

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

IN THE MATTER OF:

Brendan Lau Agricultural LLC,

Petitioner

SBA No. BDPE-603

Decided: August 16, 2022

APPEARANCES

Brendon T.W. Lau, President, Brendon Lau Agricultural LLC, Honolulu, Hawaii.

William D. David, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On May 27, 2022, Brendon Lau Agricultural LLC (Petitioner) appealed a decision of the U.S. Small Business Administration (SBA) Associate Administrator for Business Development (AA/BD), denying Petitioner entry into SBA's 8(a) Business Development (BD) program. The AA/BD found that, due to other outside employment, Petitioner's President and owner, Mr. Brendon T.W. Lau, does not manage Petitioner on a full-time basis, as required by 13 C.F.R. § 124.106(a). For the reasons discussed *infra*, the appeal is denied.

SBA's Office of Hearings and Appeals (OHA) decides appeals of 8(a) BD eligibility determinations under 15 U.S.C. §§ 634(i) and 637(a), and 13 C.F.R. parts 124 and 134. Petitioner filed its appeal within 45 calendar days after its receipt of the AA/BD's determination, so the appeal is timely. 13 C.F.R. § 134.404. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Procedural History

Petitioner applied for admission to the 8(a) BD program during 2020, based on the eligibility of Mr. Brendon T.W. Lau, Petitioner's President and sole shareholder. (Administrative Record (AR), Exh. 10.) As part of its application, Petitioner disclosed that Mr. Lau holds two other jobs in addition to his work with Petitioner. (*Id.*, at 33.) Specifically, Mr. Lau is employed by Fred Lau Hawaiian Landscaping Maintenance Company, LLC (HLC) as Foreman, and by Mari's Gardens LLC (Mari's Gardens) as Manager. (AR, Exh. 11, at 423.)

Mr. Lau's resume indicated that, as Foreman at HLC, Mr. Lau “[r]egularly monitors jobsite[s],” meets with association members, handles repairs, and “troubleshoots emergencies 24/7.” (*Id.*) As Manager of Mari's Gardens, Mr. Lau “[o]versees aquaponics operations,” coordinates scheduling, and provides guidance to the Mari's Gardens retail store. (*Id.*)

SBA requested copies of tax and pay records for Mr. Lau, so as to verify Petitioner's compliance with “a variety of eligibility requirements.” (AR, Exh. 12, at 7.) Mr. Lau's personal tax returns indicated that he earned \$164,800 in 2020 wages from HLC; \$32,076 from Mari's Gardens; and no income from Petitioner. (AR, Exh. 1, at 3.) Mr. Lau's paystub from HLC reflected that he works 40 hours per week for HLC and is compensated on an hourly rate. (AR, Exh. 11, at 243-44.) Petitioner maintained that, notwithstanding the pay records, Mr. Lau is “a salaried employee” of HLC, but is “paid as if he works 80 hours” every two weeks. (*Id.*, at 245.)

Petitioner submitted a letter, dated March 24, 2021, from Mr. Frederick Lau, owner of HLC and Mari's Gardens, concerning Brendon Lau's work for those companies. (AR, Exh. 11, at 215.) Frederick Lau is the father of Brendon Lau. (AR, Exh. 11 at 247.) According to Frederick Lau's letter:

Brendon Lau works 7 days per week part-time at both [HLC] and [Mari's Gardens]. On average he spends approximately 10 hours per week on [HLC] activities and 16 hours per week on [Mari's Gardens] activities. Due to the nature of the work, sometimes those hours overlap.

(AR, Exh. 11, at 215.)

SBA requested additional information about Brendon Lau's employment with Petitioner, HLC, and Mari's Gardens, to include his “weekly schedule with hours worked at each firm.” (AR, Exh. 12, at 15-16.) In response, Petitioner asserted that, in its view, Mr. Lau's simultaneous employment with the three firms presents “no conflicts of interest.” (AR, Exh. 11, at 396.) Petitioner claimed that Mr. Lau works 45 hours per week for Petitioner, but did not specify his work schedule. (*Id.*) Petitioner further stated that Mr. Lau works for Mari's Gardens ten hours a week on Wednesdays and Saturdays, performing work such as “[p]ayroll and scheduling,” and for HLC five hours a week with the days unspecified. (*Id.*)

B. AA/BD's Decision

On April 29, 2022, the AA/BD denied Petitioner's application, finding that Mr. Lau is not devoted full-time to the management of Petitioner, in contravention of 13 C.F.R. § 124.106(a). (AR, Exh. 1.)

The AA/BD observed that, according to Frederick Lau's letter, Brendon Lau works part-time 7 days a week for both HLC and Mari's Garden, for a combined total of 26 hours per week. (*Id.*, at 2.) Petitioner subsequently stated that Brendon Lau works 45 hours per week for Petitioner, 10 hours per week for Mari's Gardens, and 5 hours per week for HLC, but Petitioner

did not provide specific schedules or other supporting information to substantiate these claimed hours. (*Id.*) Nor did Petitioner attempt to reconcile its assertions with Frederick Lau's letter. (*Id.*)

The AA/BD found that Petitioner submitted tax and pay information for Brendon Lau, reflecting that he is “an hourly employee working an average of 40 hours a week” at HLC. (*Id.*, at 3.) Further, during 2020, Mr. Lau reported \$164,800 in wages from HLC; \$32,076 from Mari's Gardens; and no income from Petitioner. (*Id.*) In addition, Mr. Lau's resume indicates that he serves as Foreman at HLC and Manager at Mari's Gardens, positions of authority that “would require [Mr. Lau] to be onsite during the normal working hours of firms in [Petitioner's] industry.” (*Id.*)

Given this record, the AA/BD stated that she “must conclude that [Mr. Lau] do[es] not devote full-time to the operation of [Petitioner] during normal working hours.” (*Id.*) As Petitioner is not compliant with 13 C.F.R. § 124.106(a), Petitioner is not eligible for participation in the 8(a) BD program.

C. Appeal

On May 27, 2022, Petitioner filed the instant appeal. Petitioner acknowledges that it provided “conflicting reports” to SBA concerning Mr. Lau's employment. (Appeal at 1.) Furthermore, “in the past, Mr. Lau has devoted nearly half his time to [HLC] and Mari's Gardens.” (*Id.*) Going forward, however, “Mr. Lau will be transitioning more of his efforts and attention into [Petitioner],” and “Mr. Lau's compensation will begin to reflect his time and devotion to [Petitioner] as well.” (*Id.*) Petitioner offers a spreadsheet which it characterizes as “an illustration of Mr. Lau's typical work week.” (*Id.* and Exh. 2.)

With regard to Mr. Lau's income during 2020, Petitioner states that Mr. Lau reinvested money into Petitioner during the COVID-19 crisis, but “still needed income to support his own family.” (*Id.* at 1.) Under these circumstances, “the \$164,800 from [HLC] and the \$32,076 from [Mari's Gardens] all makes sense.” (*Id.*)

Petitioner requests that the denial of Petitioner's application should be reversed, and Petitioner should be admitted into the 8(a) BD program. (*Id.*, at 1-2.) Although “[i]t is understandable how the [AA/BD] came to [her] conclusions,” Petitioner urges that the decision be reconsidered in light of the “added details that have been provided here.” (*Id.*)

D. SBA's Response

On July 18, 2022, SBA responded to the appeal. SBA maintains that, given the record before her, the AA/BD correctly and reasonably determined that Mr. Lau is not devoted full-time to the management of Petitioner, in contravention of 13 C.F.R. § 124.106(a). (Response at 4.) As a result, the appeal should be denied. (*Id.*)

SBA first objects to Petitioner's Exhibit 2, which accompanied the appeal. OHA must exclude this document because Petitioner did not previously provide it to SBA in support of Petitioner's 8(a) application, and the AA/BD thus did not have access to the document in

reaching her decision. (*Id.* at 2-4.) Although OHA may, under certain circumstances, admit evidence beyond the Administrative Record upon “a substantial showing . . . that the [SBA] determination in question may have resulted from bad faith or improper behavior,” Petitioner here has not shown, nor even alleged, any impropriety on the part of the AA/BD or other SBA officials. (*Id.*, quoting 13 C.F.R. § 134.407(a).)

SBA highlights that an 8(a) applicant or participant must be managed on a full-time basis by one or more disadvantaged individuals who possess the requisite management capabilities. (*Id.* at 4-5, citing 13 C.F.R. § 124.106(a)(1).) Other outside employment will not serve as an automatic disqualification, but the 8(a) applicant is responsible for proving, by a preponderance of the evidence, that the applicant is managed full-time by a disadvantaged individual, and that such outside employment does not conflict with the applicant's normal business hours. (*Id.* at 9-10, citing 13 C.F.R. § 124.204(c) and *Matter of Raintree Advanced Mgmt. Corp.*, SBA No. BDPE-407 (2011).) OHA has repeatedly recognized that, when the disadvantaged individual performs “significant duties, both qualitatively and quantitatively” for a non-applicant concern or organization during overlapping business hours, SBA may reasonably conclude that such duties unavoidably detract from the individual's ability to manage the applicant on a full-time basis. (*Id.* at 6-7, citing *Matter of Sonoran Constr. Group aka Sonoran Equip. Appraisal*, SBA No. BDPT-581 (2020) and *Matter of AGB Investigative Servs., Inc.*, SBA No. BDPE-354 (2010).)

In the instant case, the AA/BD reasonably concluded that Mr. Lau's job duties at HLC and Mari's Gardens unavoidably detract from his management of Petitioner. The wages/salaries Mr. Lau earned from HLC and Mari's Gardens are “generally commensurate with full time employment,” and his duties as described in his resume reflect that he performs significant qualitative and quantitative duties at those two firms. (*Id.* at 7-8.) SBA offered Petitioner opportunities to produce additional information or clarification, but Petitioner failed to do so. Indeed, SBA “never received an adequate schedule” for Mr. Lau despite specifically requesting this information, and Petitioner itself acknowledges in its appeal petition that much of the documentation Petitioner did provide was contradictory. (*Id.* at 8-10.)

SBA concludes that “the AA/BD accounted for all the information provided by Mr. Lau” and reasonably found that his submissions “contained insufficient evidence to establish his full-time management of [Petitioner].” (*Id.* at 11.) OHA therefore should deny the appeal.

III. Discussion

A. Standard of Review

An 8(a) BD eligibility determination may be disturbed on appeal only if OHA concludes, based upon the entire Administrative Record, that SBA's determination was arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406. OHA's task is to decide whether SBA reached a reasonable conclusion in light of the facts available in the Administrative Record. 13 C.F.R. § 134.406(b)(2); *Matter of United Global Techs., Inc.*, SBA No. BDPE-518, at 2 (2014). An SBA determination may be found arbitrary and capricious if SBA: (1) fails to properly apply the law and regulations to the facts of the case; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its decision that runs counter to the evidence;

or (4) offers an explanation that is so implausible that it cannot be ascribed to a mere difference in view between SBA and OHA. *Matter of MJL Enterprises, LLC*, SBA No. BDPE-566, at 5 (2017); *Matter of McMahon Builders, Inc.*, SBA No. BDPE-461, at 4 (2013).

B. Administrative Record

In conducting its review, OHA may only consider information contained in the written Administrative Record. 13 C.F.R. § 134.406(a). As a result, the Administrative Record must be complete before OHA can ascertain whether it supports SBA's determination. *Matter of Southern Aire Contracting, Inc.*, SBA No. BDPE-453, at 2 (2012). A complete Administrative Record must contain all documents that are relevant to the determination on appeal, and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. 13 C.F.R. § 134.406(c)(1).

In the instant case, SBA filed a comprehensive Administrative Record with OHA, and Petitioner has not objected to the absence of any documents from the Administrative Record or to any SBA claim of privilege. I therefore find that the Administrative Record is complete. *Id.* § 134.406(c)(3).

I agree with SBA that Petitioner's Exhibit 2 is not properly before OHA. Exhibit 2 is not included in the Administrative Record because Petitioner did not previously provide it to SBA in support of Petitioner's 8(a) application, and the AA/BD thus did not consider Exhibit 2 in reaching her decision. Sections II.A and II.B, *supra*. Accordingly, Exhibit 2 is EXCLUDED from the record.

C. Full-Time Devotion Requirement

To gain entry into the 8(a) BD program, a concern must, among other requirements, be “be managed on a full-time basis by one or more disadvantaged individuals who possess requisite management capabilities.” 13 C.F.R. § 124.106(a)(1). Further, the disadvantaged individual(s) who manage the 8(a) applicant “must devote full-time to the business during the normal working hours of firms in the same or similar line of business.” *Id.* § 124.106(a)(3).

SBA regulations do not define the terms “full-time” or “normal working hours.” In prior decisions, however, OHA has recognized that “devoting 40 hours of work per week” generally qualifies as “full-time,” and that “the hours of 8:00am or 9:00am to 4:00pm or 5:00pm, Monday through Friday” may be considered “normal working hours.” *Matter of Sonoran Constr. Group aka Sonoran Equip. Appraisal*, SBA No. BDPT-581, at 13 (2020); *Matter of Raintree Advanced Mgmt. Corp.*, SBA No. BDPE-407, at 7 (2011); *Matter of AGB Investigative Servs., Inc.*, SBA No. BDPE-354, at 7 (2010).

OHA has held that employment outside of the 8(a) applicant is not inherently problematic, and “SBA may not presume that outside employment in itself constitutes conflict with the disadvantaged individual's full-time commitment to the applicant concern.” *Raintree*, SBA No. BDPE-407, at 8. Instead, the central question is “whether the dual obligations conflict to the extent that SBA may reasonably conclude that one precludes the other.” *Sonoran*, SBA

No. BDPT-581, at 12; *see also Matter of BDS Protective Servs., LLC*, SBA No. BDPE-433, at 8 (2012).

D. Analysis

Having reviewed the record and the arguments of the parties, I see no basis to conclude that the AA/BD's determination was arbitrary, capricious, or contrary to law. Accordingly, this appeal must be denied.

As the AA/BD observed in her decision, Petitioner claimed that its President and owner, Mr. Lau, works 45 hours per week for Petitioner, 10 hours per week for Mari's Gardens, and 5 hours per week for HLC. Sections II.A and II.B, *supra*. Despite SBA's requests, though, Petitioner did not produce Mr. Lau's work schedules at these firms. *Id.* Absent such information, the AA/BD could not ascertain whether Mr. Lau worked for Petitioner during the "normal working hours of firms in the same or similar line of business," as required by 13 C.F.R. § 124.106(a)(3).

Moreover, Petitioner's assertions with regard to Mr. Lau's employment were undermined or contradicted by other information in the record, which Petitioner itself provided to SBA. According to his resume, for example, Mr. Lau serves as Foreman at HLC and Manager at Mari's Gardens, positions that require him to "[r]egularly monitor[] jobsite[s]" and "troubleshoot[] emergencies 24/7." Section II.A, *supra*. Petitioner did not address, or explain, how Mr. Lau could perform such work entirely outside of Petitioner's own "normal working hours." *Id.* Similarly, although Petitioner maintained that Mr. Lau works only 5 hours per week at HLC, his pay records reflected that, in actuality, Mr. Lau works for HLC essentially full-time, or 40 hours per week. *Id.* Petitioner did not attempt to resolve this inconsistency. *Id.* The AA/BD further noted that Mr. Lau reported no income from Petitioner during 2020, but \$164,800 from HLC. *Id.* Again, though, Petitioner did not explain how Mr. Lau derived \$164,800 in income from HLC, working 5 hours per week as Foreman. *Id.*

Given the record before her, then, the AA/BD reasonably concluded that Mr. Lau is not devoted full-time to the management of Petitioner, in contravention of 13 C.F.R. § 124.106(a). *E.g., Sonoran*, SBA No. BDPT-581, at 15-16 (when a disadvantaged individual "engaged in outside employment during normal business hours," there was "great potential for conflict between his outside employment and [the 8(a)] business").

Petitioner also argues that, in the future, Mr. Lau intends to "transition[] more of his efforts and attention into [Petitioner]." Section II.C, *supra*. While this may be so, SBA regulations provide that "[a]n [8(a)] applicant must be eligible as of the date the AA/BD issues a decision." 13 C.F.R. § 124.204(d). Any future changes in Mr. Lau's employment thus are not relevant to the outcome here. *E.g., AGB Investigative Servs.*, SBA No. BDPE-354, at 7 (declining to consider prospective changes to a disadvantaged individual's outside employment schedule, because "despite any changes that [the disadvantaged individual] may make in the future, the SBA had to determine *current* eligibility for the 8(a) BD program") (emphases in original).

IV. Conclusion

For the above reasons, I AFFIRM the AA/BD's determination and DENY this appeal. 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).

KENNETH M. HYDE
Administrative Judge