

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

IN THE MATTER OF:

ORB Solutions Inc.

Petitioner

SBA No. BDPE-559

Decided: April 19, 2017

DECISION AND ORDER

On November 23, 2016, ORB Solutions Inc. (“Petitioner” or “OSI”) appealed a determination of the Small Business Administration (“SBA” or the “Agency”) denying Petitioner admission into the 8(a) Business Development Program (“8(a) BD Program”). See 13 C.F.R. parts 124, and 134. The *Appeal Petition* contends that the SBA improperly applied the laws and regulations in making its determination that Petitioner's principal owner and Chief Executive Officer, Ms. Seema Gupta, was not economically disadvantaged. The Agency filed its *Answer* to the *Appeal Petition* on January 9, 2017. The case is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a), (c) and 134.102(j)(1), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.¹

Procedural History

On August 28, 2015, Petitioner filed its initial application for admission into the 8(a) BD Program. After Petitioner's timely response to several SBA requests for additional information, the Agency denied the application on May 30, 2016. The SBA determined that OSI was ineligible for the 8(a) BD program because the individual who was the principal owner and Chief Executive Officer, Ms. Gupta, was not economically disadvantaged. The basis for that conclusion is that Ms. Gupta's net worth was determined to be in excess of the regulatory threshold of \$250,000. See 13 C.F.R. § 124.104(c)(2).

On July 12, 2016, Petitioner filed a Request for Reconsideration (“Request”) and supporting documentation that explained, in detail, why the 2011 Loans should be considered loans made for a legitimate business purpose and considered a true liability for the purpose of determining Ms. Gupta's net worth. However, on October 25, 2016, the SBA again declined Petitioner's 8(a) Program application and Request due to the SBA's belief that (1) Ms. Gupta would not enforce the 2011 Loans against herself; and (2) Ms. Gupta's adjusted personal net

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 brought by the U.S. Small Business Administration.

worth, including a loan from Ms. Gupta to OSI of \$27,226.00 plus the fair market value of the Purchase Agreements, exceeded the regulatory limits. The *Appeal Petition* followed thereafter.

Program Eligibility Requirements

To gain entry to 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. § 124.104(a). An economically disadvantaged individual is a socially disadvantaged individual whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to non-socially disadvantaged competitors in the same or similar line of business. 13 C.F.R. § 124.104(a).

When determining economic disadvantage, the SBA considers the personal financial condition of the person claiming disadvantaged status, including income from the past three years, personal net worth, and the fair market value of all assets. 13 C.F.R. § 124.104(c). An individual with a personal net worth of more than \$250,000 is not considered economically disadvantaged. 13 C.F.R. § 124.104(c)(2). When calculating net worth, the SBA excludes the ownership percentage in the applicant company, and the equity in the owner's primary personal residence. *Id.* Funds invested in an official retirement account are also excluded from the net worth calculation, as is income from the applicant company that is reinvested in the company or used to pay the company's normal taxes. 13 C.F.R. § 124.104(c)(2)(ii)-(iii).

Standard of Review

An SBA determination may be overturned only if the reviewing court concludes (1) that the administrative record is complete; and (2) based upon the entire administrative record, the Agency determination was arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). The Court may only consider information contained in the written administrative record. 13 C.F.R. § 134.406(a). Therefore, the administrative record must be complete before the Court may determine whether it supports the SBA's ultimate conclusion.

Completeness of the Record. In determining whether the administrative record is complete, the 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. *Burlington Truck Lines, v. United States*, 371 U.S. 156, 168 (1962); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). If the Agency's decision fails to address these factors, the record is considered incomplete and the case may be remanded to the Agency for a new initial determination. *DK Environmental*, SBA No. BDPE-481. The Court may also remand a decision if it is “clearly apparent from the record” that the Agency committed a mistake of fact or law. 13 C.F.R. § 134.406(e)(2); *see also Innovet*, SBA No. BDP-466.

Reasonableness of Decision. If the administrative record is deemed to be complete, the reviewing court proceeds with its review to ensure that the Agency decision was not arbitrary, capricious or contrary to law. The reviewing court's task is to decide whether the Agency reached a reasonable conclusion, considering all 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, at 3 (“[Examination] is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct.”). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

Final Agency Determination

The SBA evaluates claims of economic disadvantage under 13 C.F.R. § 124.104 (c) by examining certain factors relating to the personal financial condition of the individual claiming disadvantaged status.² Here, the factor being challenged is Ms. Gupta's net worth. If the net worth of an individual claiming disadvantage is not less than \$250,000, the individual is not economically disadvantaged and the individual's business cannot be admitted into the 8(a) BD program. 13 C.F.R. § 124.104 (c) (2). OSI now challenges, on appeal, the SBA's decision to deny OSI's entry into the 8(a) BD program³ as arbitrary, capricious, and contrary to law. The basis for OSI's claim is that the SBA erred in its calculation of Ms. Gupta's net worth based on: (1) a failure to adjust Ms. Gupta's net worth for a bona fide debt; (2) inconsistent calculations; and, (3) a miscalculation of the purchase agreements.

1. The SBA did not err in its determination that the 2011 loan was not a bona fide loan.

Petitioner contends that the SBA failed to consider the 2011 Loan of \$132,858 as a true, bona fide liability because the record lacked sufficient objective evidence. Petitioner further argues that the objective evidence the SBA claimed was lacking was in fact provided by Petitioner in response to the SBA's request for additional information. In support, Petitioner

² 13 C.F.R. § 124.104(c) states that will evaluate claims of economic disadvantage by considering: . . . factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past three years, personal net worth, and the fair market value of all assets, whether encumbered or not. An individual who exceeds any one of the regulatory thresholds for personal income, personal net worth, or total assets will generally be deemed to have access to credit and capital and not economically disadvantaged.

³ Small Business Act of 1958, § 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).

claims that “courts have considered three types of evidence: testimony of the [shareholder receiving corporate payments], objective evidence contemporaneous to the transfer of funds to corroborate asserted intentions, and acts subsequent to the date of the transfer,” all of which Petitioner maintains were present in this case. *See Nasser v. United States*, 257 F. Supp. 443, 447 (N.D. Cal. 1966).

OSI provided additional documentation to the SBA such as the 2011 Resolution showing OSI agreed to advance money to Ms. Gupta for corporate investments in India; two purchase agreements as evidence of the development of building structures; OSI's balance sheets that reflected a schedule of advances and deposits to show that OSI had loaned a total of \$265,716 to Ms. Gupta and her husband for property purchases in India; and, Ms. Gupta's statements to the SBA that explained the purchase price and market value for the two properties in India. Petitioner's documentation also includes a record of payments that were made on the loan since the loan transfer, and the subsequent execution of a formal promissory note that occurred in June 2016. Relying on *Nasser*, Petitioner finally argues that the record should lead to the conclusion that “there is no doubt that an advance by a corporation to a controlling, even sole, shareholder can constitute a loan.”

In its *Answer*, the SBA contends that Petitioner twice failed to demonstrate, by a preponderance of the evidence, that Ms. Gupta was economically disadvantaged under 13 C.F.R. § 124.104. The SBA maintains that it reasonably assessed the three assets/liabilities presented by Petitioner in determining whether Ms. Gupta was eligible under 8(a) BD.

The SBA reviewed the 2011 Resolution and other documentation provided by Petitioner and discovered OSI agreed to advance money for the purchase of properties and an office in India. But, the SBA later questioned whether the 2011 Resolution loan transfer was a true, bona fide liability because “the record is void of any common indicia of a typical loan arrangement including a promissory note, repayment schedule, or provision for interest.” Since the sole discretion to enforce the debt rests with the owner, the SBA surmised that it was unreasonable to conclude Ms. Gupta would enforce this debt against herself. The obligation to repay was conditional rather than unconditional. As a result, such conditional liability should not be considered as a factor to reduce Ms. Gupta's net worth because it was uncertain whether the loan would in fact be repaid.

The SBA also reviewed the OSI balance sheets and statements made by Ms. Gupta regarding the impending purchases to establish Ms. Gupta's intent at the time of the loan transfer. Again, the record reflected that because Ms. Gupta not only did not return unused funds to OSI's corporate account from the 2011 loan, but instead, kept the funds in her personal account. The formal promissory note for the full amount of the advance was executed but not until June 30, 2016, five years after the transfer of funds from OSI to Petitioner. Other than Ms. Gupta's uncorroborated statements of OSI's desire to establish corporate offices in India, there was nothing else in the record that demonstrated that the \$132,858 transfer was made solely for business purposes.

Herein, the record clearly demonstrated that the SBA reasonably calculated Ms. Gupta's personal net worth at a value that exceeded the \$250,000 regulatory threshold for 8(a) eligibility.

It was reasonable for the SBA to conclude that the \$132,858 transfer advance was not a true, bona fide liability to Ms. Gupta but was, in effect, an asset that Ms. Gupta likely would not enforce against herself or her spouse. The SBA considered sufficiently all the facts and evidence related to the 2011 and presented by OSI and correctly applied the laws and regulations applicable to these proceedings prior to denying 8(a) eligibility to Petitioner.

2. SBA did not erroneously treat the 2016 loan from Ms. Gupta to OSI as an asset instead of a liability.

Petitioner claims that SBA's characterization of the 2011 loan from OSI to Ms. Gupta, and the 2016 loan from Ms. Gupta to OSI, is inconsistent; Petitioner questions how, in one instance, the 2016 Loan can be treated as an asset while in the other instance the 2011 loan was treated as a liability even though "both loans are one in the same (i.e., loans between a sole shareholder and a corporation, and must be treated as such.)" According to Petitioner, "if SBA's analysis and decision regarding the 2011 Loan from OSI to Ms. Gupta is correct (which OSI disputes), then the SBA cannot inflate Ms. Gupta's net worth with a supposed asset (the 2016 loan) and, at the same time, refuse to credit her net worth for the 2011 Loans from OSI to Ms. Gupta."

The SBA agrees with Petitioner that Ms. Gupta's 2016 loan to OSI should be included as a personal asset to Ms. Gupta. It is settled that "in calculating personal net worth for 8(a) eligibility a loan by an applicant's owner to the applicant firm is an asset to the owner." *Computer One, Inc.*, SBA No. BDP-148 (2001); *Matter of Logicare, Inc.*, SBA No. MSB-576 (1997). However, the SBA views differently the set of circumstances that led to the 2011 Loan being treated as an asset. Although the SBA considered Petitioner's objective evidence for the 2011 Loan, the factor that actually led to the SBA characterizing the 2011 Loan as an asset was the record's clear demonstration that Petitioner would not enforce this loan against herself or her spouse.

Petitioner's position that the SBA is treating the 2011 loan and the 2016 loan inconsistently is simply not supported by the record. The SBA's alleged inconsistency is merely a matter of interpretation. There are two loans at issue here, the 2011 loan of \$132,858 from OSI to Ms. Gupta and the 2016 loan of \$27,226.00 from Ms. Gupta to OSI. While both loans involve a loan transaction between the sole shareholder of OSI and OSI as the company, these two loans were each based on two very different set of circumstances. The 2011 loan was in effect deemed an asset based on SBA's assessment that Ms. Gupta would not enforce repayment to OSI against herself or her spouse. Not deducting the 2011 Loan amount from Ms. Gupta's net worth resulted in the treatment of that loan as an asset. It was not deducted from Petitioner's net worth, which would have been the case had the 2011 loan been treated as a bona fide liability. But, the set of circumstances surrounding the 2016 loan poses a different scenario because the SBA made its asset determination based on a record that clearly demonstrated the existence of a loan arrangement that proves the clear intent to execute a repayment schedule for that loan and the intent that the loan continues to accrue interest payable to Ms. Gupta.

The only inconsistency in this matter is the inconsistent interpretation between the parties on how SBA treated the two loan transactions in this case. In this regard, the Court finds that the

SBA did not err in its determination to treat the 2011 loan differently because, based on the record of this proceeding, SBA reasonably assessed the 2011 loan as nothing more than an advance to Ms. Gupta without the expectation of a clear intent to repay OSI.

3. The SBA did not err in its valuation of the purchase agreements.

Petitioner challenges the SBA's valuation of the purchase agreements for corporate investments to purchase properties and an office for OSI in India. Petitioner also claims that the SBA failed to explain why it did not accept the documentation and explanation provided by OSI in support of its valuation of the purchase agreements. The SBA erroneously treated the purchase agreements of properties in India as real estate already owned by Ms. Gupta. According to Petitioner, by treating the purchase agreements as real estate, the SBA concluded that the total value of the purchase agreements was \$307,510, a valuation now refuted by Petitioner.

Petitioner contends that the SBA's explanation of the total value of the purchase agreements did not include the independent accountant report prepared by OSI's accountant that later confirmed the valuation of Ms. Gupta's other assets and yielded a value less than the total value determined by the SBA. The total value of \$153,755 assigned by the SBA to Ms. Gupta's one-half share in other assets artificially inflated Ms. Gupta's adjusted net worth. As a result, her net worth exceeded, by \$55,122, the \$250,000 threshold for 8(a) BD eligibility and led to Ms. Gupta being declared ineligible. Petitioner claims that, had the valuation been based on the cash deposits relied upon by OSI's hired accountant, Ms. Gupta's assigned value for her one-half share would have been lower, at \$98,633. Such outcome likely would have resulted in her falling below the \$250,000 threshold for Section 8(a) BD eligibility.

The SBA maintains that 13 C.F.R. § 124.104(c) states, “[i]n considering diminished capital and credit opportunities, SBA will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years . . . , personal net worth, and the fair market value of all assets, whether encumbered or not.” (emphasis in original). Petitioner cited no relevant legal authority why the SBA should have valued Ms. Gupta's interest in this manner. But, the SBA provided a detailed explanation of how it calculated Ms. Gupta's interest in the purchase agreements under governing regulations and relevant case law precedent. The SBA also thoroughly explained how it arrived at its valuation of the purchase agreements by averaging the properties' fair market values provided in OSI's own broker reports.

Because the SBA's determination was based on Ms. Gupta's interest in the purchase agreements, grounded in the regulations, thoroughly explained to Petitioner, and was factually supported by the record, the Agency's assessment must be upheld. The record shows that Petitioner's value assessment of the purchase agreements was based solely on cash deposits, and not on the valuation methods required by regulation or consistent with case law precedent. The SBA's Reconsideration Determination Letter fully explained the process it used to calculate the fair market value of the subject properties, and, the SBA based its determination entirely upon evidence that was properly included in the Administrative Record. Consequently, the SBA did not err in its valuation of the purchase agreements in this case.

CONCLUSION

For the foregoing reasons, the Court finds that Respondent SBA's determination denying 8(a) program entry to Petitioner, ORB Solutions Inc. was not “arbitrary, capricious, or contrary to law.” Accordingly, the Determination is hereby **AFFIRMED**.

So ORDERED.

J. JEREMIAH MAHONEY
United States Administrative Law Judge