Cite as: *Matter of Wholesale Distribution*, SBA No. BDP-456 (2012)

United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Wholesale Distribution,	SBA No. BDP-456
Petitioner	Decided: November 27, 2012

DECISION

On April 2, 2012, Wholesale Distribution, ("Petitioner") appealed a Determination of the Small Business Administration ("SBA" or the "Agency") denying Petitioner admission into the 8(a) Business Development Program ("8(a) BD Program"). *See* 13 C.F.R. parts 124, 134. On May 8, 2012, the Agency filed a *Response to Petitioner's Appeal Petition* ("Response"). In its *Response*, the SBA argued that Petitioner failed to prove by a preponderance of the evidence that its owner, Ms. Linda Sharp, had experienced chronic and substantial social disadvantage as a result of disability-motivated bias.

The case is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a) and 134.102(j)(1), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.

PROGRAM ELIGIBILITY REQUIREMENTS

To gain entry into the 8(a) BD Program, a business entity must be unconditionally owned and controlled by one or more socially or economically disadvantaged individuals who are of "good character," are citizens of the United States, and who can demonstrate the potential for business success. 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." 13 C.F.R. § 124.103(a). There is a rebuttable presumption that members of specified racial and ethnic groups are socially disadvantaged. 13 C.F.R. § 123.103(b).

Individuals who are not members of any presumptively disadvantaged group must establish individual social disadvantage by providing evidence demonstrating that (1) they have at least one objective distinguishing feature that has contributed to their social disadvantage; (2) they have personally experienced substantial and chronic social disadvantage in the United States because of that distinguishing feature; and (3) the disadvantage has negatively impacted their entry into or advancement in the business world. 13 C.F.R. § 124.103(c). To prove negative impact, an applicant must submit a Personal Eligibility Statement ("PES") recounting specific, bias-motivated events in then-education and employment histories and in their dealings as owner of the applicant business. 13 C.F.R. § 124.103(c)(2)(iii)(A)-(C). The SBA must then determine whether the totality of the described events shows the requisite disadvantage. 13 C.F.R. § 124.103(c)(2)(iii).

"Evidence of chronic and substantial disadvantage means there must be more than one or two specific, significant incidents." Med-Choice. Inc., SBA No. SDBA-179, p. 8 (2008). However, "only one such incident is sufficient if it is so substantial and far-reaching that there can be no doubt that the applicant suffered social disadvantage." *Ace Technical, LLC,* SBA No. SBDA-178, p. 4 (2008). The classic example of such an incident is a single act of workplace discrimination, such as a gender-based pay disparity, that lasts for multiple years.

BURDEN OF PROOF

An applicant seeking entry into the 8(a) BD Program on the basis of individual social disadvantage must prove that disadvantage by a preponderance of the evidence in the administrative record. 13 C.F.R. § 124.103(c)(1). The preponderance standard has been described as the "most common standard in the civil law." *Bitstreams Inc.*, SBA No. BDP-122 (1999). *Black's Law Dictionary* defines it as "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." PREPONDERANCE OF THE EVIDENCE, *Black's Law Dictionary* (9th ed. 2009).

Under this standard, an applicant is not required to convince the fact-finder that an incident was motivated by bias. *Southern Aire. Inc.*, SBA No. BDP-453, p. 8 (2012); *StrategyGen Co.*, SBA No. BDP-427, p. 4 (2012). The applicant must only present evidence sufficient to lead the fact-finder to conclude that it is more likely than not that bias was a factor. *Director, Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 279 (1994); *Southern Aire*, SBA No. BDP-453, at 8; *see also*, 4 L. Sand, et al., *Modern Federal Jury Instructions* ¶ 73.01 (1998) (Form Instruction 73-2).

Although an applicant does not have to provide conclusive proof of an event, the event "must be presented in sufficient detail to be evaluated." *Seacoast Asphalt Servs., Inc*., SBA No. SDBA-151, p. 6 (2001). To be sufficiently detailed, the claim must generally 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. *Southern Aire*, SBA No. BDP-453, at 7; *Loyal Source Gov't Serv., LLC*, SBA No. BDP-434, p. 5 (2012).

In many 8(a) BD Program cases, the PES represents the entirety of the applicant's evidence. No corroborating evidence is necessary. *Bitstreams, Inc*., SBA No. BDP-122. at 10-11; *Ace Technical*, SBA No. SDBA-178, at 5. Although the SBA is free to consider lack of corroboration while weighing the evidence, any evidence that has not been contested must be accepted as true. *Quock Ting v. U.S.*, 140 U.S. 417, 420 (1891). As there is generally no discovery in these cases, the applicant's PES often goes unopposed and uncontested. The Agency may then discount or disregard the PES only if it is (1) inherently improbable; (2) inconsistent with other credible evidence in the record; (3) lacking in sufficient detail; (4) merely conclusory, or (5) if the applicant failed to provide apparently available supporting evidence without explanation. *Southern Aire,* SBA No. BDP-453, at 7; *Bitstreams, Inc.*, SBA No. BDP-122, at 9;

StrategyGen Co., SBA No. BDP-427, at 4. If the SBA discounts or disregards the evidence, it must provide "cogent reasons for denying the claim. It may not arbitrarily disbelieve credible evidence." *Bitstreams, Inc*., SBA No. BDP-122, at 10 (*citing Greenwich Collieries*, 512 U.S. at 279).

STANDARD OF REVIEW

The SBA's determination that an 8(a) BD Program applicant is not socially disadvantaged can only be overturned if the reviewing court concludes — after considering the entire administrative record — that the determination was arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). The reviewing court's task is to decide whether the agency reached a reasonable conclusion in light of the facts available in the administrative record. It does not ask whether the conclusion was the best one, or even the correct one. Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29 (1983); Griffis v. Delta Family-Care Disability, 723 F.2d 822, 825 (11th Cir. 1984) ("This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith-not whether it was right."); Ace Technical, SBA No. SDBA-178, at 3 ("[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct."). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. State Farm, 463 U.S. at 42-43; Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402,416 (1971); 13 C.F.R. § 134.406(b).

An agency's conclusion is unreasonable, and thus arbitrary and capricious, if it constitutes a "clear error of judgment." State Farm, 463 U.S. at 43; StrategyGen Co., SBA No. BDP-427, at 5. Such error occurs if the agency (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 decision that runs counter to the evidence before the agency, or, (4) offers an explanation that is so implausible that it cannot be ascribed to a mere difference in view between the agency and the Court Southern Aire, SBA No. BDP-453, at 4.

THE AGENCY'S DETERMINATION

Petitioner's *Appeal Petition* asks the Court to review the SBA's Determination Letter denying Wholesale Distribution's admission into the 8(a) BD Program, set aside that decision, and find that Petitioner should be admitted into the program. Petitioner argues that the SBA has committed an error of judgment because the Determination Letter does not explain the reasons for the denial.

In that Determination Letter, the SBA concluded that Ms. Sharp had not experienced social disadvantage due to her gender or disability.[1] Specifically, the Agency found that the

[1] The Determination Letter repeatedly states that Petitioner did not show evidence of substantial and chronic disadvantage due to gender bias. It is true that, at scattered points in the PES, Petitioner references her struggles as a woman in the legal field and the furniture wholesale industry. The SBA may have interpreted these references as raising a gender bias claim. Any

incidents recounted in Petitioner's application were insufficiently detailed, and that Petitioner failed to show how the incidents negatively impacted her entry into or advancement in the business world.

I. Educational History

The Determination Letter states that, "[A]s a point of reference ..." Petitioner did not present any claims of bias in the area of higher education. Petitioner' does not dispute this fact, noting that she did not suffer from epilepsy during her college years and so could not have experienced disability-related bias at that time. Petitioner contends that "education should not have any bearing on [the SBA's] decision."

SBA regulations require the fact-finder to examine an applicant's education, employment, and business history to determine whether the applicant's business goals have been negatively impacted by substantial and chronic bias. 13 C.F.R. § 124.103(c)(2)(iii)(A)-(C). An applicant is not required to present evidence of bias in all three enumerated areas; negative impact in any one area is sufficient *Alabasi Constr., Inc*., SBA No. BDP-368, p. 13 (2010). However, the regulation states that these factors will be considered "[I]n every case," where applicable. 13 C.F.R. § 124.103(c)(2)(iii).

The Court interprets the contested sentence to be a simple acknowledgement that the first factor — Educational History — is inapplicable. Rather than omitting any discussion of this factor, the SBA disposes of it perfunctorily before moving on to discuss Petitioner's employment and business history claims. This is not error.

II. Employment Experiences

a. Dubin & Stephenson Claims

In her PES, Ms. Sharp states that she began working as a paralegal for a law firm named Dubin & Stephenson, but found it "very difficult" to be taken seriously as a woman in the legal

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ambiguity, however, was resolved later in the PES, when Petitioner stated that her "inability to pursue new customers, new business and important industry events and lectures *due to my disability*" were stunting the growth of her company. Petitioner further clarified her position in a May 2011, correspondence, when she expressly informed the Agency that the application was based on disability-related bias.

At bar, the SBA's references to gender needlessly complicate its analysis and raise concerns regarding the Agency's review of Petitioner's PES. The Agency's error at bar could have been fatal to its position; any determination based *solely* on gender bias would constitute error necessitating a remand, along with a stern rebuke for completely misreading Petitioner's PES.

Notwithstanding the Agency's lapse, it has provided a legitimate, separate rationale for its ultimate decision. If there is more than one ground for declining an 8(a) BD application, and at least one ground is reasonable, the decision to decline the application cannot be found arbitrary, capricious, or contrary to law. *Garza Telecomms., Inc.*, SBA No. MSB-620 (1998).

field in the 1980s. Ms. Sharp also claims that she was treated "more like a secretary than a Paralegal who graduated with a Bachelors Degree from a reputable college." After being diagnosed with epilepsy, Ms. Sharp states that she was ridiculed by co-workers, who mimicked her seizures and concentration loss.

In analyzing this first claim, the SBA concluded that Petitioner had not provided "the quality and quantity of detailed information"[2] necessary to support her claim. The Agency noted that the PES did not specifically identify any of the co-workers who were making mocking comments, and did not explain how she was adversely affected by the alleged mockery. The Agency contends that Petitioner therefore did not meet all the requirements for a sufficiently detailed claim.

The PES is indeed devoid of any details elaborating on the alleged mockery, and there is no additional evidence available elsewhere to flesh out this claim. As stated previously, a sufficiently detailed claim must answer the when, where, who, and how of an allegedly bias-motivated event, and describe how the event harmed the applicant. See supra, p. 2. Petitioner's statement offers only a very general sense of when and where this particular event took place, and gives no clear information regarding who the alleged culprits were or how she was harmed by the experience.

Although Petitioner's *Appeal Petition* provides substantially more information regarding this event, and others, the Court's review of the SBA's decision is limited to the evidence the Agency had before it at the time the decision was made. 13 C.F.R. § 134.406(a). Evidence offered after the close of the administrative record will only be admitted if there is a substantial showing, based on credible evidence, that the SBA's decision was the result of bad faith or improper behavior. 13 C.F.R. § 134.407(a); *Alabasi*, SBA No. BDP-368, at 8. Petitioner has made no such showing. Therefore, the additional information provided in the *Appeal Petition* will not be considered.[3]

In sum, the SBA adequately considered this incident, examined the evidence in the administrative record, and found the claim to be insufficient. The Agency's conclusion is reasonable, and therefore is not arbitrary. capricious, or contrary to law. Additionally, the statements in the PES regarding Ms. Sharp's struggles as a woman in the legal field are of no relevance here, as Petitioner has made clear she was not seeking 8(a) certification on the basis of

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[2] In *Southern Aire*, this Court noted that simple reliance on this phrase, without more explanation, would normally be considered conclusory, and therefore warrant remand. *Southern Aire*, SBA No. BDP-453, at 4. That is not the case here, however, because the SBA immediately follows the phrase with specific examples of evidence that would provide the required specificity. In this case, then, the phrase is a lead-in to the analysis, rather than the analysis itself.

[3] Petitioner acknowledged in her *Appeal Petition* that there were "many details" left out of her PES. She also stated that she did not provide more initial information because she "wasn't aware of the weight these details would carry" in the application process. Petitioner was informed, however, that she could correct the deficiencies and seek reconsideration before filing the present appeal. She elected not to do so, as is her right 13 C.F.R § 124.206(b). However, by choosing that route she lost the opportunity to supplement the record.

gender bias.

Second, Petitioner claims that she was fired from Dubin & Stephenson in 1999 because of her disability. The SBA, however, concluded that her termination was due to her inability to meet the requirements of the job, and cited a termination letter included in the administrative record as support. That letter stated; “We are about to get busy and I do not mink that you are in a position to handle the volume of closings that we will be handling.” The letter also offered Ms. Sharp a $5,000 severance package.

Ms. Sharp acknowledges that her termination was based on her nonperformance, but contends that the nonperformance was entirely the result of her medical condition. She describes the severance package as a “payoff” to prevent her from filing a complaint under the Americans with Disabilities Act. Petitioner provided the SBA with no documentation supporting this contention. The Agency, therefore, made its determination based only upon her statement in the PES and the text of the termination letter. In discounting the PES, the Agency specifically identified the relevant evidence in the administrative record (i.e., the letter), and discussed what aspects of that evidence were taken into account. It then weighed the PES and the letter against each other, and concluded that the letter was more credible. The claim was addressed, analyzed, and explained, and the conclusion reached was reasonable in light of the evidence in the record. As such, the Court is in no position to overrule it.

The Agency also states, that, even if Ms. Sharp's termination was based upon her medical condition, she did not prove that the incident negatively impacted her employment prospects because she received a severance package and found another job within two months. Petitioner argues that “the fact that I got another job should not be part of their determinations.”

The Determination Letter somewhat inartfully found that Petitioner had “not shown any negative impact” as a result of her termination from Dubin & Stephenson. Surely an unexpected termination, two months of unemployment and the stress of a job search qualify as “negative impacts,” particularly for a mother of two, such as Ms. Sharp. However, the question is not whether a bias-motivated incident negatively impacts an applicant's life in general. The proper question is whether the incident negatively impacted the applicant's *entry into or advancement in the business world*. 13 C.F.R. § 124.103(c)(iii) (emphasis added). Even assuming that Ms. Sharp's termination qualified as a bias-motivated event the SBA concluded that it did not hinder her ability to participate in her chosen profession. The Court's opinion notwithstanding, the SBA has articulated a reasoned basis for this conclusion. The conclusion must therefore be upheld.

b. Wynn & Wynn Claim

Petitioner also recounts her experiences as a paralegal at Wynn & Wynn. Ms. Sharp states in her PES that she “felt a great deal of stress” at the firm, felt overly scrutinized, and received a poor annual review because her epilepsy prevented her from completing assignments in a timely manner. She tendered her resignation in 2000, after slightly more than a year at the firm.

The SBA considered this account, as well as the resignation letter included in the

administrative record, and concluded that Ms. Sharp had not alleged any acts of bias relating to her time at the firm. She does not suggest that anyone at Wynn & Wynn was aware of her medical condition, or that she was treated differently from other employees because of that condition. Additionally, Ms. Sharp stated in her resignation letter that she "thoroughly enjoyed" working at the firm and "felt very comfortable," but was resigning to pursue a better opportunity as an independent paralegal. The Agency cited the resignation letter as evidence that Ms. Sharp did not experience bias while at Wynn & Wynn.

Petitioner therefore failed to allege bias, and expressly cited a non-bias-related reason for leaving the firm. The SBA's determination that her claim did not reflect disability-based bias is therefore entirely supported by the record.

III. Business History

Petitioner states that her furniture distribution business suffers due to her epilepsy and narcolepsy. She is unable to drive long distances, must maintain a strict routine, and cannot spend long periods of time in crowded, noisy environments. As a result, she is unable to drive to visit clients and potential clients, and cannot attend most trade shows or training programs. Her medications cause her hands to shake, making it difficult for her to take legible notes. Additionally, she states that her epilepsy causes memory loss, which reduces her efficiency because she must often stop to write reminders to herself or retrace her steps.

The Determination Letter dismisses Petitioner's entire Business History narrative in one sentence; stating that the section "provides generalizations without specific claims." Overall, the Agency's treatment of this section is abrupt and dismissive. However, the short response is reasonable in this case because Petitioner has made no suggestion that her business struggles are attributable to disability-related *bias*. The narrative appears based on the theory that Ms. Sharp's disability alone makes her socially disadvantaged, and so any professional difficulties based on her condition constitute negative impact. This theory is not sound. Socially disadvantaged individuals are those who have been subjected to *bias* because of their objective distinguishing feature. *See* 13 C.F.R. § 124.103(a), (c) (emphasis added). The negative impact in question refers to the impact of the bias, not of the disability itself. If Petitioner has experienced disability-based bias while running her business, there is no evidence of it in the administrative record. Rather, the entirety of Petitioner's Business History narrative discusses obstacles she faces as a result of her medical conditions. It does not, at any point, allege biased actions or words by any individual or group. As the SBA says, the section offers no claims, and thus nothing for the Agency to analyze. Its response is therefore reasonable.[4]

[4] The SBA's abbreviated Business History analysis is reasonable, but just barely. When denying an application, the Agency must provide "adequate notice of the facts and reasons" for the denial, so an applicant can meaningfully address those deficiencies if it chooses to seek reconsideration. *Southern Aire*, SBA No. BDP-453, at 3. A blanket statement that a "narrative provides generalizations without specific claims" is not insightful. However, when the narrative entirely devoid of relevant testimony, as Petitioner's Business History section is, the SBA cannot identify any specific weakness or offer any specific suggestions. In such circumstances, additional explanation would be helpful to both the applicant and the reviewing court, but the

ORDER

For the foregoing reasons, the Court finds that the SBA's Determination denying Wholesale Distribution, Inc. admission into the 8(a) BD Program was not arbitrary, capricious, or contrary to law. Accordingly, the Determination is **AFFIRMED**. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the SBA.

Should Petitioner wish to reapply to the 8(a) BD Program, it may do so 12 months after the date of this *Decision*. 13 C.F.R. § 124.207.

ALEXANDER FERNÁNDEZ
Administrative Law Judge

Notice of Reconsideration Rights. This *Decision* constitutes a final agency decision that is binding on the parties. 13 C.F.R. § 134.409(a). However, within 20 days after the issuance of this *Decision*, the Court may reconsider this *Decision* upon clear showing of an error of fact or law material to the *Decision*. 13 C.F.R. § 134.409(c).

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failure to provide it is not unreasonable. Regardless, to the extent that the Agency can more thoroughly articulate an applicant's deficiencies, it should aspire to do so.