

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

VSBC Appeal of:

Carleton Controls Corporation,

Appellant,

SBA No. VSBC-303-A

Decided: August 23, 2023

APPEARANCE

James G. Diroff, President, Carleton Controls Corporation, Carleton, Michigan

DECISION

I. Introduction and Jurisdiction

On March 15, 2023, Carleton Controls Corporation (Appellant) appealed a decision of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Veteran-Owned Small Business (VOSB). SBA found that Appellant could not be certified due to issues with Appellant's ownership structure. On appeal, Appellant maintains that SBA's denial decision was erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied.

OHA adjudicates VOSB status appeals pursuant to the Small Business Act of 1958, 15 U.S.C. §§ 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K. Appellant timely filed its appeal within 10 business days after receiving the denial notice on March 14, 2023. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

Appellant is a corporation established in the state of Michigan in April 2016. (Case File (CF), Exh. 31.) In January 2023, Appellant applied for certification as a VOSB, and submitted various supporting documents to SBA. (CF, Exh. 1.) Appellant's stock ledger reflects that Appellant currently is 93.79% owned by "Carleton Controls 401(k) f/b/o Jim Diroff." (CF, Exh. 27.) The remaining 6.21% ownership interest is held by Mr. James G. Diroff individually. (*Id.*) Mr. Diroff is a veteran. (CF, Exh. 33.)

Mr. Diroff is Appellant's President and sole director. (CF, Exh. 26.) Appellant's Bylaws provide that "the business and affairs of the corporation will be managed by, or under the direction of, its board of directors." (CF, Exh. 30, at 4.) Appellant's President "has general

supervision, direction, and control of the day-to-day business and affairs of the corporation, subject to the direction and control of the board of directors.” (*Id.* at 8.)

In support of its application for certification, Appellant submitted a “401(k) Summary Plan Description” (hereafter, “the Plan”), dated May 9, 2018. (CF, Exh. 25.) The Plan indicates that “[t]he Plan's assets are held in a trust created under the terms of the Plan. The Trustee is Jim Diroff.” (*Id.* at 20.) According to the Plan, any person employed by Appellant is eligible to participate, so long as the employee is not part of a collective bargaining agreement, a leased employee, or a non-resident alien. (*Id.* at 4.) Furthermore, any participating employee “may direct the Trustee as to the exercise of voting rights with respect to your allocable share of any investment in the Trust Fund that allows or requires voting.” (*Id.* at 14.)

B. Denial

On March 14, 2023, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for certification as a VOSB. (CF, Exh. 24.) The D/GC found that the documentation Appellant provided did not demonstrate that Appellant is at least 51% directly and unconditionally owned by one or more qualifying veterans. (*Id.* at 1, citing 13 C.F.R. § 128.202(a).) The D/GC continued:

The regulation states that “to be considered direct ownership, the qualifying Veteran must own 51 percent of the concern directly, and not through another business entity” (13 CFR 128.202(a)).

The documentation provided demonstrates that the qualifying Veteran owns approximately 6% of the applicant business, with the remaining shares owned by “Carleton Controls 401k FBO Jim Diroff”.

Therefore, we cannot conclude that the ownership requirements have been met.

(*Id.*)

C. Appeal

On March 15, 2023, Appellant appealed the D/GC's decision to OHA. Appellant asserts that “the denial is incorrect because I believe that the [D/GC] was not familiar with ownership through a 401k program.” (Appeal at 1.) More specifically, Mr. Diroff utilized an Internal Revenue Service (IRS) program known as Rollover for Business Startups (ROBS), whereby he “accessed [his] 401k and rolled the funds into [Appellant's] 401k resulting in a new 401k titled ‘Carleton Controls 401k FBO Jim Diroff.’” (*Id.*) Appellant maintains that Mr. Diroff owns both his initial investment as well as “Carleton Controls 401(k) f/b/o Jim Diroff,” and thus fully owns Appellant. (*Id.*) Appellant also complains that the D/GC denied Appellant's application without seeking further “clarification or an explanation” from Appellant. (*Id.*)

III. Discussion

A. Standard of Review

When a concern seeks certification as a VOSB, SBA regulations provide that:

An Applicant's eligibility will be based on the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances. The Applicant bears the burden of proof to demonstrate its eligibility as a VOSB[.]

13 C.F.R. § 128.302(d).

On appeal to OHA, Appellant has the burden of proving, by a preponderance of the evidence, that the denial decision is based upon clear error of fact or law. 13 C.F.R. § 134.1111.

B. Analysis

Appellant has failed to show that the D/GC committed any error of fact or law in reaching his decision. As a result, this appeal must be denied.

As the D/GC indicated in the denial decision, SBA regulations require that a VOSB must be at least 51% “unconditionally and directly” owned by one or more veterans. 13 C.F.R. § 128.202. Accordingly, ownership “through another business entity or trust” generally is not permissible. *Id.* § 128.202(a). The regulations recognize a limited exception for certain trusts, but only if “the trust is revocable, and qualifying veterans are the grantors, trustees, and the current beneficiaries of the trust.” *Id.*

Here, Appellant made no attempt to explain how its ownership structure meets SBA requirements. Appellant offered copies of its stock ledger and a “401(k) Summary Plan Description”, which appear to reflect that Appellant is 93.79% owned by its 401(k) plan through a trust. Section II.A, *supra*. There is no indication, however, that this trust is revocable, or that all current beneficiaries of the trust are veterans. *Id.* Nor did Appellant provide the D/GC copies of the actual documents organizing or establishing the trust. *Id.* Given the record before him, then, the D/GC properly concluded that Appellant did not demonstrate its compliance with the direct ownership requirements of 13 C.F.R. § 128.202(a).

On appeal, Appellant complains that the D/GC denied Appellant's application without seeking additional clarification from Appellant, and posits that the D/GC may have been unfamiliar with the IRS ROBS program. Section II.C, *supra*. *Id.* These arguments are unavailing, since under 13 C.F.R. § 128.302(d), Appellant was responsible for proving its eligibility as a VOSB. Section III.A, *supra*. The D/GC is vested with “sole discretion” to decide whether or not to seek additional information from an applicant, and SBA regulations are clear that the D/GC will not resolve material ambiguities in favor of an applicant; rather, if the information provided is insufficient for the D/GC “to determine the concern's compliance with any of the VOSB or

SDVOSB eligibility requirements,” the D/GC “will decline the concern's application.” 13 C.F.R. § 128.302(b) and (d)(1).

IV. Conclusion

Appellant has not established that the D/GC committed any error of fact or law in denying Appellant's application for certification. The appeal therefore is DENIED. This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(A); 13 C.F.R. § 134.1112(d).

KENNETH M. HYDE
Administrative Judge