

8(a) GRADUATION APPEAL INSTRUCTIONS

SBA provides this general appeal information and appeal petition template for use by the general public. The following is based on the 8(a) regulations codified in Title 13 of the Code of Federal Regulations and section 8(a) of the Small Business Act.

- 1. WHO MAY REPRESENT ME?** 13 C.F.R. § 134.208 provides “[a] party may represent itself, or be represented by an attorney. A partner may represent a partnership; a member may represent a limited liability company; and an officer may represent a corporation, trust, association, or other entity.”
- 2. WHAT CAN I APPEAL?** You can appeal the reasons SBA provides for graduating you from the 8(a) program.
- 3. WHO WILL DECIDE MY APPEAL?** An independent Administrative Law Judge will decide your appeal.
- 4. HOW DO I KNOW WHETHER I SHOULD APPEAL THE SBA’S DECISION?** Only you can decide whether to appeal. Before deciding to appeal you should become fully familiar with the issues and the law involved in your case. You should review the pertinent SBA regulations, as well as prior SBA decisions involving cases that addressed issues similar to those in your case. They will help you to decide whether you have a meritorious appeal.
- 5. WHAT REGULATIONS SHOULD I READ BEFORE I APPEAL?** The regulations governing 8(a) graduations and appeals are in Title 13 of the Code of Federal Regulations (CFR), specifically:
 - Part 124 §§ 124.301 - 124.304 (how SBA graduates an 8(a) firm);
 - Part 134 §§ 134.101 - 134.229 (general rules for appeals to OHA); and
 - Part 134 §§ 134.401 - 134.409 (special rules for 8(a) appeals).
- 6. WHERE CAN I FIND THESE REGULATIONS?** The regulations may be found online at: <http://www.gpoaccess.gov/cfr/index.html>. You should click on the “Browse and/or search the CFR” link and then click the Title 13 regulations link. The regulations are also available on SBA’s website at: <http://www.sba.gov/tools/resourcelibrary/lawsandregulations/index.html>. Bound copies may also be found at many large public libraries and SBA offices.
- 7. WHERE CAN I FIND OHA DECISIONS IN CASES SIMILAR TO MINE?** You can find Office of Hearings and Appeals (OHA) decisions on the OHA homepage of the SBA website at: http://www.sba.gov/aboutsba/sbaprograms/oha/ohadecisions/OHA_DECISIONS.html.
- 8. HOW WILL THE ADMINISTRATIVE LAW JUDGE DECIDE MY APPEAL?** In most cases, the Judge will decide your appeal solely on a review of the written

administrative record in the case, your appeal petition and written legal arguments, the SBA's response to your appeal and the SBA's written arguments. The Judge will also look at SBA regulations as well as case precedent (earlier cases) that addressed similar legal issues.

9. WHAT IS THE WRITTEN ADMINISTRATIVE RECORD? The written administrative record includes all of the documents that are relevant to the determination being appealed, and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied.

10. WHAT STANDARD WILL THE ADMINISTRATIVE LAW JUDGE USE IN DECIDING WHETHER MY APPEAL SHOULD BE GRANTED? The Judge's review is limited to determining whether the SBA's decision is arbitrary, capricious, or contrary to law. *See* 13 C.F.R. § 134.406(b). Your appeal, therefore, must show the SBA's decision to graduate you from the 8(a) program was arbitrary, capricious, or contrary to law. (*See* Sample Appeal Petition).

11. DO I HAVE TO USE THIS SAMPLE APPEAL PETITION? No, you do not have to use this sample; however, your appeal must follow the requirements of the SBA regulations. OHA appeals must contain the following: (1) the basis of OHA jurisdiction; (2) a copy of the SBA Graduation Letter and the date you received it; (3) a clear and concise statement of the case, including the reasons, facts, and evidence that the SBA acted arbitrarily, capriciously, or contrary to law; (4) legible copies of any documents you wish to include; (5) your name, address, telephone number, facsimile number, and your signature or your attorney's signature; and (6) a Certificate of Service indicating that a copy of the appeal petition was sent via mail, facsimile, or personal delivery to the proper parties. Filing via facsimile is OHA's preferred method of service. (*See* Sample Appeal Petition).

12. HOW DO I COMPLETE MY APPEAL?

a. Caption: Include the full name of the firm being graduated from the 8(a) program.

b. Basis of jurisdiction: Include the date you received the SBA Graduation Letter that you are appealing. Be sure to attach the SBA Graduation Letter to your appeal and label it "Attachment 1."

c. Claim: State the reasons why you believe the SBA erred in graduating you from the 8(a) program.

d. State the facts you believe support your claim that the SBA erred. You should include, if available, evidence to establish these facts including letters, statements, or documents that you previously submitted to the SBA. In most cases, the Judge will consider only evidence that the SBA considered when it made its determination. You

cannot introduce “new” evidence which is not already part of the SBA’s file. *See* 13 C.F.R. § 134.407 for more information and exceptions to this prohibition.

e. Arguments: State your legal arguments, referring to the facts and your claim, that show the SBA’s determination is arbitrary, capricious, or contrary to law. You may refer to any relevant laws or regulations (particularly the Small Business Act and the regulations in 13 C.F.R. parts 124 and 134) and to other 8(a) BD appeal decisions and judicial precedent to support your arguments.

f. Date and sign: You must date and sign the appeal petition. You must also include your printed name, title, address, telephone number, and facsimile number.

g. Certificate of Service: You must attach a “Certificate of Service” showing how and when you served copies of your appeal petition on the proper parties. A sample Certificate of Service is included with the sample appeal petition.

13. WHAT WILL HAPPEN IF I DO NOT INCLUDE ALL OF THE REQUIRED INFORMATION IN MY APPEAL? Your appeal may be dismissed if you do not include all of the required information in your appeal.

14. HOW LONG DO I HAVE TO FILE MY APPEAL? You must file your appeal with OHA no later than 45 calendar days from the day you received the SBA Graduation Letter. It is helpful to keep a record of when you received the SBA Graduation Letter, for example, by keeping the envelope containing the SBA Graduation Letter, the facsimile cover sheet, or retaining the email containing the Graduation Letter.

15. MAY I GET AN EXTENSION OF TIME TO FILE MY APPEAL? No, SBA regulations prohibit extending the time to file an appeal. If your appeal is late, it must be dismissed.

16. WHAT DOES “FILING” MEAN? Filing means OHA actually received your appeal. If OHA receives your appeal after 5:00 p.m., it will be considered filed the next business day.

17. HOW DO I FILE MY APPEAL? You may file your appeal by U.S. mail, delivery to OHA personally or by a commercial delivery service, or by facsimile. Due to delays in mail processing, filing by facsimile is recommended to ensure timeliness.

18. WHERE DO I FILE MY APPEAL? If you file by mail or delivery, it should be addressed to: Docketing Clerk, Office of Hearings and Appeals, Small Business Administration, 409 Third Street, SW, Washington, DC 20416-0005. If you file by facsimile, the number for the OHA facsimile machine is (202) 205-7059.

19. WHO CAN I CALL IF I HAVE QUESTIONS ABOUT HOW TO FILE MY APPEAL? You may call OHA at (202) 401-8200 for inquiries.

20. WHAT DOES “SERVICE” MEAN? Service means concurrently sending a copy of the documents you filed with OHA to designated offices or individuals. Copies may be sent by U.S. mail, personal delivery, commercial delivery service, or facsimile. Due to delays in mail processing, serving by facsimile is recommended to ensure timeliness.

21. DO I HAVE TO SERVE (SEND) COPIES OF MY APPEAL TO ANYBODY ELSE? Yes, you must send copies of your 8(a) graduation appeal to the Director, Office of Business Development/Small Business Administration (facsimile number 202-205-5206) and the Associate General Counsel for Litigation/Small Business Administration (facsimile number 202-205-7154).

22. HOW DO I SHOW OHA THAT I PROPERLY SERVED (SENT) COPIES OF MY APPEAL? When you file your appeal petition with OHA, you must attach a “Certificate of Service” showing how and when you served copies of your appeal petition on the proper parties. (*See* Sample Certificate of Service).

23. WHAT HAPPENS AFTER I FILE AND SERVE MY APPEAL?

a. Preliminary matters are resolved. The Administrative Law Judge will review your appeal. If there are deficiencies that can be corrected, the Judge will notify you of the deficiencies and give you an opportunity to correct them. If the Judge determines that he or she cannot decide your case because you do not have a right to an appeal or there is no jurisdiction to hear your case, then the Judge may dismiss your appeal.

b. SBA files and serves its response and the administrative record. If your appeal is in order, the Judge will issue an order for the SBA to file its response (“Response”) to your appeal and the administrative record. The SBA will provide you (serve) copies of its Response and the administrative record.

c. You may object to the administrative record and any SBA claim of privilege. You have the opportunity to object to the contents of the administrative record if you believe certain documents were either improperly excluded from the administrative record or were improperly included in the administrative record. The SBA may legally exclude certain documents from the administrative record. For example, documents that include communications to and from the SBA’s attorneys and certain internal communications between SBA staff may be omitted from the administrative record under a claim of privilege. You may object to the SBA’s claim of privilege, but you must show why the SBA’s claim of privilege is improper.

d. The Administrative Law Judge issues a final decision. After closing of the record, the Judge will decide your case and issue a written decision. The decision will include a discussion of the facts of the case, the law involved, and the reasons for the decision. The Judge may decide the appeal in your favor if the SBA’s determination is found to be arbitrary, capricious, or contrary to law. If not, the Judge will deny your appeal and uphold the SBA’s determination. In some cases, the Judge may return the case (“remand”) to the SBA for further consideration.

e. You may request reconsideration of the decision. You have the right to request that the Administrative Law Judge reconsider the decision if you can make a clear showing that the Judge made an error of law or fact material to the decision. A request for reconsideration must be filed (received) at OHA within 20 calendar days of the date of the decision.

24. WHAT IF I DISAGREE WITH THE JUDGE'S DECISION? If you still disagree with the decision, you have a right to seek judicial review in Federal court.