

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

IN THE MATTER OF:

Boblits Services, LLC,

Petitioner

SBA No. BDPE-480

Decided: April 1, 2013

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On August 1, 2012, Boblits Services, 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 September 20, 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 Christina Boblits, the individual upon whom eligibility is based, has experienced chronic and substantial social disadvantage as a result of gender-motivated bias that has negatively impacted Ms. Boblits' 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

I. Procedural History

On or about November 3, 2010, Petitioner filed an application seeking entry into the SBA's 8(a) BD Program.² The application stated that Ms. Boblits has experienced chronic and substantial social disadvantage as a result of gender-motivated bias. Ms. Boblits stated that as a direct result of being a woman, she has experienced “gender bias, gender discrimination, and sexual harassment” throughout her life that has “resulted in personal economic disadvantage without regard for [her] qualities as an individual.”

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 Petitioner previously applied for entry into the SBA's 8(a) BD Program and was denied admission on reconsideration on December 12, 2009, based on the Agency's finding that Ms. Boblits did not meet the social disadvantage requirements of the Program. Petitioner waited approximately twelve months after denial and submitted a new application on or about November 3, 2010. *See* 13 C.F.R. § 124.207.

On June 18, 2012, the SBA issued a *Determination Letter* denying Petitioner admission into the 8(a) BD Program. The SBA found that Petitioner did not establish that Ms. Boblits is socially disadvantaged. Specifically, the Agency found that Petitioner did not demonstrate that Ms. Boblits' "ability to compete in the market place has been impaired due to biased/prejudicial treatment or practices" against Ms. Boblits or Petitioner based on Ms. Boblits' gender. The SBA invited Petitioner to submit additional evidence of Ms. Boblits' social disadvantage to the Agency in order to be reconsidered for the 8(a) BD Program.

Rather than submit a request for reconsideration, Petitioner chose to appeal the SBA's decision directly to the Office of Hearings and Appeals ("OHA"). Petitioner filed its appeal on August 1, 2012.

II. Program eligibility Requirements

In order 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. "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 13 C.F.R. § 124.103(a). An individual's social disadvantage must stem from circumstances beyond their control. *Id.*

Individuals who are not members of a presumptively disadvantaged group must establish individual social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1).³ To do so, they must demonstrate: (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 through the submission of a Personal Eligibility Statement ("PES") that details specific, bias-motivated events in the individual's education and employment history, and as owner of the applicant business. 13 C.F.R. § 124.103 (c)(2)(iii)(A)-(C). In each case, the SBA must determine if the totality of the described events shows disadvantage resulting in a negative impact on the applicant. 13 C.F.R. § 124.103(c)(2)(iii).

III. Burden of Proof

As noted above, 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

³ There is a rebuttable presumption that members of certain racial and ethnic groups are socially disadvantaged. 13 C.F.R. § 124.103(b)(1) (including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, etc.).

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 for the SBA to properly evaluate a petitioner's claims, 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 OHA has consistently held that “[t]he 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”). 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.

IV. Standard of Review

The SBA's determination that an 8(a) BD Program applicant has not met program requirements can only be overturned if the reviewing court considers the entire administrative record and finds 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). The court's 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.

The court must start by evaluating whether the agency examined all the relevant evidence in the administrative record 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 the agency: (1) considered all of the evidence presented by petitioner; (2) arrived at its conclusion using only the facts contained in the administrative record; and (3) articulated a conclusion that 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 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 the agency's decision 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 administrative record is deemed to be complete, the court proceeds with its review in order to determine if the agency's decision was arbitrary, capricious, or contrary to law. The court must determine whether the agency reached a reasonable conclusion in light of the facts available in the record. It does not matter whether the agency's conclusion was the best one, or even the correct one, so long as it was a reasonable one. *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 on its own. *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’” *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.

V. 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. However, as previously stated, the Court cannot 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 Administrative Record and came to a conclusion rationally based upon that evidence.

Having carefully reviewed Petitioner's 8(a) BD Program application (including Petitioner's PES), the SBA's *Determination Letter*, and the Administrative Record as a whole, the Court finds that remand is necessary in this case to allow the SBA the opportunity to address the following deficiencies in the Administrative Record:

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

A reviewing court may remand an agency's determination of 8(a) BD Program eligibility for further consideration if the administrative record shows the agency has committed a mistake of law. 13 C.F.R. § 134.406(e)(2). In this case, the SBA has committed a mistake of law by applying the improper burden of proof to Petitioner's claims of chronic and substantial social disadvantage. The correct burden to be used by the Agency is whether Petitioner demonstrated social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1); *supra* p. 2. Preponderance of the evidence means that Petitioner “need only show that the fact is more likely true than not true.” *Loyal Source*, SBA No. BDP-434, at 5 (citing *Bitstreams*, SBA No. BDP-122, at 6). While the SBA cites the preponderance of the evidence standard in its *Determination Letter*, a careful review of the *Determination Letter* shows that the SBA actually subjected Petitioner's claims to a heightened burden of proof more similar to the “clear and convincing evidence” standard.

Erroneously Requiring Corroboration.

The SBA subjects Petitioner's claims to a heightened burden of proof by requiring Petitioner to provide additional information and supporting documentation where no such corroboration is required. Petitioner claims that Ms. Boblits has experienced social disadvantage as a result of her gender when working with her current firm, Boblits Services, LLC. Petitioner claims that oftentimes, Petitioner will submit highly competitive bids for work that is well within the firm's capabilities, only to have the work awarded to a non-woman owned firm. One such example cited by Petitioner is when Ms. Boblits interviewed on behalf of Petitioner for a subcontracting opportunity with the owner of Allen Clark Construction Company. During the interview, the owner of Clark Construction stated that he liked what Petitioner had to offer and would like to do business with Boblits Services. However, Petitioner was not awarded the opportunity and was later told by an employee of Clark Construction that Petitioner did not get the work because Petitioner's owner, Ms. Boblits, was a woman and Clark Construction ultimately decided to go with a male-owned firm. The SBA discounted Petitioner's claim, finding that Petitioner did not present “the quality and quantity of specific information to reflect that [Petitioner's] bids were competitive and that [Petitioner was] the lowest responsible bidder in order to be awarded the contract(s).” The SBA went even further, finding fault with the fact that Petitioner “did not provide any of the rejection letters from clients seeking bids explaining their rationale” for rejection.

This is error. By requiring supporting documentation, such as specific information that Petitioner's bids were competitive or the rejection letters from firms refusing hire Petitioner, the SBA is implicitly requiring corroboration of Petitioner's claims. The preponderance standard does not require corroboration of Petitioner's claims made in the PES. *Southern Aire*, SBA No. BDP-453, at 6; *supra* p. 3. Petitioner was not required to provide evidence confirming the existence of gender bias; Petitioner was only required to provide evidence that it was more probable than not that such bias existed. *McMahon Builders, Inc.*, SBA No. BDPE-461, at 5 (2013).

Erroneously Discounting Statements in the PES.

The SBA also subjects Petitioner's claims to a heightened burden of proof by declining to accept Petitioner's statements in the PES as true and failing to provide an explanation for doing so. While working at the Tax Reduction Institute, Ms. Boblits claims that she received only minimal raises while her male counterparts received much higher raises. Specifically, Petitioner claims that she received only a 2% raise when Josh Harkins — a male employee who received performance reviews equal to those of Ms. Boblits — received a 5% raise. Petitioner contends that the inequity must be based on Ms. Boblits' gender because Ms. Boblits had similar qualifications, performance, and appraisals as the males who received higher raises. The SBA found fault with this claim, concluding that Petitioner did not provide any information to demonstrate that Ms. Boblits' lower salary was the result of gender bias, and that Petitioner's claim that gender was the only explanation was “conclusory.”⁴

The SBA's finding here is similar to the Agency's determination in *StrategyGen Co.*, SBA No. BDPE-460 (2012). In *StrategyGen*, the petitioner recounted an incident where she was not permitted to attend a professional development conference, even though her male counterparts were allowed to attend similar conferences in the past. *Id.* at 9. The SBA dismissed this claim, finding that the petitioner did not supply sufficient information to demonstrate that gender bias was the reason she was not permitted to attend the conference. *Id.* The court in *StrategyGen* ruled this determination arbitrary, finding that the SBA's treatment of the claim was “indicative of a general air of skepticism” and “demonstrates an unwillingness to take [petitioner] at her word.” *Id.* at 10, 11. The court noted that there was no evidence in the administrative record suggesting an alternative explanation for why petitioner was denied the opportunity to attend the conference, and that the SBA did not cite any reason for discounting or disbelieving petitioner's statements in the PES. *Id.* at 10; *see Southern Aire*, SBA No. BDP-453, at 7 (stating that if the SBA chooses to discount or disregard information in the PES, the Agency must explain its rationale for doing so). The court in *StrategyGen* concluded that the SBA sought definitive proof that the incidents described by the petitioner in the 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.” *StrategyGen*, SBA No. BDPE-460 at 9, 11.

The SBA makes a similar error here. The Agency declines to accept Ms. Boblits' claims in the PES as true, and fails to explain why they are unbelievable or cite to any contrary evidence in the Administrative Record that would support such a conclusion.⁵ In doing so, the

⁴ The SBA made a similar finding in its analysis of Petitioner's sexual harassment claims, discussed in Section [V.D.] below, which is also error for all the same reasons discussed above. *See infra* pp. 10-11.

⁵ In its *Determination Letter*, the SBA commingles its discussion of this claim with Petitioner's claim that Ms. Boblits was denied promotions to management and supervisory positions and denied opportunities to lead significant projects based on her gender. While the SBA adequately explains its reasoning for discounting the claim that Ms. Boblits was denied

SBA seeks definitive proof that Ms. Boblits received lower compensation and raises than her male counterparts because of her gender, which is indicative of a clear and convincing evidence standard. *See id.* at 9 (“It is not for the Agency to determine whether gender bias was, in fact, the underlying cause. If the evidence shows that bias was the likely culprit, then petitioner has met its burden.”); *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.”); *see also Black Horse Group, LLC*, SBA No. BDPE-468, at 6 (2013) (finding error on the part of the SBA where the Agency declined to accept petitioner's claims of gender bias in the PES as true and failed to explain its rationale for doing so).

Erroneously Discounting Hearsay.

The SBA also errs by discounting statements in Petitioner's PES because they are hearsay. Throughout the PES, Petitioner cites multiple incidents where Ms. Boblits was not hired for a position or Petitioner's bid was not accepted for a project. After Ms. Boblits was denied the position or project, she states that she often heard afterward from a third-party that she was not chosen because of her gender. The SBA discounts these incidents, stating that “[h]earsay information is insufficient in establishing that you have suffered chronic and substantial gender bias/prejudice and negative impact.”⁶

This conclusion is erroneous for several reasons. In administrative proceedings before the OHA, the Federal Rules of Evidence are used as a “general guide.” 13 C.F.R. § 134.223(a). While Federal Rule of Evidence 802 states that hearsay is not admissible, Federal Rules of Evidence 801 through 804 list many exclusions and exceptions. Fed. R. Evid. 801-04. In addition, 13 C.F.R. § 134.223(b) states that hearsay evidence is admissible in administrative proceedings if it is deemed to be relevant and reliable by the court. 13 C.F.R. § 134.223(b); *Griffin Servs., Inc.*, SBA No. 4135, 1996 WL 34714, at *6 (1996); *Microtech Indus., Inc.*, SBA No. 1882, 1984 WL 41827, at *2 (1984). Indeed, virtually everything in the Administrative Record, including Ms. Boblits' PES, is hearsay. Ms. Boblits' use of hearsay in her PES does not automatically exclude the evidence from being considered as part of the Administrative Record. Each level of hearsay considered in court — or in an administrative action — must be evaluated separately for its own credibility. *See* Fed. R. Evid. 805 (hearsay within hearsay). In the spirit of the governing regulations and case law, the SBA should have reviewed the evidence for its relevance and reliability and weighed it accordingly in making its determination.

Further, if the SBA decided to discount the evidence because it found the evidence not to be relevant or reliable, the SBA must explain its reasoning for doing so. *See Southern Aire*, SBA

promotions and the opportunity to lead, the SBA fails to explain why it discounts or disbelieves Petitioner's claim that Ms. Boblits received minimal pay raises in comparison to her male counterparts.

⁶ This is the incorrect standard, as discussed in Section [V.B] of this decision. *See infra* pp. 8-9.

No. BDP-453, at 7; Bitstreams, SBA No. BDP-122, at 10 (“When the SBA finds a PES unconvincing, it must provide cogent reasons for denying the claim. It may not arbitrarily disbelieve credible evidence.”) (citations omitted); *supra* p. 6. The Agency may not simply dismiss a claim because it is based on hearsay, without any further explanation or assessment of why the hearsay is not worthy of belief. This is especially true in cases involving gender discrimination, since in many cases, “such incidents, by their very nature, cannot be verified and must be evidenced by the applicant's statements.” *Custom Copper & Slate, Ltd.*, SBA No. BDP-160, at 4 (2001); *see, e.g., StrategyGen Co.*, SBA No. BDP-427, at 9 (2012) (finding that where the SBA discounted a statement in petitioner's PES because it was hearsay, direct confirmation of the incident described was not necessary because it was the type of incident that is rarely witnessed, and by its nature cannot be verified).

By labeling Petitioner's evidence as hearsay and simply discounting it without explanation, the SBA's actions are “indicative of a general air of skepticism” that “demonstrates an unwillingness to take [Ms. Boblits] at her word.” *StrategyGen*, SBA No. BDPE-460 at 10, 11. If, for example, the person making the statement to Ms. Boblits is not identified, or has not expressed how they came to believe she was discriminated against based on gender, that may well result in a determination that the hearsay statement made to and reported by Ms. Boblits is lacking in reliability or credibility. However, the SBA's treatment of Petitioner's claims requiring corroboration simply because they are hearsay within hearsay subjects Petitioner's claims to a heightened burden of proof beyond the preponderance of the evidence standard.

B. Mistake of Law - Improper Analysis of “Chronic and Substantial” Requirement

Throughout its *Determination Letter*, the SBA repeatedly references Petitioner's failure to demonstrate “chronic and substantial gender bias” experienced by Ms. Boblits. This is error because it misstates the standard articulated by SBA regulations. 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); *Black Horse Group*, SBA No. BDPE-468, at 7; *McMahon Builders*, SBA No. BDPE-461, at 5; *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*, SBA No. BDPE-460, at 7.

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. SDPA-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 attempting to demonstrate chronic and substantial social disadvantage, a petitioner is not required to show a chronic and substantial effect in each incident detailed in the PES. Rather, the SBA must examine whether the *totality* of all Petitioner's described experiences shows evidence of chronic and substantial social disadvantage. 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.”); *see Black Horse Group*, SBA No. BDPE-468, at 7; *McMahon Builders*, SBA No. BDPE-461, at 5; *Southern Aire*, SBA No. BDP-453, at 13.

In its *Determination Letter*, the SBA individually analyzes each claim made by Petitioner and concludes over and over again that each incident described in the PES does not demonstrate, or is not indicative of, “chronic and substantial gender bias.”

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. Boblits] suffered a chronic and substantial social disadvantage. *Black Horse Group*, SBA No. BDPE-468, at 8; *see McMahon Builders*, SBA No. BDPE-461, at 6. The SBA stated at the beginning of its *Determination Letter*, that “when the totality of the evidence presented is considered[,]” Petitioner did not demonstrate by a preponderance of the evidence that Ms. Boblits was socially disadvantaged. At the end of the *Determination Letter*, the SBA concluded by stating that the examples in the PES “do not establish a pattern of biased treatment.” The Court cannot tell if the SBA came to these conclusions based on the Agency's independent review of the Administrative Record, taking all of Petitioner's claims into account, or because the Agency improperly disregarded Petitioner's claims as individually failing to meet the chronic and substantial requirement. Accordingly, the Court must remand the SBA's determination so that the Agency may reevaluate Petitioner's claims in the proper context using the correct standard, as required by the regulations.

C. Mistake of Fact - Conclusions Contrary to Evidence

A comprehensive review of the Administrative Record shows that the SBA came to conclusions in its *Determination Letter* concerning Petitioner's education-related claims that are not supported by evidence in the record. In the beginning of its *Determination Letter*, the SBA notes that Petitioner has not presented any claims of gender bias in the area of higher education.⁷ This is simply not true. While Ms. Boblits begins her PES with claims regarding her employment history and later, her experience as owner of the applicant business, Ms. Boblits ends her PES with details regarding her education history and experiences she had while in college at the University of Maryland. Specifically, Ms. Boblits claims that she was one of the only women in her business management classes, that she was often excluded from social and educational interactions, that it was difficult to find a study partner or group that would include

⁷ While relevant, this information is not necessary. Section 124.103(c)(2)(iii) states that, “[i]n every case . . . SBA will consider education, employment and business history, where applicable. . . .” 13 C.F.R. § 124.103(c)(2)(iii). The court has consistently held that “[a]n applicant is not required to present evidence of bias in all three enumerated areas; negative impact in any one area is sufficient.” *Wholesale Distrib.*, SBA No. BDP-456, at 4 (2012); *see also StrategyGen Co.*, SBA No. BDPE-460, at 5 n.7 (2012) (noting that a showing of negative impact caused by substantial and chronic social disadvantage in one of the three categories would be sufficient); *Alabasi Contsr. Inc.*, SBA No. BDP-368, at 13 (2010) (finding that it is not necessary for the applicant to present evidence in all three areas).

her, and that she was explicitly told she could not join a study group because they did not “want a girl in [their] group.”

The SBA later acknowledges this claim at the end of its *Determination Letter*, concluding that Petitioner failed to provide the Agency with enough details to determine whether or not the incident was indicative of gender bias. It is inconsistent for the Agency to conclude that no such claim existed, and later analyze the claim's viability. This inconsistency brings into question the thoroughness of the SBA's review of the information provided by Petitioner, as questioned in Petitioner's *Appeal Petition*.

The SBA's analysis of Ms. Boblits' education-related claim is also troublesome because the Agency concluded that “[t]his incident would appear to be fleeting and insignificant given the fact that you ultimately were not hindered from graduating from college.” The SBA's conclusion here is similar to a conclusion drawn by the Agency 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. In *dsi Assocs.*, the SBA concluded that the petitioner's education-related claims did not negatively impact petitioner because she was still able to pursue her field of interest and obtain both a bachelor's and a master's degree. *Id.* at 8. On appeal, the court found the SBA's determination in *dsi Assocs.* 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, “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. . . .” *Id.*

Similarly, the SBA's conclusion that Ms. Boblits' successful completion of her college degree negates any negative impact she might have experienced, is 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. [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.” *Id.* at 6.

These errors suggest that the SBA did not thoroughly review Petitioner's PES, or that the Agency disregarded facts established therein. As neither explanation is acceptable, 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 facts established by a preponderance of the evidence. *See Black Horse Group*, SBA No. BDPE-468, at 9-11 (remanding the SBA's determination in part because the SBA cited facts in its Determination Letter that were contrary to evidence in the record); *see also Innovet, Inc.*, SBA No. BDPE-466, at 8-10 (2013); *Med-Choice, Inc.*, SBA No. SDBA-179, at 6 (2008).

D. Incomplete Administrative Record - Failure to Articulate a Clear Rationale

Finally, the SBA errs by making broad, conclusory statements as to why Petitioner's claims alleging gender bias, and specifically sexual harassment, were insufficient to demonstrate social disadvantage. Petitioner claims that while working as Director of Operations at Kiser Research, Ms. Boblits was sexually harassed by Clark Williams, an employee of Pfizer. At the time, Pfizer was a private industry account of Kiser Research's. Ms. Boblits states that Pfizer was "very happy" with the account, until Mr. Williams asked Ms. Boblits to dinner while the two were conducting business. After Ms. Boblits declined the invitation, she claims that the tone of the business meeting changed immediately, Mr. Williams walked out of the meeting, and the next day Kiser Research lost the Pfizer account. This in turn, affected Ms. Boblits' monthly revenue and commissions. The SBA noted this incident, and merely stated, "you did not provide any details and/or specific information of the quality and quantity to allow SBA to determine fact and find that the loss of this work was due to gender bias as you allege" and that the Agency was "unable to conclude that [Ms. Boblits] experienced chronic and substantial gender bias."⁸

Petitioner also claims that while working as the owner of Boblits Services, Ms. Boblits interviewed for a subcontracting opportunity with Mike Scoglin of Harbor View Contractors. During the interview, Mr. Scoglin told Ms. Boblits that her firm met all of his requirements and that he would be in favor of hiring the firm for its professional services. After the interview, Mr. Scoglin invited Ms. Boblits out for a cocktail, which she declined. After Ms. Boblits declined the invitation, Mr. Scoglin told her that he was no longer interested in her firm's professional services. The SBA noted this incident as well, and stated again that, "you have not provided any specific information of the quality and quantity to allow SBA to determine fact and that you experienced gender bias as you claim."

The SBA cannot make "sweeping conclusory generalizations about the inadequacy of Petitioner's application, without evaluating the information Petitioner supplied[.]" and without offering "insight into why Petitioner's application is inadequate or . . . any guidance on additional information needed to support the claim of social disadvantage." *Med-Choice*, SBA No. SDBA-179, at 5. The SBA must provide adequate notice of the facts and reasons for denying Petitioner's application, so that Petitioner and the reviewing court may understand the Agency's basis for denial. *See Ace Technical*, SBA No. SDBA-178, at 6. "Only by understanding the agency's basis for denying the 8(a) BD application can the reviewing court determine whether the denial was arbitrary, capricious, or contrary to law." *Southern Aire*, SBA No. BDP-453, at 3.

Accordingly, the Court must remand the SBA's determination to allow the Agency the opportunity to explain to Petitioner why the sexual harassment claims found in its application were inadequate and to provide Petitioner guidance for submitting such claims in the future. *See Innovet*, SBA No. BDPE-466, at 5-6 (remanding the SBA's determination in part because the SBA made conclusory statements as to why petitioner's claims were insufficient and did not

⁸ This is the incorrect standard, as discussed in Section [V.B] of this decision. *See supra* pp. 8-9.

explain its reasoning for denial); *Southern Aire*, SBA No. BDP-453, at 11-12 (remanding the SBA's determination where the SBA did not provide adequate analysis for dismissing petitioner's claims); *Med-Choice*, SBA No. SDBA-179, at 5 (remanding the SBA's determination where the SBA omitted its reasoning in its determination letters).

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 on or before *May 1, 2013*.⁹

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

⁹ 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.