

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

IN THE MATTER OF:

Timely Engineering Soil Tests, LLC

Petitioner

SBA No. BDP-297

Decided: August 27, 2008

APPEARANCES

Lev Buchko, President, Timely Engineering Soil Tests, LLC, *pro se*, Tucker, Georgia, for Petitioner.

Sam Q. Le, Esq., Office of General Counsel, Small Business Administration, Washington, D.C., for the Agency.

DECISION

ARKOW, Administrative Law Judge:

I. Introduction and Jurisdiction

On March 18, 2008, Timely Engineering Soil Tests, LLC (Petitioner) appealed a Small Business Administration (SBA) determination denying Petitioner entry into the 8(a) program. The SBA found that Petitioner did not establish by preponderant evidence that its owner is socially disadvantaged. I find that the Petitioner established by preponderant evidence that its owner was subject to chronic and substantial pay discrimination that negatively impacted his entry into and advancement in the business world. Accordingly, the SBA determination was arbitrary, capricious, and contrary to law.

This appeal petition is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 124 and 134. The appeal is timely. 13 C.F.R. § 134.202(a)(i).

II. Issue

Whether the SBA's determination that Petitioner is ineligible for 8(a) certification is arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

### III. Facts

1. Petitioner is owned, controlled, and managed by its President, Lev Buchko. Mr. Buchko was born in Uzbekistan and earned a degree in civil engineering at the Tashkent Institute of Railway Engineers. AR, Ex. 12, at 5. Mr. Buchko worked as a senior engineer at the Tashkent Bridge Testing Station of Ministry of Rail Communications in Uzbekistan from 1982 to 1993. AR, Ex. 12, at 4. In April 1994, Mr. Buchko immigrated to the United States as a refugee. AR, Ex. 9, at 1. Mr. Buchko is an American citizen. AR, Ex. 13, at 8.

2. Mr. Buchko was employed by Golder Associates, Inc. from 1994 to 1998. AR, Ex. 12, at 4. While at Golder, Mr. Buchko passed the Georgia Engineer in Training examination. AR, Ex. 5, at 58. As a result, Golder promoted Mr. Buchko to a staff engineer position. Despite the promotion and a concomitant increase in responsibilities, Mr. Buchko did not receive a pay raise. AR, Ex. 5, at 6. Several months later, Mr. Buchko received a certification in the construction subfield of Geotechnical Engineering Technology, Level 1, from the National Institute for Certification in Engineering Technologies (NICET). AR, Ex. 5, at 55. Upon receiving this certification, he became the only certified technician in Golder's Atlanta office. AR, Ex. 5, at 6. Again, he did not receive a pay raise despite this additional certification. *Id.*

3. Mr. Joseph W. Emmons, Mr. Buchko's former supervisor at Golder, stated that Mr. Buchko's pay was "significantly below that of other technicians performing the same duties" despite Mr. Buchko's superior technical knowledge and being the only technician with NICET certification. AR, Ex. 5, at 57.

4. Mr. Buchko was employed by Accura Engineering and Consulting Services, Inc. from 1998 to 2005. AR, Ex. 12, at 3-4. During his nearly seven years at Accura, Mr. Buchko claims he was underpaid, even though he received his Georgia professional engineering license during this period. AR, Ex. 5, at 67. He submitted an April 2005 pay stub showing he was paid \$54,000 per year. AR, Ex. 5, at 60. To demonstrate he was underpaid, he provided the SBA a 2007 statistical study, which shows professional engineers in the Atlanta, Georgia area had a median salary of about \$75,000 and those with ten to nineteen years of experience had a median salary of about \$79,000. AR, Ex. 5, at 62.

5. Mr. J. Philip Kyle, a co-worker at Accura, stated that Mr. Buchko was severely underpaid based on his responsibilities and knowledge, which Mr. Kyle attributes to Mr. Buchko's English language difficulties. AR, Ex. 5, at 68.

### IV. SBA Determinations

#### A. Initial Determination

On September 24, 2007, the SBA denied Petitioner's 8(a) application. AR, Ex. 6. The SBA found Mr. Buchko was not socially disadvantaged because he had not presented evidence that would allow the SBA to conclude that his ability to compete in the free marketplace has been impaired due to discriminatory practices against Mr. Buchko and/or Petitioner because of Mr. Buchko's place of birth, Uzbekistan.

The SBA determined that a person from Uzbekistan is not within the defined group of Subcontinent Asian Americans who may be presumed to be socially disadvantaged and that Petitioner's owner, Mr. Buchko, did not "demonstrate chronic and substantial discriminatory practices."

Mr. Buchko did mention he was paid less than other engineers, even after passing his licensing examinations. The SBA found, however, that he did not provide corroborating evidence such as affidavits from uninterested third parties or documents setting forth company policies alleged to be discriminatory, and it could be interpreted that the lower wages were related to his written and verbal skills he stated were not up to par.

The SBA advised Petitioner that it could request reconsideration or appeal its determination. If it requested reconsideration, Petitioner was requested to provide evidence to substantiate, by a preponderance of evidence, Mr. Buchko's chronic and substantial social disadvantage.

#### B. Final Determination

On February 4, 2008, after evaluating Petitioner's October 31, 2007, request for reconsideration, the SBA determined that Petitioner did not submit sufficient evidence to overcome its determination that Mr. Buchko was not socially disadvantaged because of his Uzbekistan origin. The SBA found Petitioner's examples either did not indicate bias or failed to include sufficient details to indicate a negative impact on Mr. Buchko's entry or advancement in the business world. Petitioner appealed that denial on March 18, 2008.

The SBA evaluated evidence in three areas: (1) education, (2) employment, and (3) business history. Because of the disposition of the case, it is unnecessary to summarize the evidence of education and business history.

#### Employment

The final determination addressed five claims of bias, prejudice, or discrimination in the area of employment. First, the SBA addressed Mr. Buchko's claims that he was underpaid in various jobs and failed to receive pay increases. The SBA found that Mr. Buchko did not provide information regarding the education or tenure of higher-paid employees nor did Mr. Buchko indicate that he requested pay increases. The SBA concluded that there was no indication that Mr. Buchko's lower pay was a result of bias against Mr. Buchko's Uzbekistan origin, but may have been due to Mr. Buchko being new to the company.

Second, the SBA found Mr. Buchko's failure to receive a number of job interviews was not the result of bias, but rather appeared to result from a lack of work experience in the U.S. Further, Mr. Buchko failed to supply information regarding the job requirements for the jobs he was denied an interview.

Third, the SBA addressed Mr. Buchko's contention that he was underpaid based on his 2005 salary of \$54,000 as compared to the 2007 median salary for a Professional Engineer in the Atlanta area of \$75,000. The SBA concluded that it was not reasonable to compare Mr. Buchko's 2005 salary to 2007 median salaries in the Atlanta area. Further, there was no indication that Mr. Buchko's salary was the result of bias due to being from Uzbekistan, and instead may have resulted from Mr. Buchko's poor English skills.

Fourth, the SBA found Mr. Buchko's assertion that his work experience in Uzbekistan was discounted for certification exams to be without merit. The SBA concluded that all applicants for certification had their foreign work experience subject to the same review regardless of his/her place of birth.

Fifth, the SBA found Mr. Buchko's failure to receive additional compensation from his employer for learning Excel to not be a result of bias due to Mr. Buchko's birthplace. Instead, the SBA found there was no indication whether Excel was required for the job or if other employees received additional compensation for learning Excel.

## V. Position of the Parties

### A. Petitioner

On March 18, 2008, Petitioner filed its appeal. First, Petitioner asserts the SBA improperly based its social disadvantage determination on Mr. Buchko's country of origin, rather than evaluating the broader issue of Mr. Buchko's ethnic origin or ethnicity.

Next, Petitioner claims SBA failed to consider or gave insufficient weight to the following: (1) Mr. Buchko's difficulty in obtaining recommendations to take an engineering exam; (2) Mr. Buchko's limited English skills, which prevented him from taking engineering exams within the required time frame; (3) Mr. Buchko's difficulty in obtaining an engineering license because his degree from Uzbekistan was not accredited; (4) Mr. Buchko's supervisor's statement that Mr. Buchko's pay was lower than his co-workers who performed similar duties and had less technical knowledge; (5) Potential employers discounting Mr. Buchko's engineering experience in Uzbekistan, which resulted in Mr. Buchko not obtaining any job interviews and created difficulty in obtaining professional certifications; (6) Mr. Buchko's salary was 26-34 percent lower than engineers with similar years of experience and accounting for inflation; (7) Mr. Kyle's letter attributing Mr. Buchko's lower pay to his lack of English skills and not his engineering experience; (8) Mr. Buchko's failure to receive additional compensation for the creation of novel Excel programs; (9) Mr. Buchko's difficulty in obtaining business credit cards despite his perfect personal credit score; (10) Mr. Buchko's difficulty in obtaining business contacts and communicating with clients based on his lack of English proficiency and disparity in cultural experiences; and (11) the under-representation of Uzbek business owners in the U.S.

Petitioner then asserts SBA ignored the following evidence of social disadvantage: (1) the additional money and time required to translate and notarize Mr. Buchko's Uzbekistan diploma in order to be accredited for an engineering exam; (2) the South Carolina engineering licensing authority presuming Mr. Buchko's education was insufficient for certification; (3) Mr.

Emmons's letter stating that despite Mr. Buchko's advanced certifications, a qualification other co-workers lacked, Mr. Buchko did not receive any pay increases; (4) Mr. Kyle's letter stating that Mr. Buchko's social disadvantage and language barrier caused him to be underpaid; and (5) Mr. Adkison's letter stating that Mr. Buchko's inability to obtain job interviews was based on cultural perceptions that an Uzbekistan education is inferior to an American education.

In a subsequent brief, Petitioner argues that Uzbekistan should be one of the countries listed as part of the Asian subcontinent and persons with origins from Uzbekistan should thus be presumed socially disadvantaged. Petitioner argues that Uzbekistan is geographically located in Subcontinent Asia and shares a similar culture and heritage with India and Pakistan, countries listed as part of the Asian subcontinent. Moreover, Petitioner asserts that in 1990, the last time SBA revised its regulations, Uzbekistan was still part of the Soviet Union and thus could not have been included in the list of countries in Subcontinent Asia. Petitioner maintains that the definition of countries in Subcontinent Asia needs to be revised to reflect the new countries established after the fall of the Soviet Union.

#### B. Respondent SBA

On May 2, 2008, SBA responded to the appeal. First, the SBA asserts it correctly concluded that Mr. Buchko is not a member of any of the designated groups presumed to be socially disadvantaged in 13 C.F.R. § 124.103(b)(1). SBA argues the parenthetical list in 13 C.F.R. § 124.103(b)(1) is an exhaustive list of countries in the Asian Subcontinent. This list, SBA maintains, may only be amended by the SBA Administrator through the APA rulemaking process. Thus, SBA maintains it properly required Petitioner to establish Mr. Buchko's social disadvantage by the preponderance of the evidence. 13 C.F.R. § 121.103(c)(1).

Next, SBA argues it did not commit clear error in concluding Petitioner had identified Mr. Buchko's country of origin as the sole distinguishing feature contributing to his social disadvantage. SBA asserts Petitioner never specified Mr. Buchko's ethnicity in order for SBA to evaluate whether his ethnic origin caused him social disadvantage. Further, Mr. Buchko's social and language skills are not objective distinguishing features that SBA considers to be the causes of social disadvantage. 13 C.F.R. § 124.103(c)(2)(i).

SBA then argues the record supports the conclusion that none of Petitioner's claims of social disadvantage establish Mr. Buchko's social disadvantage based on country of origin. SBA discusses the examples cited by Petitioner and how the incidents either: (1) do not show social disadvantage based on country of origin and do not evince social disadvantage that is chronic and substantial as required by 13 C.F.R. § 124.103(c)(2)(ii); (2) represent experiences of others or a group, rather than the personal experiences of Mr. Buchko as required by 13 C.F.R. § 124.103(c)(2)(ii); or (3) recount Mr. Buchko's unfortunate treatment but do not establish that Mr. Buchko experienced unequal treatment due to his country of origin. Accordingly, SBA maintains that it was not arbitrary, capricious, or contrary to law for it to conclude that Petitioner had not shown by a preponderance of the evidence that Mr. Buchko meets the definition of a socially disadvantaged individual.

## VI. Discussion

### A. Standard of Review

The SBA's determination must be sustained unless a review of the written Administrative Record demonstrates the SBA acted arbitrarily, capriciously, or contrary to law in concluding that Mr. Buchko is not socially disadvantaged. 13 C.F.R. § 134.406(b).

My review of the Administrative Record is narrow and does not permit me to substitute my own judgment for that of the SBA. I must examine whether the SBA considered all of the facts presented as well as the laws and regulations that guide the decision-making process. Then, I must determine whether the SBA made a clear error of judgment in its decision before I can find the SBA acted arbitrarily, capriciously, or contrary to law. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

A clear error of judgment can be found if the SBA (1) fails to properly apply the law and regulations to the facts of the case; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its determination that runs contrary to the evidence; or (4) provides an implausible explanation that is more than a difference between my views and those of the SBA. In sum, the SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its determination. *See id.* As long as the SBA's determination is reasonable, it must be upheld on appeal. 13 C.F.R. § 134.406(b). This appeal reviews the SBA's determination solely on the contents of the administrative record. 13 C.F.R. § 134.406(a).

### B. Proof of Social Disadvantage

Petitioner's initial application stated Mr. Buchko is presumed to be socially disadvantaged because he is from Subcontinent Asia. AR, Ex. 13, at 9. The SBA informed Petitioner that its application was incomplete because, among other reasons, Mr. Buchko was born in Uzbekistan, and is thus not presumed to be socially disadvantaged. AR, Ex. 11, at 2. Specifically, 13 C.F.R. § 124.103(b) provides, "There is a rebuttable presumption that the following individuals are socially disadvantaged: ... Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal)...." Because Uzbekistan is not among the countries listed in 13 C.F.R. § 124.103(b), the SBA informed Mr. Buchko that he must establish his social disadvantage by the preponderance of the evidence.

On May 20, 2008, I ordered the parties to brief whether the parenthetical clause in 13 C.F.R. § 124.103(b) was intended to be an exhaustive or illustrative list of countries in the Asian subcontinent. I noted that Uzbekistan was created after the breakup of the Soviet Union and thus did not exist when the SBA most recently revised this regulation.

After reviewing the briefs, I find that only persons originating from the seven countries parenthetically listed in 13 C.F.R. § 124.103(b) as countries in the Asian subcontinent should be afforded presumptive disadvantaged status. Representatives of an identifiable group whose

members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively disadvantaged group. 13 C.F.R. § 124.103(d)(1). Until the SBA makes a final decision that a group should be considered presumptively disadvantaged, and publishes its conclusion as a notice in the Federal Register, the list of countries in 13 C.F.R. § 124.103(b) is an exhaustive list. *See* 13 C.F.R. § 124.103(d)(4).

To be accepted into the 8(a) program on a claim of ethnic discrimination, Petitioner must establish that Mr. Buchko, who owns, controls, and manages Petitioner, is socially and economically disadvantaged. 13 C.F.R. §§ 124.101-124.108. The only issue in dispute is whether Mr. Buchko is socially disadvantaged. Because Mr. Buchko is not presumptively socially disadvantaged as his country of origin, Uzbekistan, is not listed in 13 C.F.R. § 124.103(b), Mr. Buchko must establish his social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1). *See Matter of Bitstreams, Inc.*, SBA No. BDP-122, at 9 (1999) (discussing the preponderance of evidence standard).

“Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.” 13 C.F.R. § 124.103(a). Petitioner must establish Mr. Buchko’s social disadvantage by meeting each of the following elements:

(1) Mr. Buchko’s claim was based on “[a]t least one objective distinguishing feature that has contributed to social disadvantage, such as . . . ethnic origin . . . not common to individuals who are not socially disadvantaged . . . .”;

(2) Mr. Buchko had “[p]ersonal experiences of substantial and chronic social disadvantage in American society, not in other countries . . . .”; and

(3) Mr. Buchko’s personal experiences of social disadvantage had a “[n]egative impact on [his] entry into or advancement in the business world,” which nexus may be shown by any relevant evidence, particularly discrimination in education, employment, and business history.

13 C.F.R. § 124.103(c)(2).

#### 1. Objective Distinguishing Feature Element

The SBA argues that it did not consider Mr. Buchko’s ethnic origin as an independent distinguishing feature contributing to his claimed social disadvantage because Mr. Buchko never specified his ethnicity and instead only stated his country of origin.<sup>1</sup> SBA Response, at 23. The problem with this argument is that it ignores a commonly accepted definition of ethnicity, *i.e.*, ethnicity is rooted in national origin. *See The American Heritage New Dictionary of Cultural Literacy* (3d ed. 2005) (defining “ethnicity” as “identity with or membership in a particular racial, *national*, or cultural group and observance of that group’s customs, beliefs, and language” (emphasis added)).

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<sup>1</sup> Petitioner did, however, list Mr. Buchko’s “ethnic origin with limited English skills preventing business development” as an objective distinguishing feature. AR, Ex. 13, at 9.

National origin discrimination includes discrimination because a person comes from a particular place or is a member of a national origin group. *See* EEOC Compliance Manual § 13-II, *available at* <http://www.eeoc.gov/policy/docs/national-origin.html> (last visited August 20, 2008) (hereinafter EEOC Manual). A national origin group is often referred to as an ethnic group. *Id.* It is a group of people who share a common language, culture, ancestry, and/or similar social characteristics. *Id.* Employment discrimination against a national origin group includes discrimination based on ethnicity and linguistic traits. *Id.* Such discrimination can violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*<sup>2</sup> Petitioner claims employment and pay discrimination based on his country of origin, Uzbekistan, which necessarily implicates his Uzbek ethnicity.

Further, contrary to SBA counsel's argument, Mr. Buchko did not need to specify that he belonged to the Uzbek, Tatar, or Tajik ethnic group; it is sufficient that he stated that he emigrated from Uzbekistan to establish his Uzbek national origin or ethnicity. I also note that of the six listed ethnic groups in Uzbekistan, eighty (80) percent are Uzbek. CIA - The World Factbook - Uzbekistan, *available at* <https://www.cia.gov/library/publications/the-world-factbook/geos/uz.html> (last visited August 19, 2008).

Accordingly, the SBA's conclusion that Petitioner did not establish his ethnicity as an objective distinguishing feature is erroneous. Therefore, Mr. Buchko meets the first element: Mr. Buchko's Uzbek origin or ethnicity is an objective distinguishing feature not common to individuals who are not socially disadvantaged.

## 2. Substantial Social Disadvantage Element (Pay Discrimination)

Petitioner must establish that the social disadvantage was personal to Mr. Buchko, stemmed from his ethnicity, was rooted in treatment he experienced in American society, and was chronic and substantial. Petitioner must also establish Mr. Buchko's personal experiences of social disadvantage had a negative impact on his entry into or advancement in the business world. Petitioner presented evidence in the areas of education, business history, and employment; Petitioner, however, does not have to establish social disadvantage in each of these areas. *Bitstreams*, SBA No. BDP-122, at 8 (citing 62 Fed. Reg. 43,584, 43,587 (Aug. 14, 1997) (proposed rule) ("The failure to establish such disadvantage in any one or even two areas (*i.e.*, education, employment, or business history) would not prevent an individual from meeting this requirement of negative impact as long as the totality of the circumstances experienced by the individual demonstrate such disadvantage.")). Because I find Petitioner established Mr. Buchko's social disadvantage in the area of employment, it is unnecessary to consider the evidence in the areas of education and business history.

Mr. Buchko was employed by Golder Associates, Inc. from 1994 to 1998 and by Accura Engineering and Consulting Services, Inc. from 1998 to 2005, for a total of approximately 11 years. AR, Ex. 12, at 3-4.

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<sup>2</sup> It is not necessary to have a Title VII violation to establish a claim of social disadvantage under the 8(a) program. The 8(a) requirements are less stringent than Title VII requirements.



a. Golder

During his four years at Golder, Petitioner claims that Mr. Buchko was underpaid when compared to other employees performing the same duties. While at Golder, Mr. Buchko passed the Georgia Engineer in Training examination. AR, Ex. 5, at 58. As a result, Golder promoted Mr. Buchko to a staff engineer position. Despite the promotion and a concomitant increase in responsibilities, Mr. Buchko did not receive a pay raise. AR, Ex. 5, at 6. Several months later, Mr. Buchko received a certification in the construction subfield of Geotechnical Engineering Technology, Level 1, from the National Institute for Certification in Engineering Technologies (NICET). AR, Ex. 5, at 55. Upon receiving this certification, he became the only certified technician in Golder's Atlanta office. AR, Ex. 5, at 6. Again, he did not receive a pay raise despite this additional certification. *Id.*

After the SBA asked for corroborating evidence of discriminatory company policies,<sup>3</sup> Petitioner submitted a statement by Mr. Buchko's former supervisor, Mr. Joseph W. Emmons. Mr. Emmons stated that Mr. Buchko's pay was "significantly below that of other technicians performing the same duties" despite Mr. Buchko's superior technical knowledge and being the only technician with NICET certification. AR, Ex. 5, at 57.

An applicant's discrimination claim, however, need not be corroborated to establish discrimination under the preponderance of evidence standard. *Bitstreams*, SBA No. BDP-122, at 13 (citing 63 Fed. Reg. 35,726, 35,728 (June 30, 1998) (noting that "an individual's statement of personal experiences in combination with the generalized evidence may be sufficient to demonstrate social disadvantage.")). The SBA's erroneous request for corroboration, however, is harmless because Mr. Emmons's affidavit corroborates Petitioner's claim that Mr. Buchko's training and technical knowledge exceeded that of his peers and he was the only licensed employee, yet he did not receive a pay raise. AR, Ex. 5, at 57.

In its reconsideration determination, the SBA concluded Petitioner did not establish social disadvantage in the area of employment at Golder because (1) Petitioner did not submit any evidence regarding the education or tenure of other employees, which could have been a factor in their levels of pay; (2) there was no evidence the lower pay was due to bias against Uzbeks; and (3) Mr. Buchko's lower pay could have been because he was new to the company. AR, Ex. 1, at 2-3.

The SBA must accept Mr. Buchko's claims of social disadvantage as true unless the evidence in the administrative record is (1) inherently improbable, (2) inconsistent, (3) lacking in sufficient detail, or (4) merely conclusory. Further, the SBA may discredit Petitioner's evidence if, without explanation, Petitioner fails to present apparently available evidence to support the claim of social disadvantage. *Bitstreams*, SBA No. BDP-122, at 14.

First, the SBA may discount inherently improbable evidence. It did not do so. Here, Petitioner's claim that Mr. Buchko did not receive pay raises because of his ethnicity is not inherently improbable. There is no evidence in the record that Mr. Buchko had any performance

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<sup>3</sup> AR, Ex. 6, at 2.

problems at Golder. Absent any other explanation, it is more likely than not that the reason Mr. Buchko did not receive a pay raise during his tenure at Golder was discriminatory.

Second, the SBA may disbelieve an inconsistent account. Here, the SBA found no inconsistencies that would discredit Mr. Buchko's pay discrimination claim at Golder.

Third, the SBA may find the record lacks the detail necessary to credit Mr. Buchko's social disadvantage claim. Here, the record contains sufficient detail of Mr. Buchko's claim to lend credibility to the evidence Petitioner submitted of ethnic-based pay discrimination at Golder.

Fourth, the SBA may find the Golder claim contains conclusory statements that cast doubt on the persuasive character of the evidence. Statements merely characterizing conduct as discriminatory do not provide sufficient information about the underlying acts to permit the SBA to find the applicant established the social disadvantage claim. Here, the evidence is not conclusory. The record demonstrates Petitioner's claim provides facts, not conclusions, supporting the claim of discrimination.

Finally, the SBA may draw an adverse inference from the absence of other, apparently available, evidence when the applicant declines without explanation to present it. The SBA's conclusion that Petitioner did not submit evidence concerning the education or tenure of other employees is unreasonable and should not have been considered by the SBA. First, the SBA never requested such information. Second, it is unreasonable for the SBA to expect Petitioner to be able to produce the requested records because (1) they are not in his possession, (2) they are ten to fourteen years old, and (3) without a lawsuit or voluntary production, Golder is not under any legal obligation to provide that information. Moreover, it is unlikely that Golder would voluntarily produce the information because Golder might be subject to a discrimination claim. Thus, although the SBA cites the absence of potential evidence which it believes would defeat Petitioner's claim of social disadvantage at Golder, I find that potential evidence is not reasonably available to support an adverse inference.

The SBA's conclusion that the lower pay could have been because Mr. Buchko was a new employee is unreasonable. Although Mr. Buchko was a new employee in his first year at the company, that argument does not hold water after his second, third, and fourth year with Golder. More significantly, the SBA's conclusion is mere speculation. There is no evidence in the record that tenure was a factor in Golder's decision to grant pay raises. Indeed, the evidence implies the contrary because Mr. Buchko received annual cost of living raises. In fact, in the business world, unlike most of the Federal government, pay raises are typically based on merit rather than longevity. Most importantly, the SBA relied on hypothetical reasons for Mr. Buchko's pay stagnation instead of evaluating the actual evidence presented by Petitioner, which shows Mr. Buchko did not receive a pay raise despite obtaining professional certifications and licenses.

The SBA seems to be requiring Petitioner to discount all possibilities for Mr. Buchko not receiving a pay raise rather than showing it is more likely than not that discrimination based on Mr. Buchko's Uzbek ethnicity was the reason he did not receive a raise. It is unlikely that there

would be direct evidence that Golder discriminated against Mr. Buchko by refusing to give him any raises in the four years he was an employee of the company. So it is necessary to draw any reasonable inferences from the evidence in the record, not speculate that there could possibly be other reasons for Golder not giving Mr. Buchko any pay raises.

When, as here, the SBA finds evidence unconvincing, it must provide cogent reasons for that conclusion. It may not “arbitrarily disbelieve credible evidence.” *Bitstreams*, SBA No. BDP-122, at 15 (citing *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 279 (1994) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., at 22 (1945))). Rather, if the applicant “establishes a prima facie case supported by credible and credited evidence,” the SBA must accept the evidence as true unless “the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated.” *Matter of Woroco Int’l*, SBA No. BDP-174, at 9 (2002) (quoting H.R. Rep. No. 1980, 79th Cong., 2d Sess., at 36 (1946) (discussing § 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556(d))). Here, Petitioner’s evidence is credible and the SBA has not shown any substantial reason for disbelieving it.

The SBA must recognize that because there is no discovery or other opportunities to confront or cross-examine an alleged offender to establish discrimination, the applicant’s own submission, without more, is common in 8(a) cases. 13 C.F.R. §§ 134.406(a), 134.407. Thus, as here, the applicant’s examples may be the only available evidence of social disadvantage. A decision-maker must recognize that the reasons for pay discrimination are rarely documented and one cannot obtain statements admitting discrimination. *Bitstreams*, SBA No. BDP-122, at 13; *Woroco*, SBA No. BDP-174, at 7.

Accordingly, in the absence of evidence which casts doubt on Petitioner’s submissions, or some other cogent reason not to accept the evidence in the record, the SBA must accept it as true. I conclude that Petitioner established the Golder claim of substantial pay discrimination by a preponderance of the evidence and the SBA’s contrary finding is unreasonable, arbitrary, capricious, and contrary to law.

#### b. Accura

During his nearly seven years (1998-2005) at Accura Engineering and Consulting Services, Inc., Mr. Buchko claims he was underpaid, even though he received his Georgia professional engineering license during this period. AR, Ex. 5, at 67. He submitted an April 2005 pay stub showing he was paid \$54,000 per year. AR, Ex. 5, at 60. To demonstrate he was underpaid, he provided the SBA a 2007 statistical study, which shows professional engineers in the Atlanta, Georgia area had a median salary of about \$75,000 and those with ten to nineteen years of experience had a median salary of about \$79,000. AR, Ex. 5, at 62.

In his request for reconsideration, Petitioner submitted a notarized statement from Mr. J. Philip Kyle, a co-worker at Accura. Mr. Kyle states that Mr. Buchko was severely underpaid based on his responsibilities and knowledge, which Mr. Kyle attributes to Mr. Buchko’s English language difficulties. AR, Ex. 5, at 68.

The SBA concluded: (1) it was unreasonable to compare Mr. Bucko's 2005 salary with 2007 data, (2) Mr. Kyle attributed Mr. Buchko's lower pay to his language and communication difficulties, not to Mr. Buchko's Uzbek origin, and (3) there was no evidence the lower pay was the result of bias due to being born in Uzbekistan. AR, Ex. 1, at 3.

First, the SBA appears to concede that Mr. Buchko's pay was lower than it should have been by concluding the lower pay may have been due to reasons other than Mr. Buchko's Uzbek origin. SBA argues, however, that Petitioner did not precisely establish the difference between Mr. Buchko's pay and other engineers in the Atlanta area. While I agree that comparing data from different years is not a precise measure of the *exact* pay discrepancy, it is nonetheless probative of a pay discrepancy. When dealing with statistical data, one is not always able to do an exact comparison.<sup>4</sup> Petitioner's submissions were made in 2007 and it supplied 2007 data, which was apparently what was available online. While the SBA may reasonably disagree with the precise pay differential between Mr. Buchko's pay and other professional engineers in the Atlanta area, it is unreasonable for the SBA to dismiss the evidence outright. In other words, the weight given to such evidence is within the discretion of the SBA decision-maker; it is unreasonable, however, to fail to consider the evidence at all. *See Bitstreams*, SBA No. BDP-122, at 15. The record thus establishes that Mr. Buchko received less pay than the median pay for engineers in the Atlanta area.

Next, based on Mr. Kyle's statement, the SBA found Mr. Buchko could have received less pay because of his poor language and communication skills, rather than his Uzbek origin, which is not probative of social disadvantage. Ethnicity and language skills, however, are not issues to be considered in isolation. Indeed, language proficiency and/or a foreign accent may be the only manifestation of one's ethnic origin. Further, if one fails to receive a pay raise or promotion based on poor language skills, and English proficiency is not required for the job, the applicant may establish a personal experience of social disadvantage.

Indeed, in a Title VII context, an English fluency requirement is permissible only if required for the effective performance of the position for which it is imposed. EEOC Manual § 13-V. Likewise, "an employer may only base an employment decision on accent if effective oral communication in English is required to perform job duties and the individual's foreign accent materially interferes with his or her ability to communicate orally in English." *Id.*

Here, there is no evidence in the record that Mr. Buchko's position as a Geotechnical Laboratory Director at Accura required English proficiency. Mr. Buchko's technical proficiency has also been demonstrated by evidence showing he passed his professional engineer examination, completed many technical courses, and earned a number of professional

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<sup>4</sup> When determining economic disadvantage, the SBA compares a participant's income to IRS income tables. Invariably, the IRS tables are a few years behind the income being considered by the SBA. This comparison has been found to be reasonable. *See, e.g., Matter of Tower Communications*, SBA No. MSB-587, at 7 (1997) (citing cases using this methodology). If one accepts the SBA's argument that it is unreasonable for Petitioner to use mismatched comparisons, then it could be argued that the SBA's use of older IRS tables in excessive income cases is also unreasonable.

certificates. It is unreasonable for the SBA to conclude that an employee who is technically proficient at his job as an engineer and whose written and oral communicative skills have not been established as an important part of his job duties may be denied pay raises for seven years because he speaks with a foreign accent, and may not be as familiar with the English language as his peers.

Accordingly, I conclude that Petitioner established the Accura claim of substantial pay discrimination by a preponderance of the evidence and the SBA's contrary finding is unreasonable, arbitrary, capricious, and contrary to law.

### 3. Chronic Social Disadvantage Element

Petitioner established by a preponderance of evidence that Mr. Buchko suffered substantial pay discrimination at Golder for four years from 1994 to 1998 and at Accura for nearly seven years from 1998 to 2005. 13 C.F.R. § 124.103(c)(2)(ii). This amounts to almost eleven years of pay discrimination at two jobs. This is chronic discrimination. *Matter of Informed Decision Services, Inc.*, SBA No. MSB-518, at 10 (1995) (holding salary discrimination at two jobs over a seven year period is chronic).

### 4. Negative Impact Element

To establish social disadvantage, the SBA considers that unequal treatment in pay and fringe benefits negatively impacts an 8(a) applicant's entry or advancement in the business world. 13 C.F.R. § 124.103(c)(2)(iii)(B). Thus, pay discrimination is per se evidence that Mr. Buchko's personal experiences of social disadvantage had a negative impact on his entry into or advancement in the business world. *Id.*

### 5. Summary

I find the SBA made a clear error of judgment in concluding Petitioner did not establish Mr. Buchko's social disadvantage by a preponderance of the evidence. First, the SBA did not apply the correct legal standard for assessing a foreign accent and English language difficulties when considering a discrimination claim. Second, the SBA did not consider and evaluate the significant relevant facts during his tenure at Golder and Accura in assessing the pay discrimination claims, namely, the length of Mr. Buchko's employment, the certifications and licenses he earned during his employment, the promotions he earned, and the lack of any adverse actions demonstrating poor performance. Third, the SBA did not find any reason for disbelieving any of Petitioner's evidence. Finally, the SBA required Petitioner to discount every possibility that would justify underpaying Mr. Buchko.

For these reasons, it was unreasonable, arbitrary, capricious, and contrary to law for the SBA to conclude that Petitioner has not established by a preponderance of the evidence that Mr. Buchko's ethnic origin from the country of Uzbekistan led to chronic and substantial pay discrimination, which impeded his entry and advancement into the business world.

VII. Conclusion

Respondent Small Business Administration's decision that Petitioner is ineligible for 8(a) certification is ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

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RICHARD S. ARKOW  
Administrative Law Judge