

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

VSBC Appeal of:

NIJI LLC,

Appellant

SBA No. VSBC-333

Decided: February 6, 2024

APPEARANCE

Lathasha Wytch-Burgess, President, NIJI LLC, Eagle River, AK

DECISION

I. Introduction and Jurisdiction

On October 6, 2023, NIJI LLC (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 did not demonstrate that one or more service-disabled veterans fully controls Appellant. On appeal, Appellant maintains that the 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 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 October 6, 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 limited liability company (LLC) based in the state of Alaska and formed on June 16, 2018. (Case File (CF), Exh. 32.) In September, 2023, Appellant applied for certification as an SDVOSB, and submitted various supporting documents to SBA. (CF, Exh. 1.) Appellant is a limited liability company owned by Lathasha Wytch-Burgess, a service-disabled veteran. (CF, Exh. 9.)

Appellant provided a copy of its current Operating Agreement, dated September 26, 2023 (CF, Exh. 29.), and prior operating agreements dated July 25, 2023; September 14, 2023; and September 19, 2023. (CF, Exh. 28 to 31.) The Operating Agreement reflects that Lathasha

Wytch-Burgess, and two non-service-disabled veterans Lionel Burgess and Ajani Burgess, are Appellant's three Members, owning 51%, 39% and 10% of the business respectively. (*Id.* at 8.) The company is managed by Lathasha Wytch-Burgess who is the “President, Manager and owner” of Appellant. Lathasha Wytch-Burgess “controls all and manages all daily business operations as well as both the long-term decision-making and the day-to-day operational decisions” with assistance from Lionel Burgess, who is “VP, Assistant Manager and part owner . . . and assist[s] with the control and management of the daily business operations and decision-making of the business.” (*Id.*) Ajani Burgess is a “member and part owner” of Appellant “[without] authoritative control and management of the daily business operations and decision-making of the business.” (*Id.*) The Operating Agreement states that each Appellant member shall have voting power equal to its share of membership interest. (*Id.* at 8.) The Articles of Incorporation state that the LLC is “Manager member” managed with no further detail as to ownership or control among the three “organizers.” (CF, Exh. 32.)

### B. Denial

On October 6, 2023, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for certification as an SDVOSB. (CF, Exhs. 26, 27) In its first letter dated October 6, 2023, The D/GC explained:

13 C.F.R. § 128.203(d) states “Control over a limited liability company. In the case of a limited liability company, one or more qualifying veterans must serve as managing members, with control over all decisions of the limited liability company.”

(*Id.* at 1.)

### C. Appeal

On October 6, 2023, Appellant appealed the D/GC's decision to OHA. On November 22, 2023 Appellant objected to certain SBA reviewing office notations on documents in the Case File, including Exhibits 25 to 27. (Appeal dated October 6, 2023 at 1). Appellant stated it was evident from the Operating Agreement “Lathasha Wytch-Burgess is the President, manager and owner of Appellant and holds the highest officer position of the business.” (*Id.*) Appellant also asserted “Ms. Burgess controls and manages all daily business operations as well as both the long-term decision-making in day-to-day operational decisions.” (*Id.*) Moreover, Appellant disagrees that there “are conflicting provisions in its Operating Agreement as to one or more qualifying veterans serving as managing members with control over all decisions of the LLC.” (*Id.*) According to Appellant the “Articles of Organization . . . state that the LLC is managed by a manager.” (*Id.* at 2.) Furthermore, the Operating Agreement dated September 26, 2023 “lists on page 3 the creation of a Board that is made up of a manager which implies one manager and on page 1 a ‘Board of Manager.’” (*Id.* at 2.) According to Appellant the “Operating Agreement, lists the duties and positions of each member on pages 1 and 2 along with identifying the controlling manager.” (*Id.* at 2.) According to Appellant, there is no indication that Lionel Burgess or Ajani Burgess is the Board of Manager member. (*Id.*) As a result, the “Operating Agreement firmly

identifies who controls all the decisions and daily operations of the Company, how the Board Manager is created, and who makes of the Board.” (*Id.*)

Additionally, Appellant also asserts the fact that the Operating Agreement states each of Appellant's members shall have voting power equal to their share of membership interest and does not explicitly state that the service-disabled veteran is the Managing Member with control over all decision-making is not problematic and should not be interpreted to mean that the service-disabled veteran is not Appellant's Managing Member with control over all of Appellant's decision-making. (*Id.*)

In its Appeal letter dated November 22, 2023, Appellant makes many of the same arguments in its Appeal dated October 6, 2023. Appellant also included a copy of its President Lathasha Wytch Burgess' veteran status certification from the VA, as well as a copy of Title 38 of the United States Code.

### III. Discussion

#### A. Standard of Review

When a concern seeks certification as a VOSB or SDVOSB, 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 or SDVOSB.

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 clearly erroneous. 13 C.F.R. § 134.1111.

#### B. Analysis

Appellant has not shown that the D/GC committed any error of fact or law in reaching his decision. This appeal must therefore be denied.

As the D/GC observed in his decision, SBA regulations require that in order to qualify as an SDVOSB, “In the case of a limited liability company, 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).

Here, as part of its application for SDVOSB certification, Appellant disclosed that Lathasha Wytch-Burgess, and two non-service-disabled veterans Lionel Burgess and Ajani Burgess, are Appellant's three Members, respectively owning 51%, 39% and 10% of the

business. Section II.A, *supra*. Appellant additionally stated that Lathasha Wytch-Burgess “controls all and manages all daily business operations as well as both the long-term decision-making and the day-to-day operational decisions” with assistance from Lionel Burgess, who is “VP, Assistant Manager and part owner . . . and assist[s] with the control and management of the daily business operations and decision-making of the business.” *Id.* Appellant also stated that the Operating Agreement provides that Appellant's members shall each have voting power equal to their share of membership interest and does not explicitly state that the service-disabled veteran is the applicant's Managing Member with control over all of the applicant's decision-making. Section II.A and B, *supra*.

As discussed above, an appellant firm has the burden of proof of establishing by a preponderance of the evidence that the D/GC's denial was based upon a clear error of fact or law. 13 C.F.R. § 134.1111. Because the Operating Agreement does not explicitly state that: (i) the service disabled veteran is the applicant's sole Managing Member with control over all of the applicant's decision-making, and (ii) Lathasha Wytch-Burgess controls all and manages all daily business operations as well as both the long-term decision-making and the day-to-day operational decisions, and that only her vote constitutes a quorum for all decision making, the D/GC could reasonably decide there was a lack of clarity as to the service disabled veteran being the final decision maker based on the documentation presented. Given the record, then, the D/GC could reasonably conclude that Appellant had failed to meet its burden of demonstrating that a service-disabled veteran fully controls Appellant's decision-making.

On appeal to OHA, Appellant maintains that it was evident from the Operating Agreement that “Lathasha Wytch-Burgess is the President, Manager and owner of Appellant and holds the highest officer position of the business” . . . and that “Ms. Burgess also controls all and manages all daily business operations as well as both the long-term decision-making in the day-to-day operational decisions.” Section II.C, *supra*. Moreover, Appellant disagrees that there are conflicting provisions in its Operating Agreement and Articles of Organization as to one or more qualifying veterans serving as managing members with control over all decisions of the LLC. Section II.C, *supra*. According to Appellant the “Articles of Organization . . . state that the LLC is managed by a manager.” Section II.C, *supra*. Furthermore, the Operating Agreement dated September 26, 2023 “lists on page 3 the creation of a Board that is made up of a manager which implies one manager and on page 1 a “Board of Manager.” Section II.C, *supra*. Appellant additionally asserts that the “Operating Agreement firmly identifies who controls all the decisions and daily operations of the Company, how the Board Manager is created, and who makes up the Board.” Section II.C, *supra*.

The problem for Appellant, however, is that Appellant did not present to the D/GC an Operating Agreement that explicitly stated that Lathasha Wytch-Burgess was the sole decision-making authority and Managing Member, and indeed conceded that Lionel Burgess was an Assistant Manager and part owner who “assisted with the control and management of the daily business operations and decision-making.” Section II.A, *supra*. Furthermore, by affirming in the Operating Agreement that a Board exists and then stating that it is one manager is inconsistent with a definition of a Board which implies two or more members. In addition, the Articles of Organization state that the LLC is Manager member operated. Based on these facts, the D/GC could have reasonably concluded that because Appellant's documentation did not specify that the

service-disabled veteran exercised full discretion and decision-making authority over the day-to-day operations of the business, Appellant did not comply with 13 C.F.R. § 128.203(d).

As the applicant seeking SDVOSB certification, Appellant ultimately was responsible for establishing its eligibility as an SDVOSB. Section III.A, *supra*. The D/GC did not err, therefore, by failing to consider evidence or arguments that were not presented to him in the first instance. *E.g.*, *VSBC Appeal of The Old Breed Servs., LLC*, SBA No. VSBC-305-A (2023).

#### 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).

CHRISTOPHER HOLLEMAN  
Administrative Judge