

Small Business Administration Section 8(a) Program

The Office of Minority Enterprise Development (MED) Program was created to assist socially and economically disadvantaged business persons to gain access to the resources necessary to develop small businesses and improve their ability to compete in the mainstream of the American economy.

The most well known element of the MED program is the 8(a) Program, named from Section 8(a) of the Small Business Act. The 8(a) Program is a business development program that provides its participants access to a variety of business development services, including the opportunity to receive federal contracts on a sole-source or limited competition basis. Under the 8(a) Program, SBA enters into prime contracts with federal departments and agencies and subcontracts the performance of work to disadvantaged small businesses that are certified participants in the program.

SMALL BUSINESS CONCERN

An applicant concern must qualify as a small business concern as defined in Part 121 of SBA Rules and Regulations. The particular size standard to be applied will be based on the primary industry classification of the applicant concern.

OWNERSHIP

A firm must be at least 51 percent unconditionally owned by an individual(s) who is a citizen of the United States and who is determined by SBA to be socially and economically disadvantaged.

- In the case of a partnership, 51% of the partnership interest must be unconditionally owned by an individual(s) determined by SBA to be socially and economically disadvantaged. Such unconditional ownership must be reflected in the firm's partnership agreement.
- In the case of a corporation, 51% of each class of voting stock and 51% of the aggregate of all outstanding shares of stock must be unconditionally owned by an individual(s) determined by SBA to be socially and economically disadvantaged.
- SBA does not consider a firm to be unconditionally owned if socially and economically disadvantaged individual(s) claim ownership of a firm based on unexercised stock options or other arrangements.
- When determining ownership of a firm for 8(a) program eligibility, SBA considers options to purchase stock held by non-disadvantaged individuals or entities. The right to convert non-voting stock or debentures held by non-disadvantaged individuals or entities into exercised voting stock must also be considered. However, potential ownership interests (such as options or warrants) held by investment companies licensed under the Small Business Investment Act 1958 shall not be treated as ownership interests until exercised.
- The individual(s) upon whom eligibility is based must receive at least 51% of the annual distribution of dividends paid on the voting stock of a corporate applicant firm.

In the event that the stock is sold, the individual(s) upon whom eligibility is based must be entitled to receive 100% of the value of each share of stock in his/her possession.



In the event of dissolution of the corporation, the individual(s) upon whom eligibility is based must be entitled to receive at least 51% of the retained earnings of the firm and 100% of the value of each share of stock in his/her possession.

One 8(a) firm may not hold more than a 10% equity ownership interest in any other 8(a) firm.

An individual in an 8(a) firm, whether or not disadvantaged, is prohibited from simultaneously holding an equity ownership interest exceeding 10% in another 8(a) firm.

An entity who/which is a partner, stockholder, officer and/or director is also prohibited. Partners or shareholders that are financial institutions licensed or chartered by Federal, state or local government, including investment companies licensed under the Small Business Investment Act of 1958, shall not hold ownership interest in an 8(a) firm exceeding 49%.

- A non-8(a) firm in the same or similar line of business is prohibited from having an equity ownership interest in an 8(a) firm, which exceeds 10%.
- With prior SBA approval, an 8(a) firm may continue participation in the program after a change of ownership. Prior SBA approval is not required when the change in ownership represents less than a 10% interest in the firm or results from the death or incapacity due to serious or long-term illness or injury of a disadvantaged principal. However, the firm shall notify SBA as soon as possible.
- A program participant's request for SBA's approval for the issuance of a public offering is treated as a request for a change in ownership and SBA examines the firm's continued need for access to the business development resources of the 8(a) program.

CONTROL AND MANAGEMENT

The management and daily business operations of a firm must be controlled by an owner(s) of the firm who has (have) been determined to be socially and economically disadvantaged. For a disadvantaged individual to control the firm, that individual must have managerial or technical experience and competency directly related to the primary industry in which the firm is seeking 8(a) certification.

The firm must be managed on a full-time basis by one or more individuals who are socially and economically disadvantaged. Such person(s) must possess requisite management or technical capabilities as determined by SBA. For those industries requiring professional licenses, SBA determines that the firm or individuals employed by the firm hold(s) the requisite license(s).

At least one socially and economically disadvantaged full-time manager must hold the position of President or Chief Executive Officer. This precludes outside employment or other business interest by the individual which conflicts with the management of the firm or hinders it in achieving the objectives of its business development plan.

- 1) A non-disadvantaged individual as an officer or member of the Board of Directors of the 8(a) firm, or through stock ownership, has the power to control day-to-day direction of the business affairs of the firm.
- 2) The non-disadvantaged individual or entity provides critical financial or bonding support or licenses to the 8(a) firm, which directly or indirectly allows the non-disadvantaged individual to gain control or direction of the 8(a) firm.



- 3) A non-disadvantaged individual or entity exercises voting control of the participant through a nominee(s).
- 4) A non-disadvantaged individual or entity controls the corporation or the individual disadvantaged owners through loan arrangement.
- 5) Other contractual relationships exist with non-disadvantaged individual or entities, the terms of which would create control over the disadvantaged concern.

SOCIAL DISADVANTAGE

Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

In the absence of evidence to the contrary, the following individuals are presumed to be socially disadvantaged: Black Americans, Hispanic Americans, Native Americans (American Indians, Eskimos, Aleuts or Native Hawaiians); Asia, Pacific Americans (person with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China, Taiwan, Laos, Cambodia, Kampuchea, Vietnam, Korea, the Philippines, U.S. Trust Territory of the Pacific Islands, Republic of Palau, Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Hong Kong, Fiji, Tonga, Kiributi, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time-to-time by SBA.

An individual seeking socially disadvantaged status as a member of a designated group may be required to demonstrate that he/she holds himself/herself out and is identified as a member of a designated group if SBA has reason to question such individual's status as a group member.

An individual who is not a member of one of the above-named groups must establish his/her individual social disadvantage on the basis of clear and convincing evidence. A clear and convincing case of social disadvantage must include the following elements:

1. The individual's social disadvantage must stem from his or her color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar cause not common to small business persons who are not socially disadvantaged.
2. The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group, which could be considered socially disadvantaged.
3. The individual's social disadvantage must be rooted in treatment, which he or she has experienced in American society, not in other countries.
4. The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant.
5. The individual's social disadvantage must have negatively impacted on his or her entry into and/or advancement in the business world. SBA considers any relevant evidence in assessing this element of an applicant's case. SBA particularly considers and places emphasis on the following experiences of the individual, where relevant:



Education - SBA considers, as evidence of an individual's social disadvantage, denial of equal access to institutions of higher education, exclusion from social and professional association with students and teachers, denial of educational honors, social patterns or pressures which have discouraged the individual from pursuing a professional or business education, and other similar factors.

Employment. SBA considers, as evidence of an individual's social disadvantage, discrimination in hiring, promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channeled the individual into nonprofessional or non-business fields; and other similar factors.

The socially and economically disadvantaged individual(s) upon whom eligibility is based shall control the Board of Directors of a firm, either in actual numbers of voting directors or through weighted voting. All voting rights of the Board of Directors must comply with applicable state law.

Individuals who are not socially and economically disadvantaged may be involved in the management of a firm and may be stockholders, partners, officers, and/or directors of such firm. Such individual(s), their spouses or immediate family members who reside in the individual's household may not however:

1. Exercise actual control or have the power to control the applicant or 8(a) firm.
2. Be an officer or director or more than a 10% owner, stockholder, or partner of another firm in the same or similar line of business as the applicant firm.
3. Receive excessive compensation from the applicant or 8(a) firm as directors, officers or employees. Individual compensation from the firm in any form, including dividends paid to a non-disadvantaged owner, his/her spouse or immediate family member residing in the same household, is deemed excessive if it exceeds the compensation received by the Chief Executive Officer or the President. However, with SBA's approval, the Chief Executive Officer or President may elect to take a lower salary than such a non-disadvantaged individual if it is demonstrated to be in the best interest of the applicant or 8(a) firm.
4. Be former employers of the disadvantaged owner(s) of the applicant or 8(a) firm unless it is determined by the AA/MED that the contemplated relationship between the former employer and the disadvantaged individual or firm does not give the former actual control or the potential to control the individual or 8(a) firm and such relationship is in the best interests of the 8(a) firm.
5. Have an equity ownership interest of more than 10% in another 8(a) firm.

Non-disadvantaged individuals or entities may be found to control or have the power to control in any of the following circumstances, which are illustrative only and not all inclusive:

Non-disadvantaged individuals control the voting Board of Directors of the 8(a) firm. Control can be directly through majority voting membership or indirectly if the by-laws allow non-disadvantaged individuals to block any action proposed by the disadvantaged individuals through negative control. For example, any equal number of disadvantaged and non-disadvantaged voting directors could create negative control.

ECONOMIC DISADVANTAGE



For purposes of the 8(a) program, economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities.

In determining economic disadvantage for purposes of 8(a) program eligibility, SBA compares the firm's business and financial profile with profiles of businesses in the same or similar line of business, which are not owned and controlled by socially and economically disadvantaged individuals.

In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, SBA considers factors relating both to the firm and to the individual. An individual whose personal net worth exceeds \$250,000.00 is not considered economically disadvantaged for purposes of 8(a) program entry. When SBA calculates the personal net worth of an individual claiming disadvantaged status for purposes of the 8(a) program, SBA excludes the individual's ownership interest in the applicant or participating 8(a) firm and the equity in his/her primary personal residence. However, any portion of such equity in his/her primary residence attributable to excessive withdrawals from the applicant or participating 8(a) firm is not excluded.

POTENTIAL FOR SUCCESS

A firm must demonstrate that it has been in business in the primary industry classification in which it seeks 8(a) certification for two full years prior to the date of its 8(a) application by submitting income tax returns showing revenues for each of the two previous years.

To determine whether a firm has the potential for success, SBA evaluates technical and managerial experience and competency of the individual(s) upon whom eligibility is based, the financial capacity of the applicant firm and the firm's record of performance on previous Federal and private sector contracts in the primary industry in which the firm is seeking 8(a) certification.

ADDITIONAL REQUIREMENTS:

Individual character review of the applicant(s). Standards of conduct apply to SBA employees and former employees.

Manufacturers and regular dealers must meet the requirements of the Walsh-Healey Public Contracts Act in its primary industry classification. Immediate family members living in the same household may not each use their individual disadvantaged status to qualify more than one business firm for 8(a) Program Participation if the firms are in the same or similar line of business.



INELIGIBLE BUSINESSES

- Brokers and Packagers
- Franchises
- Debarred or suspended person or firm
- Non-profit Organizations
- Concerns owned by other disadvantageded firms

TWO-YEAR RULE

Public Law 101-574 allows a waiver of the two-year in business requirement for participation in the 8(a) program when the Following criteria are met:

- A. The individual(s) upon whom eligibility is based have substantially demonstrated business management experience;
- B. The applicant has demonstrated technical expertise to carry out its business plan with a substantial likelihood for success;
- C. The applicant has adequate capital to carry out the business plan;
- D. The applicant has a record of successful performance on contracts from governmental and non-governmental sources in the primary industry category in which the applicant is seeking program certification; and
- E. The applicant has or can demonstrate the ability to obtain the personnel, facilities, equipment, and any other requirements needed to perform such contracts.

SOURCE

13 CODE OF FEDERAL REGULATIONS

Part 124

Public Law 100-656

Public Law 100-574

