



## Column: The unappealable 8(a) denial

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It is widely known that the Small Business Administration (SBA) disagrees with how the agency's own Office of Hearings and Appeals (OHA) has ruled in recent years with regard to appeals brought to OHA stemming from denials of 8(a) applications.

SBA believes that OHA has placed the burden too heavily on the agency to show why someone is not disadvantaged instead of forcing the individual applying for 8(a) status to affirmatively show they were actually discriminated against or otherwise disadvantaged in their life.

To this end, SBA has proposed to amend its 8(a) regulations to make it harder for 8(a) applicants to be admitted to the program.

However, a less widely-known tactic being used by SBA to enforce this new, stricter application of the rules is that OHA's jurisdiction to review 8(a) denials is limited and these limits give SBA a massive legal loophole to guard their denial decisions from appellate review...or does it?

### Recent OHA decision

In a recent OHA decision (*A.J. Nesti Materials, SBA No. BDPE-551 (2015)*), OHA dismissed an appeal from an 8(a) denial stating that OHA only has jurisdiction to hear appeals from an 8(a) denial where the denial is based solely upon a negative finding of social disadvantage, economic disadvantage, ownership, or control.

Thus, if the denial is in any way based upon another determination, such as a finding that the company does not show an adequate likelihood of success (due to subjectively determined metrics), or if one item in the 8(a) application was inaccurate (even by inadvertent error), SBA regulations strip OHA of its authority to hear the matter.

### Non-appealable issues

Thus, anyone denied 8(a) status due to areas other than socio-economic eligibility, ownership, or control is left without an obvious

route to appeal. This legal loophole allows SBA to deny 8(a) applications claiming that someone has not shown they are truly Hispanic or Latino, or because there is a dispute about the individual's finances – all items over which OHA would have jurisdiction – so long as SBA also throws in as part of the denial a single sentence in one of the non-appealable areas, such as where an individual forgot to disclose that they had an SBA loan 13 years ago.

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### U.S. District Court appeals

However, all is not lost. Also in the *A.J. Nesti* case, OHA noted that, although SBA has chosen to shield itself from OHA's more efficient and cost-effective appellate review, SBA does not have the authority to divest 8(a) applicants of the right to challenge the 8(a) denial as a "final agency action" in a U.S. District Court under the Administrative Procedure Act ("APA").

Unfortunately, however, appeals to OHA are much less expensive, and are resolved much faster, than APA actions filed in U.S. District Court, but at least aggrieved 8(a) applicants have somewhere to turn to ensure that SBA is not discriminating against, or improperly denying 8(a) status to individuals who truly are socio-economically disadvantaged and meet all other criteria.

### Legal hurdles under the APA

Of course, filing an APA action has its own legal hurdles. Specifically, if SBA did have numerous findings in an 8(a) denial, some of which were appealable to OHA and others which were not, the District Court could claim that the company asserting the APA claim failed to exhaust administrative remedies by pursuing the case to OHA to at least resolve the appealable issues.

If this happens, the aggrieved 8(a) applicant would not only lose the APA action, but it would also be out of time to file an appeal with OHA.

Given this risk, anyone looking to move forward with an APA action to challenge an 8(a) denial should be prepared to argue that it did not have to exhaust its administrative remedies through an OHA appeal because such a review would be futile.

Indeed, if an 8(a) application is denied for a mixture of appealable and non-appealable issues, OHA would likely dismiss the case entirely, not rule on part of the case and not another. Thus, any appeal is futile, thus waiving the need to exhaust the administrative remedies and clearing the path for an APA action in District Court.

While this is not ideal, SBA has made it clear that the 8(a) landscape is changing and the APA action might be the only way to ensure SBA follows the rules going forward.

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