

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

IN THE MATTER OF:

Caduceus Healthcare, Inc.,

Petitioner

SBA No. BDPE-578

Decided: October 8, 2019

APPEARANCES

LaChandra Pye, Esq., General Counsel and Vice President, Caduceus Healthcare, Inc.,  
Atlanta, Georgia

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Business Administration, Washington, D.C.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On June 11, 2019, Caduceus Healthcare, Inc. (Petitioner) appealed the decision of the U.S. Small Business Administration (SBA) to suspend Petitioner from the 8(a) Business Development (BD) program. On June 24, 2019, Petitioner appealed SBA's decision to terminate Petitioner from the 8(a) BD program. Because the two appeals arise from the same operative facts, the Office of Hearings and Appeals (OHA) is consolidating them into a single proceeding. In response to the appeals, SBA moves for summary judgment, asserting that there are no genuine issues of material fact and that SBA is entitled to judgment as a matter of law. For the reasons discussed *infra*, OHA grants SBA's motion and dismisses the consolidated appeal. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.408(b).

OHA has jurisdiction to adjudicate these appeals. 15 U.S.C. §§ 634(i) and 637(a)(9), and 13 C.F.R. parts 124 and 134. Petitioner filed its appeals within 45 days of receiving SBA's determinations, so both appeals are timely. 13 C.F.R. § 134.404. Accordingly, this matter is properly before OHA for decision.

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<sup>1</sup> This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

## II. Background

### A. Facts

Petitioner was incorporated in Georgia on May 15, 2008, and is a participant in SBA's 8(a) BD program, with its 9-year term ending on December 14, 2020. Mr. Carlos Lopez, who is the individual claiming disadvantage, wholly owns Petitioner. Mr. Lopez also wholly owns Caduceus Holdings, Inc. (Holdings), a concern that is not in the 8(a) BD program.

The Administrative Record (AR) for these appeals contains, *inter alia*, Petitioner's audited financial statements for the year ending December 31, 2017 and Holdings' compiled financial statements for the year ending December 31, 2017. Petitioner's balance sheet reports total stockholder's equity as \$[XXX]. (AR, Exh. 10 at 000212.) Holdings' balance sheet reports total equity as \$[XXX]. (*Id.* at 000260.)

On July 31, 2018, SBA issued to Petitioner a Letter of Intent to Graduate Early. (Term. Appeal, Exh. A.) The stated reason was that Mr. Lopez's 3-year average Adjusted Gross Income (AGI) and his withdrawals from Petitioner ““exceeded the regulatory limits.”” (*Id.*) Specifically, his average AGI was above \$350,000 and his withdrawals exceeded the \$400,000 threshold for an 8(a) participant with revenues above \$2,000,000. (*Id.*) On August 1, 2018, SBA issued a revised letter clarifying that the three years in question were 2014, 2015, and 2016, and that the AGI included income from “personal, company, affiliates and W2s.” (Term. Appeal, Exh. B.)

On August 30, 2018, Petitioner timely responded to the Letter of Intent to Graduate Early. (Term. Appeal, Exh. F.) There, Petitioner contended that Mr. Lopez's average AGI for 2014-2016 did not exceed the regulatory limit because, per Mr. Lopez's Forms W-2, he earned \$[XXX] in 2014, \$[XXX] in 2015, and \$[XXX] in 2016 for a three-year average AGI of \$308,703. (*Id.* at 2.) Petitioner asserted that Mr. Lopez's military pension should not be included in the computations because this income is not indicative of lack of economic disadvantage. (*Id.* at 3.) Further, “[i]t has always been Mr. Lopez' understanding that he was compliant with SBA AGI regulations as long as his W2 wages did not exceed \$350,000” and SBA has never advised him otherwise. (*Id.*) Petitioner also noted that Mr. Lopez personally invested \$[XXX] into Petitioner in 2017, and was voluntarily taking a [XX]% salary decrease in 2018. (*Id.*)

Regarding withdrawals, Petitioner stated that there were no distributions in 2014 or 2015, and that the 2016 distribution of \$[XXX] to Mr. Lopez was for payment of Petitioner's S Corporation taxes and, thus, cannot be considered an excessive withdrawal under 13 C.F.R. § 124.112(d)(1). (*Id.*) Petitioner also maintained its recent increase in receipts was due to certain short-term contracts, and that Petitioner is not yet ready to compete in the “full and open” market. (*Id.* at 3-5.)

### B. Letter of Intent to Terminate

On December 17, 2018, SBA issued to Petitioner a Letter of Intent to Terminate. (Term. Appeal, Exh. G; AR, Exh. 7.) SBA stated it had halted its earlier action to graduate Petitioner

early, but that following review of Petitioner's most recent financial statements, there exist two grounds for terminating Petitioner from the 8(a) BD program. (*Id.* at 1.) The first ground was for failure by the concern to maintain its eligibility, including failure by an individual owner to continue to meet the requirements for economic disadvantage, based on 13 C.F.R. §§ 124.303(a)(2) and 124.104(c). (*Id.* at 2-4.) The second ground was for excessive withdrawals for the personal benefit of the owner and detrimental to the achievement of the targets, objectives, and goals of the concern's business plan, based on 13 C.F.R. §§ 124.303(a)(13) and 124.112(d). (*Id.* at 4-5.)

Regarding economic disadvantage, SBA found that Mr. Lopez's income, net worth, and assets all exceed regulatory limits. With regard to income, SBA explained there is a rebuttable presumption of no disadvantage where the owner's income exceeds \$350,000. (*Id.* at 2, citing 13 C.F.R. 124.104(c)(3).) SBA provided a table of Mr. Lopez's income derived from his personal income tax returns for 2014, 2015, and 2016, and then determined that his income exceeded the regulatory limit. (*Id.* at 2-3.) After recapping the arguments Petitioner had made on this issue in its August 30, 2018 response to the Letter of Intent to Graduate Early, SBA found these did not overcome the regulatory presumption of no economic disadvantage. (*Id.*)

For net worth, SBA set out the regulatory ceiling for continued 8(a) eligibility, which is \$750,000 after excluding ownership interest in the participant and equity in the primary personal residence. (*Id.* at 3-4, citing 13 C.F.R. § 124.104(c)(2).) SBA noted that the 2017 financial statement for Holdings, which Mr. Lopez wholly owns, reported his equity interest as \$[XXX], an amount that, by itself, exceeds the \$750,000 limit. (*Id.* at 4.) Thus, SBA concluded, Mr. Lopez is not economically disadvantaged based on his net worth. (*Id.*)

For assets, SBA observed that the limit for continued 8(a) eligibility is \$6,000,000 for all assets. (*Id.*, citing 13 C.F.R. § 124.104(c)(4).) In addition to his \$[XXX] equity interest in Holdings, Mr. Lopez has an equity interest in Petitioner, as reported in Petitioner's 2017 financial statement, of \$[XXX], for a total of \$[XXX]. (*Id.*) Because these two interests by themselves exceed the regulatory limit for an owner's total assets, SBA concluded that Mr. Lopez is not economically disadvantaged based on his excessive assets. (*Id.*)

Turning to excessive withdrawals, SBA first determined that because Petitioner's sales exceed \$2,000,000, the limit for withdrawals is \$400,000. (*Id.*, citing 13 C.F.R. § 124.112(d)(3).) SBA next noted Petitioner had stated in its August 30, 2018 response to the Letter of Intent to Graduate Early that the only withdrawals Mr. Lopez makes from Petitioner are to pay his S Corporation taxes. (*Id.* at 5.) Then, based on Petitioner's 2017 financial statements, SBA determined that in 2017, Petitioner's total distributions were \$[XXX], that Petitioner's 2017 tax liability based on 39% tax rate would have been \$[XXX], and that the difference, \$[XXX], was "excess draw." (*Id.*) Also, based on the 2017 financial statements, SBA found Petitioner had made advances to Holdings of \$[XXX] during 2017, on top of outstanding earlier advances of \$[XXX], for a total of \$[XXX]. (*Id.*) Since Mr. Lopez owns Holdings, SBA characterized Petitioner's advances to Holdings as withdrawals, and concluded that combined withdrawals were well over the \$400,000 limit. (*Id.*) Lastly, SBA cited Petitioner's business plan goals of developing strong staffing proposals and graduating successfully from the 8(a) BD program, and stated that excessive withdrawals "undoubtedly inhibit[] Petitioner's ability to develop

competitive proposals” and that Petitioner's “relative gains over the last few years will be erased unless the company is able to leverage working capital to support its payroll and sustained growth.” (*Id.*)

SBA instructed Petitioner to respond to the proposed termination within 30 days, and that its response “should provide argument and evidence, including supporting documentation” to show that Mr. Lopez remains economically disadvantaged and that the withdrawals either were not excessive or were not detrimental to the business plan goals. (*Id.*) Among other documents, SBA specifically requested “[a] corrected SBA Form 413, Personal Financial Statement [for Mr. Lopez] . . . showing assets and liabilities” and documentation “verifying the values of each asset and liability identified” on the form. (*Id.* at 6.)

### C. Petitioner's Response to the Letter of Intent to Terminate

On January 16, 2019, Petitioner timely responded to the Letter of Intent to Terminate. (Term. Appeal, Exh. H; AR, Exh. 6.) Regarding Mr. Lopez's income, Petitioner maintained that Mr. Lopez's 2014-2016 income was “unusually high and unlikely to occur in the future” [XXXXXXXXXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 2, citing *Matter of Digital Management, Inc.*, SBA No. BDP-288 (2008).)

As for net worth and assets, Petitioner asserted that Mr. Lopez's high equity interest in Petitioner was due to the “aberration” of those completed high-value, short-term contracts, and that “[XXXXXXXXXXXXXXXXXXXX].” (*Id.* at 4.) Petitioner gave the annual value of these contracts as [XXXXXXXXXXXX], averring they present a “false illusion that the firm is prepared for entry into the full and open market.” (*Id.* at 4-5.) Petitioner also requested a “waiver for net worth and assets” through the end of its 2019 program year. (*Id.* at 5.)

Regarding withdrawals, Petitioner contended that “SBA's 39% method” vastly understated the S Corporation taxes it had paid in 2017. (*Id.* at 3.) In support, Petitioner provided a table listing its 2017 tax payments by payee, check number, and amount. (*Id.*) As for the advances to Holdings, Petitioner stated that these were for “corporate condos, office space in Puerto Rico, and leasehold improvements” needed for Petitioner's expansion in accord with its business plan, that Petitioner has staff in the office space and using the condos, and that some space is being leased to provide additional capital. (*Id.* at 3-4.)

Petitioner also argued that termination is not appropriate because it “connotes negative conduct” and that early graduation is appropriate. (*Id.* at 5-6.) Petitioner also complained that SBA added two new grounds (net worth and assets) to the proposed termination which were not mentioned in the proposed early graduation. (*Id.* at 6.) No documents were attached to Petitioner's January 16, 2019 response letter.

### D. Notice of Termination

On May 8, 2019, SBA issued Petitioner a Notice of Termination. (Term. Appeal, Exh. I; AR, Exh. 5.) The Notice of Termination first reviewed the December 17, 2018 Letter of Intent to Terminate, recapped the grounds for termination, and noted Petitioner's January 16, 2019

response. (*Id.* at 1.) Regarding excessive income, SBA summarized Petitioner's response, inferring from it that Petitioner anticipated that Mr. Lopez's reinvestment should offset the “relatively high salary he enjoyed from 2014 through 2016” to rebut Mr. Lopez's presumed lack of economic disadvantage based on his income, and also noted the request for a waiver. (*Id.* at 2.) SBA then stated, first, that no waiver is available and, second, that SBA not persuaded that Petitioner's revenue forecast is predictive of Mr. Lopez's salary, [XXXXXXXXXXXXXXXXXX]. (*Id.* at 2-3.)

Turning to net worth and assets, SBA referenced the Letter of Intent to Terminate, and summarized Petitioner's response as asserting that Mr. Lopez's net worth and assets were due to high-value and short-term contracts, along with a request for a waiver. (*Id.* at 3.) SBA reiterated that no waiver is available, and then added, “[f]urthermore, as discussed below, the termination file demonstrate[s] that [Petitioner] has been advancing significant capital contributions to another firm owned by Mr. Lopez, [Holdings].” (*Id.*) SBA therefore continued to conclude that Mr. Lopez is no longer economically disadvantaged. (*Id.*)

Regarding excessive withdrawals, SBA recapped the regulations and recalled its earlier finding that Petitioner “had withdrawn funds in excess of [its] tax liability and made substantial advances to [Holdings], another company owned by Mr. Lopez.” (*Id.* at 3-4.) SBA determined that the withdrawals exceeded the regulatory limit and “were detrimental to [Petitioner's] business development.” (*Id.* at 4.) SBA then noted Petitioner's response, which was that the distributions were for less than was paid for taxes, and were to benefit Petitioner's operations in Puerto Rico. (*Id.*) SBA rejected these arguments, maintaining that its calculations actually overstated the tax liability, and that the regulation was intended only to provide credit for the owner's personal tax payment “on the pass-through portion of the corporate revenues.” (*Id.*) Thus, SBA concluded Mr. Lopez “excessively withdrew \$[XXX] more th[a]n was needed to pay his pass-through tax liability.” (*Id.*) SBA also rejected Petitioner's argument that the \$[XXX] in loans to Holdings was anything but a benefit to Mr. Lopez. SBA concluded Petitioner thus had failed to overcome the excessive withdrawals ground for termination. (*Id.*)

#### E. Notice of Suspension

On June 4, 2019, a contract specialist for the U.S. Army Medical Command (Army) contacted Mr. Lopez to inquire whether Petitioner would be able to provide services for an 8(a) sole source requirement under North American Industry Classification System (NAICS) code 541711. (Susp. Appeal, Exh. C; AR, Exh. 2, at 000006.) On June 5, 2019, Mr. Lopez informed SBA of the opportunity, and requested clarification whether SBA would allow Petitioner to accept the award given the May 8, 2019 Notice of Termination and the fact that the 45-day appeal period had not yet expired. (AR, Exh. 2, at 000008.)

On June 6, 2019, SBA issued to Petitioner a Notice of Suspension suspending it from further participation in the 8(a) BD program for the reasons discussed in the May 8, 2019, Notice of Termination. (Susp. Appeal, Exh. A; AR, Exh. 3.) On June 7, 2019, SBA issued to Petitioner a revised Notice of Suspension. (Susp. Appeal, Exh. B; AR, Exh. 1.) The Notice of Suspension stated that Petitioner had been terminated on May 8, 2019 based in part because its owner, Mr. Lopez, is no longer economically disadvantaged, and that:

It has come to [SBA's] attention that [Petitioner] may be self-marketing its capabilities for sole source 8(a) procurements. To this end, on June 5, 2019, Mr. Lopez contacted SBA via e-mail to inquire whether SBA would accept a pending sole source requirement on behalf of [Petitioner].

(*Id.* at 1.) SBA found immediate suspension was necessary because Petitioner, an ineligible concern, continued to pursue 8(a) contracting benefits. (*Id.* at 1-2.) The SBA closed by setting out Petitioner's hearing rights, including that an appeal must be filed within 45 days of receipt. (*Id.* at 2.)

#### F. Suspension Appeal

On June 11, 2019, Petitioner appealed the suspension to OHA. Petitioner calls the suspension “unwarranted” and “not necessary to protect the interest of the Federal Government.” (Susp. Appeal at 1.) As background, Petitioner asserts that it did not solicit the 8(a) sole source requirement, rather the Army contacted Petitioner on June 4, 2019 to see if Petitioner was interested in the requirement. (*Id.* at 1-2.) Because Petitioner had received the Notice of Termination on May 8, 2019, and the 45-day appeal timeline had not expired, Petitioner asked SBA if it was still eligible for an award before responding. (*Id.* at 2.) SBA responded with the Notice of Suspension. (*Id.*)

Petitioner contends, first, that the suspension is improper because “[a]dequate information does not exist” to show that Petitioner clearly lacks program eligibility and that suspension is necessary to protect the interests of the Government, as required under 13 C.F.R. § 124.305(a). (*Id.* at 3.) Thus, SBA, which has the burden of showing that suspension is necessary, cannot support its decision to suspend Petitioner. (*Id.*)

Specifically, Petitioner maintains SBA's explanation for suspending Petitioner is contrary to the evidence and facts because the Notice of Suspension stated that the fact “that [Petitioner] continues to pursue 8(a) contracting benefits is adequate evidence that the Federal Government is at heightened risk as long as the firm remains eligible for 8(a) BD Program assistance, and that ‘[a]n immediate action is necessary to ensure that the significant benefits of 8(a) sole source awards are only flowing to eligible program participants.’” (*Id.* at 4, quoting Notice of Suspension at 1.) However, Petitioner contends, “it is uncontradicted that when Mr. Lopez submitted the inquiry to the SBA on June 5, 2019, [Petitioner] was eligible for 8(a) BD Program support and still ‘eligible program participant’ in the 8(a) BD Program.” (*Id.*) In support, Petitioner quotes from the 8(a) BD program's Standard Operating Procedure (SOP), where the question of whether a Participant continues to receive program support during termination proceedings is answered, “Yes, unless the Participant is also suspended in conjunction with a termination proceeding. *The Participant's program support continues until it is terminated or early graduated.*” (*Id.*, quoting SOP 80 05 5 (Sept. 23, 2016), emphasis added by Petitioner.) SBA's rationale for suspending Petitioner is “implausible,” in Petitioner's view, because “[i]t is contradictory for the SBA to use [Petitioner's] eligibility . . . as its sole evidence that the Federal Government is at heightened risk if the company continued to be eligible for 8(a) contracting benefits.” (*Id.* at 4-5.) “If, in fact, that is the case,” Petitioner suggests, “then the SBA's entire policy to allow 8(a) BD Program

participants to continue to receive program support during the pending early graduation or pending termination proceeding places the Federal Government at heightened risk.” (*Id.* at 5.) Thus, SBA's assertion in the Notice of Suspension that Petitioner's pursuit of an 8(a) contract is “adequate evidence” to show the Government is at heightened risk is “arbitrary, contradictory, and contrary to evidence and the facts.” (*Id.*)

Next, Petitioner argues that SBA did not consider all of the facts in its decision to suspend Petitioner. (*Id.*) For one, Petitioner did not self-market its capabilities to the Army for the work at issue; the Army sent an unsolicited e-mail inquiry about it to Petitioner. (*Id.*) Also, no 8(a) sole source procurement was actually issued to Petitioner, and SBA had not received a formal offer letter. (*Id.*) Mr. Lopez even told SBA that the Army was only asking him if Petitioner was interested in the opportunity. (*Id.*) Petitioner did not want to tell the Army Petitioner was eligible if it was not “and then tarnish our relationship.” (*Id.*) Rather than consult the facts, the SBA made an arbitrary decision based on suspicion, and under OHA case law, mere suspicion is not adequate evidence of ineligibility. (*Id.*) Petitioner characterizes SBA's allegations as “vague” and “conclusory” and its decision to suspend Petitioner “abrupt” and “based on a mislead[ing] assertion that [Petitioner] may have marketed itself for the sole source SBA 8(a) procurement.” (*Id.* at 6.)

Petitioner contends that SBA's statement, in the Notice of Suspension, “for the reasons outlined in the May 8, 2019, Notice of Termination SBA has sufficient information showing a clear lack of [Petitioner's] program eligibility” fails as a basis for the suspension because the May 8, 2019 Notice of Termination did not show clear lack of program eligibility. (*Id.*) Thus, SBA had no proper grounds to support Petitioner's suspension. (*Id.*) Petitioner also notes that SBA did not suspend Petitioner immediately after issuing the Notice of Termination, but allowed Petitioner to continue as an 8(a) participant. (*Id.*) SBA did not suspend Petitioner until Petitioner himself inquired about the possibility of an 8(a) contract with the Army. (*Id.* at 6-7.)

As relief, Petitioner requests that OHA (1) find that suspension is not necessary to protect the interest of the Government; (2) find that SBA had acted arbitrarily, capriciously, or contrary to law in suspending Petitioner; and (3) lift the suspension. (*Id.* at 7.)

#### G. Termination Appeal

On June 24, 2019, Petitioner appealed the termination to OHA. Petitioner asserts that SBA's decision to terminate Petitioner from the 8(a) program is arbitrary, capricious, and contrary to law; was made in bad faith; and involved improper conduct. (Term. Appeal at 4.)

Regarding economic disadvantage, Petitioner reiterates its contention that Mr. Lopez's AGI was unusually high because Petitioner had two exceptional years in 2015 and 2016, [XXXXXXXXXXXXXXXXXXXXX]. (*Id.* at 9-10.) Further, his military pension should not be counted in his income because he would have received it regardless of Petitioner's involvement in the 8(a) BD program. (*Id.* at 9.)

As for Mr. Lopez's net worth, Petitioner asserts that Holdings was formed to hold Petitioner's property, so all loans and advances to Holdings were for the benefit of Petitioner, and

any equity in Holdings should be attributed to Petitioner, and therefore excluded from Mr. Lopez's personal net worth calculation. (*Id.* at 11.) Also, Petitioner contends, the two very successful years 2015 and 2016 present “an inaccurate demonstration of [Mr. Lopez's] economic disadvantage” because they resulted in high equity values for Petitioner and Holdings, in contrast to the “drastic decline in revenue” that now “severely impacts” Mr. Lopez's net worth and assets. (*Id.*) Petitioner characterizes the recent downward trend in Petitioner's revenues, and hence in Mr. Lopez's net worth and assets, as an important aspect of the case that SBA failed to consider. (*Id.*)

Regarding excessive withdrawals, Petitioner renews its argument, made in response to the Letter of Intent to Terminate, that its 2017 tax payments totaled \$[XXX] — more than the alleged \$[XXX] withdrawal amount. (*Id.* at 6.) Petitioner again argues that funds were not withdrawn for Mr. Lopez's personal benefit, and the withdrawals made were not detrimental to the achievement of Petitioner's business plan. (*Id.* at 5.) Further, Mr. Lopez created Holdings as a separate entity [XXXXXXXXXX] in support of [XXXXXXXX] Petitioner's business plan. (*Id.* at 8.) Petitioner had over 100 employees working in Puerto Rico, and a physical presence there would help Petitioner to win other contracts, also supporting the business plan. (*Id.*) Petitioner contends that there are two required elements to the excessive withdrawals ground for termination: (1) personal benefit to the owner, and (2) detriment to the business plan, and that neither has been established. (*Id.* at 9.)

Petitioner also argues that SBA's decision to terminate Petitioner was made in bad faith and involved improper behavior, noting irregularities in the initial and revised Letters of Intent to Graduate Early, including incorrect instructions and lack of detailed figures concerning the excessive AGI and excessive withdrawals allegations. (*Id.* at 12-14.) Petitioner also complains that, once the Letter of Intent to Graduate Early was withdrawn, SBA referenced Petitioner's response to that letter in the subsequent Letter of Intent to Terminate. (*Id.* at 13.) Also improper was SBA's unjustified suspension of Petitioner solely because Petitioner's owner had inquired about the sole-source opportunity. (*Id.*)

As relief, Petitioner requests that OHA: (1) find SBA's decision to terminate Petitioner arbitrary, capricious, and contrary to law; (2) direct SBA to restore Petitioner to the 8(a) BD Program; (3) expedite Petitioner's appeal of its suspension; and (4) if OHA affirms the termination, to make the termination effective at the end of the program year, December 14, 2019. (*Id.* at 14.)

#### H. SBA's Answer to Suspension Appeal

On July 26, 2019, SBA filed its Answer to the Suspension Appeal. SBA maintains that its decision to suspend Petitioner was reasonable, supported by the Administrative Record, and was not arbitrary, capricious, or contrary to law. (Answer at 1.) In recounting the facts, SBA highlights that Petitioner did not contest SBA's findings with respect to Mr. Lopez's personal net worth or the fair market value of his total assets in its January 16, 2019 Response to the Letter of Intent to Terminate. (*Id.* at 2.) Instead, Petitioner argued only that Mr. Lopez's \$[XXX] equity interest in Holdings, and his \$[XXX] combined equity interests in Petitioner and Holdings, do not indicate a lack of economic disadvantage. (*Id.*, citing AR, Exh. 6, at 28-29.) After Petitioner



notified SBA of the Army contract opportunity, on June 6, 2019, SBA suspended Petitioner after determining that action was necessary to protect the Government's interest, for the reasons set out in the May 8, 2019 Notice of Termination, that is, because adequate evidence exists to show Petitioner's clear lack of 8(a) program eligibility. (*Id.* at 3.)

SBA maintains that the only issue in this appeal is whether the Administrative Record contains adequate evidence indicating Petitioner's clear lack of eligibility. (*Id.* at 5.) Here, SBA limits its argument to two of the four issues presented in the May 8, 2019 Notice of Termination: personal net worth and total assets. (*Id.* at 5-6.) For Petitioner to continue to be eligible for the 8(a) BD program, Petitioner's owner, Mr. Lopez, must qualify as economically disadvantaged and thus cannot exceed the regulatory limits for personal net worth (\$750,000) and total assets (\$6,000,000). (*Id.* at 6, citing 13 C.F.R. § 124.104.) SBA contends that the Administrative Record contains ample evidence that Mr. Lopez exceeds these limits and, thus, Petitioner clearly lacks eligibility. (*Id.* at 7, citing AR, Exh. 10 (Petitioner's 2017 financial statements and Holdings' 2017 financial statements).) These financial statements provide the value of Mr. Lopez's equity in Petitioner as \$[XXX], and the value of his equity in Holdings as \$[XXX], amounts which by themselves exceed the regulatory limits. (*Id.* at 6-7, citing AR, Exh. 10, at 000212, 000260.)

SBA presented this evidence to Petitioner in the December 17, 2018 Letter of Intent to Terminate, and afforded Petitioner the opportunity to demonstrate why the proposed grounds should not justify termination. (*Id.* at 6-7, citing AR, Exh. 7, at 000035-000038.) Petitioner, though, has not contested SBA's findings or the figures contained in Petitioner's and Holdings' 2017 financial statements, and even conceded his non-compliance with the regulatory limits by seeking a "waiver" of those requirements. (*Id.* at 7.) Because the Administrative Record plainly shows Mr. Lopez's personal net worth and total assets both exceed regulatory limits for continued eligibility, and Petitioner has provided no argument or evidence to refute these findings, Petitioner was no longer eligible for the 8(a) program at the time of the suspension, and therefore suspension was necessary to protect the interests of the Government. (*Id.* at 8.)

### I. Objections to the Administrative Record

With its Answer, SBA filed the Administrative Record on which SBA based its decision to suspend Petitioner. On August 5, 2019, Petitioner filed objections to the Administrative Record. Petitioner objects to the Administrative Record by arguing that SBA "failed to provide adequate documentation supporting this alleged 'heightened risk' at the time it made the arbitrary decision to suspend" Petitioner. (Objections at 2.) Further, Petitioner argues it was still eligible for 8(a) assistance at the time of the suspension because the 45-day termination appeal period had not yet expired, and SBA did not present any evidence or documentation "to show a reasonable belief that, all of a sudden, the Government's interest now needed to be protected" from Petitioner's participation in the 8(a) BD program. (*Id.* at 2-3.)

Petitioner objects to the third-party documentation in Exhibit 10, which shows Petitioner's former location and other details. (*Id.* at 3.) Petitioner also objects to the SBA's claim of deliberative process privilege regarding Exhibits 8 and 9, containing SBA's internal

memoranda, because, in Petitioner's view, SBA did not adequately describe why these documents are predecisional or deliberative. (*Id.* at 4.)

#### J. SBA's Motion for Summary Judgment

On August 8, 2019, SBA moved for summary judgment on the termination appeal. More specifically, although SBA does not seek summary judgment on the question of excessive withdrawals, SBA asserts that it is entitled to summary judgment because that Mr. Lopez is no longer economically disadvantaged. SBA quotes extensively from the Letter of Intent to Terminate and the Notice of Termination, recapping the grounds for termination and the evidence presented to support those grounds. (Motion at 2-7.) SBA emphasizes that the amounts cited for Mr. Lopez's net worth (\$[XXX]) and total assets (\$[XXX]) are based on the owner's equity reported in Petitioner's own 2017 balance sheet (\$[XXX]) and in Holdings' 2017 balance sheet (\$[XXX]).

SBA also maintains that in its January 16, 2019 response to the Letter of Intent to Terminate, Petitioner did not contest either the amount of Mr. Lopez's net worth or his total assets, and did not challenge SBA's contention that these amounts exceed the regulatory limits of \$750,000 for net worth and \$6,000,000 for total assets. (*Id.* at 6, 11.) [XXXXXXXXXXXXXXXXX] (*Id.* at 6, citing AR, Exh. 6, at 4-5.) Also, Petitioner requested a waiver for both net worth and fair market value of assets, in effect conceding Petitioner's non-compliance with these requirements. (*Id.* at 13.)

SBA observes that in its appeal petition, Petitioner again fails to deny SBA's factual findings that Mr. Lopez's equity interest in Holdings, based on Holdings' 2017 financials, exceeds the \$750,000 personal net worth limit, and that the fair market value of all of Mr. Lopez's assets, based on the 2017 financials of Petitioner and Holdings, exceeds the regulatory \$6,000,000 limit. (*Id.* at 13.) Instead, Petitioner argues that Holdings was created for Petitioner's benefit so any equity in Holdings should not count in calculating Mr. Lopez's personal net worth. (*Id.*) Petitioner, though, “offers no regulatory or caselaw support for this proposition, and none exists.” (*Id.*) Further, Petitioner's contention that its success is “a false illusion” and that the asset calculation therefore is an inaccurate depiction of Mr. Lopez's economic disadvantage is misplaced, because the regulations on net worth and total assets, unlike income, do not provide for rebuttable presumptions. (*Id.*)

SBA requests that OHA grant its motion for summary judgment because there are no factual disputes concerning any of the three grounds for termination based on Mr. Lopez's lack of economic disadvantage. (*Id.* at 8.) These grounds are excessive income, excessive net worth, and excessive assets. (*Id.*) Citing prior OHA decisions, SBA argues that a finding of lack of economic disadvantage for any one of these three grounds precludes a determination of economic disadvantage, thus establishing the ineligibility of the 8(a) BD participant and the basis for its termination. (*Id.* at 10-11.) Further, Petitioner has not alleged any facts that, if proven true, would warrant reversal of SBA's decision to terminate Petitioner. (*Id.* at 14.) Thus, SBA is entitled to judgment on these three issues as a matter of law. (*Id.*)

Lastly, SBA contends that Petitioner also fails to assert any facts sufficient to establish that SBA acted in bad faith, let alone the “substantial showing, based on credible evidence and not mere allegation” required under the regulations. (*Id.*)

#### K. Petitioner's Opposition to the Motion for Summary Judgment

On August 23, 2019, Petitioner opposed SBA's motion for summary judgment. Petitioner argues that SBA is not entitled to judgment as a matter of law, because its decision to terminate Petitioner from the SBA 8(a) BD program “was arbitrary, capricious and contrary to law, and was conducted in bad faith.” (Response at 2.) Petitioner asserts that it has presented facts sufficient to overcome the SBA's determination that Mr. Lopez is no longer economically disadvantaged. (*Id.*)

Regarding income, Petitioner argues, as in its response to the Letter of Intent to Terminate and in its appeal petition, that the presumption of lack of economic disadvantage is rebutted by the fact that Petitioner's revenues, and therefore Mr. Lopez's income, were unusually high in the past, but since Petitioner has lost contracts more recently, Mr. Lopez's income has dropped. (*Id.* at 4.) SBA arbitrarily disregarded this rebuttal. (*Id.*)

Turning to personal net worth and total assets, Petitioner contends SBA should not have included Mr. Lopez's equity in Holdings in its calculations, because Holdings was formed with the purpose and intent of holding Petitioner's property and, therefore, “all loans and advances to [Holdings] were for the benefit of [Petitioner].” (*Id.*) Thus, SBA should have treated Mr. Lopez's equity in Holdings as if it were equity in Petitioner, that is, excluded from the personal net worth calculation. (*Id.*) Petitioner also renews its argument that the distributions went for S Corporation taxes and should not be considered “withdrawals.” (*Id.* at 4-5.)

Petitioner also argues that genuine issue of material fact exists as to whether SBA's decision to terminate Petitioner was made in bad faith. (*Id.* at 5.) Specifically, Petitioner asserts that, by SBA's own admission, the Notice of Intent to Graduate Early included incorrect instructions and failed to set forth “specific facts regarding the reasons for the SBA alleged findings.” (*Id.*) Thus, Petitioner urges OHA to deny SBA's motion for summary judgment. (*Id.*)

### III. Discussion

#### A. Consolidation of Suspension and Termination Appeals

The termination and suspension appeals arise from the same operative facts and relate to the same essential matter, *i.e.*, Petitioner's continuing eligibility for the 8(a) BD program. Therefore, the two appeals are CONSOLIDATED. 13 C.F.R. § 124.305(d)(3).

#### B. Ruling on the Administrative Record

SBA has withheld from Petitioner Exhibits 8 and 9 of the Administrative Record, claiming deliberative privilege, but provided those Exhibits to OHA for *in camera* review. SBA counsel included an appropriate index of these Exhibits, and I find that the withheld documents

properly fall within the claimed privileges. Specifically, the internal analyses of SBA analysts are protected under the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975). Further, the withheld material contains nothing “that would provide Petitioner with a new or different factual basis on which to challenge the SBA's decision to deny it eligibility in the 8(a) program.” *Matter of Avellan Sys. Int'l, Inc.*, SBA No. BDP-332, at 7 (2009). The rationales and bases for the SBA's decisions articulated within these documents are presented fully in the Letter of Intent to Terminate and the Notice of Termination.

### C. Summary Judgment

A party may move for summary judgment as to all or any portion of the case, on the ground that there is no genuine issue as to any material fact, and that the moving party is entitled to a decision in its favor as a matter of law. 13 C.F.R. §§ 134.212 and 134.408; *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A “genuine” issue exists when “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at 248. Additionally, a fact is not “material” unless it affects the outcome of the suit. *Id.* Summary judgment is a “drastic” remedy in the sense that, when exercised, it diminishes a party's ability to present its case. *Selva & Sons, Inc. v. Nina Footwear, Inc.*, 705 F.2d 1316, 1323 (Fed. Cir. 1983). Accordingly, the moving party bears the burden of demonstrating the absence of any material issues of fact. *Anderson*, 477 U.S. at 256. If the SBA determination being appealed was based on multiple grounds, a party may seek summary judgment on one or more of those grounds. 13 C.F.R. §§ 134.212(c) and 134.408(b).

A proper motion for summary judgment must include a statement of the material facts believed to be undisputed and the party's legal arguments. 13 C.F.R. § 134.212(a)(1). Within 15 days of service of a motion for summary judgment, a non-moving party must file and serve a response to the motion or be deemed to have consented to the motion for summary judgment. *Id.* § 134.212(a)(2). In responding to a motion for summary judgment, a non-moving party may not rest upon mere denials or allegations, but must come forward with “specific facts showing that there is a genuine issue for trial.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (quoting Fed. R. Civ. P. 56(e)). OHA considers the facts alleged in the appeal petition in determining whether a genuine dispute exists as to any material facts. *See Nationwide Life Ins. Co. v. Bankers Leasing Ass'n, Inc.*, 182 F.3d 157, 160 (2nd Cir. 1999) (In reviewing a motion for summary judgment, the tribunal must find “all ambiguities and draw all reasonable inferences in favor of the party defending against the motion.”); *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990) (“where the facts specifically averred by [the nonmoving] party contradict facts specifically averred by the movant, the motion must be denied”).

A participant in the 8(a) BD program may remain for nine years so long as the concern maintains its program eligibility. 13 C.F.R. § 124.2. However, the SBA may terminate the participation of a concern prior to the expiration of the program term for good cause. 13 C.F.R. § 124.303. Among other reasons, “good cause” for termination includes “[f]ailure by the concern to maintain its eligibility for program participation, including failure by an individual owner to continue to meet the requirements for economic disadvantage set forth in § 124.104 where such status is needed for eligibility.” 13 C.F.R. § 124.303(a)(2). The economic disadvantage

regulations specify limits on the individual owner's net worth (excluding the individual's ownership interest in the participant concern and in his or her primary residence) and on the fair market value of all his or her assets (excluding only the funds in a qualified retirement account). 13 C.F.R. § 124.104(c)(2), (c)(4). Specifically, for continued 8(a) BD eligibility, net worth must be less than \$750,000, and total assets must not exceed \$6,000,000. *Id.*

For the purposes of the instant motion, I find the following facts to be undisputed:

1. Petitioner is an 8(a) BD concern 100% owned by Mr. Lopez, the individual on whom Petitioner's eligibility is based. Section II.A, *supra*.

2. Mr. Lopez also is the 100% owner of Holdings, a concern that is not in the 8(a) BD program. Section II.A, *supra*.

3. Holdings' compiled financial statements for the year ending December 31, 2017 reports total equity as \$[XXX], an amount that, by itself, exceeds the \$750,000 regulatory limit for net worth. Section II.A, *supra*.

4. Petitioner's audited financial statements for the year ending December 31, 2017 reports total stockholder's equity as \$[XXX], an amount that, by itself, exceeds the \$6,000,000 regulatory limit for total assets. Section II.A, *supra*.

5. On December 17, 2018, SBA issued a Letter of Intent to Terminate to Petitioner. This letter stated the grounds for termination, which included, *inter alia*, that Mr. Lopez is no longer economically disadvantaged on the bases of his personal net worth and total assets. The letter explained how the amounts were determined from Petitioner's and Holdings' 2017 financial statements. The letter instructed Petitioner to respond with "argument and evidence, including supporting documentation" to show that Mr. Lopez remains economically disadvantaged. Section II.B, *supra*.

6. On January 16, 2019, Petitioner timely responded to the Letter of Intent to Terminate. Petitioner's response did not deny the correctness of the amounts taken from Petitioner's and Holdings' 2017 financial statements. Petitioner submitted no documentation or other evidence to show that Mr. Lopez's personal net worth and total assets do not exceed the regulatory limits. Section II.C, *supra*.

7. On May 8, 2019, SBA issued Petitioner a Notice of Termination based on the same grounds as the Letter of Intent to Terminate, and gave Petitioner instructions for filing an appeal. Section II.D, *supra*.

8. On June 7, 2019, SBA issued to Petitioner a Notice of Suspension, stating that it was for the reasons outlined in the Notice of Termination, and gave Petitioner instructions for filing an appeal. Section II.E, *supra*.

9. On June 11, 2019, Petitioner appealed the suspension to OHA. Section II.F, *supra*.

10. On June 24, 2019, Petitioner appealed the termination to OHA. The appeal petition did not deny the correctness of the net worth and total assets amounts taken from Petitioner's and Holdings' 2017 financial statements. At no time during the appeal proceedings has Petitioner challenged the correctness of the amounts taken from Petitioner's and Holdings' 2017 financial statements. Section II.G, *supra*.

The above-listed undisputed facts are, by themselves, sufficient to conclude that SBA correctly terminated Petitioner from the 8(a) BD program due to Petitioner's lack of continuing eligibility. 13 C.F.R. § 124.303(a)(2). Mr. Lopez's personal net worth exceeds the \$750,000 limit prescribed by 13 C.F.R. § 124.104(c)(2), and his total assets exceed the \$6 million limit prescribed by 13 C.F.R. § 124.104(c)(4).

Petitioner opposes SBA's motion for summary judgment on several grounds, but none of Petitioner's arguments is persuasive. Petitioner argues, first, that its loans and advances to Holdings were for the benefit of Petitioner, such that equity in Holdings should be excluded for purposes of determining Mr. Lopez's net worth under 13 C.F.R. § 124.104(c)(2). As SBA observes in its motion, though, Petitioner offers no legal authority for excluding equity held in concerns other than the 8(a) participant itself in determining net worth. Further, even if OHA were to agree that equity in Holdings should be excluded from the net worth calculation, Petitioner still would be ineligible under the total assets calculation at § 124.104(c)(4), because equity in the 8(a) participant is not excluded in determining total assets, and there is no dispute that Mr. Lopez's equity interest in Petitioner exceeds the \$6 million threshold.

Petitioner also contends that Mr. Lopez's net worth and total assets may be likely to decrease in the future, but this argument too is meritless. Petitioner has had ample opportunities to submit evidence that Mr. Lopez's net worth and total assets are within regulatory limits, yet has not done so. Moreover, although the average income provision at 13 C.F.R. § 124.104(c)(3) can be rebutted "by a showing that this income level was unusual and not likely to occur in the future," the provisions on net worth (§ 124.104(c)(2)) and total assets (§ 124.104(c)(4)) do not provide for any such rebuttal. Accordingly, SBA correctly determined that Mr. Lopez is not economically disadvantaged based on his net worth and total assets, and therefore that Petitioner is no longer eligible for the 8(a) BD program.

SBA also moves for summary judgment because Mr. Lopez's average personal income over the past three years exceeded the \$350,000 limit set forth at 13 C.F.R. § 124.104(c)(3). I agree with Petitioner that summary judgment is not suitable on this issue. While it is true that Mr. Lopez's average income for the years 2014-2016 apparently did exceed \$350,000, the regulation states that this creates a rebuttable presumption that the individual is not economically disadvantaged. Construing the record in the light most favorable to Petitioner, and drawing inferences in Petitioner's favor, it is possible that Petitioner could overcome the presumption. Thus, summary judgment with regard to personal income is not warranted. Nevertheless, because SBA terminated Petitioner on multiple grounds, and OHA has found that summary judgment is appropriate on two of those grounds, SBA's motion still must be granted and the consolidated appeal dismissed. 13 C.F.R. § 134.408(b).

Lastly, Petitioner's assertion that the termination and suspension were motivated by bad faith does not preclude summary judgment. To prevail on such a claim, Petitioner must make "a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior." 13 C.F.R. § 134.407(a). Here, Petitioner has not identified concrete evidence of bad faith or improper behavior by SBA. Given that SBA has a vital interest in ensuring that only eligible businesses participate in its programs, the mere fact that SBA terminated Petitioner after first proposing Petitioner for early graduation does not suggest that SBA was motivated by bad faith or malice towards Petitioner.

#### IV. Conclusion

For the foregoing reasons, SBA's motion for summary judgment is GRANTED, the termination is AFFIRMED, and the consolidated appeal is DISMISSED. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.408(b); *Matter of 4-D Constr., Inc.*, SBA No. BDPT-535 (2014). Subject to 13 C.F.R. § 134.409(c), this is the final decision of the U.S. Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

KENNETH M. HYDE  
Administrative Judge