

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

CVE Appeal of:

LpM Supply Inc.,

Appellant,

SBA No. CVE-255-A

Decided: January 25, 2023

APPEARANCE

Amos Opeyemi Ajani, President, LpM Supply Inc., Pontiac, Michigan

DECISION¹

I. Introduction and Jurisdiction

On December 13, 2022, LpM Supply Inc. (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 Bylaws. In addition, CVE was unable to determine that Appellant qualifies as small. 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.² Appellant timely filed the appeal within 10 business days after receiving the

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After receiving and considering requests for redactions, OHA now issues this redacted decision for public release

² Effective January 1, 2023, SBA implemented a Government-wide certification program for VOSBs and SDVOSBs, and amended OHA's procedural regulations governing VOSB and SDVOSB status protests and appeals. 87 Fed. Reg. 73,400 (Nov. 29, 2022). As a result, under current law, CVE no longer conducts verification of concerns' VOSB or SDVOSB status. The instant appeal, however, was filed on December 13, 2022, prior to implementation of the Government-wide certification program. Accordingly, for purposes of this appeal, OHA applies the procedural and substantive regulations in effect in December 2022. *E.g.*, *Size Appeal of Assessment & Training Solutions Consulting Corp.*, SBA No. SIZ-5228, at 4 (2011).

denial notice on December 1, 2022. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Bylaws

Appellant is a corporation based in the state of Michigan, engaged in “any activity within the purposes for which corporations may be formed under the Business Corporation Act of Michigan,” including “[s]upplies” and “[l]ogistics.” (Case File (CF), Exh. 256, at 5.) In May 2022, Appellant applied for verification as an SDVOSB and provided various supporting documentation. Among other information, Appellant submitted copies of its Bylaws, meeting minutes, and stock ledgers. (CF, Exhs. 259, 260, 273, 292, 293, 304, 308.) Appellant's President, Mr. Amos Opeyemi Ajani, is a service-disabled veteran, and part owner of Appellant. (CF, Exh. 311.)

Appellant's Bylaws, signed solely by Mr. Ajani, became effective November 25, 2013, and contain the following provisions pertinent to this appeal:

ARTICLE II SHAREHOLDERS

...

SECTION 7. QUORUM. A majority of the outstanding shares of the Corporation entitled to vote, represented in person or by proxy, shall constitute a quorum at a meeting of shareholders. If less than a majority of the outstanding shares are represented at a meeting, a majority of the shares so represented may adjourn the meeting from time to time without further notice. . . .

...

SECTION 9. VOTING OF SHARES. Each outstanding share entitled to vote shall be entitled to one vote upon each matter submitted to a vote at a meeting of shareholders.

...

ARTICLE III BOARD OF DIRECTORS

SECTION 1. GENERAL POWERS. The business and affairs of the Corporation shall be managed by its Board of Directors.

SECTION 2. NUMBER. Tenure and Qualifications. The number of directors of the Corporation shall be fixed by the Board of Directors, but in no event shall be less than 4. . . .

...

SECTION 6. QUORUM. A majority of the number of directors fixed by Section 2 of this Article III shall constitute a quorum for the transaction of business at any meeting of the Board of Directors, but if less than such majority is present at a meeting, a majority of the directors present may adjourn the meeting from time to time without further notice.

SECTION 7. MANNER OF ACTING. The act of the majority of the directors present at a meeting at which a quorum is present shall be the act of the Board of Directors.

...

ARTICLE XII AMENDMENTS

These Bylaws may be altered, amended or repealed and new Bylaws may be adopted by the Board of Directors at any regular or special meeting of the Board of Directors.

(CF, Exh. 259, at 2-5, 10.)

The proffered meeting minutes of Appellant indicate that Mr. Ajani is the only attendee and the only member of Appellant's Board of Directors. (CF, Exhs. 292, 293, 304, 308.) Stock ledger numbers [XXXXXX] indicate that Ladlas Prince LLC (Ladlas) owns 51% of Appellant and Mr. Ajani owns the remaining 49%. (CF, Exhs. 260, 273.) However, stock ledger numbers [XXXXXX] state that Mr. Ajani owns 51% of Appellant and Ladlas the remaining 49%. (*Id.*)

B. Post-Review Findings (PRF) Notice

On October 31, 2022, CVE issued Appellant a Post-Review Findings (PRF) Notice. (CF, Exh. 327a.) 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 six categories. First, CVE could not determine whether a service-disabled veteran unconditionally and directly owns at least 51% of Appellant, as required by 13 C.F.R. § 125.13(a). (*Id.* at 1-2.) Documents provided by Appellant, particularly the stock ledgers and a 2020 Schedule G, reflect “inconsistent and conflicting” ownership structures between Ladlas and Mr. Ajani. (*Id.* at 2.)

Second, CVE could not determine whether a service-disabled veteran is entitled to receive at least 51% of Appellant's dividends and distributions, as required by 13 C.F.R. § 125.13(g). (*Id.* at 3.) Nor could CVE determine whether the allocation of profit is commensurate with the service-disabled veteran's ownership interest in Appellant. (*Id.*)

With regard to CVE's concern over whether Mr. Ajani resides in reasonable proximity to Appellant's headquarters, Appellant asserted that it is "an online business (e-commerce)." (*Id.*) Moreover, Mr. Ajani "has a house" in Michigan that is only "[XXX] miles" from Appellant's office. (*Id.*) The house in Michigan is "maintained to support [Mr. Ajani's] constant travels to Michigan for business purposes," and Mr. Ajani spends "on average one week monthly" at this location in order to manage Appellant. (*Id.*)

In response to CVE's concerns over whether Mr. Ajani fully controls Appellant, and is its most highly compensated employee, Appellant stated that Mr. Ajani, a service-disabled veteran, is the "only employee" of Appellant. (*Id.* at 2.) "Not drawing money is to help cash flow" of Appellant by "making the limited resources (money) available for [its] use," and is "another confirmation" that Mr. Ajani controls Appellant. (*Id.*)

As to the question of Appellant's size, Appellant maintained that it is a small business that receives "additional support" from Ladlas. (*Id.*) Therefore, Appellant is a small business under SBA's size standards. (*Id.*)

D. Final PRF Notice

After considering Appellant's response to the PRF Notice, CVE issued Appellant a Final PRF Notice on November 18, 2022. (CF, Exh. 336a.) In the Final PRF Notice, CVE stated that, notwithstanding Appellant's response, CVE still likely could not verify Appellant as an SDVOSB. (*Id.* at 1.) The Final PRF Notice detailed two principal issues. (*Id.*) First, CVE could not conclude that Appellant is fully controlled by one or more service-disabled veterans, as required by 13 C.F.R. § 125.14(e). (*Id.* at 2-3.) CVE reiterated its concerns over provisions in Appellant's Bylaws requiring "a minimum of four directors and a majority of directors to form a quorum and to pass an act of the Board." (*Id.* at 3.) CVE also noted that, in response to the PRF Notice, Appellant did not attempt to amend its Bylaws to address CVE's concerns. (*Id.*)

Second, CVE stated that Appellant still had not demonstrated that it is a small business. (*Id.* at 3-4.) Although Appellant did provide, in response to the initial PRF Notice, a "letter of explanation" claiming to be small, "without the last four [] quarters of Form 941s pertaining to [Appellant]," CVE cannot confirm whether Appellant qualifies as small under SBA size standards. (*Id.* at 4.)

The Final PRF Notice explained that Appellant could choose to withdraw its application for verified status, and re-apply at a later time. (*Id.* at 4-5.) Absent such a withdrawal, CVE would issue a letter formally denying Appellant's application. (*Id.*)

E. Denial

On December 1, 2022, CVE denied Appellant's application for verification as an SDVOSB. (CF, Exh. 338.) CVE found that Mr. Ajani is a service-disabled veteran. (*Id.* at 1.) However, CVE was unable to conclude that Appellant meets other eligibility requirements. (*Id.*)

CVE reviewed the issues discussed in the PRF Notice and the Final PRF Notice. Specifically, CVE reiterated its concerns over provisions in Appellant's Bylaws requiring “a minimum of four directors and a majority of directors to form a quorum and to pass an act of the Board.” (*Id.* at 2-3.) Given Appellant's ownership and corporate structure, Mr. Ajani alone cannot fully control Appellant's Board. (*Id.* at 3.) CVE further reiterated that without supporting documentation, CVE cannot conclude that Appellant qualifies as small under SBA's size standards. (*Id.* at 4.)

F. Appeal

On December 13, 2022, Appellant appealed CVE's decision to OHA. Appellant offers a new version of its Bylaws, which according to Appellant have been “amended to address the control issues presented by the PRF, [and] to inform CVE [that Mr. Ajani] controls the Board of Directors.” (Appeal at 1.) Appellant states:

The Bylaw[s] [were] writ[ten] for scalability as [Appellant] grows. Meaning to accommodate less changes and distractions as [Appellant] grows. With the [B]ylaw[s] update, Article III Section 1 shows that [Mr. Ajani] is in control of the board of director[s]; in a period or situation where ownership is limited to [Mr.] Ajani and [Ladlas], . . . [Mr.] Ajani and his presence and actions equals and meets the Board of Directors' requirements and approvals (quorum and actions). Meaning [Mr.] Ajani is in control of the Board of Directors.

(*Id.*)

With respect to its size, Appellant asserts that “[w]hen a business functionally fits a NAICS code, it may not fit structurally or organizationally.” (*Id.* at 2.) Appellant does not have any employees, as even Mr. Ajani himself is “working the business as owner and not as employee.” (*Id.*) Appellant is not required to file Form 941s with the IRS, and Appellant thus “cannot provide [information] that it doesn't have.” (*Id.*) In Appellant's view, CVE should have considered the absence of Form 941s as “additional proof” that Appellant is small. (*Id.*)

CVE did not respond to the appeal.

G. Amended Bylaws

Accompanying its appeal, Appellant attached the purported new version of its Bylaws. The amended Bylaws contain the following updated provision:

ARTICLE III. BOARD OF DIRECTORS

SECTION 1. GENERAL POWERS. The business and affairs of the Corporation shall be managed by its Board of Directors. In a period or situation where shareholders/ownership is limited to [Mr.] Ajani and [Ladlas], [Mr.] Ajani represents the Board of Directors (100%) and he is in control of the Board of

Directors. Meaning [Mr.] Ajani is the Board of Directors in such periods or situations.

(Amended Bylaws at 4.)

The remaining provisions of Appellant's Bylaws remain unchanged, including the requirement in Article III Section 2 that Appellant's Board must consist of “in no event . . . less than 4” directors, and the requirement in Article III Section 6 that “[a] majority of the number of directors fixed by Section 2 of this Article III shall constitute a quorum for the transaction of business at any meeting of the Board of Directors.” (*Id.* at 4-5.) The amended Bylaws are signed solely by Mr. Ajani, and have the same effective date (November 25, 2013) as Appellant's original Bylaws. (*Id.* at 10.)

III. Discussion

A. Standard of Review

Under VA regulations in effect at the time of Appellant's application, 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 amended its Bylaws in an effort to address 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 ING Unmanned Aerial Systems LLC*, SBA No. CVE-245-A, at 5 (2022); *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 amended Bylaws. Indeed, the record reflects that, prior to denying Appellant's application, CVE issued Appellant two separate PRF Notices, thereby affording Appellant ample opportunities to address deficiencies in the Bylaws during the verification process. Sections II.B — II.D, *supra*. Appellant's amended Bylaws are thus not properly before OHA.

Moreover, even if OHA were to consider Appellant's new Bylaws, those Bylaws 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 Bylaws, though, were created only after CVE had issued its formal denial letter. Sections II.E and II.F, *supra*. As a result, the amended Bylaws could not possibly demonstrate error on the part of CVE, as the amendments did not exist at the time that CVE made its determination. *ING Unmanned Aerial Systems LLC*, SBA No. CVE-245-A, at 6; *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). Nor does it appear that the amendments to the Bylaws would suffice, in any event, to resolve the concerns identified by CVE. In its correspondence with Appellant, CVE repeatedly expressed its concern with the provisions at Article III Section 2 and Article III Section 6. Sections II.B and II.D, *supra*. Even as amended, though, those particular provisions remain unchanged and Appellant's Bylaws continue to require that Appellant's Board must consist of “in no event . . . less than 4” directors, and that “[a] majority” of such directors is necessary to establish a quorum. Sections II.A and II.G, *supra*. Given Appellant's ownership and corporate structure — whereby Mr. Ajani is only one of the four required directors and holds, at most, only 51% ownership of Appellant — CVE reasonably determined that Appellant did not demonstrate how Mr. Ajani could control Appellant's Board, within the meaning of 13 C.F.R. § 125.14(e).

Appellant's remaining contentions, that not having to file Form 941s with the IRS and having no employees should have been deemed “additional proof” that Appellant is small, are largely conclusory without legal support, nor do they establish error on the part of CVE. Section II.F, *supra*. During the course of its review, CVE repeatedly instructed Appellant to produce supporting documentation because Appellant's tax returns failed to establish that Appellant is small. Sections II.B — II.D, *supra*. Despite CVE's repeated requests for specific information, Appellant failed to provide documentation that would be a viable alternative to verify its size or resolve CVE's concerns.

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