

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

IN THE MATTER OF:

JA Harris Trucking, Inc.,

Petitioner

SBA No. BDPT-463

Decided: January 23, 2013

DECISION

On March 9, 2012, JA Harris Trucking, Inc. (“Petitioner”) appealed a determination of the Small Business Administration (“SBA”) to terminate Petitioner’s participation in the 8(a) Business Development (“BD”) program. *See* 13 C.F.R. parts 124 and 134. On May 8, 2012, the SBA filed an *Answer* claiming its decision to terminate Petitioner from the 8(a) BD program was not arbitrary, capricious, or contrary to law, because Petitioner “engaged in a pattern of failure to make required submissions to SBA in a timely manner.”

On October 23, 2012, the matter was transferred to this Court pursuant to 13 C.F.R. § 134.218(a) to determine whether the Agency’s decision was arbitrary, capricious, or contrary to law.<sup>1</sup>

I. Applicable Law

Participation in the 8(a) BD Program

The 8(a) Business Development program (“8(a) BD program”) was developed to assist eligible small disadvantaged business concerns competing in the American economy through business development. 13 C.F.R. § 124.1. The SBA accepts eligible concerns into the 8(a) BD program for a period of nine years so long as the concern maintains its program eligibility. 13 C.F.R. § 124.2. To demonstrate continued eligibility, “participants must annually submit to the SBA a certification of continued eligibility and submit certain documents, including a personal financial statement, tax returns, and fiscal, year-end financial statements.” *Fairfield Trucking Co.*, SBA No. BDP-223 (2005) (*citing* 13 C.F.R. §§ 124.112(b), 124.602); *see also Taycom Bus Solutions, Inc.*, SBA No. BDP-228 (2006).

However, the SBA may terminate the participation of a concern prior to the expiration of

---

<sup>1</sup> 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.

the program term for good cause. 13 C.F.R. § 124.303. Included in the definition of “good cause” is:

(7) [a] pattern of failure to make required submissions or responses to SBA in a timely manner, including a failure to provide required financial statements, requested tax returns, reports, updated business plans, information requested by SBA's Office of Inspector General, or other requested information or data within 30 days of the date of request.

13 C.F.R. § 124.303(a). The regulation further provides that a “material breach of any terms and conditions of the 8(a) BD Program Participation Agreement” also constitutes good cause for terminating the participation of a concern. 13 C.F.R. § 124.303(a)(19).

Prior to terminating a participant from the 8(a) program, the SBA must first notify the concern in writing of its intent and “the specific facts and reasons for SBA's findings.” 13 C.F.R. § 124.304(b). The SBA must also inform the concern that “[the concern] has 30 days from the date it receives the letter to submit a written response to SBA explaining why the proposed ground(s) should not justify termination.” *Id.* After the 30-day period for a response has passed, the SBA considers the proposed termination and any response by the concern in determining whether termination is warranted. 13 C.F.R. § 124.304(c).

#### Standard of Review

The SBA's decision to terminate a concern's participation in the 8(a) BD program can only be overturned if the reviewing court concludes — after considering the entire administrative record — that the determination was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). The reviewing court's task is to decide whether the agency reached a reasonable conclusion in light of the facts available in the administrative record. It does not ask whether the conclusion was the best one, or even the correct one. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) (“This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith—not whether it was right.”); *Ace Technical*, SBA No. SDBA-178, at 3 (“[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct.”). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

## II. The Agency's Determination

By letter dated July 20, 2011 (“Letter of Intent to Terminate”), the SBA informed Petitioner of its decision to propose termination of Petitioner's participation in the 8(a) BD program on the following grounds: (1) a pattern of failure to make required submissions or responses to SBA in a timely manner; and (2) material breach of any terms and conditions of the

8(a) BD Program Participation Agreement.<sup>2</sup> The Letter of Intent to Terminate specifically cited Petitioner's failure to submit its Annual Review update information that was requested by the SBA's Houston District Office on April 15, 2011 and May 19, 2011. The letters were preceded by two e-mails sent on March 20, 2011 and April 19, 2011 requesting the same information.

The administrative record filed by the SBA included evidence that the letters sent by the Houston District Office on April 15, 2011 and May 19, 2011 were received at Petitioner's address by Sarah Owen, Petitioner's employee. The Houston District Office also sent e-mails on January 6, 2011, March 30, 2011, and May 12, 2011 reminding Petitioner of its obligation to comply with annual reporting requirements by filing year-end financial statements and income tax returns. These e-mails were followed by two letters, dated May 16, 2011 and June 22, 2011, that were also received by Ms. Owen.

Petitioner was afforded 30 days to respond to the allegations set forth in the Letter of Intent to Terminate, but failed to do so. As such, the SBA found that Petitioner failed to “overcome the reason(s) cited for termination,” and issued a letter (“Termination Letter”) to Petitioner stating that it was moving forward with Petitioner's termination from the 8(a) BD program. As evidenced by the administrative record, the SBA considered Petitioner's failure to respond to the SBA's numerous requests and to the Letter of Intent to Terminate when recommending that Petitioner's participation in the 8(a) BD program be terminated.

### III. Discussion

The SBA has an affirmative responsibility under the Small Business Act to ensure that only eligible business concerns are admitted into—and remain in—the 8(a) BD program. This ensures that public funds are properly administered, and that the benefits of the 8(a) BD program are limited to those small businesses owned, controlled, and managed by socially and economically disadvantaged individuals. To carry out the public trust, the SBA must enforce 8(a) BD program requirements.

It is well established by SBA case law that failure to submit annual review documents as part of the 8(a) BD program, followed by subsequent failures to respond to requests for such documents, constitutes a pattern of failure under 13 C.F.R. § 124.303(a)(7) and is good cause for termination. *See e.g., Taycom Bus. Solutions, Inc.*, SBA No. BDP-228 (2006) (holding that Petitioner's failure to provide annual review documents in response to two requests and a letter of intent to terminate constituted a pattern of failure).<sup>3</sup> Here, Petitioner received four requests for

---

<sup>2</sup> The Letter of Intent to Terminate also cited 13 C.F.R. § 124.602(c) as a reason for the proposed termination. However, the Termination Letter dated January 31, 2012 did not include that section of the regulation as grounds for termination.

<sup>3</sup> Petitioner failed to respond to numerous requests, reminder letters, and emails sent from the SBA. Each was a separate instance of failure, even though they all stemmed from the original failure to comply with program requirements for year-end 2010. In the aggregate, these failures constitute a pattern of behavior that spanned over a period of at least six months. The Court considered whether a “pattern” of behavior could arise from a single failure to comply, and

Annual Review documents (two by letter and two by email), and five reminders of Petitioner's obligation to comply (two by letter and three by email). In addition, Petitioner received a Letter of Intent to Terminate Petitioner's participation in the 8(a) BD program. Petitioner's failure to respond to these numerous requests, which occurred over a six-month period, amounts to a pattern of failure to make required submissions or responses to the SBA.

Petitioner does not dispute SBA's allegations that it failed to respond to the Letter of Intent to Terminate and the Houston District Office's requests for information. Rather, Petitioner claims that its oversight is attributable to Ms. Owen, an employee who had been assigned the responsibility of maintaining compliance with SBA's requirements. According to Petitioner, this employee had become disgruntled and tried to sabotage Petitioner "because she believed she was not being compensated properly and [did] not care about the company's success." Petitioner explains that the delegation of 8(a) BD compliance duties to Ms. Owen was part of an effort to keep overhead at a minimum.

Petitioner's claims are insufficient to support a finding that the SBA's decision to terminate Petitioner's participation is arbitrary, capricious, or contrary to law. Although Petitioner's treasurer, Joe Harris, argues that he did not see the requests for information or Letter of Intent to Terminate, he does not dispute that the requests were received by Petitioner. Regardless of whether Mr. Harris, or anyone else in Petitioner's office, was aware that these requests remained outstanding, the administrative record demonstrates that the requests were in fact received by Ms. Owen, the very person to whom Petitioner delegated the responsibility of ensuring Petitioner's compliance with the 8(a) BD program.<sup>4</sup>

Petitioner's misplaced trust in an employee entrusted with an important responsibility does not absolve Petitioner of its responsibility to timely comply with SBA regulations. *See NSN, LLC*, SBA No. BDP-338 (2012) (holding that "[r]ecipients of the benefits of the 8(a) BD program bear the responsibility for timely complying with SBA's regulations," and noting that "regardless of whether a receptionist misplaced SBA correspondence ... Petitioner is still

---

concluded that a pattern of behavior *may* arise from a single failure to comply in the face of numerous requests for compliance. The Court considered several cases involving unrelated subject matter, but discussing whether a "pattern" of conduct may arise from a single occurrence. *See e.g., United States v. Nichols*, 464 F.3d 1117, 1123 (9th Cir. 2006) (stating that there must be "sufficient similarity and temporal proximity" to reasonably suggested that repeated instances of behavior constitute a pattern of conduct); *Bautista v. Los Angeles Cnty.*, 216 F.3d 837, 842-43 (9th Or. 2000) ("This court has described the term 'transaction or occurrence' as referring to 'similarity in the factual background of a claim'; claims that 'arise out of a systematic pattern of events' arise from the same transaction or occurrence.") (citations omitted); *United States v. Santiago*, 906 F.2d 867,872 (2d Cir. 1990) (stating that a court should consider "such factors as the nature of the [Petitioner]'s acts, his role, and the number and frequency of repetitions of those acts, in determining whether they indicate a behavior pattern.").

<sup>4</sup> The received requests included certified mail signed for by Ms. Owen in the course of her assigned duties.

responsible for meeting 8(a) BD program requirements.”); *see also Floyd D. Townsend & Assocs.*, SBA No. BDP-339 (2010) (holding that even when faced with technical difficulties, misaddressed mail, and mishandling of Petitioner's mail by Petitioner's office building, Petitioner is still responsible for meeting 8(a) BD program requirements); *Taycom Bus, Solutions, Inc.*, SBA No. BDP-228 (2006) (upholding termination of Petitioner from the 8(a) BD program for failure to submit required documents, even when Petitioner had only filed late due to loss of personnel).

While it is unfortunate that Ms. Owen did not fulfill her responsibilities to her employer, the responsibility for her failures as an employee lies with Petitioner. The SBA is not required to mitigate the consequences of Petitioner's failure to comply with SBA regulations.<sup>5</sup> Accordingly, the SBA's decision to terminate Petitioner for a pattern of failure to make required submissions or responses to the SBA is not unreasonable because Petitioner failed, without adequate justification, to respond to numerous requests for information, and to the Letter of Intent to Terminate.

Petitioner was also terminated from the 8(a) BD program for a “material breach of any terms and conditions of the 8(a) BD Program Participation Agreement. The Court notes that the Administrative Record is devoid of said Participation Agreement. Therefore, the Court cannot determine whether the decision to terminate Petitioner's participation on this ground was arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(a) (“[a]ny proceeding conducted under § 134.401 (a) through (d) shall be decided solely on a review of the written administrative record ...”). However, the fact that the Court cannot determine the reasonableness of the SBA's determinations on this ground is irrelevant. “If the SBA bases the termination on more than one ground, and at least one ground is not arbitrary, capricious, or contrary to law, the SBA's decision to terminate must be upheld.” *Blind Detective Agency*, SBA No. BDP-163, at 7 (2001) (*citing Daisy Electric, Inc.*, SBA No. BDP-153 (2001)).

#### IV. Conclusion

Based on the foregoing, the Court finds that the SBA's determination terminating Petitioner from the 8(a) BD program was not arbitrary, capricious, or contrary to law and it is, therefore, affirmed. See 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

So **ORDERED**,

J. JEREMIAH MAHONEY  
Administrative Law Judge

---

<sup>5</sup> Considering the unusual circumstances of the employee's apparent perfidy, it was within the SBA's discretion to withdraw the termination and permit Petitioner to file the required year-end documents. However, SBA's failure to do so was not arbitrary, capricious, or contrary to law.

**Notice of Finality.** This decision on appeal constitutes a final agency decision that is binding on the parties. 13 C.F.R. § 134.409(a). However, within 20 days of its issuance, the court may reconsider the decision if there is a clear showing of an error of fact or law material to the decision. 13 C.F.R. § 134.409(c).