

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

IN THE MATTER OF:

Mill Mike Manufacturing Corp.,

Petitioner

SBA No. BDPE-476

Decided: March 13, 2013

ORDER REMANDING TO THE SBA FOR FURTHER CONSIDERATION

On August 8, 2012, Mill Mike Manufacturing Corporation (“Petitioner” or “applicant”) 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 September 18, 2012, the Agency filed a *Response to Petitioner's Appeal Petition*. In the *Response*, the SBA argued that Petitioner failed to prove by a preponderance of the evidence that its owner, Tamyra Valentine, 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.¹

PROCEDURAL HISTORY

On December 31, 2011, Petitioner filed its initial application for entry into the 8(a) BD Program. On April 12, 2012, the Agency issued a *Determination Letter* (“Determination”) denying Petitioner's application on the grounds that Ms. Valentine was not socially disadvantaged. On May 24, 2012, Petitioner filed a *Request for Reconsideration* (“Recon Request”). On July 13, 2012, the Agency issued a *Determination upon Reconsideration* (“Recon Determination”) that again found that Ms. Valentine was not socially disadvantaged due to her gender. On August 8, 2012, Petitioner filed an *Appeal Petition*.

PROGRAM ELIGIBILITY REQUIREMENTS

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

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.

and controlled by one or more socially or economically disadvantaged individuals (1) who are of “good character,” (2) are citizens of the United States, and (3) 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 the owner's education and employment history 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 show the requisite disadvantage. 13 C.F.R. § 124.103(c)(2)(iii); *Tony Vacca Constr. Inc.*, SBA No. BDP-321 (2009) (“The incidents recounted . . . are each substantial and, taken together, chronic”)

Evidence of chronic and substantial disadvantage means there must be more than one or two specific, significant incidents. *Southern Aire Contracting, 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 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 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.” *Southern Aire*, SBA No. BDP-453, at 3 (quoting *Bitstreams Inc.*, SBA No. BDP-122, p. 6 (1999)). Under this standard, an applicant is not required to convince the fact-finder that an incident was motivated by bias. *Id.* at 8. 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. *Dir., 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 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).

In many 8(a) BD Program cases, the PES represents the entirety of the applicant's evidence. "No corroborating evidence is necessary." *Matter of Wholesale Distribution*, SBA No. BDP-456, p. 2 (2012). 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. *Quock Ting v. U.S.*, 140 U.S. 417, 420 (1891). As there is generally no discovery in these cases, an 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 (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 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)).

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 new initial determination. *Id.* The court may also remand the case to the Agency for further consideration if the SBA committed a clear mistake of law or fact. 13 C.F.R. § 134.406(e)(2).

If the administrative record is deemed to be complete, the court proceeds with its review to ensure that the Agency decision was not arbitrary, capricious or contrary to law. The 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 in the administrative record; 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's *Appeal Petition* asks the Court to review the SBA's *Recon Determination* denying Petitioner's entry into the 8(a) BD Program, set aside that decision, and find that Petitioner should be admitted into the Program. Petitioner argues that the SBA has committed an error of judgment because the SBA (1) unreasonably applied the law; (2) failed to consider an important aspect of the problem; and (3) offered an explanation for the Agency's determination that runs counter to the evidence. As previously stated, the Court cannot replace the Agency's reasoned decision with its own. Instead, the Court must decide, at this point, whether the SBA examined all relevant evidence and articulated an explanation that bears a rational connection to that evidence.

After a thorough review of Petitioner's PES and *Recon Request*, the Agency's *Determination* and *Recon Determination*, and the Administrative Record, the Court is convinced that remand is necessary due to the following deficiencies.

I. Insufficient Explanation of Rationale

The SBA errs by failing to articulate any rationale for dismissing many of Petitioner's educational history claims. It is well-established that the "SBA cannot merely make sweeping conclusory generalizations about the inadequacy of Petitioner's application without evaluating the information. . . ." *Southern Aire*, SBA No. BDP-453, at 11-12; *Med-Choice, Inc.*, SBA No. SDBA-178, at 6; *StrategyGen Co.*, SBA BDP-427, at 5. Although the Agency need not "describe each discreet event in painstaking detail," the Agency is required to "adequately address" important evidence. *Striker Electric*, SBA No. BDPE-465, at 6; *Loyal Source*, SBA No. BDP-434, at 7; *Ace Technical, LLC*, SBA No. SDBA-178, at 3. In this case, the SBA provided a generic justification to dismiss Petitioner's educational history claims.

Petitioner argues in the *Recon Request* that several events prevented her from receiving an adequate education: (1) an unstable childhood; (2) the rejection of her enrollment into a metal shop and electronics class because the course was for "boys only"; (3) being "forced" to take courses like home economics and typewriting; and (4) the lack of encouragement from teachers

to pursue a college education.

The SBA partially addresses Petitioner's claims. While the Agency recounts with specificity Petitioner's unstable childhood and later finds that there is “no evidence of gender bias” during that period of Petitioner's life, the Agency fails to do the same for the rest of the mentioned claims. Instead, the Agency, in both the *Determination* and the *Recon Determination*, provides the same two-sentence justification to reject Petitioner's educational history incidents: “While in school, you indicate you did not receive adequate science, math, and shop courses. However, no specific examples were provided.”

This Court has made it clear that Agency statements that “describe what aspects of the testimony were found wanting [and] why . . . survive the remand review.” *Southern Aire*, SBA No. BDP-453, at 12. These Agency statements explain “why [[the Agency] believes [the applicant's claims] are inherently improbable, inconsistent, or only conclusory.” *Woroco International*, SBA No. BDP-174 (2002). The SBA includes no such explanation here. Accordingly, the SBA's perfunctory dismissal of Petitioner's educational history warrants remand.

II. Evidence Not Considered

Both the *Determination* and *Recon Determination* ignore the majority of the claims raised in Petitioner's PES or *Recon Request*, including several that make specific reference to harassment or gender bias. This is error, as “findings must be set forth for every material issue relating to each eligibility factor with specific reasons for each finding.” *Southern Aire*, SBA No. BDP-453, at 13 (citing *Custom Copper & Slate Ltd.*, SBA No. BDP-160 (2001)).

Among the claims the SBA failed to address are the following:

- Education History:
 - Petitioner stated that Ms. Valentine's art teacher, Mr. Pinski, “treated all of the girls differently in his classroom and no boys ever received verbal abuse or harassment.”
 - No adult, either at home or at school, provided Ms. Valentine with encouragement or support, and none advised her about college opportunities
- Career & Business:
 - Petitioner stated that Paul Gonzales dishonored the terms of a business agreement with Petitioner because Petitioner is a woman-owned company.
 - Petitioner stated that Ms. Valentine lost a business opportunity with Bill Johnson because she refused his sexual advances.
 - Petitioner stated that a networking opportunity with Paul Santangelo had to end due to his sexual advances.
 - Petitioner stated that Ms. Valentine lost a business opportunity with Ed Selznick because she refused his sexual advances.

- Richard Charron refused to give Ms. Valentine business training because she was “just a girl.”²
- Ms. Valentine did not receive a pay raise after being promoted from janitorial to administrative duties.

The Agency omitted any discussion of these alleged events, despite addressing events located immediately before or after these claims in the PES. The Agency “is not free to pick and choose what claims deserve its attention; it must provide reasoned analysis for them all.” *Southern Aire*, SBA No. BDP-453, at 14. Having failed to do so here, this decision must be remanded for further consideration.

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, serve, and file a new initial *Determination* on or before April 12, 2013.

The 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 evidence contained within the Administrative Record. If SBA determines that Petitioner is not eligible for the 8(a) BD Program, SBA is **ORDERED** to treat the determination as an initial determination and afford Petitioner the right to request reconsideration and submit additional information and documentation to support its request, or to appeal the determination directly.

ALEXANDER FERNÁNDEZ
Administrative Law Judge

² The initial *Determination* makes brief reference to this incident, but does not offer any analysis of it or arrive at any conclusion as to whether it constitutes a legitimate bias-motivated event.