

**United States Small Business Administration
Office of Hearings and Appeals**

IN THE MATTER OF:

Black Horse Group, LLC,

Petitioner

SBA No. BDPE-468

Decided: February 19, 2013

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On August 13, 2012, Black Horse Group, LLC (“Petitioner”) appealed a Determination of the U.S. 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 October 11, 2012, the Agency filed an *Answer* to Petitioner's *Appeal Petition*. In its *Answer*, the SBA argued that Petitioner failed to prove by a preponderance of the evidence that its owner, Mary Warren, has experienced chronic and substantial social disadvantage as a result of gender-motivated bias that has negatively impacted Ms. Warren's entry into or advancement in the business world.

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.¹

PROCEDURAL HISTORY

On July 20, 2011, Petitioner filed an initial application seeking entry into the SBA's 8(a) BD Program. The application stated that Ms. Warren has experienced chronic and substantial social disadvantage as a result of gender-motivated bias. Ms. Warren asserted that being a female in the engineering and general contracting industry has resulted in “a deep rooted gender bias perception” that has impacted her entry into and advancement in the business world.

On December 13, 2011, the SBA issued an *Initial Determination Letter* denying Petitioner admission into the 8(a) BD Program. The SBA found that Petitioner did not establish that Ms. Warren is socially disadvantaged. Because Ms. Warren is not a member of one of the groups specifically presumed to be socially disadvantaged in SBA's regulations, Petitioner is required to establish Ms. Warren's social disadvantage by a preponderance of the

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.

evidence. *See* 13 C.F.R. § 124.103(c). The SBA found that Petitioner failed to provide “the quality and quantity of evidence necessary to meet the preponderance of the evidence standard” in supporting Ms. Warren's case of social disadvantage. The SBA invited Petitioner to submit additional evidence of Ms. Warren's social disadvantage to the Agency in order to be reconsidered for the 8(a) BD Program.

On January 25, 2012, the SBA received Petitioner's request for reconsideration along with additional materials supporting Ms. Warren's claim of social disadvantage. On June 29, 2012, the SBA issued a *Second Determination Letter* finding that Petitioner had provided insufficient evidence to overcome the Agency's reasons for denying Petitioner's application. On August 13, 2012, Petitioner filed this appeal.

PROGRAM ELIGIBILITY REQUIREMENTS

To qualify for the 8(a) BD Program, an entity must be classified as a small business and be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and 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” because of the individual's identity as a member of a group, “and without regard to their individual qualities.” 13 C.F.R. § 124.103(a). An individual's social disadvantage must stem from circumstances beyond the individual's control. *Id.*

There is a rebuttable presumption that members of certain racial and ethnic groups, enumerated in § 124.103(b), are socially disadvantaged. 13 C.F.R. § 124.103(b)(1) (including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, etc.). Individuals who are not members of a presumptively disadvantaged group must establish individual social disadvantage by demonstrating: (1) at least one objective distinguishing feature that has contributed to social disadvantage; (2) personal experiences of substantial and chronic social disadvantage in the United States; and (3) negative impact on entry into or advancement in the business world because of the disadvantage. 13 C.F.R. § 124.103(c)(2). Negative impact is demonstrated by the applicant via a Personal Eligibility Statement (“PES”) that details specific, bias-motivated events in the business owner's education and employment history, and 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 resulting in a negative impact. 13 C.F.R. § 124.103(c)(2)(iii).

BURDEN OF PROOF

An applicant seeking entry into the 8(a) BD Program must prove chronic and substantial social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1). The preponderance of the evidence standard “asks whether the existence of a fact is more probable than its non-existence.” *Southern Aire Contracting, Inc.*, SBA No. BDP-453, at 8 (2012). “Put simply, if the petitioner's claims are slightly more likely than not, the preponderance burden has been met.” *Id.* at 9.

In order to be properly evaluated by the Agency, each personal experience of social disadvantage asserted by the applicant must be presented in sufficient detail. A claim is sufficiently detailed if it describes: (1) when and where the incident occurred; (2) who discriminated; (3) how the discrimination took place; and (4) how the applicant was adversely affected by the discrimination. *Id.* at 7. “A claim that fails to provide sufficient detail is deficient.” *Seacoast Asphalt Servs., Inc.*, SBA No. SDBA-151, at 6 (2001).

The SBA has recognized that incidents of gender discrimination are rarely witnessed, and thus, it is not unusual for a PES alleging gender bias to be uncorroborated. *Southern Aire*, SBA No. BDP-453, at 6 (citing *Bitstreams, Inc.*, SBA No. BDP-122, at 8 (1999)); *Ace Technical, LLC*, SBA No. SDBA-178, at 5 (2008). “The applicant does not have to corroborate the PES with independent evidence to meet the burden of proof.” *Loyal Source Gov't Servs., LLC*, SBA No. BDP-434, at 6 (2012); *see Southern Aire*, SBA No. BDP-453, at 6 (“The lack of corroboration does not weaken the evidentiary weight of the PES.”); *Ace Technical*, SBA No. SDBA-178, at 5 (explaining that applicant statements in the PES “are made under penalty of criminal sanctions for false statements and thus carry the additional weight of a sworn statement”). However, the SBA may consider lack of corroboration “if the applicant fails, without explanation, to present apparently available evidence to support the claim.” *Bitstreams*, SBA No. BDP-122, at 9. The SBA may also discount or disbelieve an applicant's statements in the PES if they are inconsistent with other evidence in the record. *Id.* at 10.

STANDARD OF REVIEW

The SBA's determination that an 8(a) BD Program applicant has not met the program requirements can be overturned only if the reviewing court finds — after considering the entire administrative record — that the determination was arbitrary, capricious, or contrary to law. 5 U.S.C. § 706(2)(A); 13 C.F.R. §§ 134.402, 134.406(a)-(b). Judicial review must be based “solely on a review of the written administrative record.” 13 C.F.R. § 134.406(a). “It is [therefore] imperative that the record itself be complete before a court can determine whether it supports the agency's ultimate conclusion.” *Southern Aire*, SBA No. BDP-453, at 2.

The Administrative Record. To determine whether the administrative record is complete, the court must evaluate whether the agency examined all the relevant evidence and articulated an explanation for its determination that bears a rational connection to the facts found in the record. *Id.* An agency's determination must show that: (1) the agency considered all of the evidence presented by petitioner; (2) the agency arrived at its conclusion using only the facts contained in the administrative record; and (3) the conclusion provides a clear rationale based on those facts. *Id.* (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Ace Technical*, SBA No. SDBA-178, at 3).

Deficiencies in the Record. If the court finds that the agency's justification for its determination is deficient in any of these three areas, the administrative record is considered incomplete and the court may remand the decision to the agency for further consideration or explanation. *See* 13 C.F.R. § 134.406(e)(1); *Southern Aire*, SBA No. BDP-453, at 2. The court may also remand a decision to the agency if it is “clearly apparent from the record” that the agency committed a mistake of fact or law. 13 C.F.R. § 134.406(e)(2).

Reasonableness of the Agency Determination. If the court determines an agency's administrative record is complete, the court must then determine whether the agency reached a reasonable conclusion, in light of the facts available in the record. It is irrelevant whether the agency's conclusion was the best one, or even the correct one, so long as it was reasonable. *See State Farm*, 463 U.S. at 42-44; *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984); *Southern Aire*, SBA No. BDP-453, at 1; *Ace Technical*, SBA No. SDBA-178, at 2. Any reasonable conclusion must be upheld, even 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); *see also* 13 C.F.R. § 134.406(b).

Unsustainable Agency Determinations. “An agency's conclusion is unreasonable, and thus arbitrary and capricious, if it constitutes a ‘clear error of judgment.’” *D' NAMO, LLC*, SBA No. BDP-458, at 7 (2012); *see State Farm*, 463 U.S. at 43; *Southern Aire*, SBA No. BDP-453, at 4-5. A “clear error of judgment” occurs if the agency: (1) relies on factors Congress did not intend the agency to consider; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its decision that is not supported by the evidence before the agency; or (4) offers an explanation that is so implausible, it cannot be attributed to a difference in view between the agency and the court. *State Farm*, 463 U.S. at 43; *see also Southern Aire*, SBA No. BDP-453, at 4-5.

THE AGENCY'S DETERMINATION

Petitioner's *Appeal Petition* asks the Court to review the SBA's Determination, set aside that decision, and find that Petitioner should be admitted into the 8(a) BD Program. As previously stated, the Court is not authorized to substitute its own reasoned decision for that of the Agency. Instead, the Court must decide whether the SBA examined all the relevant evidence in the record and articulated an explanation rationally based upon that evidence.

After a careful review of Petitioner's 8(a) BD Program application (including Petitioner's PES), the SBA's Determination Letters, and the administrative record as a whole, the Court finds that remand is necessary in this case to allow the SBA to address the following deficiencies in the record:

I. Mistake of Law - Improper Application of the Preponderance Standard

Pursuant to SBA regulations, a reviewing court may remand the Agency's determination for further consideration if the administrative record shows the SBA has committed a mistake of law. 13 C.F.R. § 134.406(e)(2). The SBA commits such an error here by applying the improper standard of proof to Petitioner's claims. As discussed earlier, Petitioner is only required to demonstrate social disadvantage by a preponderance of the evidence. *Supra* p. 2. Preponderance of the evidence simply means that Petitioner “need only show that the fact is more likely true than not true.” *Loyal Source Gov't Servs., LLC*, SBA No. BDP-434, at 5 (2012) (citing *Bitstreams Inc.*, SBA No. BDP-122, at 6 (1999)). The SBA cites the preponderance of the evidence standard in both of its Determination Letters, noting that Petitioner “did not present the quality and quantity of information necessary to meet the preponderance of the evidence

standard.” However, a careful review of the Determination Letters show that the SBA subjected Petitioner's claims to a heightened burden of proof, more akin to the “clear and convincing evidence” standard.

First, Ms. Warren states that following her graduation from the New York Institute of Technology (“NYIT”) in 1989, she was unable to find employment with “a company that would hire a female engineer.”² This claim is corroborated by a letter from Guido Scrivanich, one of Ms. Warren's classmates at NYIT. The SBA discounts this claim and its corroboration, stating that the letter from Mr. Scrivanich “is inconclusive and does not specifically assert gender bias[,] [i]t merely indicated that you were unable to find employment in the engineering field after graduation while he was able to do so.”³ While the Agency's conclusion is factually correct — the letter does not specifically assert gender bias — it is legally irrelevant. The letter need not assert gender bias because Ms. Warren's claim of bias in the PES need not be corroborated. As noted in *Southern Aire Contracting, Inc.*:

As a general rule . . . the SBA is obligated to consider a [Petitioner's PES], whether it is corroborated or not, and whether it is contested or not. Given that there is no adverse party available to contest the PES's recitation of events, this creates a strong advantage for the petitioner, because uncontradicted testimonial evidence should generally be accepted as true.

SBA No. BDP-453, at 6-7 (2012).

Despite the fact that there is no evidence to the contrary in the record, the SBA fails to accept Ms. Warren's unemployment claim as true — that she could not find employment as a result of gender bias because, at the time, no company wanted to hire a female engineer. Further, the SBA fails to provide an explanation for why it found this statement not to be credible. Instead, the SBA points only to the corroborating evidence submitted, stating that it is “inconclusive.” The letter does corroborate that Ms. Warren could not get a job in her field of training, but does not state why. Whether the letter is conclusive or convincing is not the issue. As noted above, no corroboration is needed. By finding that the letter failed to corroborate Ms. Warren's claim that she did not gain employment because of her gender, the SBA is implicitly requiring corroboration of the claim. Moreover, the SBA implicitly increased Petitioner's burden of proof beyond the statutorily mandated preponderance of the evidence standard by suggesting that any corroboration must be conclusive. *See Southern Aire*, SBA No. BDP-453, at 6 (explaining that an uncorroborated PES would be deemed insufficient under the clear and convincing evidence standard, but that the SBA abandoned this standard more than a decade ago, replacing it instead with the preponderance of the evidence standard, which requires no corroboration of the PES).

Second, due to impending economic pressures and a lack of employment options, Ms.

² Petitioner's initial PES, submitted July 20, 2011.

³ All SBA findings quoted in this *Remand Order* can be found in the Agency's *Second Determination Letter*, dated June 29, 2012.

Warren joined the United States Air Force in 1989. Ms. Warren states that in September 1992, the Commander in charge of Ms. Warren's office, Colonel Steele, undermined her leadership by interacting only with the Non-Commissioned Officer (NCOIC) in charge and by recruiting the NCOIC to report on and be held responsible for the actions of then Second Lieutenant Warren. Ms. Warren asserts that Colonel Steele's actions were a result of gender bias because none of the male officers were treated like this. However, the SBA concluded that "You have not presented any specific information of the quantity and quality to indicate Col. Steele said anything or acted out of gender bias directed against you." Further, the SBA cited a letter written by fellow airman Stan Thomas, finding that "The letter from Mr. Thomas who saw Col. Steele require Staff Sergeant Coleman [sic] to oversee you [sic] and that he did not notice this happening to any . . . male" was "not indicative of gender bias."

The Agency's treatment of this claim is similar to the SBA's determination in *StrategyGen Co.*, where the petitioner recounted an incident where she was not permitted to attend a professional development conference, even though her male counterparts had been allowed to attend such conferences in the past. SBA No. BDP-460, at 9 (2012). The SBA dismissed this claim, stating that the PES did not include sufficient information to demonstrate that petitioner was denied permission to attend the conference because of her gender. *Id.* The court in *StrategyGen* found this determination to be arbitrary, noting that "the SBA's treatment of [p]etitioner's evidence demonstrates an unwillingness to take [petitioner] at her word." *Id.* at 11. The court noted that, "[t]here is no evidence in the record suggesting an alternative explanation why [petitioner] was denied the opportunity to attend the conference, and the Agency does not cite any reason for disbelieving [[petitioner]'s testimony." *Id.* at 10. The court in *StrategyGen* concluded that the SBA sought definitive proof that the incidents described by the petitioner in her PES were the result of gender bias, rather than some other reason, and that "[a]lthough the SBA never uses the exact term, this is the sort of analytical posture that would be expected under a 'clear and convincing' standard." *Id.* at 9, 11.

Similarly, the Agency's determination here subjects Petitioner's claims to a heightened standard of proof. The SBA declines to accept Ms. Warren's statements in the PES as true, but fails to explain why they are unbelievable or cite to any contrary evidence in the record that would justify such a conclusion. By doing so, the Agency seeks definitive proof that Colonel's Steele's actions were the result of gender bias, which is indicative of a clear and convincing evidence standard. *See Southern Aire*, SBA No. BDP-453, at 11 ("If the Agency is unable to find bias because the PES is fatally insufficient, so be it. It cannot, however, demand corroborating evidence, and therefore cannot fault Petitioner for failing to provide it.").

Third, the SBA challenges Ms. Warren's statement in the PES that her salary as a civilian design engineer at Fort Drum was substantially lower than that of her male colleagues because of her supervisor's bias towards female engineers. To support this claim, Petitioner submitted a letter from Robert Rice, a co-worker of Ms. Warren's at Fort Drum, which corroborates Ms. Warren's narrative that despite her background and many years of engineering experience, she made substantially less than her male colleagues. The SBA challenges this claim by pointing out that "Mr. Rice indicates he knew of your and the male employees qualifications but does not indicate how he knew." Here, the SBA once again requires additional corroboration from Ms. Warren as to her claims. One step further, the SBA rejects this corroboration as insufficient by

pressing for additional details such as how Mr. Rice obtained this information. This is simply not necessary. Corroboration itself is not needed, much less proof of the basis of such corroboration. *See, e.g., Southern Aire*, SBA No. BDP-453, at 6; *Loyal Source Gov't Servs., LLC*, SBA No. BDP-434, at 6 (2012); *Ace Technical, LLC*, SBA No. SDBA-178, at 5 (2008).

Finally, the SBA errs by raising the evidentiary standard for Petitioner's claims submitted upon reconsideration that were not included in Petitioner's initial PES. Petitioner's original PES recounts Ms. Warren's employment at the Oregon office of the Occupational Safety and Health Administration ("OSHA") and stated that Ms. Warren was a victim of gender bias because her male counterparts, which she recruited from her time in the Air Force, were quickly getting more significant and highly desired project assignments than Ms. Warren was. Upon reconsideration, Ms. Warren expanded on this claim, providing details regarding a specific project she was qualified for and requested to work on, but was denied the opportunity due to her gender. The SBA found fault with the details provided upon reconsideration, stating, "However, as required, you have not explained why, if this incident was such a detrimental instance of gender bias, you did not originally divulge this to SBA."

This is error. No such explanation is required. To the contrary, § 124.205(a) of SBA regulations states that an 8(a) BD Program applicant seeking reconsideration must provide additional information "whether or not available at the time of initial application." 13 C.F.R. § 124.205(a). "The SBA's position evidences a belief that statements introduced for the first time in a reconsideration application are inherently non-credible[.]" which is a belief that has consistently been denounced by the court as a "clear error of law." *Southern Aire*, SBA No. BDP-453, at 10; *see also Loyal Source*, SBA No. BDP-434, at 9. In practice, this flawed belief operates very much like the clear and convincing standard, and as such, is grounds for remand. *See Southern Aire*, SBA No. BDP-453, at 11.

II. Mistake of Law - Improper Analysis of "Chronic and Substantial" Requirement

Throughout both Determination Letters, the SBA repeatedly states that Petitioner has failed to demonstrate "chronic and substantial gender bias." This is error, as it misstates the standard articulated by SBA regulations. The SBA regulations require a showing of chronic and substantial *social disadvantage* to which Petitioner's gender has contributed; not chronic and substantial *gender bias*. *See* 13 C.F.R. § 124.103(c)(2)(ii); *McMahon Builders, Inc.*, SBA No. BDPE-461, at 5 (2013); *Southern Aire*, SBA No. BDP-453, at 12-13. "The difference between the two burdens is that [gender bias] focuses on whether the act itself was discriminatory in nature, while [social disadvantage] focuses on the effects of the act." *McMahon Builders*, SBA No. BDPE-461, at 5. "By emphasizing the act instead of the result, the Agency consistently undervalues the weight of Petitioner's evidence." *StrategyGen Co.*, SBA No. BDP-460, at 7 (2012).

Evidence of chronic and substantial disadvantage is usually established "if an applicant describes more than one or two specific, significant incidents." *Ace Technical*, SBA No. SDBA-178, at 3. "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." *Id.* In demonstrating social disadvantage, Petitioner is not required to show a chronic and substantial effect resulting from

each incident described in the PES in order to meet its burden. *McMahon Builders*, SBA No. BDPE-461, at 5; *Southern Aire*, SBA No. BDP-453, at 13. Instead, the SBA must examine whether the *totality* of Petitioner's alleged experiences provides evidence of chronic and substantial disadvantage. *See* 13 C.F.R. § 124.103(c)(2)(iii) (“In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.”).

In assessing Ms. Warren's claims of gender bias, the SBA individually analyzes the claims and concludes over and over again that each specific incident described in Petitioner's PES is “not indicative of” or “not demonstrative of” substantial and chronic gender bias, or that the SBA was “unable to conclude” substantial and chronic gender bias existed. The Court counts at least ten such instances where this phrase is used to sum up the SBA's determination regarding individual claims in Petitioner's PES. Even if the SBA concluded that each incident was insufficient to meet the burden of demonstrating social disadvantage on its own, the cumulative effect of all Petitioner's claims should have been evaluated for credibility and collective impact, in order to determine whether Ms. Warren suffered a chronic and substantial social disadvantage. *See McMahon Builders*, SBA No. BDPE-461, at 6.

At the end of the Agency's *Second Determination Letter*, the SBA states that “based on the totality of the information presented, we continue to find that your original and updated reconsideration submissions do not establish that you have personally suffered chronic and substantial social and economic disadvantage because of gender.” It is not clear if the Agency came to this conclusion based on an independent review of the overall record, taking all Petitioner's claims into account, or because the Agency inappropriately disregarded Petitioner's claims as individually failing to meet the chronic and substantial requirement.

Similarly, the Agency rejected the empirical evidence submitted by Petitioner, stating that the Agency considered the evidence, but found it unsupportive in light of Petitioner's “inability to present the quality and quantity of specific information related to gender bias specifically directed against [Ms. Warren] by others. . . .” Petitioner submitted evidence including statistics on comparable wages of males versus females; statistics on the number of women in the engineering field during the relevant time frame; statistics on women finding employment in male-dominated fields; studies showing females were denied opportunities to excel in the class room (specifically in math and science) during the relevant time frame; and studies showing how teacher expectations affect students' self-esteem. Even though such evidence will not prove a claim in and of itself, “[e]vidence such as newspaper articles, statistics, and studies that establish discrimination, bias, or prejudice in a particular industry or ethnic group may lend credence to a claim. . . .” *Ace Technical*, SBA No. SDBA-178, at 4. The SBA may also “take into account commonly accepted knowledge . . . as well as anecdotal evidence of discrimination in the applicant's community.” *Id.*

By summarily rejecting the empirical evidence submitted by Petitioner with little explanation as to why the Agency found it “unsupportive,” the SBA fails to establish if it has reviewed the evidence under a totality of the circumstances standard. Once again, it is unclear if the Agency came to its conclusion based on an independent review of the overall record, taking all Petitioner's claims into account and using the empirical evidence to supplement those claims

as a whole, or because the Agency inappropriately disregarded Petitioner's claims as individually failing to meet the chronic and substantial requirement, and therefore dismissed the empirical evidence as unsupportive of Petitioner's individual claims. Accordingly, the SBA's determination must be remanded so that the Agency may reevaluate Petitioner's claims, including the empirical evidence submitted by Petitioner, in the proper context.

III. Mistake of Fact - Conclusions Contrary to Evidence

A thorough review of the administrative record shows that the SBA came to conclusions in its *Second Determination Letter* that are not supported by the record.

First, Ms. Warren claims that she was denied the opportunity to pursue math and science classes in high school, which resulted in her having to take prerequisite courses in these subject matters at community college, extending her college education by at least two years and incurring an additional financial burden. In response, the Agency states, “You claim this delayed your entry into college, however, you have not presented any specific information as to whether this was the case or whether there was another extenuating circumstance which resulted in you waiting to attend college.”

It is unclear where in the record the Agency found Petitioner's claim that these missed opportunities delayed Ms. Warren's entry into college. The record shows that Ms. Warren graduated high school in 1982 and immediately enrolled at Suffolk County Community College where she was a student from 1982-1986. Ms. Warren then went on to attend the New York Institute of Technology from 1986-1989. Nowhere in the PES does Ms. Warren state that being denied the opportunity to enroll in math and science classes in high school led to a delay in her college education. Instead, Ms. Warren states the negative impact from these events was the extension of her college education for at least two, if not four, additional years plus the added financial burden that was attached to the additional college credits. These negative impacts are not addressed by the SBA.

Second, the SBA discounts Ms. Warren's education-related claims as a whole by concluding that even after reviewing Petitioner's reconsideration request, Petitioner “still [has] not established a pattern of chronic and substantial gender bias directed against [Ms. Warren] by others, which has had a negative impact on [Ms. Warren] attaining higher education and/or entry/advancement in the business world.” The SBA's treatment of Ms. Warren's education-related claims in this case is analogous to the SBA's determination in *dsi Assocs., Inc.*, SBA No. BDP-413 (2011). In *dsi Assocs.*, the petitioner claimed she experienced social disadvantage throughout her education where she was constantly discouraged by her educators to pursue her chosen profession, engineering, because she was a female. *Id.* at 7-8. The petitioner in *dsi Assocs.* was denied the opportunity to take shop class in high school, was discouraged by her high school teachers and guidance counselors from pursuing a college education in the predominantly male study of mathematics and physics, and faced resistance from her college professors regarding her pursuit of a mathematics degree and interest in engineering. *Id.*

In *dsi Assocs.*, the SBA concluded that the petitioner's education-related claims did not negatively impact petitioner's entry into or advancement in the business world because she was

still able to pursue mathematics and obtain both a bachelor's and a master's degree from a top university. *Id.* at 8. However, on appeal, the court found the SBA's determination to be in error because it was contrary to the evidence in the administrative record and because the SBA “fail[ed] to explain why it disregarded th[e] evidence of 'social patterns or pressures which discouraged the individual from pursuing a professional or business education.’” *Id.* (quoting 13 C.F.R. § 124.103(c)(2)(iii)(A)). The court noted that although the petitioner eventually obtained multiple degrees in higher education, “her road to those accomplishments was fraught with roadblocks and discouraging advice” and “while this discouragement ultimately may not have *prevented* [petitioner] from earning her bachelor's and master's degrees, the evidence in the record supports the conclusion that it did negatively impact [petitioner]'s entry into the business world by delaying her pursuit of higher education and providing guidance that restricted her educational options on the basis of her gender.” *Id.*

Similarly, Petitioner's PES here shows that Ms. Warren was discouraged from enrolling in mathematical and technical courses in high school, such as shop class and mechanical drawing, which eventually caused Ms. Warren to have to take prerequisite courses in these subject matters at community college, extending her college education by at least two years and incurring an additional financial burden. The SBA failed to address the negative impact these claims have had on Ms. Warren, and instead, summarily concluded that no negative impact existed. The SBA's conclusion here runs contrary to the evidence in the administrative record. The Agency cannot simply discount evidence in the administrative record without providing an explanation for doing so. If the Agency chooses to disregard Petitioner's evidence of “social patterns or pressures which discouraged [Ms. Warren] from pursuing a professional or business education” it must explain its rationale. 13 C.F.R. § 124.103(c)(2)(iii)(A).

Further, the SBA pointed to Ms. Warren's 3.8 GPA at Suffolk County Community College and 3.4 GPA at the New York Institute of Technology, stating, “If you were to have experienced gender bias, which as noted above, we are unable to draw this conclusion, it would appear to have been fleeting and insignificant given your college performance.” As the court noted in *dsi Assocs.*, the fact that Ms. Warren successfully obtained her degree does not mean that her road to achieving that success was not “fraught with roadblocks and discouraging advice.” SBA No. BDP-413, at 8. The evidence in the administrative record shows that Ms. Warren overcame these obstacles to achieve success. Nevertheless, the obstacles were present as a result of gender-bias and they impacted Ms. Warren's entry into the business world by prolonging “her pursuit of higher education and providing guidance that restricted her educational options on the basis of her gender.” *Id.* The SBA's conclusion that Ms. Warren's successful completion of her college degree negates any negative impact she experienced, is in error. “Such a presumption is unreasonable and ignores the regulatory command to consider all relevant evidence and make a finding of negative impact based on the totality of the circumstances.” *Id.* at 20; *see also id.* at 6 (“[I]f the SBA concludes that an 8(a) applicant has not been negatively impacted because its successes overcome its claims of bias or discrimination, the SBA's conclusion must be rationally explained and supported in the administrative record.”).

Third. Ms. Warren states that while working at the Oregon OSHA office, she was denied the opportunity to work on Confined Space Entry and Bloodborne Pathogen programs. Ms. Warren specifically requested that she be permitted to head up one of these programs, as her

previous experience in the Air Force made her familiar with the requirements of the programs and how to execute and enforce such requirements. Ms. Warren's supervisor ultimately did not allow her to participate in the programs. When Ms. Warren asked why she had not been chosen, her supervisor told her:

[H]e was concerned with [Ms. Warren] as a female - trying to inspect confined space entries of large tanks and silos - for example, it was too dangerous, and he needed a guy to be able to climb long ladders and high places and to be able to carry the necessary equipment to these areas.⁴

In the SBA's *Second Determination Letter*, the Agency found that “[t]he fact that you were unable to meet the physical demands of the job is not indicative of gender bias.” This statement was not expounded upon by the SBA and the Agency did not cite to any supporting evidence in the record; indeed, there appears to be no supporting evidence in the record.

The Court finds these conclusions by the SBA extremely troublesome. It appears that either the Agency did not thoroughly or properly review Petitioner's updated PES and supporting documents prior to issuing its *Second Determination Letter*, or the Agency chose to disregard or misconstrue the facts contained therein. Neither is acceptable. Accordingly, the Court must remand the SBA's determination so that the SBA may properly discuss and evaluate the facts in the administrative record and arrive at a decision that is supported by, and based upon evidence in the record. *See Med-Choice, Inc.*, SBA No. SDBA-179, at 6 (2008) (remanding the SBA's determination in part because the SBA incorrectly summarized the evidence and its conclusions were contrary to the evidence in the record).

IV. Incomplete Administrative Record - Failure to Consider All of Petitioner's Evidence

The administrative record is incomplete because the SBA failed to show that it considered all the material evidence submitted by Petitioner. In its *Second Determination Letter*, the SBA failed to address several important pieces of evidence submitted by Petitioner, including:

- Ms. Warren's statements in the PES that her OSHA supervisor told her “he wanted a male to head up these new programs because of the controversy and conflict that would occur in rendering fines to businesses that are performing such tasks without following the regulation” because “a woman is too emotional to handle such conflict and it is better suited for a male to handle.”;
- Ms. Warren's statements in the PES regarding disparities in the projects she was assigned versus her male counterparts at OSHA;
- Ms. Warren's statements that upon being hired as a civilian by the U.S. Army Corps of Engineers at Fort Drum, she was initially told she would be leading an \$80 million expansion project, but was later not asked to participate in the project and was denied inclusion when she requested to work on the project;

⁴ Petitioner's updated PES, submitted January 25, 2012.

- The one-year delay that occurred in Ms. Warren's being able to sit for her Professional Engineer licensing exam as a result of her supervisor at Fort Drum refusing to authorize payment for the review class;
- Ms. Warren's statements in the PES regarding disparities in the projects she was assigned versus her male counterparts at the U.S. Army Corps of Engineers at Fort Drum;
- A letter submitted by Cheryl Mesa, a Program Analyst at the Army Corps of Engineers, which corroborates Petitioner's claims that the marginal ratings assessed upon Black Horse Group by Marty Tokos were a result of Mr. Tokos' gender bias towards Ms. Warren.

The SBA omitted discussion of the above evidence in its Determination Letters.⁵ This is error, as “findings must be set forth ‘for every material issue relating to each eligibility factor with specific reasons for each finding.’” *StrategyGen Co.*, SBA No. BDP-427, at 5 (2012) (quoting *Custom Copper & Slate Ltd.*, SBA No. BDP-160, at 4 (2001)). “The SBA's failure to address these issues leaves the Court with no means of determining whether they were even considered in making the determination to deny Petitioner's application, let alone whether the SBA's conclusions with regards to [the related] claims were arbitrary, capricious, or contrary to law.” *McMahon Builders, Inc.*, SBA No. BDPE-461, at 8 (2013); *see also Loyal Source Gov't Servs., LLC*, SBA No. BDP-434 (2012) (remanding the SBA's determination after the SBA addressed some, but not all, allegations of petitioner's disability-based discrimination, including ignoring a letter submitted by petitioner to corroborate petitioner's claims); *StrategyGen*, SBA No. BDP-427 (remanding the SBA's determination in part because it ignored several relevant pieces of petitioner's evidence). Because the SBA has failed to address all of the claims and evidence submitted by Petitioner, the Court must remand the SBA's determination for a more thorough analysis that takes into account all the material evidence in the administrative record.

ORDER

The above-captioned case is hereby **REMANDED** to the SBA for further consideration pursuant to 13 C.F.R. § 134.406(e). The Agency shall issue a new Determination upon Reconsideration on or before March 22, 2013.⁶

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

So **ORDERED**,
J. JEREMIAH MAHONEY
Administrative Law Judge

⁵ Both Determination Letters noted Ms. Warren's lack of involvement on the \$80 million expansion project at the U.S. Army Corps of Engineers, but neither letter addressed the claim.

⁶ The Court will retain jurisdiction over this matter during the period of remand. If the SBA approves Petitioner's application, the Agency shall file with OHA a notice of such approval to be retained with the case file.