

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

VSBC Appeal of:

American Defense Builders Trust.,

Appellant

SBA No. VSBC-395-A

Decided: September 19, 2024

APPEARANCE

Matthew Moranor, Trustee, American Defense Builders Trust, Rapid City, South Dakota

DECISION

I. Introduction and Jurisdiction

On May 6, 2024, American Defense Builders Trust (Appellant) appealed the denial of its application for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB) by the U.S. Small Business Administration (SBA) Office of Government Contracting & Business Development (GCBD). SBA found that Appellant was ineligible for certification due to issues with Appellant's ownership and control. 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 April 30, 2024. 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 sole proprietorship established in the state of South Dakota on December 11, 2023. (Case File (CF), Exh. 14.) On March 5, 2024, Appellant applied for certification as an SDVOSB, and submitted various supporting documents to SBA. (CF, Exh. 1.) Appellant declared in the application materials to be “Sole Proprietor” of “American Defense Builders Trust,” and that the qualifying veteran for the application, one Matthew Moranor, was the “100% owner” of American Defense Builders Trust. (CF, Exh. 5.)

Appellant also submitted trust documents in support of the direct ownership claim. (CF, Exhs. 20 and 23.) The Trust documents contain the following provisions pertinent to this appeal:

IRREVOCABLE TRUST. This Trust is irrevocable, and cannot be altered, amended, revoked, or terminated in any manner whatsoever by any fiduciary, trustor, beneficiary or agents of the same. (Exh. 23, page 7).

APPOINTMENT OF INDEPENDENT TEMPORARY SPECIAL TRUSTEE. . . .

Compliance Overseer. . . .

The Compliance Overseer shall have the power to add any person as Beneficiary of this trust at any time by delivering written notice of such addition to the trustee; *(except Matthew Moranor, who shall never be a beneficiary of this trust or hold a beneficial interest in this Trust)*. (*Id.* at 6).

APPOINTMENT OF SUCCESSOR TRUSTEE. . . . Whereas, it has become necessary that another Trustee be appointed; Whereas, it is both necessary and desirable that a Successor Trustee be appointed; it is Resolved, that Collen H. Moranor be and he(/she) is herewith appointed as a Trustee of this Trust, said appointment to be effective immediately. *(signed and dated 12/04/2023)*. (Exh. 25, at 4).

RIGHTS AND OBLIGATIONS OF SUCCESSOR TRUSTEE(S). Each successor Trustee serving under this agreement, whether corporate or individual, shall have all of the title, rights, powers and privileges granted to the initial Trustees named under this agreement. In addition, each successor Trustee shall be subject to all of the restrictions imposed upon and obligations and duties, discretionary and ministerial, given to the initial Trustees named under this agreement. (*Id.* at 9).

These provisions were mentioned in a letter to Appellant from the Veteran Small Business Certification (VetCert) team at the Small Business Administration (SBA) on April 22, 2024. (CF, Exh. 22.) The letter made clear to note that it was “not a decision on [Appellant's] application,” and that VetCert was “providing [Appellant] with an opportunity to address these issues prior to issuing a final decision.” (*Id.*)

Various emails and phone call records between Appellant and SBA officials also establish that VetCert informed Appellant of the likely direct ownership and control issues with respect to the Trust as early as April 1. (CF, Exh. 26.)

B. Denial

On April 30, 2024, SBA, the Director of the Office of Government Contracting (D/GC), acting through the Director of SBA's Veteran Small Business Certification Program, denied

Appellant's application for certification as an SDVOSB. (CF, Exh. 15.) The D/GC found that Appellant did not meet, or provide sufficient proof of meeting, the following requirements:

- Being the correct owner(s) listed in the application, as required by 13 C.F.R. § 128.202(a). (*Id.*)
- If the ownership by the claimed qualifying veteran is through a trust, is the trust revocable, and the qualifying veterans being grantors, trustees, and the current beneficiaries of the trust, as required by 13 C.F.R. § 128.202(a). (*Id.*)
- One or more qualifying veterans being entitled to receive at least 51% of the annual distribution of profits paid to the owners, and the qualifying veteran's ability to share in the profits of the business being commensurate with the extent of his/her ownership interest in the business, as required by 13 C.F.R. § 128.202(g). (*Id.*)

As a result of these deficiencies, the D/GC found that Appellant did not satisfy three of the four requirements of the VetCert regulatory exception for Trust ownership. Accordingly, the D/GC concluded that the ownership requirements of the program had not been satisfied. (*Id.*)

C. Appeal

On May 6, 2024, Appellant appealed the D/GC's decision to OHA. Appellant concedes that the Trust is, under the terms of its own agreement, an irrevocable one, but contended that “the Trust being required to be Revocable cannot be a legitimate requirement, as there has been no specific attribute of a Revocable Trust identified by SBA Vetcert” and that because “there can be no significant asset protection in Revocable Trusts . . . significant contracts held by approved Veterans [are placed] at risk.” (Appeal at 3.)

Appellant also contended that Colleen Moranor, by virtue of being a Successor Trustee, is not a trustee and could only become one in the event of a succession whereby Matthew Moranor either resigns, becomes incapacitated and unable to perform the Trustee duties, or is deceased. (*Id.* at 2.)

Appellant contested the 51% annual distribution requirement by claiming that his role as both Sole Trustor (equivalent to Grantor) and Sole Trustee satisfied this requirement, but also said that the requirement of “the Trustee also being a Beneficiary in the same Trust cannot be a legitimate requirement as it creates a conflict-of-interest and has been construed as an illegal tax shelter, which can be punishable as a felony and can be considered as raiding of the Trust assets.” (*Id.*)

III. Discussion

A. Standard of Review

When a concern seeks certification as a VOSB or SDVOSB, SBA regulations require 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).

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.” *Id.* § 128.302(d)(1).

On 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. *Id.* § 134.1111.

B. Analysis

Appellant has failed to show that the D/GC decision was based upon any error of fact or law. As a result, I must deny this appeal.

As the D/GC indicated in the denial decision, SBA regulations require that an SDVOSB must be at least 51% directly and unconditionally owned by one or more service-disabled veterans. 13 C.F.R. § 128.202(a). Ownership through a trust may be sufficient to meet this requirement, if “the trust is revocable, and qualifying veterans are the grantors, trustees, and the current beneficiaries of the trust.” *Id.*

Here, Appellant was given ample warning and multiple opportunities to either submit the proper documentation or change the nature of his trust agreement in order to be in compliance with SBA regulations. Appellant proved either unable or unwilling to do so. Section II.A, *supra*. Given the record before it, the D/GC properly concluded that Appellant failed to establish its compliance with the direct ownership requirements of 13 C.F.R. § 128.202(a).

Appellant outlined in his appeal why he believed the Successor Trustee and annual distribution of profits arrangements in his trust satisfied the SBA requirements. Section II.C, *supra*. Appellant failed to raise any arguments which the D/GC had not considered in his initial, thorough determination of Appellant's VSBC eligibility (or rather, its lack thereof). Even if one were to grant all of Appellant's arguments regarding the trust arrangements as being errors of fact or law that would still leave the issue of the trust being irrevocable — which Appellant never even attempted to deny — in violation of 13 C.F.R. § 128.202(a).

Appellant also cited policy reasons for two of the three requirements of the VetCert regulatory exception for Trust ownership should not exist. Section II.C, *supra*. Appellant also cited the VA and SSA as agencies that utilize irrevocable trusts as part of their procurement processes. (CR, Exh. 21.) While those reasons and examples may perhaps have merit as policy questions, they are irrelevant to the underlying issue of Appellant's failure to meet SBA's eligibility requirements, as set forth in the regulation. The requirement of the regulation is explicit and allows for no exceptions. A concern owned by an irrevocable trust is not eligible for certification as an SDVOSB. Appellant has failed to meet the regulatory requirement, and the D/GC properly found it ineligible for certification.

IV. Conclusion

Appellant has not established that the D/GC's decision was based upon 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