

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

IN THE MATTER OF:

Irby Spine Care Professional Corporation,

Petitioner

SBA No. BDPT-612

Decided: May 1, 2024

APPEARANCES

Dr. Archer Irby, for Irby Spine Care Professional Corporation, Bogota, NJ, Appellant

Tanner Hatch, Esq., Office of General Counsel, U.S. Small Business Administration,
Washington, D.C.

DECISION

I. Introduction and Jurisdiction

On January 8, 2024, Irby Spine Care Professional Corporation (Petitioner), appealed the decision of the U.S. Small Business Administration (SBA) Associate Administrator for Business Development (AA/BD) terminating Petitioner's participation in the 8(a) Business Development (BD) program. The AA/BD determined that Petitioner's owner no longer qualifies as economically disadvantaged under 13 C.F.R. § 124.104. For the reasons discussed *infra*, I find that the AA/BD's determination was reasonable, and was not arbitrary, capricious, or contrary to law. The appeal therefore is DENIED. See 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

SBA's Office of Hearings and Appeals (OHA) adjudicates appeals of 8(a) termination decisions pursuant to 15 U.S.C. §§ 634(i) and 637(a)(9), and 13 C.F.R. parts 124 and 134. Petitioner filed its appeal within 45 days of receiving 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. Annual Review

Petitioner's 8(a) BD program start date is January 21, 2016. Petitioner is 51% owned by Dr. Archer Irby. On September 29, 2022, SBA notified Dr. Irby, through the Certify email system, that Petitioner's Annual Review and associated documentation for Program Year 6 was due by November 28, 2022. (Administrative Record (AR), Exh. 5.) On October 29, 2022, a second automated e-mail reminder was sent to Petitioner. (AR. Exh. 6.)

On November 1, 2022, Ms. Ursula M. Sanders, Program Support Assistant for the Economic Development/Lender Relations for SBA's New Jersey District Office, e-mailed Petitioner, providing a copy of its first Annual Review notification. (AR, Exh. 15.) On that same day Ms. Sanders received a delivery confirmation email from Microsoft Outlook. (AR, Exh. 12.) On November 18, 2022, Ms. Sanders again e-mailed Petitioner attaching a copy of Petitioner's second Annual Review notification. (AR, Exh. 13.) Again, Ms. Sanders received a delivery confirmation email from Microsoft Outlook that same day. (AR, Exh. 12.)

B. Intent to Terminate

On December 14, 2022, the New Jersey District Office (NJ District Office) sent Petitioner a Letter of Intent to Terminate. (AR, Exh. 10.) The letter stated SBA intended to terminate Petitioner from the 8(a) BD program due to a pattern of failing to make the submissions or responses to SBA required by 13 C.F.R. § 124.303(a)(7) in a timely manner. (*Id.* at 1.)

The NJ District Office reviewed Petitioner's repeated failures to submit the required Annual Review documentation, as requested by SBA. (*Id.*) The NJ District Office noted SBA sent Petitioner the first notification request for the required documentation on September 29, 2022, via the Certify system. (*Id.*) SBA sent Petitioner a second notification on October 29, 2022, via Certify. (*Id.*) SBA sent Petitioner a third notification via email on November 1, 2022. (*Id.*) SBA sent Petitioner a fourth notification via email on November 18, 2022. (*Id.*) The NJ District Office noted that it had yet to receive from Petitioner any information required to process its 6th program year annual review. (*Id.*, at 2.) The letter then informed Petitioner it would have 30 days from receipt of the letter to submit the missing information. (*Id.*)

On December 20, 2022, Ms. Peralta sent Dr. Irby a copy of the Letter and a Voluntary Withdrawal Agreement via email. (AR, Exh. 8.) On that same day Ms. Peralta received a delivery confirmation email from Microsoft Outlook. (AR, Exh. 11.)

C. Termination

On December 12, 2023, the AA/BD terminated Petitioner's participation in the 8(a) program. (Termination, at 1.) The AA/BD explained she was terminating Petitioner due to a pattern of failing 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, or other requested information or data within 30 days of the date of request. (*Id.* at 1, citing 13 C.F.R. § 124.303(a)(7).)

The AA/BD found that Petitioner had failed to submit Annual Review information requested by SBA's NJ District Office. The AA/BD stated SBA had sent annual update notification letters on September 29, 2022 and October 29, 2022, via Certify, and November 1, 2022 and November 18, 2022, via email. (*Id.*) In addition, Petitioner received a Letter of Intent to Terminate via e-mail on December 14, 2022, which provided it with thirty (30) days to respond; however, Petitioner “neglected to respond to SBA's proposed termination notice and follow-up messages.” (*Id.*)

The AA/BD found that “[a]s of today, SBA has not received [Petitioner's] Annual Review package.” (*Id.*) Annual Review information is not only required by 13 C.F.R. § 124.112, but also is essential to enable SBA to assess Petitioner's continued eligibility for the 8(a) BD program. (*Id.*) As a result of Petitioner's repeated failure to respond to requests for information, the AA/BD terminated Petitioner's participation in the 8(a) BD program.

D. Appeal

On January 8, 2024, Petitioner appealed its termination to OHA. Petitioner acknowledged SBA's decision and “submits mitigating factors that prevented [[Petitioner] from introducing such required documentation for its participation.” (Appeal at 1.) As background, Petitioner asserts that Dr. Irby voluntarily surrendered his medical license in August 2016, pending criminal charges. (*Id.* at 2.) In 2020, Dr. Irby's indictments were dismissed after a not guilty verdict, and his record was expunged. (*Id.*) Dr. Irby is currently appealing the State of New Jersey's final decision to permanently revoke his chiropractic license. (*Id.* at 2.) Petitioner request that SBA provide a 45-day extension or a suspension until Petitioner can resolve pending matters. (*Id.* at 1.)

Petitioner asserts it did not provide timely documentation submission because of the “absence of business activity” under its primary NAICS code 621310, Offices of Chiropractors. (*Id.* at 3.) Petitioner acknowledged receipt of SBA's notices to submit its Annual Review in November 2023; however, Petitioner alleges it could not access the System for Award Management (SAM). (*Id.*) Also, the Federal Service Desk “would not update its current states corporate status and address once requested documents were received.” (*Id.*) Petitioner further asserts it “had every intention to submit documentation,” but was unable to log into Certify.SBA.gov since October 2023 until late December 2023, when it regained access to SAM. (*Id.*)

Petitioner asserts its inability to submit documents for its Annual Review due to “awaiting GSA registration” is the reason SBA's termination is arbitrary, capricious, or contrary to law. (*Id.* at 4.)

E. SBA's Response

On March 18, 2024, SBA filed its Response to the appeal and asserts SBA's decision to terminate Petitioner from the 8(a) BD program was not arbitrary, capricious, or contrary to law, because Petitioner repeatedly failed to respond to SBA's requests for documentation. (Response at 4.) SBA asserts OHA has found that a “failure to submit all of the required annual review documents required by 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.” (*Id.*, citing *In the Matter of: MilleniumSoft, Inc.*, SBA No. BDPT-503, at 5 (2013).) Petitioner also received multiple notices from SBA requesting documentation to complete Appellant's annual review, but Appellant failed to provide any requested documentation. (*Id.*)

Next, SBA rejects Appellant's arguments regarding legal issues in New Jersey courts and asserts Dr. Irby's legal issues are "not relevant to SBA's determination that [Petitioner] should be terminated from the 8(a) BD program due to a pattern of failing to make required submissions." (*Id.*) Further, the allegations of misconduct from the state of New Jersey do not change the fact that Appellant's failure to respond to several requests for documentation and failure to provide the requested documentation for "more than a year after the initial notice sent by SBA via Certify on September 29, 2022" left Petitioner in violation of the regulation. (*Id.* at 4-5.) SBA concludes that "[t]he facts and record demonstrate that SBA's decision to terminate Petitioner from the 8(a) BD program was reasonable." (*Id.* at 5.)

III. Discussion

A. Standard of Review

A participant in the 8(a) BD program ordinarily may remain in the program for nine years so long as the concern maintains its program eligibility. 13 C.F.R. § 124.2. To maintain its eligibility, a participant must, among other requirements, annually submit information to its servicing SBA District Office. 13 C.F.R. § 124.112(b). SBA may terminate a concern's participation in the 8(a) program prior to the expiration of the program term for good cause. 13 C.F.R. § 124.303. Under SBA regulations, "good cause" for termination exists, *inter alia*, if an 8(a) participant engages in "[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)(7).

An SBA determination to terminate a concern from the 8(a) BD program may be overturned on appeal only if OHA concludes that SBA's determination was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b); 15 U.S.C. § 637(a)(9)(C). So long as SBA's decision was reasonable, it must be upheld, even if it differs from the conclusion that OHA might have reached itself. 13 C.F.R. § 134.406(b)(2); *Matter of 4-D Constr., Inc.*, SBA No. BDPT-535, at 6 (2014).

B. Analysis

I find the AA/BD's decision to terminate Petitioner from the 8(a) BD Program reasonable. The record is clear that SBA officials made numerous attempts to notify and email Petitioner regarding the submission of its Annual Review information via Certify.com and via email. Sections II. A & II. B, *supra*. In fact, the record conclusively establishes that SBA notified Appellant on September 29, 2022 and October 29, 2022 via Certify, and November 1, 2022 and November 18, 2022 via email. *Id.* The record further shows SBA officials received proof of delivery of email request of these notifications via Microsoft Outlook. *Id.* In addition to notifications for request for documentation, SBA officials provided Appellant with notice, in the form of a letter of intent to terminate Appellant from the 8(a) BD Program. Section II. B, *supra*. SBA officials informed Appellant SBA had not received any information required to proceed with its 6th program year and granted Appellant 30 days to submit a response to SBA explaining

Appellant's failure to provide the required information to the New Jersey District Office. *Id.* Appellant also warned that “[f]ailure to provide a written response within 30 days from the date of receipt of this letter will result in a recommendation by this office to proceed with termination.” *Id.* Appellant did not submit a response and SBA has no record of any submission by Appellant. Section II. E, *supra*. Thus, I find AA/BD reasonably found a “[a] pattern of failure to make required submissions or responses to SBA in a timely manner,” warranting termination under 13 C.F.R. § 124.303(a)(7).

Petitioner concedes that it “was given ample opportunities to fulfill the Annual Review” and “acknowledged the decision by the SBA.” Section II. A, *supra*. Nonetheless, Petitioner cites mitigating factors, “absence of business activity” and pending litigation in the New Jersey Superior Court of Appeals, as the reason it was unable to submit required documents. *Id.* As argued by SBA, Petitioner's mitigating circumstances does not show how the 8(a) BD Program was arbitrary, capricious, or contrary to law. Section II. E, *supra*. Thus, I am unconvinced by Petitioner's arguments; SBA regulations for the 8(a) program do not provide an exception for mitigating circumstances. This matter is analogous to *In the Matter of Geotechnical Innovation, PLLC*, SBA No. BDPT-598 (2022), where OHA determined the AA/BD made significant efforts from 2019 to 2021 to notify and remind petitioner of his requirement to submit annual review information. In *Geotechnical Innovation*, the petitioner cited to COVID-19 and other hardships as the reason for his inability to submit the information; however, OHA determined Petitioner did not attempt to inform the district office or seek an extension. *Geotechnical Innovation*, SBA No. BDPT-598, at 8. Thus, OHA dismissed the appeal, finding that petitioner could not demonstrate the AA/BD's decision was arbitrary, capricious, or contrary to law. *Id.*

Here, similar to *Geotechnical Innovation*, Petitioner neither submitted an explanation to the New Jersey District Office nor did it seek an extension of time to provide one. Sections II. A, II. B & II. C, *supra*. In fact, as observed by SBA, Petitioner failed to provide any documentation for more than a year and failed to include any documentation in the instant Appeal. Section II. E, *supra*. As of today, SBA has not received any of the documents required to process Petitioner's Annual Review. *Id.* The record shows Petitioner repeatedly failed to submit documentation, and the SBA regulations clearly provide that a pattern of failures to respond to SBA's requests for information is good cause for termination. 13 C.F.R. § 124.303(a)(7). The regulations do not include an exception for extenuating circumstances. Petitioner failed to comply with the requirements of the regulations, and the AA/BD took the action the regulation provides for terminating Petitioner's participation in the program. Sections II. A, II. B & II. C, *supra*. As SBA noted, OHA has consistently held that: “failure to submit all of the required annual review documents required by 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.” *In the Matter of: MilleniumSoft, Inc.*, SBA No. BDPT-503, at 5 (2013).

Thus, I find Petitioner has not shown that the AA/BD's decision to terminate Petitioner's participation in the 8(a) program was unreasonable or arbitrary.

IV. Conclusion

Petitioner has not demonstrated the AA/BD's decision was arbitrary, capricious, or contrary to law. Accordingly, the appeal is DENIED. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the U.S. Small Business Administration. See 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

CHRISTOPHER HOLLEMAN
Administrative Judge