

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

IN THE MATTER OF:

A.J. Nesti Materials,

Petitioner

SBA No. BDPE-551

Decided: May 18, 2015

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

On April 20, 2015, A.J. Nesti Materials (“Petitioner”) appealed a determination of the U.S. Small Business Administration (“SBA”) in which the SBA denied Petitioner admission into the 8(a) Business Development program (“8(a) BD program”). *See* 13 C.F.R. parts 124 & 134.¹

On April 30, 2015, the SBA filed a *Motion to Dismiss for Lack of Jurisdiction* (“Motion”). In the *Motion*, the SBA noted that Petitioner was denied admission into the 8(a) BD Program “based on grounds other than a negative finding of social disadvantage, economic disadvantage, ownership or control.” Specifically, the SBA Determination on Reconsideration (“Recon Determination Letter”) concluded that Petitioner had not shown “the potential to successfully meet the business development objectives of the 8(a) BD program.”

An 8(a) BD Program applicant may appeal a denial of its application 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). The Court must decline jurisdiction if the SBA's decision was based, even in part, on any other grounds. *See, e.g., Pynergy, LLC*, SBA No. BDPE-525 (July 23, 2014); *Platinum Business Services, LLC*, SBA No. BDPE-504 (Aug. 29, 2013); *Novel Wares, Inc.*, SBA No. BDP-454 (Nov.21, 2012).

The Recon Determination Letter cited two grounds for denying Petitioner access into the 8(a) BD Program: (1) failure to prove gender-based disadvantage experienced by its owner; and (2) failure to show the potential for business success. The second basis does not relate to social or economic disadvantage, ownership, or control. Accordingly, this Court does not have jurisdiction to hear this appeal.

¹ Pursuant to an Interagency Agreement in effect beginning October 1, 2012, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Small Business Administration Office of Hearings and Appeals.

Petitioner requests that the Court rule only on the SBA's social disadvantage determination. The *Appeal Petition* states that “Without [this Court's] adjudication of my claim of social disadvantage I will be without any [fo]rum of redress. Fairness dictates bifurcation so I can continue at the Court of Claims.”

The Court understands Petitioner's plight. Unfortunately, the controlling regulation is unambiguous. “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.” 13 C.F.R. § 124.206(a). The Court is not authorized to bifurcate the hearing, as Petitioner wishes. A final agency decision does not mean, however, that Petitioner is utterly without recourse. It means only that relief must be sought pursuant to the Administrative Procedures Act. 5 U.S.C. § 701 *et seq.*

For the foregoing reasons, the Court finds that it is without jurisdiction to review the SBA's decision to deny Petitioner admission into the 8(a) BD program. Accordingly, it is hereby **ORDERED** that Petitioner's *Appeal Petition* is **DISMISSED**.

SO ORDERED.

ALEXANDER FERNÁNDEZ
Administrative Law Judge