United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Sunrise Staffing,	SBA No. BDPE-499
Petitioner	Decided: August 1, 2013

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On August 6, 2012, Petitioner Sunrise Staffing[1] ("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. Petitioner contends that the Agency unreasonably concluded that Petitioner's owner, Mr. Jean Frantz Guillaume, had not shown full-time devotion to managing the subject company.

In its *Answer* to the *Appeal Petition*, filed on April 11, 2013, the SBA asserted that Petitioner failed to show that Mr. Guillaume devoted 40 hours per week or more to managing Petitioner, or show that Petitioner's normal business hours were not between 9:00 a.m. and 5:00 p.m. As a result, the SBA was reasonable in concluding that Mr. Guillaume did not devote full-time attention to Petitioner during normal business hours.

The case is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a) and 134.102(j)(l), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.[2]

I. Procedural History

Petitioner sought entry into the 8(a) BD Program on or about July 7, 2010, on the grounds that Mr. Guillaume is socially and economically disadvantaged.[3] On June 5, 2012,[4] the SBA

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[1] "Sunrise Staffing" is the "doing business as" moniker of Guillaume Group, LLC. Petitioner's initial application was filed under Guillaume Group, LLC. For reasons unknown, the appeal case was opened using the Sunrise Staffing moniker.

[2] 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.

[3] Mr. Guillaume was born in Haiti, but is a naturalized American citizen. He identifies himself as a Black American.

issued an Initial Determination Letter denying Petitioner's application after finding that Mr. Guillaume did not work full time at Petitioner and that he owed delinquent federal obligations. Petitioner requested reconsideration of that determination on or about July 6, 2012. The SBA denied Petitioner's application again on July 24, 2012. The Reconsideration Determination Letter ("Recon Determination Letter") found that the federal obligation issue had been resolved, but that Petitioner still had not shown that Mr. Guillaume dedicated full time to Petitioner. In response, Petitioner, represented by Mr. Guillaume *acting pro se*, filed the *Appeal Petition* on August 6, 2012.

The SBA filed a *Motion to Dismiss* the *Appeal Petition* on August 10, 2012, citing various alleged deficiencies in the *Appeal Petition*. Petitioner countered with a *Motion for Summary Judgment*, among other motions. The Court denied both party's motions on February 25, 2013. The case is therefore now prime for decision.

II. 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 the same thing, though the same person could both own and control an applicant company. 13 C.F.R. § 124.106. A disadvantaged individual is an "owner" if he or she has direct, unconditional ownership of the applicant firm. 13 C.F.R. § 124.105. To ""control" a firm, a disadvantaged individual "must devote full-time to the business during the normal working hours of firms in the same or similar line of business." 13 C.F.R. § 124.106(a)(3).

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.[5] 13 C.F.R. § 123.103(b).

III. Burden of Proof

An applicant seeking entry into the 8(a) BD Program bears the burden of proving its

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[4] Neither party explains the nearly two-year gap between the filing of the 8(a) BD Program application and the issuance of the Initial Determination Letter. Both parties acknowledge that there was additional communication between the SBA and Petitioner after the filing of the application, but there is no record of this communication included in the Administrative Record.

[5] Those groups are "Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiian 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)(I). The SBA does not contest Mr. Guillaume's identification as a Black American.

eligibility by a preponderance of the evidence in the administrative record. *Barnes-Williams-Anser, Inc.*, SBA No. 512 (1995); *Raintree Advanced Mgm't Corp.*, SBA No. BDP-407 (2011). The preponderance standard has been described as the "most common standard in the civil law." *Bitstreams Inc*., SBA No. BDP-122 (1999). It simply asks whether the existence of a fact is more probable than its non-existence. *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (citing *In re Winship*, 397 U.S. 358, 371-72 (1970). If the scales tip, "however slightly, in favor of the party with the burden of proof," the preponderance standard has been met. *See Southern Aire Contracting, Inc*., SBA No. BDP-453 (2012); Woroco Int'l., SBA No. BDP-174, p. 5 (2002); *Ostrowski v. Atlantic Mut. Ins. Co.*, 968 F.3d 171, 187 (2d Cir. 1992).

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. Therefore, the administrative record must be complete before the court can 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*, 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. 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, LLC*, SBA No. SDBA-178, p. 3 (2008) ("[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).

V. Objections and Motions

Before addressing the merits of this case, the Court must resolve Petitioner's outstanding motions. First, Petitioner objects to the SBA's use of the deliberative process privilege and the attorney-client privilege to justify withholding three documents from the Administrative Record, Exhibits 2, 3, and 6. Exhibit 2 is a legal opinion drafted by an attorney in SBA's Office of General Counsel, while Exhibits 2 and 6 are Business Opportunity Specialist Assessments ("BOS Assessments") created prior to the issuance of the Recon Determination Letter and the Initial Determination Letter, respectively.

Petitioner's objection does not appear to be directly concerned with any of the withheld exhibits. Rather, it largely restates Petitioner's assertion that the Administrative Record is missing relevant documentary evidence and accuses the SBA of using the claimed privileges as a means of "simply hiding the evidence." Petitioner mistakenly believes that the withheld documents include the evidence Petitioner sent the SBA. This is not the case. The attorney letter and BOS Assessments are merely the SBA's own internal, pre-decisional analysis. It is well settled that both the attorney-client privilege and the deliberative process privilege apply to the types of documents at issue here. *See, e.g., Colamco, Inc*., SBA No. SDBA-176, p. 4 (2007) (citing *Henze Indus*., SBA No. SDBA-111 (1999)); *Spectrum Contracting Servs., Inc*., SBA No. BDP-378 (2010); *dsi Assoc*., SBA No. BDP-413 (2011); *NAMO, LLC*, SBA No. BDP-458 (2012). If Petitioner's evidence is indeed missing from the submitted Administrative Record, it was not withheld under claim of privilege.

Petitioner also contends that, by withholding the three exhibits, the SBA is "refusing my right to cross examine that evidence or their analysis of it" and is "refusing due process by hiding material facts." In a sense, Petitioner is partially correct. Withholding the exhibits does indeed prevent Petitioner from reviewing them. However, shielding internal agency processes from view is precisely the purpose of the privilege. The SBA is therefore justified in withholding these documents. Accordingly, the objection is **DENIED**.

Petitioner's concerns about the Administrative Record are not as easily dismissed. Petitioner contends that it sent the SBA some 14,000 documents, including dozens of e-mail attachments, and three DVDs containing videos of Mr. Guillaume working on-site at Petitioner's office, among other evidence. Petitioner argues that the Administrative Record submitted to the' Court — enough to fill eight 2" binders — represents barely one quarter of the total documents sent to the SBA. Moreover, Petitioner claims that many of the documents in the submitted Administrative Record are blank, defaced, too dark to decipher, or are otherwise illegible. Petitioner surmises that the SBA has intentionally omitted or tampered with these documents because they contradict the Agency's conclusion that Mr. Guillaume is not fully devoted to managing the applicant company.

It is readily apparent that though the Administrative Record submitted to the Court is voluminous, it does not span 14,000 documents. If Petitioner's figures are correct, there are

several thousand documents that the SBA did not transmit to the Court. Mr. Guillaume appears convinced that this is indisputable evidence that the SBA is maliciously manipulating the evidence in order to keep Petitioner out of the 8(a) BD Program. Such nefarious intentions are theoretically possible, of course, but Petitioner has offered no evidence to support such a theory here. The mere fact that documents are missing does not inherently prove bad faith on the part of the Agency. Indeed, SBA regulations do not require the Administrative Record to include every document in the SBA's possession. Section 134.405(c) states that the Record:

> [M]ust contain all documents that are **relevant to the determination** . . . and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. The administrative record, however, **need not contain all documents** pertaining to the petitioner.

13 C.F.R. § 134.405(c) (emphases added).

Accordingly, the SBA could properly omit documents from the Administrative Record if it felt those documents were irrelevant or if they were not considered in the Agency's decisionmaking process. It is unclear whether the SBA actually considered all 14,000 documents or just a selection of them, but the fact that the submitted Administrative Record does not contain 14,000 documents is strong evidence that many of them were deemed irrelevant or were not considered. Agency Counsel has confirmed that the three DVDs Petitioner references were never viewed and did not enter into the SBA's decision, and so they were not included in the submitted Administrative Record. The question is, how much other evidence falls into this same category?

VI. The Agency's Determination

Petitioner asks the Court to review the SBA's Reconsideration Determination Letter ("Recon Determination Letter"), set aside that decision, and find that Petitioner should be admitted into the 8(a) BD Program. After examining the Administrative Record, both determination letters, and the pleadings by both parties, the Court finds that remand is necessary to allow the SBA to address the following deficiencies:

A.. Failure to Consider All Relevant Evidence

The SBA denied Petitioner's application because it does not believe Mr. Guillaume devotes full time to Petitioner, as described in 13 C.F.R. § 124.106(a)(3). The Agency bases this belief almost entirely on the fact that Mr. Guillaume works a 14-hour overnight shift three days a week at a nearby hospital, then has to commute one hour to arrive at Petitioner's office, where he works a full 8-hour shift. Both determination letters express skepticism that Mr. Guillaume could possibly maintain such a grueling schedule, and thus conclude that he cannot be physically working at Petitioner's office for 40 normal business hours per week.

The SBA's skepticism is understandable. By the Court's calculation, between 8:00 a.m. Monday and 6:00 p.m. Thursday, the only sleep Mr. Guillaume obtains is that which he can scavenge during slow periods of his hospital shift. It is reasonable to assume that on unusually busy nights he has no opportunity to sleep at all. Such a schedule would tax the physical and

mental stamina of anyone. Indeed, as the Agency pointed out in its *Answer*, a predecessor court considering a similar claim once deemed it 'inherently unlikely" that any person could successfully manage such a schedule for any length of time. *See MSC Electric,* SBA No. 442. p. 3 (1993).[6] The SBA concluded that because Mr. Guillaume's second job offers him little opportunity to sleep, it must interfere with his commitment to Petitioner. The Recon Determination Letter identifies specific evidence in the Administrative Record to support this conclusion, including a letter from Mr. Guillaume's supervisor at the hospital confirming that he works 40 hours per week there. The Recon Determination Letter also cites several e-mails sent during nights and weekends rather than during normal business hours. The Administrative Record thus offers at least some basis for the SBA's determination.

Petitioner argues, however, that the SBA can only reach its conclusion by overvaluing some evidence while ignoring or disregarding evidence that supports Petitioner's position. Both parties agree that Petitioner submitted a considerable amount of evidence during the course of the application process, although the Agency has not confirmed Petitioner's claim that 14,000 documents were submitted. The Recon Determination Letter notes that Petitioner's reconsideration request included "a copier paper box[7] of documentation which included emails, contract solicitations, video evidence that you work at the applicant firm, numerous letters ... among many other such documents." The evidence associated with the reconsideration request fills four 2" binders. The initial admissions application and its complementary evidence fill an additional four binders. Sifting through and analyzing so much evidence is a monumental task for any government agency, no matter how well staffed or efficiently run. Further complicating the task, with regard to the reconsideration request, is the fact that the SBA is required to issue a decision within 45 days of receiving the request. 13 C.F.R. § 124.205(b);); *see also* 13 C.F.R. § 124.204(a) (SBA will process an application within 90 days of receiving a complete application package a completed application package). The deluge of evidence the SBA received in this case undoubtedly made it difficult for the SBA to comply with the regulatory requirements. But while the Court certainly sympathizes with the SBA's task here, difficulty in accomplishing its duties is no excuse for failing to fulfill those duties.

SBA regulations state that, when applying for entry into the 8(a) BD Program, an applicant "must submit those forms and attachments required by SBA..." and provides a nonexclusive list of what those documents may include. 13 C.F.R. § 124.203. This is the only

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[6] The applicant owner in *MSC Electric* worked from 7:00 a.m to 3:00 p.m. at the applicant firm, but also worked from 3:00 p.m. to 1:30 a.m. four days a week at the University of Washington. The court noted that he would have to "instantly shift" from one job to the other at 3:00 p.m., leaving him no time to make the commute. *MSC Electric*, SBA No. 442, p. 3. By comparison, the court in a 2012 SBA case found that it was "neither impossible nor inherently improbable" that an applicant owner could work five straight 16.5-hour days because that owner had time to travel to the second job, and there was evidence that he had worked that schedule for more than a decade. *BDS Protective Services. LLC,* SBA No. BDP-433.

[7] Petitioner claims the box weighed 30 pounds and included almost 3.000 documents. There is no reason to doubt the accuracy of this assertion.

regulation informing a potential applicant what documents to include in its application. The regulation does not indicate any page limit, and does not mandate a specific format for submitted evidence. Accordingly, an applicant is free to submit as much evidence as it feels is necessary, in whatever format it feels is necessary, to prove its eligibility. Once submitted, the SBA is obligated to address that evidence. Failure to do so renders the administrative record incomplete. *Burlineton Truck Lines, v. United States*, 371 U.S. 156,168 (1962); *Southern Aire*, SBA No. BDP-453, at 2.

The Recon Determination Letter acknowledges the plethora of evidence provided by Petitioner, but does not discuss any of the evidence supporting Petitioner's claim that Mr. Guillaume is physically present at the company for 40 "normal" business hours each week. The Recon Determination Letter states only that the evidence proves that Mr. Guillaume works at and controls the company. The Agency then dismisses the evidence by noting that "'SBA has not disputed your control of the firm or that you work at the firm."[8]

The SBA perhaps fails to recognize that the evidence does not merely show that Mr. Guillaume controls Petitioner. As he contends, the evidence can also be interpreted as supporting his claim that he is actively engaged in managing the company during normal business hours. For example, Petitioner states several times in the reconsideration request that Mr. Guillaume has worked at both Petitioner's office and at the hospital — working the present schedule — since 2006. The SBA makes no mention of this fact, although it squarely rebuts the Agency's presumption that such a schedule is untenable.

Also, as the SBA admits, it did not review the evidence contained in Petitioner's DVDs. The Agency justifies this omission by claiming it informed Mr. Guillaume during the application process that it was unable to *access* evidence in video format. This argument is not credible. The SBA cannot legitimately suggest that, in 2012, it did not have a single computer with a DVD drive, or did not have access to a DVD player. If the Agency can be tripped up by this minimal technological hurdle, it essentially limits a petitioner to filing only textual evidence. This would be supremely ironic because an 8(a) BD Program application "must generally be filed in an electronic format," i.e., e-mail, which is a newer and more advanced technology than DVD.[9] 13 C.F.R. § 124.202.

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[8] In truth, by rejecting Mr. Guillaume's claim of full-time devotion, the SBA is indeed disputing whether Mr. Guillaume controls Petitioner. The full-time devotion requirement is merely a tool by which the SBA can determine control. The regulatory structure makes this point clear. The full-time devotion language appears at 13 C.F.R. § 124.106(a)(3). The title for Section 124.106 is "When do disadvantaged individuals control an applicant or Participant." Either the SBA believes Mr. Guillaume is not fully devoted to Petitioner, and thus does not control it, or it believes Mr. Guillaume does control Petitioner, and thus the question of full-time devotion is irrelevant.

[9] The SBA's argument would carry more weight if Petitioner's evidence utilized a truly obsolete or antiquated technology, such as cassette tapes, laserdiscs, or computer punch cards. It is unlikely that even a federal agency would still have the equipment on hand to access such evidence.

Moreover, the SBA suggests that it is Agency policy not to accept video evidence. In other words, the Agency is not just unable to review such evidence; it is unwilling to do so. If such a policy exists, it has never been published or explained. This is particularly worrisome because an anti-video policy would seem to run counter to 13 C.F.R. § 124.203, which does not place any limits on the style or format of submitted evidence. The existence of a secret internal policy raises several troubling questions. Does the policy only apply to DVDs? Did the Agency rely on this policy to justify ignoring Petitioner's online videos? Why is video-based evidence disfavored over other forms of evidence? Are there other kinds of evidence the SBA habitually rejects? What authority does the SBA have to invent an evidentiary restriction when the regulation has no such prohibition? The SBA offers no explanation on any of these points.

The potential application of such a policy is also troubling. Being that the policy is unpublished, a potential applicant will only be aware of it if someone at the SBA affirmatively informs them of the policy's existence. The Agency could thus pick and choose which applicants are subjected to the policy. This is inherently arbitrary.

The policy is also fundamentally unreasonable, as the case at bar demonstrates. Petitioner's videos allegedly depict Mr. Guillaume working on-site at Petitioner's office during normal business hours. The evidence is thus directly relevant to determining Petitioner's eligibility. And yet the policy renders this evidence impermissible. However, if Mr. Guillaume were to submit a written affidavit declaring that he is at the office at those times, the affidavit would be allowed. A photo of Mr. Guillaume, taken while the video was being filmed, would also be admissible. This is nonsensical. If a picture is worth 1,000 words, how many words is a video worth? The policy unfairly prohibits an applicant from submitted the most persuasive evidence at its disposal. As a result, the SBA dilutes the application's strength, thereby jeopardizing the applicant's chances of securing a place in the 8(a) BD Program.

Petitioner next alleges that the SBA never opened several e-mail attachments submitted to them. Mr. Guillaume states that he knows the SBA did not review the attachments because he receives a confirmation when his e-mails or their attachments are opened. He also alleges that the SBA never viewed dozens of online videos posted on Youtube.com, ScreenR.com, ScreenCast.com, and other sites. Like the DVD videos, the online videos allegedly show Mr. Guillaume engaging in Petitioner's business during normal business hours. Mr. Guillaume claims he restricted public access to his online videos and routinely tracked the view counts for each video. He contends that “the number of views have not changed since I loaded the videos to the sites mentioned.” The Recon Determination Letter makes no reference to these videos, and the SBA has never claimed that they actually viewed the videos in question.

The Court finds that the SBA ignored evidence that aided Petitioner's claim, rejected DVD evidence, and refused to watch the online evidence. The Agency therefore failed to consider all the relevant evidence. Remand is necessary to allow the SBA to consider this evidence and furnish the missing analysis.

B. Failure to Articulate an Explanation for Omitting or Disregarding Evidence

The SBA also failed to explain why it did not consider the online videos, e-mails, and other evidence; and why it found Petitioner's supporting evidence to be unpersuasive. The Recon Determination Letter informed Petitioner that "insufficient evidence was provided" to show by a preponderance that Mr. Guillaume was fully devoted to Petitioner. This conclusion is startling, given the sheer amount of evidence submitted to the Agency, particularly in the reconsideration request. As the Recon Determination Letter itself recognized, Mr. Guillaume provided "substantial evidence" that he is present at the firm. Yet the SBA remained unconvinced that he works at the firm "during the normal business hours of such firms roughly 9 am to 5 pm." Mr. Guillaume believed the evidence overwhelmingly verified his position. The Recon Determination Letter offers no explanation whatsoever why that belief was incorrect. It does not identify what evidence corroborates Petitioner's claims, does not analyze that evidence, and does not explain why that evidence is insufficient. The Letter merely states its conclusion and identifies the specific evidence that justifies its decision. It offers no insight into how the Agency balanced the conflicting evidence. Mr. Guillaume is thus left wondering why his evidence fell short. Assuming, *arguendo*, that Petitioner did indeed submit 14,000 documents, and the SBA based its determination on just 10 of them, the Agency must inform Petitioner why those 10 documents outweighed the other 13,990.[10] It did not do so.

For example, the Recon Determination Letter acknowledges that some e-mails were sent during normal working hours, but states dismissively that "these are not indicative of full-time devotion." It then cites e-mails sent on nights and weekends as compelling evidence that defeats Petitioner's claim. The Letter never describes how many e-mails were sent during the day versus during nights and weekends. It does not explain why the night- and weekend-generated e-mails are more persuasive than the e-mails generated during the normal work day. And it offers no explanation for its conclusion that the weekday e-mails did not show full-time devotion. The Administrative Record is replete with e-mails sent during normal business hours. If the SBA had reason to disbelieve or discredit these e-mails, it did not express that reason in the Recon Determination Letter.

The SBA need not identify and individually analyze each discrete document in detail. The volume of evidence here makes such an approach impractical, to say the least. As this Court has previously noted, evidence may be grouped and analyzed together if the evidence is sufficiently similar that the analysis of any one would be equally applicable to the others. *See Striker Electric*, SBA No. BDPE-465 (Feb. 1, 2013). There, the petitioner recounted three incidents where a client or potential client remarked on the applicant owner's disability. The SBA's determination did not address each claim individually. However, this Court recognized that the claims were all "simple variations on a single theme," and found that the

[10] These numbers are used for illustrative purposes only. The Court does not suggest that the SBA actually based its determination on only 10 documents. Nor does it suggest that the raw number of documents for or against Petitioner's eligibility is dispositive. It is always the quality of evidence that determines the outcome, not the quantity. See Southern Aire, BDP-453; *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011).

SBA "could hardly be faulted for addressing and disposing of the incidents as a group, provided it clearly communicated its intention to do so." *Id.* at p. 6. Depending on the nature of the evidence, the SBA may be able to apply a similar organizational structure here. For example, if the online videos are all examples of physical presence at Petitioner's office, it may be proper to analyze them as a single unit. The SBA must, however, explain why it considers the grouped evidence to be interchangeable.[11]

Given the amount of evidence submitted in this case, the Court can understand how a reviewer could become overwhelmed and simply disregard documents whose relevance is not immediately apparent. It does not help matters here that many of Petitioner's documents are offered without explanation. The SBA reviewer is thus forced to sift through thousands of pages of evidence and hypothesize as to their probative value. Of course, the SBA could have contacted Petitioner at any time during the application process to request additional clarification. Doing so may have saved both parties significant time, money, and energy. However, the Agency is under no obligation to reach out to Petitioner. 13 C.F.R. § 124.204(b) (the SBA *may* request clarification) (emphasis added). It is obligated, however, to explain why relevant information was disregarded, if that is in fact what happened here. The Recon Determination Letter is entirely devoid of such an explanation. The case must therefore be remanded so the SBA can either analyze the omitted evidence or provide an explanation why the evidence is irrelevant or insufficient.

C. Mistake of Fact

Finally, the SBA errs by misreading the letter sent by Mr. Guillaume's supervisor at Mariners Hospital. The Recon Determination letter correctly identifies Mr. Guillaume's work schedule at the hospital, but erroneously states that he works four 14-hour shifts instead of three. If true, Mr. Guillaume would work at the hospital for 56 hours per week instead of the 42 that he claims.[12] The Letter also suggests that Mr. Guillaume may have deliberately underreported his hospital hours in his initial application.

Petitioner asserts, and supports with documentary evidence, that Mr. Guillaume only works 42 hours per week at the hospital. He works three 14-hour shifts. However, because it is an overnight shift, each shift encompasses two calendar days. Mr. Guillaume therefore works at the hospital four *days* per week, but he does not work four *shifts* per week. The SBA acknowledged this mistake in its *Answer*, but argues that it was a "harmless error" because the SBA "accurately accounted for the forty hours per week" at the hospital.

Contrary to the SBA's assertion, the Recon Determination Letter does not expressly disregard the additional 14 hours it believes Mr. Guillaume works at the hospital each week. It only states that the supervisor's letter "confirms that you are required to work 40 hours a week..." The next two sentences in the Recon Determination Letter then misstate the total hours, making

[11] The Recon Determination Letter does appear to follow this structure with regard to Petitioner's e-mails, organizing them based on when they were generated.

[12] The 42-hour figure includes Mr. Guillaume's lunch break and other breaks.

it appear that Mr. Guillaume actually works more hours than required at the hospital. This is not harmless error. In making its determination, the SBA cited "the number of business days you are employed," and "the significant number of hours in your shift" as evidence that Mr. Guillaume did not devote full time to Petitioner. Both bases are directly tied to the SBA's flawed understanding of Mr. Guillaume's hospital hours. Accordingly, the case must be remanded to allow the SBA to correct this error.

VII. Conclusion

The above-captioned matter will be **REMANDED** to SBA for further consideration pursuant to 13 C.F.R. § 134.406(e)(2). Under normal circumstances, the Court would allow 30 days to issue a new decision. However, given the great weight and possible complexity of the evidence here, the Court will grant the SBA 90 days to re-examine Petitioner's application. Accordingly, the SBA shall issue a Determination upon Remand on or before October 31, 2013, following procedures mandated by the applicable regulations.[13] As there is no mistake of law present in this case, the SBA need not re-analyze the evidence properly discussed in the Recon Determination Letter or the Initial Determination Letter. The new Determination must, however, contain an analysis of all relevant evidence submitted, and explain what evidence is omitted, irrelevant, insufficient, or unpersuasive.

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

[13] 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 OH A a notice of such approval, so this case may be closed.