NATIVE HAWAIIAN ORGANIZATIONS

FREQUENTLY ASKED QUESTIONS

What is a Native Hawaiian Organization (NHO)?

A Native Hawaiian Organization is any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

What CFR outlines the requirements for NHOs?

13 CFR § 124.110 outlines the eligibility requirements for NHOs to apply for the 8(a) BD program.

Are companies owned by NHOs eligible for the 8(a) BD program?

Companies owned by economically disadvantaged Native Hawaiian Organizations are eligible for participation in the 8(a) program and other federal programs requiring SBA to determine social and economic disadvantage as a condition of eligibility. Such companies must meet all eligibility criteria set forth in §§ 124.101 through 124.108 and § 124.112 to the extent that they are not inconsistent with § 124.110.

Who is a Native Hawaiian?

A Native Hawaiian is any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

How does SBA determine whether an individual is a Native Hawaiian?

SBA has determined that the best evidence of Native Hawaiian status is the individual's birth certificate. Specifically, the birth certificate must show that the individual is at least part Hawaiian. Native Hawaiian identification cards issued by the Office of Hawaiian Affairs are also acceptable to establish Native Hawaiian status.

How does SBA determine whether an NHO is controlled by Native Hawaiians?

SBA requires at least 51% of the NHO's members and board of directors to be Native Hawaiian. An NHO may or may not have members. However, an NHO must have a board of directors with at least three members, and the number must be fixed in the Articles of Incorporation or corporate bylaws.

How does an NHO establish that its business activities will principally benefit Native Hawaiians?

First of all, the NHO should describe any activities that it has done to benefit Native Hawaiians at the time its NHO-owned concern applies to the 8(a) BD program. Secondly, the NHO must include statements in its corporate bylaws or operating agreement identifying the benefits Native Hawaiians will receive from the NHO. Thirdly, the NHO must have a detailed plan that shows how revenue earned by the NHO will principally benefit Native Hawaiians. The plan should outline how the NHO will achieve the goals it enumerates and how its revenues will be allocated to each goal.

How does an NHO establish it is economically disadvantaged?

SBA considers the individual economic status of the NHO's members to establish whether the NHO is economically disadvantaged. The majority of an NHO's members must qualify as economically disadvantaged under § 124.104. For the first 8(a) applicant owned by a particular NHO, individual NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility.

If the NHO does not have members, how does an NHO establish it is economically disadvantaged?

If the NHO does not have members, then a majority of the NHO's board of directors must qualify as economically disadvantaged. If the NHO has members and a board of directors, only a majority of the NHO's members must be economically disadvantaged.

Can SBA consider the individual economic status of an NHO member or director if the member or director previously used his/her disadvantaged status to qualify an individually-owned 8(a) applicant or Participant?

If the member or director of an NHO previously used his/her disadvantaged status to qualify an individually-owned 8(a) applicant or Participant, SBA may still consider his/her individual economic status when reviewing the NHO's economically disadvantaged status.

What is the unconditional ownership requirement for an NHO-owned concern?

The NHO must unconditionally own at least 51% of the applicant firm.

Can the NHO-owned concern be owned by a subsidiary of the NHO?

No. The Small Business Act requires that ownership of an 8(a) Participant by an NHO be direct ownership. Consequently, a company owned through a for-profit holding company owned by the NHO would not be eligible for participation in the 8(a) BD program.

Are there ownership restrictions governing NHO-owned concerns?

Yes. An NHO cannot own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) BD program under the same primary NAICS code as the applicant. An NHO may, however, own a Participant or an applicant that conducts or will conduct secondary business in the 8(a) BD program under the same NAICS code that a current Participant owned by the NHO operates in the 8(a) BD program as its primary NAICS code.

How does SBA define "same primary NAICS code" for the purposes of the above paragraph discussing ownership restrictions?

For purposes of the paragraph discussing ownership restrictions, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

Are there ownership restrictions governing nondisadvantaged individuals or other business concerns that are partial owners of an NHO-owned concern?

Yes. The restrictions of § 124.105(h) apply to nondisadvantaged individuals or other business concerns that are partial owners of an NHO-owned concern.

Are companies recently acquired by an NHO eligible for the 8(a) BD program?

The NHO must unconditionally own at least 51% of the company. SBA will assess whether the acquisition was an arm's length transaction and whether the NHO paid adequate consideration for its ownership interest. The consideration paid should have a reasonable relationship to an objective valuation or appraisal of the company in order to be deemed an arm's length transaction. SBA will review the purchase/sale agreement, terms of the purchase, derivation of the purchase price, etc.

Can an NHO finance the purchase of a company with a promissory note?

Financing the purchase price with a promissory note may be acceptable if payment is triggered by some independent event not controlled by the holder of the note. A demand note would be unacceptable because the holder may be found to have negative control over the NHO. However, a note with repayment terms based on the NHO's share of contract revenues may be acceptable. Payment of some cash consideration is always more desirable than executing a note for 100% of the purchase price.

How does an NHO establish control of a company?

An NHO must control the applicant or Participant firm. To establish that it is controlled by an NHO, an applicant or Participant must demonstrate that the NHO controls its board of directors.

Does a Native Hawaiian have to be the individual responsible for the day-to-day management of an NHO-owned concern?

An individual responsible for the day-to-day management of an NHO-owned concern need not establish personal social and economic disadvantage. Thus, the day-to-day managers of an NHO-owned concern are not required to be disadvantaged individuals.

Is the individual involved in the management or daily business operations of the NHO-owned concern deemed to have used his/her eligibility?

No, SBA does not deem an individual involved in the management or daily business operations of a Participant owned by a Native Hawaiian Organization to have used his or her individual eligibility within the meaning of § 124.108(b).

Does the individual responsible for the day-to-day management of an NHO-owned concern have to devote full-time to the company?

Yes, the individual responsible for the day-to-day management of an NHO-owned concern must devote full-time to the company.

Do the members or directors of the NHO need to have experience in the company's primary industry?

An NHO's members, or directors if there are no members, must have managerial experience of the extent and complexity needed to run the NHO-owned concern.

What is the potential for success requirement for an NHO-owned concern?

An NHO-owned concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. An NHO-owned concern must establish potential for success through one of the following methods:

(1) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the firm is seeking 8(a) BD certification; or

(2) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the firm has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the firm has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(3) The NHO has made a firm written commitment to support the operations of the firm and it has the financial ability to do so.

Does the buy support requirement apply to an NHO-owned concern?

Yes. As with other 8(a) applicants, a company will not be denied admission into the 8(a) BD program due solely to a determination that potential 8(a) contract opportunities are unavailable to assist in the development of the company unless:
(1) The Government has not previously procured and is unlikely to procure the types of products or services offered by the company; or
(2) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the company and other Participants providing the same or similar items or services.

Does SBA's good character requirement apply to an NHO-owned concern and its principals?

Yes. The NHO-owned concern must meet all of the 8(a) eligibility criteria outlined in §§ 124.101 through 124.108 and § 124.112 to the extent they are not inconsistent with § 124.110. This includes the good character requirement outlined in § 124.108.

How does SBA determine size for an NHO-owned concern?

A company owned by a Native Hawaiian Organization must qualify as a small business concern. The size standard corresponding to the primary industry classification of the NHO-owned concern applies for determining size. SBA determines the company's size independently, without regard to its affiliation with the Native Hawaiian Organization or any other business enterprise owned by the Native Hawaiian Organization, unless the Administrator determines that one or more such companies owned by the Native Hawaiian Organization have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

Can an NHO-owned concern receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract performed by another Participant or former Participant?

Once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same NHO.

Is the NHO-owned concern required to reports benefits to SBA after entry into the 8(a) BD program?

As part of the annual review conducted for an NHO-owned Participant, SBA will review how the NHO is fulfilling its obligation to principally benefit Native Hawaiians. SBA must receive information showing how the NHO has provided benefits to Native Hawaiians and/or the Native Hawaiian community due to the NHO's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the NHO to the affected community.