

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

IN THE MATTER OF:

SJ Innovations, LLC,

Petitioner

SBA No. BDPT-588

Decided: January 21, 2021

ORDER GRANTING MOTION TO DISMISS¹

I. Background

A. The Appeal

On November 9, 2020, SJ Innovations, LLC (Petitioner) filed the instant appeal with the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA), seeking to challenge Petitioner's termination from the 8(a) Business Development (BD) program. Accompanying its appeal, Petitioner provided copies of SBA's Letter of Intent to Terminate, dated September 24, 2020, and Petitioner's response thereto, dated October 19, 2020. (Appeal, Exhs. A and B.)

B. Motion to Dismiss

On December 28, 2020, SBA moved to dismiss the appeal for lack of jurisdiction. SBA contends that the appeal is premature because SBA has not yet issued a final termination decision, a prerequisite for a proper appeal under 13 C.F.R. § 124.304. (Motion at 1.)

SBA explains that, based upon its review of Petitioner's adjusted gross income from 2017-2019, SBA determined that Petitioner may no longer be eligible to participate in the 8(a) BD program. SBA therefore issued Petitioner a Letter of Intent to Terminate, to which Petitioner timely responded.

On November 3, 2020, the Director of SBA's Office of Certification and Eligibility e-mailed Petitioner, “[a]s a courtesy,” and stated that, in her opinion, Petitioner's response to the Letter of Intent to Terminate was insufficient to overcome the proposed grounds for termination. (*Id.* at 2.) The Director inquired whether Petitioner would prefer to request early graduation from

¹ This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. parts 124 and 134.

the 8(a) BD program as an alternative to termination. (*Id.*) Petitioner then filed the instant appeal with OHA.

SBA highlights that, when SBA believes that an 8(a) BD participant should be terminated from the program prior to the expiration of the program term, SBA must notify the participant in writing of its concerns through a Letter of Intent to Terminate. (*Id.* at 3, citing 13 C.F.R. § 124.304.) The participant has 30 days to respond to a Letter of Intent to Terminate. If, upon reviewing that response, SBA decides to proceed with termination, SBA must send the participant a Notice of Termination. (*Id.*) “Then, and only then, does the [participant] have a right to appeal this decision and OHA then has the jurisdiction to hear and decide the appeal.” (*Id.*)

Here, SBA has not issued a Notice of Termination. (*Id.*) Rather, the most recent correspondence between SBA and Petitioner, the e-mail of November 3, merely asked if Petitioner wished to consider early graduation from the program. (*Id.*) Accordingly, there has been no final agency decision and OHA lacks jurisdiction. (*Id.*)

C. Petitioner's Opposition

On January 8, 2021, Petitioner opposed SBA's motion to dismiss. Petitioner argues that OHA's regulations at 13 C.F.R. § 134.205 permit an appeal from “any orders and decisions that have been issued,” and that the November 3, 2020 e-mail is “a ‘decision’ that is tantamount to a termination of program participation.” (Opp. at 1.) Furthermore, 13 C.F.R. § 134.102(j)(1) indicates that a concern may appeal a “negative finding” that results in program termination. (*Id.*)

Petitioner requests, in the alternative, that OHA stay the appeal and establish a date certain by which SBA must “either ratify or reverse [its] termination decision of November 3, 2020.” (*Id.* at 1-2.)

II. Discussion

I agree with SBA that OHA presently lacks jurisdiction over this dispute. As SBA observes, the applicable regulations require that, when SBA determines that an 8(a) BD participant should be terminated from the program, SBA must inform the participant in writing of its concerns through a Letter of Intent to Terminate. 13 C.F.R. § 124.304(b). The participant may respond to the Letter of Intent to Terminate, and if SBA decides that termination is warranted, SBA must then send the participant a Notice of Termination. *Id.* § 124.304(d). A Notice of Termination may be issued only by SBA's Associate Administrator for Business Development (AA/BD), rather than by a subordinate official, and will advise the participant of its right to appeal to OHA. *Id.*

Here, the record reflects that SBA has not issued a Notice of Termination, and there is thus no final agency decision that can be appealed to OHA. Section I.A, *supra*. Petitioner points to the November 3 e-mail, but that e-mail was not styled as a Notice of Termination; contained no discussion of appeal rights; and was not issued by the AA/BD. *Id.* Further, the e-mail merely inquired, “[a]s a courtesy,” whether Petitioner preferred to consider early graduation from the 8(a)

BD program. *Id.* The November 3 e-mail, then, was not a Notice of Termination that could give rise to a proper appeal to OHA.

Petitioner suggests that OHA may have jurisdiction through 13 C.F.R. §§ 134.205(a) and 134.102(j)(1). I see no merit to these arguments. The regulation at § 134.205(a) states that the administrative record before OHA should include “any orders and decisions” relevant to the case, but does not provide that every such order and decision may be appealed to OHA. The regulation at § 134.102(j)(1) states that OHA has jurisdiction over certain “SBA 8(a) program determinations under the [Small Business] Act and part 124 of this chapter,” including “program termination.” There is no dispute that OHA would have jurisdiction over this case if SBA had issued Petitioner a Notice of Termination. Because no such Notice of Termination has yet been issued, though, OHA currently lacks jurisdiction.

Lastly, OHA cannot grant Petitioner's request to stay this case and instruct that SBA issue a Notice of Termination by a date certain. Petitioner offers no authority for OHA to issue such an order, and the applicable regulations merely indicate that SBA must “act in a timely manner in processing . . . termination actions,” but do not mandate any particular deadline for SBA to reach a final determination. 13 C.F.R. § 124.304(c).

III. Conclusion

For the above reasons, SBA's Motion to Dismiss is GRANTED and this proceeding is DISMISSED. This dismissal is WITHOUT PREJUDICE to a new appeal being filed in the event that SBA subsequently issues a Notice of Termination or other determination that can be appealed to OHA. 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