

UNITED STATES OF AMERICA
SMALL BUSINESS ADMINISTRATION
OFFICE OF HEARINGS AND APPEALS
WASHINGTON, D.C.

_____)	
IN THE MATTER OF:)	
)	
_____)	Docket No. SDBA-2000-____-__-__
)	
Petitioner)	
_____)	

NOTICE AND DEFICIENCY ORDER

On __, 2000, this Office received an Appeal Petition from __ (Petitioner), appealing Respondent Small Business Administration's (SBA) denial of small disadvantaged business (SDB) certification based on the SBA's negative determination of Petitioner's disadvantaged status or ownership and control. See 13 C.F.R. § 124.1008(f)(3) (1999).¹

A. What Petitioner Must File and Serve.

The Administrative Judge has determined the Appeal Petition is deficient, and ORDERS Petitioner to correct these deficiencies. The Administrative Judge may dismiss a deficient, improperly filed, or improperly served petition. 13 C.F.R. §§ 134.203(b), 134.204, 134.219. No later than __, this Office must RECEIVE the following:

(1) Amended Appeal Petition. The Amended Appeal Petition must include—

(a) Statement of relevant facts. State only the facts showing the SBA's determination was arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 124.1008(f)(3)(ii), 134.203(a)(3);

(b) Request for relief. State why the Judge should find SBA's determination arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 124.1008(f)(3)(ii), 134.203(a)(4); and

(c) Information about Petitioner or attorney. State the Petitioner's or attorney's name, address, telephone number, and signature. 13 C.F.R. § 134.203(a)(5).

(2) SBA determination letter.

Provide a copy of the SBA's determination letter. 13 C.F.R. § 134.203(a)(2).

¹ This appeal is governed by Title 13, Code of Federal Regulations (C.F.R.), parts 124, subpart B; and 134, subparts A and B. These regulations are in public libraries and on the Internet at www.sba.gov/oha/sdbmenu.html. All participants, even non-lawyers, must comply with them.

(3) Certificate of Service.

The Certificate of Service, *see* 13 C.F.R. § 134.204(d) and the attached Certificate of Service, must state how and when Petitioner made the following filing and service:

(a) Service of Appeal Petition on SBA. Served the Appeal Petition on SBA's Associate General Counsel for General Law (AGC-GL), 13 C.F.R. §§ 124.1008(f)(3)(i), 134.204(a) & (e), at the address on the attached Certificate of Service;

(b) Filing of other documents with this Office. Filed with this Office any document required by this Order, 13 C.F.R. § 134.204(b), (c), and (e); and

(c) Service of other documents on SBA. Served on SBA's AGC-GL any document required by this Order, 13 C.F.R. §§ 124.1008(f)(3)(i), 134.204(a) & (e).

Additionally, a properly prepared Certificate of Service, *see* 13 C.F.R. § 134.204(d) and the attached Certificate of Service, must accompany any future filing in this case.

B. What Respondent Must File and Serve.

No later than 45 days after service on the AGC-GL of an Appeal Petition conforming with the regulations and any documents required by this order, Respondent SBA must file with this Office and serve on Petitioner one or both of the following:

(1) Answer.

SBA must file an Answer, including its arguments and brief, *see* 13 C.F.R. § 134.206, or it will be in default, *see* 13 C.F.R. § 134.206(e).

(2) Administrative Record (AR).

SBA must file an Administrative Record (AR), meeting the following criteria:

(a) Completeness. The AR must contain every document relating to Petitioner's application that SBA possessed on the date of its determination, whether or not the decision-maker considered the document. *See* 13 C.F.R. § 124.1008(f)(3)(ii).

(b) Arrangement. The AR must be tabbed and bound chronologically (latest document on top), and its table of contents must list each exhibit number or letter, date, and author.

(c) Claim of privilege. If SBA asserts a claim of privilege pursuant to 13 C.F.R. § 134.204(f), SBA must file the following documents with the AR:

(i) ***Vaughn Index***. A “*Vaughn Index*”² that lists each withheld document or portion, describes each with sufficient specificity, and adequately justifies each claim of privilege, so that Petitioner can assess the applicability of the claimed privilege;

(ii) ***Redacted copy***. Unless SBA completely withholds it, a redacted copy of each document SBA claims is privileged, showing exactly how much text is withheld;³ and

(iii) ***Unredacted copy for in camera inspection***. In a sealed envelope filed in this Office only, a complete, unredacted copy of any documents SBA claims are privileged in whole or in part, clearly identifying the location and extent of each withheld page or portion.

C. What Petitioner May File and Serve.

If Petitioner believes—(1) the AR is incomplete, (2) the Administrative Judge should deny a privilege claim, or (3) the Administrative Judge should consider facts SBA did not possess when it made its determination, Petitioner may respond. Petitioner must file and serve any Response on SBA’s counsel (13 C.F.R. § 134.204(a)(2)), no later than ten days after the AR’s service. It must include the following:

(1) ***Objection to incomplete AR***.

Any objection to an incomplete AR must include either a copy or a detailed description of any document or other information Petitioner believes is missing and why Petitioner believes the AR should include it.

(2) ***Objection to claim of privilege***.

An objection to a claim of privilege must include reasons, stated clearly and precisely, and a statement of what relief, if any, Petitioner requests if the objection is sustained.

(3) ***Request to consider new evidence on appeal***.

A request that the Administrative Judge consider facts SBA did not possess when it made its determination must establish that manifest injustice would occur if the Judge were to limit the

² *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974).

³ In particular, when documents include purely factual, “severable and discoverable” material (*United States v. Exxon*, 87 F.R.D. 624, 637 (D.D.C. 1980), citing *EPA v. Mink*, 410 U.S. 73, 87-88 (1973)), they should show “which pages and paragraphs are withheld,” *id.* at 637. The index must “adequately describe each withheld document or deletion from a released document.” *Founding Church of Scientology, Inc. v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979). For example, SBA may withhold facts under the deliberative process privilege only if fact selection was itself deliberative (*Montrose Chemical Corp. v. Train*, 491 F.2d 63, 68-71 (D.C. Cir. 1974)), or if the facts are so inextricably connected to the deliberative material that their disclosure would prejudice the party’s deliberations (*Wolfe v. Department of Health and Human Services*, 839 F.2d 768, 774-76 (D.C. Cir. 1988)).

appeal to the AR. 13 C.F.R. § 124.1008(f)(3)(ii); *Matter of IRECOR, Inc.*, SBA No. SDBA-104, at 5-6 (1999).

D. Requirements for Both Parties.

The record will close ten days after service of the AR on Petitioner. Except for good cause shown (see 13 C.F.R. § 134.207(a) or (b)), the Administrative Judge will accept no other pleadings or other documents.

The Administrative Judge may impose sanctions for any misconduct. 13 C.F.R. § 134.219(a)-(e). Sanctions may include dismissal or a stay of the proceedings. 13 C.F.R. §§ 134.203(b), 134.219. Misconduct includes the following: failure to obey an Administrative Judge's order or a procedural rule, including one governing service or filing; and a prohibited *ex parte* communication, as described in 13 C.F.R. § 134.220.

All submissions must contain the Docket Number shown above and must be mailed, faxed, or delivered by courier to:

Office of Hearings and Appeals
409 Third Street, S.W., Suite 5900
Washington, D.C. 20416
ATTENTION: Patricia Lee, Docket Clerk
FAX: (202) 205-7059

Date: __, 2000

[NAME OF JUDGE]
Administrative Judge

CERTIFICATE OF SERVICE

I hereby certify that, on __, 2000, I served the foregoing, by First Class Mail, to the following:

(Name)
President/CEO/Counsel, (Petitioner)
(Address)

I hereby certify that, on __, 2000, I served the foregoing, by Internal Agency Mail, to the following:

Acting Associate General Counsel for
General Law
Small Business Administration
409 Third Street, S.W.
Washington, DC 20416

Patricia Lee
Office of Hearings and Appeals