

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

VSBC Appeal of:

Clark Building Technologies, LLC,

Appellant

SBA No. VSBC-405-A

Decided: October 17, 2024

APPEARANCE

Darren Clark, Chief Executive Officer and Owner, Clark Building Technologies, LLC,
Frederick, Maryland

DECISION

I. Introduction and Jurisdiction

On August 13, 2024, Clark Building Technologies, LLC (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 July 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 limited liability company (LLC) organized in the state of Maryland. (Case File (CF), Exh. 31.) In May 2024, Appellant re-applied for certification as a VOSB, and submitted various supporting documents to SBA. (CF Exh. 34.) Appellant identified the Qualifying Veteran for VOSB certification as Darren Lee Clark. (*Id.*)

Appellant submitted with its application its Articles of Organization and Operating Agreement, as well as Trust documents for the Qualifying Veteran and entities within his control. (CF Exhs. 26, 31, and 32).

The Operating Agreement includes Schedule A, which identifies Clark Computer Services, Inc. as the sole Member with a 100% interest in Appellant. (CF 31 at 5). Other relevant provisions include Articles, 9, 10, and 15, which provide:

- “. . . income and loss of the Company shall be allocated to the sole Member.” (Article 9, *Id.* at 2.)
- “The sole Member shall have the exclusive right to manage the business of the Company and shall have the exclusive authority to make all decisions on behalf of the Company.” (Article 10, *Id.* at 2.)
- “This Agreement may be amended by the sole Member.” (Article 15, *Id.* at 4.)

Appellant submitted trust documents. The trust is entitled “The Clark Computer Services Trust.” The trust's initial funding was 100% of the stock of Clark Computer Services, Inc. (CCS), with these assets and any future additions thereafter being referred to as the “trust estate.” The trust is revocable, and the Qualifying Veteran, Mr. Clark, is both the Trustor and Trustee, as well as the sole life beneficiary of the trust estate. Furthermore, Mr. Clark's ownership is not subject to any conditions or arrangements which would potentially cause ownership benefits to go to another (other than after death or incapacity.) Notably, the applicant concern, Clark Building Technologies, LLC, is not mentioned anywhere in the trust documents. (CF. Exh. 26).

B. Denial

On July 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. 23.) The D/GC found that Appellant did not meet the following requirements:

- A Qualifying Veteran must hold the highest job title in the business, as required by 13 C.F.R. § 128.203(b).
- A Qualifying Veteran must control the Appellant's ordinary decision-making process, as required by 13 C.F.R. § 128.203(d).
- The correct owner must be listed in the application, as required by 13 C.F.R. § 128.202(a).
- At least 51% of each class of member interest must be unconditionally owned by one or more Qualifying Veterans, as required by 13 C.F.R. § 128.202(d).
- One or more Qualifying Veterans must be 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 must be commensurate with the extent of his/her ownership interest in the business, as required by 13 C.F.R. § 128.202(g).

(*Id.*)

The D/GC based its conclusion Appellant failed to meet these regulatory requirements for certification as an SDVOSB on the ownership structure in the Operating Agreement's Schedule A, which identifies CCS, as opposed to the Qualifying Veteran, as the sole Member having a 100% ownership interest in Appellant. (*Id.*)

C. Appeal, Responses to Orders, and Evidence Proffered

On August 13, 2024, Appellant filed the instant appeal along with several Exhibits. However, this appeal lacked a written explanation alleging any error(s) on the part of SBA and without proper representation (non-Member, non-Attorney representation). (Order at 1-2). Appellant was given until August 21 to correct these deficiencies. On August 21, 2024, Appellant filed its response to the Order. Appellant maintains the documents it submitted are not new evidence but were included in its original submission to SBA.

These initial documents proffered by Appellant included a trust agreement between individuals for the Clark Computer Services Trust, a certification of trust for The Clark Family Trust, a benefit summary letter verifying veteran status for the eligible owner of Appellant, CCS's Articles of Incorporation, a Buy-Sell Agreement between Michelle Palmer-Clark and Mr. Clark for CCS's stocks, a Memorandum of Understanding between Ms. Palmer-Clark and Mr. Clark concerning the purchase and sale of CCS stock, an action in writing taken by Mr. Clark, Appellant's Operating Agreement, an organization chart for all Clark entities, an organization chart for the companies owned by Appellant's principal, Mr. Clark, and copies of email exchanges between Mr. Clark and senior management displaying day-to-day control over operations. (Appellant's Exhs. 1.2, 1.3, 1.5, 2, 3, 3.1, 3.2, 4.1, 5, 6, and 7.) All of these documents sought to substantiate the contention that Mr. Clark met the ownership and control requirements as outlined by the SBA.

Appellant argued it had complied with 13 C.F.R. § 128.203(b), and the Qualifying Veteran had the highest job title. Appellant submitted an organizational chart as its Exh. 6 that showed Mr. Clark as the CEO of Appellant - Clark Building Technologies, LLC, thereby satisfying the highest job title requirement. Appellant submitted a separate chart showing overall Clark organizational structure, in which the Qualifying Veteran, Mr. Darren Clark is at the top as Owner. Immediately below the ownership level is CCS. Appellant is placed at the level below that. Another entity, Kipp Visual Systems, is listed below that. (Exh. 5.)

In response to the other deficiencies identified by the D/GC, Appellant pointed to the Trust Agreement showing that Clark Computer Services Trust is a revocable trust, with Mr. Clark as the sole life beneficiary. Appellant contended that this structure was sufficient for purposes of satisfying any regulations regarding direct and unconditional ownership, dividends and distributions, and non-Veteran control. (Response at 1-2, 4).

Appellant also referenced its letter submitted as part of the application process arguing in favor of SDVOB certification. (CF Exh. 24.) Appellant contends that even though it is a

subsidiary of Clark Computer Services, the fact that the entities operate under the Qualifying Veteran's direct supervision and management made the ownership structure permissible under the applicable regulations. Appellant also argued that D/GC's interpretation of the regulations in question undermined the regulations' core purpose and intent, which is to keep the control and benefits of concerns in the hands of service-disabled veterans. (*Id.*)

Appellant also included citations to applicable case law: *In the Matter of Wexford Group Int'l*, SBA No. SDV-105 (2006) and *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792 (2013). (*Id.*) Appellant argues these cases hold that a structure involving an intermediary business does not negate the veteran's control and ownership if the veteran demonstrates ultimate control over all entities involved, and that the regulations' intent is to ensure control and ownership remain with the veteran, even if the structure involves other business entities. (*Id.*)

D. Exhibits as New Evidence

Appellant claimed that the documents it submitted in its initial appeal did not constitute new evidence, but rather were included in its original submission to SBA. While this was true of many of the documents in question, such as the Clark Computer Services Trust, the Articles of Incorporation, and the Operating Agreement, this did not appear to be the case with many of the other documents such as the organizational charts and email exchanges. (Appellant's Exhs. 1.2, 1.3, 1.5, 2, 3, 3.1, 3.2, 4.1, 5, 6, and 7.)

Except for good cause shown, new evidence beyond the case file will not be admitted. 13 CFR § 134.1110. As will be clear *infra*, the documents already in the record are dispositive, I therefore DENY Appellant's request to submit new evidence into the record.

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.” 13 C.F.R. § 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 establish that the D/GC decision was based upon clear error of fact or law. As a result, I must DENY this appeal.

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.*) The regulation requires that ownership be unconditional. That is “ownership must not be subject to any conditions, executory agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements causing or potentially causing ownership benefits to go to another (other than after death or incapacity).” 13 C.F.R. § 128.202(b).

Appellant cited two cases *In the Matter of Wexford Group Int'l*, SBA No. SDV-105 (2006) and *Miles Construction, LLC v. United States*, 108 Fed. Cl. 792 (2013) in support of its position. Section II.C, *supra*.

However, in *Matter of Veterans Contracting Group, Inc.*, SBA No. VET-265 (2017), OHA explicitly rejected the Court of Federal Claims reasoning in *Miles* because it was based upon Department of Veterans Affairs regulation, not applicable to SBA's veterans program.

By contrast, OHA has consistently applied the *Wexford* standard. That standard is best summarized by this passage:

In the context of 13 C.F.R. § 125.9, unconditional necessarily means there are no conditions or limitations upon an individual's present or immediate right to exercise full control and ownership of the concern. Nor can there be any impediment to the exercise of the full range of ownership rights. Thus, a service-disabled veteran: (1) Must immediately and fully own the company (or stock) without having to wait for future events; (2) Must be able to convey or transfer interest in his ownership interest or stock whenever and to whomever they choose; and (3) Upon departure, resignation, retirement, or death, still own their stock and do with it as they choose. In sum, service-disabled veterans must immediately have an absolute right to do anything they want with their ownership interest or stock, whenever they want.

(*Wexford*, at 6.)

OHA addressed the issue of the continued applicability of the *Wexford* standard in *CVE Protest of Randy Kinder Excavating, Inc.*, SBA No. CVE-232 (2022). In response to a remand order from the Court of Federal Claims questioning the continued applicability of the *Wexford* standard in the light of recent revisions of the pertinent regulations, OHA held that “[T]he *Wexford* standard remains undisturbed.” (*Randy Kinder Excavating*, at 20.)

However, Appellant's reliance upon *Wexford* is misplaced. There is no question that Mr. Clark's interest in the Trust as Trustor and trustee is unconditional. Further, that the Trust's ownership of CCs is unconditional. And that CCS's ownership of Appellant is unconditional. While Appellant and its affiliates thus meet the *Wexford* standard for unconditional ownership, the question is whether that ownership is direct, as required by the regulation.

The issue of whether an organizational structure such as the one presented by Appellant constitutes direct ownership was adjudicated in *Matter of IITS — Nabholz, LLC*, SBA No. VET-114. That case held the following:

The regulatory mandate is clear and unequivocal; a service-disabled veteran's ownership of an SDVO SBC¹ must be unconditional and direct. 13 C.F.R. § 125.9(a); *see In the Matter of The Wexford Group International*, SBA No. SDV-105, at 7-8 (2006). . . . However, a concern which is owned by another business entity that is in turn owned and controlled by a service-disabled veteran does not meet the regulatory ownership requirement. 13 C.F.R. § 125.9(a).² (emphasis supplied).

(*Nabholz* at 12.)

Mr. Clark does appear to have unconditional ownership over the concern pursuant to the *Wexford* standard and is involved in its day-to-day operations. However, OHA precedent interpreting the regulation clearly holds that an organizational structure in which there is another business entity between the Qualifying Veteran and the applicant concern does not meet the regulatory requirements for direct ownership. Here, Appellant is owned by a corporation which is owned by a Trust, of which the Qualifying Veteran is Trustee. Therefore, the Qualifying Veteran does not have direct ownership of Appellant. Accordingly, since Appellant did not satisfy the regulatory requirement, the D/GC properly found it ineligible for certification.

IV. Conclusion

Appellant has not established that the D/GC's decision was based upon clear error of fact or law in denying Appellant's application for certification. I must therefore DENY the appeal. 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

¹ The terminology at the time was Service-Disabled Veteran-Owned Small Business Concerns (SDVO SBC). The current terminology is now Service-Disabled Veteran-Owned Small Business. (SDVOSB).

² The pertinent regulation regarding direct ownership is now 13 C.F.R. § 128.202(a).