United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Bartkowski Life Safety Corp.,	SBA No. BDPE-516
Petitioner	Decided: April 14, 2014

ORDER REMANDING TO SBA FOR FURTHER CONSIDERATION

On October 14, 2013, Bartkowski Life Safety Corp. ("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 filed a response to the *Appeal Petition* on December 9, 2013, in which it defended its conclusion that Petitioner did not meet the requirements for entry into the 8(a) BD Program. The matter 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.[1]

I. Procedural History

On January 6, 2012, Petitioner submitted an application for certification as a participant in the 8(a) BD Program on the grounds that its owner, Ms. Lauren Sustek, was socially disadvantaged on the basis of gender. The SBA issued an Initial Determination Letter on February 15, 2013, denying the application. The SBA found that Ms. Sustek was not socially disadvantaged, that Petitioner did not meet the two-years-in-business requirement, and that Petitioner had not shown the potential for business success.

On April 1, 2013, Petitioner filed a Reconsideration Request ("Recon Request"), which included an expanded Personal Eligibility Statement ("Recon PES") supporting her claim of social disadvantage. On August 30, 2013, the SBA issued a Reconsideration Determination Letter ("Recon Determination Letter") finding that Petitioner had overcome the second and third grounds for denial, but again denied Petitioner's application after concluding that Ms. Sustek still had not proven social disadvantage due to her gender. Petitioner timely filed an *Appeal Petition*.

[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.

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 and 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. 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.[2] 13 C.F.R. § 123.103(b).

Individuals who are not members of any presumptively disadvantaged group must establish individual social disadvantage by providing evidence demonstrating that (1) they have at least one objective distinguishing feature that has contributed to their social disadvantage; (2) they have personally experienced substantial and chronic social disadvantage in the United States because of that distinguishing feature; and (3) the disadvantage has negatively impacted their entry into or advancement in the business world. 13 C.F.R. § 124.103(c).

Objective distinguishing features include ethnic origin, gender, and physical handicap, among others. Generally, an applicant must describe multiple significant incidents to prove substantial and chronic social disadvantage. However, a single incident can meet this prong if that incident is sufficiently substantial and far-reaching. *Ace Technical, LLC,* SBA No. SBDA-178, p. 4 (2008). The classic example of such an incident is a single act of workplace discrimination, such as a gender-based pay disparity, that lasts for multiple years. To prove negative impact, an applicant must submit a PES recounting specific, bias-motivated events in their education and employment histories and in their dealings as owner of the applicant business. 13 C.F.R. § 124.103(c)(2)(iii)(A)-(C). The SBA must then determine whether the totality of the described events show the requisite disadvantage and negative impact. 13 C.F.R. § 124.103(c)(2)(iii).

III. Burden of Proof

An applicant seeking entry into the 8(a) BD Program on the basis of individual social disadvantage must prove that disadvantage by a preponderance of the evidence in the administrative record. 13 C.F.R. § 124.103(c)(1). The preponderance standard has been described as the "most common standard in the civil law." *Bitstreams, Inc.*, SBA No. BDP-122 (1999). Under this standard, an applicant is not required to convince the fact-finder that an incident was motivated by bias. *Southern Aire*, SBA No. BDP-453, p. 8 (2012); The applicant must only present evidence sufficient to lead the fact-finder to conclude that it is more likely than not that bias was a factor. *Director. Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 279 (1994); *Southern Aire*, SBA No. BDP-453, at 8; *see also, Woroco Int'l.*, SBA No. BDP-174, p. 5 (2002) ("a fact has been proven by a preponderance of the

[2] 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).

evidence if . . . 'the scales tip, however slightly, in favor of the party with the burden of proof as to that fact.") (quoting *Ostrowski v. Atlantic Mut. Ins, Cos.*, 968 F.3d 171, 187 (2d Cir. 1992). Although an applicant does not have to provide conclusive proof of an event, the event "must be presented in sufficient detail to be evaluated." *Seacoast Asphalt Servs., Inc.*, SBA No. SDBA-151, p. 6 (2001). To be sufficiently detailed, the claim must generally describe (1) when and where the allegedly discriminatory incident occurred; (2) who discriminated; (3) how the incident occurred; and (4) how the applicant was adversely affected by the incident. *See Southern Aire*, SBA No. BDP-453, at 7; *Loyal Source Gov't Serv., LLC*, SBA No. BDP-434, p. 5 (2012).

In many 8(a) BD Program cases, the PES represents the entirety of the applicant's evidence. No corroborating evidence is necessary. *Bitstreams, Inc.*, SBA No. BDP-122, at 10-11; *Ace Technical*. SBA No. SDBA-178, at 5. Although the SBA is free to consider lack of corroboration while weighing the evidence, any credible evidence that has not been contested must be accepted as true. *Ouock Tine v. U.S.* 140 U.S. 417, 420 (1891). As there is generally no adverse party in these cases, the applicant's PES often goes uncontested. However, the Agency may discount or disregard an uncontested claim if it is (1) inherently improbable; (2) inconsistent with other credible evidence in the record; (3) lacking in sufficient detail; (4) merely conclusory; or (S) if the applicant failed to provide apparently available supporting evidence without explanation. See, *Southern Aire*, SBA No. BDP-453, at 7; *Bitstreams. Inc.*, SBA No. BDP-122, at 9; *StrategyGen Co.*, SBA No. BDPE-460 (2012). If the SBA discounts or disregards the evidence, it must provide "cogent reasons for denying the claim. It may not arbitrarily disbelieve credible evidence." *Bitstreams, Inc*., SBA No. BDP-122, at 10 (citing *Greenwich Collieries*, 512 U.S. at 279).

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. 5 U.S.C. § 706(A)(2); 13 C.F.R. §§ 134.402, 134.406(a)-(b). 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. *See Burlington Truck Lines, v. United States*, 371 U.S. 156, 168 (1962); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

If the Agency's decision fails to address these factors, the record is considered incomplete and the case may be remanded for further consideration. 13 C.F.R. § 134.406(e)(1); *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); *G.M. Hill Ene'e Inc.*, BDPE-496, Ruling and Order Denying Government's Petition for Reconsideration (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. *State Farm*, 463 U.S. at 42; *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) ("This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith-not whether it was right."); *Ace Technical*, SBA No. SDBA-178, at 3 ("[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct."). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park. Inc. v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

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

Petitioner asks the Court to review the SBA's Recon Determination Letter, set aside that decision, and find that Petitioner should be admitted into the 8(a) BD Program. After a careful review of Petitioner's 8(a) BD Program application, the Recon Request, the SBA's Determination Letters, and the Administrative Record as a whole, the Court finds that although the Agency properly rejected several of Petitioner's claims, its analysis of other claims was absent or flawed. Accordingly, remand is necessary to allow the SBA to correct these deficiencies.

This case bears a number of similarities with two cases decided by a predecessor court in 2011: *Tootle Constr., LLC*, SBA No. BDP-420, 2011 WL 8780743 (2011); and *dsi Assoc.*, SBA No. BDP-413, 2011 WL 8780736 (2011). Not only are many of the factual situations similar, the SBA's treatment of the claims is nearly identical in many respects. This is unfortunate, because the SBA's conclusions were found to be arbitrary, capricious, and contrary to law in both prior cases. The Tootle court, for example, found that "the SBA committed a number of significant legal errors" that warranted reversal of its decision. *Tootle* at * 16. Specifically, the court found that the SBA "essentially applied a clear and convincing burden of proof rather than the proper preponderance standard," and made findings that contradicted the record. *Id.* at * 16. The Agency also "often ignored the value of Ms. Tootle's PES as substantive evidence, and did not provide any cogent reason in the record for discrediting her account." Id. Many of the same errors are present here.

A. Mistake of Law - Reliance on "Ultimate Success" Rationale

Generally, an 8(a) BD Program application will include a summary of the applicant owner's educational and employment experiences, as well as her experience as owner of the applicant company. It is through these examples that the SBA must determine whether the owner has met the social disadvantage requirement. 13 C.F.R. § 124.103(c)(2)(iii)(A)-(C). As noted in the Initial Determination Letter, Petitioner's initial PES did not discuss her educational and early life experiences.[3] Petitioner's Recon Petition, however, did include an expanded PES that touched upon this stage of her life.

In the Recon PES, Ms. Sustek stated that her parents and teachers provided no career guidance for her, instead perpetuating the stereotype that women should be mothers, teachers, or nurses. Her other educational experiences reinforce this claim. For example, Ms. Sustek did not take shop class in high school because she was told "girls don't take shop." As a high school senior, she was placed in the Home Economics Related Occupation class instead of the college prep track despite being in the top 25% of her academic class at the time. She stated that "having girls attend the vocational classes kept them in a traditional woman low paying career stereotype." Additionally, she stated that her parents gave her brother career guidance, while she and her sister were ignored, and she received no career advice by her community college and college counselors.

After summarizing Ms. Sustek's educational experiences, the SBA noted that some claims — like being admonished by her algebra teacher for sleeping in class — were not indicative of gender bias. It then concluded that, for other events, the lack of career guidance "did not stop you from obtaining an AA and a BBA in Business. Thus it cannot be determined that your experiences . . . negatively impacted your entry or advancement in business."

In reaching this conclusion, the SBA resurrects its "ultimate success" rationale.[4] The

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[3] There is no requirement that the applicant cover all three areas. Any one area can provide sufficient evidence to prove social disadvantage.

[4] Linda Tootle and Susanne Hogan both alleged in their PES's that their high school guidance counselors placed them in home economics classes despite their requests to take shop class. Ms. Tootle's counselor told her that her scores on the Armed Services Vocational Aptitude Battery only qualified her to be a nurse. Ms. Hogan' counselors advised her to get married and be a teacher. Both women also described hostility from college professors when they attempted to take traditionally male-dominated courses like advanced math, chemistry, and landscape architecture. Ms. Hogan was told by a professor that engineering was not a proper field for a woman. The SBA determined that because they eventually earned degrees and got jobs in their fields, they had not suffered any negative impact. The court in *dsi Assoc*., disagreed, finding that although the "discouragement ultimately may not have *prevented* Ms. Hogan from earning her bachelor's and master's degrees, the evidence in the record supports the conclusion that it did negatively impact Ms. Hogan's entry into the business world." (emphasis in original). Thus, the SBA's conclusion "runs contrary to the evidence in the record and is thereby unreasonable." *dsi Assoc.*, at *8

SBA used the same reasoning to reject the educational claims of Linda Tootle and Susanne Hogan, the applicants in *Tootle* and *dsi Assoc.*, respectively. The rationale was soundly rejected in *dsi Assoc.*, and has been repeatedly criticized by this Court as well. *See, e.g.*, *Southern Aire*, SBA No. BDP-453; *StrategyGen Co.*, SBA No. BDPE-460. The rationale assumes that complete frustration of purpose is the only legitimate negative impact. As a result, the SBA concludes that Ms. Sustek experienced no harm because she eventually earned associate and bachelor's degrees. There is no rationale for this all-or-nothing position. An applicant owner whose path to entrepreneurship has been made more difficult because of her social disadvantage has experienced a negative impact. She is akin to a hurdler racing a sprinter. Even if the hurdler eventually passes the finish line, she has traveled a more daunting course and expended far more energy than her rival. The "ultimate success" rationale would recognize the unfairness of the race if she tripped on the final hurdle and quit, but not if she got up and completed the race. In essence, then, the SBA punishes the applicant for having the will to persevere. This is nonsensical. Rather than simply looking to the end result, the SBA must consider whether Ms. Sustek's lack of career guidance was the result of gender bias, and if so whether it inhibited her opportunity to pursue her academic goals. Remand is therefore warranted to allow the SBA to apply the correct standard.

B. Mistake of Law - Failure to Consider Social Patterns and Pressures

The Recon Determination Letter also failed to consider whether Ms. Sustek was the victim of social patterns or pressures that discouraged her from seeking a professional or business-focused education. This is one of the considerations specifically identified in 13 C.F.R. § 124.103(c)(2)(iii)(A). As described above, Ms. Sustek's Recon PES explicitly alleges that the society in which she grew up actively and passively directed her towards traditionally female occupations, thus minimizing her entrepreneurial opportunities. If credible, this would be the very definition of a negative "social pattern or pressure."[5] The Recon Determination Letter even quotes the allegation directly from the Recon PES. It does not, however, actually discuss the allegation in a "social patterns or pressures" context. Its failure to do so, especially when Petitioner expressly raised the issue, is error.[6]

C. Mistake of Law - Claims Unreasonably Dismissed

At several points throughout both Determination Letters, the SBA chooses to disbelieve Petitioner's testimony without offering any cogent reason for its skepticism. This is also an error, the Agency is not free to arbitrarily disbelieve credible evidence. Rather, it must articulate a valid, evidence-backed reason to discount or disregard it. The SBA searches for such reasons here, with mixed results.

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[5] Ms. Hogan made similar assertions in *dsi Assoc*. That court also noted that the SBA failed to address the claim in a social patterns and pressures context.

[6] The Court recognizes that determining the impact of social patterns or pressures in a specific neighborhood at a specific point in history is a nebulous and subjective exercise. However, 13 C.F.R. § l24.103(c)(2)(iii)(A) demands that the exercise be undertaken all the same.

For example, Ms. Sustek alleged that a female co-worker at Walsh Construction enjoyed better projects and workplace benefits because she was having an affair with her supervisor. The SBA dismissed this claim by noting that there was insufficient evidence that the affair was the reason for the co-worker's better treatment. The Agency also faulted Petitioner for not explaining what the enhanced projects or perks were, and why they were better.

The SBA fails to explain how additional information about the perks and projects would serve as proof that they were awarded to the co-worker in exchange for sexual attention. Nor does it offer any suggestion as to what kind of evidence would prove this claim. The Agency cannot reasonably expect Petitioner to obtain admissions, on the record, from either of the amorous parties. How then is it to acquire the smoking gun evidence the SBA demands, other than engaging in a clandestine information-gathering mission worthy of the National Security Administration? The SBA cannot justify its disbelief by citing the omission of unobtainable or irrelevant evidence. *See DK Environmental,* SBA No. BDPE-481 (2013).

Petitioner stated unambiguously that "Lauren was having an affair with Lloyd Davidson and that is why she was getting some better projects and company perks." (emphasis added). The SBA's skepticism of this claim is curious. The claim is not inherently improbable. The exchange of sex for career advancement or office perks is all-too-common in the American workplace. The SBA's refusal to believe that benefits are likely to flow from such workplace trysts appears deliberately obtuse. Indeed, Petitioner expressly alleges that sexual favors were "frequently the only way a woman could progress" at the company. Several other claims support Petitioner's depiction of a deeply chauvinistic work environment. For example, Petitioner described being sexually harassed by Program Manager Mark Brunski from October 2000 until August 2001. She also alleged harassment by Business Group Manager Ric Krause from 2004 until 2007. The SBA does not refute the existence of either incident Given that two managers at the company have attempted to initiate romantic relationships with Ms. Sustek, it seems entirely plausible that a different manager would attempt to do the same with a different female employee, albeit with more success. There is thus ample evidence in the record to support Petitioner's assertion. The SBA disregards this evidence by simply noting that other evidence is missing. This is not enough. It must explain why the omitted evidence is more persuasive than the evidence in the record. There is no such explanation present here.

The SBA also consistently disregards claims for being insufficiently detailed. For example, in responding to the harassment by Mr. Krause, the SBA again stated only that the incident was "unfortunate," but dismissed the claim because "no further details were provided and you did not disclose how his behavior impacted your advancement." The sufficiency critique is impermissibly vague, as it gives Petitioner no clue where the defect lies or how to resolve it in the future. A claim is adequately detailed if it describes (1) when and where the allegedly discriminatory incident occurred; (2) who discriminated; (3) how the incident occurred; and (4) how the applicant was adversely affected by the incident.[7] *Southern Aire*, SBA No. BDP-453, at 7.

[7] It is worth noting that the "adverse effect" requirement is slightly different from the "negative impact" requirement. The latter requires some connection to the applicant's entry or advancement in the business world. The former has no such limitation. Here, the SBA concluded

In this incident, the first three criteria are expressly laid out, but there is no distinct statement about how the incident affected Ms. Sustek. The Court presumes that this is the reason the SBA disregarded the claim. If so, the SBA implies that unwanted physical advances don't — in and of themselves — have an adverse impact on their victims. In other words, the SBA appears to say, sexual harassment is not inherently harmful, even if it persists for years. The Court could not disagree more. By demanding some additional damage in excess of the harassment itself, the SBA gives a potent signal to employers that such conduct is acceptable.[8] The Court refuses to believe that the SBA actually intends to condone workplace sexual harassment.[9]

The SBA also cites insufficient detail to justify dismissing Petitioner's claim that Mr. Brunski blocked Ms. Sustek's promotions. Although she was told she wasn't promoted because she lacked the proper education, she asserted that males with less education were routinely hired and promoted. The SBA noted that Petitioner "did not provide any names of individuals who had degrees that were getting hired and promoted." First, it is questionable that Ms. Sustek could recall the names of co-workers ten years after the fact. More importantly, these details are hardly fundamental to the analysis of this claim. Petitioner did not allege that the men who got hired and promoted discriminated against her. She specifically identified her antagonist as Mr. Brunski. The second sufficiency factor has therefore been met. The names of the other men do nothing to prove or disprove her story.[10]

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that Mr. Krause's years-long harassment didn't negatively impact Ms. Sustek's career. This may be true. However, it does not mean that the harassment was inconsequential. As such, failure to produce evidence of negative impact does not render the claim insufficiently detailed.

[8] Ms. Sustek did allege that Mr. Brunski blocked her promotion in retaliation for her spurning his romantic advances, thereby causing additional damage. The SBA, again, apparently accepted that the harassment occurred, but disregarded the retaliation claim as evidence of negative impact. There, however, the Agency cited plausible, evidence-backed grounds for doing so.

[9] Interestingly, it seems the SBA does condone family-status-based bias. Walsh Construction twice justified paying Ms. Sustek less than her male counterparts because the men had families to provide for. The SBA cited these statements as evidence that the pay disparity was not due to Ms. Sustek's gender. Though perhaps distasteful, this is a reasonable conclusion under the circumstances. Petitioner did not provide information about how men without families or women with families were treated at Walsh, even after being asked to do so. Moreover, unlike gender, familial status has not been recognized as an objective defining feature sufficient to meet the requirements of 13 C.F.R. § 124.103(cX2)(i).

[10] Additionally, Petitioner made no comment about the promotion of men with degrees. The claim contended that Ms. Sustek was passed over in favor of men without degrees. This may merely be a typographical error. It may be an analytical oversight. Or it may be evidence that the SBA introduced a new variable into this claim. Under any scenario, the names of these men are tangential details that have little to do with Mr. Brunski's alleged actions.

The same rationale is used to dismiss Petitioner's claim that, unlike others in her office, she did not receive a pay raise after earning her associate degree. The SBA demanded "the names of others in the office that received their degrees and received pay raises." Again, these names are of only marginal probative value. If the SBA believes otherwise, it must provide a reasoned explanation for that belief. It does not do so in either of these claims.

D. Incomplete Administrative Record - Failure to Examine All Evidence

Next, the SBA commits error by neglecting to fully analyze all of Petitioner's claims. As this Court noted in *Southern Aire Contracting, Inc.*, SBA No. BDP-505 (2013), a petitioner's claims can each be offered as evidence of social disadvantage, negative impact, or both. First, the SBA must determine whether a claim shows evidence of social disadvantage; and, if so, whether the claim identifies a relevant negative impact. Not every claim need meet both criteria. An incident may be evidence of social disadvantage[11] but not contain sufficient evidence of negative impact in the business world.[12] In such a scenario, the lack of professional harm does not negate the fact of the bias. The SBA errs here by repeatedly rejecting negative impact claims while remaining silent about the possible social disadvantage aspect of those claims.[13]

First, the SBA offers no opinion whether Ms. Sustek suffered a gender-based disadvantage when she was required to take home economics instead of college prep courses, or when she was told that "girls don't take shop." These are direct allegations of gender-motivated bias in Petitioner's Recon PES that go entirely unaddressed.

Second, Petitioner described in detail the nature of the sexual harassment she endured from Mr. Brunski. He allegedly spent months pursuing a romantic relationship with Ms. Sustek. Finally, after realizing she would not submit to his advances, he called her a "lesbian" and a

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[11] The Court notes that the "chronic and substantial" language relates only to the second prong of 13 C.F.R. § 124.103(c)(2); i.e., the social disadvantage prong. As a result, a single incident will not normally be enough to satisfy that prong. By comparison, a single negative impact may be sufficient to meet the third prong. *See Southern Aire*, SBA No. BDP-505 (SBA appeared to require multiple incidents to each show negative impact).

[12] This is not a bilateral arrangement. If an incident is not evidence of social disadvantage, there is no need to discuss any negative impact related to it.

[13] The SBA's *Answer* states that Petitioner was initially denied in part because it had not shown that Ms. Sustek had been negatively impacted by her social disadvantage. The implication of this argument is that the second prong had been met, making negative impact the only outstanding issue. This is inaccurate. The Initial Determination Letter stated that "it cannot be determined that you have experienced chronic and substantial social disadvantage due to gender bias and that your entry or advancement was negatively impacted." (emphasis added). The Recon Determination Letter also stated that Petitioner had not established gender bias or negative impact. Moreover, neither Determination Letter acknowledges any of Petitioner's claims as evidence of social disadvantage. It is therefore clear that the SBA did not consider the second prong to be met.

"bitch" in front of their co-workers. The Initial Determination Letter labeled this incident as "unfortunate." It did not, however, discuss whether the incident was an example of social disadvantage caused by Ms. Sustek's gender. Instead, it shifted immediately to the insufficiency of Petitioner's proof of negative impact. The Recon Determination Letter offered no additional discussion of the social disadvantage prong for this claim.

Third, in her Recon PES, Ms. Sustek alleged that a contractor invited the men in her office to a Christmas party that included female strippers. Ms. Sustek was not invited. When she asked about the event, she was told it "was a guy thing." In response to this claim, the Recon Determination Letter concluded that: "While you state this type of event excludes women, it is not clear that you not attending affected your advancement. No details were provided."

Fourth, Ms. Sustek alleged that, while at the Fire Stop Contractors International Association convention, no convention attendees attempted to network with her and she was the only female attendee in the professional development classes. She also stated that one in-class presentation included various sexual innuendos and an image of attractive young women in bikinis watching a flaming building. The SBA dismissed the claim by stating: "While unfortunate, it is not clear how this incident impacted your advancement."

Fifth, Ms. Sustek recounted an incident where a subcontractor yelled at her, told her she didn't know what she was talking about, and called her a ""little girl" in front of other subcontractors. The SBA stated again that it was "unfortunate that you were subjected to these comments," but concluded that Petitioner had "not shown how this incident has negatively impacted the firm's advancement."[14]

By focusing entirely on the negative impact implications of these claims, the SBA offers Petitioner no insight into whether the claims constituted evidence of gender-based social disadvantage. If any of the claims were accepted, the SBA did not explain why they did not satisfy the second prong's "chronic and substantial" criteria. If the SBA rejected the claims, it gave no reason why they were defective. As a result, Petitioner is left unsure whether the claims hit their mark, at least as they relate to the chronic and substantial social disadvantage element. This error also warrants remand so the necessary explanations can be added to the Record.

ORDER

Petitioner has offered examples of gender-motivated bias in all three phases of Ms. Sustek's life. She has provided evidence that the social disadvantage allegedly caused by that bias has hindered and frustrated her entrepreneurial opportunities. In dismissing several of these claims, the SBA applies improper standards, fails to discuss relevant evidence, or omits necessary analysis and explanation. As a result, the Agency's ultimate decision to deny

[14] Although this claim appears at the end of Petitioner's initial PES, it is not actually a 'business history" claim. Petitioner states that this incident occurred "during my time as a PE (Project Engineer) at the Cook County Hospital." She was employed by Walsh Construction while she was working on this project. The SBA's reference to the "firm's advancement" is therefore erroneous.

Petitioner's entry into the 8(a) BD Program stands on unstable ground. A reassessment of Petitioner's claims, in their totality, may lead to a different outcome, Accordingly, the above-captioned case is hereby **REMANDED**. The SBA shall issue, serve, and file a new Initial Determination, consistent with this *Decision and Remand Order*, on or before May 14, 2014. The SBA may rely on evidence that has already been submitted.

The SBA is **ORDERED** to follow the procedures mandated by the applicable regulations and to set forth its findings with specific reasons for each finding based on the facts relating to each significant incident described by Petitioner. If the SBA determines that Petitioner is not eligible for the 8(a) BD Program, Petitioner is authorized to either request reconsideration and submit additional information, or to appeal the determination directly. 13 C.F.R. §§ 124.205. 124.206. If the SBA approves Petitioner's application, it shall file and serve a notice of such approval to the Court forthwith.

The Court retains jurisdiction over this matter during the period of remand.

SO ORDERED.

ALEXANDER FERNÁNDEZ
Administrative Law Judge