

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

IN THE MATTER OF:

Brighter Days and Nites, LLC,

Petitioner

SBA No. BDPT-498

Decided: July 23, 2013

**RULING AND ORDER ON GOVERNMENT'S MOTION TO DISMISS FOR LACK OF
JURISDICTION OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

On July 2, 2014, the Small Business Administration (“SBA” or “the Agency”) filed a *Motion to Dismiss for Lack of Jurisdiction or, In the Alternative, for Summary Judgment* (“Motion to Dismiss” or “Motion”). The Agency contends that the *Appeal Petition* filed by Brighter Days and Nites, LLC (“Petitioner”) on May 28, 2013, “does not, on its face, allege facts that, if proven to be true, would warrant reversal or modification” of the Agency's decision to terminate Petitioner from the 8(a) Business Development Program (“8(a) BD Program”). As a result, the Agency claims, this Court lacks jurisdiction to hear the appeal, pursuant to 13 C.F.R. § 134.405(a)(1).¹ The SBA therefore requests that this proceeding be dismissed, or that the Court grant summary judgment in the Agency's favor.

Petitioner was required to file a response, if any, on or before July 17, 2013. 13 C.F.R. §§ 134.211(c), 134.212(a)(2), 134.408(a). To date, the Court has received no such response.²

I. Applicable Law

The 8(a) BD Program was designed to provide business development for small businesses owned by socially and economically disadvantaged individuals. 13 C.F.R. § 124.1. Once admitted, businesses participate in the Program for a term of nine years. 13 C.F.R. § 124.2. The term can only be shortened by termination, early graduation, or voluntary withdrawal. *Id.* A Program participant who does not maintain its eligibility is susceptible to termination. *Id.*

¹ Pursuant to an Interagency Agreement in effect beginning October 1, 2012, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Small Business Administration.

² Petitioner's failure to respond to the *Motion to Dismiss* constitutes Petitioner's consent to the *Motion* being granted. 13 C.F.R. § 134.211(c): *see also United Medical Supplies, Inc.*, SBA No. BDP-402 (2011); *J. Millennium Enterprises, Inc.*, SBA No. BDP-370 (2010).

Additionally, the SBA may terminate a business' participation for “good cause.” 13 C.F.R. § 124.303(a). Agency regulations offer a non-exhaustive list of actions that constitute good cause for termination, among them:

Failure by the concern to obtain prior written approval from SBA for any changes in ownership or business structure, management or control pursuant to §§ 124.105 and 124.106.

13 C.F.R. § 124.303(a)(4).

A business that has been terminated from the 8(a) BD Program may appeal the termination within 45 days of receiving the SBA's determination. 13 C.F.R. § 134.404. This Court is authorized to hear such appeals pursuant to 13 C.F.R. § 134.102(j)(1). However, the Court must decline jurisdiction if the appeal does not state any facts that would warrant reversal or modification of the SBA's decision. 13 C.F.R. § 134.405(a)(1); *C.J. Hearne Constr. Co.*, SBA No. BDP-449 (2012).

II. Standard of Review

If the Court finds that it has jurisdiction to hear the appeal, its review is limited to deciding whether the SBA's determination was arbitrary, capricious, or contrary to law. 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). Any reasonable SBA decision must be upheld. 13 C.F.R. § 134.406(b); *Accent Services Company, Inc.*, SBA No. BDP-421 (2011).

III. Discussion

The SBA issued a Termination Letter on April 15, 2013, terminating Petitioner from the 8(a) BD Program because Petitioner changed its business structure from a limited liability company to a corporation without obtaining prior approval from the SBA.³ The Agency contends that Petitioner's actions violated 13 C.F.R. § 124.303(a)(4), and thus represent good cause for Petitioner's termination.

Petitioner timely filed an *Appeal Petition* in which it admitted that it did not receive prior approval before changing its business structure. However, Petitioner asserts that any violation of

³ In addition to the violation of 13 C.F.R. § 124.303(a)(4), the Letter of Intent to Terminate also cited 13 C.F.R. § 124.303(a)(8) — cessation of business operations by the concern — as grounds for termination. The SBA determined in the Termination Letter that Brighter Days and Nites, LLC, was dissolved on March 30, 2011, but the new company, Brighter Days and Nites, Inc., was not chartered until April 1, 2011. The *Appeal Petition* identifies the relevant dates as March 30 and March 31, 2011, but confirms that there was at least a one-day gap between the dissolution of the limited liability company and the chartering of the corporation. The *Motion to Dismiss* does not discuss this second alleged violation. Rather, it seems to imply that the SBA has waived that basis for termination and relies entirely on the alleged violation of 13 C.F.R. § 124.303(a)(4). Under either basis, the facts admitted in the *Appeal Petition* put this proceeding beyond the Court's jurisdiction.

SBA regulations was "simply an oversight and not . . . disrespect." Moreover, Petitioner argues that its termination from the Program would have "tremendous implications on the viability of her firm," and that such a severe sanction in response to an unintentional violation is contrary to the intent of the law.

Petitioner's assertions, even if they are accepted as true, fail to rebut the SBA's claim that Petitioner violated 13 C.F.R. § 124.303(a)(4). To the contrary, the *Appeal Petition* acknowledges that Petitioner did not obtain the SBA's approval before changing its business structure. It therefore admits the violation, and confirms the SBA's grounds for termination. It is of no consequence that Petitioner did not actively intend to violate the regulation. Nor is it relevant that the SBA's reaction to the violation appears draconian. The Agency has provided a valid basis for its decision. Petitioner's *Appeal Petition* does not allege any facts that, if true, would warrant reversal or modification of that decision. Accordingly, the Court must decline jurisdiction to hear this appeal. *See C. J. Hearne Constr Co.*, SBA No. BDP-449, p. 2.

The SBA's *Motion to Dismiss for Lack of Jurisdiction, or, in the Alternative, for Summary Decision*, is **GRANTED**. Petitioner's appeal is **DISMISSED**.

So **ORDERED**,
ALEXANDER FERNÁNDEZ
Administrative Law Judge