United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
StrategyGen Co.,	SBA No. BDPE-460
Petitioner	Decided: December 28, 2012

DECISION

On June 18, 2012, StrategyGen Co, ("Petitioner") appealed a Determination of the Small Business Administration ("SBA" or the "Agency") in which the Agency denied Petitioner admission into the 8(a) Business Development Program ("8(a) BD Program"). *See* 13 C.F.R. parts 124, 134. On August 2, 2012, the Agency filed a *Response to Supplemental Appeal Petition* ("Response"). In its *Response*, the SBA argued that Petitioner failed to prove by a preponderance of the evidence that its owner, Ms. Marsha Proctor Killen, had experienced chronic and substantial social disadvantage as a result of gender 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.

PROCEDURAL HISTORY

This case has taken a winding path through the appeals process. Petitioner first applied for entry into the 8(a) BD Program in October of 2010. The application included a Personal Experience Statement ("PES") and letters from corroborating witnesses. On November 26 of that year, the SBA informed Petitioner via letter that its application was incomplete, and would not be processed until Petitioner responded to several stated deficiencies. On December 28, 2010, Petitioner responded to the SBA letter and included multiple additional documents, an updated PES, and additional corroborating letters.[1] On August 5, 2011, the SBA denied the application, finding that Ms. Killen was not socially disadvantaged due to her gender. Petitioner appealed that decision on September 19, 2011.

On February 24, 2012, the court issued a *Decision and Remand Order* ("Remand Order")

[1] The initial application, identified in the Administrative Record as Exhibit 12, contains two separate PES narratives. The *Decision and Remand Order*, issued February 24, 2012, concluded that the PES listed as Exhibit 12(a) is the one Petitioner submitted on December 28, 2010. It is unclear whether the SBA considered information from both PES's when making its initial determination.

returning the case to the SBA for a new initial determination.[2] The *Remand Order* identified several areas in which the SBA's *Initial Determination Letter* either failed to address Petitioner's claims or provided insufficient explanation for its conclusions, therefore rendering the Administrative Record incomplete. The Agency was ordered to specifically address those issues. The *Remand Order* did not make final rulings on issues where the judge determined that the Administrative Record was complete.

The SBA issued its *Determination upon Remand* ("Second Determination Letter") on May 7, 2012. After addressing the issues raised in the *Remand Order*, the *Second Determination Letter* again denied Petitioner's entry into the 8(a) BD Program, concluding that Petitioner still had not shown that Ms. Killen was socially disadvantaged due to her gender. The instant *Appeal Petition* followed on June 18, 2012. As the SBA has now had an additional opportunity to complete the Administrative Record, it falls upon this Court to determine whether the Agency's conclusions, including those in the *Initial Determination Letter*, were arbitrary, capricious, or contrary to law.

OBJECTIONS AND MOTIONS

Before addressing the merits of this case, the Court must resolve several outstanding motions. First, on June 29, 2012, Petitioner filed a *Motion for Leave to Request Expedited Review Schedule*. The *Motion* argues that SBA "does not need the fully allotted time to respond to this appeal" because the facts and arguments on remand are substantially unchanged from those in the initial appeal. Petitioner also states that the SBA has had three opportunities to review Petitioner's application over the past two years.[3]

SBA regulations provide that the Agency has 45 days from the date an appeal petition is filed to submit its response.13 C.F.R. § 134.206(b). The presiding judge may modify the deadline at his or her discretion, but is under no obligation to do so. 13 C.F.R. § 134.202(d)(2)(i). Except under the most extraordinary of circumstances, the Court is unlikely to allow a party to shorten the response time of an adverse party. No such extraordinary circumstances are present here. The *Appeal Petition* was filed on June 18, 2012 making the *Response* due on August 2, 2012. The SBA timely filed their *Response* on that date. Petitioner's *Motion* is therefore **DENIED** as moot.

Second, the SBA includes in its Answer a *Motion to Strike* any arguments in

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[2] The *Remand Order* was issued by Administrative Law Judge M. Lisa Buschmann, of the U.S. Environmental Protection Agency, pursuant to an Interagency Agreement between the SBA and the EPA. The termination of that contractual agreement led the EPA to transfer the case back to the SBA, which in turn has transferred it to the U.S. Department of Housing and Urban Development pursuant to an Interagency Agreement between the SBA and HUD.

[3] Petitioner has now twice elected to forego reconsideration, which is entirely within its rights. However, by doing so the SBA has only had two opportunities to review the application, not three.

Petitioner's *Appeal Petition* that reference events not discussed in the *Second Determination Letter*. The Agency notes that the *Remand Order* only identified three incidents as being insufficiently addressed, and found that the other incidents were ripe for decision. The Agency contends that, under the "law of the case" doctrine, Petitioner may only appeal the Agency's determination as to those three incidents because the *Remand Order* has already determined the record to be sufficiently complete with regard to the other incidents.

The SBA's argument is off target The law of the case doctrine states that a "decision rendered in a former appeal of a case is binding in a later appeal." LAW OF THE CASE, *Black's Law Dictionary* (9th ed. 2009). The only thing the *Remand Order* "decided" was that the three identified incidents were not ready to be decided. Put another way, the *Remand Order* only addressed the *sufficiency of the record* as to all the events. It did not decide whether the SBA's conclusions were reasonable as to any issue. Therefore, to the degree that the *Appeal Petition* contests the sufficiency of the record as to matters not remanded, that discussion is closed.[4] The SBA does not identify any such arguments in the *Appeal Petition*, and the Court does not find that Petitioner has raised such an argument Petitioner merely continues to assert that the SBA's decision was unreasonable. It has every right to do so.

The SBA argues that Petitioner is prohibited from contesting the merits of all but the three incidents specifically addressed in the *Second Determination Letter*. This is plainly incorrect. The incidents addressed in the *Second Determination Letter* do not exist independent of the other incidents. The *Second Determination Letter* itself makes this point clear, as it merely weaves the additional analysis into the body of the *Initial Determination Letter*. It then arrives at the conclusion that after considering all the claims, Petitioner has not met the requirements for entry into the 8(a) BD Program.

The *Appeal Petition* contests the entire determination, not just the three identified incidents. As there has been no ruling on the merits of any of the incidents, Petitioner remains free to press its arguments in relation to them all. The *Remand Order* is unambiguous on this point, stating repeatedly that "[b]ecause this matter is being remanded, Petitioner's arguments are not addressed herein." Moreover, when SBA sought clarification of the *Remand Order*, the then-presiding judge specifically noted that "the *Remand Order* assesses whether the Administrative Record is sufficiently complete; the final decision assesses whether the SBA's reasoning is arbitrary, capricious or contrary to law." *Order on Motion for Clarification of Decision and Remand Order*, p. 5, issued April 16, 2012. As there was no decision reached regarding the merits of Petitioner's claims, the law of the case doctrine is inapplicable. Accordingly, the Agency's *Motion to Strike* is **DENIED**.

Third, the Agency seeks to strike what it deems to be "new evidence" attached to the *Appeal Petition* as Enclosure 7. The attachment consists of a series of e-mails between March 2011 and October 2011, between Petitioner and, assumedly, prospective clients. Petitioner does not offer any explanation of the attachment's purpose. More importantly, these e-mails did not

[4] If Petitioner felt other incidents were insufficiently considered or explained, the time to make that argument could have been within 20 days of the issuance of the *Remand Order*.

exist when Petitioner filed its application in October 2010. They therefore were not part of the Administrative Record at the time the SBA made its determination. As such, they can only be admitted upon a substantial showing, based on credible evidence, of bad faith or improper behavior on the part of the Agency. There has been no such allegation here. The Agency's *Motion to Strike* Enclosure 7 is therefore **GRANTED**.

Fourth, on September 11, 2012, Petitioner filed a *Motion to Compel Production of the Administrative Record,* contending that the SBA had failed to file a new Administrative Record as ordered. The *Notice and Order* that followed the filing of the *Appeal Petition* did instruct the Agency to file and serve an authenticated Record by August 2, 2012, the same date as it filed its *Response*. Petitioner alleges that the SBA did not file an Administrative Record on that date, and the SBA asserted that it is under no obligation to do so. Petitioner therefore asks the Court to compel production of the Record and to levy sanctions against the Agency for its refusal to comply with the *Notice and Order*.

The SBA claims the Administrative Record it filed on November 3, 2011, satisfies the *Notice and Order* because the Agency relied on no additional documentation when re-analyzing the application upon remand. The Administrative Record was therefore unchanged. The SBA's interpretation of its obligation is correct.[5] The Agency is not required to re-create an Administrative Record on remand, it is only required to supplement a deficient one. Indeed, 13 C.F.R. § 134.406(e)(1) specifically states that the SBA may only supplement the record to the extent necessary to provide the missing rationale or to address evidence introduced after reconsideration of the remand decision. Such was not the case at bar.

Petitioner's contention that "[t]his appeal is a new appeal and must be treated accordingly" is erroneous. This theory suggests that the proceeding that began with the *Initial Appeal Petition* came to an end when the then presiding judge issued the *Remand Order*. That cannot be the case, as the court had not entered a final decision on the merits. The SBA is not obligated to re-file an identical Administrative Record for the same reason Petitioner is not precluded from arguing the merits of incidents deemed ripe in the *Remand Order*.[6] Petitioner's *Motion to Compel* is therefore **DENIED**.

PROGRAM ELIGIBILITY REQUIREMENTS

To gain entry into the 8(a) BD Program, a business entity must be unconditionally owned

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[5] Notwithstanding the "correctness" of the SBA's legal position, good practice would dictate the filing of a *Notice* indicating that the SBA stands by the Administrative Record previously filed, rather than ignoring the Order requiring the SBA to file the Administrative Record.

[6] The SBA's Office of Hearings and Appeals' practice of assigning a new docket number to matters that are heard after remand, does create the *illusion* of a brand new case. The Court has observed a similar illusion in matters involving attorneys' fees. Regardless of a new docket number, however, where no final order has been entered, treating the "second" matter as "new" would be an exaltation of form over substance and lead to impracticable results as identified *supra* and others not enumerated.

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.

Individuals who are not members of any presumptively disadvantaged group must establish individual social disadvantage by 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 business must submit a PES recounting specific, bias-motivated events in its owner's education and employment history and as owner of the applicant business.[7] 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 negative impact. 13 C.F.R. § 124.103(c)(2)(iii).

BURDEN OF PROOF

An applicant seeking entry into the 8(a) BD Program on the basis of individual social disadvantage must prove the existence of 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). 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). 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).

In many 8(a) BD Program cases, the PES represents the entirety of the applicant's evidence. No corroborating evidence is necessary. *Bitstreams*, SBA No. BDP-122. at 10-11; *Ace Technical*, SBA No. SDBA-178, at 5 (2008). Although the SBA is free to consider lack of corroboration while weighing the evidence, it cannot deny a claim simply because it has not been corroborated. Moreover, 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 neither an adverse party nor any discovery in these cases, the applicant's PES often goes unopposed and uncontested. The

[7] An applicant does not need to prove social disadvantage along all three metrics. A showing of negative impact caused by substantial and chronic bias in an applicant owner's employment history, for example, would be sufficient. *See, e.g., Bitstreams*, SBA No. BDP-122, p. 5.

Agency may then discount or disregard the PES, but only if the testimony 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*, SBA No. BDP-122, at 9. If the SBA discounts or disregards the evidence, it must provide "cogent reasons for denying the claim. It may not arbitrarily disbelieve credible evidence." *Southern Aire*, SBA No. BDP-453, at 7; *Bitstreams*, SBA No. BDP-122, at 10 (*citing Greenwich Collieries*, 512 U.S. at 279).

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 was involved; (3) how the incident occurred; and (4) how the applicant was adversely affected by the incident. *Southern Aire*, SBA No. BDP-453, at 7; *Loyal Source Gov't Serv., LLC.* SBA No. BDP-434, p. 5 (2012).

THE AGENCY'S DETERMINATIONS

Petitioner's *Appeal Petition* asks the Court to review the SBA's Determination Letters, set aside the Agency's decision, and find that Petitioner should be admitted into the 8(a) BD Program. The *Appeal Petition* cites three alleged errors in the SBA's decision-making process: (1) the Agency consistently applies the "substantial and chronic" element at the wrong stage of the analysis; (2) the Agency applies a "clear and convincing" standard rather than the "preponderance of the evidence" standard; and (3) the Agency improperly disregarded, discounted, or ignored relevant evidence in the Administrative Record.

After a careful review of Petitioner's application, the SBA's Determination Letters, and the Administrative Record as a whole, the Court finds that the SBA's decision to deny Petitioner entry into the 8(a)BD Program was arbitrary, capricious, and contrary to law. As will be discussed in detail below, the SBA's treatment of Petitioner's claims were faulty in several respects.

I. Failure to Properly Apply the Law and Regulations to the Facts of the Case

a. Improper Application of the Chronic and Substantial Element

Petitioner readily acknowledges that its owner, Ms. Killen, is not a member of any presumptively disadvantaged group. Rather, she bases her entry into the 8(a) BD Program on social disadvantage she has experienced because of her gender. As a result, she must comply with the three-pronged entry requirements enumerated at 13 C.F.R. § 124.103(c). *See supra*, pp. 4-5. The regulation specifically identifies gender as an "objective distinguishing feature that has contributed to social disadvantage." 13 C.F.R. § 124.103(c)(2)(i). Ms. Killen has therefore articulated a legitimate distinguishing feature, and thus clears the first hurdle. The SBA contends, however, that she has not cleared the second hurdle, which requires that an applicant show

"personal experiences of substantial and chronic social disadvantage in American society."[8] 13 C.F.R. § 124.103(c)(2)(ii).

The SBA's analysis in this regard is flawed. Both Determination Letters misapply the regulation by misstating the relevant test. The SBA repeatedly faults Petitioner for failing to prove "gender bias of a chronic and substantial nature." It is not chronic and substantial *gender bias* that is at issue, but rather chronic and substantial *social disadvantage* brought about by the gender bias. *Southern Aire*, SBA No. BDP-453, at 12-13. A relatively benign act could have profound consequences. By emphasizing the act instead of the result, the Agency consistently undervalues the weight of Petitioner's evidence. This is error. Moreover, even had the SBA looked for evidence of chronic and substantial effects instead of bias, it would still have gone astray because it began the search for these effects at the wrong stage of the analysis.

The SBA contends that 13 C.F.R. § 124.103(c)(2)(ii) requires that each discreet experience recounted in the PES show evidence of substantial and chronic disadvantage. Petitioner, on the other hand, argues that the proper process is to look at the experiences as a whole and determine whether the total narrative evidences the requisite disadvantage. The Agency's theory is impracticable and inconsistent with previous SBA decisions. A requirement that every discreet incident show chronic and substantial injury is implausible, as a one-time event can almost never be considered "chronic." *Merriam-Webster's Dictionary* defines the term as "marked by long duration or frequent recurrence." Chronic Definition, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/chronic (last visited Dec. 26, 2012). An extended time element is therefore central to the understanding of this term. For the Agency to demand that a single event must also be a chronic event creates an analytical paradox.

In 2008, a predecessor court held that the chronic and substantial element "is usually met if the applicant describes more than one or two specific, significant events. However, only one 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*, SBA No. SDBA-178, p. 3 (*quoting Seacoast*, SBA No. SDBA-151, pp. 7-8). For example, job discrimination that "lasted over the course of a few years might be both chronic and substantial." *Ace Technical*, SBA No. SDBA-178, at 3. To the Court's knowledge, every subsequent Small Business Determination or 8(a) BD Program appeal has relied upon this holding for the proposition that multiple events are generally required for the applicant to clear the second hurdle. *See, e.g.*, *Med-Choice, Inc.*, SBA No. SDBA-179 (2008); *Timely Eng'g Soil Tests. LLC.* SBA No. BDP-297 (2008); *Tony Vacca Constr. Inc.*, SBA No. BDP-321 (2009); *Loyal Source Gov't Serv. LLC.*,SBA No. BDP-434 (2012); *Wholesale Distribution*, SBA No. BDP-456 (2012).

In *Tony Vacca Const. Inc.*, for example, the Agency found that one of the petitioner's claims constituted substantial disadvantage, but denied the petition because the single incident

[8] The Agency's Determination Letters routinely switch the order of the terms, referring to "chronic and substantial" bias while the regulation uses "substantial and chronic." Any difference is immaterial. As this *Decision* quotes often from the Determination Letters, it will use "chronic and substantial" for the sake of internal consistency.

could not be considered chronic. *Tony Vacca*, SBA No. BDP-321. Upon review, the court determined that other incidents were also bias-motivated, and "taken together, establish substantial and chronic social disadvantage." *Id.* at 6. The reviewing court reached a similar conclusion in *Tootle Constr., LLC*, finding that the business owner's experiences at three jobs were, together, evidence of chronic and substantial disadvantage. Tootle, SBA No. BDP-420 (2011). The SBA's analytical approach is directly at odds with these holdings. If multiple incidents are generally required to prove chronic and substantial disadvantage, it is illogical for the SBA to argue that each of those incidents must themselves be chronic and substantial.

The SBA makes reference to "chronic and substantial gender bias" no fewer than nine times in its *Initial Determination Letter*, and repeats the phrase once more in the *Second Determination Letter*.[9] Each usage is in reference to a particular claim or range of claims. For example, both Determination Letters state that "[T]he college experiences you presented do not indicate that you experienced specific and direct gender bias of a chronic and substantial nature ..." In the *Initial Determination Letter*, the Agency writes, "[a]lthough [Ms. Killen's supervisor's] misogynistic behavior was unprofessional, you have not provided a specific instance(s) or connected this behavior to gender bias of a chronic and substantial nature."[10] These examples demonstrate that the SBA required evidence of chronic and substantial bias for each incident, or at the very least for each of the three emphasized areas: education, employment, and business history.[11] This requirement is incorrect. This analytical error pervades the SBA's entire determination, thereby rendering the entire decision unreasonable.

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[9] The *Second Determination Letter* is, for the most part, a word-for-word reproduction of the *Initial Determination Letter*. Eight of the nine original references exist in the revised version as well. The *Remand Order* directed the Agency to revisit six specific deficiencies related to three incidents in its original decision. The SBA did so by inserting additional explanations into the original document. The additional analysis is generally no more than one or two sentences per issue, and in some cases the SBA simply deleted the offending sentence or phrase. What's more, the additional explanations do not reflect any new analysis on the part of the feet-finder. The SBA simply repeats the arguments offered in its *Response* to Petitioner's original *Appeal Petition*. While this approach complies with the letter of the law, as it were, it also lends credence to Petitioner's claim that the Agency refused to undertake a good-faith second look at its conclusions.

[10] The *Second Determination Letter* repeats this sentence verbatim, but for two notable deletions. First, the revised version omits the word ""misogynistic." By doing so, the Agency minimizes— indeed eliminates — the connection between the incident and any anti-female sentiment. The Agency apparently recognized the gender-based hostility in the *Initial Determination Letter*, so it is curious why it sanitized its own opinion upon remand. Second, the revised version deletes "you have not provided a specific instance(s) ...," because the *Remand Order* noted that the corroborating testimony from Julie Luten Schilbrack described a specific instance. The original Determination Letter made no mention of Ms. Schilbrack's testimony, which was one of several omissions that warranted remand.

[11] The SBA states in its *Response* that Petitioner "argues for the first time that Ms. Killen suffered bias that negatively impacted her access to higher education." This is incorrect. The PES directly identified one episode of gender bias Ms. Killen experienced in high school. However,

b. Incorrect Standard of Proof

Petitioner also contends that the Agency inappropriately analyzed Petitioner's application under a clear and convincing standard rather than the preponderance standard.[12] In doing so, Petitioner alleges, the Agency gives itself the power to deny any application, regardless of the strength of the proffered evidence.

To be successful under the preponderance standard, an applicant must persuade the fact-finder that the existence of a fact is more probable than its non-existence. *Concrete Pipe & Prods, of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal*., 508 U.S. 602, 622 (1993); *Southern Aire*, SBA No. BDP-453, at 9. In an 8(a)BD Program context, the preponderance standard does not require an applicant to *prove* that an event occurred or was the product of gender bias. The applicant must only offer evidence sufficient to convince the fact-finder that it is *more likely than not* that such bias was present. This evidence can come from the PES alone; no corroboration is required. *Southern Aire*, SBA No. BDP-453, at 6; *Bitstreams*, SBA No. BDP-122, at 9.

Here, the SBA seeks definitive proof that the incidents Ms. Killen describes were the result of gender bias rather than some other reason. For example, Ms. Killen's PES recounted an incident at Blue Cross/Blue Shield where she was not permitted to attend a professional development conference, even though her male counterparts were able to attend similar events and she could have attended the conference at no cost to the company. The *Initial Determination*

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both Determination Letters incorrectly dismiss her educational claims as "generalizations." The SBA makes no mention of the high school incident. Moreover, the Agency was aware that Petitioner raised education claims because it spent a full paragraph denying that Ms. Killen was negatively impacted by her educational experiences. The SBA bases this conclusion on the fact that Ms. Killen graduated from college with good grades and eventually went to and graduated from law school. The Court notes, as it did in *Southern Aire*, that this "ultimate success" rationale can no longer survive a reasonableness review. *See Southern Aire,* SBA No. BDP-453, at 8*; dsi Assoc*., SBA No. BDP-413.

[12] To survive the clear and convincing standard, an applicant must offer evidence that "produces, in the mind of the trier of fact, an abiding conviction that the truth of the factual contention is highly probable." *Bitstreams*, SBA No. BDP-122, p. 9 (*citing Colorado v. New Mexico*, 467 U.S. 310,316 (1984)). This standard implies a degree of skepticism on the part of the fact-finder. Accordingly, the SBA routinely rejected uncorroborated PES's in the past. *See Skyview Excavating and Grading. Inc.*, SBA No. MSB-590, (1997); *Sierra Environmental Services*, SBA No. 550 (1996). However, the SBA abandoned the clear and convincing standard for purposes of 8(a) BD individualized social disadvantage claims prior to the turn of the century. *Bitstreams*, SBA No. BDP-122, at 9; *Small Business Size Regulations, 8(a) Business Development/Small Disadvantaged Business Status Determinations*; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 Fed. Reg. 35,728, 43,585 (proposed Aug. 14, 1997).

Letter dismissed this claim, stating that the PES did not include sufficient information "to demonstrate that gender bias was, in fact, the underlying cause of your not granted permission to attend." [sic]. It is not for the Agency to determine whether gender bias was, in fact, the underlying cause. If the evidence shows that bias was the likely culprit, then Petitioner has met its burden. The evidence need not be overwhelming. "As long as the scales tip, however slightly," in Petitioner's favor, the standard has been met. *Bitstreams*, SBA No. BDP-122, at 6.

Ms. Killen's PES does allege bias, noting that a male colleague — Don Holmes — had attended a similar development conference the same year, paving the way for him to receive a promotion. Ms. Killen also states that several other male co-workers had attended such conferences. She further states that the company culture supported male managers, and that men "were given preference in salary increases, promotions, and more company perks as compared to women." There is no evidence in the record suggesting an alternative explanation why Ms. Killen was denied the opportunity to attend the conference, and the Agency does not cite any reason for disbelieving Ms. Killen's testimony. Petitioner therefore presented an uncontested claim of bias supported by multiple factual statements evidencing the existence of that bias.

The SBA's treatment of this specific incident is indicative of a general air of skepticism that pervades both Determination Letters. The SBA repeatedly rejects Ms. Killen's statements by reciting its standard mantra: "You did not provide the specific quality and quantity of evidence to demonstrate that you experienced ...." In most cases, the Agency then lists one or two specific evidentiary deficiencies. For example, in rejecting Ms. Killen's claim of sexual harassment while at Occidental Chemical, the *Second Determination Letter* found that she had not *proven* negative impact because she did not explain what promotions were offered, when they were offered, or how she had lost them. The Agency also dismissed the claim because the evidence "does not suggest that you were no longer in need of mentoring" or that her supervisor "was the specific individual responsible for making decisions with regard to promotions." These findings contradict direct statements in the PES, and so imply that the fact-finder considered the statements to be untrue. The Agency did not cite any contrary evidence in the Administrative Record to justify discounting the PES because there is no such evidence. Instead, it manifested its skepticism by claiming the evidence provided was insufficiently detailed.

As stated previously, evidence in an 8(a)BD Program case is generally considered sufficiently detailed if it: (1) describes when and where the incident occurred, (2) who was involved, (3) how the incident occurred, and (4) how the owner was adversely affected by the incident, *supra*, at 6; *Southern Aire*, SBA No. BDP-453, at 7. This is not a particularly high barrier. As a result, it is generally readily apparent when an applicant has failed to provide the necessary information. The recent decision in *Wholesale Distribution* is illustrative. *Wholesale Distribution*, SBA No. BDP-456 (2012). There, the SBA dismissed the petitioner's entire Business History narrative in one sentence, stating that the PES did not offer any specific information about bias-based social disadvantage. The Court upheld that conclusion because the narrative "does not, at any point, allege biased actions or words by any individual or group." *Id.* at 7. The narrative did not identify any specific incident, and so didn't answer any of the four sufficiency parameters.

If the SBA had analyzed any of the aforementioned statements, rather than merely state

that they were not specific enough, and reasonably concluded that they did not raise the probability of bias over the 50% threshold, this Court would uphold that decision, as it has in the past. *See, e.g., Alabasi Constr. Inc.*, SBA No. BDP-368 (2010). The Agency did not, however, reject the claims on that ground. The *Initial Determination Letter* does not say that gender bias was not likely. It rejects the claim because Ms. Killen *did not prove* that gender bias was, in fact, the cause. In essence, Petitioner failed to convince the fact-finder of the actual truth of her claim. Although the SBA never uses the exact term, this is the sort of analytical posture that would be expected under a "clear and convincing" standard.

With regard to Ms. Killen's Occidental Chemical claim, the PES and the letter from Ms. Kirkland stated when and where the alleged sexual harassment occurred, who committed the act, how, and what the consequences were. The PES described in detail how her career stagnated after she rebuffed the romantic overtures of her immediate supervisor. Ms. Killen also offered a statement from a male director in the company that expressly linked her professional struggles to companywide gender bias. These statements should be more than sufficient to allow the Agency to determine whether the claim meets the eligibility criteria. If the Agency doubted Ms. Killen's credibility, it should have articulated its doubts and identified the evidence in the record that prompted its skepticism. Alternatively, if the Agency had actually undertaken an analysis of Petitioner's claim and reasonably found that there was not a 51% probability that gender bias was involved, the Court would have no basis to overturn that conclusion.[13] The SBA did neither of those things with regard to this claim. Instead, it demanded additional specificity, then used the lack of that specificity as grounds to disregard Petitioner's evidence. This was arbitrary and capricious.

The SBA's quest for ultra-specific details is reflected throughout both Determination Letters. In the *Second Determination Letter*, for example, the Agency discounts Ms. Killen's claim of gender-based discrimination in part by noting that Ms. Killen does not describe when or how her supervisor blocked her promotion opportunities. The PES does state, however, that Ms. Killen was only employed at that firm in 1995, that the incident she recounts occurred in 1995, and that the supervisor blocked her "next" promotion. The Agency thus has a clear indication that the promotion was blocked in 1995. Additionally, the Court finds no purpose in requiring a detailed description of how the promotion was blocked. Whether the supervisor gave Ms. Killen a deliberately poor review, engaged in nefarious office gossip, or slashed her tires to prevent her from appearing before a promotion panel, the end result is the same; his actions prevented her promotion. The information the SBA requires would not prove or disprove Ms. Killen's story. Although more specifics would undoubtedly make Petitioner's case more persuasive, the lack of this information cannot doom the application if the four *sufficiency parameters* are otherwise met. That is not to say, of course, that sufficiency guarantees victory for an applicant. The Agency must still weigh the evidence and determine whether it clears the preponderance bar.

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[13] The SBA does engage in substantive analysis of the evidence elsewhere in its decision. For instance, it disagreed with Ms. Killen's assessment that being snubbed for call-back interviews because of her high-pitched voice was an example of gender bias. Rather than suggest that Petitioner had not presented "enough" evidence, the Agency concluded that the evidence presented did not show gender bias. This was a reasonable, evidence-based conclusion.

Overall, the SBA's treatment of Petitioner's evidence demonstrates an unwillingness to take Ms. Killen at her word. The Court is sensitive to the Agency's important role as a gatekeeper for the 8(a) BD Program, and the Court recognizes that the application process provides very little opportunity for the introduction of adverse evidence. However, an application process that requires only a preponderance of proof and does not provide for adverse evidence will likely operate in the applicant's favor. Apparently the barrier to entry was deliberately set low. The fact-finder cannot arbitrarily raise it.

II. Conclusions Contrary to Evidence

Finally, Petitioner argues that the SBA inappropriately disregards, discounts, or ignores evidence in the Administrative Record. As a result, the Agency's conclusions are at odds with record evidence. This argument is largely inseparable from Petitioner's previous allegations of error. By demanding additional evidence and searching for evidence of chronic and substantial bias, the SBA's conclusions inevitably fail to coincide with the actual evidence.

Where the Agency specifically addresses Petitioner's evidence, it often does so in a dismissive or inaccurate manner. For example, the Agency determined that Ms. Killen had not experienced gender bias at the hands of her supervisor at a law firm. Rather, the Agency pointed to the PES and a corroborating statement as evidence of a non-bias-related motivation for the incident. Specifically, the Agency noted that the supervisor launched into a profane, gender-specific outburst after Ms. Killen “openly questioned his strategy” and failed to turn in an assignment on time. Neither source references any open confrontation. They merely state that Ms. Killen expressed her concerns about the supervisor's strategy. The record does not disclose whether this occurred during a one-on-one meeting or an open conference.

The Agency similarly misstates a corroborating letter from Ms. Kirkland describing the sexual harassment Ms. Killen experienced while at Occidental Chemical. The *Second Determination Letter* stated that the letter is not evidence of negative impact because it only shows that Ms. Killen was the subject of office gossip. In fact, however, the letter says that Ms. Killen was “humiliated” by the encounter, “lost her passion for the job,” and eventually resigned. Moreover, the letter substantiated Ms. Killen's claim that her time was monopolized by her supervisor, that the alleged harassment occurred, and that Ms. Killen sought employment alternatives afterwards. The Determination Letters make no reference to that information.

The *Second Determination Letter* also stated that Ms. Killen voluntarily quit Occidental Chemical “because you found another job at a comparable salary.” This is a gross mischaracterization of her narrative. In actuality, Ms. Killen felt she could not advance at the company unless she succumbed to her supervisor's advances. Rather than do so, she “escaped” to another job. However, she says in the PES that she was “humiliated and broken” when she resigned, and that the new job “barely covered the cost of living increase” associated with the move to a new town. The narrative is quite clear that Ms. Killen did not leave Occidental Chemical of her own volition. Only by deft manipulation of Ms. Killen's words can the SBA arrive at the conclusion that the PES does not demonstrate negative impact.

Perhaps most dramatically, Ms. Killen recounted an incident where her male colleague

informed her that a potential client refused to work with a woman-owned firm. A letter from Ms. Gleason corroborated this account. However, the SBA still concluded that it could not "reasonably determine" that gender bias was involved because Petitioner did not provide information about the bid and the loss of contract. The Agency does not explain why these documents would represent better evidence of gender bias than the first-person testimony Petitioner offers. It is feasible that a man would express anti-female sentiment during a private conversation with another male. It is far less likely that the man would memorialize that bias on a document, particularly one that would be seen by the injured party. The SBA's conclusion that the lack of these documents renders the other evidence insufficient is inexplicable. Indeed, both Determination Letters routinely place determinative weight on any evidence that happens to not be present. The SBA's conclusion that bias is non-existent in the face of such evidence is unreasonable, and therefore arbitrary and capricious.

CONCLUSION

In denying Petitioner's application for entry into the 8(a) BD Program, the SBA consistently misapplied the chronic and substantial element, either by searching for the wrong thing or searching at the wrong time. It also applied an unreasonably burdensome standard of proof, and reached conclusions that were at odds with evidence in the record. As such, the Agency's determination was unreasonable, and thus **ARBITRARY, CAPRICIOUS, AND CONTRARY TO LAW**. See 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). It is hereby **ORDERED** that the SBA shall afford Petitioner entry into the 8(a) BD Program within 30 days of the date this Order becomes final.

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).