

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

VSBC Appeal of:

Elev8 Mobility Inc.,

Appellant

SBA No. VSBC-421-A

Decided: December 19, 2024

APPEARANCE

William Selinsky, Esq., Whitcomb, Selinsky, P.C., Denver, Colorado, for Appellant Elev8 Mobility, Inc.

DECISION¹

I. Introduction and Jurisdiction

On September 6, 2024, Elev8 Mobility Inc. (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) administratively removing Appellant's application for certification as a Service-Disabled Veteran-Owned Small Business (SDVOSB).² The D/VSBC found that Appellant could not be certified due to issues with the Qualifying Veteran's ownership and control of the concern. On appeal, Appellant maintains that SBA's denial decision was clearly 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 the appeal within 10 business days after receiving the denial notice on August 25, 2024. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received no requests for redactions. Therefore, I now issue the entire decision for public release.

² The appeal was filed after the close of business on September 5, 2024. Therefore, it is counted as filed on the next business day. 13 C.F.R. § 134.204(b)(2).

II. Background

A. The Case File

Appellant is a New York corporation formed in September of 2016. (Case File (CF), Exhs. 43, 125.) Stephen Cochrane is the Qualifying Veteran and 100% owner of Appellant, as further discussed *infra*. The CF contains Appellant's stock ledger with columns A, B, and C, documenting the name of the stockholders, certificates issued, and from whom shares were transferred. (CF, Exh. 40, at 1.) The ledger extends to reflect the amount paid thereon, date of transfer of shares, to whom shares were transferred, certificates surrendered, and number of shares held. (*Id.*, at 2.) As recorded in Column A, in September 2016, Mr. Cochrane owned 102 shares of Appellant and Edward Finnegan, a non-veteran individual, owned 98 shares, making Mr. Cochrane 51% owner. Then, in Column B, it states that certificates No. 3 and No. 4 were issued on August 8, 2018, where Mr. Finnegan surrendered and transferred 58 shares to Mr. Cochrane, leaving Mr. Finnegan with 40 shares. (*Id.*, at 1-2.) Below this entry, in Column C, it states that certificates No. 5 and No. 6 were issued on May 18, 2023, and Mr. Finnegan surrendered the remaining 40 shares to Mr. Cochrane, making the Qualifying Veteran now Appellant's 100% owner. (*Id.*)

The record also contains Appellant's Amended and Restated Bylaws (Bylaws), signed by Mr. Cochrane as Chief Executive Officer (CEO) on May 24, 2024. (CF, Exh. 126.) The Bylaws establish the following quorum requirements:

The holders of a majority of shares of the stock of the Corporation issued and outstanding and entitled to vote thereat, present in person or represented by proxy, shall be requisite and shall constitute a quorum at all meetings of shareholders except as otherwise provided by statute. If, however, a quorum shall not be present or represented at any meeting of shareholders, the shareholders entitled to vote who are present in person or represented by proxy, shall have the power to adjourn the meeting until a quorum shall be present or represented. At such adjourned meeting, when a quorum shall be present or represented, any business may be transacted which might have been transacted at the original meeting.

(*Id.*, at 2.)

Further, it states that under voting, every shareholder entitled to vote at any meeting is entitled to one vote for each share of stock entitled to vote held by him of record on the date fixed as the record date for said meeting and may so vote in person or by proxy. (*Id.*) A majority of the Board constitutes a quorum at all meetings of the Board of Directors for the transaction of business. Where an absence or vacancy prevents such majority, a majority of the directors then in office will constitute a quorum. A majority of the directors present at any meeting, whether or not a quorum is present, may adjourn the meeting to another time and place without further notice. When a quorum is present in a meeting, a majority of the directors shall decide any questions brought before such meeting and the act of such majority will be the act of the Board. (*Id.*, at 4.)

The President of Appellant serves as the CEO overseeing the Corporation's business and affairs and has full power and authority, subject to the Board's directives. (*Id.*, at 6.) The voting shares and the Board of Directors are empowered to amend or revoke the bylaws or adopt new ones. However, any bylaw changed by the Board may be altered or revoked by a majority vote of the shares entitled to vote. Amendments affecting director elections or shareholder meeting procedures will require shareholder notification. (*Id.*, at 8-9.)

A Shareholder Agreement executed on June 3, 2024, also establishes that Mr. Cochrane, the Qualifying Veteran, owns 100% of Appellant's shares. (CF, Exh. 124). The Agreement also states that each share of stock in the Company carries one vote. As the sole shareholder, Mr. Cochrane possess all voting rights associated with the shares of the Company. Mr. Cochrane holds the authority to modify or adjust voting rights associated with shares of the Company, provided that such modifications do not compromise the company's status as a SDVOSB as defined by SBA. (*Id.*, § 5.) Mr. Cochrane currently serves as the sole member of the company's Board of Directors. Mr. Cochrane, as the sole shareholder, also retains the authority to appoint additional directors or advisors as he deems necessary to support the Company's operations. (*Id.*, § 6.) This Agreement may be amended only by a written instrument signed by Shareholders holding a majority of the outstanding shares. (*Id.*, § 9.)

On January 30, 2024, SBA informed Appellant its expiration date has been extended one year from the period of eligibility established by the Department of Veterans Affairs, Center for Verification and Evaluation. This certification is valid until June 16, 2024. Further, SBA informed Appellant it may reapply 120 days prior to its new expiration date by logging into <https://veterans.certify.sba.gov>. (CF, Exh. 310.)

B. Applications for Certification

From March to April 2024, Appellant filed two separate applications for certification that were later withdrawn to gather correct paperwork. (CF, Exhs. 5, 79.) During this period, Mr. Cochrane also filed a change of ownership and control as the 100% owner of Appellant and attempted to comply with SBA's request for production of documents. (CF, Exhs. 49, 58, 74, 80.)

On June 10, 2024, Appellant resubmitted its application, along with its Articles of Incorporation, Meeting Minutes of Board of Directors, its Stock Ledger, Meeting Minutes of Shareholders, Shareholder Agreement, Bylaws, etc. (CF, Exhs. 118-121, 124, 126.)

On June 12, 2024, SBA notated that a ledger was requested, and Mr. Cochrane would be in contact with Appellant's attorney to gather the requested items. (CF, Exh. 131, at 2.)

C. Administrative Removal of Application

On August 25, 2024, through the portal, D/VSBC notified Appellant that its certification application had been administratively removed from processing for three reasons. First, SBA found that it could not conclude Appellant satisfied the direct and unconditional ownership requirement of 13 C.F.R. § 128.200(b)(2) and 13 C.F.R. §§ 128.202(a) and 128.202(b), because Article 4 of the Certificate of Incorporation only authorized the issuance of 200 Shares of Stock.

SBA found that according to the provided Stock Ledger, Appellant issued over 200 Shares of Stock. Here, SBA reasoned the Qualifying Veteran was issued Certificate numbers 1, 3, and 5 for a total of 462. Edward Finnegan, non-veteran owner, was issued Certificate numbers 2, 4, and 6 for a total of 258 Shares of Stock. SBA read that page 2 of the Stock Ledger did not show any surrendering or transferring of Certificates Nos. 1 or 2. Therefore, SBA concluded that Certificate Nos. 1 and 2 appear to be active. While page 2 of the Stock Ledger shows Certificate No. 3 was surrendered, SBA counted the balance is still 160 Shares, 58 Shares of Stock was surrendered on Certificate No. 4 listing 40 Shares balance, Certificate No. 5 was surrendered with a balance of 200 Shares and 40 Shares of Stock was surrendered on Certificate 6, which lists a balance of 0 shares. Thus, SBA found that page 2 of the Stock Ledger did not support a finding the Qualifying Veteran held 200 shares of stock as the only shareholder. SBA found that due to Appellant issuing over the authorized number of shares, SBA could not conclude the owner listed on the application was correct. Similarly, without the correct ownership, SBA could not conclude that the qualifying veteran owned at least 51% of each class of voting stock. Lastly, SBA stated that a request for a new ledger was sent on June 12, 2024, but Appellant did not provide one.

Second, SBA found issues with the Board of Director and Shareholder Quorum, pursuant to 13 C.F.R. § 128.203(e)(2), because the Operating Agreement did not list the quorum requirements of the shareholder(s). Further, without the correct determination of owners, SBA could not conclude if a non-veteran could block a quorum of the shareholders.

Third, SBA questioned whether a non-Veteran could exercise control over Appellant under 13 C.F.R. §§ 128.203(e) and 128.203(h) because the Operating Agreement did not list the voting requirements of the shareholder(s) and ownership of the applicant could not be confirmed. SBA also reiterated that without the correct ownership, it could not determine whether a non-veteran could negatively influence a vote of the shareholders and Appellant did not provide a new ledger as requested.

D. Appeal

On Appeal, Appellant argues the denial was premised on SBA's misreading of Appellant's Stock Ledger, resulting in SBA's incorrect finding that Appellant did not satisfy the ownership requirements of 13 C.F.R. § 128.200(b). (Appeal, at 1.)

Appellant confirms that the Certificate of Incorporation authorizes the company to issue 200 Shares of Stock, consistent with the original stock issue of September 16, 2016, when the company was formed. This gave Mr. Cochrane 102 shares, or 51% of the stock, and the non-veteran owner Mr. Finnegan 98 shares, or 49% of the stock. Appellant explains that on August 8, 2018, Mr. Cochrane bought another 29%, or 58 shares from Mr. Finnegan, giving him 80% of the stock, and Mr. Finnegan 20%. A final purchase was made on May 18, 2023, when Mr. Cochrane bought the remaining 40 shares from Mr. Finnegan, giving him 100% ownership of the company stock. As documentation, Appellant relies on the "Minutes of Special Meeting Shareholders and Board of Directors [Appellant]" of June 11, 2024, confirming that Mr. Cochrane owned all 200 shares of Appellant and there is no evidence of any other ownership.

In SBA's letter titled "Administrative Removal of Certification Application," SBA misread the Stock Register to conclude that Appellant had issued over 200 shares of stock, or 462 shares to Mr. Cochrane, and 258 shares to Mr. Finnegan. Even if the SBA's calculation was correct, which Appellant denies, Mr. Cochrane would still have 64% of the stock, and Finnegan 36%, well within the requirement of 13 C.F.R. § 128.200(b)(2). Further, Appellant contends that SBA's analysis appears circular, often repeating the same arguments that a new ledger was requested on June 12, 2024, but failed to mention that Appellant responded to this request, as shown in the record. SBA concluded more than once that because Appellant issued more than its authorized 200 shares of stock, it could not conclude that the Qualifying Veteran owns a majority of shares, which conclusion is unwarranted by the record. (*Id.*, at 2.)

Appellant focuses on the issue of ownership and control under 13 C.F.R. § 128.200(b)(2), reiterating that its eligibility is based on the 100% ownership and control by Mr. Cochrane and arguing the decertification fails to consider all relevant provisions of Appellant's corporate records. Further, Appellant raises the same arguments as provided in the background information, from the purchase of Mr. Finnegan's shares to the Minutes of the Special Meeting, confirming that Mr. Cochrane was in control of all 200 shares. Appellant also reemphasizes the lack of evidence that Appellant ever issued more than 200 shares, and at no point in time did Mr. Cochrane own less than 51% of the shares of the company. (*Id.*, at 2-3.)

Therefore, Appellant requests that OHA issues findings of fact and conclusions of law consistent with the arguments made in this instant appeal, grant the appeal and find Appellant eligible for inclusion in the SBA's VetCert database, order Appellant's immediate reinstatement and inclusion in the VetCert database, and provide Appellant any other relief that OHA deems just and proper under the circumstances. (*Id.*, at 4.)

E. SBA's Comments

On September 13, 2024, OHA issued a request for Agency comments in response to SBA's unsigned letter issued as an "Administrative Removal of Certification Application" in the portal and as to whether OHA has jurisdiction over an appeal from such removal in this matter.

On September 27, 2024, SBA filed its comments, recognizing that like a denial, an administrative removal is SBA's final determination of eligibility, which action results in the removal of Appellant from the certification database. Accordingly, it is the Agency's position that if an Appellant files a timely challenge, an administrative removal clearly falls under OHA's jurisdiction, consistent with 13 C.F.R. § 128.500(a). SBA further adds that without this jurisdiction, applicants have no recourse to challenge final decisions made by SBA. Thus, OHA review of administrative removals meets the intent of the Small Business Act and SBA regulations and ensures procedural due process rights of VetCert participants.

III. Discussion

A. Standard of Review

When a concern seeks certification as a VOSB or SDVOSB, 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 that the D/ VSBC's decision was based on error of fact and law, and thus, I find that Appellant has addressed all concerns as to its eligibility in its Appeal and Bylaws. As a result, I must grant this appeal.

The D/VSBC denied Appellant's application upon a misreading of the Stock Ledger, which if read correctly as one large document, columns A through C, extending to page 2, it would have determined that the Qualifying Veteran indeed purchased the remaining stocks from Mr. Finnegan, correctly issued the stock certificates, and was the 100% owner of Appellant at the time of the application. Sections II.A and II.B, *supra*.

The remaining issues, which Appellant did not rebut, are SBA's reliance on an Operating Agreement, which led to the finding that Appellant failed to provide the Board of Directors and Shareholder Quorum pursuant to 13 C.F.R. § 128.203(e)(2) and the non-Veteran exercising control over Appellant under 13 C.F.R. §§ 128.203(e) and 128.203(h). These findings, however, are simply contradicted by Appellant's Bylaws, executed on May 24, 2024, which superseded any prior Operating Agreements. Sections II.A, *supra*. The Bylaws clearly state that the holders of a majority of shares of the stock constitute a quorum at all meetings of shareholders, and Mr. Cochrane is the only Director and Shareholder. *Id.* As such, Appellant is majority owned and controlled by Mr. Cochrane, the Qualifying Veteran. Because D/VSBC expressed no other concerns with Appellant's application, Appellant is an eligible SDVOSB.

IV. Conclusion

Appellant has established that the D/VSBC's determination was based on error of fact and 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