

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

IN THE MATTER OF:

Allcon, LLC,

Petitioner

SBA No. BDPE-486

Decided: April 30, 2013

DECISION

On January 22, 2013, Allcon, LLC (“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 Agency responded to the *Appeal Petition* on March 8, 2013, defending its conclusion that Petitioner did not meet the Program's entry requirements. The matter is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a) and 134.1020(j)(1), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.¹

I. Procedural History

On December 14, 2011, Petitioner submitted an application for certification as a participant in the 8(a) BD Program on the grounds that its owner, Ms. Ana Lopez, was socially disadvantaged as a Hispanic American. The SBA issued an Initial Determination Letter on July 27, 2012, denying the application. The SBA found that although Ms. Lopez had proven social disadvantage, Petitioner was barred from the Program because it had a contractual relationship with Arteaga Construction, Inc., a former 8(a) BD Program participant owned by Ms. Lopez' brother, Anthony Arteaga. Additionally, the Initial Determination Letter concluded that a non-disadvantaged person — Ms. Lopez' father, Francisco Arteaga—had provided “critical funding” to Petitioner, thereby allowing him to exert control over Petitioner.² Finally, the Letter found that Petitioner had not shown that it could perform successfully in the 8(a) BD Program.

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 Francisco Arteaga loaned Petitioner \$396,100 while the company was in its infancy. Ms. Lopez stated in the initial application that, were it not for this loan, Petitioner “would not exist.”

On September 10, 2012, Petitioner filed a Reconsideration Request (“Recon Request”) that addressed each of the SBA’s findings. The SBA then issued a Determination upon Reconsideration (“Recon Determination Letter”) on December 6, 2012, finding that Petitioner had not overcome the first two grounds stated in the Initial Determination Letter. Petitioner’s timely *Appeal Petition* followed.

II. Objections and Motions

Before addressing the merits of this case, the Court must resolve several outstanding motions. First, Petitioner objects to the SBA’s claim that the deliberative process privilege shields two documents from Petitioner’s review. Specifically, the SBA has withheld in full Exhibits 3 and 6 from the Administrative Record. Both exhibits are Business Opportunity Specialist (“BOS”) assessments created prior to the issuance of the Recon Determination Letter and the Initial Determination Letter, respectively. Petitioner contends that any factual material contained within these documents must be disclosed, as must any formal or informal recommendations made in the documents and adopted by the Agency.

The applicability of the deliberative process privilege to the SBA’s BOS assessments is well settled. This Court and its predecessors have consistently held that the SBA is justified in withholding these documents. In *Colamco, Inc.*, for example, the court stated unambiguously that BOS assessments “are internal pre-decisional memoranda embodying the analysis and recommendations of Agency officials . . . and thus are protected under the deliberative process privilege to protect the Agency’s decision making process.” *Colamco, Inc.*, SBA No. SDBA-176, p. 4 (2007) (citing *Henze Indus.*, SBA No. SDBA-111 (1999)). The question has also been addressed — with the same outcome — in several subsequent cases. *See, e.g., Spectrum Contracting Servs., Inc.*, SBA No. BDP-378 (2010); *dsi Assoc.* SBA No. BDP-413 (2011); *NAMO, LLC*, SBA No. BDP-458 (2012). Petitioner cites several federal cases in support of its position, yet it conspicuously omits any mention of the adverse precedent contained in the above-mentioned SBA cases or others directly on point. As a result, Petitioner has offered no basis for reversing the Court’s long-standing position on the matter. Accordingly, the objection is DENIED.

Petitioner next requests permission to supplement the Administrative Record with evidence that was not available when it filed the Recon Request. Specifically, Petitioner seeks to show that outstanding debts referenced in the Recon Determination Letter have in fact been paid off. SBA regulations provide that the presiding Judge:

[m]ay not admit evidence beyond the written administrative record nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based on credible evidence, and not mere allegation, that the Agency determination in question may have resulted from bad faith or improper behavior.

13 C.F.R. § 134.407(a).

Petitioner does not suggest the SBA has acted in bad faith at any point, but it does indirectly allege that the Agency behaved inappropriately by not responding to the Recon Request for approximately three months. Per SBA regulation, the Recon Determination Letter should have been issued within 45 days of the Agency's receipt of the Recon Request, or approximately October 25, 2012. 13 C.F.R. § 124.205(b). The Letter was not issued until December 6, 2012.

Although it is evident that the Recon Determination Letter was tardy, Petitioner has offered no evidence that the delay was deliberate, malicious, or otherwise inappropriate. Unfortunately, despite diligent effort it is common for federal agencies to miss mandated deadlines. The fact that the SBA did so here does not, on its own, constitute a substantial showing of impropriety. Moreover, the SBA's missed deadline should have worked in Petitioner's favor. The Recon Request was filed on September, 10, 2012, and the evidence Petitioner seeks to include came into existence in October of that year. Petitioner therefore could have provided the evidence to the SBA before it issued the Recon Determination Letter. It did not do so. The delay provided Petitioner approximately another 45 days to supplement the Administrative Record with the new evidence. Petitioner again took no action. The absence of the evidence from the Administrative Record is therefore due not to the Agency's failure to issue a timely response, but to the Petitioner's failure to inform the Agency of the changed circumstances. Accordingly, the motion to supplement the Administrative Record is DENIED.

Finally, the SBA in its *Answer* challenged the admissibility of Exhibit 1 and Exhibit 9 of Petitioner's *Appeal Petition*, arguing that they were not part of the Administrative Record at the time the Agency issued the Recon Determination Letter. Exhibit 1 is an affidavit from Ms. Lopez attesting to the payoff of the debts referenced above, as well as documentary evidence showing the payments. As already discussed, evidence of the payments is inadmissible. Exhibit 9 is an affidavit from Ms. Lopez' accountant describing the terms of the promissory loan agreement between Ms. Lopez and Francisco Arteaga, as well as background supporting information. This evidence was not included in the Administrative Record, and in fact was not created until January, 2013, after the Recon Determination Letter had been issued. The SBA therefore could not have considered this evidence when making its determination. Both Exhibit 1 and Exhibit 9 are inadmissible and will not be considered. Additionally, Exhibit 9 is now moot, as it seeks to prove a point the SBA has already conceded.

III. 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. Ownership and control are not interchangeable terms. A disadvantaged individual who unconditionally owns 51% of a limited liability corporation's outstanding stock is considered the "owner" of the corporation, whether or not that individual actually "controls" the corporation. "Control" includes both long-term, strategic concerns and day-to-day management of the business. 13 C.F.R. §§ 124.105(c); 124.106.

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 specific racial and ethnic groups are socially disadvantaged.³ 13 C.F.R. § 123.103(b).

An applicant that meets these criteria may still be denied entry into the 8(a) BD Program if the owner has an immediate family member who is or has been a participant in the 8(a) BD Program. The relevant regulation states:

Ownership of another Participant in the same or similar line of business: (1) An individual may not use his or her disadvantaged status to qualify a concern if that individual has an immediate family member who is using or has used his or her disadvantaged status to qualify another concern for the 8(a) BD Program. The [fact-finder] may waive this prohibition if the two concerns have no connections, either in the form of ownership, control or contractual relationships, and provided the individual seeking to qualify the second concern has management and technical experience in the industry. Where the concern seeking a waiver is in the same or similar line of business as the current or former 8(a) concern, there is a presumption against granting the waiver. The applicant must provide clear and compelling evidence that no connection exists between the two firms.

13 C.F.R. § 124.105(g)(1).

IV. Standard of Review

An SBA determination can be overturned only if the reviewing court concludes (1) that the administrative record is complete; and (2) based upon the entire administrative record, the Agency determination was arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). The court may only consider information contained in the written administrative record. *Southern Aire*, SBA No. BDP-453, at 2 (citing 13 C.F.R. § 134.406(a)). Therefore, the administrative record must be complete before the Court may determine whether it supports the SBA's ultimate conclusion.

In determining whether the administrative record is complete, a court considers whether the Agency (1) adequately examined all relevant evidence; (2) arrived at its conclusion using only those facts contained in the administrative record; and (3) articulated an explanation for its conclusion that is rationally connected to the facts found in the record. *Id.* (citing *Burlington Truck Lines, v. United States*, 371 U.S. 156, 168 (1962) and *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 at 43 (1983)).

If the Agency's decision fails to address these factors, the record is considered incomplete and the case may be remanded to the Agency for a new initial determination. *Southern Aire*,

³ Those groups are “Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans; and members of other groups designated from time to time by SBA. . . .” 13 C.F.R. § 124.103(b)(1).

SBA No. BDP-453, at 2. The Court may also remand a 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); *see also Innovet, Inc.*, SBA No. BDP-466 (2013).

If the administrative record is deemed to be complete, the reviewing court proceeds with its review to ensure that the Agency decision was not arbitrary, capricious or contrary to law. The reviewing court's task is to decide whether the Agency reached a reasonable conclusion in light of the facts available in the administrative record. Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *Motor Vehicle Mfrs, Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42-43 (1983) 13 C.F.R. § 134.406(b).

The 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; *Southern Aire*, SBA No. BDP-453, at 4. 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; 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.

V. The Agency's Determination

The Initial Determination Letter identified three grounds for denying Petitioner's 8(a) BD Program application: (1) Petitioner and Arteaga Construction are in the same or similar line of business and there are contractual relationships between the two companies; (2) Francisco Arteaga, a non-disadvantaged individual, was capable of exerting control over Petitioner; and (3) Petitioner had not shown the company's potential for success. The SBA acknowledged in the Recon Determination Letter that Petitioner had overcome the third basis. Additionally, in its *Answer* the SBA conceded that Francisco Arteaga could not exert control over Petitioner. Accordingly, the only issue left to resolve is whether the Agency's consideration of the alleged contractual relationship was unreasonable.⁴

The Recon Request stated that both Petitioner and Arteaga Construction were, at various times, the lowest bidders for subcontracting projects with each other, but that the two companies “never had any pre-established or pre-bid contractual agreements or arrangements of any kind.” Petitioner also asserted that the last contract between the two companies ended on September 7, 2012, and that they did not anticipate entering into any future contractual relationships. The Recon Request also includes affidavits from Ms. Lopez and Anthony Arteaga reiterating those points.

⁴ The Agency's withdrawal of its second basis for denial does nothing to change the ultimate outcome of the case. If there are multiple bases for the denial, and one survives judicial review, the Agency's decision must be affirmed. *M.C.N. Constr., Inc.*, SBA No. BDPE-472 (2013); *NAMO, LLC*, SBA No. BDP-458.

After summarizing the claims made in the Recon Request, the Recon Determination Letter concluded that an ongoing contractual relationship existed. As evidence, the SBA pointed to a June, 2012, Aging of Accounts Receivable report indicating that Arteaga Construction owed Petitioner \$20,583.75, and an Aging of Accounts Payable report from the same month showing a \$217,721.33 debt from Petitioner to Arteaga Construction. It then surmised that the debts were related to unfulfilled contracts and thus represented an ongoing relationship, making a waiver of 13 C.F.R § 124.105(g) inappropriate.⁵

Petitioner contends that this determination constitutes a clear error of judgment and contains mistakes of fact and law, warranting remand. However, it does not explain precisely what those mistakes are. Petitioner merely reiterates its claim that no contractual relationships existed at the time the Recon Request was filed. After examining the relevant evidence, the SBA disagreed with Petitioner's assessment. It did not misstate or misapply any fact or law in doing so. Accordingly, the record is complete and the Court may determine whether the SBA's conclusion was arbitrary, capricious, or contrary to law.

First, Petitioner argues that the SBA improperly assumed that the debts were not paid and that they were related to contracts between the two companies. Both of these assumptions are reasonable. The presence of the debts on the Accounts Payable and Accounts Receivable reports strongly suggest that the debts had not been paid or received.⁶ The Agency apparently looked for confirmation in the Administrative Record that the debts had been paid. Finding none, the Recon Determination Letter simply stated that it was “unclear” whether the debts remained, and that the lack of clarity prevented Petitioner from meeting the “clear and compelling evidence” standard.⁷ This is not an unreasonable conclusion.

⁵ The SBA argues that its refusal to grant a waiver under 13 C.F.R. § 124.105(g)(1) can never be arbitrary or capricious, and cites *NAMO, LLC*, as support for this proposition. *NAMO, LLC*, SBA No. BDP-458. The Court rejects this contention. *NAMO* noted that 13 C.F.R. § 124.105(g)(1) is a permissive regulation, and so “the decision to grant or deny a waiver... is entirely within the discretion of the fact finder.” The Agency theorizes that its freedom to withhold the waiver renders it immune from any arbitrary or capricious review. The holding in *NAMO* is not nearly so expansive. In that case, the Court upheld the SBA's refusal to grant the waiver specifically because the SBA considered the relevant evidence, arrived at a reasonable conclusion based on that evidence, and provided a thorough explanation of its rationale. The Agency's decision was thus approved not because review was unnecessary, but precisely because the decision survived the review. To accept the SBA's theory would allow it to withhold a waiver for any reason at all, even a patently unreasonable one. The regulation confers no such right to be unreasonable, and *NAMO* does not hold otherwise.

⁶ Petitioner's assertion that there were no current projects between the two companies does nothing to undercut this assumption because an outstanding debt may remain from a project that was completed at some time in the distant past

⁷ Petitioner attempts to fault the SBA for basing its conclusion on assumptions about the debts rather than requesting confirmation of the information. This argument ignores the fact that an 8(a) BD Program applicant bears the burden of proving its eligibility for the program. 13

Similarly, the SBA's assumption that the debts were evidence of a contractual relationship between the companies is supported by the evidence in the Record. Petitioner repeatedly confirmed the existence of such contracts, including the fact that both companies had been both grantor and recipient of subcontracts from the other.⁸ Meanwhile, Arteaga Construction appears in both the Accounts Payable and Accounts Receivable reports. The Agency's conclusion that these facts are related is reasonable, particularly because Petitioner provided no alternative explanation for the existence of the debts.

Petitioner next contends that the SBA ignored an important aspect of the issue because it did not acknowledge that the debts had been paid. This argument is meritless. As Petitioner is aware, the Agency had no evidence of a payoff at the time it issued its determination. The SBA cannot consider evidence it does not have.

Finally, Petitioner claims the SBA raised the outstanding debt amounts as an issue for the first time in the Recon Determination Letter, and so Petitioner should be able to seek reconsideration of that distinct issue. This argument relies on a misreading of 13 C.F.R. § 124.205(c), which states that, if, after reconsidering an application, the SBA denies the application solely on new grounds, the applicant may seek reconsideration of those new grounds. The regulation is intended to prevent a scenario where the SBA blindsides an applicant with a new basis for denial after the applicant has exhausted its one chance to request reconsideration. That was not the case here. The existence of the debts is not the "issue" that must be resolved. The true issue was whether contractual relationships existed between Petitioner and Arteaga Construction at the time the Agency conducted its analysis. The debts are simply evidence suggesting that such a relationship did exist.⁹ The contractual relationship question was the first, and most thoroughly discussed, issue raised in the Initial Determination Letter. Petitioner therefore had the opportunity to address the issue in its Recon Request, and in fact did so.

A review of the Recon Determination Letter shows that the SBA fully considered Petitioner's application, examined the relevant evidence, and articulated a rational connection between that evidence and its ultimate conclusion. The Agency's determination was reasonable in light of the evidence in the Administrative Record. As such, it was not arbitrary, capricious, or contrary to law.

C.F.R. § 124.204(c). It was the duty of Petitioner to present evidence that the debts had been satisfied, not the duty of the SBA to go hunting for it.

⁸ In fact, Arteaga Construction performed under a subcontract with Petitioner as late as September 7, 2012, mere days before Petitioner filed the Recon Request.

⁹ Petitioner's interpretation of 13 C.F.R. § 124.205(c) is unworkable. Even if the Court were to grant the limited reconsideration, there is nothing to prevent Petitioner from introducing new evidence on the issue, knowing the SBA must address all relevant evidence presented to it. The Agency would therefore be obligated to discuss any new evidence. If Petitioner was again displeased with the result, it could then argue that the new evidence was being addressed for the first time, thereby creating a potentially endless loop of determinations and reconsiderations.

CONCLUSION

For the foregoing reasons, the Court finds that the SBA's determination denying Allcon, LLC admission into the 8(a) BD Program was reasonable and was not arbitrary, capricious, or contrary to law. Accordingly, the determination is **AFFIRMED**. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the SBA.

Should Petitioner wish to reapply to the 8(a) BD Program, it may do so twelve months after the date of the final Agency decision. 13 C.F.R. § 124.207.¹⁰

So **ORDERED**,
ALEXANDER FERNÁNDEZ
Administrative Law Judge

¹⁰ Notice of Reconsideration Rights. This *Decision* constitutes a final agency decision that is binding on the parties. 13 C.F.R. § 134.409(a). However, within 20 days after the issuance of this *Decision*, the Court may reconsider this *Decision* upon clear showing of an error of fact or law material to the *Decision*. 13 C.F.R. § 134.409(c).