

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

IN THE MATTER OF:

Robert Beegle, Jr. - Farrier

Petitioner

SBA No. SDBA-181

Decided: October 27, 2008

APPEARANCES

Robert Beegle, Jr., *Pro Se*, Union Green, North Carolina, for Petitioner.

Christopher R. Clarke, Esq., Office of General Law, Small Business Administration, Washington, D.C., for the Agency.

DECISION

PENDER, Administrative Judge:

I. Jurisdiction

This appeal petition is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 124 and 134.

II. Issue

Whether the decision of the Small Business Administration (SBA) to decline the application of Robert Beegle, Jr. - Farrier (Petitioner) for certification as a Small Disadvantaged Business (SDB) was arbitrary, capricious, and contrary to law.

III. Background

On September 10, 2007, Petitioner filed an application for SDB certification. Petitioner's application indicates he previously applied for SDB certification, but did not receive a response from SBA and was advised by SBA to reapply. Petitioner stated he needed funds from SBA to continue organizing his sole-proprietorship.

After screening Petitioner's application, the SBA informed Petitioner in an undated letter that his application was incomplete. SBA instructed Petitioner to submit specific documents in order for his application to be processed. On November 3, 2007, Petitioner submitted additional documentation to supplement his initial application.

On March 17, 2008, the Division Chief for Small Disadvantaged Business Certification and Eligibility¹ (DC/SDBCE) declined Petitioner's application for SDB certification. The DC/SDBCE concluded that Petitioner had not established social disadvantage by being a member of a socially designated group or by proving social disadvantage under the preponderance of the evidence standard. The DC/SDBCE informed Petitioner of the opportunity to request reconsideration or appeal the decision to the Office of Hearings and Appeals (OHA).

On May 12, 2008, Petitioner requested reconsideration and reiterated the need for SBA funds. SBA made multiple attempts to reach Petitioner via phone and email. In an email to Petitioner on May 23, 2008, SBA explained that SDB certification will not provide funds to Petitioner from the SBA.

On August 9, 2008, SBA declined Petitioner's request for reconsideration. SBA stated Petitioner's request for reconsideration was received 63 days after SBA sent the decision letter to Petitioner via email and, accordingly, exceeded the 45-day deadline, 13 C.F.R. § 124.1008(f)(3)(i).

SBA, however, recognized that while the decision letter was delivered to Petitioner's email on March 17, 2008, Petitioner may not have received the letter until a later date. Consequently, SBA honored Petitioner's request for reconsideration and denied Petitioner's request for reconsideration for failure to establish social disadvantage by being a member of a socially designated group or submitting evidence to prove social disadvantage. SBA notified Petitioner of the opportunity to appeal to OHA.

On August 27, 2008, Petitioner appealed the DC/SDBCE's determination to OHA. Petitioner states it is a "very small" sole-proprietorship. Petitioner states, after presenting Petitioner's business plan to preferred SBA lenders, the lenders indicated Petitioner was bothering them and thus Petitioner is applying for funds directly from the SBA. Petitioner's owner also notes he receives disability, but is not disabled.

On October 14, 2008, SBA filed its Response. SBA asserts the DC/SDBCE did not error in declining Petitioner's initial SDB application or Petitioner's request for reconsideration. SBA states Petitioner was initially declined because the person upon whom eligibility is based is not socially disadvantaged. SBA states Petitioner's owner does not claim to be a member of a group presumed to be disadvantaged, 13 C.F.R. § 124.103(b), nor has Petitioner's owner established his social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c). Even though specifically instructed to provide evidence of disadvantage, SBA asserts Petitioner failed to provide

¹ SBA amended the regulations to reflect new titles of SBA officials and the Assistant Administrator for Small Disadvantaged Business Certification and Eligibility (AA/SDBCE) is now referred to as the Division Chief for Small Disadvantaged Business Certification and Eligibility (DC/SDBCE). 72 Fed. Reg. 50,037, 50,040 (Aug. 30, 2007).

any evidence of Petitioner's owner's social disadvantage with the request for reconsideration. Accordingly, SBA states the DC/SBDCE declined Petitioner's SDB application on reconsideration.

IV. Discussion

A. Timeliness

Petitioner's Appeal Petition, filed within 45 days after the SBA served its decision denying SDB certification on reconsideration, is timely. 13 C.F.R. § 134.202(a)(1).

B. SBA's Claim of Privilege

SBA submits a claim of privilege under the deliberative process privilege as to the Business Opportunity Specialist's analysis of Petitioner's initial application and draft letters to Petitioner. The Agency also submits a claim of attorney-client privilege as to the legal opinions on Petitioner's application. Petitioner did not object to SBA's claims of privilege.

I find, after an *in camera* inspection of the documents, that they fall within the claimed privileges. The Business Opportunity Specialist's analysis and draft letters are internal predecisional memoranda embodying the analysis and recommendations of SBA officials to the DC/SDBCE, and thus are protected under the deliberative process privilege to protect the SBA's decision-making process. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-152 (1975); *Matter of Henze Industries*, SBA No. SDBA-111, at 7-9 (1999). The legal opinions are also protected under the attorney-client privilege. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Henze Industries*, SBA No. SDBA-111, at 7-9. Accordingly, I GRANT SBA's claim of privilege.

C. Standard of Review

An applicant for SDB certification has the burden of demonstrating a socially and economically disadvantaged individual owns and controls the business. 13 C.F.R. § 124.1008(c)(2). SBA has detailed the ownership and control requirements in 13 C.F.R. §§ 124.105 and 124.106.²

In determining whether the applicant business has met its burden, 13 C.F.R. § 124.1008(c)(2), the DC/SDBCE must examine the relevant data and articulate a satisfactory explanation for its action, including a "rational connection between the facts found and the choice made." *Matter of IRECOR*, SBA No. SDBA-104, at 5 (1999) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

² The SDB program has adopted the 8(a) eligibility criteria. 13 C.F.R. § 124.1002(a); *Matter of Trisha Koch & Associates*, SBA No. SDBA-113, at 4 (1999).

OHA's standard of review is whether the record demonstrates the DC/SDBCE determination was "arbitrary, capricious, or contrary to law." 13 C.F.R. § 124.1008(f)(4)(ii).

D. The Merits

In accordance with 13 C.F.R. § 124.1008(f)(3)(i), "if the DC/SDBCE declines the firm's application for SDB certification, the firm may request that the DC/SDBCE reconsider his or her initial decline by submitting a written request to the DC/SDBCE within 45 days of the date of the DC/SDBCE's decision."

In this case, the date of the DC/SDBCE's determination is March 17, 2008. Therefore, under 13 C.F.R. § 124.1008(f)(3)(i), Petitioner had until May 1, 2008, to file a request for reconsideration. SBA received Petitioner's request for reconsideration on May 20, 2008, 64 days after the date of the DC/SDBCE's decision and 19 days beyond the regulatory deadline.

In the SBA's determination on Petitioner's request for reconsideration, the SBA acknowledges Petitioner's request for reconsideration is untimely. SBA's determination correctly states that Petitioner's untimely filing prevents SBA from further considering Petitioner's application.

The SBA's determination on Petitioner's request for reconsideration then proceeds to ignore the regulatory deadline for requesting reconsideration and declines Petitioner's application on the merits. SBA reasoned that even though the decision was sent to Petitioner via email on March 17, 2008, it is possible that Petitioner received the DC/SDBCE's decision on a different date. SBA's reasoning is flawed.

The regulatory deadline is not dependent on receipt. The timeline provided in 13 C.F.R. § 124.1008(f)(3)(i) is "within 45 days of the date of the DC/SDBCE's decision." The date of the DC/SDBCE's decision is undisputedly March 17, 2008. Accordingly, Petitioner was required to file a request for reconsideration on or before May 1, 2008.

SBA's acceptance of Petitioner's request for reconsideration beyond the deadline is contrary to regulation. If allowed, SBA's acceptance of a request for reconsideration 19-days after the deadline will create a cascade of exceptions that eviscerate the 45-day deadline pronounced in the regulation. Once the publicized deadline is ignored, it would be impossible to impose a cutoff that is not arbitrary and capricious.

Regardless of the amount of time provided for a business to request reconsideration, there will always be businesses that submit their request too late. Deadlines are harsh with respect to the individuals who fall beyond them. However, if the timeline provided in 13 C.F.R. § 124.1008(f)(3)(i) is to have any meaning, the deadline must be enforced. "Any less rigid standard would risk encouraging a lax attitude toward filing dates." *United States v. Boyle*, 469 U.S. 241, 249 (1985).

The Record indicates on March 17, 2008, SBA sent the DC/SDBCE's decision to the email address Petitioner provided in its application for SDB certification. Petitioner does not dispute receipt of the DC/SDBCE's decision or that the decision was improperly addressed. Nor does Petitioner contend that the date of the decision or the timeline for requesting reconsideration were either absent from or unclear in the DC/SDBCE's decision. Furthermore, Petitioner objected by email, one-day after SBA issued its decline of Petitioner's request for reconsideration via email, which indicates it had no problem receiving emails.

I hold the decision of the DC/SDBCE to consider Petitioner's untimely request for reconsideration was contrary to law. The DC/SDBCE's initial decline of Petitioner's application remains in force because a timely appeal cannot cure an untimely request for reconsideration.

V. Conclusion

This is the initial decision of the SBA. Absent a request for review, this decision will become the SBA's final decision 30 days after the date of service. 13 C.F.R. §§ 134.227, 134.228(a).

THOMAS B. PENDER
Administrative Judge