UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
Washington, D.C.

| | | |
|---|---|---|
| **In the Matter of:** | * | |
| **JOHN ALAGHA and ALAGHA AND ASSOCIATES,** | * | **Docket No. 11-3682-DB** |
| **Respondents.** | * | |

## DEBARRING OFFICIAL'S DETERMINATION

### Introduction and Background

By Notice of Proposed Debarment dated September 10, 2010 ("Notice"), the Department of Housing and Urban Development ("HUD") notified Respondents JOHN ALAGHA and ALAGHA AND ASSOCIATES that HUD was proposing their debarment from future participation in procurement and nonprocurement transactions as a participant or principal with HUD and throughout the Executive Branch of the Federal Government for a period of three years from the date of the final determination of this action. The Notice advised Respondents that their proposed debarment was in accordance with the procedures set forth in 2 C.F.R. parts 180 and 2424 and was based upon their performing an audit of a HUD-approved Non-supervised mortgagee and issuing an independent auditor's report on the financial statements of the mortgagee. The Notice recited that Respondents' actions were in violation of HUD Consolidated Audit Guide for Audits of HUD Programs 2000.04 Rev-2 CHG-1. Paragraph 1-2, which requires the report be issued by a CPA licensed in the state of the mortgagee's residence. The Notice further recited that Respondent Alagha was not a certified public accountant nor was Respondent Alagha and Associates a certified public accountancy firm licensed in California, the state in which the mortgagee resided.

### Procedural History

In a letter dated October 28, 2010, Respondents, through their attorney, requested that the proposed action be dismissed. In an Order issued March 4, 2011, the Debarring Official's Designee set a briefing schedule along with a hearing date of April 26, 2011. Respondents then filed a Motion for Continuance on March 28, 2011, which was granted and a new hearing date of May 17, 2011, was set in an Order issued April 26, 2011. In an April 5, 2011 submission, Respondents filed their Response to Government's Pre-Hearing Brief and Respondents' Request for Dismissal of the Case. The Government then filed a Motion for Stay on May 11, 2011, which was granted on May 20, 2011. On June 9, 2011,

the Government filed a Motion to Refer to a Hearing Officer for Fact Finding, which was granted in an Order entered June 30, 2011. In an Order issued July 1, 2011, this matter was referred to the Office of Hearings and Appeals to be assigned to a hearing officer pursuant to 2 C.F.R. § 180.845(c). That office then issued a Notice of Hearing and Order on July 20, 2011. On March 21, 2013, the Administrative Judge, after a hearing, issued a Recommended Determination. On April 3, 2013, the Administrative Judge issued an Amended Recommended Determination to correct errors noted in the Recommended Determination. On April 10, 2013, the Administrative Judge issued an Order Correcting Amended Recommended Determination and appended thereto the corrected Amended Recommended Determination (ARD).

**Discussion**

In the corrected ARD, in addition to making findings of fact, the Administrative Judge discussed all elements of the case along with relevant legal authorities that would affect the outcome of the case. The Administrative Judge also recommended that a two-year period of debarment be imposed on Respondents. The applicable provisions governing the referral of this case to the Administrative Judge are found at 2 C.F.R. § 180.845(c), which states that

> The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any resultant finings, in whole or in part, only after specifically determining them to be arbitrary, capricious, or clearly erroneous.

I have carefully read the corrected ARD, including the exhaustive treatment by the Administrative Judge of the disputed facts and the aggravating and mitigating factors raised by the parties, and find no reason to disturb his findings of fact. Along with making findings of fact, the Administrative Judge made conclusion of law as well as recommending that Respondents be debarred for two years

There is no authority in the debarment regime specifically authorizing an Administrative Judge to make conclusions of law or to recommend, or not, debarment or appropriate terms of debarment. Accordingly, while an Administrative Judge's recommendation with respect to final action on a proposed debarment may be treated with deference, a debarring official, because the regulation confers on him the exclusive power to debar, or not to debar, a respondent, is not at liberty to cede this regulatory grant of power to an Administrative Judge. [1] For that reason, a debarring official, when faced with a Recommended Decision, must weigh the recommendation in light of, *inter alia*, all the evidence presented, arguments of the parties, and applicable legal and regulatory authorities. The debarring official, in fealty to the regulations, must determine *de novo* or independently an appropriate period of debarment, if any, notwithstanding the Administrative Judge's recommendation. *See, e.g.*, 2 C.F.R. § 180.845(c).

[1] The grant of the power to debar, or not to debar, is to be found at 2 C.F.R. § 180.845(a), which provides that the "debarring official may debar you for any of the causes in § 180.800. However, the official need not debar you even if a cause for debarment exists. The official may consider the seriousness of your acts or omissions and the mitigating and aggravating factors set forth at § 180.860."

The only open issue, therefore, is what is an appropriate period of debarment, if any, that should be imposed on Respondent. In its Notice, HUD, as stated above, proposed a three-year debarment. In light of the Administrative Judge's findings, and his well-considered treatment of the aggravating and mitigating factors, I am persuaded that a two-year period of debarment in this case is appropriate. It is worth noting also that 2 C.F.R. § 180.125(c) prohibits an agency from excluding "a person . . . for the purposes of punishment." A longer period of exclusion here in the face of the corrected ARD, incorporated herein by reference, arguably could be construed as punishment.

**Conclusion**

Accordingly, based on the administrative record in this matter, in particular the corrected Amended Recommended Determination, I have determined, in accordance with 2 C.F.R §§ 180.870(b)(2)(i) through (b)(2)(iv), to debar Respondents for a period of two years effective from the date of this Determination. Respondents' "debarment is effective for covered transactions and contracts that are subject to the Federal Acquisition Regulation (48 C.F.R. chapter 1), throughout the executive branch of the Federal Government unless an agency head or an authorized designee grants an exception."

Dated: 5/21/13

Craig T. Clemmensen
Debarring Official