

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

VSBC Appeal of:

Amenity Waste Solution,

Appellant,

SBA No. VSBC-309-A

Decided: September 26, 2023

APPEARANCE

Karis L. Gilbert, President, Amenity Waste Solution, Florence, Alabama

DECISION¹

I. Introduction and Jurisdiction

On August 3, 2023, Amenity Waste Solution (Appellant) appealed a decision of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB). SBA found that Appellant could not be certified due to issues with control of Appellant by an SDV(s). On appeal, Appellant maintains the denial decision was erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the denial. For the reasons discussed *infra*, the appeal is denied.

OHA adjudicates SDVOSB 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 the appeal within 10 business days after receiving the denial notice on July 21, 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 manager-managed single member Limited Liability Company (LLC), established in the state of Alabama on April 10, 2023. (Case File (CF), Exhs. 27, 29.)

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

On July 12, 2023, Appellant executed an Operating Agreement. (CF, Exh. 22, 25.) At the time of execution, the sole member of Appellant was Karis Gilbert. (*Id.*, at 2.) Ms. Gilbert is a 100% service-disabled veteran (SDV) (CF, Exh. 21.) The Operating Agreement contains the following provisions pertinent to this appeal:

I. Formation.

A. State of Formation. This is a Limited Liability Company Operating Agreement (the “Agreement”) for Amenity Waste Solution, LLC, a Manager-managed Alabama single member limited liability company (the “Company”) formed under and pursuant to Alabama law.

[...]

III. Member.

A. The Member. The sole member of Amenity Waste Solution, LLC at the time of adoption of this Agreement is Karis Gilbert (the “Member”).

[...]

E. Member Voting.

1. *Voting power* In the event that the Company has multiple Members simultaneously, the Company's Members shall each have voting power equal to its share of Membership Interest in the Company.

[...]

VI. Board of Managers.

A. Creation of a Board of Managers. The Member shall create a board of Managers (the “Board”) consisting of Managers appointed at the sole discretion of the Member and headed by the Chairman of the Board.

[...]

B. Powers and Operation of the Board of Managers. The Board shall have the power to do any and all acts necessary, convenient or incidental to or for the furtherance of the Company's purposes described herein, including all powers, statutory or otherwise.

i. At all meetings of the Board, a majority of the Managers shall constitute a quorum for the transaction of business and, except as otherwise provided in any other provision of this Agreement, the act of a majority of the Managers present at any meeting at which there is a quorum shall be the act of the Board. If a quorum

shall not be present at any meeting of the Board, the Managers present at such meeting may adjourn the meeting until a quorum shall be present. Any action required or permitted to be taken at any meeting of the Board may be taken without a meeting if all Managers consent thereto in writing.

[...]

VII. Officers.

A. Appointment and Titles of Officers. The initial Officers shall be appointed by the Member and shall consist of at least a Chairman, a Secretary and a Treasurer.

[...]

1. Chairman. The Chairman shall be the chief executive officer of the Company, shall preside at all meetings of the Board, shall be responsible for the general and active management of the business of the Company and shall see that all orders and resolutions of the Board are carried into effect. The Chairman shall execute all contracts on behalf of the Company, except: i. where required or permitted by law or this Agreement to be otherwise signed and executed; ii. where signing and execution thereof shall be expressly delegated by the Board to some other Officer or agent of the Company.

2. President. In the absence of the Chairman or in the event of the Chairman's inability to act, the President shall perform the duties of the Chairman, and when so acting, shall have all the powers of and be subject to all the restrictions upon the Chairman. The President shall perform such other duties and have such other powers as the Board may from time to time prescribe.

[...]

XII. General Provisions.

H. Amendment. This Agreement may be amended only by written consent of the Board and the Member.

(CF, Exh. 22, 25.)

Appellant provided copies of minutes of a Board of Directors Meeting, dated July 5, 2023. (CF, Exhs. 23, 24.) The purpose of the meeting was to “appoint a Board of Managers and the Chairman of the Board.” (*Id.*) The presence of Ms. Gilbert, Director, established a quorum. (*Id.*) During the meeting, Micah Gholston was designated as “chairperson,” while Ms. Gilbert was elected as “Director” for the term of one (1) year. (*Id.*) Appellant subsequently provided another copy of minutes of a Board of Directors Meeting, also dated July 5, 2023, which appointed Ms. Gilbert as “Chairperson” and “Director[.]” (CF, Exh. 26.)

On July 19, 2023, the SBA's Director of the Veteran Small Business Certification Program (D/VSBCP), wrote Appellant and stated the [Operating Agreement] dated [July 12, 2023] indicates that Karis Lolita Gilbert (Qualifying Veteran) does not have control over all decisions.” (CF, Exh. 36.) The D/VSBCP raised concerns with Article VI(A), Article VI(B)(1)(i), Article VII(A), and Article XII(H) [sic] of the Operating Agreement and determined the D/VSBCP cannot conclude a qualifying veteran controls Appellant. (*Id.*) The D/VSBCP instructed Appellant to “provide dated and signed Meeting Minutes and an amended Company Agreement” addressing the issues discussed. (*Id.*) In response, Appellant submitted documents titled “Corporate Minutes” and “Operating Agreement”; the D/VSBCP characterized the status of the documents cited as “Rejected.” (*Id.*)

On July 20, 2023, the D/VSBCP wrote to Appellant, again requesting (1) Amendments to Operating Agreement, and (2) Minutes Establishing Operating Practices. (Exh. 35.) D/VSBCP asserted that it rejected the Meeting Minutes because the office “already has a copy of the Meeting Minutes on file.” (*Id.*) D/VSBCP also rejected the Operating Agreement because “it is dated [July 12, 2023], the same date as the previous [Operating Agreement].” (*Id.*) D/VSBCP requested that Appellant “provide newly dated and signed meeting Minutes and an Amended [Operating Agreement] addressing the issues. . . .” (*Id.*) In response, Ms. Gilbert submitted “Corporate Minutes” on July 20, 2023, and the status of the document was cited as “Accepted.” (*Id.*)

B. Denial

On July 21, 2023, the D/VSBCP denied Appellant's application for certification as an SDVOSB. (CF, Exh. 32.) The D/VSBCP found that Appellant did not establish that one or more service-disabled veterans served as managing members with control over Appellant, as is required under 13 C.F.R. § 128.203(d). (*Id.*, at 1.)

The D/VSBCP observed that, according to the Operating Agreement, Ms. Gilbert, the qualifying Veteran, does not have control over all decisions. (*Id.*) Specifically, Appellant is a manager-managed limited liability company according to Article I of the Operating Agreement. (*Id.*) Members are required to establish a Board of Managers; and Members may serve as Managers to appoint the Chairman. (*Id.*, at 2.) The D/VSBCP observed that Appellant submitted two Meeting Minutes of the Board of Directors that identified Ms. Gilbert and Mr. Gholston as Chairperson of the meeting for the Board. D/VSBCP observed that the Meeting Minutes did not clearly establish the creation of a Board of Managers, nor identify the Managers. Thus, D/VSBCP concluded that he could not determine a “Qualifying Veteran controls the decisions of [Appellant].” (*Id.*)

Further, D/VSBCP noted that Article VI(B)(1)(i) of the Operating Agreement “states that ‘a majority of the Managers shall constitute a quorum’ and that ‘the act of a majority of the Managers present . . . shall be the act of the Board.’” (*Id.* at 2 (citation omitted).) The D/VSBCP thus reasoned that “if the company elects a non-Veteran to the Board, the Qualifying Veteran will not control the quorum and the act of the Board because a majority of the Managers would be required.” (*Id.*)

The D/VSBCP further observed that, under the Operating Agreement “Article VII(A) states that the ‘initial Officers shall be appointed by the Member and shall consist of at least a Chairman, a Secretary and a Treasurer.’” (*Id.*) Article VII(A) further states “[t]he Chairman shall be the chief executive officer of the Company, shall preside at all meetings of the Board, shall be responsible for the general and active management of the business of the Company, and shall see that all orders and resolutions of the Board are carried into effect.” (*Id.*) The D/VSBCP found that the Meeting Minutes provided by Appellant indicate that Mr. Gholston, a non-veteran, and Ms. Gilbert were elected Chairperson of the Meeting for the Board of Directors, both dating July 5, 2023. As a result, D/VSBCP concluded it could not determine a “Qualifying Veteran holds the highest officer position as required by [13 CFR § 128.203(b)].” (*Id.*)

Lastly, D/VSBCP reviewed Article XII(H) [sic] of the Operating Agreement, which states the Agreement “may be amended only by written consent of the Board and the Members.” (*Id.*) D/VSBCP concluded that it could not determine whether a “Qualifying Veteran is able to amend the Company Agreement unilaterally.” (*Id.*)

C. Appeal

On August 3, 2023, Appellant appealed the D/VSBCP's decision to OHA. Appellant asserts that she received an email correspondence from the D/VSBCP requesting “amended Meeting Minutes and Company Agreement.” (Appeal at 1.) Appellant contends that she submitted information on “the exact same criteria the denial letter based its decision.” (*Id.*) Specifically, Appellant amended the minutes on the D/VSBCP's request and attempted to submit the document, but “it was rejected” because Meeting Minutes were already on file with D/VSBCP. (*Id.* at 2.) Appellant concludes that D/VSBCP never “accepted, considered or evaluated” the amended documents. (*Id.*)

In addition to the appeal, Appellant attempts, without formally moving for admission, to submit new evidence in the form of images from the application process. Among the submissions were July 19, 2022 and July 20, 2022 correspondence from the D/VSBCP requesting that Appellant provide copies of “Amendment to Operating Agreement” and “Minutes Establishing Operating Practices” by July 25, 2023 and July 26, 2023, respectfully. (Screenshot (30); Screenshot (33).) Also, among the submissions was an image of correspondence from D/VSBCP stating that “[t]he Company Agreement has been rejected because it is dated 7/12/23, the same date as the previous Company Agreement.” (Screenshot (34).) The image further states “[p]lease provide newly dated and signed Meeting Minutes and an amended Company Agreement addressing all the issues presented above.” (*Id.*)

III. Discussion

A. Standard of Review and New Evidence

Under SBA regulations, an applicant seeking verification as a VOSB or SDVOSB “bears the burden of proof to demonstrate its eligibility.” 13 C.F.R. § 128.302(d). Eligibility is 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.” *Id.* Furthermore, “[i]f a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.” 13 C.F.R. § 128.302(d)(1). In the event of a subsequent appeal to OHA, Appellant has the burden of proving, by a preponderance of the evidence, that the denial decision was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

Appellant attempts to submit new evidence in the form of images from the application process. OHA cannot consider new evidence beyond the case file, unless good cause is shown. 13 C.F.R. § 134.1110. Evidence submitted by Appellant is already in the case file as Exhibits 36 and 35. Appellant fails to show good cause why the additional images should be considered, when already available in the record, and so I EXCLUDE the evidence from the record.

B. Analysis

I find Appellant has failed to show that the D/VSBCP committed an error of fact or law in reaching its decision, and thus must deny the appeal.

SBA regulations require that in order to be an eligible SDVOSB “the management and daily business operations of the concern must be controlled by one or more service-disabled veterans [SDV].” 13 C.F.R. § 128.203(a). Control means the SDV “controls both the long-term decision-making and the day-to-day operations” of the concern. *Id.* If the concern in question is a limited liability company (LLC), “one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.” 13 C.F.R. § 128.203(d).

The SDV must also hold the position of the highest officer in the concern. 13 C.F.R. § 128.203(b). Further, a non-SDV may not exert negative control over the challenged concern. Negative control exists in instances where “a non-qualifying-veteran has the ability, under the concern's governing documents to prevent a quorum or otherwise block action.” 13 C.F.R. § 128.102. The terms of the concern's governing corporate documents determine who controls the decisions of the company. *See CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15 (2021), *citing XOtech LLC v. United States*, 950F.3d 1376, 1380 (Fed. Cir. 2020).

I find the D/VSBCP reasonably denied Appellant's application for certification due to inconclusive results that Ms. Gilbert, the SDV, controlled Appellant. The key regulation here is the requirement that: “[i]f a concern submits inconsistent information that results in SBAs inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.” 13 C.F.R. § 128.302(d)(1); *see also VSBC Appeal of Horizon Marketing, Inc.*, SBA No. VSBC-296-A (2023) (D/VSBCP appropriately denied application for certification when applicant submitted contradictory information on material issues).

It is not in dispute that Ms. Gilbert is an SDV, nor is it in dispute that Appellant is a manager-managed LLC. Section II.A, *supra*. According to Article III.A. and Article VIA. of the

Operating Agreement, Ms. Gilbert is identified as the sole member of Appellant, with the ability to “create a board of Managers (the Board).” *Id.* In addition, under Article VLB. 1.i, a quorum is established by a majority of the Managers and “the act of a majority of the Managers present at any meeting at which there is a quorum shall be the act of the Board.” *Id.* However, there is no indication from the record that Ms. Gilbert is identified as a manager nor indication that Appellant has established a Board. The Meeting Minutes submitted by Appellant presents Ms. Gilbert and Mr. Gholston as “chairperson of the meeting” as of July 5, 2023. *Id.* In the same meeting, Ms. Gilbert was elected as a director; however, this information is insufficient because it does not identify members of the Board nor establish the existence of a Board. *Id.* In addition, under Appellant's application, when questioned on whether the owner, identified as Ms. Gilbert, is a Board Member for the business applying for certification, Appellant selected “no.” (CF, Exh. 59.) When further asked whether the owner was an officer, Appellant again selected “no.” *Id.* Accordingly, given the record, D/VSBCP properly concluded that Appellant did not demonstrate control requirements under 13 CFR § 128.203(a).

Further, as D/VSBCP reasonably concludes, it is unclear whether Ms. Gilbert holds the authority purported in the Operating Agreement. According to Meeting Minutes, both Mr. Gholston and Ms. Gilbert were elected as a chairperson of Appellant. *Id.* Under Article VILA. 1 of the Operating Agreement, the Chairman, identified as the CEO, presides over the Board, is responsible for “the general and active management” of Appellant and “shall see that all orders and resolutions of the Board are carried into effect.” *Id.* The Chairman must also “execute contracts” on behalf of Appellant. *Id.* The Operating Agreement thus appears to contemplate only one Chairperson, as is customary in nearly all concerns. Yet Appellant has submitted documents which identify two Chairpersons, one of whom is not an SDV. Thus, Mr. Gholston, having the title of Chairperson, appears to hold authority over the day-to-day management of Appellant in the same or equal capacity as Ms. Gilbert, which results in negative control of Appellant by Mr. Gholston. Further, because Ms. Gilbert and Mr. Gholston both hold the title of Chairperson, the D/VSBCP reasonably determined he could not conclude Ms. Gilbert holds the highest position in Appellant, as required by 13 C.F.R. § 128.203(b).

Appellant contends that she attempted to submit additional information requested by the D/VSBCP, but the submitted documents were rejected or not considered. Section LLC, *supra*. The D/VSBCP informed Appellant, and the record reflects, that D/VSBCP “already [had] a copy of the Meeting Minutes on file” and the Operating Agreement was dated the same date as the previously submitted Operating Agreement. Section II. A, *supra*. Appellant was instructed to submit newly dated and signed meeting Minutes and an Amended Operating Agreement. *Id.* Appellant, however, submitted Meeting Minutes dated July 5, 2023, the same date as the prior Meeting Minutes. *Id.* Given the record, D/VSBCP considered the submissions and reasonably concluded that the documents provided by Appellant were insufficient to establish that an SDV controlled Appellant.

Appellant has thus submitted information it has two Chairpersons, one not an SDV and that its SDV owner is not an officer or member of the Board. Section II. A, *supra*. Appellant submits two different sets of Meeting Minutes, with different contents, but both with the same date. *Id.* Appellant's key information here is thus inconsistent at best, and incoherent at worst. Further, it simply cannot be concluded that Ms. Gilbert holds Appellant's highest officer position

or controls the Board. All of these findings support the D/VSBCP's denial decision under 13 C.F.R. § 128.302(d)(1).

Considering Appellant's Operating Agreement and accompanying Meeting Minutes identifying a non-SDV as a Chairperson, I find Appellant has not demonstrated that an SDV has control over the concern, and that Appellant has failed to establish any error in the D/VSBCP's decision.

IV. Conclusion

Appellant has not established that the D/VSBCP 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).

CHRISTOPHER HOLLEMAN
Administrative Judge