

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

CVE Appeal of:

ING Unmanned Aerial Systems LLC,

Appellant

SBA No. CVE-245-A

Decided: November 1, 2022

APPEARANCE

Brandon [XXXX] Soper, Vice President, ING Unmanned Aerial Systems LLC, [XXXX]

DECISION¹

I. Introduction and Jurisdiction

On August 22, 2022, ING Unmanned Aerial Systems LLC (Appellant) appealed a decision of the U.S. Department of Veterans Affairs (VA) Center for Verification and Evaluation (CVE), denying Appellant's application for verification as a Service-Disabled Veteran-Owned Small Business (SDVOSB). CVE found that Appellant is not fully controlled by one or more service-disabled veterans, due to issues with Appellant's Operating Agreement.² On appeal, Appellant maintains that CVE's denial decision was clearly erroneous and requests that the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied.

OHA adjudicates CVE appeals pursuant to 38 U.S.C. § 8127(f)(8)(A) and 13 C.F.R. part 134 subpart K. Appellant timely filed the appeal within 10 business days after receiving the denial notice on August 9, 2022. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA now publishes a redacted version of the decision for public release.

² Effective August 22, 2022, SBA redesignated the SDVOSB ownership and control regulations, previously found at 13 C.F.R. §§ 125.11 through 125.14, as §§ 125.12 through 125.15. 87 Fed. Reg. 43,731, 43,739 (July 22, 2022). Citations in this decision are to the SDVOSB ownership and control regulations as redesignated.

II. Background

A. Operating Agreement

Appellant is a limited liability company (LLC) established in the state of Delaware, engaged in the business of “manufacturing, integration, training, and leasing of Unmanned Aircraft for Government and commercial purposes.” (Case File (CF), Exhs. 4, 11, 17, 20, 23, 33, 35, 48.) In September 2021, Appellant applied for verification as an SDVOSB and provided various supporting documentation. (CF, Exh. 1.) Among other information, Appellant submitted a copy of its Operating Agreement, executed by its five Members: Messrs. Brandon [XXXX] Soper (26% membership interest), Kurt L. Sonntag (26%), Ian N. Glenn (16%), Stavros Daskos (16%), and Paul James Shull (16%). (CF, Exhs. 17, 23, 35.) Messrs. Soper and Sonntag are service-disabled veterans. (CF, Exhs. 27-29.) Messrs. Glenn, Daskos, and Shull are non-veterans. (CF, Exhs. 39-41.)

The Operating Agreement became effective July 7, 2021, and contains the following provisions pertinent to this appeal:

III. **Members.**

...

D. Death, Incompetency, Resignation or Termination of a Member.

... The name of the Company may be amended upon the written and unanimous vote of all Members if a Member withdraws, dies, is found incompetent or is terminated.

...

F. Member Voting.

1. *Voting power.* The Company's Members shall each have voting power equal to their share of Membership Interest in the Company.

2. *Proxies.* At all meetings of Members, a Member may vote in person or by proxy executed in writing by the Member or by his duly authorized attorney-in-fact. Such proxy shall be delivered to the Secretary of the Company before or at the time of the meeting. No proxy shall be valid after eleven months from the date of its execution, unless otherwise provided in the proxy.

...

H. Fiduciary Duties of the Members.

...

2. *Competition with the Company.* The Members shall refrain from dealing with the Company in the conduct of the Company's business as or on behalf of a party having an interest adverse to the Company unless a majority, by individual vote, of the Members excluding the interested Member, consents thereto. The Members shall refrain from competing with the Company in the conduct of the Company's business unless a majority, by individual vote, of the Members excluding the interested Member, consents thereto. . . .

...

K. *Members as Agents.* All Members are agents of the Company for the purpose of its business. An act of any Member, including the signing of an instrument in the Company's name, binds the Company where the Member executed the act for apparently carrying on the Company's business or business of the kind carried on by the Company in the ordinary course. . . .

...

XII. General Provisions.

...

H. *Amendment.* This Agreement may be amended only by written consent of all the Members. . . .

(CF, Exhs. 17, 23, 35.)

The proffered resumes of Appellant's Members indicate that Mr. Sonntag is Chief Executive Officer/Chairman of the Board; Mr. Soper is Vice President; Mr. Glenn is Co-Owner; and Messrs. Shull and Daskos are Executive Officers/Directors. (CF, Exhs. 15, 61, 64-66.) According to his resume, Mr. Sonntag also is concurrently employed by another firm, [XXXX], as Owner/CEO. (CF, Exh. 61.)

B. Post-Review Findings (PRF) Notice

On July 7, 2022, CVE issued Appellant a Post-Review Findings (PRF) Notice. (CF, Exh. 68.1.) The Notice explained that CVE had identified issues that likely would prevent Appellant from being verified as an SDVOSB.

The Notice divided CVE's concerns into two categories. First, CVE noted that applicable regulations require that one or more service-disabled veterans must "control the operations of all business locations." (*Id.* at 2, citing 13 C.F.R. § 125.14(a).) Documentation Appellant provided showed that there are three operating locations for Appellant: [XXXXXXXX XXXXX]. (*Id.* at 1-2.) Appellant, however, did not provide sufficient details or evidence to demonstrate that Messrs. Sonntag or Soper manages and controls the location at [XXXX]. (*Id.* at 2.) Appellant declined to

respond to CVE's request for additional information, citing "privacy and information security" concerns. (*Id.* at 2-3.) As a result, CVE could not ascertain whether one or more service-disabled veterans controls Appellant's daily business operations. (*Id.* at 3.)

Second, CVE found that Appellant's Operating Agreement placed restrictions on the service-disabled veterans' ability to fully control Appellant. (*Id.* at 3-4.) While acknowledging that Messrs. Sonntag and Soper together hold a 52% ownership interest and therefore "are in control of Member decision making," CVE was troubled by other provisions in the Operating Agreement:

- Article III, Section D requires the approval of the non-veteran Members to amend the name of Appellant, if any Member "withdraws, dies, is found incompetent or is terminated." (*Id.* at 4.)
- Article III, Section H requires a majority vote of the individual Members to make decisions about competition with Appellant. (*Id.*)
- Article XII, Section H requires the written consent of all Members, including non-veteran Members, to amend the Operating Agreement. (*Id.*)

CVE concluded that service-disabled veterans apparently do not have full control over Appellant, as is required by 13 C.F.R. § 125.14(d). (*Id.*)

C. Response to PRF Notice

On July 18, 2022, Appellant responded to the PRF Notice. (CF, Exh. 70.) Appellant first asserted that [XXXXXXXXXX], at which time Appellant expects to change its "mailing address" at [XXXXXXXXXX]. (*Id.* at 1.)

With regard to the issues of control discussed in the PRF Notice, Appellant stated:

The five-day ultimatum [to respond to the PRF Notice] seems fair to someone who has the money to pay for the changes requested and legal consultation on both the US and Canadian side of things. I, however, have already stated that what you are requesting will take at least till the next VA disbursement. I do take exception to the erroneous findings that both perpetrate one of the veterans leaving the company (which would mean at the time it would not be veteran owned, and rightfully so) and that is the reason why you [CVE] are disapproving the application.

(*Id.*) Appellant proceeded to comment on the particular provisions in the Operating Agreement referenced by CVE. In response to CVE's concern over the provision requiring unanimous approval of the Members to amend the Operating Agreement, Appellant maintained that such a provision is mandatory under Delaware state law. (*Id.*) "If the statement were removed it is still law by Delaware State Code. The question is, are you [CVE] denying all Delaware applications?" (*Id.*)

With regard to CVE's concern over the provision requiring the unanimous agreement of all Members to change Appellant's name, Appellant contended that a name change would be "a huge issue" that would necessitate new CVE verification. (*Id.*) In Appellant's view, "to deny based off of a decertifying event is unreal." (*Id.*)

Lastly, in response to CVE's concern over the provision pertaining to competition with Appellant, Appellant posited that:

The veteran walked away from daily operations which decertifies the company in this scenario. It does not matter if the majority of [Members] are or are not Veterans at this point because they are not participating in day-to-day operations. To deny us on this front is a farse as well.

(*Id.*)

D. Final PRF Notice

After considering Appellant's response to the PRF Notice, CVE issued Appellant a Final PRF Notice.³ (CF, Exh. 68.2.) In the Final PRF Notice, CVE stated that, notwithstanding Appellant's response, CVE likely still could not verify Appellant as an SDVOSB. (*Id.* at 1.)

CVE continued to be troubled by provisions in Appellant's Operating Agreement, which prevent service-disabled veterans from fully controlling Appellant. Although the unanimous approval of the Members may be required under Delaware state law for an amendment to an LLC's operating agreement, the verification process "is based on the documentation of each company" and Appellant's Operating Agreement "is the governing document." (*Id.* at 3.) The provision remains problematic because it gives all of Appellant's Members, including those who are not service-disabled veterans, the "ability to block proposed amendments." (*Id.*)

Similarly, the provision in the Operating Agreement requiring unanimous approval of the Members for any name change gives non-service-disabled veterans the "ability to block a proposed name change." (*Id.*) Contrary to Appellant's contentions, "a business name change is not an extraordinary circumstance" as defined at 13 C.F.R. § 125.12, and the exception for extraordinary circumstances at 13 C.F.R. § 125.14(m) therefore is not applicable in this circumstance. (*Id.* at 4.)

Lastly, CVE rejected Appellant's argument that CVE should not be concerned about the non-competition provision in Appellant's Operating Agreement because "the Veteran's walking away from daily business operations 'decertifies the company'." (*Id.*) CVE reiterated that its view that such a provision impermissibly gives non-service-disabled veterans the "ability to block decisions." (*Id.* at 5.)

³ OHA is unable to ascertain the date of the Final PRF Notice.

The Final PRF Notice explained that Appellant could choose to withdraw its application for verified status, and re-apply at a later time. (*Id.*) Absent such a withdrawal, CVE would issue a letter formally denying Appellant's application. (*Id.*)

E. Denial

On August 9, 2022, CVE denied Appellant's application for verification as an SDVOSB. (CF, Exh. 73.) CVE found that, although Messrs. Sonntag and Soper are service-disabled veterans, CVE could not conclude that they fully control Appellant, as required by 38 C.F.R. part 74 and 13 C.F.R. part 125.

CVE reviewed the issues discussed in the Final PRF Notice. Specifically, CVE reiterated its concerns over provisions in Appellant's Operating Agreement requiring unanimous approval of all Members to amend the Operating Agreement or to change Appellant's name, as well as requiring a majority of the individual Members to make decisions regarding competition with Appellant. (*Id.* at 2-4.) In light of these provisions, service-disabled veterans do not fully control Appellant. (*Id.*)

F. Appeal

On August 22, 2022, Appellant appealed CVE's denial decision to OHA. Appellant offers a new version of its Operating Agreement, dated August 17, 2022, which according to Appellant should suffice to “fix” two of deficiencies identified by CVE. (Appeal at 1.) Appellant explains:

I have changed Article XII, Section H verbiage from “of all the Members” to “from a voting majority of Members.” (A voting majority as described in the findings to be the two Service Disabled Veterans controlling 52% of [Appellant] jointly.)

I have changed Article III, Section H verbiage from “shall refrain” to “should refrain” as the intent was to discourage selling US secrets to the Chinese. I changed it as per [CVE's] request.

(*Id.*)

With respect to the provision in the Operating Agreement requiring written and unanimous agreement of all Members to change Appellant's name, Appellant states, “I can't fix this one,” and reiterates its view that a name change would require that Appellant be re-verified or “face the monetary penalty.” (*Id.*) Accordingly, Appellant maintains, “[t]o be denied the status on probable grounds is not acceptable.” (*Id.*)

CVE did not respond to the appeal.

III. Discussion

A. Standard of Review

Under VA regulations, an applicant seeking verification as an SDVOSB bears the burden of proving its eligibility. 38 C.F.R. § 74.11(d). In the event of a subsequent appeal to OHA, Appellant has the burden of proving, by a preponderance of the evidence, that the denial was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

B. Analysis

I find no merit to this appeal. Appellant's principal argument on appeal is that Appellant has now amended its Operating Agreement in an effort to address most of the concerns previously identified by CVE. Section II.F, *supra*. Under OHA's rules of procedure, however, OHA cannot consider new evidence beyond the CVE Case File, unless good cause is shown. 13 C.F.R. § 134.1110; *CVE Appeal of Watanabe Enterprises, LLC*, SBA No. CVE-224-A, at 2 (2022) (PFR); *CVE Appeal of JLS Med. Prods., LLC*, SBA No. CVE-147-A, at 7 (2020). Here, Appellant has not attempted to explain why good cause exists to introduce the new version of Appellant's Operating Agreement. Indeed, the record reflects that, prior to denying Appellant's application, CVE issued Appellant two separate PRF Notices, thereby affording Appellant ample opportunity to address deficiencies in the Operating Agreement during the verification process. Sections II.B — II.D, *supra*. Appellant's amended Operating Agreement is thus not properly before OHA.

Moreover, even if OHA were to consider Appellant's new evidence, it would not demonstrate that CVE erred in reaching its decision. This is true because CVE assesses an applicant's eligibility “based on the totality of circumstances existing on the date of application.” 38 C.F.R. § 74.11(d). The amended Operating Agreement, though, was created only after CVE had issued its formal denial decision letter. Sections II.E and II.F, *supra*. As a result, the amended Operating Agreement could not possibly demonstrate error on the part of CVE, as the amendments did not exist at the time that CVE made its determination. *Watanabe Enterprises*, SBA No. CVE-224-A, at 2; *CVE Appeal of Bravo Fed. Consulting, LLC*, SBA No. CVE-213-A, at 3 (2021); *CVE Appeal of David Han d/b/a Coresivity*, SBA No. CVE-140-A, at 4 (2019); *CVE Appeal of LACHIN Architects, apc*, SBA. No. CVE-133-A, at 6 (2019). If anything, the fact that Appellant evidently saw the need to make revisions to its Operating Agreement suggests that CVE's concerns about the prior iteration of the Operating Agreement were well-founded.

It is worth noting that, although CVE focused its denial decision on provisions in Appellant's Operating Agreement requiring the unanimous agreement of all Members, there are additional issues in the record that might also potentially prevent Appellant from being verified as an SDVOSB. For example, Appellant's Chief Executive Officer/Chairman of the Board, Mr. Sonntag, appears to have other outside employment, which may be problematic under 13 C.F.R. § 125.14(k). Section II.A, *supra*. Furthermore, Appellant's Operating Agreement appears to authorize all of its Members, including those Members who are not service-disabled veterans, to make binding decisions on behalf of Appellant, thereby undermining control by service-disabled veterans. *Id.* It is unnecessary to explore these issues in greater detail, however, because as

discussed above, Appellant has not demonstrated that CVE otherwise erred in denying Appellant's application for verification.

IV. Conclusion

Appellant has not established that CVE committed error of fact or law in denying Appellant's application for verified status. The appeal therefore is DENIED. 13 C.F.R. § 134.1112(f). This is the final agency action of the U.S. Small Business Administration. 38 U.S.C. § 8127(f)(8)(A); 13 C.F.R. § 134.1112(d).

KENNETH M. HYDE
Administrative Judge