

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

IN THE MATTER OF:

Horses First, Inc.

Petitioner

SBA No. BDP-273

Decided: February 7, 2008

ORDER DISMISSING UNTIMELY APPEAL

On October 2, 2007, Petitioner Horses First, Inc. (Petitioner), requested reconsideration of a July 28, 2007, initial determination by Respondent Small Business Administration (SBA), denying Petitioner admission into the 8(a) Program (SBA Initial Determination). Also on October 2, 2007, SBA returned Petitioner's request for reconsideration stating it was untimely filed. *See* 13 C.F.R. § 124.205(a). On October 5, 2007, Petitioner filed an Appeal Petition with the Office of Hearings and Appeals (OHA). *See* 13 C.F.R. Parts 124 & 134. On December 14, 2007, Petitioner served its Appeal Petition on the SBA.

On December 17, 2007, I ordered SBA to brief the issue of OHA's jurisdiction over the appeal by January 10, 2008. On January 10, 2008, SBA filed its brief and moved to dismiss the appeal because Petitioner neither timely requested reconsideration nor timely appealed the SBA's Initial Determination. Petitioner was then ordered to file its response to the Motion to Dismiss or be deemed to have consented to the relief sought. 13 C.F.R. § 134.211(c). On January 30, 2008, Petitioner filed its Response to the Motion to Dismiss.

I. SBA Brief and Motion to Dismiss¹

Petitioner failed to submit a request for reconsideration or an appeal petition within 45 days of receipt of the SBA's Initial Determination denying it admission into the 8(a) Program. 13 C.F.R. §§ 124.205(a), 124.206(c). By failing to do either, SBA argues the SBA's Initial Determination became the final Agency decision.

Petitioner requested reconsideration after the 45-day deadline. The SBA returned the request for reconsideration to Petitioner, advising Petitioner that the request was untimely. Petitioner then filed the instant Appeal Petition within 45 days of receipt of that letter. SBA argues that this letter was not an Agency determination, but only an acknowledgment that it rejected the untimely request for reconsideration. Further, the only Agency decision that Petitioner could appeal was the SBA's Initial Determination.

¹ On January 28, 2008, SBA filed its Response to the Appeal and the Administrative Record. In view of the disposition of the Appeal, neither was considered.

Thus, the SBA contends the Appeal Petition should be dismissed as untimely. 15 U.S.C. § 637(a)(9)(E)(ii) (requiring the Administrative Law Judge to dismiss an untimely appeal petition for lack of jurisdiction).

II. Petitioner's Appeal Petition and Response to Motion to Dismiss

A. Appeal Petition

Petitioner concedes that it submitted its request for reconsideration nine days after the 45-day deadline, but because the SBA was well over its 8(a) application processing deadline, Petitioner should also be allowed to exceed the deadline to request reconsideration. Further, its original 8(a) application meets all of the eligibility requirements for the Program.

Petitioner "seek[s] appeal of this 45 day rule and the original determination because I have now complied and provided evidence based on the stricter standard in a reasonable timeframe."

B. Response to Motion to Dismiss

Petitioner concedes that its request for reconsideration was untimely, but argues that its delay was *de minimis*. In contrast, the SBA's delay in processing its application was lengthy -- over eight months, contrary to the regulatory 90-day deadline. Thus, Petitioner contends that I, as a matter of fairness and equity, should hear the case especially since the delay did not prejudice the SBA.

Petitioner argues that the time to file a request for reconsideration "does not carry the same weight as a statute of limitations," and because this is an administrative matter, fairness dictates that the case be returned to the SBA so it can reconsider the evidence Petitioner submitted with its request for reconsideration or the appeal be heard on its merits.

In a letter attached to its response to the motion, Petitioner's owner states that the delay in filing the request for reconsideration was due to her need to attend to her sister, who was in the final stages of a serious illness.

Finally, Petitioner requests that the case either be sent back to the SBA for reconsideration or that it be decided on the merits upon a review of the complete record in the case.

III. Findings of Fact

1. On November 14, 2006, Petitioner applied for admission into the 8(a) Program.
2. On July 28, 2007, the SBA denied Petitioner's application because "the individual upon whom eligibility is based, [is] not socially disadvantaged due to your gender."

Petitioner received the Initial Determination by email on July 28, 2007, and by U.S. Postal Service on August 8, 2007.

3. The July 28, 2007 Initial Determination advised Petitioner that it may request this finding be reconsidered no later than 45 days from receipt of the letter.
4. The July 28, 2007 Initial Determination also advised Petitioner that it could appeal its decision directly to OHA without taking advantage of the right to request reconsideration, also no later than 45 days from receipt of the letter.
5. The Initial Determination warned Petitioner that “failure to submit your request for reconsideration, along with the supporting documentation, or failure to appeal this finding within the prescribed period will prevent further consideration of your firm’s application. Should this happen, or should your appeal to the Office of Hearings and Appeals be unsuccessful, you will have to wait 12 months from the date of the final Agency decision before you can reapply.”
6. On October 2, 2007, Petitioner submitted its request for reconsideration.
7. On October 2, 2007, the SBA returned the request for reconsideration to Petitioner because it was untimely. The letter states Petitioner received the Initial Determination by email on July 28, 2007, and by U.S. Postal Service on August 8, 2007. The 45-day time limit expired on September 11, 2007 for the former, and September 22, 2007 for the latter.

IV. Discussion

A.

The 8(a) application process provides applicants fair and even-handed procedures for the evaluation of an applicant’s eligibility for admission into the 8(a) Program. *See In the Matter of Custom Copper & Slate, Ltd.*, SBA No. BDP-160 (2001). It also imposes obligations on applicants, which can be rigid. *See, e.g.*, 13 C.F.R. § 134.103(b) (noting that time limits governing when a case may be commenced cannot be modified).

An applicant may request the SBA reconsider a denial of its application by submitting a request for reconsideration within 45 days of receipt of notification that it was denied admission into the Program. 13 C.F.R. § 124.205(a). The Initial Determination clearly informed Petitioner of this requirement.

Here, Petitioner received the Initial Determination via email on July 28, 2007, and via certified mail on August 8, 2007. Petitioner submitted its request for reconsideration to the SBA on October 2, 2007, twenty-one days after the 45-day deadline for requesting reconsideration

assuming receipt on July 28, 2007, and ten days after the 45-day deadline assuming receipt on August 8, 2007.² Thus, the request for reconsideration was untimely.

At its option, the applicant may elect to appeal an Initial Determination without requesting reconsideration. 13 C.F.R. § 124.206(b). The appeal must be filed within 45 days of receipt of the SBA's Initial Determination. 13 C.F.R. § 124.206(c). The Initial Determination clearly informed Petitioner of this option. Petitioner filed its Appeal Petition on October 5, 2007, at least thirteen days³ after the appeal deadline. Thus, Petitioner's Appeal Petition was untimely.

Further, even though Petitioner presents extenuating circumstances and requests I equitably waive these time limits, I may not do so. The Small Business Act requires the judge hearing an 8(a) appeal to decline to hear an untimely case. *See* Small Business Act, § 8(a)(9)(E)(ii); 15 U.S.C. § 637(a)(9)(E)(ii) ("The adjudicator selected to preside over a proceeding conducted under the authority of this paragraph shall decline to accept jurisdiction over any matter that is untimely filed."). SBA's regulations provide that an appeal is untimely if not filed within 45 days from receipt of the SBA's determination. 13 C.F.R. § 124.206(c).

Further, the regulations provide a judge may not waive or excuse the failure to meet a time limit imposed by statute or modify a time limit governing when a case may be commenced. 13 C.F.R. § 134.103(b). A recent Supreme Court case makes clear that failure to meet a time limit is jurisdictional and cannot be excused. *Bowles v. Russell*, 127 S.Ct. 2360 (2007) (holding a habeas petitioner could not rely on the unique circumstances exception to excuse an untimely appeal, outside a statutory time limit, as such time limits are jurisdictional). Thus, regardless of any extenuating circumstances, I cannot extend the time limit to file an appeal.

Because the Initial Determination gave Petitioner the option of requesting reconsideration or appealing, the Initial Determination is an appealable decision. If an appealable decision is not timely appealed, the SBA's determination is the final Agency decision. 13 C.F.R. § 124.206(d). Accordingly, I must dismiss Petitioner's untimely appeal since the Initial Determination became the final Agency decision when Petitioner failed to timely request reconsideration or appeal.

B.

The SBA will process an application within 90 days of receipt of a complete application package and issue an initial determination. 13 C.F.R. § 124.204(a). Petitioner correctly notes SBA took considerably longer than the time mandated by regulation, 13 C.F.R. § 124.204, to process its application. However, this does not in any way support Petitioner's contention that it

² Given the fact that Petitioner's reconsideration request and Appeal were untimely based on Petitioner's receipt via both email and certified mail, I need not consider the validity of Petitioner's notice via email.

³ Petitioner filed its Appeal Petition twenty-four days after the appeal deadline based on its receipt of the Initial Determination via email on July 28, 2007, and thirteen days after the appeal deadline based on Petitioner's receipt of the Initial Determination via certified mail on August 8, 2007.

should be afforded leeway in the interest of fairness when it filed a late reconsideration request. *See generally In the Matter of Posche Promotions*, SBA No. SDBA-162 (2004) (holding that the failure of the SBA to meet its own regulatory time-limits does not make its determination denying an application arbitrary and capricious). Further, the provision setting forth SBA's deadline, which is only guidance to SBA personnel, does not offer Petitioner any remedies when the SBA fails to meet its self-imposed deadline. Petitioner must still comply with the time limits for requesting reconsideration. Thus, Petitioner's contention is without merit.

Although the SBA advised Petitioner that its request for reconsideration had been returned without action because it was untimely submitted, this informational letter does not start the time to appeal to OHA anew. An untimely reconsideration request does not stay the time for an applicant to file an appeal at OHA because when Petitioner failed to either request reconsideration or appeal the Initial Determination, the Initial Determination became the final Agency decision which cannot be appealed. Thus, even though Petitioner's Appeal Petition was filed within 45 days of receipt of SBA's informational letter, the Appeal Petition remains untimely.

V. Conclusion

For these reasons, SBA's Motion to Dismiss is GRANTED and the Appeal Petition is DISMISSED.

Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* Small Business Act, § 8(a)(9)(D), 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

RICHARD S. ARKOW
Administrative Law Judge