

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

IN THE MATTER OF:

Y & S Technologies, Inc.,

Petitioner

SBA No. BDPE-507

Decided: October 25, 2013

APPEARANCES

Antonio R. Franco, Esq., Peter B. Ford, Esq., PilieroMazza PLLC, 888 17<sup>th</sup> Street, NW, 11<sup>th</sup> Floor, Washington, D.C. 20006, for the Petitioner

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FINAL DECISION AND ORDER

On June 19, 2013, Y & S Technologies, Inc. (Y & S or Petitioner) appealed a determination of the United States Small Business Administration (SBA or Agency) denying Petitioner admission to the 8(a) Business Development Program (the Program).<sup>1</sup>

I. Procedural History

Y & S applied for admission to the 8(a) Business Development Program. (AR Ex. 16).<sup>2</sup> On August 24, 2011, SBA informed Petitioner the application was considered incomplete and requested additional information. (AR Ex. 14-15). On February 15, 2012, Petitioner provided a response and additional information for consideration. (AR Ex. 13). On February 22, 2012, SBA again informed Petitioner the application was considered incomplete, and requested additional information. (AR Ex. 12). On or about May 21, 2012, Petitioner provided additional information to SBA. (AR Ex. 11).

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<sup>1</sup> The purpose of the 8(a) Business Development Program “is to assist eligible small disadvantaged business concerns compete in the American economy through business development.” 13 C.F.R. § 124.1. To qualify for admission into the Program, an applicant small business must be “unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.” 13 C.F.R. § 124.101.

<sup>2</sup> Citations referencing the Administrative Record are as follows: Administrative Record followed by Exhibit Number (AR Ex. at \_\_ ).

On August 27, 2012, SBA issued a letter denying Petitioner admission to the Program. (AR Ex. 8). The letter informed Petitioner SBA had determined that Stewart Finck, the individual upon whom eligibility was based, was not disadvantaged pursuant to 13 C.F.R. § 124.103. *Id.* The letter further informed Petitioner SBA had concluded that Stewart Finck did not control the applicant business concern. *Id.*

Thereafter, on or about October 11, 2012, Petitioner filed a Request for Reconsideration. (AR Ex. 17). On May 7, 2013, SBA informed Petitioner via letter that it had still not overcome one of the original reasons for declining the application. (AR Ex. I). Specifically, SBA determined that Stewart Finck, the individual upon whom eligibility was based, did not meet the requirements for social disadvantage as provided for in the applicable regulations. *Id.*

Thereafter, on June 19, 2013, Petitioner filed a timely appeal of the decision by SBA. *See* 13C.F.R. § 134.202(a). On June 20, 2013, SBA's Office of Hearings and Appeals (OHA) issued a Notice of Assignment, assigning the matter to the United States Coast Guard (USCG) Office of Administrative Law Judges.<sup>3</sup> The Notice of Assignment explained that SBA must file and serve both its response to Petitioner's Appeal Petition and the Administrative Record not later than forty-five (45) days after the filing of the Appeal Petition. 13 C.F.R. § 134.206(b).

On June 25, 2013, the matter was assigned to the undersigned Administrative Law Judge (ALI) for adjudication. On August 2, 2013, SBA filed its Response to Appeal Petition and a copy of the Administrative Record.<sup>4</sup> 13 C.F.R. § 134.406(c)(1). Thereafter, on August 14, 2013, SBA filed an Amendment to the Administrative Record, explaining certain documents had been inadvertently omitted from the Administrative Record. Petitioner did not object as to the completeness of the Record. *See* 13 C.F.R. § 134.406(c)(2). Accordingly, on August 27, 2013, the undersigned issued an Order Closing Administrative Record. *See* 13 C.F.R. § 134.406(c)(2).

## II. Applicable Law

### A. Jurisdiction

OHA and the undersigned have jurisdiction over Petitioner's Appeal pursuant to 13 C.F.R. § 134.102(j)(1).

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<sup>3</sup> Pursuant to an Interagency Agreement with SBA, the USCG Office of Administrative Law Judges is providing judicial services to the extent required under the regulations.

<sup>4</sup> The Administrative Record contained seven (7) exhibits for which the Agency claimed evidentiary privileges and submitted a *Vaughn* index; unredacted copies were provided to the undersigned. 13 C.F.R. § 134.206(b)(4). Petitioner did not object as to the claimed privileges. The undersigned finds that exhibits 2, 3, 4, 6, and 10 were properly withheld pursuant to the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132(1975). Exhibits 5 and 9 were properly withheld as they constitute privileged legal opinions. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981).

## B. Standard of Review

Pursuant to 13 C.F.R. § 134.406(b), an ALJ's review is limited to determining whether SBA's determination was arbitrary, capricious, or contrary to law. As long as SBA's determination is reasonable, the ALT must uphold it on appeal. *Id.* An Agency's decision is unreasonable if it constitutes a clear error of judgment. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)

## C. Social Disadvantage

An applicant business concern meets the requirements for admission to the Program when it qualifies as a small business that “is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success.” 13 C.F.R. § 124.101.

Socially disadvantaged individuals are defined as 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). There is a rebuttable presumption that members of certain groups are socially disadvantaged. 13 C.F.R. § 124.103(b). Individuals who are not members of the enumerated groups must establish social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1).

Any evidence of social disadvantage must include the following elements:

- (i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;
- (ii) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and
- (iii) Negative impact on entry into or advancement in the business world because of the disadvantage. SBA will consider any relevant evidence in assessing this element. 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.

13 C.F.R. § 124.103(c)(2)(i-iii).

Evidence of substantial and chronic social disadvantage is generally established if the applicant adequately describes “more than one or two specific, significant incidents.” However, one incident may be sufficient if it is so substantial that there is no doubt the applicant suffered social disadvantage. *Matter of Boblits Services, LLC*, SBA No. BDPE-480 (2013) (citing *Matter of Ace Technical, LLC*, SBA No. SDBA-178 (2008)).

### III. Petitioner's Argument

In the Appeal, Petitioner argues the sole issue is whether Mr. Finck, the individual upon whom Program eligibility is based, is socially disadvantaged. To demonstrate social disadvantage, Mr. Finck must provide evidence of: (1) an “objective distinguishing feature that has contributed to social disadvantage”; (2) personal experience of “substantial and chronic” social disadvantage; and (3) “[n]egative impact on entry into or advancement in the business world because of the disadvantage.” 13 C.F.R. § 124.103(c)(2)(i-iii). Petitioner contends SBA erroneously determined Mr. Finck has not sufficiently demonstrated the latter two elements.

Petitioner contends Mr. Finck provided sufficient evidence of discrimination he faced in the areas of education history, employment history, and business history as a result of his Hasidic Jewish American practices. However, SBA improperly dismissed many of Mr. Finck's assertions.

For instance, Mr. Finck provided evidence regarding his encounter with a purchasing agent while working for 47<sup>th</sup>Photo, a reseller of IT products, and an opportunity he was given to market a “clone computer” to Revlon. While SBA determined the evidence regarding these incidents lacked adequate detail, Petitioner, citing *Unicon, Inc.*, SBA No. BDP-428 (2012), argues Y & S provided sufficient evidence and detail regarding the incidents. Petitioner suggests that, pursuant to *Unicon*, Mr. Finck need only describe “(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.” *Unicon, Inc.* SBA No. BDP-428 (2012). In rejecting Petitioner's evidence, SBA improperly required Petitioner to establish bias with clear and convincing evidence and erroneously speculated as to what occurred during the incidents.

Petitioner suggests that, as a current business owner, Mr. Finck continues to face discriminatory practices which impede Petitioner's ability to grow. For instance, Petitioner provided evidence regarding incidents at NY Bank and Capital Pines wherein Petitioner either lost or was refused lines of credit. Y & S suggests SBA improperly dismissed this evidence, erroneously examining the claims of bias from the perspective of the banks, and unfairly speculating as to other reasons why the denials of credit may have occurred.

### IV Agency's Argument

In the August 2, 2013 Answer, SBA summarizes the requisite elements for entry into the Program, conceding Y & S has satisfied the first element, namely, that Mr. Finck has an objective distinguishing feature that has allegedly contributed to social disadvantage. *See* 13 C.F.R. § 124.103. However, SBA contends Petitioner has not demonstrated the latter two elements.

As to the second element, personal experiences of substantial and chronic social disadvantage, SBA asserts that it “considered information and noted in its initial decline letter that Mr. Finck failed to provide ‘sufficient specific details to demonstrate how’ the incidents claimed caused a negative impact on Mr. Finck's entry or advancement in the business world.”

SBA asserted that while Mr. Finck provided additional information, “SBA stated that Mr. Finck’s statements lack specificity and a nexus as to how the claimed biased treatment had a negative impact on Mr. Finck’s business.”

As to the third element, negative impact on entry or advancement into the business world, SBA asserted that it “determined that Mr. Finck failed to show a nexus between the alleged discrimination and his entry or advancement in the business world,” despite being provided additional opportunities to “provide information that would illustrate a nexus.”

## V. Discussion

In the instant case, SBA’s Answer summarizes the legal requirements for Program admission and generally refers to the determination letter and voluminous record, stating “[t]he AR provided here contains the evidence upon which SBA relied, its analysis and support for the determination reached that Petitioner was ineligible for 8(a) BD certification.” However, the May 7, 2013 letter provides greater specificity as to SBA’s rationale for denying Y & S admission to the Program. The fifteen (15) page letter explains why SBA determined Petitioner had not provided sufficient information to demonstrate the social disadvantage requirements of the Program based on a preponderance of the evidence.

The letter notes that while Petitioner provided case law of documented discrimination towards Chassidic Jews, SBA noted that, while persuasive, such evidence by itself did not prove an individual has been subjected to prejudice within American society, as required by the regulations. The letter also summarized SBA’s rationale in finding Petitioner had not met Program requirements through evidence provided related to education, employment, and business history.

### A. Education

As to educational disadvantage, Mr. Finck described his experiences while attending Ohio State University (OSU) from 1974-1978. The Request for Reconsideration states, *inter alia*, Mr. Finck converted to Chassidism in 1976, and was thereafter treated with disrespect while at OSU. Mr. Finck suggests his professors began to treat him with disdain and “declined to accommodate [him] with makeup tests, missed class notes, curved grading or extra work whenever . . . [he] had to miss class because of [his] holy days of obligation.”

He explained that, because he had converted after the start of the school year, he was unable to alter his class schedule. Although he later tried scheduling his classes so that they did not interfere with Shabbat, this was not always possible. For instance, in 1978, he had to leave early from a management class that took place on Friday afternoons, and his professor did not allow him to make up the work, resulting in his receiving a poor grade.

Mr. Finck explained that he wanted to major in Finance and Accounting, and, as such, needed to take a fundamental finance class. In 1977, this class was only offered during the fall semester, when the vast majority of Jewish holidays fall. Therefore, he missed many classes. His finance professor was unaccommodating, treated him coldly, and “harbored anti-Semitic

prejudices and biases as the reasons for her remarks and not accommodating (him] with makeup opportunities for [his] missed classes.”

Mr. Finck further explained:

The bulk of Jewish holidays are celebrated in the fall and winter months and I made this very clear to my professors. This is when I needed their help but to no avail. I cannot prove that the professors were bigoted and biased towards me as a Chassidic Jew. I can only compare the treatment I received in college as a Chassidic Jew to the situation I enjoyed before conversion, which was totally different and impartial.

Mr. Finck further explained that he could not “interface with others, especially women, as is done normally in the secular world” and was thus “thrust into this dimension where no one would assist [him] or interact with [him] in study groups, labs or other collective forms of study.” He indicated he believed he was the only Chassidic Jew at OSU during this time.

Mr. Finck stated he was subjected to this prejudice, bias, and discrimination for three years, such that it caused him to change majors “as well as impacting [his] future employability, [and] is indicative that this disparate treatment was chronic and substantial.”

In the May 7, 2013 letter, SBA noted that Mr. Finck's narrative did “not suggest that [he] received biased treatment due to racism or religious intolerance [but rather, given his statement that he was unable to interface with others, especially women] . . . the differing treatment . . . was a reaction toward [his] change toward [his] fellow students and professors as opposed to biased treatment on their part.” SBA further noted “it is not an indication of bias by others where you take a class that has the expectation of Friday night activity and then require the others in the class to accommodate your religious beliefs.” With this position the undersigned must agree.

SBA held that although Mr. Finck had provided documentation in support of his claims of bias, some of the claims were not credible. For instance, although Mr. Finck stated he believed he was the only Chassidic Jew at Ohio State University, a January 25, 2011 letter provided by Petitioner from Zev Prescott, a friend of Mr. Finck's, describes their friendship as dating back to:

. . . the days when we attended Ohio State University (OSU) together. It was during this time that we were both making a commitment to live as Hasidic Jews. We attended the local Lubavitch center at OSU and shared an apartment together.

As such, SBA explained that “[i]n contrast to the information...submitted in support of the reconsideration request you indicate you were not the only Hasidic Jew, in fact, your room mate was also Hasidic and played a role in your conversion.”

SBA further determined that the record did not contain sufficient information to support the conclusion that Mr. Finck's Finance professor was anti-Semitic or exhibited behavior to lead to that conclusion. In lieu of providing examples of biased comments or behaviors, Petitioner

provided information regarding the professor's refusal to adopt requested accommodations. Further, SBA again noted the record contained conflicting information, and explained: In your original submission you indicate that with your degree in Economics and Finance you were full of excitement...in your request for reconsideration you state that because of this professor and this class you changed your major and graduated with a degree in marketing and a minor in economics.

As discussed, so long as SBA's determination is reasonable, the undersigned must uphold it on appeal. 13 C.F.R. § 134.406(b). The undersigned finds SBA's determination that Petitioner did not show the requisite experiences and impact in the realm of education to be reasonable. *See* 13 C.F.R. § 124.103(c)(2)(iii).

With regard to education, SBA takes into account “such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.” 13 C.F.R. § 124.103(c)(2)(iii)(A).

As to Mr. Finck's arguments related to his educational experiences, SBA properly (1) addressed the evidence submitted; (2) informed the applicant of the facts relied upon in reaching the conclusion; and (3) clearly stated the rationale for the conclusion. *Matter of Ace Technical, LLC.*, SBA No. SBDA-178 (2008).

In *Matter of Boblits Services, Inc.*, SBA No. BDPE-480 (2013), the ALJ remanded a case to SBA for a new determination. In so doing, the ALJ noted SBA had improperly dismissed a petitioner's education-related claims of gender bias, including claims “she was often excluded from social and educational interactions, that it was difficult to find a study partner or group that would include her, and that she was explicitly told she could not join a study group because they did not ‘want a girl in their group.’” *Id.*

In the instant case, SBA noted Petitioner had not provided examples of biased comments, behavior, exclusion, or denial of access, but rather evidence as to the refusal on the part of students and professors to adopt his requested accommodations. Unlike the petitioner on *Boblits Services*, the record does not indicate Mr. Finck was excluded from any class or groups. Rather, Mr. Finck seems to allege professors and students were not accommodating to his religious practices, including his inability to participate in Friday night classes or activities. It was, therefore, not a change of behavior by the professors or students but a change of behavior by Mr. Finck. Although Petitioner classified this behavior as biased and anti-Semitic, SBA is not required to accept assertions that are speculative or conclusory. *Matter of Unicon, Inc.*, SBA No. BDP-428 (2012) (citing *Timely Eng'g Soil Tests, LLC.*, SBA No. BDP-297 (2008)).

Further, as noted by SBA, the record contains conflicting information as to Mr. Finck's educational experiences which cast doubt on some of the assertions made. *See Matter of Bitstreams, Inc.*, SBA No. BDP-122 (1999) (explaining SBA may disbelieve an inconsistent account). Thus, given the evidence in the record, SBA's conclusion as to Petitioner education-related assertions was reasonable under the circumstances. 13 C.F.R. § 134.406(b).

## B. Employment

As to employment, Mr. Finck provided a narrative describing his inability to obtain a job after college graduation. He explained he moved to New York City because it was a region more conducive to a Chassidic lifestyle. He asserted that “[a]s soon as prospective employers or employment agency representatives saw [him], [he] was told in most cases that the jobs had been filled and was not even given the respect of an interview.” He stated he could sense the “nervousness, discomfort and insensitivity” with employers. Mr. Finck attempted to gain employment with banks with branches in neighborhoods with large concentrations of Chassidic Jews, but explained this did not work and he “was told clearly that [his] dress code was not conducive to the accepted banking image.”

Mr. Finck explained he was eventually able to procure employment at a small business called 47<sup>th</sup> Street Photo, but initially had difficulty selling to large companies and their buyers because “they conducted business at restaurants, bars, parties, get-togethers and other venues and forums that [he] could not attend...because [his] lifestyle and religion prevented [him].” He explained he was unable to enter non-kosher restaurants and could not meet potential clients at bars or clubs. He stated that:

In a fast-paced world of hotshot pilots and trendy opportunists who would slit your throat for a sale or rock bottom purchases, I was the oddball outsider who didn't belong in the game because of my old-fashioned clothes and old-European, 18<sup>th</sup> Century appearance.

Mr. Finck asserted it was a constant struggle to overcome the religious and racial prejudices he encountered on a daily basis. He explained:

I wrote mild letters of complaint to several department heads explaining our products and our expertise, as well as our preferred method of conducting business during normal business hours within our religious perimeters all to no avail. Some were non-responsive while others would plainly tell me to play or stay, meaning that if I could not adjust to their rules of the game, I could not expect any contracts. Again, this was another, albeit more subtle, form of discrimination I had to endure.

In support of these assertions, Petitioner provided numerous letters and affidavits, including many statements written by Mr. Finck. In the May 7, 2013 letter, SBA stated the “expectation for others to conform to your religious customs is not indicative of bias directed against you.” Thus, the fact that business was conducted in a manner in which Mr. Finck could not partake was not in and of itself indicative of bias. This reasonable opinion of the SB A must be upheld.

SBA further indicated the information provided lacked the requisite specificity. For instance, although Mr. Finck alleged he was unable to gain employment in banks with branches in neighborhoods with large concentrations of Chassidic Jews, Mr. Finck did not provide

“detailed information to indicate what if any positions were available, the qualifications required as compared to your qualifications, whether, or whether you applied for and were denied these positions.” [sic].

Similarly, although the record contains supporting statements, letters, and affidavits, SBA concluded the documentation lacked the requisite specificity. For instance, an affidavit written by Robert Brand states generally that “Mr. Finck's lifestyle as a Hassidic Jew made [the business world] even more difficult.” However, the affidavit provides no specific examples or details.

The record also includes a letter from Jonathan Ferziger in which Mr. Ferziger stated that, while working with Mr. Finck at 47<sup>th</sup> Street Photo, he and Mr. Finck were often “barred from bidding on some larger contracts that companies used for corporate purchasing, because of the perception that we were not sophisticated in our understanding of the business model that was required to sell on a volume basis to corporate American.” [sic]. He asserted that “[t]his was based solely on the perception of Hasidic appearance and mannerisms.” In the May 7, 2013 letter, SBA again noted that Mr. Ferziger had not provided any specific examples to support his assertions.

The record also includes multiple, separate statements written by Mr. Finck. In one such statement, Mr. Finck describes how, in 1987, 47<sup>th</sup> Street Photo supplied computer products to Paine Webber and Chase Manhattan Bank. However, he was unable to compete “on the large contract for their major purchases.” He suggested this was due to the fact that he could not engage in activities such as “going to a bar or gentleman's club”. Since many deals were made in a social setting, he became a “second class supplier.”

The statement also described Mr. Finck's experiences with Manufacturer Hanover Bank. He explained the computer buyer at Manufacturer Hanover Bank went out of her way to emphasize that she purchased from minorities. However, after Mr. Finck explained companies owned by Chassidic Jews were considered minorities, the woman “began to rant and rave [sic] that she buys from minorities, not Jewish-owned companies.” Mr. Finck concluded that “[o]bviously, she did not like Jews, especially conservative religious Jews and she absolutely refused to consider our firm as a possible vendor.”

Mr. Finck further described how, in 1987, he was given an opportunity to present a computer to Revlon. He stated that “as soon as the buyers saw [him in his] Chassidic dress and appearance, [he] was given the cold shoulder and excuse there were other brand units that they needed to test and they would get back to me.” He alleged this opportunity cost him “several hundred thousand dollars.”

In an additional statement, Mr. Finck described how he was unable to get business from BMG, a large book publisher. He stated that he had previously been working with a buyer who told him that since a German company had taken over the firm, “his manager told him in no certain terms [sic] if he wanted to keep his job . . . he was to stop purchasing any more electronic or computer items from 47<sup>th</sup> St. Photo.”

As to the assertions regarding Paine Webber and Chase Manhattan Bank, SBA noted that

although Mr. Finck stated 47<sup>th</sup> Street Photo's inability to obtain large contracts for major purposes was due to his dietary and religious constraints, this claim is contradicted by the record. First, Mr. Finck indicated he was hired by 47<sup>th</sup> Street Photo because it was a very Chassidic Jewish Company. Further, the record indicates 47<sup>th</sup> Street Photo regularly did business with Paine Webber and Chase Manhattan Bank. Thus, it was not unreasonable for SBA to conclude that Paine Webber and Chase Manhattan Bank may have elected not to work with 47<sup>th</sup> Street Photo on contracts for major purchases for reasons other than bias.

As to Manufacturer Hanover Bank, SBA noted that, based on the information provided, Mr. Finck's statements regarding the woman's views towards Jews appeared to be conclusory. Regarding the incident with Revlon, SBA explained the claim lacked specificity to allow for an evaluation of the claim of bias, noting the statement was not clear as to whether Mr. Finck had an opportunity to present to Revlon or "how the actual purchase decision was made, i.e., direct award, bid, etc." Similarly, the assertions as to the incident with BMG did not explain how Mr. Finck was negatively impacted by the failed relationship.

With regards to employment, SBA takes into account "such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields." 13 C.F.R. § 124.103(c)(2)(iii)(B).

Based on the standard of review the undersigned must employ, it was not unreasonable for SBA to conclude Mr. Finck failed to sufficiently demonstrate personal experiences of substantial and chronic social disadvantage and a negative impact on entry into or advancement in the business world because of his employment experiences. 13 C.F.R. § 134.406(b).

As to Mr. Finck's employment history, SBA again (1) addressed the evidence submitted; (2) informed the applicant of the facts relied upon in reaching the conclusion; and (3) clearly stated a reasonable rationale for the conclusion. *See Matter of Ace Technical, LLC*, SBA No. SBDA-178 (2008).

As noted by SBA, many of Mr. Finck's statements are speculative or lack specificity. For example, while trying to procure employment with banks with branches in neighborhoods with large concentrations of Chassidic Jews, Mr. Finck states he "was told clearly that [his] dress code was not conducive to the accepted banking image." However, the record does not describe any specific instance in which a comment or action was made regarding Mr. Finck's dress code during his attempts to procure employment with these banks.

Similarly, the affidavits provided by Mr. Finck's friends merely conclude Mr. Finck was subject to bias absent specificity as to how or when the bias occurred. *See In the Matter of Bitstreams, Inc.*, SBA No. BDP-122 (1999) (citing *Matter of Sierra Environmental Services*, SBA No. 550 (1996) (explaining "[s]tatements merely characterizing conduct as abusive, derogatory, disparaging or discriminatory do not provide sufficient information about the underlying acts to permit the SBA to find the applicant established the social disadvantage claim.")).

### C. Business History

As to business history, in his original submission, Mr. Finck explained that “the business environment is not designed or structured to let Chassidic Jews compete equally in a free market.” He explained he was constantly reminded Chassidic Jews outward appearances make clients uncomfortable, and, as a result, he had to pay “outside, non-Chassidic technicians higher wages to service (the) clients.”

He further explained the negative impact is evident in Y & S's pricing, stating:

. . . in order for Y & S to obtain contracts, we have to be much lower in price that [sic] the prevailing market rates offered by our non-Chassidic competitors. Our low pricing is the only advantage we have that drives our customers to buy from Y & S. We have tested this theory by raising our prices to match our next lowest competitor and we suffered loss of work. Our regular customers would not order from us at our increased pricing, but instead ordered from our competitors at the same higher price. We can positively state that, without a doubt, discrimination against Y & S is ‘alive and well’ in New York City today!

He further explained that many company representatives, including subcontractors, show a preference for dealing with his non-Chassidic son and that Y & S struggles to obtain even small lines of credit.

SBA explained it had determined that many of the statements in the initial application were “general and conclusory.” In the reconsideration request, Mr. Finck provided additional detail as to the alleged instances of discrimination related to business opportunities; however, SBA determined this information was insufficient.

With regards to Mr. Finck's assertions as to having to hire non-Chassidic technicians at higher wages, SBA concluded the record lacked sufficient detail to be evaluated, such as “the dates and names of persons and companies involved.” Further, SBA noted the record shows some companies indicated a preference for uniforms as opposed to non-Chassidic attire, and the record did not indicate the uniform requirement did not apply equally to competitors.

In the request for reconsideration, Petitioner provided additional information, explaining, in part:

How this bias affects me is simple: lower profit margins. As you will see in the financials you have requested for 2011, my profit margin, while positive, is very small. On sales of almost \$2 million, with reasonable expenses, my profit is \$10,608 or .0059 (1/2 of 1 %)! Our cost of goods sold is fixed and we are constantly trying to improve it through better pricing from our suppliers, so the only answer toward improving our margins is in our sales, or pricing. The industry standard for technology companies on average is 10.59%. This is over 1,800% higher than our .00579%. Even if Y&S were performing at half this ratio

of 900%, this would suggest that if our pricing (sales) were closer to the competition in a free market unencumbered with biases and prejudices, our sales would jump to a minimum of \$9 million! I can't think of a worse adverse economic impact.

Mr. Finck further asserted that his lines of credit are also affected by his race and religion as a Chassidic Jew. He explained that although he could not prove that he has had problems with banks and creditors because he is a Chassidic Jew, he could list the institutions and credit lenders he had tried to work with in the past.

As to the allegations regarding prevailing market rates, SBA noted the record lacked sufficient information, explaining:

. . . your discussion of profit margins does not fully address a number of factors potentially influencing your profit margins versus those of your competitors such as, rents, salaries, nature of products and services being sold and associated cost differentials. Additionally, you did not include information regarding actual contracts or bids and the associated pricing versus normal market rates.

In the May 7, 2013 letter, SBA explained Mr. Finck's experiences with some of the banks had no discernible relation to bias; for instance, Mr. Finck himself closed one of his accounts because the banker "invested much of [his] retirement funds in misplaced investments without [his] knowledge or permission," and another bank closed his account because he was not generating enough trading.

However, Mr. Finck alleged that the Bank of New York accused Chassidic Jews of criminal activities and forced him to close his account, resulting in the loss of a \$50,000.00 line of credit. SBA noted Mr. Finck indicated he had never had any previous problems with this bank until meeting with a woman from the audit department in the fall of 2004. During this incident, he was questioned regarding a wire transfer for over \$700,000.00. Mr. Finck acknowledged the audit could have been justified because the bank may have been suspicious of illegal money laundering. Mr. Finck alleged the bank accused him of money laundering and intimidated several times that Chassidic Jews were not considered to be straight business people.

SBA noted that while the attitude of the bank representative may have been inappropriate, it was not unreasonable for the bank to have concerns regarding the transaction, noting that the movement of a large sum of money through a business account and not generated through normal business activities would generally raise concern. Thus, the record does not demonstrate the audit and subsequent account closure was due to religious and/or racial bias.

However, as to an incident regarding Samsung, SBA concluded that Mr. Finck had demonstrated biased treatment and a negative impact by a preponderance of the evidence. As to this incident, SBA determined that both Mr. Finck and his son Mordy provided consistent statements indicating a Samsung representative who had previously been supportive of Y & S became "very uncomfortable and distant" upon meeting Mr. Finck and was never in contact with the company again. As a result, Y & S did not receive a more lucrative license with Samsung.

SBA also addressed the numerous attachments provided by Petitioner, concluding they were not indicative of negative impact due to bias. Among them was a claim that Mr. Finck wanted to meet with a sales manager from Extron who indicated she did not have time to meet with him. Another representative of Extron thereafter informed Mr. Finck that she did not trust Mr. Finck, and that he looked like “Santa Claus.” However, SBA noted that in the request for reconsideration Mr. Finck explained he ultimately did receive the sought after dealership with the company. Accordingly, SBA concluded Petitioner did not demonstrate with a sufficient level of detail that the company had been subjected to biased treatment which negatively impacted entry or advancement in the business world.

In the initial application, Mr. Finck also provided a statement related to a venture capital roll up that occurred in 1999 while he was working with M&M Computer. He stated that the lawyer he was working with, Mr. Mortner, found a venture capitalist in Chicago who did industry roll ups. Mr. Finck explained the venture capitalist seemed eager to work with them, but at the last second “said he was not interested and could not give us any reasonable rational [[sic] why we did not move forward.” Mr. Finck asserted that Mr. Mortner informed him “anti-Semitism played heavily in the venture capitalist's decision...”

In the May 7, 2013 letter, SB A noted the statement in the record from Mr. Mortner indicated the venture capitalist “cancelled the meeting and his excuse was that he did not trust the head of the management team who was one of the most impressive executive [sic] you could every [sic] meet.” Mr. Mortner further stated:

Mr. Finck felt that he was encouraging us to move forward just so he could put the knife to our backs. I did not agree with him but nonetheless how does one explain the way that [the venture capitalist] acted. At least he should have let us come to Chicago with our paper work. Is this an act of blatant Anti-Semitism to end of the dream of an individual obviously dressed as a Hasidic Jew? That answer is I just do not know.

Thus, SBA concluded that the record contained conflicting information. Although Mr. Finck asserted Mr. Mortner had informed him anti-Semitism played heavily in the decision, Mr. Mortner indicated he did not agree with Mr. Finck's assessment of the situation, and stated he was unsure as to whether anti-Semitism played a role in the decision. SBA further noted that “it is not unusual for such deals to fail because of the lack of enthusiasm and/or trust in the designated manager or management team.”

SBA noted Mr. Finck had also described how, while CEO of M&M Computers, he won a bid with the NYC Finance Division to service their PCs. However, a committee ultimately refused to honor his bid, claiming his firm was too small and, because Mr. Finck was “Shabbats observant, they doubted that [he] could find personal [sic] to service their equipment when a major emergency arose either on Saturday or on Jewish holidays.” Although Mr. Finck informed the committee that he would subcontract that aspect of the bid to another firm, they did not accept this as a solution. Mr. Finck concluded that “[c]learly, the City of New York discriminated against [him] because of [his] religious beliefs.”

In the May 7, 2013 letter, SBA noted that a letter in support of this claim written by Ralph Zutler indicated that:

. . . when you returned from your meeting with the IT Director, you informed him of what had transpired, indicating that you told him that the IT Director had told you that the city could not take a chance by hiring a firm where the President would not pick up the phone or beeper on Saturday. He noted that you told him that the IT Director apologized to you and advised that you would be receiving a letter from (he city stating that your bid was not acceptable for that reason.

Thus, SBA determined that while unfortunate Mr. Finck's firm was not awarded the contract., the record did not support by a preponderance of the evidence that the denial of this contract was due to biases directed at Mr. Finck because of his religion and/or appearance. Instead, it appeared the city was concerned about potential unavailability.

Last, SBA noted that Mr. Finck had alleged his firm was denied credit from Castle Pines in 2011 for discriminatory reasons. In his initial application, Mr. Finck alleged that his son initially met with a Capital Pines representative about getting a \$250,000.00 credit line. Mr. Finck's son indicated the meeting went very well. However, when the representative met Mr. Finck the two got "the coldest feeling you can imagine," and the company was denied the line of credit. SB A noted that this claim lacked a sufficient level of detail to allow SBA to evaluate the claim and did not describe how this denial negatively impacted entry or advancement in the business world.

With regards to business history, "SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations." 13 C.F.R. § 124.103(c)(2)(iii)(C).

After thoroughly examining the record, SBA determined that, based on the totality of the evidence presented. Petitioner did not demonstrate social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(2)(iii). Although Petitioner credibly demonstrated one example of bias, SBA determined this one example was insufficient to demonstrate Petitioner faced substantial and chronic discrimination that affected his advancement in the business world. *See Matter of Alabasi Construction, Inc.*, SBA No. BDP-368(2010).

While Petitioner is not required to cite examples in all of the three areas in order to demonstrate social disadvantage, the undersigned nonetheless finds SBA's determination reasonable. *Matter of Bitstreams, Inc.*, SBA No. BDP-122 (1999). SBA did not, as alleged, raise the bar to clear and convincing evidence.

As discussed, the review of the administrative record is narrow; the undersigned may not substitute his own judgment for that of the SBA. 13 C.F.R. § 134.406(b). *See Matter of Spectrum Contracting Services, Inc.*, SBA No. BDP-378 (2010). Nor may the undersigned review the

record de novo to decide whether SBA's ultimate conclusions are correct. *See Matter of Ace Technical, LLC*, SBA No. SDBA-178 (2008). Rather, the undersigned must determine only whether SBA's determination is reasonable and supported by the administrative record. *Id.*

Here, SBA addressed the evidence contained in the administrative record and provided a rational explanation for its conclusions, articulating the facts it relied on in determining Petitioner had not demonstrated social disadvantage. *See Matter of Ace Technical, LLC*, SBA No. SBDA-178 (2008). Accordingly, the undersigned finds SBA's decision denying Y & S admission to the Program was not arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b).

ORDER

WHEREFORE,

IT IS HEREBY ORDERED THAT Petitioner's Appeal is DENIED and SBA's Determination is AFFIRMED.

THE PARTIES ARE HEREBY NOTIFIED THAT, subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. 13 C.F.R. § 134.409(a).

Done and dated this 25th day of October, 2013 at Galveston, Texas

DEAN C. METRY  
Administrative Law Judge