

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

VSBC Appeal of:

MaxIt Corporation,

Appellant

SBA No. VSBC-415-A

Decided: November 21, 2024

APPEARANCE

Earle E. Baruch, III, President, MaxIt Corporation, Ponte Vedra Beach, Florida

DECISION

I. Introduction and Jurisdiction

August 22, 2024, MaxIt Corp (Appellant) appealed the denial of its application for certification as a Veteran-Owned Small Business (VOSB) to the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA). OHA conducts VOSB status appeals under the authority of the Small Business Act of 1958, 15 U.S.C. §§ 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K.

The SBA's Director of the Veteran Small Business Certification Program (D/VSBC) denied Appellant's application due to issues with Appellant's ownership structure. On appeal, Appellant maintains that the denial decision was erroneous and requests that OHA reverse it. For the reasons discussed *infra*, the appeal is denied.

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 its appeal within 10 business days after receiving the denial notice on August 21, 2024. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

i. Bylaws

Appellant is a corporation, established on May 23, 1995, in the State of Delaware. (Case File (CF), Exh. 35.) Appellant's Qualifying Veteran is Earle E. Baruch, III, a Service-Disabled Veteran. Mr. E. Baruch is Appellant's President and 51% shareholder. Phillip K. Baruch, a non-

veteran and Mr. E. Baruch's brother is Appellant's 49% shareholder. (CF, Exh. 36.) Both shareholders sit on Appellant's Board of Directors. (CF, Exh. 31.)

Appellant's Bylaws define quorum as:

A majority of the shares of the Corporation entitled to vote, represented in person or by duly executed proxy, shall constitute a quorum at any and all meetings of the shareholders. If a quorum is present, the affirmative vote of the majority of shares, unless otherwise established in any lawful agreement between the shareholders which are presented at the meeting and entitled to vote, shall be the act of the shareholders.

(CF, Exh. 34, Art. 2.7.)

Special meetings of the shareholders may be called at any time by the Board, the President, or any holders of at least 50% of the shares entitled to vote. (*Id.*, Art. 2.2.)

The full and entire management of the affairs and business of the Corporation is vested in the Board of Directors. (*Id.*, Art. 3.1.) The shareholders shall fix the precise number of members of the Board of Directors by resolution. A majority of the Directors shall constitute a quorum for transacting business. (*Id.*, Art. 3.2.) All resolutions and business transacted shall require the affirmative vote of the majority of the Directors. (*Id.*)

Under the removal clause, the Bylaws allow any Director may be removed, with or without cause, upon a two-thirds vote of the shareholders, at a meeting with respect to which notice of such purpose is given. (*Id.*, Art. 3.6.)

ii. Amendments

On February 1, 2024, Appellant's Board of Directors met for the annual meeting. Financial reports were accepted, and both Baruch brothers were elected as Directors for the coming year. (CF, Exh. 31, at 1.)

On August 10, 2024, Appellant's Board of Directors held a meeting to amend its Bylaws. (CF, Exhs. 29, 30.) The Amendment added "Article 9 - Control and Management by Veteran Owners," which states:

9.1. Ownership and Control: The Corporation affirms that it is at least 51% unconditionally and directly owned by one or more veteran individuals who are U.S. citizens.

9.2. Management and Daily Operations: The Corporation confirms that the management and daily business operations are controlled by the veteran owner(s). The veteran owner(s) shall:

-Hold the highest officer position within the Corporation.

-Have the requisite management experience to manage the day-to-day operations and the overall strategic direction of the Corporation.

-Possess the authority to make long-term decisions, manage the business's resources, and oversee the implementation of policies.

9.3. Operational Authority: The veteran owner(s) shall have the power to control the operations and activities of the Corporation, ensuring that the business functions independently and is not unduly influenced by any non-veteran individual or entity.

9.4. Commitment to Compliance: The Corporation is committed to remaining in full compliance with all SBA requirements for the duration of its participation in relevant SBA programs. This includes maintaining the control and management of the Corporation by veteran individuals as defined by SBA regulations.

9.5. Annual Review: The Board of Directors shall conduct an annual review to ensure continued compliance with this provision and shall take necessary actions to rectify any deviations from these requirements promptly.

(Id.)

B. Denial

On August 21, 2024, the D/VSBC denied Appellant's application. (CF, Exh. 26.) The D/VSBC found that Appellant failed to meet the requirement of 13 C.F.R. § 128.203(a), that the concern's management and daily business operations are controlled by one or more service-disabled veterans. The D/VSBC pointed out that Article 3.2 of the Bylaws defined a quorum of the Board of Directors as the presence of a majority of Directors. Further, that all resolutions adopted, and all business transacted by the Board of Directors required the affirmative vote of a majority of the Directors present at the meeting. It was further noted that Minutes of the Board meetings of February 1, 2024, and August 10, 2024, indicated both Mr. E. Baruch, the Qualifying Veteran, and Mr. P. Baruch, a non-veteran, serve as Directors. The Qualifying Veteran cannot form a quorum without relying on the presence of the non-veteran Director and does not have unilateral control over all voting of the Board of Directors. Accordingly, the D/VSBC concluded Appellant failed to meet the control requirements of 13 C.F.R. § 128.203(a).

C. Appeal

On August 21, 2024, Appellant appealed the D/VSBC's decision to OHA. Appellant asserts the D/VSBC erred in denying its application because Mr. E. Baruch, the Qualifying Veteran, is 51% owner, and has always maintained control over Appellant's strategic direction, financial decisions, and daily operations. (Appeal at 1.)

Appellant states that it has amended its Bylaws (referring to Article 9, *supra*) to explicitly state that the Qualifying Veteran controls Appellant's management and daily operations.

Appellant has also revised the minutes of its February 1, 2024, Board of Directors meeting to clarify that the Qualifying Veteran has full control over all major decisions. (*Id.*)

Appellant asserts that the Qualifying Veteran makes all financial decisions including payroll, budgeting and contract management. Appellant states it is prepared to revise its bylaws to further ensure that quorum can be met by the Qualifying Veteran alone and he will have unilateral control over all voting. Lastly, Appellant requests reconsideration of its application and attaches an affidavit from Mr. P. Baruch attesting to the Qualifying Veteran's full control over the business. (*Id.*, at 2.)

On August 27, 2024, OHA issued an Order to Show Cause why it should not dismiss the appeal for lack of compliance with the regulations. On September 3, 2024, Appellant responded to the Order, asserting that it believed the D/VSBC's denial was in error due to a misinterpretation of its corporate governance documents and practices. Appellant's amended Bylaws and minutes were designed to clarify the Qualifying Veteran's unilateral control over Appellant. The D/VSBC's denial failed to account for the amended documents. Appellant argues the Affidavit it submits was obtained after the denial to address any remaining concerns. Appellant did not submit it earlier because it thought its earlier submissions were sufficient. Thus, Appellant argues there is good cause for the submission of new evidence under 13 C.F.R. § 134.1110, because it directly addresses the D/VSBC's concerns. Appellant reaffirms that it is prepared to implement additional changes to be in compliance with the regulations, and request reconsideration of its application.

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. 13 C.F.R. § 128.302(d).

Appellant seeks to submit as new evidence an affidavit from the non-veteran Director. New evidence may not be admitted on appeal except for good cause shown. 13 C.F.R. § 134.1110. Appellant's argument for the affidavit's admission is that it directly addresses the issues here. The affidavit contains no information that was not available when Appellant filed its application, and merely rehashes the arguments Appellant has already made. I therefore EXCLUDE the proffered affidavit.

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 failed to show that the D/VSBC committed any error of fact or law in reaching his decision. As a result, I must deny this appeal.

As the D/VSBC stated in the denial decision, SBA regulations require that a VOSB's management and daily business operations be controlled by one or more veterans. 13 C.F.R. § 128.203(a). In the case of a corporation, if a qualifying veteran owns 51% of all voting stock, is on the Board of Directors, and there are no supermajority voting requirements, SBA will deem the qualifying veteran to control the Board of Directors. 13 C.F.R. § 128.203(e)(1)(ii). However, if there are supermajority requirements, the qualifying veteran must own enough stock to overcome them. *Id.*; 13 C.F.R. § 128.203(f).

To determine who controls the company, we must turn to its governing documents. *CVE Protest of Valiant Construction, LLC*, SBA No. CVE-205-P, at 15, (2021), citing *XOTech LLC v. U.S.*, 950 F.3d 1376, 1380 (Fed.Cir. 2020). Here, the Qualifying Veteran, Mr. E. Baruch, holds a majority of the stock and sits on the Board of Directors. However, the non-veteran owner is also a Director and can prevent the establishment of a quorum and block action by the Qualifying Veteran. The Bylaws require a vote by a two-thirds majority of the shareholders to remove a Director. While the Qualifying Veteran holds a majority of the stock, he does not hold two-thirds and cannot on his own meet that supermajority requirement. Section II.A, *supra*. Therefore, the Qualifying Veteran cannot be said to control the Board of Directors. Mr. E. Baruch cannot establish a quorum or take action on his own and cannot remove the other Director on his own. The Bylaws have given the non-veteran director negative control of the corporation. Therefore, the Qualifying Veteran does not control the corporation. 13 C.F.R. § 128.102; *CVE Protest of First Nation Group, LLC*, SBA No. CVE-185-P, at 17 (2021)

Appellant argues that its addition of Article 9 to its Bylaws, as noted above, gives the Qualifying Veteran control over the firm. While Article 9 states the Qualifying Veteran has control, it does not remove or invalidate the supermajority requirement for removal of a Director, and the provisions on establishing a quorum and requiring a majority vote for action by the Board, which all remain undisturbed in the Bylaws, having full force and effect. The new Article 9 does not override these provisions, and so, the non-veteran Director retains his negative control. The Bylaws contain nothing like a weighted voting provision, which would give the Qualifying Veteran majority or full control of the Board. *CVE Protest of First Nation Group, LLC*, SBA No. CVE-201-P, at 15 (2021).

Lastly, Appellant seems to misunderstand the appeal process, stating that it seeks reconsideration of the D/VSBC decision and is prepared to make further revisions. That is not the nature of this proceeding. I must determine whether the D/VSBC's decision was based upon clear error. If Appellant seeks to reapply for certification, the regulations provide a process outside of this proceeding. 13 C.F.R. § 128.305.

I conclude that Appellant's Bylaws give negative control of the concern to the non-veteran Director, and thus Appellant fails to meet the requirement that it be controlled by a veteran. 13 C.F.R. §§ 128.200(a)(2); 128.203(a). Appellant has failed to establish that the D/VSBC's decision was based upon error of fact or law. Accordingly, I must deny the instant appeal.

IV. Conclusion

Appellant has not established that the D/VSBC 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).

CHRISTOPHER HOLLEMAN
Administrative Judge