

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

IN THE MATTER OF:

Arrow S. Company, Inc.,

Petitioner

SBA No. BDPE-546

Decided: March 19, 2015

APPEARANCES

Lori Skaggs, President, Arrow S. Company, Inc., 177 California Ave., Arbuckle, CA 95912-9730, for the Petitioner

Catalina Martinez, Esq., United States Small Business Administration, Office of General Counsel, 409 Third Street S.W., 5<sup>th</sup> Floor Washington, D.C. 20416, for the Small Business Administration

FINAL DECISION AND ORDER

Arrow S. Company, Inc. (Arrow or Petitioner) filed an appeal of the decision by the Small Business Administration (SBA or Agency) denying Petitioner's admission to the 8(a) Business Development Program (Program).<sup>1</sup> Arrow's application for admission to the Program was based upon the gender of Arrow's President, Ms. Lori Skaggs. Petitioner asserted that because of Ms. Skaggs' female status running a construction company in a male dominated profession, she qualifies under the 8(a) criteria as socially disadvantaged due to the gender discrimination she has faced.

Following Arrow's request for reconsideration, SBA once again determined that Ms. Skaggs was not a socially disadvantaged individual and thus denied Petitioner's entry into the Program. SBA found Petitioner's application and supporting documents lacked the level of detail and specificity required to establish social disadvantage. Because SBA did not find Ms. Skaggs socially disadvantaged, it did not reach the issue of whether Petitioner was economically disadvantaged.

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<sup>1</sup> See Small Business Act § 8(a), as amended, 15 U.S.C. § 637(a); 13 C.F.R. Part 124. The purpose of section 8(a) is to “promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy. . . .” 15 U.S.C. § 631(f)(2)(A); see also 13 C.F.R. § 124.1.

Petitioner timely appealed SBA's denial, and SBA's Office of Hearings and Appeal (OHA) transferred the case to the United States Coast Guard (USCG) Office of Administrative Law Judges for review and disposition.<sup>2</sup>

For the reasons provided in this Order, I find that SBA's decision concerning Ms. Skaggs' social disadvantage should be reversed based upon unwarranted, non-record assumptions concerning Petitioner's submission. As a result, SBA wrongly disregarded as inadequate Petitioner's evidence that established Ms. Skaggs' social disadvantage.

Specifically, I find that SBA improperly rejected Petitioner's evidence concerning the gender discrimination: (1) that she faced while working at CL Skaggs Trucking, exemplified in particular by the job opportunity and perks given to a co-worker and not to Ms. Skaggs, along with her physical isolation in the workplace by the owner of that company and (2) in disregarding Ms. Skaggs' business dealings with a customer, Associated Constructors, whose representative threatened to withhold payments for reasons of gender discrimination. Contrary to SBA's determinations, Arrow substantiated the alleged social disadvantage based on gender with enough specificity and details to render SBA's denial of admission unreasonable and thus unlawful under the appropriate standard for reviewing such applications.

### I. Procedural Background

On September 1, 2013, Petitioner filed an application for admission into SBA's 8(a) Business Development Program. On or about April 25, 2014, SBA denied the application on two bases: 1) Ms. Skaggs was not found to be socially disadvantaged under 13 C.F.R. § 124.103 by a preponderance of the evidence and 2) SBA determined that Petitioner did not meet the potential for success criterion to carry out the purposes of the Program's objectives under 13 C.F.R. § 124.107. On May 21, 2014, Petitioner requested reconsideration of SBA's denial and submitted additional information in support of the application. On September 8, 2014, SBA withdrew its determination related to the adverse potential for success element of the denial. However, SBA reaffirmed its earlier determination that Ms. Skaggs was not socially disadvantaged based on her gender. Thus, SBA declined to admit Petitioner to the Program.<sup>3</sup>

On October 24, 2014, Petitioner timely filed an Appeal of SBA's denial. That same day, OHA transferred this case to the USCG Office of Administrative Law Judges. On November 6, 2014, the USCG's Chief Administrative Law Judge assigned the case to me for review and disposition. On December 4, 2014, I issued an Order Granting a Joint Motion for Extension of

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<sup>2</sup> This transfer was made pursuant to a Memorandum of Agreement with the SBA, which provides that a USCG Administrative Law Judge will perform judicial services for the SBA in accordance with the OPM Administrative Law Judge loan program. The USCG Chief Administrative Law Judge then assigned the case to my office.

<sup>3</sup> As such, SBA's determination as to Petitioner's potential for success forms no part of the current Appeal given that SBA removed the negative determination on this subject upon reconsideration.

Time, which gave SBA counsel until December 23, 2014 to file SBA's Response to the Appeal and transmit the Administrative Record (AR).<sup>4</sup> On December 22, 2014, SBA counsel filed its Response with the Court, along with the AR. Copies of its Response and the AR were concurrently served on Petitioner.

## II. Principles of Law

These proceedings are conducted pursuant to SBA regulations at 13 C.F.R. Parts 124 and 134. OHA has jurisdiction over Petitioner's Appeal pursuant to 13 C.F.R. § 134.102(j)(1). SBA counsel timely filed both a Response to Petitioner's Appeal and the Administrative Record (AR). *See* 13 C.F.R. § 134.206.<sup>5</sup>

The Agency withheld from Petitioner certain documents over which the Agency claimed privilege but provided those documents for my review in camera. Agency counsel included an appropriate index of such documents, and I find that the withheld documents properly fall within the claimed privileges. Specifically, the internal analyses and discussions of SBA analysts and legal counsel are protected under the deliberative process and/or attorney-client/legal work product privileges. *See NLRB v Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975). Furthermore, this material contains nothing “that would provide Petitioner with a new or different factual basis on which to challenge the SBA's decision to deny it eligibility in the 8(a) program.” *Avellan Systems Int'l, Inc.*, SBA No. BDP-332, at 8 (2009). The rationales and bases for the Agency's decisions articulated within these documents are presented fully in the decisions (both initial and upon reconsideration) issued to Petitioner.

### A. Standard of Review

SBA's determination must be sustained unless a review of the written administrative record demonstrates that the decision denying Petitioner's admission was arbitrary, capricious, or

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<sup>4</sup> References to the Administrative Record take the form of “AR at Exh. [[#], [page]]”.

<sup>5</sup> Petitioner did not request a remand for further record development or object to SBA's withholding of documents because of claimed privilege. *See* 13 C.F.R. § 134.406(c)(2). Despite this fact, I made a complete review of the AR. 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 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. *D.K. Environmental*, SBA No. BDPE-481 (2013). 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). Based on my review, I determined that the file is complete, so a remand for further record development is not required even if such are request had been made. *See* 13 C.F.R. § 134.406(c)(3).

contrary to law. *See* 13 C.F.R. § 134.406(b). As long as the SBA's decision to deny admission to the Program was reasonable, it must be upheld on appeal. *Id.*

Under the arbitrary and capricious standard, an agency's decision is evaluated in terms of whether it was a reasonable conclusion in light of the facts available in the record and does not involve asking whether the conclusion was the best or even the correct one. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *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. LLC*, SBA No. SDBA-178, at 3 (2008) (“[Examination] is not a de novo review of the administrative record to decide whether the SBA's ultimate conclusions are correct.”).

#### B. Requirements for Admission to the Program

To be eligible for admission to the Program, a business entity must be unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who: (1) are of good character; (2) are citizens of and residing in the United States; and (3) can demonstrate a potential for 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 because of their identities as members of groups and without regard to their individual qualities.” 13 C.F.R. § 124.103(a). Certain groups have a rebuttable presumption of social disadvantage based on their membership in listed racial and ethnic groups. 13 C.F.R. § 124.103(b).

In contrast, individuals not members of these designated racial and ethnic groups, like Ms. Skaggs, must establish “individual social disadvantage” by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1). The preponderance of the evidence standard commonly has been defined as requiring “the trier of fact to believe that the existence of a fact is more probable than its nonexistence” before a fact-finder may find in favor of the party who has the burden of persuasion as to the fact's existence. *LaLonde v. Sec'y of Health & Human Servs.*, 746 F.3d 1334, 1338 (Fed. Cir. 2014). This standard asks the court to “make a comparative judgment about the evidence” to determine whether a proposition is more likely true than not true based on the evidence in the record. *Lindsay v. NTSB*, 47 F.3d 1209, 1213 (D.C. Cir. 1995).

In SBA cases, evidence of individual social disadvantage must include the following elements: (1) at least one objective distinguishing feature that has contributed to social disadvantage (such as race, ethnic origin, gender, physical handicap, etc.); (2) personal experiences of “substantial and chronic disadvantage in American society”; and (3) negative impact on entry into or advancement in the business world because of the disadvantage. 13 C.F.R. § 124.103(c)(2).

Evidence of “substantial and chronic disadvantage” generally means “there must be more than one or two specific, significant incidents.” *Med-Choice. Inc.*, SBA No. SDBA-179, p. 8 (2008). Yet, “only one such incident is sufficient if it is so substantial and far-reaching that there can be no doubt that the applicant suffered social disadvantage.” *Ace Technical. LLC*, SBA No.

SBDA-178, p. 4 (2008). Nevertheless, any such incidents) must be “presented in sufficient detail to be evaluated.” *Seacoast Asphalt Servs., Inc.*, SBA No. SBDA-151, p. 6 (2001). The level of detail required generally should include: (1) when and where the incident occurred; (2) who discriminated; (3) how the discrimination took place; and (4) how the applicant was adversely affected by the discrimination. *Southern Aire. Inc.*, SBA No. BDP-453, p. 8 (2012); *Loyal Source Gov't Serv., LLC*, SBA No BDP-434, p. 5 (2012).

SBA may discount the claims and evidence of social disadvantage if they are: (1) inherently improbable; (2) inconsistent with credible evidence in the record; (3) lacks sufficient detail; (4) merely conclusory; or (5) insufficiently detailed when apparently available supporting evidence was not provided without explanation. *Southern Aire. Inc.*, SBA No. BDP-453, at 7; *Bitstreams. Inc.*, SBA No. BDP-122, at 9 (1999). If such evidence is rejected, SBA must provide “cogent reasons for denying the claim” and may not arbitrarily reject apparently credible evidence. *Id.* at 10.

The regulations provide that SBA will consider “any relevant evidence” in assessing negative impact or entry into the business world, but “in every case” SBA will consider education, employment and business history, where applicable, to see if the “totality of the circumstances” shows such disadvantage. *Id.* at § 124.103(c)(2)(iii). The regulations provide that SBA uses specific factors in considering an applicant's education, employment and business history when making a determination of social disadvantage. 13 C.F.R. § 124.103(c)(2)(iii)(A-C).

With respect to education, SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individuals from pursuing a professional or business education. *Id.* at § 124.103(c)(2)(iii)(A).

In terms of employment, SBA is to consider unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures that channeled the individual into non-professional or non-business fields. *Id.* at § 123.103(c)(iii)(B).

Finally, with respect to business history, SBA considers unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations. *Id.* at § 124.103(c)(iii)(C).

### III. Petitioner's Application

Petitioner's application indicated that Arrow S. Company is a California licensed engineering corporation with specialized knowledge and skill in site remediation and restoration; environmental enhancement; underground utilities; levees, dams and canals; highways, streets

and roads; grading and paving; earthmoving and excavating, etc. AR at Exh. 7, p. 7. The application also noted that Arrow is located in Arbuckle, California. *Id.* at p. 7-8.

Petitioner asserted as a basis for social disadvantage Ms. Skaggs' gender and included a narrative describing such claimed gender bias. That narrative included various depictions of alleged gender bias, including the following: (1) a letter from one of Arrow's subcontractors (Mr. Maxwell Martir, owner of Arsenal Construction), which described alleged gender bias Ms. Skaggs encountered and also indicated Mr. Martir hesitated to work with Arrow because of Ms. Skaggs' gender; (2) Ms. Skaggs' claim that a male co-worker (Mr. Dedmon) at a trucking company both harassed her and received differential pay and benefits, despite Ms. Skaggs' greater experience in the industry; (3) depiction of a recent meeting at Travis Air Force Base in which the contracting officer allegedly acted in a gender biased manner; (4) interactions with a particular customer (Associated Constructors), the project manager for whom allegedly threatened to withhold payments for discriminatory reasons; (5) a description of alleged gender bias in 2012 when Ms. Skaggs applied for CalTrans DBE (Disadvantaged Business Enterprise) certification; and (6) Ms. Skaggs' assertion that she recently quoted a project and the company to which she made the pitch decided to go with another company, but expressed sexist comments to her when letting her know she did not get the contract. AR 7.

On or about August 30, 2013, Ms. Skaggs also submitted an expansion of her socially disadvantaged narrative. AR 7 at Socially Disadvantaged Narrative, page 8-10. Ms. Skaggs asserted that her main barrier in the construction industry is that she is viewed as “just a woman in a man's world.” *Id.* at 9. Ms. Skaggs continued by relating how the gender discrimination she has suffered by some men in the industry has negatively affected her self-confidence and made her feel intimidated, harassed, and belittled. *Id.* Ms. Skaggs also expanded on her claims of gender discrimination, and in particular, mentioned that she was once invited to a safety class but was asked to wear “Daisy Duke” shorts so that men would be sure to attend. *Id.* at 10.

#### IV. The Agency's Denial

On April 25, 2014, SBA denied Petitioner's application for admission into the SBA's 8(a) Business Development Program. Agency Response, Exh. A. SBA asserted two bases for the denial: (1) Ms. Skaggs was not considered socially and economically disadvantaged per the requirements of 13 C.F.R. § 124.103 and (2) Petitioner did not have the requisite potential for success as required by 13 C.F.R. § 124.107. *Id.* at 1-3. As the only issue on appeal is whether Ms. Skaggs met the first criteria given SBA's reconsideration, this Decision and Order will only analyze the first basis for SBA's denial.

With respect to the claimed social and economic disadvantage, SBA based its denial on the Petitioner's failure to present preponderant evidence to demonstrate that gender bias impaired Petitioner's ability to compete in the construction business. In so finding, SBA discussed Petitioner's evidence related to the three factors under 13 C.F.R. § 124.103(c)(2)(iii)(A-C) used in determining social disadvantage with respect to entry into or advancement within the business world.

#### V. Petitioner's Reconsideration Submission

On or about June 3, 2014, SBA received Petitioner's request for reconsideration. AR Exh. 3. In this request, Ms. Skaggs asserted for the first time that she believed she had suffered gender bias in her educational experiences. Specifically, Ms. Skaggs stated that she believed she suffered gender bias as a result of her attending an all girls' high school and that studies showing being segregated made her self-conscious of men. AR Exh. 3 at 7. In support, Petitioner submitted copies of two articles addressing the alleged disadvantages of single sex education. *Id.* at 8-10.

Ms. Skaggs also addressed her work at CL Skaggs Trucking and stated that she was placed in an office trailer by herself while working there and instructed not to converse with the drivers. *Id.* at 11. Ms. Skaggs also attached a letter from Mr. Carrol Skaggs and several articles suggesting that women face difficulties because of gender in the construction industry in support of her claims. *Id.* at 12-25. Additionally, Ms. Skaggs provided more information concerning her work with Associated Constructors. AR Exh. 3 at 30.

Ms. Skaggs also expanded on the DBE certification issue: (1) by asserting that her ability to obtain such certification helps establish the gender bias she has experienced; and (2) by describing in greater detail the alleged inappropriate questions the interviewer asked. *Id.* at 34.

#### VI. The Agency's Decision on Reconsideration

SBA replied to Petitioner's request for reconsideration by again denying Petitioner admission to the Program. Agency Response, Exh. B. With respect to the all female high school education, SBA determined that although the results of the research mentioned in the articles indicated negative female gender stereotypes in the construction industry, those studies are not substitutes for examples of bias suffered by Ms. Skaggs personally, or against Arrow, on the basis of gender. *Id.* at 2.

As for Ms. Skaggs' work history with CL Skaggs Trucking, SBA acknowledged that the articles provided by Ms. Skaggs set forth a troubling litany of discrimination against women in the construction industry. However, SBA found that these articles, like those related to single sex education, were not sufficient by themselves because they could not substitute for personal examples of gender bias against Ms. Skaggs. *Id.* at 3.

Despite the additional details Petitioner provided, SBA again determined that Ms. Skaggs' depiction of her experiences at CL Skaggs Trucking was not credible, specific enough evidence of gender bias. Agency Response, Exh. B at 3. SBA also analyzed the additional evidence concerning Petitioner's business relationship with Associated Constructors and rejected it too as non-persuasive and again inconsistent with earlier statements. *Id.* at 3-4.

Finally, SBA rejected Ms. Skaggs' assertion that since she obtained the DBE certification, that certification is proof in-and-of itself of having been subject to gender bias. As for the particular questions asked during the DBE interview process, SBA determined that they were likely part of the DBE rote questions involved in its process and do not appear unreasonable or

inappropriate. Finally, because Petitioner obtained the DBE certification, SBA questioned how the company had been adversely affected, even if the questions were assumed improper. Agency Response, Exh. B at 4-5.

## VII. Petitioner's Appeal

On appeal Petitioner argued that SBA had acted arbitrarily in disregarding/discrediting her evidence and did not properly apply the applicable standard of proof. Appeal at 1.

With respect to SBA's findings that Ms. Skaggs had not been specific enough in her Application and Petition for Reconsideration, Ms. Skaggs argued that she had practical concerns about disclosing certain types of information. *Id.* Specifically, she believed that Arrow would be subject to possible retaliation for disclosing particular details about alleged gender discrimination. *Id.* In this regard, Ms. Skaggs stated that as many details as possible had been provided given these concerns in an effort to protect Arrow's ongoing business relationships. *Id.*

Petitioner then addressed the three areas of education, employment and business history at issue and attempted to expand upon Ms. Skaggs' experience and allegations of bias in each. *Id.* at 2-8. With respect to education, Ms. Skaggs related how her single-gender education negatively affected her advancement within the male-dominated construction industry in which Petitioner participates. *Id.* at 2 (citing *Southern Aire*, SBA BDP-505 for the proposition that school official dissuading a female student from taking woodshop class amounted to persuasive evidence of gender discrimination).

Ms. Skaggs also further expounded upon her experiences at CL Skaggs Trucking, asserting that even a single instance of long-term pay disparity may be deemed sufficient evidence of chronic social disadvantage. *Id.* at 3-4 (citing *Southern Aire*, *supra*; *Ace Technical, LLC*, SBA No. SDBA-178). Furthermore, Petitioner argued that SBA should not have rejected the letter from Mr. Skaggs as not credible; in part, by assuming that CL Skaggs Trucking would benefit from Petitioner's entry into the Program because the two companies were distantly located from one another (citing *Bitstreams*, SBA BDP-122 for the proposition that an assumption about the letter's credibility should not affect the decision).<sup>6</sup> *Id.* at 4.

As for Ms. Skaggs' business history, Petitioner: (1) further detailed the interactions with Associated Constructors to counter SBA's assertion that payment was late due to financial conditions; (2) restated that the DBE interviewer at CalTrans created a hostile environment through his questioning; and (3) took issue with the alleged voyeuristic motives for SBA to request additional specifics concerning alleged gender-based harassment. *Id.* at 5-6. Finally, Petitioner listed 10 new alleged instances of gender-based harassment/discrimination that were not previously disclosed to SBA. *Id.* at 7.

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<sup>6</sup> Petitioner also repeated the assertion that a lack of specificity and details was required to protect ongoing business relationships

### VIII. The Agency's Response

In response, Agency counsel argued that SBA's determinations were proper because Petitioner had not meet the burden of proof and that Petitioner's claims of gender-based social disadvantage were vague and conclusory, despite opportunities to augment the record during the reconsideration process. Agency Response at 1-2,6.

SBA counsel also asserted that any new instances or details about Ms. Skaggs's alleged gender discrimination (whether in education, employment, or business history) that were not considered by the Agency when making its determinations could not now be considered because the appeal process is not meant to provide a petitioner a second chance to meet their burden of proof for entry into the Program. *Id.* at 7-8 (citing *Aero CNC, Inc.*, No. SBDA-106 at 6 (1999); 13 C.F.R. § 134.407(a)).

In addressing Ms. Skaggs' proffer of the differential treatment between herself and Mr. Dedmon, Agency counsel stated that not enough information was provided to allow SBA to make a meaningful comparison between the two. Thus, Agency counsel asserted that more specific information was required for SBA to rule on the merits of Ms. Skaggs claims that the male employee received better pay/benefits. Agency Response at 9 (citing *dsi Assoc. Inc.*, SBA No. BDP-413 (2011); *DJ Business Solutions. LLC*, SBA No. BDP-406(2011)).

In explaining SBA's rejection of Mr. Skaggs' letter as not credible, Agency counsel stated: (1) the letter was too general and conclusory without identifying the names of individuals, specific incidents, times, or places when this alleged discrimination occurred; and (2) the familial relations between Mr. Skaggs and Ms. Skaggs rendered the statements within the letter inherently questionable. Agency Response at 10. SBA counsel did, however, acknowledge that the articles Petitioner included provided relevant evidence that women routinely suffer gender discrimination in the construction industry. However, Agency counsel noted that despite this empirical data, such articles cannot substitute for specific instances of bias suffered by Ms. Skaggs herself. *Id.* at 10-11.

SBA counsel also addressed Petitioner's contention that some names, dates and specific details were withheld due to concerns about ramifications for Arrow's ongoing and future business relationships. *Id.* at 11-12. The Agency's Response reasserted, in large part, the rationales for rejecting Petitioner's evidence that it was too vague and lacked specific enough details. *Id.* at 13-15.

Finally, SBA counsel argued that the evidence Petitioner presented did not satisfy the additional requirement that such incidents, taken together, demonstrate "chronic and substantial" discrimination. *Id.* at 15-16 (citing *Bitstreams. Inc.*, No BDP-122 (1999)).

### IX. Analysis

Many of SBA's findings and the rationales for its findings are supported in the record, and SBA counsel's arguments concerning both the scope of review upon Appeal and my inability

to consider new evidence presented in the Appeal are correct. As a result, I will not consider any such new evidence in reviewing the lawfulness of SBA's denial. *See* 13 C.F.R. § 134.407(a).

Furthermore, Petitioner's alleged justification for not providing more details and specifics concerning the alleged incidents of gender bias are unpersuasive and do not excuse a failure of proof. As indicated above, Petitioner was concerned that providing further details might undermine Arrow's ongoing and future business relationships. While such concerns might be understandable as a practical matter, SBA counsel correctly explained that: (1) participation in the Program is not a right and the regulations unquestionably establish the burden petitioners, like Arrow, have to meet to be eligible for the Program (which includes a specific demonstration of social disadvantage) and (2) SBA does not freely disclose such information in any event.<sup>7</sup>

The only real question to be resolved here is whether the SBA's evaluation of the evidence in the record was arbitrary and capricious and contrary to law with respect to Petitioner's claims of individual social disadvantage. Petitioner attempted to prove Ms. Skaggs' individual social disadvantage based upon several alleged discriminatory experiences. Each of these will be analyzed to determine whether Petitioner met the requisite burden under the applicable law and regulations and whether SBA acted arbitrarily and capriciously in rejecting such evidence. Such evidence must include the following elements: (1) at least one objective distinguishing feature that has contributed to social disadvantage (such as race, ethnic origin, gender, physical handicap, etc.); (2) personal experiences of “substantial and chronic disadvantage in American society”; and (3) negative impact on entry into or advancement in the business world because of the disadvantage. 13 C.F.R. § 124.103(c)(2).

Both SBA's Initial Determination and decision on reconsideration accurately stated the threshold issues involved on a general level by citing to, and characterizing the burdens placed on an applicant through the regulations. However, I am concerned that SBA has improperly conflated the second and third elements given in Section 124.103(c)(2). Specifically, SBA did not separate the analysis of Petitioner's evidence of personal experiences of alleged substantial and chronic gender bias from the analysis of any negative impact or entry into or advancement in the business world. For example, in both decision letters, SBA discussed the evidence presented along the three areas of education, employment and business history. These are the areas at minimum that SBA is directed to analyze in considering the negative impact or entry into or advancement in the business world prong under 13 C.F.R. § 124.103(c)(2)(iii) — not necessarily in evaluating personal experiences of substantial and chronic social disadvantage under 13 C.F.R. § 124.103(c)(2)(ii).<sup>8</sup>

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<sup>7</sup> Petitioner's failure to understand the scope of releasable material under the Freedom of Information Act or Privacy Act is understandable, but do not relieve it of the burden required to demonstrate specific instances of chronic social disadvantage.

<sup>8</sup> Also note that under 13 C.F.R. § 124.103(c)(2)(iii), the regulations specifically state that SBA is to consider any relevant evidence “in assessing this element” and further that “[i]n every case, SBA will consider education, employment and business history . . . to see if the totality of the circumstances show disadvantage in entering into or advancing in the business world.”

A conflation of what otherwise should be separate analyzes is no small matter. Indeed, without such a split, SBA wrongfully applied the “substantial and chronic” requirement of Section 124.103(c)(2)(ii) to the negative impact on entry into or advancement in the business world element under Section 124.103(c)(2)(iii). Such a conflation is improper on a plain reading of the regulations. *See Sothern Aire*, SBA No. BDP-505, 2013 (Sept. 5, 2013) (“Section 124.103(c)(2)(iii) does not ask whether an applicant has experienced significant negative impact. It asks whether the social disadvantage has caused any negative impact at all.”).

Furthermore, SBA's initial decision and the decision on reconsideration stated that Petitioner had not proven by a preponderance of the evidence that Ms. Skaggs was socially disadvantaged under 13 C.F.R. § 124.103. *See* Agency Response Exhs. A, B. But more specifically, both decisions stated the conclusions drawn were based on the fact that Petitioner did not present sufficient evidence that would allow SBA to conclude that Ms. Skaggs' “ability to compete in the free market place has been impaired due to discriminatory practices against” Ms. Skaggs. *Id.* SBA's use of the phrase “ability to compete in the free market place has been impaired” is curious and unexplained.

Nowhere does this particular language appear in the regulations with reference to socially disadvantaged individuals.<sup>9</sup> To the extent SBA held Petitioner to this “standard”, it was error. Having one's ability “to compete in the free market place impaired” means something quite different than suffering a “negative impact upon entry into or advancement into the business world”. Surely, one could “compete” despite clear instances of gender discrimination. Indeed, such individuals often do so successfully even while having suffered some negative impact on entry into or advancement within the business world due to gender discrimination.

However, taken as a whole, SBA clearly determined both that Ms. Skaggs: (1) failed to show she had been subject to substantial and chronic gender discrimination as required under 13 C.F.R. § 124.103(c)(2)(ii); and (2) failed to establish “negative impact on entry into or advancement in the business world because of the disadvantage” (i.e., gender discrimination) as required under 13 C.F.R. § 124.103(c)(2)(iii). Reading SBA's interpretations of the evidence Petitioner presented, SBA clearly justified its denial based along both elements, despite failing to clearly demarcate the analysis of those two separate issues through its formatting of the decision letters that spoke in terms of the 124.103(c)(2)(iii) considerations.<sup>10</sup>

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<sup>9</sup> The closest I could find appears under 13 C.F.R. § 124.104's definition of “economically disadvantaged”, which includes the phrase: “Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities. . . .”

<sup>10</sup> Agency counsel argued Petitioner failed to demonstrate both that Ms. Skaggs suffered “substantial and chronic disadvantage” based on her gender and negative impact of the social disadvantage upon her entrance into or advancement in the business world. Agency Response at 4. *See also* Response at 6 (“Petitioner's first and second narratives were lacking specific details for evidence of gender bias” and Petitioner did not demonstrate by preponderance of the evidence “chronic and substantial social disadvantage, which resulted in a negative impact on her entry into or advancement in the business world.”).

With this framework in mind given SBA's particular language in the decision letters, I find that the proper analytic rubric for this case involves reviewing Petitioner's claims to determine: (1) whether those particular claims showed preponderant evidence of substantial and chronic gender bias, as SBA rejected several of them as failing to indicate such bias; and (2) if such bias is found, whether any of the claims established the relevant negative impact upon Ms. Skaggs entry into or advancement within the business world.

While an individual upon whom an Applicant claims eligibility for admission could satisfy the first requirement; such satisfaction by itself, would not suffice to show individual social disadvantage, as all three elements from 13 C.F.R. § 124.103(c) must be met.<sup>11</sup> *See also Bartowski Life Safety Corp.*, SBA No. BDPE-516, 2014 (Apr. 14, 2014) (finding SBA erred in that “[a]n 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.”).

A. Alleged gender discrimination suffered by Ms. Skaggs was proper basis for Petitioner's Application to the Program

Admission into the SBA 8(a) Business Development Program required Petitioner to demonstrate by a preponderance of the evidence that the person upon whom eligibility is based suffered “individual social disadvantage”. 13 C.F.R. § 124.103(c)(1). Since Ms. Skaggs is not a member of certain listed groups (*e.g.*, race, ethnic origin, etc.), she is not entitled to the presumption of such social disadvantage under 13 C.F.R. § 124.103(b). Therefore, to meet the required burden, Petitioner first had to prove that Ms. Skaggs has at least one objective distinguishing feature that contributed to social disadvantage (like race, ethnic origin, gender, physical handicap, etc.). 13 C.F.R. § 124.103(c)(2). Ms. Skaggs clearly falls within the gender category upon which individual social disadvantage can be based. Thus, this prerequisite was satisfied for entry into the Program.

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<sup>11</sup> SBA has very recently proposed changes to its regulations to specifically “clarify” this issue in light of OHA cases establishing the contrary. See Small Business Mentor Protégé Program; Small Business Size Regulations; Government Contracting Programs; 8(a) Business Development/Small Disadvantaged Business Status Determinations; HUBZone Program; Women-Owned Small Business Federal Contract Program; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 80 FR 6618-01 (February 5, 2015) (“[T]he proposed rule would clarify that each instance of alleged discriminatory conduct must be accompanied by a description of the negative impact of the conduct on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.”). The Agency is certainly free to alter the regulations as it deems proper, and OHA would be required to follow any such alterations. However, SBA's perceived need for clarification on this issue does not render the analysis arising from the plain language of the regulations as currently written invalid.

B. Ms. Skaggs' alleged personal experiences of substantial and chronic disadvantage in American society and negative impact or advancement into the business world

Taking all the materials Petitioner presented to SBA as proposed evidence of substantial and chronic disadvantage and/or negative impact or advancement into the business world results in several discrete alleged incidents of gender discrimination. As explained fully below, SBA's rejection of some of these alleged incidents as inadequate was reasonable. Furthermore, I agree with SBA that, in general, several of Ms. Skaggs' allegations of gender discrimination in the application and the materials submitted for reconsideration are vague, conclusory and too general to sustain Petitioner's burden of proof (e.g., general statements about being a woman in a male-dominated industry like construction and non-specific relations of more particular instances like being asked to attend a training meeting in "Daisy Duke" shorts with no other details or corroborating evidence from third parties were insufficient). As such, Petitioner's generalized claims of gender bias simply did not offer SBA enough details to make an affirmative determination.

1) Alleged gender discrimination in Ms. Skaggs' education

I agree with SBA that Petitioner did not establish by a preponderance of the evidence that Ms. Skaggs' educational history offered specific instances of individual gender bias. Petitioner never identified in her Application or in materials submitted for reconsideration any discrete incident or act of gender bias related to her educational experiences, separate and apart from a generalized claim that single-sex education might have adverse effects upon a given gender's interactions with the other. Certainly, the articles provided indicate that Ms. Skaggs' all girl educational experience might have had such a negative impact upon her ability to deal with males, particularly in a male-dominated profession like the construction industry. However, SBA's determination that such articles cannot substitute for specific incidents of gender discrimination within the educational context was reasonable.

The articles Petitioner provided clearly may be considered under the totality of circumstances, but Ms. Skaggs' educational experiences, as provided in her application and materials submitted for reconsideration, do not standing alone, constitute an adequate showing of "substantial and chronic" disadvantage.

2) Alleged instances of gender discrimination suffered by Ms. Skaggs

A) Letter from Ms. Skaggs' subcontractor

Mr. Martir made several claims in his letter. *See* AR Exh. 7, Socially Disadvantaged Narrative at 1. Specifically, Mr. Martir stated that he has worked as a subcontractor for Ms. Skaggs on a few projects and has witnessed "obstacles" Ms. Skaggs faces in the industry simply due to her gender. *Id.* Mr. Martir offered as an example an incident where both he and Ms. Skaggs were on-site to meet with a lead contractor; and even though he was working as Ms. Skaggs subcontractor, that lead contractor only addressed Mr. Martir and not Ms. Skaggs. *Id.*

Mr. Martir also presented a second alleged incident in which he and Ms. Skaggs were on a job-site walk-through and Ms. Skaggs was asked by another contractor why she had been sent instead of her boss, to which Ms. Skaggs replied that she was the boss. *Id.* The other contractor allegedly snickered in response and asked “What is the world coming to?” *Id.* Mr. Martir then stated that Ms. Skaggs did not end up getting the job, even though her bid was competitive with other “long established” firms. *Id.* Finally, Mr. Martir asserted that he was “hesitant to work with Ms. Skaggs at first” because she was a female contractor and he was thus “skeptical” of her abilities. *Id.*

SBA concluded the letter from Mr. Martir was vague and lacked sufficient details, as neither names were provided nor dates when the alleged incidents occurred. AR Exh. 4 at 3. SBA also noted that without sufficient information, it could not be determined that Ms. Skaggs' failure to get the job was related to her gender. *Id.*<sup>12</sup> This statement reflects SBA's apparent position that an applicant need both demonstrate gender discrimination and some discrete adverse effect from that same discrimination to qualify as adequate proof. Otherwise, it will reject proffered evidence as inadequate on the whole issue of gender discrimination.

As such, SBA's rejection of Mr. Martir's alleged incidents was not unreasonable on the surface. The letter does not provide any specific dates, locations, or names of other parties, which one would generally need to see to give such claims credibility. The information Mr. Martir presented was certainly non-specific as to when and where such incidents occurred and who, in particular, made the comments (although I note, the positions of the alleged individuals was given).

Even without such details, Mr. Martir's letter does recount two instances where, at minimum, sexist orientations and gender based discrimination against Ms. Skaggs were manifest. There is nothing outright implausible about Mr. Martir's relation of these two incidents and it is questionable how, in this particular instance, the provision of further details (like the specific names of those making the comments or the particular date or location) would further benefit the analysis of such incidents as evidence of gender discrimination. Mr. Martir clearly articulated the circumstances, and the nature of, such comments and behavior — he was working for Ms. Skaggs as a subcontractor and was personally accompanying Ms. Skaggs and witnessed these alleged instances on a potential or actual job site.

Furthermore, I find SBA's outright rejection of this evidence unreasonable on the basis of its assertion with respect to the latter instance Mr. Martir presented that Ms. Skaggs did not establish that her not receiving the project might have had as much to do with non-discriminatory reasons as gender bias. As discussed above, I do not read the regulations as specifically requiring that an applicant make a necessary causal connection between a particular instance of gender

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<sup>12</sup> SBA also noted that because no dates were provided, it could not determine whether the job was lost to other long-established firms (as Mr. Martir commented in his letter), which would give a valid reason for not giving Ms. Skaggs' the job as opposed to conclusory statements. AR Exh. 4 at 3.

discrimination and a resulting, specific, negative entry into or advancement within the business world because of that particular instance of gender discrimination.<sup>13</sup>

The regulations speak in terms of an applicant having to establish both personal experiences of chronic and substantial social disadvantage and negative entry or advancement in the business world because of the “disadvantage” — not because of those articulated personal experiences of “chronic and substantial social disadvantage”. It is thus conceivable that one could have had numerous personal experiences of gender bias and discrimination (i.e., the “social disadvantage”) that were “chronic and substantial”; but all of which did not necessarily lead to negative entry or advancement in the business world. Without establishing at least some negative entry or advancement in the business world because of the social disadvantage (i.e., here gender bias — no matter how extensive and chronic it might have been in other areas), an applicant would not be eligible for admission to Program.

I thus have concerns that SBA disregarded credible evidence of gender bias simply on the basis that there might have been other, non-discriminatory reasons for the ultimate result. It is not an applicant's burden to disprove SBA's assertion, in the face of credible evidence, that gender discrimination did not, in fact, occur; or establish that such gender discrimination led to discernible adverse consequences, separate and apart from the gender discrimination itself.

Indeed, I find it hard to believe that Petitioner could present credible, written evidence, like a statement or an affidavit from the decision-maker for a particular job stating that Ms. Skaggs' bid for the work was passed over simply because she was a woman. Blatant, clear admissions by third parties that they engaged in discriminatory conduct are usually not readily obtainable (although a clear exception is discussed *infra*).

Here, Mr. Martir presented credible, uncontested instances of gender bias against Ms. Skaggs within the context of her business efforts for Petitioner. Overall, the preponderance of the evidence leans in favor of Petitioner that such incidents did in fact take place. They were witnessed by a third party (Mr. Martir) and are related with enough substantive details that SBA's rejection of them was unreasonable.

Finally, I note that if SBA were looking for adverse effects of such gender discrimination, Mr. Martir's letter explicitly provides some negative impacts upon Ms. Skaggs because of gender bias in that he states quite clearly that he himself was hesitant to work for Ms. Skaggs “at first” simply because of her gender. Such a clear and explicit admission lends credence to Ms. Skaggs' more generalized statements that she has difficulty competing in a male-dominated industry like construction as a woman. Hesitation, like Mr. Martir's, by employees or subcontractors to work for a female contractor certainly indicates the adverse impact of gender bias — despite the

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<sup>13</sup> As articulated previously, an applicant must demonstrate negative entry into or advancement within the business world due to the disadvantage established; but there is no reason within the regulations, as currently written, to reject evidence of gender bias just because it did not necessarily result in such adverse effects. Reviewing an applicant's efforts to establish “significant and chronic” disadvantage is a separate inquiry.

ultimate fact that such individuals overcame their initial reluctance and elected to work for a woman in the industry.

B) Ms. Skaggs' experiences at CL Skaggs Trucking

Ms. Skaggs initially claimed that in the past her co-workers were promoted and received increased wages, even though her salary was “stagnant” despite the fact she put in more hours and had more responsibilities. AR Exh. 7, Socially Disadvantaged Narrative (July 11, 2013) at 1. Specifically, Ms. Skaggs recounted that Mr. Dedmon was hired and he tried to alienate Ms. Skaggs from her boss and co-workers and made inappropriate comments and sexual innuendos, including a daily “blonde joke.” *Id.* Ms. Skaggs claimed that as a result of this behavior, she resigned her position; but after a few weeks of unemployment, she was offered her position back and she saw that Mr. Dedmon had been given a company vehicle, gym membership and vacation time, which she did not receive because the owner felt that she was a “younger female” (then aged 30) and Mr. Dedmon was an older male (40 years old) and had more to offer. *Id.* Ms. Skaggs claimed that at the time she had been in the industry for 12 years and Mr. Dedmon had come from shoe sales.

In applying for reconsideration, Petitioner supplied a letter from Mr. Skaggs, her father and the owner of CL Skaggs Trucking. AR at Exh. 7. That letter stated that Ms. Skaggs worked for the trucking company, located in Fairfield, California, for 27 years (from 1986 to 2013). *Id.* at 25. Mr. Skaggs also noted that he personally felt that the “superior role” was best occupied by a man during the years Ms. Skaggs was employed at the company, as a male “boss” is more respected by his peers. *Id.* Mr. Skaggs admitted that in an effort to “promote business”, Ms. Skaggs' advancement in the company was “crippled” due to her gender and characterized her gender as “her only handicap” in the field. *Id.*

Ms. Skaggs further claimed that she was placed in an office trailer by herself at Skaggs Trucking and instructed not to converse with the drivers. *Id.* at 11. Ms. Skaggs also attached several articles suggesting that women face difficulties because of gender in the construction industry in support of her claims. *Id.* at 12-25.

In considering this evidence, SBA initially determined that although Mr. Dedmon was alleged to be intent on taking over Mr. Skaggs' job by attempting to alienate Ms. Skaggs and making sexist remarks, such actions did not appear to be an example of gender-based bias. AR Exh. 4. Indeed, SBA surmised, based on materials Petitioner provided (including Ms. Skaggs' resume), that given: (1) Ms. Skaggs was working for an immediate family-owned business; (2) Ms. Skaggs' apparent age at the time of the incident (30 years old); (3) the fact Ms. Skaggs had been working for CL Skaggs Trucking for 14 years in administration and management; and (4) the fact that Mr. Dedmon was a new employee (aged 40) coming from sales, SBA determined that it was not more probable than not that Ms. Skaggs encountered gender bias from either Mr. Dedmon or the owner of the company. *Id.*

Upon reconsideration, SBA again found fault with Ms. Skaggs' depiction of her time at CL Skaggs Trucking and the incidents with Mr. Dedmon. Agency Response, Exh. B at 2-3. Specifically, SBA addressed the differential perk (a company vehicle) and speculated that Mr.

Dedmon, who came from shoe sales, might have been a sales representative for the company and so legitimately might have been given the company car while Ms. Skaggs, an administrative assistant, was not provided one. *Id.* at 3. Furthermore, SBA rejected Ms. Skaggs' assertion that she was placed in a trailer all by herself by noting that the use of such trailers on construction sites or in the industry generally were quite common. These assumptions were not based on record evidence, but rather offer speculative and alternative, possible explanations to counter Petitioner's proffer on this subject.

SBA also determined that Mr. Skaggs' letter was not specific enough (no names, dates or specific incidents) and was not credible because Mr. Skaggs is Ms. Skaggs' father and "is expected to also gain financially from business relationships with [Petitioner] as a subcontractor." *Id.*

SBA's rejection of Ms. Skaggs' evidence concerning gender discrimination on this issue was unreasonable and thus arbitrary and capricious. First, SBA speculated that the differential perks given to Mr. Dedmon resulted from his sales experience; and that perhaps he filled the same role for the company, despite the fact that Mr. Skaggs' letter makes general statements that Ms. Skaggs was held back at the company just on the basis of her gender. No record evidence supports SBA's speculation. Indeed, Ms. Skaggs made it clear that Mr. Dedmon allegedly wanted her position and also that she had many more years of experience than Mr. Dedmon in the construction field. The details concerning the particular positions occupied by Mr. Dedmon and Ms. Skaggs are lacking to be sure. But, I find SBA's assumptions about why Mr. Dedmon received greater benefits to be extra-record and contrary to the statements offered by Mr. Skaggs.

Second, Mr. Skaggs' letter clearly articulates the years during which Ms. Skaggs worked for the company and stated explicitly that Ms. Skaggs was not provided opportunities within the company due to her gender and perceived deficiencies in the construction industry on that basis.

While I agree with SBA counsel that the letter itself does not discuss Mr. Dedmon's role in the company compared to Ms. Skaggs', it nevertheless provides clear and direct support to Ms. Skaggs' contentions that she was passed over for opportunities in the company and treated differently just based on her gender. Importantly, this discriminatory treatment was allowed to continue year after year despite the fact that her father was the company's president. Indeed, while Mr. Skaggs might argue that he was only trying to protect his daughter in the male dominated construction business, such an argument must fail as Ms. Skaggs has related how such long-standing discrimination impacted her efforts to establish herself in the field. In point of fact, Mr. Skaggs discriminated against his daughter over the entire period of employment in an unapologetic, explicit, and egregious manner. Nevertheless, the Agency dismissed the father-daughter interaction at Skaggs Trucking as self-serving. That conclusion is hereby rejected. The record evidence overwhelmingly supports the conclusion that Mr. Skaggs' actions resulted in Ms. Skaggs having to endure prolonged and improper gender discrimination.

Third, SBA's rejection of the Skaggs' letter as not credible is again speculative and not supported by evidence in the record. SBA did not refer to any basis, other than a familial relationship, to contend that CL Trucking would benefit from Petitioner's entry into the Program

and thus impeached the credibility of Mr. Skaggs' letter as a result. Such unfounded assumptions are inherently arbitrary and capricious.

Ms. Skaggs' extended experience at CL Skaggs Trucking and being passed over for a position that she desired merely on the basis of her gender is a single, but significant, instance of discrimination that was established by a preponderance of the evidence. I find SBA's conclusions to the contrary clearly arbitrary and capricious.

### C) Meeting at Travis Air Force Base

Ms. Skaggs also related an alleged incident that took place at Travis Air Force Base. AR Exh. 7, Socially Disadvantaged Narrative (July 11, 2013) at 2. She claimed that during this meeting with a contract officer, she was totally ignored and that her superintendent had to suggest that questions be directed toward Ms. Skaggs. The contract officer allegedly would not look at Ms. Skaggs and only made eye contact with her once during the meeting and the next day during a phone conversation stated that he “could not fathom the idea of [Ms. Skaggs] driving a backhoe or digging a trench in an excavator.” *Id.* Furthermore, the contract officer allegedly stated that Ms. Skaggs' is “so gorgeous” she “should be in Hollywood.” *Id.*

SBA initially analyzed Petitioner's evidence and found that the contracting officer was merely paying her a compliment. AR Exh. 4 at 3. SBA also noted that without sufficient information, it could not be determined that Ms. Skaggs' failure to get the job at Travis Air Force Base was related to her gender. *Id.* Again, SBA took a specific instance of alleged gender discrimination and rejected it, in part, because there was no proof offered that the discrimination itself had a negative impact upon entry into or advancement within the business world.

Ms. Skaggs clearly did not provide the specific name of the contract officer, but she did provide the identity in terms of specific role and the particular location — a Travis Air Force Base contracting officer. The specific date was not provided, but the specific conduct was sufficiently articulated that on the whole, SBA's rejection of this incident as evidence of gender discrimination was improper. I find it more likely than not that this incident occurred as alleged.

SBA's contention that this contract officer's comments were merely a “compliment” is frankly absurd. An individual presumably in a position to make a business decision or evaluate Ms. Skaggs' abilities to complete the project made a specific comment concerning Ms. Skaggs' capacity to do the job under consideration (i.e., he could not imagine her digging a trench in an excavator). Combining this comment with the other comment concerning her appearance clearly establishes a gender motivated bias. It is ridiculous to assume, as SBA apparently did, that these comments were merely complimenting Ms. Skaggs in a neutral fashion about something unrelated to her capacity to professionally engage in construction jobs.

This is not to say that without more, SBA's conclusion that this incident, by itself, did not represent a specific incident establishing Ms. Skaggs' negative entry into or advancement within the business world was equally improper. However, this incident was adequate evidence that Ms. Skaggs had suffered gender discrimination.

D) Ms. Skaggs' work with Associated Constructors

Ms. Skaggs further recounted that in 2011 she received a contract with Associated Constructors. AR Exh. 7, Socially Disadvantaged Narrative (July 11, 2013) at 2. She claimed that she heard excuses for not being paid for her work with this company, such as she did not need the money as “her ole man takes care of her.” *Id.*<sup>14</sup> Furthermore, Ms. Skaggs stated that she waited six months to get her first payment for this job and was eventually told to come to the office to pick up the payment. *Id.*

She brought a box of cupcakes as a thank you, and when she returned to her office, she had an email from Mr. Gary Kenyon, the project manager at Associated Constructors, which Ms. Skaggs rightfully characterized as inappropriate and unwarranted behavior. *Id.* Ms. Skaggs attached a copy of that email dated June 26, 2012 to her application. *Id.* at 4. Mr. Kenyon's email stated the following (emphasis added):

Thank you for your beautiful presence, and o yes the cupcakes. I'm fantasizing the bow has the essence of your soul upon it — but nothing — dog gone it. How about I send it back, you put some of your favorite perfume on it so I can relive the moment of your presence. Thank You for your kindness — Perhaps I'll get our CFO to hold the checks again to get your presence again. — This time I'll take pictures, because the field crew will not believe it. A ribbon with no scent is all I have to show for it now.

As a result of this email, Ms. Skaggs claimed that she ceased work on the project and subsequently lost business for her company. AR Exh. 7 at 2.

Initially, SBA questioned Ms. Skaggs for not complaining to the executives or the human resources department of that company about Mr. Kenyon's behavior. AR Exh. 4 at 3. SBA also noted that Petitioner's submission included apparent activity through the early part of 2013 with Associated Constructors following Mr. Kenyon's email. SBA alleged that such activity contradicted Ms. Skaggs' claim that she decided not to do further business with the company following Mr. Kenyon's email in June 2012. *Id.*

Upon reconsideration, Ms. Skaggs explained that she ceased working for the company but had to wait until September 8, 2013 to receive her final payment for the work she had done. AR Exh. 3 at 31. Ms. Skaggs also stated that Associated Constructors' failure to pay for the work she had completed in a timely fashion negatively impacted her company's financial condition. Indeed, as a result of this non-payment, she claimed it impeded her ability to pursue other projects due to a lack of funds. *Id.* Attached to this explanation was a copy of Arrow's Customer

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<sup>14</sup> I note that SBA did not address specifically this alleged reason for why Petitioner did not get paid initially. I find it credible that such a comment was made, particularly in light of the Kenyon email. The referent for “ole man” is not clear, but in any event, such a reference that Ms. Skaggs' did not need the money for work performed because some other male figure was “taking care” of her is a clear instance of gender discrimination.

QuickReport clarifying the last day worked for Associated Constructors (February 28, 2013) and the final payment for the work done (September 8, 2013). *Id.* at 32-33.

In response, SBA analyzed the additional evidence and rejected it as unpersuasive. Agency Response, Exh. B at 3-4. In addition, SBA found the information provided inconsistent with earlier statements given in the Application concerning the last day she worked for the company and her receipt of final payment, long after the Kenyon email. *Id.*

In sum, SBA acknowledged that Mr. Kenyon's email discussing her visit to the office to pick up the check and accompanying threat to have the company's CFO withhold checks just to have her come into the office again was grossly improper. Nevertheless, SBA rejected this evidence on the basis that its interpretation of the record as a whole indicated Petitioner continued work with Associated Constructors after the incident and Ms. Skaggs did not complain to the customer's higher level managers or human resources about Mr. Kenyon's behavior.

I find SBA's position problematic in discounting Ms. Skaggs' evidence. Ms. Skaggs explained that she was disturbed by Mr. Kenyon's email of June 26, 2012 and ceased work on this project. In her application, Ms. Skaggs did not assert, but certainly fairly implied, that she then made the decision not to work for Associated Constructors. However, in materials submitted in support of reconsideration, Ms. Skaggs indicated that her last day of work for Associated Constructors was February 28, 2013. She explained on reconsideration with reference to her accounts receivable records that she then had to wait for final payment on the work done for Associated Contractors from that date.

Ms. Skaggs asserted that SBA's finding that she continued working for Associated Constructors after receiving "derogatory treatment" was erroneous, but she should have been more explicit about the exact timing of her cessation of work with Associated Constructors and any reasons for continuing actual work for the company following the Kenyon email. I find Ms. Skaggs' explanations lack clarity, but on balance, SBA's assumptions about Petitioner's work for Associated Constructors are more problematic than Ms. Skaggs' lack of clarity as it relates to evidence of gender discrimination.

Most troubling, SBA made the assertion, based on nothing referenced in the record other than an apparent contradiction, that it was more probable than not that Associated Contractors delayed payment due to economic/financial conditions. Nothing in the record indicates that such late payments had anything to do with the company's financial condition. The basis for such an assertion is not adequately explained. Indeed, such an interpretation of the evidence flies in the face of the explicit and direct evidence indicating that withholding payment was specifically threatened on the basis of clear sexual discrimination and attempts to get Ms. Skaggs into the office to personally pick up any such payments.

Furthermore, SBA inexplicably rejected Ms. Skaggs' evidence for the unrelated reason that she did not elevate the issue to Associated Constructors' management or human resources department. The regulations clearly do not require a victim of claimed social disadvantage to seek a remedy up the chain-of-command in order to perfect proof for alleged instances of

discrimination. Instead, the requirement entails an individual applicant to the Program to have suffered significant and chronic instances of such disadvantage.

SBA's rejection of Petitioner's evidence on this particular incident and dealings with a customer was thus improper. Overall, the balance of evidence in the record favors Ms. Skaggs' account of her specific dealings with this customer. However, Ms. Skaggs did not sufficiently articulate that because of the gender/sexual discrimination, her business was negatively affected.

The record certainly indicates gender discrimination occurred, and that she did eventually cease work for this customer and thus might have lost future opportunities. However, Ms. Skaggs' explanations were unclear enough that SBA's rejection of this evidence on this particular aspect of her dealings with Associated Constructors was not contrary to law. Ms. Skaggs certainly could have been clearer about the incident, e.g., the exact nature of the project and what work might have been left to wrap it up in order to get paid. But taken as whole, the incident reflects an outrageous example of detailed and specific gender discrimination. SBA's rejection of this incident as evidence of such conduct was improper.

E) Ms. Skaggs' interview for DBE certification

Ms. Skaggs also claimed that in 2012 she applied for CalTrans DBE (Disadvantaged Business Enterprise) certification and felt discriminated against by the interviewer who allegedly had trouble believing that Ms. Skaggs had taken and passed the general engineering license exam. AR Exh. 7, Socially Disadvantaged Narrative (July 11, 2013) at 2.

In support of reconsideration, Ms. Skaggs asserted that her ability to obtain such certification helps establish the gender bias she has experienced. Otherwise, she stated that she would not have gotten that certification. AR Exh. 3 at 34. Ms. Skaggs also provided additional details concerning her encounter with a CalTrans interviewer, Mr. Larry Johnson, including "many inappropriate questions." *Id.* Such questions included: (1) whether Ms. Skaggs received the license from her father; (2) why, being a lady, did she enter the construction industry; and (3) how she was going to compete with other male-owned companies. *Id.*

SBA rejected as unpersuasive that Ms. Skaggs' obtaining DBE certification is proof itself of having been subject to gender bias. As for the particular questions Mr. Johnson asked during the interview process, SBA determined that they were likely part of the DBE process and do not appear unreasonable or inappropriate. Finally, because Petitioner obtained the DBE certification, SBA questioned how she or her company was adversely affected.

SBA's reasons for rejecting Ms. Skaggs' claimed discriminatory evidence with respect to her DBE interview was proper. Nothing in the record establishes that the interviewer's questions were improper and SBA's contention that such questions might have been part of the DBE application/evaluation process was not unreasonable.

Furthermore, I agree with SBA that given Petitioner received the DBE certification, it is difficult to discern how such questioning, even assuming that it was motivated by, and evidence of, gender bias negatively impacted Petitioner's advancement or entry into the business

world. *See also Seacoast Asphalt Services, Inc.*, SBA No. SDBA-151 (2001); *Arteaga Construction, Inc.*, SBA No. MSB-584 (1997) (other agency/program DBE procedures and evaluations are not determinative on SBA proceedings).

F) Alleged biased remarks made to Ms. Skaggs' regarding a project quote

Ms. Skaggs also related a then-recent quoting for a project and the company decided to go with another firm but the individual who told Ms. Skaggs that she did not get the work allegedly stated: "I'm sure Id. like your heels better than his work boots." AR Exh. 7, Socially Disadvantaged Narrative (July 11, 2013) at 2.

Clearly a sexist remark was made to Ms. Skaggs in connection with her work in the construction industry by a potential client or client's representative. But Petitioner did not provide any significant details about when this incident took place or where it took place or who, particularly made the alleged comment. Significantly, no third party corroborated this incident, which might have (like the incidents Mr. Martir discussed or Mr. Skaggs' explicit admission of gender discrimination) lent some credibility to such a claim where such details are absent. As a result, I find this particular incident too vague and non-specific. SBA's rejection of it as evidence of chronic and substantial gender bias was not unreasonable.

CONCLUSION

Taken as a whole, I find SBA improperly rejected Petitioner's evidence offered to establish substantial and chronic social disadvantage that negatively impacted Ms. Skaggs' entrance into or advancement within a well-established male dominated industry like construction. Specifically, I find the rejection of Ms. Skaggs' experiences while at CL Skaggs Trucking and the rejection of the clear incident of gender discrimination Ms. Skaggs faced while working with Associated Constructors were arbitrary and capricious and not based on a proper evaluation of the record evidence Petitioner submitted in support of its application.

Furthermore, I find it more likely than not that as compared to Mr. Dedmon, Ms. Skaggs was limited in her position with the company only on the basis of her gender (as evidenced by Mr. Skaggs' letter that SBA wrongfully rejected as not credible). Mr. Dedmon was given perks (like vacation time, a gym membership, and use of a company vehicle) not offered to Ms. Skaggs that more likely than not were unrelated to the particular position Mr. Dedmon held. Furthermore, Ms. Skaggs' made credible assertions that she was intentionally kept isolated from other, male co-workers in a separate workspace. SBA's rejection of the evidence based upon alternative, non-record assumptions was improper.

Petitioner established by a preponderance of the evidence that Ms. Skaggs has suffered chronic and substantial social disadvantage on the basis of her gender and was thereby negatively impacted in the entry and/or advancement in Petitioner's industry. SBA's conclusion that Petitioner should be denied entry into the 8(a) Program was contrary to the preponderant

evidence Petitioner submitted, and, as such, was unreasonable, and arbitrary, capricious, and contrary to the law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).<sup>15</sup>

**WHEREFORE:**

**ORDER**

**IT IS HEREBY ORDERED THAT** the SBA shall afford Petitioner entry into the 8(a) BD Program within 30 days of the date this Decision and Order becomes final.

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

**Done and dated on this 19<sup>th</sup> day of March, 2015 at Alameda, California.**

HON. PARLEN L. MCKENNA  
Administrative Law Judge

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<sup>15</sup> I note that SBA did not make a formal finding as to Petitioner's economic disadvantage in its determination letters under 13 C.F.R. § 124.104. However, my in camera review of the record indicates that such a finding likely would have been made in favor of Petitioner had the social disadvantage analysis been properly made. Should SBA review the materials Petitioner submitted to establish economic disadvantage and determine otherwise, it is welcome to file for reconsideration on this subject pursuant to 13 C.F.R. § 134.409(c). This approach conserves judicial and Agency resources if that element of Petitioner's admission into the Program is uncontested and thus obviates the need for a remand on that subject.