

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

IN THE MATTER OF:

BDS Protective Services, LLC,

Petitioner

SBA No. BDP-433

Decided: June 22, 2012

APPEARANCES

Jeffery A. Jackson, President and CEO of BDS Protective Services, LLC, for Petitioner

Meagan K. Guerzon, Esq., United States Small Business Administration, Office of General Counsel. for Respondent

DECISION AND REMAND ORDER

I. Introduction and Jurisdiction

This proceeding arises from Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a), and is governed by the Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 13 C.F.R. Part 134 (the “Rules”). BDS Protective Services (“Petitioner”) applied for certification as a participant in the 8(a) Business Development (“8(a) BD”) program in October or November 2010. Administrative Record (“AR”) Exs. 10, 11. Petitioner claims eligibility for the 8(a) BD program through Jeffery A. Jackson, its president, chief financial officer, and sole owner, on the basis of Mr. Jackson's race. AR Ex. 11 at 10-11, 13-14. On March 29, 2011, the United States Small Business Administration (“SBA”) issued an Initial Determination in the form of a denial letter, denying Petitioner admission into the 8(a) BD program because SBA concluded that Mr. Jackson did not manage Petitioner on a full-time basis as required by 13 C.F.R. § 124.106(a)(3). AR Ex. 5 at 1. Petitioner was invited to apply for reconsideration by submitting specified additional information. AR Ex. 6 at 5-6. Petitioner did apply for reconsideration on May 20, 2011. AR Ex. 4 at 1, 54. On October 28, 2011, SBA issued a Final Determination in a letter, in which it again denied Petitioner admission into the 8(a) BD program. AR Ex. 1. The sole basis for denial was SBA's determination that Petitioner had failed to establish by a preponderance of the evidence that Mr. Jackson managed Petitioner on a full-time basis. AR Ex. 1 at 1-3.

On December 12, 2011, Petitioner filed a timely Appeal Petition (“Petition”). *See* 13 C.F.R. § 134.404 (forty-five days to file appeal). The Office of Hearings and Appeals (“OHA”) has jurisdiction over this appeal because Petitioner was denied admission to the 8(a) BD program “based solely on a negative finding as to . . . control. . . .” 13 C.F.R. § 134.102(j)(l); *see also* Small Business Act § 8(a)(9)(A), (B)(i), 15 U.S.C. § 637(a)(9)(A), (B)(i).

SBA filed an Answer to the Petition, together with a certified copy of the Administrative Record. On February 24, 2012, Petitioner served a motion to reply to SBA's Answer, with an accompanying Reply. Petitioner's motion is granted, and the Reply will be considered. *See* 13 C.F.R. § 134.206(e). By order dated April 24, 2012, the undersigned was designated to preside over this proceeding.

After reviewing the Administrative Record, I find that SBA based its determination in part on a finding that was arbitrary and capricious. Furthermore, SBA's Final Determination raises a new ground not present in the Initial Determination. Therefore, this matter must be remanded to the Director of the Office of Business Development for further proceedings consistent with this Order.

II. New Evidence

Petitioner submitted with its Petition several documents that do not appear in the Administrative Record. These documents include Mr. Jackson's W-2 statements for 2010, and sixteen letters of reference attesting to Mr. Jackson's work ethic and availability during normal business hours. *See* Petition at 12-28. SBA objects to the inclusion of these documents because they were not provided with Petitioner's initial application or its application for reconsideration. Answer at 3.

Appellate review must be conducted “solely on a review of the written administrative record,” which “must contain all documents that are relevant to the determination on appeal ... and upon which the SBA decision-maker . . . relied.” 13 C.F.R. § 134.406(c). There is no indication that the documents referenced above were provided to the SBA decision-maker before SBA made its Final Determination, so the documents are therefore not part of the written Administrative Record. In this matter, evidence beyond the administrative record may only be admitted if Petitioner, “upon written submission, has made a substantial showing, based on credible evidence and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.” 13 C.F.R. § 134.407(a). Petitioner has not produced a written submission or made such a showing. As a result, Mr. Jackson's W-2 statements for 2010 and Petitioner's sixteen letters of reference cannot be admitted as evidence or considered in the course of this appeal.

III. 8(a) Business Development Program Standards

To qualify for entry into the 8(a) BD program, a small business must be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character. . . .” 13 C.F.R. § 124.101. “In order to maintain that a disadvantaged individual has ‘control’ over the business, the 8(a) applicant must show that the business ‘is managed on a full-time basis by one or more disadvantaged individuals’ and that the disadvantaged individual ‘devote[s] full-time to the business during the normal working hours of firms in the same or similar line of business.’” *Raintree Advanced Mgmt. Corp.*, SBA No. BDP-407, at 6 (2011) (quoting 13 C.F.R. § 124.106(a)(1), (3)). As Petitioner claims eligibility through

Mr. Jackson, it must establish by the preponderance of the evidence that Mr. Jackson manages Petitioner on a full-time basis within the meaning of 13 C.F.R. § 124.106(a). *See id.* (citing *Barnes-Williams-Anser, Inc.*, SBA No. MSB-512, at 3 (1995)) (burden of proof); 13 C.F.R. § 124.204(c) (burden of proof is on applicant).

The regulations do not define the terms “full-time” or “normal working hours.” *See* 13 C.F.R. § 124.106(a); *Raintree*, SBA No. BDP-407, at 6. Whether an individual manages an applicant “full-time” as defined by section 124.106(a), or whether outside employment interferes with such management, must be determined on a case-by-case basis. *Raintree*, SBA No. BDP-407, at 6; *AGB Investigative Servs., Inc.*, SBA No. BDP-354, at 6 (2010); *Minority Temp. Agency*, SBA No. SDBA-166, at 10 (2006); *Fletcher Books*, SBA No. MSB-568, at 5 (1997). Relevant factors include “(1) the amount of time devoted to the applicant concern; (2) the amount of time devoted to outside employment and interests; and (3) the potential for conflicts between the applicant concern schedule and time spent in outside pursuits.” *Raintree*, SBA No. BDP-407, at 8 (citing *Oak Hill Rehab. Specialists, Inc.*, SBA No. BDP-154 (2001)). Absent evidence to the contrary, devoting forty hours of work per week would qualify as “full-time,” and the hours of 8:00 a.m. or 9:00 a.m. to 4:00 p.m. or 5:00 p.m., Monday through Friday, may be considered “normal working hours.” *See AGB Investigative Servs.*, SBA No. BDP-354, at 6 (working or operating hours); *KRW Inc.*, SBA No. MSBT-379, at 21 (1991) (full-time); *see also* 8(a) Business Development/Small Disadvantaged Business Status Determinations, 62 Fed. Reg. 43584, 43586 (August 14, 1997) (preamble to proposed rule stating that the “term ‘normal business hours’ is intended to mean ... the normal 40 hour work week of most business concerns”); *but see Minority Temp. Agency*, SBA No. SDBA-166, at 11 (“While a regulation's preamble provides insight into an agency's contemporaneous understanding of its proposed rules; the language of the preamble is not controlling over the language of the regulation.”) While these provide useful guideposts, “the rule necessarily includes some flexibility” *AGB Investigative Servs.*, SBA No. BDP-354, at 6. Once admitted, a firm may be terminated from the 8(a) BD program if at any time it is not managed full-time by a disadvantaged individual or does not make reasonable efforts to develop its business. 13 C.F.R. § 124.303(a)(3), (9).

Appellate review of SBA's determination is narrow and “is limited to determining whether [SBA's] determination is arbitrary, capricious, or contrary to law.” 13 C.F.R. § 134.406(a), (b). The presiding Administrative Law Judge may not substitute his or her judgment for that of the SBA or review the administrative record de novo to decide whether the SBA's ultimate conclusions are correct. *AGB Investigative Servs.*, SBA No. BDP-354, at 5. Review is conducted “solely on a review of the written administrative record. . . .” 13 C.F.R. § 134.406(a). The administrative record consists of “all documents that are relevant to the determination on appeal . . . and upon which the SBA decision-maker . . . relied.” 13 C.F.R. § 134.406(c)(1).

When the administrative record is complete, the Judge's role is “to assess whether the SBA's determination (1) adequately addressed the significant evidence submitted by the applicant; (2) informed the applicant of the facts relied upon in reaching the conclusions; and (3) clearly stated the rationale for the conclusions.” *Med-Choice, Inc.*, SBA No. SDBA-179, at 4 (2008); *see AGB Investigative Servs.*, SBA No. BDP-354, at 5; *see also Ace Technical, LLC*, SBA No. SDBA-178, at 3 (2008). The Judge then must ascertain whether SBA made a “clear error of judgment” in its determination before the Judge can find that SBA's decision is

“arbitrary, capricious, or contrary to law.” *Tony Vacca Construction, Inc.*, SBA No. BDP-321, at 5 (2009); see *AGB Investigative Servs.*, SBA No. BDP-354, at 5; *Matter of Fairfield Trucking Co.*, SBA No. BDP-223, at 3 (2005) (citing *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The SBA makes “a clear error of judgment” if it “(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” the judge's views and those of the SBA. *AGB Investigative Servs.*, SBA No. BDP-354, at 5; *Matter of Timely Engineering Soil Tests LLC*, SBA No. BDP-297, at 6 (2008). As long as SBA's determination was “reasonable,” it must be upheld on appeal. 13 C.F.R. § 134.406(b).

IV. Background

The Administrative Record shows that Mr. Jackson is a socially and economically disadvantaged individual with twenty-three years of experience in the security services industry. AR Ex. 11 at 17; see AR Ex. 5 (initial determination does not challenge claim of social or economic disadvantage). Between 1989 and 2002, Mr. Jackson spent thirteen years in the employ of a security contracting firm based in Washington, D.C. Mr. Jackson founded Petitioner in 2002 and has operated Petitioner for the past ten years. AR Ex. 11 at 9-11, 15, 17. Mr. Jackson describes Petitioner as an organization that “continually collaborates with reputable businesses to promote safe and sound environments” by educating clients about “safety techniques and crime prevention strategies,” and by offering services including armed or unarmed “guards, special police officers, canine teams and concierges.” AR Ex. 11 at 15. The Record contains several letters of recommendation purporting to be from Petitioner's customers. AR Ex. 11 at 68-71.

In addition to his work in the security industry, Mr. Jackson has been employed by the Government Printing Office (“GPO”) since 1988. AR Ex. 4 at 2; AR Ex. 11 at 17, 107, 128, 137. In an April 12, 2011 letter, the Assistant Foreperson 3rd Shift stated that “Mr. Jackson works on the third shift [11:30 pm to 08:00 am] at the” GPO in the Production Department, “and has been working in the federal Government [sic] since February 1988.” AR Ex. 4 at 2. Notwithstanding his employment with the GPO, Mr. Jackson states that he devotes over forty hours per week toward the operation and management of Petitioner, and has done so since Petitioner was founded. AR Ex. 4 at 3. Mr. Jackson explains that working the third shift at the GPO gives him “the flexibility to fully maintain supervision of BDS business operations,” and that his outside employment provides Petitioner with liquidity between billing cycles. AR Ex. 4 at 4.

Petitioner applied for admission to the 8(a) BD program in 2010. On March 29, 2011, SBA issued an Initial Determination denying the application. AR Ex. 5 at 1. SBA noted that Mr. Jackson had received a W-2 statement from the GPO, but that Petitioner had “not provided any information indicating [Mr. Jackson's] final date of employment with this federal agency.” AR Ex. 5 at 1. SBA wrote: “Based on the lack of information for [Mr. Jackson's] departure from Government Printing Office [sic], SBA must conclude that [Mr. Jackson does] not devote full-time to the operation of [Petitioner] during normal work hours at the time of application.” *Id.* SBA then directed Petitioner to submit several documents if it wished to have its application reconsidered, including “[e]vidence to show that [Mr. Jackson] devote[s] full-time to

management of the applicant firm including a letter from [GPO] to indicate [his] final date of employment,” and “[i]f available” Petitioner’s “2010 personal tax return including all . . . W-2’s [sic]. . . .” *Id.* In the list of documents to be submitted, SBA noted “that federal employees are ineligible to receive federal contracts as indicated under the Federal Acquisition Regulations Subpart 3.6, Section 3.601. . . .”¹ AR Ex. 5 at 2.

On May 19, 2011, Petitioner submitted a request for reconsideration.² AR Ex. 4 at 1. The request did not include any document indicating Mr. Jackson’s final date of employment at the GPO, nor did it include any W-2 statements. *See* AR Ex. 4 at 1-54. Mr. Jackson did submit materials in which he claimed that his third-shift schedule at GPO does not conflict with his ability to manage the daily operation of Petitioner full-time.³ AR Ex. 4 at 1-4. Mr. Jackson also stated that his “desire and goal” is “to transition out of the GPO position as [Petitioner] becomes fully self-sustained” in the future. AR Ex. 4 at 4.

Following reconsideration, SBA denied Petitioner’s application on October 28, 2011. AR Ex. 1 at 1. In its Final Determination, SBA acknowledged that Mr. Jackson worked at the GPO from 11:30 p.m. to 8:00 a.m., Monday through Friday, and that Mr. Jackson also claimed to devote forty hours per week to Petitioner. *Id.* SBA then wrote:

[W]e must conclude that [Mr. Jackson’s] GPO employment responsibilities and hours of employment would adversely affect [his] ability to manage [his] firm successfully on a full-time basis during normal work hours. [Mr. Jackson’s] schedule indicates that after having worked the night shift until 8 am, [he] then work[s] a full normal business day with [his] firm. We find that this arrangement is not practical given the number of hours you are working consecutively, detracting from [Mr. Jackson’s] ability to concentrate on the development of [his] firm, a program requirement.

Id. SBA also determined that Petitioner’s “failure to provide all 2010 W-2 statements” precluded SBA from determining whether Mr. Jackson received wages from employers other than the GPO and Petitioner. *Id.* On these bases, SBA concluded that Mr. Jackson’s “employment at GPO conflicts with program intent related to business development,” and denied Petitioner’s application.⁴ *Id.* Petitioner then filed this appeal.

¹ Section 3.601(a) of the Federal Acquisition Regulations states: “Except as specified in 3.602, a contracting officer shall not knowingly award a contract to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more Government employees.” 48 C.F.R. § 3.601(a).

² The letter accompanying Petitioner’s application for reconsideration is dated May 19, 2010, but the content of the submission and its context in the Administrative Record make clear that this is a typographic error and that the letter was in fact submitted in 2011.

³ Mr. Jackson notes in his statement that the services required by many of Petitioner’s clients require short-term commitments and part-time hours. AR Ex. 4 at 4. This statement does not imply that Mr. Jackson’s devotion to Petitioner is short-term or part-time.

⁴ SBA did not refer to the Federal Acquisition Regulations in its Final Determination, so they will not be considered as part of this appeal.

V. Parties' Arguments

Petitioner argues that the regulations governing control of 8(a) BD participants only requires Mr. Jackson to devote full-time management to Petitioner “during the normal working hours of firms in the same or similar line of business,” and that firms in Petitioner's line of business normally operate “outside of a 'standard' Monday through Friday, 9am - 5pm work week.” Petition at 3; *see* 13 C.F.R. § 124.106(a)(3). Petitioner contends that “Saturday and Sunday hours are also included” because “business oversight must occur during the varied contracted hours of clients.” Petition at 3. Petitioner claims that if Mr. Jackson works eight hours each on Saturday and Sunday, he is able to devote the balance of forty hours to Petitioner between Monday and Friday. Petition at 3-4. Petitioner describes this as a “very practical” schedule that provides Mr. Jackson with adequate time to focus on developing the firm. Petition at 4.

In its Answer SBA notes that Petitioner has not specified precisely which hours Mr. Jackson devotes to managing Petitioner, but asserts that “Mr. Jackson devotes minimal time to [Petitioner] during normal working hours of firms in the same or similar line of business.” Answer at 7. SBA does not dispute that security firms provide services outside of “normal working hours,” but SBA does argue that that “there is no evidence that security firms conduct marketing and contracting activities outside of weekday, day-time business hours” *Id.* SBA posits that “[a] firm cannot be successful if the only time the manager can devote to the business is during hours when clients and marketing venues are not operational.” *Id.* SBA argues that if Mr. Jackson devotes twenty-four hours to Petitioner between Monday and Friday “it is unclear whether those hours are during normal working hours” Answer at 7-8. SBA conjectures that Mr. Jackson could be working from 6:00 p.m. to 11:00 p.m. during the workweek, or that he could “not wholly unreasonabl[y]” be working from 9:00 a.m. until 2:00 p.m. Answer at 8. SBA states that under either scenario, there is no evidence of Mr. Jackson's precise schedule and that Petitioner admitted in its Petition that Mr. Jackson devotes “only 24 of 40 hours to BDS during the work-week.” *Id.*

In contrast to Mr. Jackson's claimed devotion to Petitioner, SBA argues there is no question that Mr. Jackson works the third shift at the GPO. Answer at 8. SBA contends that it was reasonable to conclude “that it would be impractical for Mr. Jackson to effectively market his firm to potential clients such as the Federal Government or meet with SBA officials because he *may* be exhausted from working 8-hour night shifts at GPO.” Answer at 10 (emphasis added). SBA asserts that Mr. Jackson's full-time schedule with GPO does conflict “with his ability to effectively market and develop” Petitioner. *Id.* SBA claims its determination that Petitioner does not meet the full-time devotion requirement of the regulations “was reasonable and should be upheld because it was based on the evidence presented, which demonstrated that [Mr. Jackson] devoted minimal time to [Petitioner] during normal working hours, [Mr. Jackson] devoted full-time to his position at GPO, and that [Mr. Jackson's] employment with GPO conflicts with his ability to effectively manage” Petitioner. *Id.*

In reply to SBA's Answer, Petitioner denies admitting that Mr. Jackson only devotes twenty-four hours to Petitioner during the Monday to Friday workweek, and instead claims that

Mr. Jackson “has made and continues to make a daily sacrifice in working schedules of consecutive full-time shifts” Reply at 2-3. Petitioner reiterates that Mr. Jackson devotes full-time to Petitioner during the normal working hours of security firms. Reply at 1-3.

VI. Discussion

A. Mr. Jackson's Employment at the GPO

The question posed by this appeal is whether SBA reasonably determined that Petitioner is not managed on a full-time basis “during the normal working hours of firms in the same or similar line of business” by a socially and economically disadvantaged individual. 13 C.F.R. § 124.106(a)(3). The only such individual implicated in this matter is Mr. Jackson. SBA determined that Mr. Jackson does not manage Petitioner on a full-time basis primarily because he works forty hours per week during the third shift at the GPO. *See* AR Ex. 1 at 1. SBA inferred that working the third-shift hours of 11:30 p.m. to 8:00 a.m. at GPO, followed by working a full business day at Petitioner, “is not practical given the number of hours” consecutively worked and would “detract[] from [Mr. Jackson's] ability to concentrate on” developing Petitioner. *Id.* Based on this inference, SBA determined that Mr. Jackson does not manage Petitioner full-time during the normal working hours of firms in Petitioner's line of business. *See id.* The first question is whether SBA reasonably concluded that Mr. Jackson's full-time employment at GPO prevents him from devoting full-time management to Petitioner.

Full-time employment outside an applicant firm does not necessarily preclude a disadvantaged individual from also managing an applicant firm full-time. *Raintree*, SBA No. BDP-407, at 9-10; *Art Constr. Sys.*, SBA No. MSBE-423, at 10 (1993); *KRW Inc.*, SBA No. MSBT-379, at 12. The issue is whether the dual obligations conflict to the extent that SBA may reasonably conclude that one precludes the other. *See Oak Hill Rehab. Specialists*, SBA No. BDP-154, at 5; *see Barkley Security Agency, Inc.*, SBA No. BDP-105, at 4 (1998) (discussing changes in full-time control requirements).

In this case, Mr. Jackson's schedule at the GPO does not directly conflict with his ability to manage Petitioner. Mr. Jackson works for the GPO between 11:30 p.m. and 8:00 a.m., and SBA does not claim or presume that these constitute the normal working hours of Petitioner or other firms in Petitioner's line of business. Indeed, SBA argues that Petitioner's normal working hours are or should be the “normal working hours” of 9:00 a.m. to 5:00 p.m. *See* Answer at 7. Here the presumed conflict arises from the anticipated effect that working 11:30 p.m. to 8:00 a.m. will have on Mr. Jackson's faculties. The effect of full-time evening employment on an individual's ability to successfully manage an applicant firm has been addressed twice before, with divergent outcomes.⁵

In the *Matter of MSC Electric*, SBA No. MSBE-442 (1993), the disadvantaged individual managing the applicant firm claimed to work for the firm between the hours of 7:00 a.m. to 3:00

⁵ Though the applicable regulations have been amended since these cases were decided, the cases continue to provide relevant and persuasive guidance under the current rules. *See Raintree*, SBA No. BDP-407, at 6 n.4.

p.m. during weekdays, plus weekend hours as required. *MSC Electric*, SBA No. MSBE-442 at 2. The individual claimed that he also worked forty hours per week for an outside employer during the hours of 3:00 p.m. to 1:30 a.m., Monday through Thursday. *Id.* The administrative record contained letters of recommendation showing “beyond doubt” that the individual did direct and manage the firm, personally handled “all the important paperwork,” was the firm’s “‘point-of-contact’ with the company’s customers.” performed much of the necessary labor, and was “virtually always available when a customer needs to communicate something about the job at hand.” *Id.* at 2-3. The firm was denied admission to the 8(a) BD program in relevant part because SBA determined that the individual did not in fact work full-time for the applicant firm. *Id.* at 2.

On appeal, OHA found that SBA’s determination was reasonable. *Id.* at 3. The presiding judge reasoned that “as a practical matter” the individual “would have to get by with about three hours [of] sleep four days per week,” and this was “possible” but “inherently unlikely.” *Id.* The judge also noted that “at 3:00 p.m., four days per week,” the individual “would have to instantly shift from” the firm’s location to his other employer’s work site. *Id.* The judge found that the letters submitted with the firm’s application did not actually prove the number of hours the individual devoted to the firm, leaving the individual’s own statement as the only evidence that he did devote full-time management to the applicant. *Id.* Under these circumstances, the judge held that SBA’s determination was reasonable. *Id.*

In the *Matter of Balderas General Contractors, Inc.*, SBA No. MSBE-513 (1995), the applicant firm was a real estate and contracting business owned by a presumably disadvantaged individual. *Balderas Gen. Contractors*, SBA No. MSBE-513, at 2. The individual claimed to manage the applicant on a full-time basis, and also stated that for the prior eleven years he had worked the second shift at an outside employer between 4:00 p.m. and 12:00 midnight. *Id.* at 3. The record also showed that the individual “had adjustable hours which permitted him to leave and take time off with a pay loss when necessary, and had worked a fifteen or sixteen hour schedule since around 1984 in order to run both his real estate and contracting companies” *Id.* SBA denied the firm entry to the 8(a) BD program because it determined that the individual’s full-time outside employment would “detract” from his ability to manage the applicant on a full-time basis. *Id.* at 2, 4-5.

OHA found that SBA’s determination was arbitrary and capricious under the circumstances. *Id.* at 5. The presiding judge noted that the regulations did not prohibit outside employment, and that SBA had not provided any reason for not crediting the individual’s statement that he regularly worked fifteen to sixteen-hour days. *Id.* at 4. The judge also faulted SBA for not analyzing whether “full-time employment” managing the applicant contracting business had to consist of eight-hour days or could consist of “several hours a day during the week and long days on the weekend.” *Id.* Finally, the judge found that the evidence demonstrated that the individual had run the applicant business under the proposed schedule successfully for approximately ten years before the business applied for admission to the 8(a) BD program. *Id.* This evidence supported the individual’s claim of full-time devotion, and had not been rebutted or discredited by SBA. *Id.* Given the evidence, the judge held that SBA had “substituted vague inference for fact” in determining that the individual’s outside employment would impermissibly detract from his ability to manage the applicant on a full-time basis. *Id.* at 4-5.

Unlike *MSC Electric* where the individual's proposed schedule posed a direct conflict between his obligations, here there is no indication that Mr. Jackson's schedule requires him to instantaneously shift from the GPO to Petitioner's place of business. Furthermore, where the individual managing the applicant firm in *MSC Electric* proposed to work eighteen and a half hours per day, four days per week, in this case Mr. Jackson claims to work sixteen and a half hours per day, five days per week. It is neither impossible nor inherently improbable that Mr. Jackson could work such hours. Indeed, like the individual in *Balderas General Contractors*, the evidence suggests that Mr. Jackson had successfully maintained such a schedule for thirteen years before founding Petitioner. *See* AR Ex. 11 at 14, 17. Similarly, tax documents in the Administrative Record reveal that Petitioner has shown substantial gross annual revenues between 2007 and 2010 under Mr. Jackson's management, supporting his claim of full-time devotion. *See* AR Ex. 4 at 8, 16; AR Ex. 11 at 114, 131, 140. SBA did not address Mr. Jackson's long employment history or Petitioner's recent financial performance when it assumed that working the second shift at GPO would prevent Mr. Jackson from engaging in full-time management of Petitioner. In doing so it failed to consider important aspects of this case, SBA's finding is also based on speculation and lacks reasonable support in the Administrative Record. SBA's conclusion that Mr. Jackson's full-time employment at GPO prevents him from devoting full-time management to Petitioner was therefore arbitrary and capricious or otherwise contrary to law.

This discussion has assumed that Mr. Jackson must work eight hours per day, between 9:00 a.m. and 5:00 p.m., Monday through Friday, to manage Petitioner on a full-time basis. As previously noted, the regulations do not compel this schedule. The regulations require “full-time” devotion “during the normal working hours of firms in the same or similar line of business.” 13 C.F.R. § 124.106(a)(3). The quantity of hours required by the term “full-time” is not defined, and the temporal restraints imposed by the phrase “normal working hours of firms in the same or similar line of business” are necessarily flexible. *See Raintree*, SBA No. BDP-407, at 8; *AGB Investigative Servs.*, SBA No. BDP-354, at 6.

Mr. Jackson states that he manages Petitioner on a full-time basis, and both his work history and Petitioner's financial performance provide some evidence to support his statement. AR Ex. 4 at 1, 3-4. SBA conceded in its answer “that a security firm provides its services on weekends and certainly outside of only normal working hours,” and also stated that “it is not wholly unreasonable that Mr. Jackson could manage” Petitioner between the hours of 9:00 a.m. and 2:00 p.m., Monday through Friday. Answer at 7-8. SBA's concern, as articulated in its Answer, is Mr. Jackson's ability to “conduct marketing and contracting activities” during “weekday, day-time business hours when clients are usually available” to communicate and when SBA officials are available. *Id.* at 7-8, 10. SBA does not, however, indicate why Mr. Jackson could not adequately perform these functions between the hours of 9:00 a.m. and 2:00 p.m. during the workweek, and address his other managerial duties during alternative hours including the weekend. *See Balderas Gen. Contractors*, SBA No. MSBE-513, at 4. Finally, there is no evidence in the Administrative Record to support SBA's assertion in its Answer that Mr. Jackson devotes “minimal time” to Petitioner “during normal working hours. . . .” Answer at 10-11.

B. Mr. Jackson's 2010 W-2 Statements

Petitioner's application for admission to the 8(a) BD program, submitted in October or November of 2010, included tax documents for the years 2007 through 2009. Tax documents for the year 2010 would not have been available at the time of application. In its Initial Determination dated March 29, 2011, SBA did not raise the absence of 2010 tax documents as a decline issue. However, SBA instructed Petitioner to submit its "2010 personal tax return including all schedules, attachments, W-2's [sic] totaling wages on line item seven ... or other IRS documentation" if it wished to have its application reconsidered. AR Ex. 5 at 1-2. Petitioner did not submit any W-2 statements with its application for reconsideration. In its Final Determination dated October 28, 2011, SBA stated that Petitioner's "failure to provide all 2010 W-2 statements to allow SBA to confirm where wages were earned precludes our ability to determine whether [Mr. Jackson] receive wages elsewhere other than with the GPO." AR Ex. at 1. Because the issue of the missing 2010 W-2 statements was raised for the first time in the Final Determination, this matter may be remanded to the Director of the Office of Business Development so that Petitioner may apply for reconsideration of this ground for denial. *See* 13 C.F.R. § 134.406(e)(3).

VII. Conclusion

SBA's determination that Mr. Jackson does not manage Petitioner on a full-time basis as required by 13 C.F.R. § 124.106 because his full-time work on the third shift at the GPO might detract from his ability to concentrate on the development of Petitioner was arbitrary, capricious, or contrary to law.

SBA did not conclude that Petitioner's failure to submit W-2 statements for tax year 2010 precludes SBA from determining whether Mr. Jackson receives wages from a source other than Petitioner or the GPO in its Initial Determination. Instead, this issue was raised for the first time in SBA's Final Determination. Petitioner is therefore entitled to request that the Associate Administrator for Business Development reconsider this issue as if the determination dated October 28, 2011 was an initial decline, and this matter is **REMANDED** to the Director of the Office of Business Development. 13 C.F.R. §§ 124.205, 134.406(e)(3). Petitioner shall be allowed to submit to SBA within forty-five (45) days of its receipt of this Order "any additional information and documentation pertinent to overcoming" this decline issue, "whether or not available at the time of initial application, including information and documentation regarding changed circumstances." 13 C.F.R. § 124.205. Proceedings on remand shall otherwise conform to the requirements set forth in 13 C.F.R. §§ 124.205-124.206.

BARBARA A. GUNNING
Administrative Law Judge