United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
KBT Contracting Corporation,	SBA No. BDPE-526
Petitioner	Decided: August 20, 2014

DECISION

On March 20, 2014, KBT Contracting Corporation ("Petitioner") appealed a determination of the Small Business Administration ("SBA" or the "Agency") in which the SBA denied Petitioner admission into the 8(a) Business Development Program ("8(a) BD Program') after concluding that its owner. Mrs. Rebecca Timmons. had not experienced chronic and substantial social disadvantage as a result of gender bias and had not shown full control over the business. *See* 13 C.F.R. parts 124. 134. The SBA responded to the *Appeal Petition* on April 30, 2014. 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.

I. Procedural History

Petitioner first applied for entry into the 8(a) BD Program on June 24, 2013, on the grounds that Mrs. Timmons was socially disadvantaged based on her status as a woman. The Agency denied the application on October 29, 2013, finding that Mrs. Timmons was not socially disadvantaged due to her gender. It also found that Petitioner "was not operating in accordance with the requirements governing participation of non-disadvantaged individuals" because Mrs. Timmons' husband, Keith, largely maintained operational control of the company. Petitioner sought reconsideration of that decision on December 9, 2013. On January 24, 2014, the SBA again denied the application, for the same reasons. A timely *Appeal Petition* followed.

On March 21, 2014, the matter was transferred to this Court pursuant to 13 C.F.R. § 134.218(a).[1] The Court has jurisdiction, under 13 C.F.R. § 134.l02(j)(1), to determine whether the SBA's decision was arbitrary, capricious, or contrary to law.

[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 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). To prove negative impact, an applicant business must submit a Personal Experience Statement (PES) recounting specific, bias-motivated events in its owner's education and employment history and as owner of the applicant business.[3] 13 C.F.R. § 124.103(c)(2)(iii)(A)-(C). The SBA must then determine whether the totality of the described events shows the requisite 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 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)).

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[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).

[3] An applicant does not need to prove social disadvantage along all three metrics. A showing of negative impact caused by substantial and chronic bias in an applicant owner's employment history, for example, would be sufficient. *See, e g.*, *Bitstreams*, SBA No. BDP-122, p. 5.

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*, SBA No. BDP-122, at 10-11; *Ace Technical*, SBA No. SDBA-178, p. 5 (2008). 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. *Quock 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 even an uncontested claim if it is (l) inherently improbable; (2) inconsistent with other credible evidence in the record; (3) lacking in sufficient detail; (4) merely conclusory; or (5) if the applicant failed to provide apparently available supporting evidence without explanation. *See, Southern Aire*, SBA No, BDP-453, at 7; *Bitstreams*, 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*, SBA No. BDP-122, at 10 (citing *Greenwich Collieries*, 512 U.S. at 279).

IV. Standard of Review

An SBA determination may 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. 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 SBA (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. *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 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. *DK Environmental*, SBA No. BDPE-481. 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 decision was not arbitrary, capricious or contrary to law. The

reviewing court's task is to decide whether the SBA 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 a correct one. *State Farm*, 463 U.S. 29; *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, p. 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 SBA's conclusion is unreasonable, and thus arbitrary and capricious, if it constitutes a "clear error of judgment." *State Farm*, 463 U.S. at 43; *McMahon Builders*, SBA No. BDPE-461 (2013). 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. *McMahon Builders*, at 4.

V. Discussion

Petitioner asks the Court to review the SBA's Determination Letter upon Reconsideration ("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 initial 8(a) BD Program application, the Initial Determination Letter, the Request for Reconsideration ("Recon Request"), the Recon Determination Letter, and the Administrative Record as a whole, the Court finds that the SBA failed to properly address many of Petitioner's social disadvantage claims. However, its second basis for denial — participation of non-disadvantaged individuals — was properly analyzed and is not unreasonable. If valid grounds for denial exist, the Agency's determination must be upheld, notwithstanding errors elsewhere in its analysis. If there are multiple bases for the denial, and one survives judicial review, the Agency's decision must be affirmed. *M.C N. Constr., Inc.*, SBA No. BDPE-472 (2013); *NAMO, LLC*, SBA No. BDP-458 (2012); *Alabasi Construction, Inc.*, SBA No. BDP-368 (2010).

A. The SBA's Social Disadvantage Determination

The SBA's analysis of Petitioner's social disadvantage claims are generally reasonable and supported by evidence in the record. Many of Petitioner's claims are vague, conclusory, insufficiently detailed, or unrelated to her own personal experiences. These claims are correctly dismissed or discounted. For example, when discussing Mrs. Timmons' employment history, the SBA found that Petitioner's Recon PES conflicted with information in her resume. This is a proper, evidence-backed justification for questioning Petitioner's credibility. The treatment of other claims is less laudable, however. At various points, the SBA ignored relevant evidence, omitted any analysis of Petitioner's claims, arrived at conclusions that are contrary to the evidence, or failed to justify its credibility critiques. These errors would warrant remand in most circumstances.

1. Education Claims

Petitioner's Recon PES described her experience in an Architecture Design course during Mrs. Timmons' freshman year at the University of Florida. She stated that she and a female friend were graded more harshly in the class because the professor did not believe women could be successful in architecture. The professor also told her that “women typically do not excel” at architecture.

The Recon Determination Letter rejected this claim, noting that Petitioner had not explained how she knew her grades were being subjected to harsher standards. It also pointed out that although Petitioner received a C in that class, she also received a C in another architecture class that semester, in which she had not alleged bias by the instructor. It thus concluded that her Architecture Design grade was not the product of bias. Both are legitimate bases for denying the claim.

However, the SBA also denied the claim because Petitioner had not included “adequate specific details such as the name of the professor or information in support of your contention that architecture was your primary career objective.” These grounds call Petitioner's credibility into question without reason. It is true that the name of an alleged antagonist is one of the enumerated detail parameters, but the lack of that information here is hardly suspicious. Mrs. Timmons took the class a quarter of a century ago. Forgetting the name of the professor is entirely understandable and should not cast doubt on the veracity of the claim, given the amount of time that has passed since that incident. *See Tootle Construction, LLC*, SBA No. BDP-420 (2011). The SBA offered no explanation why Mrs. Timmons' inability to remember this detail undermines her credibility.

Additionally, there is ample evidence that architecture was indeed Mrs. Timmons' career interest at that point in her college education. The SBA seeks evidence of Mrs. Timmons' subjective frame of mind as a freshman college student, yet it gave no weight to the fact that she took three architecture courses that year, none of which were mandatory. The Court is unsure what evidence could meet the SBA's requirement other than Mrs. Timmons' own words and actions.

The SBA also dismissed this claim as inconsistent because “the next semester, you took another architecture course which you indicated after your first semester course, you changed career paths.” This is an erroneous recitation of Petitioner's testimony. Mrs. Timmons never said she changed majors after her first semester. Rather, she stated in the Recon PES that her professor's words caused her to “rethink my choice and even change my major” from architecture to business/marketing. The SBA assumes this meant she changed majors immediately. However, this assumption is instantly discredited because she took another architecture course her next semester. The SBA thus values its assumed fact (immediate change of major) more than the objective fact (additional architecture courses). There was nothing inconsistent about Petitioner's claim. The inconsistency was created by the SBA itself.

Next, the Recon Determination Letter stated that receiving an employment offer "shows favorable treatment and lack of bias by your employers" because Mrs. Timmons graduated college with a 2.87 GPA. The Court is mystified what this passage refers to. Petitioner never alleged that gender bias by potential employers hindered her post-college job search. To the contrary, she specifically stated in the Recon PLS that she struggled to find employment because the job market was saturated with marketing majors. She makes clear that the discussion of her post-graduation job search was meant to illustrate the negative impact of the professor's statements, stating that his "biased treatment had a direct affect [sic] on my earning potential when I graduated." The SBA's comment in response to this claim did not address this point. Instead, it focused on whether the employers were biased against her. In doing so, the SBA discounted a nonexistent claim while ignoring the full analysis of Petitioner's actual claim. The SBA is obligated to consider whether her professor's "advice" constituted a "social pattern or pressure" that discouraged Mrs. Timmons from pursuing a professional or business education. 37 C.F.R. § 124.103(c)(iii)(A). There is no evidence that the SBA undertook that analysis here. Remand is appropriate to correct this oversight.

Finally, Petitioner stated that she went back to school in 2012 to earn her General Contractors License. As the only female student in her class at AAA Construction School Inc., she states that she was repeatedly disrespected by the instructor, Rob Irion. Petitioner claims she would have passed her certification test with a much higher score if not for his treatment of her in the class. The Recon Determination Letter did not address this claim at all.

2. Employment History Claims

The majority of Petitioner's claims regarding bias in her work history were properly dismissed and explained. For example, she alleged that she was passed over for promotion in favor of Roger Tillis, despite her qualifications, because he was single and male. The SBA noted that the claim never described Mr. Tillis' or Mrs. Timmons' qualifications, making it impossible to determine if she was the better qualified candidate.[4] A letter sent to corroborate Petitioner's claims of Mr. Tillis' misogynistic tendencies did not assert any bias or inappropriate interactions between Mr. Tillis and Mrs. Timmons; it merely recounted allegations of impropriety in Mr. Tillis' past. The SBA found that this was not indicative of any bias experienced by Mrs. Timmons herself.

The Recon Determination Letter strays off course at one point, however. Specifically, it denied Petitioner's claim that she was passed over for promotion in favor of two male candidates. The SBA concluded that Petitioner had not "articulated any arguments how your experience, education and accomplishment were superior when compared with that of the two individuals." This conclusion is contrary to the evidence in the record. The Recon PES specifically stated that she had "the same skills and experience," as the two men, had excellent performance reviews, was an internal candidate, and was one of the few employees with a four-year college degree. The Recon PES recited this information when summarizing the claim. This

[4] Although the SBA never speaks to the issue, Petitioner's statement that Mr. Tillis was hired because he was single and male is conclusory, and so could have been discounted on that ground as well.

is precisely the sort of comparative information that was missing in her claim about Mr. Tillis. Although the claim did not include information about the other individuals, it clearly did articulate how Mrs. Timmons' qualifications were superior.

3. Business History

The Court finds no substantial errors in the SBA's consideration of Petitioner's claims in this area.[5]

B. The SBA's Participation of Non-Disadvantaged Individuals Determination

The Initial Determination Letter found that KBT Contracting was not operating in accordance with 13 C.F.R. § 124.106, and thus was not eligible for entry into the 8(a) BD Program. Although the SBA never identifies which specific part of § 124.106 Petitioner fails to comply with, the substance of the discussion clearly references § 124.106(e)(1)-(2). This part of the regulation states that no non-disadvantaged individual or immediate family member may have the power to control the applicant business. 13 C.F.R. § 124.106(e)(1). A non-disadvantaged individual may not be a former employer unless the relationship (1) does not give the former employer control over the applicant business, and (2) the SBA determines that the relationship is in the best interests of the applicant business. 13 C.F.R. § 124.106(e)(2).

Here, the SBA concluded that Mrs. Timmons had previously worked for the firm while it was under the control of her husband, making him a former employer. Given that he had been running the business since 2006 and had a Certified Builders License, the SBA found that it was not in the best interest of the company to have Mrs. Timmons serve as president over him. Additionally, the company's bylaws indicated that business decisions could only be made with the unanimous consent of the board of directors, which consisted of only Mr. and Mrs. Timmons. Mr. Timmons therefore had the ability to block any action Mrs. Timmons attempted, effectively giving him control of the company. The SBA also found that “KBT Contracting” referred to Mr. Timmons' initials, and thus “further outwardly conveys his influence and control in the firm.”

In response to the Initial Determination Letter, Petitioner amended its bylaws to remove the unanimous consent requirement, thereby giving Mrs. Timmons sole authority to make business decisions. She also contended in the Recon PES that she was never an employee of the applicant, but worked full-time for other companies. Finally, she asserted that “KBT” stands for “Keith and Becky Timmons,” and it was only a coincidence that the name mirrored her husband's initials.

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[5] The Recon Determination Letter does summarily disregard Petitioner's empirical information from the U.S. Bureau of Labor Statistics. Although acknowledging that it does consider empirical information, the SBA stated that it did not place “significant weight” on the statistics because Petitioner did not present “specific information in this area in your claims.” This is a vague and perplexing statement. Empirical information is intended to be general. It is unclear what specific information would be expected. Regardless, the SBA is correct that empirical evidence is of only moderate value, and so they commit no error by treating it dismissively.

The SBA acknowledged in the Recon Determination Letter that Mrs. Timmons now has complete control over Petitioner's business decisions. However, it still found that her presidency was not in the best interests of the firm, for the same reasons stated in the Initial Determination Letter.[6] To reach this conclusion, the SBA held that Mrs. Timmons had been a part-time employee of the firm prior to her appointment as president.

The SBA's conclusion that Mrs. Timmons was an employee was reasonably based on evidence in the record. She stated in her initial PES and elsewhere that she worked for Petitioner in some capacity while maintaining her full-time career. The regulations do not require her to be a full-time employee at the applicant firm. Accordingly, it was up to the SBA to decide whether the business relationship between Mr. and Mrs. Timmons was in the best interests of the firm. It answered this question in the negative because of Mr. Timmons' superior experience. The Recon Determination Letter did note Mrs. Timmons' superior license, but it also pointed out that she did not receive the license until 2012. The SBA thus weighed both owners' qualifications and explained why it reached its decision. It is not for the Court to disturb that opinion.

VI. Conclusion

The SBA presented two separate bases for denying Petitioner entry into the 8(a) BD Program. The Court hereby finds that the SBA's analysis of Petitioner's social disadvantage argument was incomplete or erroneous. However, its conclusion as to the participation of a non-disadvantaged individual was reasonable. If there are multiple bases offered, and one of them is reasonable, the SBA's determination must be affirmed. Such is the case here. Accordingly, the SBA's determination was not arbitrary, capricious, or contrary to law. It is therefore **AFFIRMED**. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). Subject to 13 C.F.R. § 134.409(a),[7] this is the final decision of the SBA.

So ORDERED,

ALEXANDER FERNANDEZ
Administrative Law Judge

[6] The Recon Determination Letter recited the earlier conclusion regarding Mr. Timmons' initials, but it did not include this basis as a reason for denying the claim The Court therefore presumes that the SBA accepted Petitioner's alternate explanation for the genesis of the company's name.

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