United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Ironwood Commercial Builders, Inc.,	SBA No. BDPE-532
Petitioner	Decided: September 23, 2014

ORDER REMAINDING TO SBA FOR FURTHER CONSIDERATION

On May 12, 2014, Ironwood Commercial Builders, Inc. ("Petitioner") appealed a determination of the Small Business Administration ("the SBA") in which the SBA denied Petitioner admission into the 8(a) Business Development Program ("8(a) BD Program") after concluding that its owner, Mrs. Nancy Brinkerhoff, had not experienced chronic and substantial social disadvantage as a result of gender bias and was not economically disadvantaged. *See* 13 C.F.R. parts 124, 134. The SBA filed an Administrative Record on June 26, 2014.[1] Petitioner filed a supplement to the Administrative Record on July 28, 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 SBA's decision was arbitrary, capricious, or contrary to law.

I. Procedural History

Petitioner first applied for entry into the 8(a) BD Program on February 25, 2012, on the grounds that Mrs. Brinkerhoff was socially disadvantaged based on her status as a woman. The application was denied on July 26, 2013, on four grounds, including failure to prove social and economic disadvantage. Petitioner sought reconsideration of that decision on September 6, 2013. On March 28, 2014, the SBA issued a Determination Letter upon Reconsideration ("Recon Determination Letter") that again denied Petitioner's application because Mrs. Brinkerhoff was not socially or economically disadvantaged. A timely *Appeal Petition* followed.

On May 15, 2014, the matter was transferred to this Court pursuant to 13 C.F.R. §

[1] Although the SBA filed an Administrative Record, it acknowledged that the record did not contain portions of Petitioner's initial application and subsequent documents. Petitioner therefore supplied those documents in its Supplemental Administrative Record. The SBA's Administrative Record was not accompanied by a response to the *Appeal Petition*, as is required by 13 C.F.R. § 134.206(b)(2).

134.218(a).[2] The Court has jurisdiction, under 13 C.F.R. § 134.102(j)(l), to determine whether the SBA's decision was arbitrary, capricious, or contrary to law.

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.[3] 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.[4] 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

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[2] Pursuant to an Interagency Agreement in effect beginning October 1, 2012, Administrative Law Judges of the U.S. Department of Housing and Urban Development are authorized to hear cases for the U.S. Small Business Administration.

[3] 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. . . ." I3C.F.R. § 124.103(b)(1).

[4] 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.

(1999). Under this standard, an applicant is not required to convince the fact-finder that an incident was motivated by bias. *Southern Aire Contracting. Inc*., 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)).

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); *Tootle Constr., LLC*, SBA No. BDP-420, *18 (2011). As there is generally no adverse party in these cases, the applicant's PES often goes uncontested. However, the SBA may discount or disregard even 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 (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 identify the flaw in the evidence and 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 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 decide 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 decision fails to address these factors, the record is considered incomplete and the case may be remanded for a new initial determination. *DK Environmental,* SBA No. BDPE-481 (2013). The Court may also remand a decision if it is "clearly apparent from the record" that the decision was marred by 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 (2008) ("[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct."). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park. Inc, v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

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 SBA (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 decisionmaker and the Court. *McMahon Builders*, at 4.

V. Discussion

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.[5] 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 committed a pervasive mistake of law when assessing Petitioner's social disadvantage claim, and also committed two errors of fact when assessing Petitioner's economic disadvantage claim. The proceeding must therefore be remanded to correct these errors.

[5] The Court lacks authority to unilaterally admit a petitioner into the 8(a) BD Program. If the Court finds the SBA's determination to be unreasonable, however, it can order the SBA to grant entry into the Program. *See G.M. Hill Eng'g Inc.*, SBA No. BDPE-496, Ruling And Order Denying Government's Petition For Reconsideration (2013).

With regard to the mistake of law, the Court finds that the SBA analyzed Petitioner's social disadvantage claims under a "clear and convincing" standard rather than the preponderance standard. The application of this heightened evidentiary burden leads to a variety of analytical missteps. At multiple points, the SBA dismissed claims because Petitioner failed to disprove the SBA's speculative alternate theories. *See Tootle,* SBA No. BDP-420 at *18; *StrategyGen Co.,* SBA No. BDPE-460 (2012). It mischaracterized the nature of Petitioner's claims, and so failed to address issued actually raised in the claims. It also attempted to justify facially discriminatory treatment by relying on evidence that did not appear in the Administrative Record, or assumed facts that contradict evidence in the Record. The SBA rejected claims as evidence of social disadvantage despite accepting similar claims in other cases, suggesting a disregard for its own precedents. *See Southern Aire,* SBA No. BDP-505. It also dismissed claims for failing to show negative impact without considering whether the claims constitute evidence of social disadvantage, thereby conflating two separate prongs of the analysis. *See Bartkowski Life Safety Corp.,* BDPE-516 (2014). Most, if not all, of the errors have appeared in previous cases. The Court has consistently identified them as manifestations of the clear and convincing standard. *See, e.g., StrategyGen Co.*, SBA No. BDPE-460; *DK Environmental,* SBA NO. BDPE-481. It is therefore worrisome that the same flaws have reared their heads yet again here. Overall, the Court concludes that the SBA was unwilling to accept Petitioner's account of her social disadvantage, and thus required overwhelming evidence in support of her claims. This is not the correct standard. As it appears that the clear and convincing standard has been applied throughout both determination letters, the proceeding must be remanded so SBA can conduct its analysis under the preponderance standard.

A. The SBA's Social Disadvantage Determination

Both Determination Letters are littered with evidence that the SBA applied a clear and convincing standard to Petitioner's claims. The Court does not attempt to revisit every claim; some were thoroughly and reasonably explained and do not warrant further discussion. This *Order* is intended to highlight the claims that were improperly analyzed, and explain the errors so the SBA may avoid them in the future.

1. Education and Early Life

Mrs. Brinkerhoff alleged in her PES that her high school guidance counselor dissuaded her from entering the "Chevron Program," stating that the "program is for boys because it's too physical a job for women." The counselor then encouraged Mrs. Brinkerhoff to enroll in a telephone operators program or a child care program because they were "more along my lines as a woman." Later that year, Mrs. Brinkerhoff told the same counselor that she was considering pursuing a college degree in social work. The counselor again dissuaded her, telling her that social work was "a man's field." He also told her that college was unnecessary because she "didn't need an education to be a housewife or childcare worker."

In the Initial Determination Letter, the SBA acknowledged that the counselor's comments

about the Chevron Program appeared to show bias against women.[6] However, it then concluded that because Mrs. Brinkerhoff suffered from a debilitating physical condition,[7] the counselor could have been motivated by concern for her physical limitations. It used the same justification to dismiss the counselor's comments about her college aspirations. In the Recon Determination Letter, the SBA noted that Petitioner did not discuss whether her health had an impact on the counselor's lack of encouragement or her decision not to attend college.

A claim may properly be disregarded if there is evidence of a non-discriminatory explanation in the Record. Here, however, there is no evidence that the guidance counselor was influenced by Mrs. Brinkerhoff's medical condition. Indeed, there is no evidence that he was even aware of her diagnosis. The SBA's suggestion that his comments were perhaps motivated by concern over Mrs. Brinkerhoff's physical limitations is therefore pure speculation. The SBA cannot base its determination on hypothetical theories. It therefore also cannot condemn a petitioner for failing to address or disprove those theories. *Tootle,* SBA No. BDP-420 at *16; *Timely Eng'g Soil Tests LLC,* SBA No. BDP-297, *10 (2008) ("The SBA seems to be requiring Petitioner to discount all possibilities"). A petitioner has no way to anticipate what justifications the SBA may invent, and is under no obligation to overcome every theoretical non-discriminatory explanation. *Tootle,* SBA No. BDP-420, *17. As the court in *Tootle* stated, "The SBA appears to have required [the petitioner] to disprove all possible non-discriminatory reasons for her disparate treatment. This is not the correct standard ... The question is not whether [petitioner's] narrative leaves open the possibility that a non-discriminatory reason could have been present. Instead, the question is whether the evidence shows that it is more likely than not that [the petitioner] was discriminated against on the basis of her gender." *Id*. at ** 17, 19. The SBA commits the same error here.

Additionally, the SBA's rationale is directly at odds with the evidence. The counselor's comments reflect his opinions about the general abilities and career expectations of males and females. He stated that the Chevron Program was "for boys," and social work was a "man's field." He guided Mrs. Brinkerhoff to socially acceptable "careers" for women, i.e., telephone operator, child care worker, or housewife. None of these comments were related to Mrs. Brinkerhoff as an individual. Certainly none focused on her unique health challenges. The SBA thus ignored the actual evidence in favor of its own speculative explanation. This was improper. If a petitioner establishes a prima facie case supported by credible evidence, the SBA "must accept the evidence as true unless the contrary has been shown or such evidence has been rebutted or impeached by duly credited evidence or by facts officially noticed and stated." *Tootle,* SBA NO. BDP-420 at *16; *Woroco Int'l*., SBA No. BDP-174, p. 9. The SBA can point to no evidence in the record to support its theory of the counselor's motivations. It therefore had no reason to disbelieve or discount Petitioner's evidence regarding those motivations.

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[6] This is generally consistent with the SBA's eventual position in *Southern Aire*. SBA No. BDP-505. There, the guidance counselor dissuaded a female student from taking wood shop class because it "wasn't meant for girls." The SBA agreed that the event was "persuasive evidence of gender discrimination." *Id.* at p. 6.

[7] Mrs. Brinkerhoff was diagnosed with Myasthenia gravis, a form of muscular dystrophy.

Petitioner's Recon PES also provided additional information about gender bias in her home. Mrs. Brinkerhoff stated that none of the women in her family were allowed to obtain drivers' licenses, and that her brother was treated differently because he was male. The SBA noted the claims, but determined that her brother's treatment was not evidence of gender bias,[8] and found no evidence that being denied a driver's license negatively impacted Mrs. Brinkerhoff's advancement or entry into the business world.

A petitioner's claims can each be offered as evidence of social disadvantage, negative impact, or both. *Southern Aire*, SBA No. BDP-505; *Bartkowski*, SBA No. BDPE-516. Not every claim need satisfy both criteria. For example, an incident may be evidence of social disadvantage but not contain sufficient evidence of negative impact in the business world. In such a scenario, the lack of professional harm does not negate the fact of the bias.

By focusing its attention solely on the negative impact implications of being denied a driver's license, the SBA failed to adequately examine the evidence in a social disadvantage context. The negative impact assessment itself implies a finding of social disadvantage because the former cannot exist without the latter.[9] Mrs. Brinkerhoff has alleged that the women in her family - including her - were treated differently because of their gender. If the SBA considered this to be valid evidence of social disadvantage, it did not inform Petitioner of that conclusion. If it did not believe that the incident was valid, it offered no explanation for that determination. In either case, it commits error.

2. Employment History

The SBA also improperly analyzed Mrs. Brinkerhoff s claims of bias while working as a teller at Bank of America. She stated that she never received a raise during five years of employment and that all the tellers were women. After moving into the personnel department in 1985, she was denied the opportunity to apply for a management position. Despite a company policy that vacant positions were to be posted and offered to current employees first, Mrs. Brinkerhoff's manager, Mr. Miller, did not post the job and hired a “man to come in and watch over the women.” She also stated that the male employees would go to happy hour at 4:30p.m. every Friday while the women had to stay on duty at least until the bank closed.

The Initial Determination Letter included the lack of a raise in the summary of the claim, but did not address it in its analysis. The Recon Determination Letter ignored this aspect of the

[8] The unequal treatment of an applicant's brother by her parents was deemed to be “an example of discrimination against you by your parents” in *Southern Aire*. SBA No. BDP-505.

[9] A petitioner must show ‘negative impact on entry into or advancement in the business world because of the *disadvantage*.” 13 C.F.R. § I24.l03(c)(2)(iii) (emphasis added). Accordingly, if there is no social disadvantage, there can be no negative impact

claim entirely.[10] Neither determination letter made any reference to the male-only happy hours. These omissions alone would warrant remand.

The SBA did address the biased hiring claim, but rejected it because "it is not clear whether you were still working part time and what supervisory experience you had at that time compared to the men that were eventually hired." This rationale is not remotely responsive to Petitioner's claim. Again, the SBA attempts to rely on circumstances unique to Mrs. Brinkerhoff - her work schedule and supervisory experience - to justify dismissing a claim of generalized gender bias. According to her PES, Mrs. Brinkerhoff and the other women in her department were never offered the opportunity to apply for a management job because the supervisor specifically preferred to hire a male. Mrs. Brinkerhoff thus alleged a broad practice of discrimination against all the women in the office. This naturally includes Mrs. Brinkerhoff. In support of her claim, she included a quote from Mr. Miller expressly indicating a gender-based hiring preference. Whether she herself was qualified for a management position has no bearing on whether Mr. Miller was willing to hire a woman for the position.[11] The SBA failed to even discuss his comments, and so failed to address the primary thrust of Petitioner's claim.

A corroborating letter from a co-worker, Stacey Doty, went even farther. In addition to substantiating Petitioner's claim about Mr. Miller's hiring preferences, Ms. Doty's letter stated that "[E]very position of power or management was given to a male," and that management positions went to male applicants "regardless of the qualifications of the female applicants." These are explicit allegations of institutionalized, office-wide bias. Although the SBA made passing reference to this corroborating evidence in the Initial Determination Letter, it never attempted any analysis of the allegations made in the letter.

The SBA also once again relied on Mrs. Brinkerhoff s health issues as a hollow justification for discounting her claims. The Initial Determination Letter found that "in 1986,

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[10] The petitioner in *Southern Aire* also did not receive a raise during her five-year stint at her employer. In that case, the SBA acknowledged that "failure to get any raise at all... is evidence of gender bias and provides support for your claim of social disadvantage." *Southern Aire*. SBA No. BDP-505, p. 6. Moreover, a single instance of long-term pay disparity may be deemed sufficient evidence of chronic and substantial disadvantage, and is *per se* evidence of negative impact. Id.; *Ace Technical, LLC,* SBA No. SDBA-178. The scenario here is distinguishable from *Southern Aire* only because Mrs. Brinkerhoff failed to allege that the lack of pay raises was gender-motivated. Had the SBA disregarded the claim on that ground, it would withstand judicial review. The SBA chose instead to ignore this part of the claim.

[11] The Court notes that Mrs. Brinkerhoff never actually stated that she applied for the supervisor position. Nor could she have, as the vacancy was never announced. The SBA thus questions her qualifications for a position she could not have applied for. It may also have again conflated two distinct aspects of the analysis. The first question is whether Mr. Miller's words and actions were motivated by gender bias. If the answer is yes, the second question is whether Mrs. Brinkerhoff was negatively impacted by that bias. The SBA appears to imply that Mrs. Brinkerhoff may not have been qualified for the position, and so was not harmed when she did not receive it. This answers the second question, but not the first.

your doctor expected you to quit working and from 1986 to 2007, you were not allowed to work because your health deteriorated due to your advanced disease. This indicates other reasons for not advancing at that time." The Recon Determination Letter noted that "no comments were provided on whether your health issues caused physical limitations that impacted your advancement."

This is another example of the SBA requiring Petitioner to disprove the SBA's own speculative hypothesis. Mrs. Brinkerhoff stated that her hours were limited due to her medical condition, but she made no comment about any physical limitations caused by the condition. The SBA simply assumed these limitations into existence. And again, the SBA ignored the direct evidence of Mr. Miller's statements while hunting in vain for alternative explanations.

Oddly, the SBA also concluded that Mrs, Brinkerhoff's declining health may have caused her lack of advancement while at Bank of America. This theory is chronologically nonsensical. Mrs. Brinkerhoff was not working at Bank of America between 1986 and 2007. In fact, she was not working at all during that time period. She therefore had nothing to advance "at that time." If the SBA intended to imply that Mrs. Brinkerhoff's medical condition in 1986 and beyond somehow influenced events in 1985, it offered no explanation of its hypothesis, much less evidentiary support for it.[12]

3. Business History

The improper analysis of Petitioner's claims continues in the business history section. For example, Petitioner stated that, during a pre-bid meeting with the Raymond Company in 2012, Mrs. Brinkerhoff was ignored by the Raymond Company's attendees, all male. During the meeting, they interacted only with Petitioner's estimator. Jim Sayer. When Mrs. Brinkerhoff posed questions, the answers were directed to Mr. Sayer. Later, Mr. Sayer suggested the meeting was a sham and Raymond Company would not give them the contract. A letter from Mr. Sayer corroborates Petitioner's claim.

In analyzing the claim, the SBA concluded that it could not find gender bias because "details were not provided, including who ultimately won the contract, whether you or the other company were the lowest bidder and qualifications of the companies involved." The justification for the denial of the claim is again divorced from the substance of the claim itself. Mrs. Brinkerhoff alleged she was ignored in favor of her male employee, and that this treatment is indicative of a pervasive anti-female sentiment in the construction industry. The SBA's task is to determine whether the claim is more likely true than not. It does not attempt to answer that question. Rather, it asks whether Petitioner actually deserved to win the contract. Although this

[12] The Determination Letters seem to suggest that Mrs. Brinkerhoff's doctor ordered her to stop working in 1986 because her health had deteriorated due to her myasthenia gravis. This misstates the testimony. Mrs. Brinkerhoff initially quit her job because she was pregnant. Moreover. there is again no evidence that Mr. Miller knew about or was concerned about her health. Regardless. evidence of her medical condition would still not address Mr. Miller's alleged unwillingness to hire women for managerial positions. The SBA's theory is thus simultaneously inaccurate and irrelevant.

line of questioning may have some bearing on whether Petitioner was negatively impacted by the alleged bias, it does nothing to prove or disprove whether the incident occurred.[13]

The analysis of the DiGiorgio Contracting claim is more egregious. There, Petitioner successfully completed Phase I of a construction project. However, when discussing Phase II of the project, the contractor's owner, Tony DiGiorgio, told Mrs. Brinkerhoff that "[A]s a woman, I don't think you are suitable to complete the second phase of this project." A letter from Mr. Brinkerhoff corroborates this claim and stated that the contractor and his family "are not fond of women owning and or running any type of construction company."

The SBA inexplicably concluded that because Petitioner performed the first phase of the project, "it is not clear that gender bias was the reason for not being awarded Phase II."[14] This outcome flies directly in the face of the evidence. Mr. DiGiorgio's motivation is not in question. The claim is not based on hearsay or conjecture. According to the PES and the corroborating letter, Mr. DiGiorgio told Mrs. Brinkerhoff, to her face, that her gender was the reason Petitioner would not get the contract for Phase II. This is a rare, direct admission of bias. The SBA cannot merely wave it away as an ""unfortunate" incident. It is far more than unfortunate. It is unambiguous evidence of gender-motivated discrimination. The SBA has no reason to question the credibility of this claim, and does not even attempt to do so. Instead, it minimizes the evidence while demanding tangential information about who else bid on Phase II, what Phase II entailed, and who ultimately won the contract. The SBA never bothers to explain how this information is relevant or why it would be more persuasive than the direct evidence of bias.

The SBA's treatment of Petitioner's Saarmin Construction claim is one example of a proper analysis under the preponderance standard. Petitioner claimed that Saarmin's owner, Hussein Husabi, attempted to pay substantially less than requested for a contract. Petitioner submitted copies of the relevant e-mail exchange. The SBA noted in the Initial Determination Letter that some pages of the e-mails were missing, and that there was no indication of gender bias among the pages that had been provided. Petitioner submitted additional pages of e-mails in the Reconsideration Request. However, the SBA again found no evidence of gender bias within the e-mails. Instead, it found that "[W]hile you state that Mr. Husabi attempted to take advantage of you because you are a woman, no details, such as comments that he may have made, were provided to show gender bias." This is a reasonable assessment of this claim. The SBA looked at the evidence and did not find it to be indicative of gender-motivated bias. It did not hypothesize

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[13] In its rush to reject each of Petitioner's claims wholesale. the SBA failed to note that this claim is entirely speculative, and thus could have been disregarded on those grounds. The PES merely recounts the incident and concludes it was caused by bias. However. the only evidence linking the behavior to a gender-based motivation comes from Mr. Sayer. and that evidence consists solely of his own guess about the Raymond Company employee's motivations.

[14] The SBA found the outright refusal to work with a female to be discriminatory in *Southern Aire*. Its rationale here, however, is reminiscent of its determination in *StrategyGen Co.*. SBA No. BDPE-460. There, like here, an antagonist expressed a clear unwillingness to work with a woman-owned company. The SBA concluded that the claim was insufficient to show bias absent evidence of the bid process. This Court found that determination to be arbitrary and capricious. The outcome is no different here.

explanations for Mr. Husabi's actions. What's more, Petitioner failed to identify any nexus between the incident and gender bias, thereby failing to meet the third sufficient detail parameter. The claim is also speculative, as it merely reflects Mrs. Brinkerhoff s personal assumption as to Mr. Husabi's motivations. There was simply nothing in the evidence, other than Mrs. Brinkerhoff's conclusory statement, to suggest that Mr. Husabi's actions were in any way related to her gender. By comparison, Mr. DiGiorgio stated unequivocally that his decision was entirely motivated by Mrs. Brickerhoff's gender.

In another incident, the owner of Zolman Construction, Ali Zolman, refused to look at or speak to Mrs. Brinkerhoff during a business meeting. Instead, he told Mr. Brinkerhoff that he would not do business with her because he did not believe women should be in positions of power. The SBA dismissed the claim because it was “not clear how you and your firm were negatively impacted by those comments.” The SBA also noted that Mr. Brinkerhoff had once been the CEO/President of the company, and so questioned whether Mr. Brinkerhoff was running the company at the time of the incident. By emphasizing only the negative impact implications, the SBA again failed to consider whether the claim was evidence of gender-motivated social disadvantage. It made the same error when assessing Mrs. Brinkerhoff's claim that a Zolman executive asked her husband why he had allowed Mrs. Brinkerhoff to be present at a work site. Additionally, Mr. Zolman's comment implies he already knew Mrs. Brinkerhoff controlled the firm, as he would not have referred to her as being in a “place of power” otherwise.

Petitioner also recounted an incident where Mark Lindquist, the owner of a rival firm, interrupted a conversation between Mrs. Brinkerhoff and a potential contractor to state that Mrs. Brinkerhoff “has never even held a trowel in her hand.” Petitioner suggests the comment was meant to imply that, as a woman, Mrs. Brinkerhoff lacked actual experience in the construction industry. The SBA disregarded the claim, finding that it lacked detail and did not indicate gender bias. Additionally, it found that there was no negative impact because Petitioner “did ultimately win a portion of the project.”

The SBA s conclusion that the claim was not indicative of gender bias is reasonable, given the nature of the evidence presented. Although Petitioner implied that Mr. Lindquist's comment was gender-motivated, a self-serving suggestion of bias is not evidence of it. The SBA was thus free to arrive at a different conclusion. However, the other aspects of this analysis are problematic. Simply stating that a claim lacks detail is ineffective. The SBA must explain which of the four detail parameters are missing. In this case, all four parameters were met. Petitioner identified where and when the incident occurred (during a networking event in July 2011), identified the allegedly biased individual (Mr. Lindquist), stated what happened (the allegedly gender-based comment), and described the adverse effect (“lost control of the conversation” and did not receive the bulk of the project). The claim was therefore sufficiently detailed and so should not have been dismissed on those grounds.

The claim also describes clear negative impacts caused by the comments. In a corroborating letter, Frank Nunes stated; “[S]ince this event I have had questions from other contractors in the industry who have questioned Nancy and Ironwood's ability to perform.” Mr. Lindquist's comments thus allegedly harmed Petitioner's reputation among potential contracting

partners. The SBA simply ignored this point. Petitioner also stated that Mr. Lindquist's company eventually won the interior construction project from the contractor, valued at $6 million. Meanwhile, Petitioner was given the outside construction project, valued at $1.5 million. Petitioner thus alleges that Mr. Lindquist's comment directly cost Petitioner $4.5 million. The SBA cannot seriously contend that this is not a negative impact. The fact that the company secured a $1.5 million contract does not erase the fact that it potentially lost S4.5 million due to gender bias. The SBA s determination here is merely a twist on the "ultimate success" rationale that has been rejected multiple times in recent years. *See dsi Assoc*., SBA No. BDP-413, (2011); *Southern Aire Contracting. Inc*., SBA No. BDP-453 (2012); *StrategyGen Co*., SBA No. BDPE-460 (2012); *Bartkowski*, BDPE-516 (2014).

Later in her PES, Mrs. Brinkerhoff stated that she had to hire a man, Jeff Doty, to accompany her to job estimates because she is not taken seriously by male contractors. The claim is supported by a letter from Mr. Doty. The SBA rejected the claim as too general, noting that it did not provide "any specific examples, including the names of companies and individuals, the dates, what specifically occurred to show gender bias and how it has impacted your advancement." It is true that the PES (and the Recon PES) did not include the necessary detail factors. However, the missing information could be found in Mr. Doty's corroborating letter. The SBA acknowledged only that the letter contained "some additional information." This is an understatement. The letter contained exactly the information the SBA claimed was omitted. Accordingly, the dismissal of the entire claim on sufficiency grounds is at odds with the evidence.

Overall, the Court counts, at minimum, nine separate claims of social disadvantage that were either analyzed improperly or ignored entirely. Neither Determination Letter explicitly used the term "clear and convincing evidence," but there can be little doubt that the SBA has applied that standard here. Its determined skepticism in the face of direct evidence is pointedly inconsistent with the application of the preponderance standard. That standard asks whether the proffered evidence is "sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Southern Aire,* SBA No. BDP-453. By comparison, the clear and convincing standard demands that the evidence "produces, in the mind of the trier of fact, an abiding conviction that the truth of the factual contentions is highly probable." *Bitstreams. Inc*., SBA No. BDP-122, at 9. Here, the SBA demanded that Petitioner disprove the SBA's hypothetical alternate explanations. It assumed facts not in evidence, ignored evidence, and rejected claims for lacking irrelevant evidence. In doing so, the SBA imposed an evidentiary burden on Petitioner well in excess of that required by the regulations. The Court has previously observed the SBA's tendency to place determinative weight on any evidence that happens to be missing. *See StrategyGen Co*., SBA No. BDPE-460. It did so again throughout these Determination Letters. This course of conduct gives the distinct impression that the SBA is simply searching for reasons to deny every claim. If so, this is not the product of a "fair and impartial mind," but rather one that is actively antagonistic to the petitioner's goals. There is no justification for this position. The proceeding must therefore be remanded so the SBA can apply the proper standard.

B. The SBA's Economic Disadvantage Determination

The Initial Determination Letter stated that, due to discrepancies and omissions in Petitioner's application, it could not determine whether Mrs. Brinkerhoff exceeded the $250,000 net worth limit. Petitioner attempted to address these concerns in its Recon Request. However, the Recon Determination Letter found that the updated financial information was inaccurate. After substituting "corrected" financial information, the SBA concluded that Mrs. Brinkerhoff's net worth was $265,416, making her ineligible for the 8(a) BD Program. Additionally, the SBA found that mortgage information about a rental property owned in part by Mrs. Brinkerhoff ("the Elder Drive property") had not been submitted. It then determined that because she had not "provided an explanation and mortgage loan documents, we are unable to determine that your share of the mortgage balance is correctly reflected on your form."

The SBA's curiosity about the terms of the mortgage on the Elder Drive property are understandable. The Brinkerhoff's claim 50% ownership of the property. Mrs. Brinkerhoff herself thus claims 25% ownership. However, as the SBA notes, she also claims 50% of a $256,205 mortgage on the property as a liability. It is this apparent discrepancy that prompted the SBA to seek additional information about the mortgage.

The SBA errs, however, because the Recon Determination Letter incorrectly claims that Petitioner did not submit the necessary documentation in its Recon Request. Among the documents in that filing is a Home Loan Payment Change Notice ("Elder Drive document") regarding the Elder Drive property. The Elder Drive document, addressed to the Brinkerhoff's alone, identifies the mortgage account number, the principal balance, interest amount, payment amount, and includes a transaction history. The history confirms that the Brinkerhoff's are the only ones who make payments on this mortgage. It is thus easily ascertainable that the Brinkerhoff's took out their own loan on a property that they only partially own. Mrs. Brinkerhoff is therefore responsible for 50% of that loan, as she claims. The SBA appears to have simply overlooked this document.

Mrs. Brinkerhoff's corrected net worth also appears to be incorrectly calculated. The SBA stated that she "included a portion of one loan secured by your residence but did not provide the corresponding asset." The item in question was a $280,000 loan from Mrs. Brinkerhoff to Petitioner, secured by a mortgage on her primary home. The SBA listed the debt as a liability, but found that "the balance does not appear to be correctly listed." Accordingly, it removed the $280,000 from the equation, thus lowering Mrs. Brinkerhoff's total liabilities.

A balance sheet from August 3, 2013, lists a $280,000 "personal loan Nancy Brinkerhoff" among Petitioner's long term liabilities. This would necessarily be an asset for Mrs. Brinkerhoff personally, as Petitioner would have to repay that loan at some point in the future. The "Assets" section of her September 4, 2013, Form 413 shows a $280,000 balance under "Accounts and Notes Receivable." She therefore has provided the corresponding asset. It is included among her total assets on the Form 413. The removal of the debt on the liability side thus throws the calculation out of balance. The case must therefore be remanded so the SBA can correct these factual errors.

ORDER

Petitioner has offered examples of gender-motivated bias in all three phases of Mrs. Brinkerhoff's life. She has provided evidence that the social disadvantage allegedly caused by that bias has hindered and frustrated her entrepreneurial opportunities. In dismissing all of these claims, the SBA applied the wrong evidentiary standard, failed to discuss relevant evidence, based its conclusions on the failure to submit tangentially relevant evidence, arrived at conclusions that contradicted credible evidence, arrived at conclusions based on non-existent evidence or unfounded speculation, and omitted necessary analysis and explanation. These various errors of law and fact require a reassessment of Petitioner's claims, in their totality. 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 October 23, 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