

8(a) BUSINESS DEVELOPMENT PROGRAM: GETTING CERTIFIED AND STAYING COMPLIANT



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Set-Aside Alert™



PRESENTED BY

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OVERVIEW

- ❖ **Preparing for a smooth certification process**
 - **Make sure you meet the eligibility criteria**
 - **Understand the application process**
- ❖ **Maintaining eligibility/avoiding pitfalls**
 - **Continued eligibility standards**
 - **Annual reviews and eligibility reviews**
 - **Excessive withdrawals**
 - **Remaining economically disadvantaged**
 - **Changes of ownership**
 - **Staying small**
- ❖ **Looking ahead**
- ❖ **Q&A**



PREPARING FOR A SMOOTH CERTIFICATION PROCESS



MAKE SURE YOU MEET THE ELIGIBILITY CRITERIA!

- ❖ **Must be a SMALL business in primary industry**
- ❖ **Size of a firm includes any affiliates**
 - **Multiple ways that affiliation can arise**
 - **Key is when one firm controls or has the power to control the other, or a third party or parties control or have the power to control both, even if this control is not exercised (13 C.F.R. § 121.103)**
- ❖ **Special affiliation rules for Tribes and Native-owned concerns**



8(a) ELIGIBILITY CRITERIA

- ❖ **Must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are U.S. citizens of good character**
 - **Firms owned by Tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations are also eligible to participate in the 8(a) Program**

- ❖ **Must possess potential for success**



WHO IS SOCIALLY DISADVANTAGED?

- ❖ Individuals “who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities”
- ❖ Individuals are presumed to be socially disadvantaged if they are a U.S. Citizen and a member of one of the following groups:
 - Black Americans
 - Asian Pacific Americans
 - Hispanic Americans
 - Native Americans
 - Subcontinent Asian Americans



WHO IS SOCIALLY DISADVANTAGED? (CONTINUED)

- ❖ **Individuals who are not members of one of the designated groups must establish social disadvantage by a “preponderance of the evidence”**
- ❖ **Evidence of social disadvantage must include:**
 - **Objective distinguishing feature contributing to social disadvantage (race, gender, physical handicap, etc.)**
 - **Personal experiences of substantial and chronic social disadvantage in American society**
 - **Negative impact on entry into or advancement in business world because of the disadvantage (education, employment and business history)**



WHO IS ECONOMICALLY DISADVANTAGED?

- ❖ Socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities
- ❖ Economic disadvantage factors and thresholds:
 - *Net Worth* – Personal net worth of **\$250,000**
 - *Personal Income* – Three-year average adjusted gross income of **\$250,000**
 - *Total Assets* – Fair market value of assets of **\$4 million**
- ❖ Certain exclusions in determining economic disadvantage



UNCONDITIONAL OWNERSHIP

- ❖ Must own at least 51% (of each class, if applicable)
- ❖ Ownership must be direct (exception for certain trusts)
- ❖ Unexercised stock options held by non-disadvantaged individuals treated as if exercised
- ❖ Entitlement to dividends and distributions:
 - *Annually* – at least 51% of annual distributions paid
 - *Upon Sale* – 100% of the value of each share owned
 - *Upon Dissolution* – at least 51% of retained earnings and 100% of unencumbered value of each share owned
- ❖ Community property laws given effect



UNCONDITIONAL OWNERSHIP

- ❖ Can you apply if your brother owns (or owned) another firm in the 8(a) Program?
 - Prohibition on ownership by immediate family members
 - SBA may waive prohibition (no connections plus requisite expertise)
 - Presumption against granting waiver if the two firms are in same or similar line of business



UNCONDITIONAL OWNERSHIP

- ❖ Non-disadvantaged individual (or non-participant) with **10%** ownership interest in one 8(a) firm may not own more than **10%** of another 8(a) firm in the developmental stage or **20%** of another 8(a) firm in the transitional stage
- ❖ Ownership restrictions for non-participants (or principals thereof) in same or similar line of business
 - No more than **10%** (developmental) and **20%** (transitional) in current participant
 - *Exception for former participants* – No more than **20%** (developmental) and **30%** (transitional) in current participant



UNCONDITIONAL CONTROL

- ❖ **What is control?**
 - Not the same as ownership
 - Both the strategic policy setting exercised by boards of directors and the day-to-day management and administration of business operations
 - Managerial experience versus technical expertise

- ❖ **What does control require of a disadvantaged individual?**
 - Manage on a full-time basis
 - Hold the highest officer position
 - Receive the most compensation
 - Serve as general partner with control over all decisions (partnerships)
 - Serve as managing member with control over all decisions (limited liability companies)
 - Control the board of directors (corporations)



UNCONDITIONAL CONTROL

- ❖ When will non-disadvantaged individuals or entities be found to control?
 - Control of the board of directors either directly through majority voting or indirectly through ability to block quorum or action
 - Significant influence over business decisions due to provision of critical bonding or financial support or a critical license
 - Loan arrangements (loan guaranty may be okay)
 - Business relationships that prevent the exercise of independent business judgment without great economic risk



POTENTIAL FOR SUCCESS

- ❖ *Two Years in Business Requirement* – Must be generating revenues in primary industry for at least **2 full years** as evidenced by income tax returns
- ❖ *Two-Year Waiver* – SBA may waive requirement if:
 - Applicant's disadvantaged owner has substantial business management experience
 - Applicant has demonstrated technical experience to successfully carry out its business plan
 - Applicant has adequate capital to sustain its operations and carry out its business plan
 - Applicant has a record of successful performance on contracts in primary industry
 - Applicant has (or can readily obtain) the personnel, facilities, equipment, and any other requirements needed to perform contracts



POTENTIAL FOR SUCCESS

- ❖ **What else does SBA consider in assessing potential for success in the 8(a) Program?**
 - **Access to credit and capital (long-term financing, working capital, bonding, etc.)**
 - **Technical and managerial experience of managers**
 - **Operating history**
 - **Record of performance on contracts in primary industry**
 - **Financial capacity (focus on working capital, net worth and net income)**



GOOD CHARACTER

- ❖ The applicant or participant (and all principals) must have good character
- ❖ An applicant is ineligible for the 8(a) Program if the firm or its principals:
 - Lack **business integrity** (guilty plea, conviction, civil judgment or settlement, etc.)
 - Is currently incarcerated, or on parole or probation following conviction of any crime involving business integrity
- ❖ Knowing submission of false information = DENIED
- ❖ Debarred or suspended = DENIED



UNDERSTAND THE APPLICATION PROCESS

- ❖ **Verify eligibility**
- ❖ **Review sample 8(a) Program application forms and checklist**
- ❖ **Access SBA's General Login System**
- ❖ **Complete and submit electronic application forms**
- ❖ **Compile supporting documentation (based on checklist)**
- ❖ **Print, sign and submit hardcopy of online application and supporting documentation to appropriate SBA office**
- ❖ **Be prepared to respond to additional SBA information requests!**



WHAT HAPPENS AFTER YOU APPLY?

- ❖ Within **15 days** of receipt of an application, SBA will advise applicant as to whether the application is complete and, if not, what additional information or clarification is required
- ❖ Within **90 days** of receipt of a complete application package, SBA will process an application for 8(a) Program participation
 - SBA may request clarification or additional information at **any time** during the application process – failure to timely respond or provide incomplete information can lead SBA to draw adverse inference
 - Applicant **must** inform SBA of any changed circumstances that could adversely affect 8(a) Program eligibility (particularly economic disadvantage and ownership and control) during its application review
- ❖ Decision to approve or deny an application will be in writing (if denied, letter will state specific reasons for denial and inform the applicant of any appeal rights)



APPROVED OR DENIED?

❖ If approved:

- Date of approval letter = date of 8(a) Program certification (for purposes of determining program term)
- Carefully review (and sign) the Participation Agreement
- Submit business plan to SBA servicing office **as soon as possible**
- Participant will not be eligible for 8(a) Program benefits, including 8(a) contracts, until SBA approves its business plan

❖ If denied:

- May file a request for reconsideration and submit **any additional information** pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application
- May file an appeal in connection with initial (or subsequent) decline if denial based on negative finding of **social disadvantage, economic disadvantage, ownership, control**, or any combination of these four criteria



MAINTAINING 8(a) ELIGIBILITY AND AVOIDING PITFALLS



CONTINUED ELIGIBILITY STANDARDS

- ❖ **For a firm to remain eligible for 8(a) Program participation, it must:**
 - **Continue to meet all eligibility criteria**
 - **Inform SBA of any changes in circumstances which would adversely affect 8(a) Program eligibility**
 - **Make annual submissions supporting continued eligibility**



ANNUAL REVIEWS

- ❖ **Participants must annually submit information to servicing district office to support continued 8(a) Program participation**
- ❖ **At a minimum, annual review submissions include:**
 - **Certification that eligibility requirements are met**
 - **Certification that there are no changed circumstances which could adversely affect eligibility**
 - **Personal financial information for each disadvantaged owner**
 - **A record of all payments, compensation, and distributions made to each owner, officer or director**
 - **A listing of any fees paid to agents or representatives for assistance in obtaining (or seeking to obtain) a Federal contract**



ELIGIBILITY REVIEWS

- ❖ **SBA will review a firm's eligibility for continued participation upon receipt of specific and credible information alleging non-compliance with continued eligibility criteria**

- ❖ **Sufficient reasons for SBA to conclude that a socially disadvantaged individual is no longer economically disadvantaged include:**
 - **Excessive withdrawals of funds or other assets**

 - **Substantial personal assets, income or net worth**



EXCESSIVE WITHDRAWALS

❖ What are withdrawals?

- Cash dividends, distributions in excess of amounts needed to pay taxes of pass-through entities; cash and property withdrawals; payments to immediate family members not employed by the participant; bonuses to officers; and investments on behalf of an owner
- Officer salaries are generally not considered withdrawals

❖ When are withdrawals excessive?

- > **\$250,000** (sales up to \$1 million)
- > **\$300,000** (sales between \$1 million and \$2 million)
- > **\$400,000** (sales exceeding \$2 million)



EXCESSIVE WITHDRAWALS

- ❖ Potential consequences of excessive withdrawals include:
 - Initiation of **termination** proceedings
 - Initiation of **early graduation** proceedings
 - An appropriate **reinvestment of funds** or other assets as a condition of continued 8(a) Program eligibility



REMAINING ECONOMICALLY DISADVANTAGED

- ❖ Economic disadvantage factors and thresholds for continued eligibility:
 - *Net Worth* – Personal net worth of **\$750,000**
 - *Personal Income* – Three-year average adjusted gross income of **\$350,000**
 - *Total Assets* – Fair market value of assets of **\$6 million**
- ❖ No economic disadvantage = early graduation



CHANGES OF OWNERSHIP

- ❖ **Changes of ownership or business structure permitted only where:**
 - **Disadvantaged individual(s) own and control the participant after the change; and**
 - **SBA approves the transaction in writing prior to the change**
- ❖ **No prior SBA approval = termination**
- ❖ **Limited instances where prior SBA approval not required**



STAYING SMALL

- ❖ A firm must generally remain small for its primary industry, as adjusted during the 8(a) Program, to remain eligible for participation
- ❖ SBA may initiate early graduation proceedings where a firm exceeds the size standard corresponding to its primary NAICS code, as adjusted, for **three successive 8(a) Program years**, unless:
 - The firm demonstrates that its primary industry is changing to a related secondary NAICS code contained in its most recently approved business plan; and
 - The firm's business plan contains specific targets, objectives, and goals for its continued growth and development under its new primary industry



LOOKING AHEAD



CHANGES ARE COMING

- ❖ **New Standard Operating Procedures**
- ❖ **New SBA mentor-protégé programs (similar to 8(a))**
- ❖ **Increased scrutiny of 8(a) applicants and participants**



Any Questions?

Thank you for joining us today.

If you would like to speak with Tony or Peter about the 8(a) Program, please contact them at:

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