

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

VSBC Appeal of:

Healing Acres LLC,

Appellant

SBA No. VSBC-401

Decided: October 17, 2024

APPEARANCE

Joshua Adelsperger, Member, Healing Acres LLC, Ragland, Alabama

AMENDED DECISION¹

I. Introduction and Jurisdiction

On May 10, 2024, Healing Acres LLC (Appellant) appealed a decision of the Director of Government Contracting (D/GC) acting through the Director of the Veteran Small Business Certification Program (D/VSBC), 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 establish that one or more service-disabled veterans fully control 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*, I grant the appeal.

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 May 7, 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) based in the state of Alabama and formed on July 20, 2018 as a Georgia LLC. (Case File (CF), Exhs. 28-31.) In March 2024, Appellant applied for certification as an SDVOSB and submitted various supporting documents to SBA. (CF, Exhs. 24-37.) Appellant is 51% owned by Mr. Joshua Adlesperger, a service-disabled

¹ This decision was previously issued with an incorrect case number. OHA is herewith reissuing the decision with the correct case number.

veteran, and 49% owned by his non-veteran spouse Ashley Skinner-Adlesperger. (CF, Exhs. 24, 68-70.) Mr. Adlesperger is a 100% totally and permanently disabled veteran. (CF, Exh. 22, Appeal, Ex. VA letter, May 10, 2024.) Ms. Skinner-Adlesperger is his caretaker. (CF, Exh. 42.)

Appellant provided a copy of its current Amended Operating Agreement, dated April 2, 2024. (CF, Exh. 24, 32.) In the course of the application process, Appellant had previously submitted an Operating Agreement dated November 3, 2022. (CF, Exh. 27.) The Amended Operating Agreement reflects that Mr. Adlesperger, and his spouse are Appellant's sole Members. (CF, Exh. 32 at Schedule A.) The Amended Operating Agreement identifies Mr. Adlesperger as CEO and as sole Manager. (*Id.*, at Schedule B.) The company's managers have "full and complete authority, power and discretion to manage and control any and all other acts or activities, customary to or related to the management of the company's business." (*Id.* at 2.) Other provisions of the Operating Agreement are:

Required Unanimous Consent

Notwithstanding anything contained in the ACT [the Georgia Limited Liability Company Act] or this Agreement, the following matters must be agreed to unanimously by all members of the company.

(a) To create or allow to subsist any fixed or floating charge, lien or other encumbrance over the whole or any part of the undertaking, property, and assets of the Company, except for the purpose of securing the indebtedness of the Company to its bankers for sums borrowed in the ordinary course of business;

(b) To borrow any sum except from the Company's bankers in the ordinary course of business;

(c) To enter into any partnership or any profit sharing agreement with any person;

(d) To make any change in the nature of the business;

(e) Or any other matter which may be changed from time to time as may be deemed fit or necessary by amendment of this Agreement and/or the Article of Organization.

(Amended Operating Agreement, at 4.)

Quorum; Voting; Action Allowable Without a Meeting: A majority of the Managers shall be necessary to constitute a quorum for the transaction of business. Every act or decision done or made by a Majority of the Managers present at a meeting at which a quorum is present shall be regarded as the act of the company, unless a greater number is required by law or the ACT.

(Amended Operating Agreement, at 5.)

B. Denial

On May 7, 2024, the D/GC denied Appellant's application for certification as an SDVOSB. (Denial Letter at 1.) The D/GC found Appellant did not establish that Mr. Adlesperger held the highest officer position in the company. In addition, the documentation was insufficient to show that if supermajority or unanimous voting requirements exist in the governing documents, one or more qualifying veterans were able to overcome such requirements (with the exception of the five extraordinary circumstances enumerated at 13 C.F.R. § 128.203(j)).

The D/GC explained:

13 CFR § 128.203(b) states 'A qualifying veteran must hold the highest officer position in the concern (usually President or Chief Executive Officer)...' According to the Managers/Management section on page 2 of the Operating Agreement dated 11/3/2022, 'The Managers shall manage the business and affairs of the Company. In addition to the powers and authority expressly conferred by this Agreement the Managers still have full and complete authority, power, and discretion to manage and control any and all other acts or activities customary to or related to the management of the Company's business . . .' The Number of Managers and Qualifications section on the same page states, '. . . A list of current Managers is attached hereto as Schedule B.' Schedule B lists Joshua Adlesperger (veteran) and Ashley Adlesperger (Non-Veteran) as Managers. As such, it cannot be reasonably determined that the Service-Disabled Veteran is the highest officer. Therefore, based on the foregoing, SBA is unable to reasonably conclude that the control requirement of 13 CFR § 128.203(b) is satisfied.

(Denial Letter at 1.)

C. Appeal

On May 10, 2024, Appellant appealed the D/GC's decision to OHA. Appellant states that it is obvious he holds the highest position as company CEO and the Operating Agreement lists him as CEO:

Per Operating Agreement Signature Block on schedule A and schedule B, Joshua Adlesperger 100% Disabled Veteran Permanent and Total CEO highest position in company. How is this insufficient? . . . Per Operating Agreement with my spouse, Ashley, who owns 49% of the company and is my Caregiver per Veterans Affairs, the members will require 51% of voting power to make any changes to the company. Given I own 51% ownership, I have sole authority to make changes to the company without any input for (sic) Ashley. In order for Ashley to make any changes, she would require my consent before making changes to the company,

therefore she cannot adversely affect or make changes to the company without my consent.

(Appeal at 1.)

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

As the D/GC observed in his decision, the service-disabled veteran upon whom a concern's eligibility is based must hold the highest officer position and have managerial and supervisory control over both the long-term decision making and day-to-day management of the concern. 13 C.F.R. § 128.203(a) & (i). The qualifying veteran must hold the highest officer position in the concern. 13 C.F.R. § 128.203(b). In the case of a limited liability company, one or more qualifying veterans must serve as the managing members, with control over all decisions of the company. 13 C.F.R. § 128.203(d). The terms of a concern's governing documents determine who controls a company's decisions. *CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15 (2021), citing *XOtech v. U.S.*, 950 F. 3rd 1376, 1380 (Fed. Cir. 2020).

The D/GC's error here was to base the decision upon Appellant's original Operating Agreement of November 3, 2022, rather than its successor, the Amended Operating Agreement of April 2, 2024. The Amended Operating Agreement clearly designates Mr. Adlesperger as Appellant's sole Manager and CEO. Exh. 32, at 13, 16. Therefore, he holds the highest officer position in Appellant. As sole Manager and CEO, Mr. Adlesperger has the ability to control Appellant and is vested with "full and complete authority, power and discretion to manage and control any and all other acts or activities, customary to or related to the management of the company's business." Further, while a majority of Managers is necessary to constitute a quorum to do business, as sole Manager, Mr. Adlesperger constitutes a quorum of Managers on his own.

It is true that unanimous consent of Appellant's Members is necessary to undertake certain actions. However, Mr. Adlesperger is a totally and permanently disabled veteran. In the case of veterans with permanent and severe disability, the spouse or permanent caregiver of such veteran may also control the management and daily business operations of an eligible concern and has the same rights to exercise control over an SDVOSB as a service-disabled veteran under 13 C.F.R. § 128.203(a). The regulation clearly allows for the spouse of a permanently and totally disabled veteran to exercise control over the management and daily business operations of a SDVOSB, as though that spouse were themselves a service-disabled veteran. *Matter of Onpointe 3D Technologies, LLC*, SBA No. CVE-131-A, at 8 (2019). Therefore, as Mr. Adlesperger's spouse and caregiver, Ms. Adlesperger's exercise of control is treated as control by a service-disabled veteran. As a result, the fact that certain actions require unanimous consent of Appellant's members, when the two members are Appellant and his spouse, does not mean that Appellant is not controlled by service-disabled veterans.

Accordingly, I therefore conclude that Appellant has met its burden of establishing that the D/GC's decision to decline Appellant's application for admission to SBA's certification database is based on error of fact or law. Accordingly, I must GRANT the instant appeal.

IV. Conclusion

Appellant has met its burden of establishing that the D/GC's determination that it was not an eligible SDVOSB was based on an error of fact or law in denying Appellant's application for certification. I therefore GRANT this appeal and direct the D/GC to immediately include Appellant in the SBA certification database. 13 C.F.R. § 134.1112(f). 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