

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

VSBC Appeal of:

Northeast Solar Design Associates, LLC,

Appellant

SBA No. VSBC-397-A

Decided: October 24, 2024

APPEARANCE

Gregory O. Garrison, CEO, Northeast Solar Design Associates, LLC, Hatfield, Massachusetts

DECISION

I. Introduction and Jurisdiction

On September 10, 2024, Northeast Solar Design Associates, LLC (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 did not demonstrate that it is fully controlled by one or more veterans. On appeal, Appellant maintains that the denial was in error and that the evidence it produced demonstrates compliance with all relevant requirements. For the reasons discussed *infra*, the appeal is denied.

The Office of Hearings and Appeals (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 the appeal within 10 business days after receiving the denial notice on September 4, 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 limited liability company (LLC) established in the Commonwealth of Massachusetts. (Case File (CF), Exh. 34.) In July 2024, Appellant applied for certification as a VOSB, and submitted various supporting documents to SBA. Mr. Gregory O. Garrison, a veteran, is Appellant's CEO and owns 80% of Appellant. (CF, Exh. 38.) Mr. David J. Baird, Appellant's Vice President, owns the remaining 20% of Appellant. (*Id.*) Mr. Baird is not a veteran. (*Id.*)

Appellant submitted a copy of its Amended and Restated Operating Agreement, dated April 1, 2018. (CF, Exh. 36.) The Operating Agreement reflects that Messrs. Garrison and Baird are Appellant's two Members. (*Id.* at 1.) Both Messrs. Garrison and Baird are also Managers of Appellant. (*Id.* at 5.)

The Operating Agreement contains the following provisions pertinent to this appeal:

*Fiduciary Duties.* The Manager's fiduciary duties to the LLC and to the other Members shall be exclusively limited to the following:

...

vi. Duty Not to Receive Improper Personal Benefits from the LLC. If a Manager receives an improper personal benefit, the Manager shall promptly disclose this benefit to the other Members and Managers and, except as provided below, shall promptly transfer it to the LLC. For purposes of this Agreement, an improper personal benefit shall mean a material amount of cash or anything else of material value: (a) that a Manager receives from any third party (i) in connection with the Manager's performance of the Manager's responsibilities under this Agreement; or (ii) by reason of the Manager's status as a Manager; and (2) that, at the time of its receipt, is not approved as a benefit to the Manager under this Agreement. A Manager may retain an otherwise improper personal benefit, and the benefit shall not be deemed to be improper, if the Manager is authorized to retain it by this Agreement or by the express written consent of all Members and Managers.

vii. Duty in Using LLC Property. The Manager shall make no use of LLC property, cash or services (including LLC records, information or intellectual property) or of the Manager's position as a manager for any purpose except to benefit the LLC unless: (a) the Manager first advises the Members and Managers of the Manager's intent to do so; and (b) each of the other Members and Managers unanimously consent to the use in writing.

...

*Additional Capital Contributions.* In the event the LLC requires additional capital to carry out its purpose, to conduct its business, or to meet its obligations, the additional amount needed may be obtained by additional contributions to the capital of the LLC by the Unit Owners (herein "Additional Capital Contributions"). The determination of the amount of any Additional Capital Contribution shall be determined by the unanimous consent of the Members entitled to vote thereon.

(*Id.* at 6-9.)

As part of its application, Appellant submitted 2023 payroll records reflecting that Mr. Baird is Appellant's highest-compensated employee, with a salary of \$[XXXX] and total gross compensation of \$[XXXX]. (CF, Exh. 29 at 6.) Mr. Garrison is Appellant's next-highest-

compensated employee, with a salary of \$[XXXX] and total gross compensation of \$[XXXX]. (*Id.* at 8.)

### B. Denial

On August 21, 2024, SBA requested that Appellant produce additional information in support of its application. (CF, Exh. 46.) SBA explained that Appellant's Operating Agreement appeared deficient, because the Operating Agreement contains provisions requiring the unanimous agreement of Appellant's Members and/or Managers, one of whom is not a veteran. (*Id.*) SBA requested amendments to the Operating Agreement, and “an explanation identifying how it is beneficial for [Mr. Garrison] not to be the highest compensated employee[] and how it is for the best interests of [Appellant],” by August 26, 2024. (*Id.*)

On August 23, 2024, Appellant responded to SBA's request with an unsigned letter from Mr. Garrison. (CF, Exh. 31.) With regard to the issue of employee compensation, Mr. Garrison asserted: “David Baird has higher compensation due to [] stock options. And I am a generous partner.” (*Id.* at 2.) As for the unanimity provisions in the Operating Agreement, Mr. Garrison stated:

I am aware of the provision, but it was a provision included by the attorney drafting the agreement. As a small business with only two members this has never been an issue or ever reviewed.

(*Id.*)

On September 4, 2024, SBA, acting through the Director of the Office of Government Contracting (D/GC), denied Appellant's application for VOSB certification. (CF, Exh. 25.) The D/GC determined that the documentation Appellant provided did not demonstrate that Mr. Garrison fully controls Appellant. (*Id.*)

The D/GC found that Appellant's Operating Agreement reflects that a Manager may retain “an otherwise improper personal benefit, and the benefit shall not be deemed to be improper, if the Manager is authorized to retain it by this Agreement or by the express written consent of all Members and Managers.” (*Id.* at 1, quoting Operating Agreement § 5.i.vi.) Other unanimity requirements are set forth at §§ 5.i.vi and 6.b. (*Id.* at 1-2.) Since one of Appellant's two Members/Managers, Mr. Baird, is not a veteran, the D/GC could not conclude that Mr. Garrison would be able to unilaterally overcome all unanimous voting requirements, as required by 13 C.F.R. § 128.203(f). (*Id.* at 2.)

Furthermore, Mr. Baird, rather than Mr. Garrison, is Appellant's highest-compensated employee. (*Id.*) SBA regulations stipulate that the qualifying veteran should be a VOSB's highest-compensated employee, “unless the concern demonstrates that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern.” (*Id.*, quoting 13 C.F.R. § 128.203(h)(2)(ii).) Appellant was afforded an opportunity to explain why it is beneficial to Appellant for Mr. Baird to be its highest-compensated employee, but Appellant responded only

that Mr. Baird “has the highest compensation due to stock options and because [Mr. Garrison] is [] gener[ous].” (*Id.*) As a result, the D/GC could not determine that Mr. Garrison had elected to receive lower compensation for Appellant's benefit. (*Id.*)

### C. Appeal

On September 16, 2024, Appellant filed the instant appeal. Appellant argues that the unanimity provisions in its Operating Agreement pertain only to extraordinary situations, and therefore should not have been grounds for the D/GC to find that Mr. Garrison lacks full control over Appellant's decisions. (Appeal at 1.) With regard to employee compensation, Appellant asserts that the compensation it pays to Mr. Baird is “commercially reasonable.” (*Id.* at 1-2.) Furthermore:

[Mr. Garrison] ha[s] voluntarily chosen to take lower compensation in order to avoid placing an excessive burden on the company's payroll. This arrangement is in the best interest of [Appellant's] financial health, particularly in light of [Mr. Baird's] technical expertise as Vice President and Master Electrician. [Mr. Garrison's] compensation is structured to ensure that the business can thrive, and [he] benefit[s] during profitable years through distributions tied directly to [his] ownership percentage.

(*Id.* at 2.)

## 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 or SDVOSB.

13 C.F.R. § 128.302(d). SBA may, “in its sole discretion,” request clarification and/or additional documentation at any time during the eligibility determination process. *Id.* § 128.302(b) and (c).

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

I find no merit to this appeal. A principal problem for Appellant is that, although Appellant maintains on appeal that Mr. Baird's compensation is commercially reasonable, and that Mr. Garrison chooses to accept lower compensation for Appellant's benefit, Appellant failed

to address these matters in its application, even in response to SBA's specific inquiry. Sections II.A and II.B, *supra*. Instead, Appellant offered a perfunctory statement attributing Mr. Baird's higher compensation to "stock options" and to Mr. Garrison's "genero[sity]." Section II.B, *supra*. SBA regulations are clear, however, that in order to qualify as a VOSB, a non-veteran may not:

Receive compensation from the concern in any form as a director, officer, or employee, that exceeds the compensation to be received by the qualifying veteran who holds the highest officer position (usually Chief Executive Officer or President), unless the concern demonstrates that the compensation to be received by the non-qualifying veteran is commercially reasonable or that the qualifying veteran has elected to take lower compensation to benefit the concern.

13 C.F.R. § 128.203(h)(2)(ii). Appellant here plainly failed to make any such showing. The regulation encompasses "any form" of compensation, so Appellant's claim that Mr. Baird receives some compensation in the form of stock options has no relevance under the rule. Likewise, the regulation does not recognize "genero[sity]" towards non-veterans as a valid reason for non-compliance. Given that Appellant ultimately was responsible for proving its eligibility as a VOSB, the D/GC correctly concluded that Appellant did not demonstrate its compliance with 13 C.F.R. § 128.203(h)(2)(ii).

Appellant also contends that the D/GC erred in taking issue with provisions in Appellant's Operating Agreement requiring the unanimous agreement of Appellant's Members and/or Managers, because such provisions apply only in unusual or extraordinary situations. Sections II.B and II.C, *supra*. This argument reflects a misunderstanding of applicable law. Under SBA regulations, "extraordinary circumstances" are limited to five particular types of situations discussed at 13 C.F.R. § 128.203(j), such as bankruptcy of the company or the sale of all of the company's assets. While it may be true that the unanimity provisions in Appellant's Operating Agreement would seldom apply, these situations are not among "extraordinary circumstances" specified in the regulation. Section II.A, *supra*. Accordingly, the D/GC did not err in finding that Appellant's Operating Agreement is not in accordance with SBA requirements. Prior to issuing his decision, the D/GC informed Appellant of these concerns and requested that Appellant address the matter, but Appellant declined to do so, instead reiterating that the provisions in question had "never been an issue" previously. Section II.B, *supra*.

#### IV. Conclusion

Appellant has not shown 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