United States Small Business Administration
Office of Hearings and Appeals

VSBC Appeal of: Snowfensive LLC., Appellant	SBA No. VSBC-412-A Decided: November 6, 2024

APPEARANCE

Kenneth M. Bitner, Esq., Terry, Jessop & Bitner, Salt Lake City, Utah, for Snowfensive LLC

DECISION

I. Introduction and Jurisdiction

On August 16, 2024, Snowfensive LLC (Appellant) appealed a decision of the U.S. Small Business Administration's (SBA) Director of the Veteran Small Business Certification Program (D/VSBC), on behalf of the Director of Government Contracting (D/GC) denying Appellant's application for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB). The D/VSBC found that Appellant could not be certified due to issues with the Qualifying Veteran's control of Appellant. On appeal, Appellant maintains that the D/VSBC's denial decision was erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is granted.

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 its appeal within 10 business days after receiving the denial notice on August 23, 2024. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

On March 28, 2016, Appellant was first organized as Snow Offensive Security, LLC (Snow Offensive), in the State of Utah. (Case File (CF), Exh. 28.) On January 20, 2017, Snow Offensive was renamed as Appellant. (CF, Exh. 74.)

On July 2, 2024, John Carruthers and Stephanie Carruthers executed Appellant's Amended and Restated Operating Agreement (the Agreement) as Members of Appellant. (CF, Exh. 73) Appellant is managed by Mr. Carruthers, a Service-Disabled veteran, the Qualifying

Veteran and Manager of the Company. (*Id.*, at 2 § 1.4, CF, Exh. 30.) Mr. Carruthers has a 90% ownership interest of the concern, and Ms. Carruthers owns the remaining 10%. (*Id.*, § 1.5.)

The Agreement defines a "majority of the Members" as "Members holding more than 50% of the Sharing Ratios" Sharing Ratio being an ownership interest. (*Id.*, at 3 § 1.10(c).)

The pertinent sections of the Agreement are:

> **Article II — MEMBERS**
>
> **2.3. Majority Vote**. Unless otherwise required under this Agreement, a vote by a majority of the Members is necessary and sufficient to conduct business.
>
> **2.5 Action without Meeting**. Any action requiring the vote or consent of Members under this Agreement may be taken without a meeting provided that Members holding sufficient Sharing Ratio that would be necessary to authorize the action, consent in writing and set forth the action. A Member may appoint a proxy or other agent to vote, consent, or otherwise act for the Member.

(*Id.*, at 4.)

> **Article III — MANAGEMENT**
>
> **3.10 Removal and Resignation**. A Manager, with or without cause, may be removed by a majority of the Members as provided in Section 48-3a-407(3)(d). In the event members wishing to remove a manager cannot obtain a majority to do so by statutory, non-judicial action, the LLC or members holding at least a 25% interest in the profits of the company, may petition the court for removal of a manger (*sic*). A Manager may resign by submitting such resignation in writing to the remaining Managers or, if there are none, to a Member. In case [of] removal or resignation of a Manager, the Members shall forthwith elect a successor Manager.

(*Id.*, at 5.)

> **Article VI — ACCOUNTS**
>
> **6.1 Member's Accounts**
>
> **(b) Relationship to Sharing Ratios**. To the full extent possible without conflicting with the Treasury Regulation capital accounting rules referred to in the preceding paragraph, the Members' capital accounts shall be maintained so that they are in proportion to their Sharing Rations.

(*Id.*, at 8.)

> **Article XI — MISCELLANEOUS**
>
> **11.3 Entire Agreement**. This Operating Agreement (a) contains the entire agreement among the parties, (b) except as provided in Article XII, may not be amended nor may any rights hereunder be waived except by an instrument in writing signed by the party sought to be charged with such amendment or waiver, and (c) shall be construed in accordance, and government by, the laws of Utah.

(*Id.*, at 14.)

> **Article XII — AMENDMENTS**
>
> **12.1 Amendments**. Amendments to this Operating Agreement or to the Articles of Organization that are of an inconsequential nature (as determined by the person holding the power of attorney granted in Article 9.1) and that do not affect the rights of the other Members in any material respect, or that are contemplated by this Operating Agreement (including without limitation those contemplated by Article 7.4), may be made by that person designated in Article 9.1 through the exercise of such person's power of attorney. All other amendments shall be adopted by consent of a majority of the Members.

(*Id.*, at 15.)

B. Denial Letter

On August 16, 2024, the D/VSBC denied Appellant's application for certification as a SDVOSB. The D/VSBC found issues with Appellant's voting and decision making under 13 C.F.R. § 128.203(d) and its supermajority or unanimous voting provisions under 13 C.F.R. § 128.203(f).

The D/VSBC noted that 13 C.F.R. § 128.203 requires that a certified SDVOSB be controlled by one or more Qualifying Veterans. The D/VSBC further noted that 13 C.F.R. § 128.203(j) only allows certain narrow exceptions to control by the Qualifying Veteran, including adding a new owner; the company declaring bankruptcy; dissolving the company; merging the company; and sale of the company. However, based on the documents Appellant submitted the D/VSBC could not conclude the control requirements had been satisfied. (Denial, at 2-3.)

Further, the D/VSBC found that:

> **Article 2.3 of the Operating Agreement** requires a vote by a majority of members to conduct business. With 2 members, both must agree to constitute a majority. Article 6.1 (b) requires a majority of the members, including the non-Veteran member, to allow a member to make a transfer from their distribution account to their capital account. Article 11.3 requires the signature of the non-Veteran member for certain amendments to the Agreement, but there is no “further assurances” clause requiring the non-Veteran member to sign. Article 12.1 requires the consent

> of a majority of members to make most amendments to the Agreement. Each of these provisions allows non-Veteran control of decisions not in the exceptions in 13 CFR § 128.203(j). Applicant was given the opportunity to resolve these issues, but did not.

(*Id.*, at 3.)

C. Appeal

On August 23, 2024, Appellant timely filed the instant appeal. Appellant argues that SBA overlooked the definition of "majority of the Members" at Article 1.10(c) of the Agreement, where it expressly sets forth that the "'majority of the Members' means Members holding more than 50% of the Sharing Ratios." (Appeal, at 1.)

Appellant asserts the Qualifying Veteran Member holds 90% of the Sharing Ratio as documented in Article 1.5, and thus, in each instance where the consent or vote of a "majority of the Members" is required by the Agreement, the Qualifying Veteran Member has ultimate control. (*Id.*, at 1-2.)

Appellant further takes issue with SBA's conclusion Appellant requires the cooperation of the non-veteran Member to conduct business under Article 2.3 of the Agreement, contrary to the requirement of 13 C.F.R. § 128.203(d). However, Article 2.3 requires "a vote by a majority of the Members." SBA incorrectly determined that this provision requires the non-veteran Member's vote, rather than applying the Majority Definition, which would result in a determination that because the Qualifying Veteran Member holds well over 50% of the Sharing Ratios (ownership interest), the Qualifying Veteran Member is the "majority of the Members" and does not require the consent of the non-veteran Member to conduct business. (*Id.*, at 2.)

In each of the other instances referenced in the Denial Letter, SBA incorrectly interpreted that "majority of the Members" means the Qualifying Veteran Member holding 90% of the ownership interest required the consent of the non-veteran Member to form a majority. However, the Majority Definition supports the opposite result. The Qualifying Veteran Member simply does not need the consent of the non-veteran Member to take any of the actions referred to by the Denial Letter. (*Id.*)

Particularly, SBA mistakenly claims Article 6.1(b) requires the consent of the non-veteran Member to allow a Member to make a transfer from their distribution account to their capital account. However, Article 6.1(b) does not include any reference to majority consent. In fact, Article 6.1(b) expresses the intent that the Members' capital accounts be maintained so that they are in proportion to their Sharing Ratios (ownership interest). Assuming the D/VSBC meant Article 6.1(c), he is still incorrect. That provision expressly allows losses to be charged to the Members' capital accounts if "a majority of the Members" choose to do so. Again, the Qualifying Veteran, with his 90% interest, constitutes "a majority of Members." (*Id.*)

SBA also incorrectly claims that Article 11.3 of the Agreement requires the signature of the non-veteran Member for certain amendments to the Agreement. However, Article 11.3 states

that the Agreement is the entire agreement and "except as provided in Article XII," the Agreement may not be amended, nor may any rights be waived unless the party sought to be charged has signed an instrument. SBA claims the Agreement needs to have a "further assurances" clause requiring the non-veteran member to sign such document. However, the Agreement does not need a "further assurances" clause. The Qualifying Veteran Member holds 90% of the Sharing Ratios and, as provided in Article XII, may amend the Agreement without the non-veteran Member's consent. (*Id.*)

Similarly, SBA incorrectly claims that Article 12.1 requires the consent of the non-veteran Member to amend the Agreement. First, Article 9.1 designates the Qualifying Veteran Member as Appellant's agent to make most amendments to the Agreement as allowed under Article 12.1. However, even more importantly, the Qualifying Veteran Member also holds 90% of the Sharing Ratios (ownership interest). Therefore, in accordance with the Majority Definition the Qualifying Veteran Member being the "majority of the Members" has the authority and power to adopt any and all amendments to the Agreement with or without the non-veteran Member's consent. (*Id.*, at 2-3.)

SBA denied Appellant's previous application to be a certified SDVOSB. SBA claims it gave Appellant the opportunity to resolve previous issues in handling this reapplication. Appellant characterizes this claim is simply wrong on its face, when Appellant's Members amended and restated the Agreement to comply with the SBA's control requirements. (*Id.*, at 3.)

Appellant maintains that the D/VSBC failed to acknowledge and apply Appellant's revisions and provide a "thorough review" of the record. The D/VSBC overlooked the Majority Definition, which if applied would overcome all issues of control the D/VSBC raised as the basis for denying Appellant's application. (*Id.*)

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).

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

Appellant has established the D/VSBC's decision was based on error of law. I find Appellant successfully addressed all concerns on the Qualifying Veteran's control in its Operating Agreement. As a result, I must grant this appeal.

To be considered an eligible SDVOSB, a concern must be at least 51% owned and controlled by one or more service-disabled veterans. 13 C.F.R. §§ 128.200(a), 128.202 and 128.203. The "control" requirement means that "both the long-term decision-making and the day-to-day operations" must be controlled by one or more service-disabled veterans. 13 C.F.R. § 128.203(a).

The record clearly shows that Mr. Carruthers, the Qualifying Veteran, directly and unconditionally owns a 90% interest in Appellant. Appellant thus meets the ownership requirements. 13 C.F.R. § 128.202(d). The D/VSBC denied Appellant's application, finding it had failed to meet the control requirements of 13 C.F.R. § 128.203(d) and (f) based on issues with Appellant's majority voting requirements in the Amended Operating Agreement (hereinafter "Agreement"). However, as Appellant maintains and the D/VSBC overlooked, the Agreement clearly defines a "majority of the Members" as "Members holding more than 50% of the Sharing Ratios." Mr. Carruthers then, by himself, is a majority of the Members. Section II.A, *supra*.

As executed, Mr. Carruthers is the Managing Member and the majority shareholder. There are no supermajority voting requirements. The D/VSBC's concern was that Articles 2.3, 6.1 and 12.1 require a vote or consent by a majority of Members; however, under the Agreement, the Member holding more than 50% of the shares is the majority of the Members, and thus, Mr. Carruthers controls Appellant. Mr. Carruthers can take all the actions the Agreement permits a majority of the Members to take. He can conduct business under Article 2.3, allow a Member to make a transfer from their account under Article 6.1(c), and make amendments to the Agreement under Article 12.1.

The D/VSBC found the Agreement failed to meet the regulatory requirement because Article 11.3 requires the signature of the non-veteran Member for certain amendments to the Agreement, but the Agreement lacks a "further assurances" clause requiring the non-veteran Member to sign. However, Appellant has clearly demonstrated that Article 12.1 provides Mr. Carruthers, as the majority of the Members, with the authority to make such and all other amendments.

The Agreement also gives Mr. Carruthers the ability to conduct business (§ 2.3), take action without a meeting (§ 2.5), manage the company (§ 3.1), remove Members (§ 3.10), and approve salaries and membership fees (§ 3.9). Therefore, Appellant has established that it is majority owned and controlled by Mr. Carruthers, the Qualifying Veteran. Because D/GC expressed no other concerns with Appellant's application, Appellant is an eligible SDVOSB.

IV. Conclusion

Appellant has established that the D/GC's determination was based on error of law in denying Appellant's application for SDVOSB certification. The appeal therefore is GRANTED. The D/VSBC must 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