

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

IN THE MATTER OF:

Alabasi Construction, Inc.,

Petitioner

SBA No. BDP-368

Decided: October 12, 2010

APPEARANCES

Hayder Alabasi, Owner, Alabasi Construction, Inc., Cleveland, Ohio, for Petitioner

Meagan Guerzon, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION

I. Introduction and Jurisdiction

On April 22, 2010, Alabasi Construction, Inc. (Petitioner) appealed a Small Business Administration (SBA) determination denying Petitioner entry into the 8(a) Business Development (BD) program. The SBA found Petitioner did not establish by a preponderance of the evidence that its owner, Mr. Hayder Alabasi, is socially disadvantaged or economically disadvantaged, as required by the regulations governing program eligibility. 13 C.F.R. §§ 124.101, 124.103, 124.104. I find the SBA's denial of Petitioner's 8(a) BD program application is reasonable, supported by the administrative record, and not arbitrary, capricious, or 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. Petitioner filed this appeal within forty-five days of receiving the SBA's final determination, so the appeal is timely. 13 C.F.R. § 134.202(a)(1). Accordingly, this appeal is properly before the SBA Office of Hearings and Appeals (OHA) for decision.

II. Issue

Was the SBA's determination denying Petitioner admission into the 8(a) BD program arbitrary, capricious, or contrary to law? *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

III. Background

A. Petitioner's Application

On July 25, 2008, Petitioner submitted its initial documentation in support of its application for admission into the 8(a) BD program. In response to an email from the SBA of the same date, Petitioner submitted further documentation in support of its application; this letter is dated August 30, 2008, but was received by the SBA on September 12, 2008.

On September 15, 2008, the SBA determined that Petitioner's application was incomplete and notified Petitioner that it must resubmit the application with more information. Among other requests for information and documentation, the SBA requested that Mr. Alabasi, an Arab American of Iraqi descent, expand upon his narrative claiming he is socially disadvantaged due to his ethnic background. On October 2, 2008, Petitioner submitted an expanded narrative regarding social disadvantage, along with the requested documentation.

On October 16, 2008, after reviewing Petitioner's amended application, the SBA again requested further information from Petitioner. The SBA reiterated that Mr. Alabasi's narrative was insufficient to establish social disadvantage and also requested more information and documentation regarding economic disadvantage, among other things. On February 18, 2009, after requesting an extension of time to supplement its application, Petitioner submitted an updated narrative, further information regarding economic disadvantage, and the documentation requested by the SBA.

On March 9, 2009, the SBA notified Petitioner that there were continuing deficiencies in its application. Specifically, the SBA requested updated financial statements and forms due to the length of time Petitioner's application had been pending. On March 16, 2009, Petitioner submitted all the requested documentation.

On March 27, 2009, the SBA notified Petitioner that its application was substantially complete, but also requested that Petitioner submit its final 2008 financial statements upon their completion. In a letter dated May 13, 2009 (received by the SBA on May 18, 2009), Petitioner submitted its final 2008 financial statements.

B. SBA's Initial Determination

On August 26, 2009, the SBA issued its initial determination denying Petitioner admission to the 8(a) BD program. The SBA first found that Mr. Alabasi is not economically disadvantaged, as defined by 13 C.F.R. § 124.104. The SBA explained that an individual whose personal net worth exceeds \$250,000 is not considered economically disadvantaged. The SBA calculated, based on Mr. Alabasi's personal financial statement, that his personal net worth is \$291,500 after subtracting his equity in both Petitioner (\$500) and his primary residence (\$80,000).

The SBA also determined Mr. Alabasi had not established that he is socially disadvantaged due to his ethnic background. *See* 13 C.F.R. § 124.103. The SBA explained that

because Mr. Alabasi is not a member of one of the groups specifically recognized as socially disadvantaged in the regulation, he was required to establish his social disadvantage by a preponderance of the evidence. The SBA further explained that “the totality of the evidence must show that discriminatory practices in the areas of education, employment, or business history have had a negative impact on the individual's entry into or advancement in the business world.” AR Ex. 11, at 2.

After a review of the materials submitted by Mr. Alabasi with regard to social disadvantage, the SBA concluded that he failed to provide “the quality and quantity of evidence necessary to meet the preponderance of the evidence standard in supporting [his] case of social disadvantage.” *Id.* First, with regard to educational opportunities, the SBA stated that Mr. Alabasi indicated he felt he could not pursue an education upon his arrival in the United States due to discrimination and intimidation from others. However, the SBA also noted that Mr. Alabasi indicated he had no knowledge of the English language. The SBA concluded that Mr. Alabasi's inability to pursue an education was not due solely to prejudice based on his ethnicity, but due at least in part to his lack of knowledge of the English language.

Next, with regard to employment opportunities, the SBA set forth Mr. Alabasi's assertions that upon arriving in the United States he worked for \$3/hour for an Arab American contractor, that he tried to find other jobs but was unsuccessful, and that he eventually worked at a 7-11 store and as a prep cook. The SBA concluded that although Mr. Alabasi attributed his lack of employment opportunities to ethnic discrimination, discrimination was not necessarily the reason for his lack of opportunities. Instead, the SBA noted, Mr. Alabasi was in his early twenties at the time, so his lack of experience could have contributed to his lack of employment opportunities.

With regard to business opportunities, the SBA explained that Mr. Alabasi claimed he has had difficulty obtaining bonding or securing lines of credit. Mr. Alabasi also contended he has been denied life insurance on multiple occasions due to his ethnicity. However, the SBA pointed out that it is typical for new businesses to have difficulty obtaining financing, and Petitioner currently has a loan and a mortgage, both on reasonable terms.

Finally, the SBA described several specific instances of discrimination alleged by Mr. Alabasi. On one occasion, Mr. Alabasi was told he would not be given a job, despite being the lowest bidder, because the project manager did not like people from Iraq. In another instance, after qualifying for a lottery of projects, Mr. Alabasi was only called once, whereas other contractors were called several times. Mr. Alabasi also claims other firms in Petitioner's industry that perform similar work at much higher prices get more work than Petitioner. Additionally, Mr. Alabasi described being detained at the airport while on vacation and being questioned by the Federal Bureau of Investigation. Mr. Alabasi also provided statements from his wife and two friends providing that they have witnessed discriminatory acts being taken against him.

Based upon this evidence, the SBA concluded Petitioner had failed to prove by a preponderance of the evidence that Mr. Alabasi is socially disadvantaged due to his ethnicity. The SBA explained that although Mr. Alabasi had alleged specific instances of discrimination and provided statements from friends to support his allegations, those instances were not related

to his education, employment, or business opportunities and did not impact his ability to advance in the business world. The SBA found that although Mr. Alabasi had described difficulty in obtaining employment and contracts, he had not proved that this difficulty resulted from his ethnicity alone. Instead, it appeared to the SBA that there were contributing factors, such as lack of experience and language difficulties. Additionally, the SBA pointed out the Petitioner is a successful business, and thus it does not appear that discrimination has impacted Mr. Alabasi's ability to advance in the business world. The SBA instructed Petitioner that it had thirty days to request reconsideration of its determination.

C. Petitioner's Request for Reconsideration

On October 5, 2009, Petitioner requested reconsideration of the SBA's findings. Petitioner included updated financial forms to rebut the SBA's conclusion that Mr. Alabasi is not economically disadvantaged. Specifically, Petitioner asserted that a business warehouse solely owned by Petitioner is not Mr. Alabasi's personal asset and should be removed from the calculation of Mr. Alabasi's personal net worth.

With regard to social disadvantage, Petitioner disputed the SBA's conclusion that Mr. Alabasi had not provided the quality and quantity of evidence necessary to support his claim of social disadvantage. Petitioner asserted that Mr. Alabasi's evidence does meet the preponderance of the evidence standard required for a finding of social disadvantage, especially in light of the fact that it is extremely difficult to prove discrimination. Additionally, Petitioner argued many of the SBA's assumptions were unfounded, particularly the SBA's assertions that: (1) Mr. Alabasi's lack of employment opportunities were due to his age and not his ethnicity, and (2) the fact that Petitioner is successful indicates that Mr. Alabasi's ability to advance in the business world has not been effected by prejudice.

Petitioner argued the evidence Mr. Alabasi previously submitted is sufficient to prove by a preponderance of the evidence that he has suffered social disadvantage because ethnic prejudice has impeded his ability to succeed in the business world. Petitioner added: "Particularly since the events of September 11th, 2001, there has been widespread and widely-reported instances of discrimination and racism directed towards Arab Americans, of which my own experiences have been wholly consistent." AR Ex. 10, at 2. Petitioner urged the SBA to approve his 8(a) BD program application.

D. SBA's Final Determination

On March 11, 2009, the SBA issued its final determination finding that Petitioner had not submitted sufficient evidence to overcome the initial reasons for its denial of Petitioner's application for admission to the 8(a) BD program—*i.e.*, Mr. Alabasi is not socially or economically disadvantaged. With regard to social disadvantage, the SBA recognized and summarized Petitioner's objections to its finding that Mr. Alabasi is not socially disadvantaged. However, the SBA noted that Petitioner had not "provided any new information or additional details to show how the incidents of bias stem from [Mr. Alabasi's] ethnicity and how it has impacted [his] entry or advancement in business." AR Ex. 1, at 2. The SBA indicated that in previous correspondence to Petitioner, the SBA explained that Petitioner must submit detailed

information, such as names, dates, and locations, relating to specific instances of prejudice or bias. The SBA also explained that the social disadvantage must be chronic and substantial and must have negatively impacted Mr. Alabasi's participation in business.

The SBA also pointed out that evidence of general prejudice against Arab Americans and evidence of bias against Mr. Alabasi not related to business or educational opportunities (such as being detained at an airport) is not sufficient to prove social disadvantage. The SBA concluded that the information submitted by Mr. Alabasi lacked sufficient specificity to conclude that the instances of bias to which he referred were in fact a result of his ethnicity and not of other contributing factors. The SBA further concluded that the instances of bias that Mr. Alabasi described were insufficient to conclude that ethnic prejudice has negatively impacted Mr. Alabasi's advancement in business. Because Petitioner submitted no new information in its request for reconsideration, the SBA found Petitioner had not overcome this reason for declining Petitioner's 8(a) BD program application.

With regard to economic disadvantage, the SBA acknowledged that Petitioner had removed the value of a property from Mr. Alabasi's net worth, but noted that Petitioner had done so without any explanation or documentation sufficient to justify the exclusion. Specifically, Petitioner submitted documentation showing that Petitioner, not Mr. Alabasi, owns the property located at 5366 St. Clair Avenue in Cleveland, Ohio. However, the address of the property that the SBA included in Mr. Alabasi's net worth, and which appeared on the previous financial forms, was 5368 St. Clair Avenue. Furthermore, other documents (financial statements and tax returns) reflect rental income attributable to Mr. Alabasi from a property located at 5314 St. Clair Avenue, evincing that Mr. Alabasi personally owns commercial rental property, and Petitioner's letterhead lists the firm's address as 5863 St. Clair Avenue. The SBA found no acceptable explanation regarding these inconsistent addresses.

Additionally, the SBA reiterated its contention that Petitioner appears to be a successful firm. Thus, the SBA concluded it cannot determine that either Mr. Alabasi's or the firm's ability to compete in business has been impaired by diminished access to capital and credit opportunities. The SBA also explained that it reviewed the financial profiles of firms in the same industry as Petitioner published in the Risk Management Association (RMA) Annual Statement Studies: Financial Ratio Benchmarks for 2006-2007. Based upon a comparison of Petitioner's 2008 financial statements to this RMA data, the SBA concluded that "the financial condition of the firm appears strong and not indicative of a firm and individual that is affected by diminished capital and credit opportunities." AR Ex. 1, at 3-4. Accordingly, the SBA affirmed its initial denial of Petitioner's application to the 8(a) BD program.

E. Appeal Petition

On April 22, 2010, Petitioner submitted the instant appeal petition to OHA. Petitioner alleges the SBA's denial of its 8(a) BD program application was arbitrary, capricious, and contrary to law because: (1) Petitioner submitted sufficient evidence to prove that Mr. Alabasi is socially disadvantaged by a preponderance of the evidence; and (2) Petitioner proved that Mr. Alabasi is economically disadvantaged because his net worth is less than \$250,000.

Petitioner first argues that it has shown by a preponderance of the evidence that Mr. Alabasi is an Arab American, that he has experienced substantial and chronic social disadvantage due to his ethnicity (especially since September 11, 2001), and that his entry into and advancement in the business world has been hindered by this social disadvantage. Petitioner emphasizes that the burden of proof for finding social disadvantage is a preponderance of the evidence and argues the evidence submitted to the SBA is more than sufficient to prove that it is more probable than not that Mr. Alabasi is socially disadvantaged.

Petitioner next disputes the SBA's conclusion that Mr. Alabasi is not economically disadvantaged. Petitioner contends that the correct address of the property discussed in the SBA's final determination—Petitioner's only business address—is and always has been 5368 St. Clair Avenue, “despite any typos on letterhead, etc.” Appeal Petition, at 2. Petitioner reiterates that the firm owns the property in full.

Petitioner also challenges the SBA's use of RMA data as a way of determining Petitioner's financial strength. Petitioner contends the RMA data is not fully representative of a given industry and should be used only as a general guideline. Petitioner explains the RMA data is not based on a statistically reliable method and does not account for variables such as geographic location, accounting methods, or other business practices.

Moreover, Petitioner claims that even if the RMA data is reliable enough to form the basis of a comparison between Petitioner and other firms in the same industry, there are flaws in the SBA's analysis. Petitioner contends the SBA miscalculated Petitioner's pre-tax profit percentage and failed to give proper weight to the fact that Petitioner's total assets are only slightly above the RMA average. Petitioner argues these errors, combined with the unreliability of the RMA data and the fact that Petitioner's net sales did not exceed the RMA average, significantly weaken the SBA's conclusion that Petitioner and Mr. Alabasi are not economically disadvantaged.

Petitioner concludes that Mr. Alabasi suffers social disadvantage on the basis of his ethnicity, and he has not been able to advance to his full potential in the business world as a result. Thus, Petitioner contends it has amply demonstrated that Mr. Alabasi is both socially and economically disadvantaged, and Petitioner requests that its 8(a) BD program application be approved.

F. SBA's Answer

On June 7, 2010, the SBA submitted the administrative record and filed its answer to the appeal petition. The SBA contends its denial of Petitioner's 8(a) BD program application was reasonable because Petitioner failed to provide sufficiently specific evidence that Mr. Alabasi is socially and economically disadvantaged. Thus, the SBA claims its determination must be upheld.

The SBA first addresses the issue of social disadvantage. The SBA emphasizes that because Mr. Alabasi does not belong to a group specifically recognized in the regulation as socially disadvantaged, Petitioner must establish social disadvantage on the basis of Mr.

Alabasi's Iraqi ethnicity by a preponderance of the evidence. 13 C.F.R. § 124.103(b). (c)(1). The SBA explained that to meet this burden, Petitioner must provide the SBA with specific examples of Mr. Alabasi's personal experiences with chronic and substantial social disadvantage that have negatively impacted his entry into or advancement in the business world. 13 C.F.R. § 124.103(c)(2)(ii)-(iii).

The SBA also explained that although evidence of general discrimination against a group can provide additional support for a claim of social disadvantage, it cannot establish social disadvantage because it does not reflect the personal experiences of the individual in question. U.S. SMALL BUSINESS ADMINISTRATION, STANDARD OPERATING PROCEDURE 80 05 3A § 3(b)(2)(b), *available at* <http://www.sba.gov/tools/resourcelibrary/sops/index.html>. The SBA contends that whereas Petitioner submitted numerous reports indicating generally that Iraqi Americans have experienced discrimination in the United States, Petitioner provided only one specific example of discrimination against Mr. Alabasi personally in the business world. The SBA also claims that many of the examples of prejudice set forth in Mr. Alabasi's narrative (such as the use of derogatory terms referring to his ethnicity) relate only to his personal life and not to his experience in the business world.

As mandated by 13 C.F.R. § 124.103(c)(2)(iii), when analyzing the issue of social disadvantage, the SBA considered the details Petitioner provided regarding Mr. Alabasi's education, employment, and business history. With regard to education, the SBA claims Petitioner failed to provide any specific examples of cultural bias negatively impacting Mr. Alabasi's access to education. *See* 13 C.F.R. § 124.103(c)(2)(iii)(A). Instead, Petitioner admitted that Mr. Alabasi has difficulty reading and writing the English language. The SBA views this difficulty as a possible reason for Mr. Alabasi's alleged lack of advancement.

With regard to Mr. Alabasi's employment history, the SBA contends the information Petitioner submitted consists mostly of general materials indicating that Arab Americans have faced discrimination in seeking employment opportunities. However, according to the SBA, Petitioner failed to submit any specific information about his own experiences in which cultural bias negatively affected his employment opportunities. *See* 13 C.F.R. § 124.103(c)(2)(iii)(B). “Mr. Alabasi has not shown the nexus between his lost employment opportunities and cultural bias that he personally experienced.” Answer, at 10.

Relating to Mr. Alabasi's business history, the SBA claims Petitioner merely concludes that Mr. Alabasi faced discrimination in creating and operating Petitioner but again failed to provide specific examples of such bias. *See* 13 C.F.R. § 124.103(c)(2)(iii)(C). For instance, although Petitioner contends Mr. Alabasi was unable to obtain bonding or credit due to cultural bias, Petitioner does not provide the details of any such experiences—*i.e.*, who denied Mr. Alabasi credit, where, and when. The SBA asserts that despite Petitioner's general claims of prejudice, Mr. Alabasi provides only one concrete and specific example of cultural bias that negatively affected his business opportunities: “in Cleveland in 2004 when I was being considered for a job as the lowest bidder on a Regional Transit Authority Project, I was told I would not get the job because the project manager did not like people from my country.” Appeal Petition, at 11 (quoting AR Ex. 20, at 17). The SBA concludes that this one example of cultural bias is insufficient to demonstrate by a preponderance of the evidence that Mr. Alabasi

faced substantial and chronic discrimination that negatively affected his advancement in the business world as a result of his ethnicity. *See Matter of Tony Vacca Constr., Inc.*, SBA No. BDP-321 (2009).

The SBA went on to analyze whether Mr. Alabasi is economically disadvantaged. The SBA explained that to be eligible for the 8(a) BD program, Mr. Alabasi's personal net worth must be less than \$250,000. 13 C.F.R. § 124.104(c)(2). The SBA contends that Mr. Alabasi submitted inconsistent information regarding his personal assets, and, therefore, the SBA was unable to determine whether his net worth falls below that threshold. The SBA asserts that “[i]n the absence of sufficient, consistent evidence, it was reasonable for SBA to conclude that Mr. Alabasi had not established his economic disadvantage.” Answer, at 13.

The SBA claims the first three of Mr. Alabasi's personal financial statements submitted by Petitioner each listed a property at 5368 St. Clair Avenue in Cleveland, Ohio, as a personal asset. It was not until Petitioner submitted Mr. Alabasi's fourth personal financial statement (accompanying Petitioner's request for reconsideration) that the property on St. Clair Avenue was removed from Mr. Alabasi's personal assets. The SBA explained that if the value of the property was deducted from Mr. Alabasi's net worth, his net worth would fall within the \$250,000 limit. However, the SBA contends that Petitioner failed to submit sufficient information to justify the property's removal from the list of Mr. Alabasi's personal assets, particularly when the information Petitioner did submit (a record from the county auditor's website) related not to 5368 St. Clair Avenue, but to 5366 St. Clair Avenue.

Additionally, Petitioner's 2008 financial statements indicate that it leases its building from Mr. Alabasi for \$10,000 per month. The SBA argues that this “contradicts Petitioner's argument that the real estate is owned by the business because if the business is the landlord, rent would be paid into a business account, not to Mr. Alabasi personally.” Answer, at 15. Moreover, Mr. Alabasi's 2006 and 2007 income tax returns indicate that Mr. Alabasi received rent of approximately \$100,000 to \$120,000 for each year for a property located at 5314 St. Clair Avenue. The SBA notes that this address may be a typographical error, but stresses that Petitioner failed to explain or clarify it.

The SBA asserts that Petitioner claims for the first time on appeal that its correct business address is 5368 St. Clair Avenue, notwithstanding any typographical errors. The SBA also points out that Petitioner contends the mortgage on the building was paid off “just prior to ... October 2009 ... leaving ownership of the property wholly with the business.” Answer, at 16 (quoting Appeal Petition, at 2). The SBA argues that this statement is contrary to Petitioner's 2008 financial statement, which reflects the payment of rent to Mr. Alabasi. The SBA asserts that these inconsistencies were not satisfactorily explained by Petitioner, despite repeated requests for clarification from the SBA. Accordingly, the SBA could not conclude that Mr. Alabasi's net worth is less than \$250,000, and the SBA's denial of Petitioner's 8(a) BD program application was reasonable because Petitioner presented conflicting evidence.

The SBA also defends its comparison of Petitioner to other similarly situated forms based on the RMA data and disputes Petitioner's argument that the RMA data is unreliable. The SBA contends it “has long used the RMA data for financial profile analyses. SBA conducted a

reasonable analysis of Petitioner's financial profile, as compared to businesses in the same or similar industry, based on the evidence provided by Petitioner.” Answer, at 16.

Lastly, the SBA asserts the new evidence submitted by Petitioner on appeal should be excluded from the record. 13 C.F.R. § 134.407. Petitioner attached two webpage printouts from the Cuyahoga County Auditor's website and the introduction to the RMA Annual Statement Studies Financial Ratio Benchmarks, 2008-2009. The SBA contends that because these documents were not before the SBA at the time it made its determination, they may not be admitted to the administrative record at this stage.

The SBA concludes that its denial of Petitioner's 8(a) BD program application was reasonable because: (1) Petitioner failed to submit sufficient, specific evidence that Mr. Alabasi suffered chronic and substantial discrimination due to his ethnicity that negatively impacted his advancement in the business world; and (2) Petitioner failed to submit sufficient and consistent evidence that Mr. Alabasi's personal net worth is less than \$250,000. Accordingly, Petitioner failed to prove that Mr. Alabasi is socially and economically disadvantaged, and the SBA's denial of its 8(a) BD program application was not arbitrary, capricious, or contrary to law.

IV. Discussion

A. Privilege

The SBA has asserted claims of privilege for multiple exhibits in the administrative record. Specifically, the SBA claims the deliberative process privilege protects exhibits 2, 3, 4, 6, 7, 12, 13, and 25 from disclosure. These exhibits consist of email correspondence between SBA staff and SBA attorneys, SBA attorney analyses and recommendations regarding the case, a draft letter denying Petitioner's 8(a) BD program application, SBA business opportunity specialist analyses of the case, and an SBA eligibility screening checklist.

The deliberative process privilege permits the government to withhold documents relating to policy formulation to encourage open and independent discussion among those who develop government policy. BLACK'S LAW DICTIONARY 1215 (7th ed. 1999); *see also In re Grand Jury*, 821 F.2d 946, 958-59 (3d Cir. 1987) (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975)). The SBA staff and attorney findings contained in the withheld materials were set out by the SBA in support of its determinations. Therefore, I find the deliberative process privilege covers each of the documents for which the SBA claims the privilege.

Even where a privilege is applicable, it is often relevant to consider the extent of harm non-disclosure causes the party requesting disclosure. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981); *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997). Non-disclosure does not cause any harm in this situation. There is nothing in the privileged materials that would provide Petitioner with a new or different factual basis on which to challenge the SBA's decision to deny it admission into the 8(a) BD program. Moreover, Petitioner did not object to the withholding of this material. Accordingly, the SBA's withholding of the privileged documents was proper.

B. New Evidence

The SBA challenges Petitioner's submission of new evidence to the record on appeal. Specifically, the SBA asserts that the two webpage printouts from the Cuyahoga County Auditor's website and the introduction to the RMA Annual Statement Studies Financial Ratio Benchmarks, 2008-2009, should be excluded from the record because they were not before the SBA at the time the Agency made its determination. Pursuant to 13 C.F.R. § 134.407, evidence beyond the administrative record may not be admitted to the record on appeal unless there is a substantial showing based upon credible evidence that the SBA determination may have resulted from bad faith or improper behavior. There is no allegation or evidence of bad faith or improper behavior in this case. Accordingly, I may not admit new evidence into the record at this stage or consider it in my decision. 13 C.F.R. §§ 134.406(a), 134.407. These documents are therefore EXCLUDED from the record.

C. Standard of Review

The SBA's determination must be upheld unless a review of the written administrative record demonstrates that the SBA acted arbitrarily, capriciously, or contrary to law in denying Petitioner's 8(a) BD program application. 13 C.F.R. § 134.406(b). This appeal will be decided solely upon review of the contents of the administrative record. 13 C.F.R. § 134.406(a).

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. I must then 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 U.S., 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. *See id.*

My review of the administrative record is narrow and does not permit me to substitute my own judgment for that of the SBA. 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 does so and its determination is reasonable, I am compelled to uphold it on appeal. 13 C.F.R. § 134.406(b). Additionally, “[i]f there is more than one ground for declining an 8(a) BD application and at least one ground is reasonable, the SBA's decision to decline the application cannot be found arbitrary, capricious, or contrary to law.” *Matter of Garza Telecomms., Inc.*, No. MSB-620 (1998) (citing *Matter of Technical Assistance Int'l, Inc.*, SBA No. MSB-530, at 5 (1995); *Matter of TAO of Sys. Integration, Inc.*, SBA No. MSB-528, at 6 (1995); *Matter of B&H Contracting Co., Inc.*, SBA No. MSB-460, at 22 (1994)).

D. Analysis

An applicant firm is eligible to participate in the 8(a) BD program “if it is a small

business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals.” 13 C.F.R. § 124.101. The issues presented in this appeal are whether Mr. Alabasi, the individual upon whom Petitioner's eligibility is based, is socially disadvantaged and whether he is economically disadvantaged.

“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. The social disadvantage must stem from circumstances beyond their control.” 13 C.F.R. § 124.103(a). The regulations set forth certain groups whose members are presumed to be socially disadvantaged. 13 C.F.R. § 124.103(b)(1). If an individual upon whose status as an 8(a) BD program applicant's eligibility is based is not a member of one of these designated groups, as Mr. Alabasi is not, he or she “must establish individual social disadvantage by a preponderance of the evidence.” 13 C.F.R. § 124.103(c)(1).

To meet this burden, the individual must provide evidence of: (1) an “objective distinguishing feature that has contributed to social disadvantage;” (2) “[p]ersonal experiences of substantial and chronic social disadvantage in American society;” and (3) “[n]egative impact on entry into or advancement in the business world because of the disadvantage.” 13 C.F.R. § 124.103(c)(2). The regulations further provide that in analyzing the third element of social disadvantage—the negative impact of the disadvantage upon the individual's entry into or advancement in the business world—“SBA will consider any relevant evidence In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.” 13 C.F.R. § 124.103(c)(2)(iii).

The individual must describe the incidents demonstrating social disadvantage in sufficient detail so that those incidents may be properly evaluated. *Id.* To constitute sufficient detail, the description must generally include: “(1) when and where the incident occurred, (2) who committed the act, (3) how the incident took place, and (4) how the applicant was adversely affected.” *Matter of Ace Technical, LLC*, SBA No. SDBA-178, at 4-5 (2008) (citing *Matter of Seacoast Asphalt Servs., Inc.*, SBA No. SDBA-151, at 8 (2001)). Additionally, “[t]he SBA may take into account commonly accepted knowledge, such as discrimination against Middle Easterners after the September 11, 2001, attack on the World Trade Center, as well as anecdotal evidence of discrimination in the applicant's community.” *Id.* at 5.

1. Substantial and Chronic Social Disadvantage

There is no dispute that Petitioner satisfied the first element of social disadvantage because he presented evidence that he is an Arab American of Iraqi descent, and his ethnicity is a distinguishing feature that may contribute to social disadvantage. 13 C.F.R. § 124.103(c)(2)(i). The second element of social disadvantage—personal experiences of substantial and chronic disadvantage—is generally satisfied when the individual describes “more than one or two specific, significant incidents.” *Id.* at 4. In its initial August 26, 2009, letter denying Petitioner's 8(a) BD program application, the SBA did not explicitly distinguish between the second and third elements of social disadvantage. Instead, the SBA analyzed Mr. Alabasi's claims of social disadvantage with regard to education, employment, and business opportunities and concluded

on the basis of its analysis that Mr. Alabasi failed to prove social disadvantage because he had “not presented evidence that would allow [the SBA] to conclude that [his] ability to compete in the market place has been impaired due to discriminatory practices against [Mr. Alabasi or Petitioner] because of [Mr. Alabasi's] ethnicity.” AR Ex. 11, at 2.

Nevertheless, the administrative record demonstrates that Mr. Alabasi proffered sufficient evidence to meet the second element of social disadvantage—personal experiences of substantial and chronic disadvantage. Mr. Alabasi described numerous experiences of bias and prejudice resulting from his ethnicity. For instance, Mr. Alabasi described the use of various derogatory terms with regard to his ethnicity. Mr. Alabasi also described an encounter with a police officer in Hollywood, Florida, in 1995, in which the officer pulled Mr. Alabasi over for speeding, told Mr. Alabasi to go back to his own country “where Saddam will shoot you in the head,” and subsequently punched Mr. Alabasi's brother, who was a passenger in the car, in the face. This experience is corroborated by Mr. Alabasi's brother, who submitted an affidavit attesting to these facts. AR Ex. 20, at 11.

Mr. Alabasi described his experience on September 11, 2001, when he visited the Cuyahoga Metropolitan Housing Authority Construction Offices in Cleveland, Ohio, to meet with project managers. One of these project managers advised Mr. Alabasi to leave the building immediately for fear of Mr. Alabasi's safety because people in the office were opining that Mr. Alabasi may be a terrorist. This experience is corroborated by the project manager, Mr. Norris McClure, who submitted an affidavit attesting to these facts. Mr. Alabasi described his experiences of being subjected to investigation by the Federal Bureau of Investigation following the September 11, 2001, attacks. Mr. Alabasi described an experience in which he attempted to cross the border from Mexico into the United States in 2001 and was detained without explanation overnight before being released. This incident is corroborated by the affidavit of a friend who accompanied Mr. Alabasi to Mexico, Mr. Stuart Mendel, who was permitted to cross the border without incident. Mr. Alabasi described an experience in which he and his Arab American companions were singled out and not permitted to board a flight in 2004. Mr. Alabasi described another incident in 2004 in which he was told that he would not be awarded a job for a Cleveland, Ohio, Regional Transit Authority project, despite being the lowest bidder, because the project manager did not like people from Iraq. Additionally, Mr. Alabasi presented voluminous evidence, including news articles and various research studies, of the discrimination faced by Arab Americans in the wake of the September 11, 2001, attacks.

Given that the SBA may take into account “commonly accepted knowledge, such as discrimination against Middle Easterners after the September 11, 2001, attack on the World Trade Center, as well as anecdotal evidence of discrimination in the applicant's community,” Mr. Alabasi has provided sufficient evidence to prove by a preponderance of the evidence that he has faced substantial and chronic social disadvantage due to his ethnicity. *Ace Technical*, SBA No. SDBA-178, at 5.

2. Negative Impact on Advancement in the Business World

The only remaining question with regard to the issue of social disadvantage, therefore, is whether Mr. Alabasi presented sufficient evidence to meet the third element of the social

disadvantage test—that his experiences with bias and prejudice had a negative impact upon his entry into or advancement in the business world. This third element is satisfied when the individual presents “any relevant evidence, particularly disadvantage in education, employment, and business history.” *Id.* (citing 13 C.F.R. § 124.103(c)(2)(iii)). It is not necessary, however, for the individual to present evidence in all of these areas. *Id.* (citing *Matter of Bitstreams, Inc.*, SBA No. BDP-122, at 8 (1999)). Rather, the SBA must discern whether the “totality of circumstances shows disadvantage in entering into or advancing in the business world.” 13 C.F.R. § 124.103(c)(2)(iii). As noted above, in its initial August 26, 2009, letter denying Petitioner's 8(a) BD program application, the SBA analyzed Mr. Alabasi's claims of social disadvantage with regard to education, employment, and business opportunities.

a. Education

With regard to educational opportunities, the SBA “considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.” 13 C.F.R. § 124.103(c)(2)(iii)(A). In his narrative statement, Mr. Alabasi claims he “did not feel that [he] could pursue an education” when he arrived in the United States because of “the discrimination and intimidation [he] felt from others” and because he had no knowledge of the English language or formal training of any kind. AR Ex. 20, at 16. Mr. Alabasi concluded that due to these challenges and his lack of educational opportunities, he is at a disadvantage in the business world. On the basis of this information, the SBA, in its initial August 26, 2009, letter, could not conclude that Mr. Alabasi's inability to pursue an education was due to bias or prejudice based on his ethnicity. Instead, the SBA noted that Mr. Alabasi's lack of knowledge of the English language likely contributed to his lack of educational opportunities. The SBA argues on appeal that Mr. Alabasi failed to offer any specific instances of bias negatively impacting his educational opportunities.

The SBA articulated a reasonable explanation, including a rational connection between the facts and its determination, for its conclusion that Mr. Alabasi failed to prove his social disadvantage hindered his educational opportunities. The SBA explained that Mr. Alabasi failed to offer any specific examples of the ways in which bias or prejudice prevented him from pursuing an education and failed to address why he believed that discrimination specifically, and not other factors, negatively impacted his education. Mr. Alabasi did not present any evidence or allegation of his being denied access to institutions of higher education, excluded from social and professional associations, or denied educational honors. It could be argued that Mr. Alabasi's narrative as a whole described social patterns or pressures that discouraged him from pursuing an education, but given that Mr. Alabasi himself blamed his lack of educational opportunities at least in part on his lack of knowledge of the English language, the SBA did not act arbitrarily or contrary to law in finding that Mr. Alabasi did not present sufficiently specific evidence of bias or prejudice negatively impacting his educational opportunities to establish social disadvantage by a preponderance of the evidence.

b. Employment

With regard to employment opportunities, the SBA “considers such factors as unequal

treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.” 13 C.F.R. § 124.103(c)(2)(iii)(B). Mr. Alabasi claims in his narrative statement that “[b]ecause of prejudice and racism the opportunities for employment for Arab Americans have been hard to come by.” AR Ex. 20, at 17. Mr. Alabasi explains that as an immigrant to the United States, he accepted a construction job for three dollars per hour. Mr. Alabasi also asserts that he attempted to find other employment, “only to be met with rejection” until he held jobs with businesses owned by other Middle Easterners. *Id.* Mr. Alabasi concludes that because of his lack of employment opportunities due to discrimination, he decided to open his own business.

The SBA, in its initial August 26, 2009, letter, determined that “while [Mr. Alabasi] attributed [his] lack of employment opportunities to bias based on [his] ethnicity, [the SBA] cannot concluded that this was the reason for lack of opportunities at that time.” AR Ex. 11, at 2. Instead, the SBA considered Mr. Alabasi's youth and lack of experiences to be contributing factors in his failure to find improved employment. The SBA asserts on appeal that Mr. Alabasi's evidence with regard to this element consisted primarily of general information regarding discrimination against Arab Americans in the employment arena. The SBA again argues that Mr. Alabasi failed to offer any specific instances of prejudice that negatively impacted his personal employment opportunities.

Again, the SBA provided a reasonable explanation for its conclusion. Mr. Alabasi failed to prove his social disadvantage hindered his employment opportunities because he failed to describe any specific examples of the ways in which bias or prejudice negatively impacted his employment opportunities. Mr. Alabasi did not present any evidence of unequal treatment in hiring, promotions, pay, or fringe benefits. Nor did Mr. Alabasi indicate that any of his employers had engaged in retaliatory or discriminatory conduct toward him. As with his claims regarding his educational opportunities, it can be argued that Mr. Alabasi's total submission indicated social patterns or pressures that initially channeled him into nonprofessional or nonbusiness fields, but given that Mr. Alabasi did not present even one specific, personal, detailed example of an experience with unequal treatment in the employment arena, the SBA did not act arbitrarily or contrary to law in finding that Mr. Alabasi did not present sufficiently specific evidence of bias or prejudice negatively impacting his employment opportunities to establish social disadvantage by a preponderance of the evidence.

c. Business History

With regard to business history, the SBA “considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.” 13 C.F.R. § 124.103(c)(2)(iii)(C). In his narrative, Mr. Alabasi explains his difficulties with obtaining residential customers because many potential customers expressed fear of him, “either because I looked like a terrorist or as one home owner I overheard said, ‘looked like I could make bombs or something.’” AR Ex. 20, at 17. Accordingly, Mr. Alabasi

decided to pursue construction jobs with government agencies. Mr. Alabasi also states that he has had trouble obtaining bonds and lines of credit. Mr. Alabasi alleges that he has been told on multiple occasions that his applications for life insurance (necessary to obtain bonding) have been denied due to his ethnic heritage. As outlined above, Mr. Alabasi describes one incident in 2004 in which he was denied a job because the project manager did not like people from Iraq, and another occasion on which, after qualifying for a lottery of projects and attending multiple walk-throughs, Petitioner was only called once, whereas other contractors were called several times. Mr. Alabasi generally describes his belief that other firms in his field, some with higher prices and inferior work, are awarded more work than Petitioner on the basis of ethnic discrimination. Mr. Alabasi concludes that Petitioner's biggest obstacle is discrimination, and Petitioner seeks 8(a) BD program certification so that it may escape the rampant ethnic discrimination Mr. Alabasi faces in the private sector.

In response to Mr. Alabasi's narrative regarding his business history, the SBA indicated, in its initial August 26, 2009, letter, that it was unclear when Mr. Alabasi had trouble obtaining bonding or financing because Petitioner currently holds a loan and a mortgage on reasonable terms. The SBA also found that although Mr. Alabasi “described examples of [his] difficulty in obtaining employment and obtaining credit and contracts, the information provided does not show that the reason for [his] difficulties was due to bias alone and not due to other factors.” AR Ex. 11, at 3. Furthermore, the SBA determined that although Mr. Alabasi submitted affidavits from friends confirming that Mr. Alabasi has faced prejudice and discrimination, “the statements do not show that the incidents [the affiants] have witnessed have impacted [Mr. Alabasi's] ability to advance in the business world.” *Id.*

The SBA also emphasized that “the firm appears to be quite successful,” so it does not appear that the prejudice Mr. Alabasi faced “impacted [his] ability to further advance in the business world.” *Id.* According to the SBA, Petitioner generated revenues of \$6.6 million in 2006, \$9.5 million in 2007, and \$5.4 million in 2008. Petitioner's net worth was over \$2.2 million in 2007 and 2008, and Petitioner's net income was over \$500,000 in 2007 and nearly \$300,000 in 2008. Petitioner has not disputed these facts.

The SBA contends further on appeal that Petitioner provided only one specific and significant experience of bias that affected his business history—the incident in which he was not hired for a job, despite being the lowest bidder, because the project manager did not like people from Iraq. Aside from this experience, the SBA highlights that Mr. Alabasi failed to provide any details about other instances of bias that he faced—for instance, who denied him credit or bonding, when that occurred, and why Mr. Alabasi believes the denial was due to his ethnicity. The SBA emphasizes that one specific example of prejudice is not sufficient to establish social disadvantage. *See Matter of Tony Vacca Constr., Inc.*, SBA No. BDP-321 (2009). Thus, the SBA asserts that Mr. Alabasi failed to meet the burden of proving social disadvantage on the basis of his business history because his narrative lacked sufficient detail to determine that his experiences with bias had a negative impact his business.

I find that the SBA's determination that Mr. Alabasi failed to prove that his experiences with bias and prejudice negatively impacted his business history, was not arbitrary or capricious. In its initial August 26, 2009, letter, the SBA emphasized that Petitioner is already a successful

business, which has generated millions of dollars in revenues. Mr. Alabasi started Petitioner in 1996, Mr. Alabasi controls Petitioner, Petitioner is Mr. Alabasi's only business, and Petitioner is a successful business, so it was reasonable for the SBA to conclude that Mr. Alabasi has in fact been a successful entrepreneur. Because the ultimate burden of proving social disadvantage lies with Petitioner, 13 C.F.R. § 124.103(c), it was Mr. Alabasi's responsibility to refute this proposition. The SBA's conclusion that Mr. Alabasi failed to present sufficient evidence to do so by demonstrating that bias has negatively affected his business history was not arbitrary based upon the administrative record.

Furthermore, I cannot conclude the SBA acted arbitrarily or capriciously in determining that much of Mr. Alabasi's evidence regarding his business history lacked sufficient detail. To constitute sufficient detail to prove social disadvantage, the description of the individual's encounters with bias or prejudice must generally include: (1) when and where the incident occurred, (2) who committed the act, (3) how the incident took place, and (4) how the individual was adversely affected. *Ace Technical*, SBA No. SDBA-178, at 4-5. Mr. Alabasi did not meet this burden with regard to many of the instances of bias or prejudice that he related in his narrative.

Although Mr. Alabasi alleged generally that he has received unequal access to capital and bonding, and that he received unequal treatment from potential customers, he provided no details regarding these experiences—*i.e.*, who, where, when. Mr. Alabasi failed to provide these details, even after the SBA explicitly requested that he provide such details. In its letter to Mr. Alabasi of October 16, 2008, the SBA explained that Mr. Alabasi's narrative “does not appear to provide sufficient detail to establish [his] social and economic disadvantage.” The SBA went on: “To establish a credible case of social disadvantage, please provide a detailed narrative of your experiences of social disadvantage. Your narrative must be specific and include *names of individuals and companies, dates, locations, etc.*” AR Ex. 21, at 1 (emphasis added).

As the SBA recognized, Mr. Alabasi did provide sufficient detail with regard to at least one incident of bias relating to his business history—when Petitioner was denied a job in 2004 despite being the lowest bidder. However, the SBA weighed the undisputed evidence of Petitioner's success against Mr. Alabasi's mostly incomplete accounts of bias and concluded that Mr. Alabasi failed to prove that prejudice has negatively affected his business history. Based on the administrative record, the SBA did not act arbitrarily or contrary to law in finding that Mr. Alabasi did not present sufficiently specific evidence of bias or prejudice that negatively impacted his business to prove social disadvantage by a preponderance of the evidence.

d. Totality of the Circumstances

As noted above, the SBA must finally determine, based on a totality of the circumstances, whether the evidence presented with regard to education, employment and business history, is sufficient to meet the third element of social disadvantage—negative impact upon one's entrance into or advancement in the business world. 13 C.F.R. § 124.103(c)(2)(iii). As discussed above, the SBA concluded that none of the evidence Mr. Alabasi provided with regard to each of the three factors (education, employment and business history) independently was sufficient to prove that his social disadvantage had a negative impact on his advancement in the business world.

Thus, the final step in the analysis is to consider whether all the evidence presented for all three factors taken together is sufficient to prove that Mr. Alabasi's social disadvantage had a negative impact on his advancement in the business world. After analyzing each of these three factors, the SBA concluded that Mr. Alabasi had not proven by a preponderance of the evidence that he is socially disadvantaged because although he described some incidents of bias and discrimination against him due to his ethnicity, "these incidents do not appear to relate to education, employment or business, so they do not appear to have impacted [Mr. Alabasi's] ability to advance in the business world." *Id.*

Implicit in the fact that Mr. Alabasi must demonstrate that prejudice has negatively impacted his advancement in the business world (to satisfy this third element of the social disadvantage test) is the fact that Mr. Alabasi must prove that he has in fact suffered some actual lack of advancement in the business world. Petitioner's success constitutes evidence that Mr. Alabasi has not suffered any lack of advancement in the business world due to prejudice. Mr. Alabasi failed to recognize or appreciate this evidence and, therefore, failed to make any attempt at rebutting it. Thus, it was not error for the SBA to rely upon this evidence.

Mr. Alabasi presented much evidence regarding bias and discrimination against Arab Americans generally. OHA has previously recognized the discrimination that Arab Americans have faced since the September 11, 2001, attacks. *See Ace Technical*, SBA No. SDBA-178, at 5. Mr. Alabasi also related multiple and detailed personal experiences of bias and prejudice. *See supra* Part IV.D. 1. What Mr. Alabasi failed to provide, however, as the SBA argues, was the nexus between the discrimination he has faced and his lack of advancement in the business world. Put another way, although Mr. Alabasi proved that he has faced bias and prejudice, he did not prove that he suffered any lack of advancement in the business world as a result of that prejudice. Thus, neither the SBA's determination that Mr. Alabasi failed to prove that his social disadvantage negatively impacted his advancement in the business world, nor its resulting ultimate determination that Mr. Alabasi failed to prove social disadvantage by a preponderance of the evidence, was arbitrary, capricious, or contrary to law.

Should Petitioner wish to reapply for admission to the 8(a) BD program in one year, 13 C.F.R. § 124.207, Mr. Alabasi must submit specific details of his personal experiences with discrimination (*i. e.*, who, what, where, when, why) and connect those experiences specifically with his lack of or delayed advancement in business. Mr. Alabasi must demonstrate that bias and prejudice due to his ethnicity have had a particular negative impact on his entry into or advancement in the business world (specifically regarding his education, employment, or business history) in order to prove social disadvantage by a preponderance of the evidence.

3. Reconsideration

Petitioner did not submit any new information regarding Mr. Alabasi's social disadvantage with its request for reconsideration. Petitioner merely expressed disagreement with the SBA's conclusion and asserted that Mr. Alabasi had already presented enough evidence to satisfy the preponderance of the evidence standard. Accordingly, the SBA affirmed its initial denial of Petitioner's 8(a) BD program application. Because Petitioner submitted no new

evidence on reconsideration, my analysis and conclusions with regard to the SBA's initial decline letter apply equally to the SBA's final determination upon reconsideration.

4. Economic Disadvantage

Because I determined that it was reasonable for the SBA to deny Petitioner's 8(a) BD program application on the basis of Mr. Alabasi's failure to prove social disadvantage, it is unnecessary for me to consider the issue of Mr. Alabasi's economic disadvantage. *See, e.g., Matter of Garza Telecomms., Inc.*, No. MSB-620 (1998) (“If there is more than one ground for declining an 8(a) BD application and at least one ground is reasonable, the SBA's decision to decline the application cannot be found arbitrary, capricious, or contrary to law.”)

V. Conclusion

For the foregoing reasons, I conclude the SBA's determination denying Petitioner admission to the 8(a) BD program was not arbitrary, capricious, or contrary to law. Accordingly, I deny the instant appeal and affirm the SBA's final determination. *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 U.S. Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

BRENDA P. MURRAY
Administrative Law Judge