

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

PETITION FOR RECONSIDERATION

Issued: September 13, 2022

SMALL BUSINESS ADMINISTRATION

Docket No. PFR-5292997209

Petitioner

Appeal of Windsor Court Hotel Partners LLC,
SBA No. PPP-5292997209

APPEARANCES

Tabitha Mangano, Esq., Agency Representative, District of Columbia, for Petitioner
U.S. Small Business Administration.

Edward Bukaty, Esq. for Appellant, Windsor Court Hotel Partners, LLC.

DECISION

I. Introduction and Jurisdiction

On or about August 26, 2022, the U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) received a Petition For Reconsideration (PFR) in the above-captioned matter from Petitioner, the Small Business Administration. The PFR seeks OHA's reconsideration pertaining to a Paycheck Protection Program (PPP) Loan No. 5292997209 and OHA's initial decision, denying the appeal of the same PPP Loan No.

OHA has jurisdiction to decide this PFR. *See* 13 C.F.R. Part 134, Subpart L.

II. Background

A. Cares Act 2020

On March 25, 2020, in response to the economic distress caused by the COVID-19 pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116-136, 134 Stat. 281 (2020). Among other provisions, the CARES Act established the PPP at Section 1102. The Program lends money to eligible small businesses to assist them in

covering expenses and making payroll for their workers to keep them employed during the pandemic. If the loan funds are used for certain specified expenses, the borrowers can receive full forgiveness of the loan.

B. PPP Loan Application, Forgiveness, and Appeal

On or about March 6, 2021, Lender disbursed PPP Loan Number 5292997209 (“PPP Loan”) in the amount of \$2,000,000.00.

On or about April 29, 2021 Windsor Court Hotel Partners LLC (hereinafter referred to as “Windsor Court”) executed a PPP Loan Forgiveness Application Form 3508 requesting forgiveness for the full amount of the loan (Administrative Record, also referred to herein as “AR”) pp. 2043-2045).

On or about April 11, 2022, SBA issued a final SBA loan review decision (“FLRD”), denying Windsor Court forgiveness because it found Windsor Court was ineligible to receive a PPP loan. SBA concluded ineligible payroll costs were used to calculate the PPP loan amount (AR 19-20).

On May 3, 2022, Appellant filed an appeal with OHA. On June 20, 2022, OHA issued a Notice and Order. On August 22, 2022, OHA filed its Initial Decision granting the appeal and reversing the Final Loan Review Decision. SBA now submits its Petition For Reconsideration seeking the reversal of the Initial Decision.

C. OHA’s Initial Decision

The Undersigned Administrative Judge found that Appellant had established that the final SBA loan review decision was based on a clear error and thereby granted the appeal and reversed the FLRD.

D. SBA’s PFR

The SBA argues that the Initial OHA Decision is erroneous and should be reversed because ALJs are bound by the SBA’s regulations and SBA’s interpretation of its governing statutes and regulations.

On August 26, 2022, SBA timely filed its petition for reconsideration within the ten (10) day requirement.

III. Analysis

In its decision, SBA found SBA has determined that the borrower was ineligible for the PPP loan. The reason(s) for SBA’s decision is as follows:

After review of the documentation provided, the SBA concludes that the borrower did not have any eligible payroll cost at the time of loan application. When reviewing the loan origination calculation sheet, it is noted that ineligible payroll costs were utilized to calculate the PPP Loan Amount. Per IFR #1 – Paycheck Protection Program (section III.2.e-f); lenders are required to calculate the applicant max loan amount utilizing IRS forms. Utilizing the 2020 IRS 1065 Partnership Tax Return report, a

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Resulting in a maximum eligible loan amount of \$0.00, which is 2.5 times the average monthly payroll.

Windsor Court owns the Windsor Court Hotel and uses workers who are technically employed by a management company, known as Aimbridge Hospitality (hereinafter referred to as “Aimbridge”) to operate the Hotel. Windsor Court has a contract/Management Agreement with Aimbridge by which Windsor Court pays all of the payroll costs associated with the employment of Hotel employees.

The key issue in this case is the definition of “Employee”. The term “Employee” is addressed when computing size determinations (i.e. for number of employees) and means any full-time, part-time or any other basis (emphasis added). 15 USC Section 636(a)(36)(D)(v)). SBA shall consider the totality of the circumstances. 13 C.F.R. § 121.106(a).

The SBA argues that these workers are independent contractors and therefore cannot be included in the payroll costs of Windsor Court. SBA further argues that Aimbridge is not a PEO.

The SBA has issued its own guidance in this area with its Frequently Asked Questions, dated July 29, 2021. Question No. 10 reads as follows:

10. Question:

What if an eligible borrower contracts with a third-party payer such as a payroll provider or a Professional Employer Organization (PEO) to process payroll and report payroll taxes?

Answer:

SBA recognizes that eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data on the Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower’s employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO’s or other payroll provider’s Form

941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. In addition, employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.

The SBA Petition For Reconsideration argues that OHA made a clear error of fact and law in the Initial Decision by determining that the Management Agreement constituted a PEO Agreement and by concluding that Aimbridge is a PEO (Professional Employer Organization), and thereby misinterpreted the SBA Frequently Asked Question, #10.

Windsor Court has recently filed amended tax returns in an attempt to simplify and clarify this issue. The fact of the matter is that Windsor Court incurred payroll costs to operate its Hotel. The Manager, Aimbridge, technically hired the employees and was paid pursuant to the contract with Windsor Court. Aimbridge did not and could not attempt to apply for a PPP loan for itself and claim the employee cost as payroll expenses. Contrary to SBA's assertion, these employees were not independent contractors. They were employed by Aimbridge to perform work at Windsor Court and their work is controlled by Aimbridge.

SBA argues that Aimbridge is not a PEO and relies upon IRS definitions of independent contractors. Even if this was correct, Aimbridge can be considered a "similar payroll provider" as set forth in SBA's FAQ #10.

In light of the above, and considering the totality of the circumstances, I find that the leased employees are includable as payroll costs of the business concern (Windsor Court) and that the payroll costs associated with the leased workers is attributable to Windsor Court, who incurred their expense and not the payroll provider/PEO. Therefore, as noted in SBA FAQ #10, these costs are includable in Windsor Court's maximum loan calculation and would not be includable in any payroll costs of Aimbridge if that entity were to apply for a PPP loan.

Conclusion

For the foregoing reasons, the Petitioner, the SBA, has not met its burden of proof that the Initial OHA Decision was erroneous and based upon a clear showing of an error of fact or law material to the decision.

Therefore, the instant PFR is **DENIED**. 13 C.F.R. § 134.1211(c). Unless the SBA Administrator elects to review this decision pursuant to 13 C.F.R. § 134.1211(c)(3) & (d), OHA's decision on the request for reconsideration is a reconsidered initial OHA decision and becomes the SBA's final decision 30 calendar days after its service. *See* 13 C.F.R. § 134.1211(c).

Michael Breton

MICHAEL BRETON
Administrative Judge