

Date: September 27, 2005

To: All Directors  
All ODA HQ Staff

From: Associate Administrator  
for Disaster Assistance

Subject: #05-35, Independently Owned and Operated Business

This is to clarify EIDL eligibility requirements as addressed in Paragraph 118 of SOP 50-30-5, "INDEPENDENTLY OWNED AND OPERATED BUSINESS." As a reminder, it remains the responsibility of the loan officer to justify all eligibility determinations in the loan officer report. This change is effective immediately and will be included in the next update of SOP 50 30 5.

¶ 118. a. Critical Factors. You must examine two critical factors to determine if a business is independently owned and operated.

(1) The owner(s) must have a business risk resulting from investing in facilities or equipment and by incurring ongoing expenses, which must be paid regardless of whether the operation generates a profit. The owner must share the risk of both the profits and the losses.

For example, an individual participates as a crewmember on a fishing boat and does not have an investment in the boat or equipment. The crewmember works for a share of the catch, reduced by certain trip expenses (fuel, food, etc.), which are deducted from the catch. If the catch is insufficient to cover the expenses, the crewmember incurs no liability for trip expenses. Thus, this individual is not a small business concern and is not eligible for EIDL assistance.

(2) The business operation must be free from significant control by other concerns (e.g., the customers or businesses that pay for its services). However, in determining what constitutes significant control, loan officers should consider that a state licensing prerequisite that requires an independent contractor to work in conjunction with a licensed firm does not, in and of itself, disqualify an Independent Contractor from participation in the EIDL program.

For example, in the real estate industry, the broker/agent relationship is often more related to State law rather than any sort of significant day-to-day control over what the agent does in terms of how they conduct their

business, build their clientele, or market their services. Many agents operate to a great deal independently of the broker with their own websites, marketing materials/programs, and may even have their own staff including licensed assistants and transaction coordinators. In such cases, it is possible, considering all relevant circumstances, to find that the agent is an independently owned and operated business and may be eligible.

Some factors to consider in making eligibility determination include:

An agent is engaged by the broker for an indefinite period of time.

The agent is not required to follow a routine or schedule set by the firm and is free to set his own working hours.

The broker firm may furnish forms, records, and promotional materials, but the agent furnishes his own place of business, equipment, all other materials, and supplies used in performing his services.

The agent may independently hire, supervise, pay, and discharge others assisting him.

The broker firm pays the agent strictly on a commission basis. The agent receives no pension, sick leave days, paid vacation days, or bonuses and has no guaranteed minimum amount of pay. The broker does not carry workmen's compensation insurance on the agent and does not deduct social security taxes or federal or state income taxes from the agent's pay.

Substantially all payments for their services as agents are directly related to sales, rather than the number of hours worked.

Their services are performed under a written contract providing that they will not be treated as employees for Federal tax purposes.

Possession of a business license does not in and of itself create eligibility.

If the applicant is a franchise, refer to counsel for eligibility guidance.

b. Effect of IRS Guidelines. Not all self-employed persons or independent contractors for tax purposes rise to the level of "small business concern" as required for EIDL eligibility. Merely filing a Schedule C with the Federal Tax Return does not qualify the individual as an independently owned and operated business. We are not bound by IRS guidelines for determining if an individual is an employee or an independent contractor. EIDL eligibility is contingent upon compliance with the business risk and freedom from control factors.

(SIGNED – HERBERT L. MITCHELL)

Herbert L. Mitchell