

How to Appeal PPP Non-Forgiveness for Staffing Firms

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Denied a loan or forgiveness under the Paycheck Protection Program (“PPP”)? Applicants and/or borrowers still have recourse to appeal. The U.S Small Business Administration (“SBA”) has issued protocols for borrowers denied a PPP loan or facing a claim that their PPP loan is not eligible for forgiveness. In order to obtain a review of a final SBA decision, however, applicants and/or borrowers must overcome a number of procedural hurdles to make sure their subject application gets its fair shake.

On what basis can an appeal be filed?

While the SBA may review a PPP loan decision at any time on its own initiative, borrowers of PPP loans may appeal a SBA loan decision that finds a borrower ineligible for a PPP loan, ineligible for the PPP loan amount received or used the PPP loan proceeds for unauthorized uses, is ineligible for PPP loan forgiveness in the amount determined by the lender, or is ineligible for PPP loan forgiveness in any amount. Once a final SBA loan decision is reached, that decision may be appealed to the SBA Office of Hearings and Appeals (the “OHA”).

There are a few things to keep in mind when filing an appeal. First, only the borrower on a loan for which the SBA has issued a final loan review decision has standing to appeal the decision to the OHA. Individual owners of a borrower and lenders do not have standing to appeal an SBA loan review decision. Second, the appeal must be filed before the earlier of two dates: (1) 30 days from the borrower’s receipt of the final SBA loan review decision, or (2) 30 days from notification by the lender of the final SBA loan review decision. The standard of review for an appeal of an SBA final decision is whether the SBA loan review decision was based on clear error of fact or law, which the borrower has the burden of proving by a preponderance of the evidence.

What must an appeal include?

To file an appeal, borrowers may file an appeal petition of no more than 20 pages (not including attachments) that substantively includes:

1. The basis for OHA jurisdiction, including, but not limited to, evidence that the appeal is timely filed;
2. A copy of the SBA loan review decision that is being appealed (or a description of that decision if a copy is unavailable);
3. A full and specific statement as to why the SBA loan decision is alleged to be erroneous, along with facts and legal arguments supporting those allegations;
4. A request for relief; and

5. Name, signature, and contact information of the appealing party or its attorney.

The appeal petition must also append the following documents:

1. Signed copies of payroll tax filings actually reported to the IRS and state quarterly business and individual employee wage reporting and unemployment insurance tax filings for the relevant state, for the relevant periods of time, if not provided with the PPP Loan forgiveness Application, or an explanation why these materials are not relevant to the appeal or are otherwise unavailable; and
2. Signed copies of applicable federal tax returns filed with the Internal Revenue Service (“IRS”). Once prepared, the appeal, along with a signed certificate of service, must be served, with attachments, on the Associate General Counsel for Litigation, U.S. Small Business Administration, 409 Third Street SW, Washington, DC 20416, OLITService@sba.gov. An appeal petition lacking any of these required components may be subject to dismissal by the Judge’s own initiative or upon motion by the SBA.

What is the appeal process?

Once an appeal is received, the OHA will assign the matter to either an Administrative Law Judge or an Administrative Judge. Unless the appeal is dismissed for failing to include the requisite documents and information, the Judge will issue a notice and order setting deadlines for the SBA’s production of the administrative record, consisting of relevant documents that the SBA considered in making its final decision, typically by no later than 20 days after issuance of the notice. The SBA must certify the authenticity and completeness of the record and file the record with the OHA and serve on the appealing borrower. The borrower has 10 days after receiving the administrative record to lodge a formal objection to the absence of any documents that it believes should have been included in the record.

After receipt of an appeal petition, and within 45 days of receiving the appeal, the SBA may respond to an appeal with the relevant facts and legal arguments opposing the issues presented on appeal. Unless the Judge directs otherwise, no reply to the SBA’s appeal response is permitted. The parties are not bound to this formal appeal process. They may submit a joint motion to the Judge requesting the use of alternative dispute resolution to assist in resolving the matter. If the parties’ motion is granted, the Judge will stay the proceedings before the OHA pending the outcome of the alternative dispute resolution.

What happens next?

Generally, an appeal will be decided solely based on the administrative record, the appeal documents, and the SBA’s response thereto. If the SBA, upon written submission, makes a showing of good cause, the Judge may allow for additional fact discovery to take place. The appeal will generally not include an oral argument unless the Judge determines, after a party motion or on the Judge’s own initiative, there is a genuine dispute of material fact that cannot be resolved except by the taking of testimony and confronting witnesses.

The Judge must issue a decision within 45 days after the close of the record (the record usually closes 45 calendar days from the date of OHA’s receipt of the appeal). The decision must contain findings of fact and conclusions of law, the reasons for such findings and conclusions, and any relief ordered. This

decision is just an “initial decision”, however, it is subject to a request for reconsideration within 10 days of the decision by either party, or within 20 day of the decision by the Judge *sua sponte*. The parties may also request a review by the Administrator within 30 days of the appeal decision. If no requests for reconsideration or review are made after 30 days of service of the initial decision, the initial decision shall become final.

If a request for review by the Administrator is made, the decision of the Administrator is a final decision of SBA appealable to a federal district court. A borrower wishing to preserve its right to seek judicial review must serve a request for review of an initial or reconsidered decision by the Administrator. A failure to seek Administrator review is deemed a failure to exhaust administrative remedies, thus waiving a borrower’s right to seek review in federal court.

The OHA may affirm, reverse, or remand an SBA loan review decision. If remanded, the OHA no longer has jurisdiction over the matter unless a new appeal is filed as a result of a new SBA loan review decision. The good news for borrowers is that the prevailing party in a PPP loan appeal is not entitled to recover attorney’s fees, which is an incentive to appeal an unfavorable SBA loan decision.

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