United States Small Business Administration
Office of Hearings and Appeals

IN THE MATTER OF:	
Express Plus Staffing LLC,	SBA No. BDPE-533
Petitioner	Decided: September 22, 2014

DECISION

On May 27, 2014, Express Plus Staffing LLC ("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, Ms. Georgetta Duncan, had not experienced chronic and substantial social disadvantage as a result of Bulgarian ethnicity or her gender. The SBA filed a Response to the *Appeal Petition* and an Administrative Record on July 7, 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 March 14, 2013, on the grounds that Ms. Duncan was socially disadvantaged based on her ethnicity and gender. The application was denied on December 11, 2013. Petitioner sought reconsideration of that decision on December 21, 2013, and submitted additional information in support of her position. On April 11, 2014, the SBA issued a Determination Letter upon Reconsideration ("Recon Determination Letter") that again denied Petitioner's application on the same grounds. The *Appeal Petition* followed.

On May 28, 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. § 134.102(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

[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.

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)).

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.

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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.

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 Ting 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 that (1) 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. 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 ("[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 decision maker 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. 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's analysis of Petitioner's claims was comprehensive, fully explained, and reasonable. Its conclusion is therefore not arbitrary or capricious.

Both of the SBA's Determination Letters repeatedly dismissed Petitioner's claims as being insufficiently detailed, conclusory, or not indicative of ethnic or gender bias. The Initial Determination Letter correctly stated the four sufficiency factors, and the SBA identified for each claim which factors were missing. Petitioner therefore had a clear indication why each claim was dismissed. Petitioner could have remedied these deficiencies in its request for reconsideration, but for the most part it did not do so. The revised, expanded, or new claims made in the reconsideration also suffered from lack of detail and overall generality. For example, Ms. Duncan contended in both the PES and the Recon PES that Barbara Whitely at The Fair Grounds refused to use Petitioner's workers because she "did not accept me, or possibly disliked me." Petitioner did not, however, offer any evidentiary nexus between Ms. Whitely's disdain and Ms. Duncan's Bulgarian ethnicity. In denying the claim, the SBA found that Ms. Duncan did not "present any details pertaining to what Ms. Whitely said to you, what specific actions she took, etc. which led you to believe she was biased against you in this claim. Absent this information we must again find that your allegations appear to be conclusory." This is an accurate assessment of the claim.

The SBA also reasonably concluded that the claims that were sufficiently detailed failed

to show evidence of ethnic- or gender-motivated bias.[4] Much of Petitioner's narrative focused on the social and cultural struggles Ms. Duncan has faced as a first-generation immigrant. There is no doubt that the life of an immigrant can be frustrating, frightening, and lonely. However, as the SBA concluded, this is not evidence of social bias. Although the Court is convinced that Ms. Duncan and other first-generation immigrants are often at a distinct social disadvantage in the United States, it is not a social disadvantage the 8(a) BD Program is designed to remedy.

"Immigrant" is not an ethnicity. Petitioner must therefore show that her social disadvantage is the product of bias against her due to her status as a Bulgarian. Neither PES recounted a single incident specifically connected to that ethnicity. Indeed, Petitioner acknowledges throughout both PES's that most of Ms. Duncan's professional struggles relate to her thick accent and lack of English proficiency. She has therefore provided non-discriminatory explanations for her lack of business success. *See Alabasi Constr., Inc*., SBA No. BDP-368 (2010) (applicant offered several examples of bias against Arab Americans in his day-to-day life, but did not provide am evidence of negative impact in his business ventures): *Wholesale Distribution*, SBA No. BDP- 456 (2012) (applicant attributed her professional struggles to her medical condition, but offered no evidence that anyone was biased against her due to the condition). The SBA does not err by taking Petitioner's explanations into account.

In sum, the SBA properly explained why it dismissed or discounted several of Petitioner's claims. It considered the remaining claims on their merits, and concluded that they failed to raise the probability of bias above the 50% threshold. The claims therefore did not prove by a preponderance of the evidence that Ms. Duncan was socially disadvantaged. Petitioner has not alleged that this conclusion was erroneous. The Court similarly sees no error in the SBA's analysis. Accordingly, the SBA's Determination denying Petitioner admission into the 8(a) BD Program was not arbitrary, capricious, or contrary to law. The Determination is AFFIRMED. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the SBA.

Should Petitioner wish to reapply to the 8(a) BD Program, it may do so 12 months after the date of this *Decision*. 13 C.F.R. § 124.207.

SO ORDERED.

ALEXANDER FERNANDEZ
Administrative Law Judge

[4] Petitioner only made one allegation of gender-motivated bias, but the claim did not meet any of the sufficiency parameters and was properly dismissed as "general in nature."