United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Striker Electric,	SBA No. BDPE-465
Petitioner	Decided: February 1, 2013

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On April 11, 2012, Striker Electric, ("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 June 6, 2012, Petitioner sought leave to file a contemporaneous *Amended Appeal*. On June 8, 2012, the Agency filed the Administrative Record and an *Answer* ("Answer") to the initial *Appeal Petition*. The Court accepted Petitioner's *Amended Petition of Appeal* ("Amended Appeal") and allowed the SBA to amend its *Answer*, which it did on November 8,2012. In its *Amended Answer*, the SBA argued that Petitioner failed to prove by a preponderance of the evidence that its owner, Mr. Justin Nickle, had experienced chronic and substantial social disadvantage as a result of disability-motivated bias.[1] 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.[2]

PROCEDURAL HISTORY

Petitioner filed its initial application for entry into the 8(a)BD Program on March 1, 2011. On March 7, 2011, the Agency notified Petitioner that the application was incomplete, and requested that Petitioner provide additional information. Petitioner complied with the request. The Agency contacted Petitioner again on March 29, 2011, to request more information, including an additional Personal Experience Statement ("PES"). Petitioner again complied with the request. On November 10, 2011, the Agency issued a *Determination Letter* denying Petitioner's application on the grounds that Mr. Nickle was not socially disadvantaged and did

[1] Mr. Nickle's left leg was amputated above the knee as the result of a workplace accident in 2007. He now uses a metal alloy prosthetic leg.

[2] 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.

not possess business integrity.[3] Petitioner filed a *Request for Reconsideration* ("Recon Request") on November 19, 2011, supported by additional testimonial evidence and two letters of corroboration. On February 27, 2012, the Agency issued a *Determination upon Reconsideration*("Recon Determination") that again found that Mr. Nickle was not socially disadvantaged due to his physical disability. The initial *Appeal Petition* followed soon afterward.

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 their 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." *Southern Aire, Inc.,* SBA No. BDP-453, p. 13 (2012); *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

[3] The SBA based the lack of business integrity conclusion on the fact that Petitioner and Mr. Nickle had been found liable for a work-related civil judgment in the amount of $62,781 in 2009. Neither party has elaborated on the details surrounding this event, nor are they required to. The *Recon Determination* found that Petitioner had resolved the question of its business integrity, and so did not deny the application on that ground.

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). Under this standard, an applicant is not required to convince the fact-finder that an incident was motivated by bias. *Southern Aire*, 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).

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. *Ouock Tine 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

An SBA determination can be overturned only if the reviewing court concludes: (1) that the administrative record is complete; and (2) based upon the entire administrative record, the Agency 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 Court may only consider information contained in the written administrative record. *Southern Aire*, SBA No. BDP-453, at 2 (citing 13 C.F.R. § 134.406(a)). Therefore, the administrative record must be complete before the Court may determine whether it supports the SBA's ultimate conclusion.

In determining whether the administrative record is complete, a court considers whether the Agency (1) adequately examined all relevant evidence; (2) arrived at its conclusion using only those facts contained in the administrative record; and (3) articulated an explanation for its conclusion that is rationally connected to the facts found in the record. *Id.* (citing *Burlington*

Truck Lines, v. United States, 371 U.S. 156,168 (1962) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 at 43 (1983)).

If the Agency's decision fails to address these factors, the record is considered incomplete and the case may be remanded to the Agency for further consideration and explanation. The SBA then has the opportunity to supplement the administrative record with the missing information or analysis. *Southern Aire*, SBA No. BDP-453, at 2.

If the administrative record is deemed to be complete, the reviewing court proceeds with its review to ensure that the Agency decision was not arbitrary, capricious or contrary to law. 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.

MOTIONS AND OBJECTIONS

Before addressing the merits of Petitioner's appeal, the Court must resolve Petitioner's outstanding objection to the Administrative Record. Petitioner contends that the SBA cannot rely on the deliberative process privilege to justify withholding two documents from the Administrative Record. Both documents, found at Tab B and Tab E, respectively, are Business Opportunity Specialist analyses ("BOS Analyses") conducted by SBA personnel and used in the determination of Petitioner's 8(a)BD Program application. Petitioner argues that any factual information contained in the BOS Analyses should be segregated and disclosed, and that the Court must "consider the extent of harm" non-disclosure would cause Petitioner. The SBA maintains that SBA precedent has consistently confirmed the applicability of the deliberative process privilege to BOS Analyses, and Petitioner has offered no justification why the present case warrants a different outcome.

The deliberative process privilege prevents the disclosure of an agency's internal communications when those communications constitute necessary internal debate about

upcoming agency policies or decisions. *See EPA v. Mink*, 410 U.S. 73 (1973); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975); Jordan v. Dep't. of Justice, 591 F.2d 753 (D.C. Cir. 1978); *Petroleum Information Coro. v. U.S. Dep't. of the Interior,* 976 F.2d 1429, 1433 (D.C. Cir. 1992). To fall within this privilege, a document must be both "predecisional" and "deliberative." *See Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753 (D.C. Cir. 1978). A document is considered pre-decisional if it was prepared to assist an agency decision-maker in arriving at a decision, rather than to support a decision already made." *Petroleum Information Corp.*, 976 F.2d at 1434 (quoting *Renegotiation Bd. v. Grumman Aircraft,* 421 U.S. 168 (1975)); *Jordan*, 591 F2d at 774 ("The various rationales for the privilege evanesce once a final policy decision has been reached.") Material is deliberative if it "reflects the give-and-take of the consultative process." *Petroleum Information Corp.*, 976 F.2d at 1434 (quoting Coastal States Gas Corp. v. U.S. Dep't. of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980)).

A protected document "must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters. Pre-decisional materials are not exempt merely because they are pre-decisional; they must also be a part of the agency give-and-take of the deliberative process by which the decision itself is made." *Jordan*, 591 F.2d at 774. Even documents that pass this two-part test may still not warrant protection. Courts have long held that any factual material present in these documents must be disclosed, unless those facts are inextricably intertwined with the policy-making or decisional process. *See Mink*, 410 U.S. at 87-91: *Exxon*, 87 F.R.D. at 637; *Montrose Chemical Corp. of Calif. v. EPA*, 491 F.2d 63 (D.C. Cir. 1974).

The SBA Administrative Law Judges have had multiple opportunities to address whether BOS Analyses and other internal SBA documents merit deliberative process privilege protection. It has consistently arrived at the conclusion that they do. *See, e.g., Loval Source*, SBA No. BDP-434 (BOS analyses . . . are pre-decisional deliberative documents that express opinions and make recommendations" and "are therefore properly covered by the deliberative process privilege."); *Colamco, Inc*., SBA No. SDBA-176 (Oct. 18, 2007) (BOS Analyses are "internal pre-decisional memoranda embodying the analysis and recommendations of Agency officials."); *NAMO, LLC*, SBA No. BDP-458 (Dec. 5, 2012); *Spectrum Contracting Servs., Inc.*, SBA No. BDP-378 (Oct. 14, 2010); *Alabasi Constr. Inc*., SBA No. BDP-368 (Oct. 12, 2010).

Petitioner's *Motion* cites to several federal court decisions discussing various general aspects of the deliberative process privilege. However, there is no reference to any of the multiple SBA decisions that are squarely on point. The SBA ALJ decisions have stated definitively that BOS Analyses are protected documents, and that their nondisclosure is not harmful. The Court finds nothing in this case, and Petitioner has presented nothing, that would overcome this precedent. Accordingly, the objection is **DENIED**.

THE AGENCY'S DETERMINATION

Petitioner's *Amended Appeal* asks the Court to review the SBA's *Recon Determination,* set aside that decision, and find that Petitioner should be admitted into the program. Alternatively, Petitioner suggests that the case should be remanded to SBA to correct deficiencies in the Administrative Record. Petitioner argues that the SBA committed clear error

because the *Recon Determination* failed to address three incidents contained in the *Recon Request*, failed to explain its basis for disregarding those incidents, and ignored corroborating evidence in the memorandum of Craig Lamoreaux.[4]

Petitioner is correct in its assertion that the *Recon Determination* did not individually address Petitioner's three accounts of disability-based bias, which Mr. Nickle labels the "Wahlen Incident," the "Tholen Incident," and the "Broken Arrow Incident." All three events describe conversations between Mr. Nickle and current or potential clients. In each case, the client made a statement or asked a question concerning the effect Mr. Nickle's handicap would have on his ability to complete projects in a timely manner. Each time, Mr. Nickle responded that his disability limited his mobility, and stated that he would require more time than an able-bodied person to complete the task. In each incident, the client then responded that it could not afford delays. All three of these incidents were referenced in the PES's submitted prior to the *Determination Letter*. The *Recon Request* provided slightly more detail about each event, including additional information describing Mr. Nickle's reactions and answers in response to the questions.

The *Recon Determination* did not specifically refer to any of the three incidents. However, the failure to individually identify every claim does not necessarily render an SBA decision fatally deficient. The Agency is obligated only to "adequately address" the significant evidence. *Loval Source*, SBA No. BDP-434, at 7; *Ace Technical, LLC*, SBA No. SDBA-178, at 3 (2008). This phrasing does not impart upon the SBA an absolute mandate to describe each discreet event in painstaking detail. Such a commandment could, in specific instances, raise form above function, benefiting no one. The three incidents addressed in the *Recon Request* illustrate this point. All three incidents are simple variations on a single theme. The stories are nearly identical; only the identities of the characters change. The analysis of any one claim would therefore be interchangeable with the other two. Under these circumstances, the SBA could hardly be faulted for addressing and disposing of the incidents as a group, provided it clearly communicated its intention to do so. However, the Agency did not do so here, and indeed did not address the impact of these incidents at all.

The Court identifies only one paragraph in the *Recon Determination* that can readily be identified as relating specifically to the *Recon Request*. That paragraph reads, in its entirety:

> You indicate that it takes you awhile [sic] to climb ladders and there are workplace obstacles. There is no evidence of bias against you in this example. In your industry, you are required to climb ladders and work in unfinished areas.

Recon Determination, p. 2.

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[4] Petitioner's *Amended Appeal* does not object to the entirety of the *Recon Determination*. Rather, it limits the scope of the appeal to the Agency's discussion of the "three specific incidents" and the Lamoreaux Memorandum. Amended Appeal, p. 2. Petitioner states that it intends to "streamline the issues on appeal" by focusing on "the four most compelling incidents." Id. at p. 5. The Court therefore follows suit, and will limit its discussion to only those incidents.

Mr. Nickle's original PES mentions his difficulty climbing stairs and ladders, but it makes no reference to "workplace obstacles." By comparison, the *Recon Request* states that "A simple task, like climbing a ladder now takes 3 to 4 times the effort as a normal person to complete an equal task," and "stairs, passageways and job site obstacles require extra time to navigate." The *Recon Determination* thus appears to be discussing these passages, but the passages do not relate to any of the three incidents at issue here. Those passages describe the day-to-day struggles Mr. Nickle's faces as an amputee in the construction industry. They are not presented as examples of bias brought against him by any specific individual. It is therefore no surprise that the Agency found "no evidence of bias against you in this example."

Mr. Nickle does affirmatively allege bias in the three specific incidents. He identified approximately when the incidents occurred, who he was interacting with, what was said, and what the impact was. Mr. Nickle therefore provided sufficient detail to allow the Agency to assess the validity of these claims. The Agency made no references to any of these incidents in its initial *Determination Letter*, and again failed to mention them in the *Recon Determination*, although an entire page of the *Recon Request* was devoted to these events.

The *Recon Determination* does state that "one client asked you if you needed any special provisions, which seems reasonable." The Agency's use of the word "provisions" suggests that this sentence is in reference to the Broken Arrow Incident, because Mr. Nickle's initial PES used that word when discussing that incident. Regardless, this single sentence does not constitute analysis on reconsideration, as the sentence was imported verbatim from the initial *Determination Letter*. Additionally, it is a purely conclusory statement that offers Petitioner no insight into why the question "seems reasonable."

Notably, the *Recon Request* uses the term "environmental barriers" when discussing the Broken Arrow Incident, but the phrase is absent from the *Recon Determination*. This omission, though subtle, is telling. Both Determination Letters regularly incorporate specific terms from the respective PES's — such as "job site/workplace obstacles" and "provisions" — to anchor the analysis to the specific claims. The fact that no language specific to the three incidents appears in the *Recon Determination* further suggests that the SBA ignored those claims entirely.

A determination that fails to examine all relevant evidence is incomplete. The SBA did not address the Wahlen, Tholen, or Broken Arrow incidents or provide any explanation why those claims were disregarded. Accordingly, a remand is necessary to allow the Agency to address these deficiencies.

The *Recon Determination* does, however, specifically address the Lamoreaux Memorandum and provides an explanation for its determination that there was "no evidence of bias" in that example. The record is therefore complete as to the Lamoreaux Memorandum. Whether the determination is reasonable is a question to be addressed once the entire Administrative Record is complete.

ORDER

The above-captioned case is hereby **REMANDED** to SBA for further consideration pursuant to 13 C.F.R. § 134.406(e)(2). The Agency shall issue a new Determination upon Remand on or before March 1, 2013.

SBA is **ORDERED** to follow the procedures mandated by the applicable regulations and to set forth SBA's findings with specific reasons for each finding based on the facts relating to each significant incident described by Petitioner.

ALEXANDER FERNÁNDEZ
Administrative Law Judge