

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

IN THE MATTER OF:

LFM Industries, Inc., d/b/a Massey
Industries, Inc.

Petitioner

SBA No. BDPT-601

Decided: March 7, 2022

ORDER DISMISSING APPEAL¹

I. Background

On February 11, 2022, LFM Industries, Inc., d/b/a Massey Industries (Petitioner) filed with the Small Business Administration (SBA) Office of Hearings and Appeals (OHA) the instant appeal of the November 30, 2021 determination of the SBA's Associate Administrator (AA) for Business Development (BD), terminating Petitioner's participation in the SBA's 8(a) BD Program.

In its appeal, Petitioner states that its principal, Lisa Faith Massey, only became aware of the determination on February 5, 2022. Petitioner stated that it did not receive the letter of determination until three days prior to its filing of the appeal. Petitioner further stated that it did not receive a hard copy of the determination via United States Postal Service (USPS) mail, that the electronic mail transmission was delivered to Petitioner's "junk" file, and that it only discovered the letter accidentally during an update of its files. Appeal, at 1. With its appeal, Petitioner submitted an incomplete copy of the termination letter, dated November 30, 2021.

Petitioner, however, failed to serve a copy of its appeal to the SBA's Director, Office of Business Development and the Associate General Counsel for Litigation, as required by 13 C.F.R. § 134.403.

Petitioner refers to "124.303 section (7)" (possibly referring to 13 C.F.R. § 124.303(a)(7)) as a basis for OHA's jurisdiction. Petitioner adds that "[t] his letter is to serve as an official request to appeal the decision to terminate LFM Industries, Inc., from the SBA 8(a) program. I am requesting an extension allowing all missing information to be submitted along with a new business plan immediately upon approval." *Id.* Petitioner attempts to explain that the COVID-19 pandemic prevented Ms. Massey from focusing on its business matters. Finally,

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 121 and 134.

Petitioner requests that SBA give Petitioner the opportunity to submit all requested information immediately. *Id.*

On February 15, 2022, OHA issued to Petitioner an Order to Show Cause why OHA should not dismiss this appeal as (1) untimely and (2) failing to state a reason why the determination is arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.405(a)(1)-(2). The response was due no later than February 22, 2022.

On February 23, 2022, Petitioner responded to the Order to Show Cause.² In a letter dated February 1, 2022, Petitioner denies the appeal was untimely because Ms. Massey only learned of the termination on February 5, 2022 and filed its appeal less than one week later. Response, at 1. Petitioner maintains that a communication this important should have been sent via USPS mail. Petitioner acted within a week of learning of the termination, and thus, argues its appeal is timely. *Id.*

Petitioner further states that its original letter “was filed as required by the regulation 13 C.F.R. (sic),” which included what Petitioner characterized as proper service to the SBA's Director, Office of Business Development and the Associate General Counsel for Litigation. Petitioner submits a copy of a Houston, Texas USPS receipt, dated February 11, 2022, at 2:03 p.m. Petitioner also concedes that it was an oversight in submitting an incomplete copy of the SBA's termination letter and indicates that it has included an attachment with the complete letter from SBA.³

Petitioner then discusses the merits of its case, the great difficulties the pandemic had caused in its business, and the stresses that Ms. Massey had faced in the last three months. On its response, Petitioner now argues that SBA's decision was arbitrary and capricious in not considering the effect of the economic conditions caused by the pandemic. Thus, Petitioner requests an opportunity to submit all required documents to SBA in the matter of days for review. *Id.*

II. Discussion

An appeal petition challenging an 8(a) determination must be filed within 45 calendar days after receipt of the SBA determination being appealed. 13 C.F.R. § 134.404. A judge may modify any time period or deadline “except . . . [t]he time period governing commencement of a case (*i.e.*, when the appeal petition may be filed). . . .” 13 C.F.R. § 134.202(d)(2)(i)(A). Further, the appeal must also state, with specific reference to the determination and the record supporting the determination, the reasons why the determination is alleged to be arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.402. The regulations also provide the Judge shall decline to

² Petitioner's Response was filed after the close of business on February 22, 2022, at 6:00 p.m., ET. Therefore, it is counted as filed on the next business day. 13 C.F.R. § 134.204(b)(2).

³ Petitioner, however, did not submit a complete copy of SBA's letter. Rather, Petitioner submitted a response to the Order to Show Cause, titled “sba appeal letter and certificate of service,” a copy of a USPS receipt, and OHA's Show Cause Order.

accept jurisdiction 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, or (2) the appeal is untimely filed. 13 C.F.R. § 134.405(a)(1) & (2). The regulations require that a Petitioner must serve copies of its petition to the SBA's Director, Office of BD and the Associate General Counsel for Litigation. 13 C.F.R. § 134.403(a) and (b)(1).

Petitioner here filed its appeal well after 45 calendar days from its receipt of the AA/BD's termination letter. The fact that the e-mail reached Petitioner's system, even if it went into a "junk" folder, means Petitioner did in fact receive the termination letter on November 31, 2021, and thus should have filed its appeal within 45 calendar days of that date. That Petitioner's e-mail box received the notice means that it is charged with receipt of the AA/BD's determination. SBA cannot be on notice of Petitioner's internal workings as to what happens when Petitioner receives a communication. *Size Appeal of Red Orange North America, Inc.*, SBA No. SIZ-6136, at 3 (2021).

Thus, Petitioner received the AA/BD's determination on November 30, 2021, and its appeal was due on January 14, 2022. Appellant's February 11, 2022 appeal is plainly untimely. I cannot modify the deadline by which Petitioner must file its appeal. Thus, the appeal is untimely, and I must decline to accept jurisdiction over this matter. *See* 13 C.F.R. § 134.405(a)(2); *see also In the Matter of Secure Trendz, Inc.*, SBA No. BDP-371 (2010) (dismissing an 8(a) appeal due to lack of timeliness.)

As for Petitioner's response to the Order to Show Cause, it was also untimely. Section I, *supra*, fn. 2. Petitioner offers no authority to support its argument that its appeal is timely. To this day, Petitioner failed to submit to OHA a complete copy of SBA's termination letter. Petitioner's mail service upon the SBA's Director, Office of BD and the Associate General Counsel for Litigation, was made after the fact and issuance of the Order to Show Cause, and thus, the appeal was defective *ab initio*. Even on the merits, Petitioner fails to show the termination was arbitrary and capricious, when it concedes it failed to submit the required documents to SBA and now seeks the opportunity to submit them.

For the above reasons, I DISMISS the instant appeal for lack of jurisdiction. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.409(a).

CHRISTOPHER HOLLEMAN
Administrative Judge