United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
NAMO, LLC,	SBA No. BDP-458
Petitioner	Decided: December 5, 2012

DECISION

On June 7, 2012, NAMO, LLC, ("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 July 20, 2012, the Agency filed an *Answer* to Petitioner's *Appeal Petition*. In its *Answer*, the SBA argued that Petitioner's application was denied because Petitioner's interactions with a company owned by the brother of Petitioner's owner prevented the Agency from waiving the ownership restrictions set forth in 13 C.F.R. § 124.105(g).

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

I. Procedural History

On April 27, 2011, Petitioner filed an initial application seeking entry into the 8(a) BD Program stating that its owner, Ms. Mary Tran, had experienced social disadvantage due to her Vietnamese ethnicity. Petitioner's application was denied on September 26, 2011. In issuing the denial, the SBA found that Petitioner did not meet certain regulatory ownership restrictions. The Agency also expressed doubt as to whether Petitioner qualified as a small business under the standards described in 13 C.F.R. § 121.201. Accordingly, the Agency stated that a formal size determination must be conducted before it could consider Petitioner for 8(a) BD Program.

On October 28, 2011, Petitioner requested reconsideration of its application, arguing that it was a qualified small business and that a waiver was justified because Petitioner was not economically dependent on Earth Savers, Inc. (an 8(a) BD participant), a company owned by Ms. Tran's brother, Paul Tran. The SBA requested a formal size determination on November 15, 2011. On March 15, 2012, a separate SBA office issued a Size Determination Report ("SDR") finding that Petitioner met the regulatory requirements and was properly classified as a small

[1] Pursuant to an Interagency Agreement in effect beginning October 1, 2012, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Small Business Administration.

business. The SDR also concluded that NAMO, LLC and Earth Savers, Inc., were "affiliated" for purposes of the size determination.

On April 23, 2012, the SBA issued its Determination Letter upon Reconsideration ("Determination Letter"), again denying Petitioner's application for entry into the 8(a) BD Program. The three-page Determination Letter found that (1) NAMO and Earth Savers had a contractual relationship; and (2) the two companies were engaged in the same or similar line of business, and Petitioner had not provided clear and compelling evidence that the companies had no connections. The *Appeal Petition* then brought the matter before this Court

Petitioner has subsequently filed multiple objections to the Administrative Record. Specifically, Petitioner seeks to exclude the affidavit accompanying the Administrative Record, argues that certain documents in the Administrative Record have been improperly withheld, and states that the SBA is engaged in a clandestine vendetta against Caucasian females wishing to enter the 8(a)BD Program. Petitioner has also filed a *Motion to Clarify* what it considers to be inaccurate statements in the SBA's *Answer*. On August 22, 2012, the Agency responded to the objections, contested Petitioner's Motion to Clarify, and filed a *Motion for Sanctions* against Petitioner's counsel pursuant to 13 C.F.R § 134.219(a)(5) for what the Agency deems to be unethical and disruptive tactics.

II. Objections and Motions

Before addressing the merits of this case, the Court must resolve the outstanding motions. First, Petitioner contends that the SBA's affidavit is insufficient because it is signed by the Associate Administrator of Business Development ("AA/BD") rather than SBA's Secretary, as required in *U.S. v. Reynolds*, a 1953 U.S. Supreme Court case. *U.S. v. Reynolds*, 345 U.S. 1, 7-8 (1953). There, the Court determined that an agency may only withhold a document on privilege grounds if the head of the relevant department has personally examined the document and determined that its contents are too sensitive to be released. *Id.* In response, the SBA maintains that Petitioner bases its objection on cases involving procedural requirements for withholding military or state secrets, neither of which are at issue here.

In *Reynolds*, for example, the Supreme Court stated that the Secretary of the U.S. Air Force "attempted . . . to invoke the privilege against revealing military secrets," and noted that "[J]udicial experience with the privilege which protects military and state secrets has been limited in this country." *Reynolds*, 345 U.S. at 7. The state secrets privilege and the deliberative process privilege are both subsets of "executive" privilege, but the two are not interchangeable, much like the attorney-client privilege and the attorney work product privilege are close but not identical. In citing only to *Reynolds* and similar state secrets cases, Petitioner fails to discuss precedent that is directly on point. This failure appears to be deliberate for reasons that will become apparent further in this opinion. Thorough research into affidavit requirements related to the deliberative process privilege should have uncovered a slew of prior cases that directly undercut Petitioner's contention that only the head of the agency can claim the privilege. In *U.S. v. Exxon*, for example, the court concluded that the head of an agency could delegate authority to another official, and that official could claim the privilege on behalf of the agency. *U.S. v. Exxon*, 87 F.R.D. 624, 637 (D.D.C. 1980).

The Federal Circuit and the Court of Federal Claims both reached the same conclusion relatively recently. *Marriott Intern. Resorts. L.P. v. U.S.,* 437 F.3d 1202 (Fed. Cir. 2006); Pacific Gas & Elec. Co.. v. U.S., 70 Fed.Cl. 128, 134-36 (2006). Both cases offer extensive discussion of who may assert the privilege. Petitioner cites to *Pacific Gas* elsewhere in its objection, demonstrating that Petitioner's counsel was aware of the case and recognized its applicability to the case at bar. The Court assumes that counsel has read the cases it cites to. As such, it could not have missed the fact that *Pacific Gas* completely contradicts its first objection.

Second, Petitioner argues that an affidavit asserting a deliberative process privilege must include (1) the affiant's position and general responsibilities; (2) a statement that the document has been requested in the course of the litigation; (3) a statement that the affiant personally examined the documents; (4) a general description of the document; (5) a statement of the need for secrecy in national security affairs; and (6) a statement that disclosure of the document would undermine national security.[2] The SBA's affidavit, Petitioner alleges, does not contain a description of the affiant's responsibilities, does not contain an adequate description of the withheld documents, and makes no mention of national security. Petitioner therefore contends that the withheld documents should be released and the affidavit should be struck in its entirety.

Again, a cursory examination of existing case law would highlight Petitioner's profound misstatement of the requirements for a deliberative process privilege claim. Even the cases Petitioner cites as support should have made it apparent that the theory is off-target. *See Reynolds*, 345 U.S. 1: National Lawyers Guild v. Attorney General, 96 F.R.D. 390 (S.D.N.Y. 1982). Both cases focus entirely on the state secrets privilege. *National Lawyers Guild* even identified *Reynolds* as the "starting point in an examination of the state secrets privilege," calling it the "definitive" opinion on the matter. National Lawyers Guild, 96 F.R.D. at 394. No reasonable reading of either case could suggest the requirements identified by Petitioner would be applied to a deliberative process privilege claim in. a matter before the SBA.[3] Indeed,

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[2] It is unclear where Petitioner comes across these requirements. Its motion cites *Reynolds,. Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973); and *National Lawyers Guild v. Attorney General*, 96 F.R.D. 390, (S.D.N.Y. 1982) as authority. None of these cases offer such a checklist. Indeed, *National Lawyers Guild*, the most recent of these three cases, expressly states that there "are no particular requirements as to the contents of the formal claim." *National Lawyers Guild*, 96 F.RD. at 397. The Court is therefore not persuaded, that this six-point list is a legitimate mechanism for determining the sufficiency of SBA's affidavit, notwithstanding the fact that neither *Reynolds* nor *National Lawyers Guild* relates to the deliberative process privilege.

[3] *National Lawyers Guild* does state in a footnote that "these formal requirements have been uniformly applied to all governmental privileges," including the deliberative process privilege. *National Lawyers Guild*, 96 F.R.D. at 396, n.10. However, the requirement it is referring to relates to who can claim the privilege, and its conclusion in mat regard contradicts the holding in *Exxon*. Regardless, there is no support in *National Lawyers Guild* for Petitioner's six-point checklist.

Petitioner's attempt to bridge the gap between state secrets and deliberative process privileges illustrates the fundamental absurdity of the argument For example, Petitioner's motion faults SBA's affidavit for not discussing the national security implications of the withheld documents. The Court can imagine no plausible scenario where the SBA would routinely find itself relying on sensitive national security documents to determine the outcome of an 8(a)BD Program application.

Had these objections been a one-time occurrence, they could conceivably be attributed to poor legal research rather than deliberate obfuscation. However, as the Agency points out, Petitioner's counsel is well aware that its arguments have no merit. In 2011, the SBA issued its decision in *dsi Assoc.*, an 8(a)BD Program appeal much like the case at bar. *dsi Assoc.*, SBA No. BDP-413 (2011). In assessing the sufficiency of the Agency's affidavit asserting the deliberative process privilege, the court concluded that the affidavit was ""adequate" and that the SBA could properly withhold the documents. *Id.* at 3. The court's analysis in that case squarely addressed each of the arguments raised by Petitioner in the current proceeding. This was not a coincidence. There, like here, the petitioner's counsel was Bryant Banes, the managing partner of Neel, Hooper & Banes, P.C. The objections at issue here are a near-verbatim recitation of the arguments raised and rejected in *dsi Assoc*. Mr. Banes is therefore aware that his "reliance upon *U.S. v. Reynolds* is misplaced."[4] *Id.* The earlier decision expressly cited and discussed the holding in *Exxon,* which refutes Petitioner's objection entirely. Rather than address Exxon's inconvenient holding head-on and offer a plausible counter-argument, Petitioner's counsel simply ignored it entirely. This is the same approach he took with *dsi Assoc*, and *Pacific Gas*. Petitioner's counsel was aware of all three cases, yet fails to mention them.

Mr. Banes's objection to the withholding of SBA's Business Opportunity Specialist ("BOS") assessments is similarly meritless. Several relatively recent SBA cases — including *dsi Assoc*. — have addressed the deliberative process privilege and found that BOS assessments "are internal pre-decisional memoranda embodying the analysis and recommendations of Agency officials . . . and thus are protected under the deliberative process privilege." *See Colamco, Inc.*, SBA No. SDBA-176, p. 4 (2007); see also Henze Indus., SBA No. SDBA-111 (1999). The only documents Petitioner seeks access to are the BOS assessments. Petitioner's counsel already knows these documents are properly withheld, but he makes the attempt anyway, again without so much as hinting at the existence of adverse precedent. Either he believes ignoring precedent makes it go away, or he has miscalculated the Court's ability to do legal research. Either way, Mr. Banes' actions are unacceptable. By deliberately reintroducing legal arguments that have already been addressed and thoroughly refuted, Mr. Banes wastes the time and resources of this Court and of the SBA's Office of General Counsel. Moreover, he wastes the economic resources of his client.

Petitioner's counsel cannot legitimately suggest that his missteps have been the result of

[4] In fact, no assumption is necessary. In the *Appeal Petition,* Mr. Banes describes the ultimate outcome in *dsi Assoc*., thereby proving that he read and understood that decision. The *Appeal Petition* even includes a copy of mat decision to support a separate argument. Mr. Banes thus invites the Court to read the very case that would justify sanctions against him.

zealous advocacy for his client In his third point of objection, he alleges the existence of an "informal departmental directive" that requires the AA/BD to apply an artificially high level of scrutiny to non-minority female applicants. Mr. Banes is, or should be, aware that bis client is Vietnamese. As such, this objection bears no relationship to her situation because, as a member of a presumptively disadvantaged group, she would not have been affected by such an invisible directive, even if one existed.[5] Ms. Tran would therefore gain no benefit from Mr. Banes' crusade to expose. SBA's alleged "practice of devaluing Caucasian women." From all appearances, Mr. Banes has simply cut and pasted his previous objections wholesale, neglecting to conduct even a basic review to ensure their applicability to his client's case.

Petitioner's objections to the Administrative Record have been raised, discussed, and defeated in previous SBA cases. Petitioner has provided no new arguments, cases, or legal theories to overcome the adverse precedent, and routinely fails to even acknowledge that such precedent exists. The objections are therefore fatally flawed, and thus are **DENIED**.

The SBA, on the other hand, has offered compelling evidence that Mr. Banes habitually files near-identical objections despite his actual awareness that the arguments are meritless. All the objections filed here were conclusively resolved in 2011, with the *dsi Assoc*, decision. That should have been the end of it. However, Mr. Banes raised them again in *Tootle Const. LLC*, SBA No. BDP-420 (2011) (objections denied as moot) that same year. By the Court's count, he has also filed identical objections in four cases currently before the Court, including this one. In fact, the Court has yet to find an 8(a) BD Program appeal brought by Neel, Hooper & Banes, P.C. that does not include these specious objections. It appears, then, that it is Mr. Banes' standard operating procedure to burden the proceedings with frivolous arguments. No more.

SBA regulations state that a presiding judge may impose "appropriate sanctions," except for monetary penalties, against a party or attorney who acts in an unethical or disruptive manner. 13 C.F.R. § 134.219(a).[6] Such sanctions include, but are not limited to: dismissing an appeal with prejudice, suspending counsel from practicing before the Court, filing a complaint with the applicable state bar association, or "any other action that is appropriate to further the administration of justice." 13 C.F.R. § 134.219(b).

The Court is convinced that the repeated introduction of baseless objections is unethical and constitutes grounds for disqualifying Mr. Banes from trying cases before this Court In filing these objections, Mr. Banes attempts to pull the wool over the Court's eyes by misapplying legal theories and deliberately ignoring adverse precedent. There is simply no justification for this sort

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[5] Once again, this argument was raised and rejected in *dsi Assoc*, which noted that mere allegations of bad faith are insufficient. *See dsi Assoc.,* SBA No. BDP-413, at 4. An allegation of bad faith must include credible evidence to support it. *Id.* Petitioner offers none here.

[6] The SBA asks the Court to sanction Petitioner's counsel pursuant to 13 C.F.R. § 134.219(a)(5), for unethical or disruptive acts. The Court therefore will only consider sanctions on that basis. It notes, however, that counsel's actions could also arguably have run afoul of 13 C.F.R. §§ 134.219(a)(3) or (a)(4).

of behavior. Mr. Banes has not even attempted to provide one, as he did not file any response to the SBA's *Motion for Sanctions*.

The Court is therefore within its rights to take draconian action against Mr. Banes and his firm. However, the Court is generally reluctant to order harsh punishment without providing adequate opportunity for a wayward attorney to correct his behavior. Accordingly, Petitioner's counsel is hereby put on notice that any further ethical violations in any case heard before this Court will subject his firm to an *Order to Compel* requiring counsel to show cause as to why a term of years suspension from practice before this Court is not warranted. The Agency's *Motion for Sanctions* is reluctantly **DENIED**.

III. Program Eligibility Requirements

To gain entry into the 8(a) BD Program, a business entity must be classified as a "small" business, and 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 Black Americans, Hispanic Americans, Native Americans (including Alaskan and Hawaiian natives), and Asian Pacific Americans are socially disadvantaged. 13 C.F.R. § 124.103(b). This presumption may only be overcome with credible evidence to the contrary.

An applicant that meets these criteria may still be denied entry into the 8(a) BD Program if the owner has an immediate family member who is or has been a participant in the 8(a) BD Program. The relevant regulation states:

> *Ownership of another Participant in the same or similar line of business*: (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD Program. The [fact-finder] may waive this prohibition if the two concerns have no connections, either in the form of ownership, control or *contractual relationships*, and provided the individual seeking to qualify the second concern has management and technical experience in the industry. Where the concern seeking a waiver is in the same or similar line of business as the current or former 8(a) concern, there is a presumption against granting the waiver. The applicant must provide clear and compelling evidence that no connection exists between the two firms.

13 C.F.R. § 124.105(g)(1).

IV. Standard of Review

The SBA's determination that an 8(a) BD Program applicant has not met the regulatory requirements 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."); *Southern Aire Contracting, Inc*., SBA No. BDP-453, p. 1 (2012); *Ace Technical, LLC*, SBA No. SDBA-178, p. 3 (2008) ("[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; *Southern Aire*, SBA No. BDP-453, at 3; *StrategyGen Co*., SBA No. BDP-427, p. 5 (2012). 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.

V. The Agency's Determination

Petitioner's Appeal Petition asks the Court to review the SBA's Determination upon Reconsideration, set aside that decision, and find that Petitioner should be admitted into the 8(a) BD Program. The Court is not authorized to replace the Agency's reasoned decision with its own. Rather, the Court must decide whether the SBA examined the evidence and articulated an explanation that bears a rational connection to that evidence.

In its Initial Determination, the Agency expressed doubt that NAMO, LLC, was properly considered a "small" business, and so required a Formal Size Determination Report, That report, which is included in the Administrative Record, found that Petitioner did qualify as a small business. Petitioner therefore met that requirement.

The SBA also does not contest that Ms. Tran is a socially disadvantaged individual within the meaning of the regulation. As an Asian American, she falls within one of the groups afforded a presumption of social disadvantage. No evidence rebuts this presumption, and so Ms. Tran meets this requirement as well.

Moreover, the Agency made no finding questioning Ms. Tran's degree of ownership over NAMO, LLC. She controls 100% of the stocks, and is the company's sole owner. The only point of contention in this matter is whether Ms. Tran can comply with the ownership requirements described in 13 C.F.R § 124.105(g)(1). *See supra*, p. 2.

In denying Petitioner's application, the SBA determined that NAMO, LLC, and Earth Savers had a contractual relationship, thereby negating the possibility of waiving the regulatory prohibition. The decision also found that because both companies were in the same or similar lines of business, a waiver could only be granted if there was clear and compelling evidence that there were no connections between the two companies. Petitioner contends that (1) there has been no contractual relationship between the companies since June of 2011; and (2) the companies are not in the same business and Earth Savers exerts no control over Petitioner.

A. Contractual Relationship Question

SBA regulations provide that an 8(a) BD Program applicant is prohibited from entering the program if he or she is directly related to a current or former Program participant. 13 C.F.R. § 123.105(g)(1). This prohibition may only be waived if there are no ownership, control, or contractual connections between the applicant's company and the participant's company. *Id.* As a threshold matter, the Court notes that the terms of this regulation are permissive rather than mandatory. "The [fact-finder] *may* waive this prohibition if. . . ." (emphasis added). Accordingly, even a showing that no connections exist between the two companies does not guarantee a waiver. The decision to grant or deny a waiver under those circumstances is entirely within the discretion of the fact finder.

The Agency has articulated a reasonable basis for concluding that waiver would not be appropriate in this case. It is undisputed that Earth Savers was an 8(a) BD Program participant and that Paul Tran, Earth Savers' owner, is Petitioner's brother. Moreover, the SBA's Determination upon Reconsideration points to Petitioner's *Reconsideration Request* as evidence that Petitioner and Earth Savers did have a contractual relationship. It therefore discounted Petitioner's contention that no such relationship existed. The Agency's conclusion that a contractual relationship existed is well supported in the Administrative Record.

The *Reconsideration Request* does indeed make several unambiguous references to such a relationship, stating at one point that "no business relationships exist between NAMO (disadvantaged participant) and Earth Savers *which would cause 8(a) Applicant not to exercise independent business judgment without great economic risk"* (emphasis added). As the italicized fragment makes clear, this sentence disclaims only those business relationships that would trigger ownership or control conflicts. It therefore tacitly acknowledges that other business relationships between the two companies do exist.

In the next paragraph, the *Reconsideration Request* directly admits to a contractual arrangement, stating that "Earth Savers/Paul Tran agreed to subcontract a portion of the work that Earth Savers was performing with the Navy and Lakeside Hospital." The relationship is further cemented later in the paragraph, where Petitioner says "Earth Savers/Paul Tran has no involvement with the management or operation of NAMO. Thus the percentage of revenue that NAMO derives *from its subcontract with Earth Savers* is not relevant to NAMO's eligibility for admission to the 8(a) Program." (emphasis added). In addition, the SBA cited Petitioner's initial application as evidence of a contractual relationship, because the application included copies of at least four contracts between NAMO and Earth Savers. Nothing in Petitioner's *Reconsideration Request* refutes these contracts. Rather, Petitioner merely argues that the contracts do not show

that Earth Savers had any ownership or control interest in NAMO.

The SBA appropriately identified the relevant evidence in the record, recognized that it contradicted Petitioner's other claims, and weighed the conflicting evidence against each other. The Agency then determined that a contractual relationship existed that prevented the waiver of the regulatory prohibition. The decision was not arbitrary, capricious, or contrary to law.

B. Same or Similar Business Question

Having found that the SBA's refusal to waive the regulatory prohibition is valid and reasonable, the Court need not address Petitioner's argument concerning whether NAMO and Earth Savers are in the same or similar line of business. 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. *Alabasi*, SBA No. BDP-368 (2010); *Garza Telecomms., Inc.*, SBA No. MSB-620 (1998). Accordingly, the validity of the SBA's second conclusion has no power to change the ultimate outcome of this appeal. The Agency has articulated a reasonable basis for its denial, and so the decision must stand.

ORDER

For the foregoing reasons, the Court finds that the SBA's Determination denying NAMO, LLC 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 the final Agency decision. 13 C.F.R. § 124.207.

ALEXANDER FERNÁNDEZ
Administrative Law Judge