United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Gearhart Construction Services,	SBA No. BDPE-473
Petitioner	Decided: March 4, 2013

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On September 19, 2012, Gearhart Construction Services, ("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. The SBA filed an *Answer* and an authenticated Administrative Record on November 19, 2012, The case is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a)and 134.1020(1), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.[1]

PROCEDURAL HISTORY

Petitioner filed its initial application for entry into the 8(a)BD Program on April 17, 2011, seeking entry on the grounds that its owner, Mr. David Gearhart, was socially and economically disadvantaged due to his status as a Native American. On May 5, 2011, the Agency notified Petitioner that the application was incomplete, and requested that Petitioner provide additional information. Petitioner complied with the request. The Agency issued an *Initial Determination Letter* denying Petitioner's application after concluding that (1) Mr. Gearhart was not socially disadvantaged, (2) Petitioner's business relationships prevented it from exercising independent business judgment; and (3) Petitioner may not qualify as a small business.[2] Petitioner filed a *Request for Reconsideration* ("Recon Request") on January 12, 2012, supported by additional testimonial evidence, including multiple letters of corroboration. Petitioner sent more supporting documentation to the SBA on June 7, 2012. On August 6, 2012, the Agency issued a *Determination upon Reconsideration ("Recon Determination Letter")* finding that Mr. Gearhart had not proven that he was a Native American, and had not shown by a preponderance

[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.

[2] The *Recon Determination Letter* found that Petitioner had resolved the latter two questions.

of the evidence that he had experienced individual social disadvantage. 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 mere 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 mere 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

Black, Hispanic, Native American, and Asian-Pacific American applicants are presumed to have suffered social disadvantage. 13 C.F.R. § 124.103(b), An applicant seeking entry into the 8(a) BD Program on the basis of individual social disadvantage, however, 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). 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. The SBA is free to consider lack of corroboration while weighing the evidence; however, any evidence that has not been contested must be accepted as true. *Quock Tine v. U.S.*, 140 U.S. 417,420 (1891). As there is generally no discovery in these cases, claims in the applicant's PES often go unopposed and uncontested. The Agency may discount or disregard such a claim 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. To be sufficiently detailed, the claim must generally describe (1) when and where the incident occurred; (2) who was involved; (3) what the allegedly bias-motivated event was; and (4) how the applicant was adversely affected by the event. *Southern Aire*, SBA No. BDP-453, at 7; *Loyal Source Gov't Serv., LLC*, SBA No. BDP-434, p. 5 (2012). 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 me 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. The Court may also remand a case if it is "clearly apparent from the record that SBA made an erroneous factual finding . . . or a mistake of law." 13 C.F.R. § 134.406(e)(2).

If the administrative record is deemed to be complete, the reviewing court proceeds with its review to ensure mat 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 me best one, or even the correct one. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) ("This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith not whether it was right."); *Ace Technical*, SBA No. SDBA-178, at 3 ("[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct."). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 416(1971); 13 C.F.R. § 134.406(b).

An agency's conclusion is unreasonable, and thus arbitrary and capricious, if it constitutes a "clear error of judgment." *State Farm*, 463 U.S. at 43; *StrategyGen Co*., SBA No. BDP-427 at 5. Such error occurs if the agency (1) fails to properly apply the law and regulations to the facts of the case; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its decision that runs counter to the evidence before the agency; or (4) offers an explanation that is so implausible that it cannot be ascribed to a mere difference in view between the Agency and the Court. *Southern Aire,* SBA No. BDP-453, at 4.

THE AGENCY'S DETERMINATION

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

In its *Answer* to the *Appeal Petition*, the SBA conceded that Petitioner had met the first regulatory requirement listed under 13 C.F.R. § 124.103(c). Specifically, the SBA acknowledged that Mr. Gearhart held himself out to be and was recognized by others to be a Native American. Accordingly, this *Decision* does not take into account any statements in the *Recon Determination Letter* relating to that element. After careful review of Petitioner's Reconsideration Request, the Agency's response to it, and the Administrative Record as a whole, the Court concludes that remand is necessary to allow the SBA to correct the following deficiencies.

1. Mistake of Law — Incorrect Application of the "Chronic and Substantial" Element

SBA regulations require that an applicant seeking entry into the 8(a) BD Program on the basis of individual social disadvantage show "personal experiences of substantial and chronic social disadvantage in American society." 13 C.F.R. § 124.103(c)(2)(H). The SBA errs by misstating the relevant test and by applying it at the wrong stage of the analysis.

First, the *Recon Determination Letter* repeatedly faults Petitioner for failing to prove

instances of "chronic and substantial bias/prejudice." It is not chronic and substantial *bias* that is at issue, but rather chronic and substantial *social disadvantage* brought about by the alleged bias. Southern Aire, SBA No. BDP-453, at 12-13. This is not a minor grammatical slip. A relatively benign act may have a profound effect. For example, a woman who makes only 80% of her male colleague's salary because of her gender has suffered only one act of bias. This would not be a "chronic" event. However, the effects of that bias are felt in every paycheck, which would cause a distinct social disadvantage. By analyzing me act instead of the outcome, the Agency seeks an answer to the wrong question, and in doing so consistently undervalues the weight of Petitioner's evidence. Accordingly, the decision must be remanded so the Agency can correct this error.

Second, even had the SBA looked for evidence of chronic and substantial effects instead of bias, its determination would still have gone astray because it applied this standard at the wrong stage of the analysis. After reviewing each of an applicant's alleged incidents, the Agency must determine whether the incidents, taken together, show the requisite evidence of chronic and substantial disadvantage. As the *Recon Determination Letter* illustrates, the SBA interprets 13 C.F.R. § 124.102(c)(2)(ii) to mean that each discreet experience must, itself, be chronic and substantial. This interpretation is illogical, impracticable, and inconsistent with previous SBA decisions. A single event can almost never be considered "chronic" because the term is defined as "marked by long duration or frequent recurrence." *StrategyGen Co*., SBA No. BDPE-460. An extended time element is therefore a central component.

In 2008, a predecessor court outlined a classic scenario where a single event may meet the "chronic and substantial" test. In *Ace Technical*, the reviewing 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 (emphasis added). For example, job discrimination that "lasted over the course of a few years might be both chronic and substantial." *Id.* 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); *Striker Electric*, SBA No. BDPE-465 (2013). The SBA's analytical approach is directly at odds with these holdings.

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

Here, the *Recon Determination Letter* makes reference to "chronic and substantial bias" eight different times. Each reference relates to a particular claim or range of claims. For example, in his PES Mr. Gearhart recounted an incident where his high school gym teacher told Mr. Gearhart he looked "like the last Mohican" and made other disparaging comments about his traditional Native American hairstyle. The SBA dismissed this account, stating that "[T]he derogatory remarks teachers made regarding your hair style is not indicative of chronic and substantial bias/prejudice. . . ." Indeed, the Agency dismisses every claim offered by Petitioner, at least in part because the specific claim was not chronic and substantial. This creates an analytical paradox. Applying the SBA's interpretive theory to the existing case law would mean that, while chronic and substantial disadvantage generally requires the presence of multiple incidents, those incidents must themselves be chronic and substantial. Few, if any, applicants could hope to survive such a standard. The SBA applies this standard throughout its *Recon Determination Letter*. Accordingly, the entire decision must be remanded to allow the Agency to apply the proper analytical framework.

2. Mistake of Law — Misapplication of the Preponderance Standard

Remand is also necessary because the SBA erroneously required conclusive evidence of the bias Petitioner alleges. Evidence does not need to be conclusive to meet the preponderance standard, it must only be more probable than not.

In the *Initial Determination Letter*, the Agency expressly stated that "[Y]our preponderance narrative does not include sufficient supporting information to *conclusively demonstrate* that the incidents of alleged biased treatment you recounted were *actually bias* you experienced due to your identification as a Native American. . . ." This is direct evidence that the Agency applied an improper standard.

The *Recon Determination Letter* confirms this conclusion. For example, Petitioner claimed mat Mr. Gearhart's placement in the "B Group" rather than the "A Group" of his fourth-grade class was the result of biased school administrators. The *Recon Determination Letter* disregarded this claim because it was "inconclusive as to bias/prejudice." Later in the *Letter*, the SBA also dismissed Petitioner's claim related to Gideon's Accent Floors because it is "general, inconclusive and speculative and does not identify any specific negative impact."[3] Although a claim may be disregarded for being insufficiently detailed or conclusory, it cannot be disregarded for being inconclusive. The decision must therefore be remanded.

Additionally, the SBA disregards Petitioner's evidence because it lacks corroboration, although no corroboration is necessary. *See Tootle Constr. LLC*, SBA No. BDP-420. For example, the Agency stated that Petitioner's claim of bias in high school was deficient because Petitioner had not included a copy of Mr. Gearhart's high school transcript to prove he had a 3.73

[3] The Court notes that the finding of "no negative impact" is contradicted by the *Recon Determination Letter* itself. Two sentences prior to the above-quoted passage, the *Letter* states that "[Y]ou claim to not have received raises and promotions despite being there for a long period of time." This is a classic example of a negative impact, and one the Agency apparently deemed sufficiently worthy to specifically identify.

grade point average.[4] In discussing Petitioner's claim that he was denied a small business loan by the Pentagon Federal Credit union, the SBA stated that Petitioner "did not provide a copy of this bank denial information to allow SBA to review to determine whether you experienced bias as you allege or whether your firm was denied credit based on normal banking requirements." This phrasing suggests the SBA would not accept Petitioner's claim without this documentation, effectively meaning corroboration was a requirement for success. This is inconsistent with the preponderance standard, and warrants remand. 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.

ORDER

The above-captioned case is hereby **REMANDED** to the SBA for further consideration pursuant to 13 C.F.R. § 134.406(e)(2). The Agency shall issue a new Determination upon Reconsideration on or before April 8, 2013.

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

ALEXANDER FERNÁNDEZ
Administrative Law Judge

[4] The *Recon Determination Letter* states that the transcript would presumably be available to support Mr. Gearhart's claim. The SBA may discount a claim if a petitioner fails to provide apparently available evidence without explanation. Here, however. Petitioner affirmatively declared in the Reconsideration Request that "there is no such transcript in existence to provide SBA" because that GPA was a brief occurrence. The SBA was therefore aware that its presumption of availability was incorrect. It therefore should not have disregarded the claim on those grounds. Notably, the *Letter* makes no mention of Petitioner's explanation of the transcript's absence.