United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Loyal Source Government Services, LLC,	SBA No. BDP-434
Petitioner	Decided: June 22, 2012

APPEARANCES

Pamela J. Mazza, Esq., Patrick T. Rothwell, Esq., & Kelly A. DiGrado, Esq., PilieroMazza PLLC, Washington, D.C., for Petitioner

Alison M. Mueller, Esq., Office of General Counsel, United States Small Business Administration, Washington, D.C.

DECISION AND REMAND ORDER

I. Introduction and Jurisdiction

This proceeding arises under the authority of 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 ("the Rules"), 13 C.F.R. Part 134. Loyal Source Government Services ("Petitioner"), appeals the determination of the United States Small Business Administration ("SBA") denying Petitioner's application for admission to the 8(a) Business Development ("8(a) BD") program. 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 social disadvantage ...." 13 C.F.R. § 134.102(j)(1); *see also* Small Business Act § 8(a)(9)(A), (B)(i), 15 U.S.C. § 637(a)(9)(A), (B)(i).

SBA's determination contains a clear mistake of law and erroneous findings of fact, and is insufficiently complete in its evaluation of the evidence in the record. I am therefore unable to assess the reasonableness of the SBA's claim determination, and this matter must be remanded to the Director of the Office of Business Development for a new determination. *See* 13 C.F.R. § 134.406(e).

II. Background

Loyal Source Government Services, LLC ("Petitioner"), applied for certification as a

participant in the 8(a) BD program on December 16, 2010. Administrative Record ("AR") Ex. 12 at 8-11. Petitioner claims eligibility for the 8(a) BD program through Seth Eubank, its president, chief financial officer, and sole owner, on the basis of Mr. Eubank's physical disabilities. AR Ex. 12 at 12, 16, 22-23, 146-49, 153. Mr. Eubank suffers from lumbosacral degenerative disc disease, bilateral tinnitus with associated hearing loss, and left S1 radiculopathy of the left ankle, as a result of his experiences in the United States Army as an Airborne Ranger. AR Ex. 5 at 2, 21-22; Answer at 6. On May 9, 2011, SBA issued a Denial Letter denying Petitioner admission into the 8(a) BD program because, among other reasons, SBA determined that Mr. Eubank had not demonstrated by a preponderance of the evidence that he was socially disadvantaged. AR Ex. 6 at 1-3. The Denial Letter invited Petitioner to apply for reconsideration by submitting specified additional information. AR Ex. 6 at 5-6.

Petitioner did apply for reconsideration on June 22, 2011, and submitted an updated narrative account of his alleged social disadvantage. AR Ex. 5 at 1, 3, 19. On October 28, 2011, SBA issued a Reconsideration Denial 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 Mr. Eubank had failed to establish by a preponderance of the evidence that he was socially disadvantaged because of his disability. AR Ex. 1 at 1-3.

On November 23, 2011, Petitioner filed a timely Notice of Appeal ("Petition"). *See* 13 C.F.R. § 134.404 (forty-five days to file appeal). SBA filed an Answer to the Petition, together with a certified copy of the Administrative Record, on January 24, 2012. On February 9, 2012, Petitioner filed Objections to the Administrative Record and Claim of Privilege ("Motion") contained therein. *See* 13 C.F.R. § 134.406(c)(2) (petitioner may object to claim of privilege). Finally, on February 23, 2012, SBA filed a Motion to File Reply to Petitioner's Objections to the Administrative Record and Claim of Privilege ("Response"). By order dated April 19, 2012, the undersigned was designated to preside over this proceeding.

III. Agency's Claim of Privilege

SBA has asserted that the deliberative process privilege applies to seven exhibits in the Administrative Record and has withheld them from Petitioner. These are Exhibits 2 ("BOS Analysis: Second level"), 3 ("Draft SBA Denial Letter"), 4 ("BOS Analysis: First level"), 7 ("BOS Analysis: Second level"), 8 ("Draft SBA Denial Letter"), 9 ("BOS Analysis: First level"), and 10 ("IG Email"). SBA claims that each of these exhibits is "an internal predecisional document" within the meaning of 5 U.S.C. § 552(b)(5), and is subject to the deliberative process privilege.[1] AR Vaughn Index at 1-3.

In its Motion, Petitioner contends that "SBA did not provide any genuine details" in its determination explaining "the factual basis for its conclusion[[s] that Mr. Eubank's narrative

[1] The undersigned notes that in the Vaughn Index, SBA identifies an 8(a) BD applicant other than Petitioner in its written justification for its claims of privilege. Petitioner has not raised any objections on this point, and the undersigned will assume that the misidentification is a scrivener's error.

lacked 'specific information' and that he did not present the 'quality and quantity of information necessary' to support his claim of social disadvantage." Motion at 1 (quoting AR Ex. 1 at 3). From this, Petitioner makes two objections.

First, Petitioner objects to the Administrative Record because it "is entitled to know the factual basis for [the SBA's] decision so as to have an opportunity to rebut" it. Motion at 2. Petitioner cites 13 C.F.R. § 134.406(c)(1), which allows a petitioner to "object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record." 13 C.F.R. § 134.406(c)(1). As Petitioner has not identified any particular document that it believes is missing from the Administrative Record, its first objection has no merit.

Second, Petitioner objects to SBA's claim of privilege over Exhibits 2 and 3, to the extent that the factual bases for SBA's determination are included in those Exhibits. Petitioner argues that the deliberative process privilege does not extend to factual material, and that such material must be segregated and disclosed if possible. Motion at 2-3 (citing *Army Times Publ'g Co. v. Dep't of Air Force*, 998 F.2d 1067, 1071 (D.C. Cir. 1993); *Hopkins v. U.S. Dep't of Housing and Urban Dev.*, 929 F.2d 81, 84 (2d Cir. 1991)). Petitioner also argues that the deliberative process privilege is not absolute and may be overcome by a showing of sufficient need. Motion at 3 (citing *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir 1997)). Petitioner contends "that nondisclosure of SBA's final factual findings with respect to Mr. Eubank's experiences of bias will cause harm to" Petitioner and may amount to a denial of due process. Motion at 3-4 (citing *Dairyland Power Co-op v. United States*, 77 Fed. CI. 330, 336 (Fed. Cl. 2007), *vacated in part on other grounds*, 645 F.3d 1363 (Fed. Cir. 2011)).

"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." *Matter of Spectrum Contracting Servs., Inc.*, SBA No. BDP-378, 2010 WL 4271524, at 6 (2010) (citing Black's Law Dictionary 1215 (7th ed. 1999); *In re Grand Jury*, 821 F.2d 946, 958-59 (3d Cir. 1987)). After reviewing the withheld documents in camera, the undersigned finds that the SBA Business Opportunity Specialist ("BOS") analyses, Draft Denial Letters, and Inspector General ("IG") Email are predecisional deliberative documents that express opinions and make recommendations about this matter. *See Matter of Henze Indus.*, SBA No. SDBA-111, at 6 (1999) (describing documents eligible for privilege); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151-53 (1975) (describing deliberative process privilege generally). The withheld Exhibits are therefore properly covered by the deliberative process privilege.

Furthermore, the privilege has not been overcome by a showing of need because nondisclosure of the Exhibits will not cause harm in this case. *See In re Sealed Case*, 121 F.3d at 737-38 (explaining qualified privilege). The withheld Exhibits do not contain any facts or findings not set forth in SBA's determination, and "[t]here 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 Petitioner admission into the 8(a) BD program." *Spectrum Contracting Servs., Inc.*, SBA No. BDP-378, 2010 WL 4271524, at 7. The SBA's assertion of the deliberative

process privilege was therefore appropriate and Petitioner's request that OHA direct SBA to produce the withheld information is denied.

IV. 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. A "socially disadvantaged individual" is someone who has "been subjected to racial or ethnic prejudice or cultural bias within American society because of the individual's identity as a member of a group, "and without regard to [his or her] individual qualities." 13 C.F.R. § 124.103(a). The social disadvantage must stem from circumstances beyond the individual's control. *Id.* An individual claiming disadvantage on the basis of a physical disability is not presumed to be socially disadvantaged. *See* 13 C.F.R. § 124.103(b) (listing presumptively disadvantaged groups). Such an individual may be deemed socially disadvantaged if he establishes by a preponderance of the evidence that he personally experienced "substantial and chronic social disadvantage" that negatively impacted his "entry into or advancement in the business world. . . ." 13 C.F.R. § 124.103(c). In assessing the negative impact, SBA considers "any relevant evidence . . . to see if the totality of circumstances shows" such disadvantage. 13 C.F.R. § 124.103(c)(2)(iii). "In every case . . . SBA will consider" evidence concerning the individual's "education, employment and business history, where applicable. . . ." *Id.*

SBA does not dispute that Mr. Eubank has physical disabilities that constitute an "objective distinguishing feature that has contributed to social disadvantage" within the meaning of 13 C.F.R. § 124.103(c)(2)(i). Answer at 6 ("It is undisputed that Mr. Eubank has satisfied the first element of establishing social disadvantage because he is physically disabled. . . ."). Petitioner must therefore prove by the preponderance of the evidence that Mr. Eubank has personally experienced "substantial and chronic social disadvantage in American society. . . ." 13 C.F.R. § 124.103(c)(2)(ii). "These experiences must include specific incidents that [both] demonstrate [his] social disadvantage and had a negative impact on [his] entry into or advancement in the business world." *Matter of Seacoast Asphalt Servs., Inc.*, SBA No. SDBA-151, 2001 WL 36039167, at 6 (2001) (citing 13 C.F.R. § 124.103(c)(2)(ii)-(iii)). An applicant usually must prove there were "more than one or two specific, significant incidents" to show that the resulting social disadvantage was "substantial and chronic." *Matter of Med-Choice, Inc.*, SBA No. SDBA-179, at 8 (2008).

"Each specific incident of social disadvantage in the applicant's claim must be presented in sufficient detail to be evaluated." *Seacoast Asphalt Servs., Inc.*, SBA No. SDBA-151, 2001 WL 36039167, at 6. Generally, the claim "must describe (1) when and where the incident occurred, (2) who discriminated, (3) how the discrimination took place, and (4) how the applicant was adversely affected by the discrimination." *Id.* (citing *Matter of Bitstreams, Inc.*, SBA No. BDP-122, at 15 (1999)). "A claim that fails to provide sufficient detail is deficient." *Id.* (citing *Bitstreams*, SBA No. BDP-122, at 15).

"If the applicant presents the claim in sufficient detail, then the SBA must evaluate or weigh the evidence presented to determine if the applicant has proven by the preponderance of

the evidence that the incident happened as described. *Id.* To prove a fact by the preponderance of the evidence, an applicant "must present 'evidence which is of greater weight or more convincing than evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not."' *Bitstreams*, SBA No. BDP-122, at 7 (quoting *Greenwich Collieries v. Director, Office of Workers' Compensation Programs*, 990 F.2d 730, 736 (3d Cir. 1993)). Put more simply, the individual need only show "'that the fact is more likely true than not true."' *Id.* at 8 (quoting 4 L. Sand, et al., *Modern Federal Jury Instructions* P 73.01 (1998) (Form Instruction 73-2)). Direct proof of discrimination is not required to establish social disadvantage; circumstantial or inferential evidence will suffice. *Matter of Woroco Int'l*, SBA No. BDP-174, at 8 (2002).

"Evidence to support a claim of social disadvantage includes the complete application," including the personal eligibility statement ("PES") of the individual claiming to be disadvantaged, "and other evidence that supports the applicant's statement, including evidence in a request for reconsideration." *Matter of Ace Technical, LLC*, SBA No. SDBA-178, at 5 (2008). This other evidence may "include statements from witnesses to the incident and written documents that prove or lend credibility to the applicant's statement, such as letters, diplomas, transcripts, financial statements, court documents, certifications, loan applications, checks, tax returns, credit reports, or any other document that proves or lends credibility to" the applicant's individual claims. *Id.* "Evidence such as newspaper articles, statistics, and studies that establish discrimination, bias, or prejudice in a particular industry or ethnic group may lend credence to a claim," but cannot alone prove an individual's claim of social disadvantage. *Id.* SBA may consider "commonly accepted knowledge" or "anecdotal evidence of discrimination in the applicant's community." *Id.*

Often the PES is the only evidence available because "there is generally no discovery" during the 8(a) BD program application process, and because certain types of discrimination are "rarely witnessed and one cannot expect an applicant to obtain a statement admitting discrimination." *Woroco Int'l*, SBA No. BDP-174, at 7 (2002). The applicant does not have to corroborate the PES with independent evidence to meet the burden of proof. *Ace Technical*, SBA No. SDBA-178, at 5; *Bitstreams*, SBA No. BDP-122, at 10-11. Indeed, the statements in the PES "are made under penalty of criminal sanctions for false statements and thus carry the additional weight of a sworn statement." *Ace Technical*, SBA No. SDBA-178 at 5 (citing 15 U.S.C. § 645; 18 U.S.C. § 1001); *Seacoast Asphalt Services, Inc.*, SBA No. SBDA-151, 2001 WL 36039167, at 6.

However, SBA "may consider lack of corroboration in weighing the evidence ... if the applicant fails, without explanation, to present apparently available evidence to support the claim." *Bitstreams*, SBA No. BDP-122, at 11. Similarly, "SBA may discount or disbelieve" the PES or other evidence "if it is inconsistent with other, credible evidence in the record showing, for instance, a particular incident complained of is attributable to a nondiscriminatory cause." *Ace Technical*, SBA No. SDBA-178, at 5. Evidence may also be discounted if it is "(1) inherently improbable, (2) inconsistent, (3) lacking in sufficient detail, or (4) merely conclusory." *Matter of Timely Eng'g Soil Tests, LLC*, SBA No. BDP-297, at 9 (2008).

When evaluating an application to the 8(a) BD program, SBA must "make an

individualized determination based on the arguments and evidence submitted by a person and disclosed to that person." *Ace Technical*, SBA No. SDBA-178, at 6 (citing *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994)). The SBA "may not 'arbitrarily disbelieve credible evidence."' *Timely Eng'g*, SBA No. BDP-297, at 11 (quoting *Bitstreams*, SBA No. BDP-122, at 15). If the SBA refuses to credit evidence submitted by an individual, it must provide a cogent reason in its determination for doing so. *Ace Technical*, SBA No. SDBA-178, at 5-6 (citing *de la Llana-Castellon v. I.N.S.*, 16 F.3d 1093, 1096 (10th Cir. 1994)); *see Timely Eng'g*, SBA No. BDP-297, at 11. An initial determination denying an application to the 8(a) BD program should include a description of the facts presented by the applicant upon which SBA relied, and "an evaluation of the evidence, or a statement of the rationale for discounting" the evidence presented by the applicant. *Ace Technical*, SBA No. SDBA-178, at 6. The determination should give the applicant "adequate notice of the facts and reasons for denying" the application so that the applicant may understand the basis for the denial and meaningfully address SBA's conclusions during reapplication or appeal. *Id.*

Appellate review 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). It does not permit the Administrative Law Judge ("ALJ") to substitute his or her judgment for that of the SBA or to review the administrative record de novo to decide whether the SBA's ultimate conclusions are correct. Instead, 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*, SBA No. SDBA-179, at 4; *see also Ace Technical*, SBA No. SDBA-178 at 3.

Appellate 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). The ALJ must first consider whether the administrative record is complete. *See* 13 C.F.R. § 134.406(c). A case may be remanded if the ALJ "determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law." 13 C.F.R. § 134.406(e)(1). A case may also be remanded "where it is clearly apparent from the record that SBA made an erroneous factual finding . . . or a mistake of law." 13 C.F.R. § 134.406(e)(2).

If the administrative record is complete, then the judge must ascertain whether SBA made a "clear error of judgment" in its determination before the judge can find that the SBA's decision is "arbitrary, capricious, or contrary to law." *Matter of Tony Vacca Construction, Inc.*, SBA No. BDP-321, at 5 (2009); *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 SBA. *Fairfield Trucking Co.*, SBA No. BDP-223, at 3; *Timely Eng'g*, SBA No.

BDP-297, at 6. As long as SBA's determination was "reasonable," it must be upheld on appeal. 13 C.F.R. § 134.406(b).

V. Discussion

In the PES submitted with Petitioner's initial application for admission to the 8(a) BD program, Mr. Eubank described his experiences as an officer in the Army National Guard and as an agent for the Internal Revenue Service, and recounted a confrontation with a potential business partner at an Orlando Magic viewing party. AR Ex. 12 at 153-56. After SBA determined that Petitioner had failed to show that Mr. Eubank was socially disadvantaged, Mr. Eubank prepared a revised PES in which he describes thirteen additional incidents allegedly showing that Mr. Eubank has experienced chronic and substantial social disadvantage on the basis of his disabilities. *Compare* AR Ex. 12 at 153-56 *with* AR Ex. 5 at 19-34. In the application for reconsideration, Petitioner's counsel stated that Petitioner had prepared its initial application without the benefit of legal counsel, and so "did not have a complete understanding of the legal standard or the amount of information required to support its 8(a) application." AR Ex. 5 at 3-4. Petitioner's counsel requested "that SBA accept for consideration [Mr. Eubank's] updated narrative which contains additional details, including corroborating evidence, which was not previously submitted to SBA." AR Ex. 5 at 4.

In its determination following reconsideration, SBA addressed four of the thirteen additional incidents as a group. AR Ex. I at 2-3. In each of these four incidents, a potential business partner "had made verbal commitments to" Petitioner or Petitioner was "in line to get a contract ..., but after they met [Mr. Eubank] in person and were witness to [his] disabilities, [Petitioner] never received any contract work." *Id.* at 2. SBA found that each of the four "alleged events predated the period of Mr. Eubank's original PES, and noted that none had been included in Petitioner's initial application. *Id.* SBA then determined that Petitioner's claim that it had not had "a complete understanding of the legal standard or amount of information required to support its 8(a) application" was "not credible given [Petitioner's] presentation of claims prior to these events which occurred in 2010." AR Ex. 1 at 3; AR Ex. 5 at 3-4. SBA also noted that Petitioner had been provided with "the preponderance of information guidance ... on several occasions" before it submitted its initial application. AR Ex. 1 at 2-3. SBA then concluded:

> [T]hese [four] claims again are vague and do not present the quality and quantity of information required to demonstrate chronic and substantial bias. You did not provide the specific information requested for these new claims to demonstrate that these incidents have validity and were not presented solely because of your initial denial.

AR Ex. 1 at 3. In its Answer, SBA clarifies its determination by explaining: "SBA found that these alleged events were not credible because Petitioner failed to provide sufficient specific information to demonstrate why they were being presented for the first time on reconsideration." Answer at 21.

Petitioner argues that SBA erred when it "did not explain why it found this evidence [to be] vague." Petition at 14, 16. Petitioner also contends that SBA impermissibly ignored the

additional evidence it submitted on reconsideration. *Id.* at 14-15.

SBA committed a clear error of law insofar as it found that the four incidents in question lacked validity because they were presented on reconsideration "solely because of [Petitioner's] initial denial." AR Ex. 1 at 3. The regulations expressly allow an applicant to request that SBA reconsider an initial decline decision denying the applicant admission to the 8(a) BD program. 13 C.F.R. § 124.205. An applicant will necessarily request reconsideration only because its initial application is denied. If an applicant does request reconsideration, the regulations state that it "must provide any additional information and documentation pertinent to overcoming the reasons(s) for the initial decline, whether or not available at the time of initial application. . . ." *Id.* SBA cannot allow an applicant to request reconsideration and mandate that the applicant include with its request any relevant information that was available at the time of the initial application, but then refuse to consider or credit such evidence solely because it was not included with the initial application. *See Ace Technical*, SBA No. SDBA-178, at 5 (complete application includes evidence in request for reconsideration). Doing so would place an applicant who in good faith failed to include relevant evidence with its initial application into a Catch-22 situation.

SBA's determination in this instance was also arbitrary. Petitioner's request for reconsideration included evidence of thirteen additional incidents of alleged social disadvantage. SBA discounted four of these incidents because it found that they predated Petitioner's initial application, but had not been included. SBA did not similarly fault the nine other additional incidents, even though they either predate the initial application or are undated. While SBA erred in invalidating the four incidents solely because they were not submitted with the initial application, it applied this erroneous standard in an arbitrary fashion.

SBA also made a clear mistake of fact. SBA found that the four incidents all occurred before Petitioner submitted its initial application and therefore could have been included with that application. AR Ex. 1 at 2. This finding is clearly contradicted by the evidence in the Administrative Record. Petitioner submitted its initial application on December 16, 2010. One of the four incidents in question allegedly occurred on or around February 17, 2011. AR Ex. 1 at 2-3; AR Ex. 5 at 31. SBA's finding that this incident occurred before Petitioner submitted its initial application is clearly erroneous.

Finally, to the extent that SBA did consider the content of the evidence concerning these four incidents, it did not adequately explain its reasoning. SBA wrote in its determination that "these claims" were "vague," lacked ""specific information," and did not "present the quality and quality of information required to demonstrate chronic and substantial bias." AR Ex. 1 at 3. A statement that a claim was "vague" is a conclusory evaluation that does not address the specific evidentiary material in the record and provides no insight into SBA's reasoning. *See Med-Choice*, SBA No. SDBA-179, at 7. It invites the reviewing judge to guess why or in what way the claim was vague, and thereby risk substituting her own judgment for that of SBA. *See* 13 C.F.R. § 134.406(b) ("[R]eview is limited to determining whether the Agency's determination is arbitrary, capricious, or contrary to law."); *Ace Technical*, SBA No. SDBA-178, at 3 (ALJ may not substitute own judgment for that of the SBA); *Med-Choice*, SBA No. SDBA-179, at 7 (unable to assess reasonableness of SBA's determination failed "address the evidence submitted, cite the evidence relied on, and provide a rational explanation for the determination").

It is no explanation to say that a claim is "vague" because it lacks "specific information," as this merely begs the question. Because SBA neither explained why it concluded that the evidence concerning the four alleged incidents was vague, nor described what specific information was missing, the undersigned cannot assess whether SBA's determination was reasonable.[2]

In addition to its errors regarding the four incidents detailed above, SBA made a clear error of judgment by completely ignoring other evidence in the Administrative Record. In its determination, SBA addressed "two examples of experiences [Mr. Eubank] had at conferences or networking events." AR Ex. 1 at 3. SBA determined that Petitioner had failed to establish that either of Mr. Eubank's two experiences at conferences or networking events demonstrated social disadvantage. *Id.* The difficulty is that Mr. Eubank's PES plainly describes three experiences that he had at conferences or networking events, and his account of one such event is supported by a letter from a third party. AR Ex. 5 at 10-12, 54. SBA made a clear error of fact when it found that Petitioner only provided two examples of experiences at conferences or networking events.

SBA also did not provide any details in its determination that would enable the undersigned to ascertain which two of the three experiences it did intend to address, making it impossible to evaluate whether SBA's determination was reasonable. Furthermore, by only addressing two of the experiences, SBA evidently failed to consider the third. SBA also overlooked Mr. Eubank's allegation that he experienced social disadvantage during a speaking engagement, and ignored a letter submitted on reconsideration to corroborate Mr. Eubank's account of his experience at a viewing party for the Orlando Magic. AR Ex. 5 at 12-13, 56. Thus, in this instance SBA's determination did not address multiple facts alleged by Petitioner, and did not adequately evaluate Petitioner's evidence. *See Ace Technical*, SBA No. SDBA-178, at 6.

A presiding ALJ "may remand a case" for further consideration if she "determines that, due to the absence in the written administrative record of the reasons upon which the determination was based, the administrative record is insufficiently complete to decide whether the determination is arbitrary, capricious, or contrary to law." 13 C.F.R. § 134.406(e)(1). A case "may also" be remanded "where it is clearly apparent from the record that SBA made an erroneous factual finding ... or mistake of law. . . ." 13 C.F.R. § 134.406(e)(2). In this matter, it is clearly apparent that SBA made erroneous factual findings, an error of law, and failed to adequately explain in the Administrative Record the reasons underlying its determination. Because SBA has not fully evaluated Petitioner's evidence and explained its reasons for

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[2] In the words of the United States Supreme Court:

> If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive, In other words, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong."

SEC v. Chenery Corp., 332 U.S. 194, 196-97 (1947) (quoting *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 511 (1935)).

declining Petitioner's application, the Administrative Record is insufficiently complete and it is appropriate to remand this case for further consideration.

VI. Conclusion

The case is **REMANDED** to the Director of the Office of Business Development for further consideration and a new determination of Petitioner's eligibility for the 8(a) Business Development program, consistent with this Decision and Remand Order. *See* 13 C.F.R. § 134.406(e). When making its determination, SBA may rely on the evidence that has already been submitted.

SBA is **ORDERED** to issue, serve, and file its new initial determination with the Office of Hearings and Appeals no later than thirty (30) days from the date of this Decision and Remand Order.

If SBA determines that Petitioner is not eligible for the 8(a) Business Development program, SBA is **ORDERED** to treat the determination as an initial determination and afford Petitioner the right to request reconsideration and submit additional information and documentation to support its request, or to appeal the determination directly. 13 C.F.R. §§ 124.204(f) to 124.206. If SBA approves Petitioner's application, it shall file and serve notice of such approval.

BARBARA A. GUNNING
Administrative Law Judge