions on reconsideration.² Petitioner has offered no reason why such cases were wrongfully decided or should otherwise not form persuasive authority.

Here, SBA initially determined that Petitioner was ineligible for admission to the Program for four separate reasons, two of which are not appealable to OHA under Agency rules. SBA reconsidered Petitioner's application to the Program in light of materials submitted and concluded that Petitioner did not in fact have an outstanding tax Hen at the time of the application. SBA therefore withdrew one of the four reasons for its denial.

However, the Agency continued to assert that Petitioner failed to disclose the existence of a trust, thus indicating ineligibility under 13 C.F.R. § 124.108(a)(5) (“If, during the processing of an application, SBA determines that an applicant has knowingly submitted false information,

² *See In re Best Technology Services, Inc.*, SBA No. BDP-435 (2012); *In re New Horizons Training & Consulting, LLC*, SBA No. BDP-414 (2011); *In re Choc-Taw Construction*, SBA No. BDP-295 (2008); *In re Kaspar Group, Inc.*, SBA No BDP-292 (2008); *In re Joint Military Development Services, Inc.*, SBA No. BDP-282 (2008); *In re The Patrick Wolffe Group, Inc.*, SBA No. BDP-275 (2008); *In re Woodsman Construction, Inc.*, SBA No. BDP-263 (2007); and *In re Trioid Int'l Group, LLC*, SBA No. BDP-103 (1998).

regardless of whether correct information would cause SBA to deny the application, and regardless of whether correct information was given to SBA in accompanying documents, SBA will deny the application.”).

Contrary to Petitioner's arguments, I do not read SBA's final determination as relying on the fact that the existence of the trust remained undisclosed throughout the application and reconsideration process. Rather, SBA seemingly determined that Petitioner's failure to disclose the trust in the initial application rendered Petitioner ineligible for admission under Section 124.108(a)(5) despite her provision of the trust document and an explanation at SBA's request. Nowhere does the Agency's final determination state that SBA *never* received notice of the trust's existence. It appears that the SBA was not persuaded by Petitioner's explanation for failing to disclose the existence of the trust in the initial application.³

None of Petitioner's remaining arguments alter the lack of jurisdiction to hear Petitioner's Appeal. First, the issue of whether Petitioner's notice of appeal served to preserve the right to appeal is moot given the jurisdictional issue. Nevertheless, the materials that Petitioner submitted with the Motion to Amend Appeal have been considered in rendering the decision on the Agency's Motion to Dismiss.

Second, the issue of remanding the case to SBA for further record development under 13 C.F.R. § 134.406(c)(2) is inapplicable given the clear lack of jurisdiction to hear Petitioner's Appeal. Such record development is appropriate only if the judge has jurisdiction over the appeal to address whether the Agency acted in an arbitrary, capricious or otherwise unlawful way within the confines of issues appealable to OHA. Given that a denial based on 13 C.F.R. § 124.108(a)(5) is not subject to OHA jurisdiction, further record development to assess an appeal made on that issue is not available.

Additionally, given the state of this record (i.e., the materials submitted by both parties, including the documents attached to Petitioner's Motion to Amend Appeal), no reason to remand to SBA exists in any event. The timing of Petitioner's disclosure and explanation of a trust was clearly communicated (i.e., after the initial application).⁴ The rationale for SBA's denial, which I read as not dependent upon Petitioner's claimed denial of such later communications by the SBA, is contained in SBA's final determination.

Third, Respondent's appeal to the general provisions of the Administrative Procedure Act, due process, and the asserted need to check the Agency's power fail to overcome the explicit mandates of the Agency's procedural regulations concerning OHA jurisdiction.

³ Substantively ruling an that particular ground for denial is outside the scope of my jurisdiction. Petitioner's arguments on this point are addressed in some detail because Petitioner alleged Agency misconduct, or at least negligence, which I find unpersuasive and unfounded by the record.

⁴ See Petitioner's Motion to Amend at Exh. 2 (letter from Ms. Arronow to SBA, stating, “I am enclosing a copy of [the] Revocable Trust as you have requested. . . . I apologize for not including mention of this Trust in my 8-A application. . . .”).

Furthermore, OHA appeals are not the appropriate forum for a collateral attack on SBA's regulations. *See, e.g., Eagle Helicopter, Inc. d/b/a Kaching Aviation*, SBA No. SIZ-4810 (2006) (rejecting a challenge to the Agency's regulations and stating "this Office has no jurisdiction to entertain any challenge to the constitutionality or validity of SBA's regulations."). Should Petitioner have issues with the SBA's limitation of OHA jurisdiction, the appropriate place for any such argument is found in the Article III courts.

Because SBA denied Petitioner admission to the Program, at least in part, for a reason not appealable to OHA, I do not have jurisdiction to hear and decide Petitioner's Appeal.

WHEREFORE:

ORDER

IT IS HEREBY ORDERED that SBA's Motion to Dismiss is **GRANTED** and Petitioner's Appeal is thereby **DISMISSED**.

THE PARTIES ARE HEREBY NOTIFIED that subject to 13 C.F.R. § 134.409(c), this Order is the final decision of the Small Business Administration.

Done and dated on this 11th day of January, 2013 at Alameda, California.

HON. PARLEN L. MCKENNA
Acting Chief Administrative Law Judge
United States Coast Guard