

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

In the Matter of:

American Power, LLC,

Petitioner

SBA No. BDPE-590

Decided: March 1, 2021

APPEARANCES

Matthew T. Schoonover, Esq., Ian P. Patterson, Esq., Schoonover & Moriarty LLC,
Olathe, Kansas, for American Power, LLC

Lara H. Hudson, Esq., Office of General Counsel, U.S. Small Business Administration,
Washington, D.C.

DECISION¹

I. Introduction and Jurisdiction

On August 13, 2020, American Power, LLC (Petitioner) appealed a U.S. Small Business Administration (SBA) determination denying Petitioner entry into SBA's 8(a) Business Development (BD) program. SBA concluded that Petitioner did not establish that its owner is socially disadvantaged by a preponderance of the evidence. For the reasons discussed *infra*, I find that SBA's determination was not arbitrary, capricious, or contrary to law. The appeal therefore is denied. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

SBA's Office of Hearings and Appeals (OHA) decides appeals of 8(a) BD eligibility determinations under 15 U.S.C. §§ 634(i) and 637(a)(9), and 13 C.F.R. parts 124 and 134. Petitioner filed its appeal within 45 days of its receipt of SBA's determination, so the appeal is timely. 13 C.F.R. § 134.404. Accordingly, this matter is properly before OHA for decision.

II. Procedural History

Petitioner is 100% owned, controlled, and managed by [Individual], an Azerbaijani Turkish-American and Muslim. (Administrative Record (AR), Exh. 8.) In 2018, Petitioner applied for entry into the 8(a) BD program based on alleged economic and social disadvantage

¹ This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. After receiving and considering one or more timely requests for redactions, OHA now issues this redacted decision for public release.

stemming from discrimination [Individual] experienced based on his immigrant status, origin from a Muslim majority nation, race, ethnicity, and religious beliefs. (*Id.* at 6.) The application included a narrative statement describing the social disadvantage and providing examples of incidents to demonstrate that disadvantage. On May 20, 2020, the Associate Administrator of SBA's Office of Business Development (AA/BD) denied Petitioner's application, finding that Petitioner did not establish that [Individual] is socially disadvantaged as required by 13 C.F.R. § 124.103. (AR, Exh. 5, at 1.) Because [Individual] is not a member of one of the groups that SBA presumes to be socially disadvantaged, he must show individual social disadvantage by a preponderance of the evidence. (*Id.*, citing 13 C.F.R. § 124.103(c).) The incidents cited in Petitioner's application, though, "lacked sufficient details to allow [SBA] to attribute the incidents to bias due to [Individual's] race, ethnicity, religious beliefs, immigrant status, or origin from a Muslim majority nation." (*Id.* at 6.) Further, the proffered incidents did not show that [Individual] suffered social disadvantage that negatively impacted his entry into or advancement in the business world. (*Id.*) In addition, some of the incidents cited by Petitioner did not appear to have been directed towards [Individual] personally. (*Id.*)

Petitioner requested reconsideration of the denial. (AR, Exh. 4.) Petitioner clarified two of the incidents of social disadvantage provided in its initial application and added four more examples. (*Id.* at 1.) Petitioner asserted that if someone calls [Individual] an "immigrant," he believes they are referring to his race, ethnicity, national origin, and religion, not merely his immigrant status. (*Id.*)

On July 27, 2020, the AA/BD denied the request for reconsideration. (AR, Exh. 1.) The AA/BD concluded that the reconsideration request did not provide "sufficient documentation to overcome the original reason for decline." (*Id.* at 1.) Although Petitioner described six incidents of alleged social disadvantage, the information Petitioner provided suggested that factors other than bias were "likely the reason behind the incidents that occurred." (*Id.* at 10.) Petitioner failed to establish "a case of chronic and substantial social disadvantage based on a preponderance of the evidence that has negatively impacted [Individual's] entry and/or advancement in the business world." (*Id.*)

III. Instances of Alleged Social Disadvantage

Petitioner alleged in its initial 8(a) BD program application that [Individual] experienced social disadvantage due to his status as an Azerbaijani Turkish-American Muslim. (AR, Exh. 8.) In its request for reconsideration, Petitioner clarified two incidents and added four more incidents. (AR, Exh. 4.) These six incidents form the basis of the instant appeal.

A. Incident 1: Board of Education

Petitioner maintains that, after founding Petitioner, [Individual] campaigned for a seat on the Dayton, Ohio Board of Education in 2013, and experienced discrimination due to his social status. (AR, Exh. 8 at 11, 13-14.) Some prospective voters stated that they would not vote for a Muslim candidate. (*Id.* at 11, 13.) [Individual] nevertheless won the race and served on the Board for four years, eventually becoming the Board's President. (*Id.* at 11, 14.) Petitioner claims that

[Individual] still experienced discriminatory attitudes, as an example, one person asked him “So why are you President of the Board?” (*Id.* (emphasis Petitioner's).)

On reconsideration, Petitioner added that during [Individual's] campaign for the Board, he repeatedly publicized his ownership of Petitioner. (AR, Exh. 4 at 2.) After [Individual] was elected to the Board and had become President, a meeting attendee publicly questioned him regarding the racial and religious diversity of students in the school district, [Individual's] beliefs in representative democracy, and why [Individual] was President of the Board. (*Id.* at 2-3.) [Individual] was shocked by the attendee's questions, which suggested that [Individual] “did not deserve to be a business owner, a member of the Board, or much else because [he] was an ethnic and religious minority.” (*Id.* at 3.) Petitioner asserts that this incident impacted Petitioner's business advancement because of the negative publicity that came with the Board of Education position. (*Id.*) According to Petitioner, there is “no doubt that situations like these caused [Petitioner] to lose community support, and importantly, valuable business,” although the amount of lost business cannot be quantified. (*Id.*)

B. Incident 2: County Recorder

Petitioner's second example of discrimination stems from [Individual's] campaign to become Montgomery County Recorder in 2018. (AR, Exh. 8 at 14.) Days before the election, on October 31, 2018, an opponent posted a “racist attack ad” on Facebook, highlighting [Individual's] race, ethnicity, and immigrant status, and stating that the opponent was “proud that [the opponent] had never been to Azerbaijan and Turkey, and the only ‘turkey’ he knows is the one ‘he enjoys eating for Thanksgiving.’” (*Id.*) The ad was condemned as racist and xenophobic and was withdrawn that same day with an apology. (*Id.*) Petitioner states that the ad had a debilitating effect on [Individual's] campaign and contributed to him narrowly losing the election. (*Id.* at 15.) Petitioner additionally offered a sample of hostile comments left on [Individual's] Facebook page. (*Id.* at 14-15.)

On reconsideration, Petitioner added that, although Petitioner primarily is engaged in the trucking business, [Individual] intended to create a new real estate division within Petitioner if had he been elected County Recorder. (AR, Exh. 4 at 3-4.) [Individual] learned from the Montgomery County Sherriff and the Chairman of the County Republican Party that “several people had called in to the campaign headquarters to express their anger that a Muslim was running in the local election.” (*Id.* at 4.) Furthermore, during a campaign event, the moderator questioned [Individual's] citizenship but not that of other candidates. (*Id.* at 4-5.) Petitioner argues that this incident impacted Petitioner's business because discrimination caused [Individual] to lose the election, and thus to abandon Petitioner's planned expansion into the real estate business. (*Id.* at 5.) “Without the Recorder salary, [Individual] was unable to finance the new real-estate division of [Petitioner] and its expansion stalled.” (*Id.*)

C. Incident 3: [Bookkeeper]

On reconsideration, Petitioner introduced a new example related to [Bookkeeper], who formerly performed Petitioner's bookkeeping. (*Id.* at 6.) Petitioner alleges that [Bookkeeper], although “highly recommended” by other trucking companies, defrauded Petitioner and

eventually was caught. (*Id.*) Specifically, [Bookkeeper] falsified receipts showing payment of certain taxes and instead diverted those monies to himself. When confronted, [Bookkeeper] initially “blamed everything on mistakes made by his employees” but then exclaimed “You guys shouldn't even be here in America” and “You guys aren't even allowed in this building! You guys are Muslims!” (*Id.*) Petitioner reported the alleged fraud to the police, but has been unsuccessful in its efforts to recoup monies from [Bookkeeper]. Because the fraud may have been motivated by ethnic and/or religious animus, [Individual's] status impacted Petitioner's business. (*Id.* at 7.) Petitioner estimates that the alleged fraud cost Petitioner approximately \$30,000. (*Id.*)

D. Incident 4: Pioneer Transfer, LLC

On reconsideration, Petitioner introduced a new incident related to Pioneer Transfer, LLC (Pioneer Transfer). (*Id.*) Petitioner explains that, for business reasons, Petitioner discontinued a line of credit that it had offered to Pioneer Transfer to transfer its freight. (*Id.* at 7-8.) In response, a representative of Pioneer Transfer threatened to report [Individual] to Immigration and Customs Enforcement. (*Id.* at 8.) [Individual] believes that this threat was due to his immigrant status. (*Id.*) Following the incident, Pioneer Transfer also threatened to file a lawsuit against Petitioner and made a negative comment about Petitioner on FreightGuard, a trucking carrier monitoring system. (*Id.*) This comment was later removed but resulted in at least one potential client informing Petitioner that he “couldn't work with anyone who has negative reviews on [FreightGuard] for any reason.” (*Id.*) Petitioner asserts that this incident shows the impact of discrimination because Petitioner not only lost the business of Pioneer Transfer due to discrimination, but the negative comment resulted in further lost business. (*Id.* at 8-9.)

E. Incident 5: Psalms Freightline LLC

Petitioner's fifth incident, introduced on reconsideration, involves a 1-star Google review about Petitioner left by the broker of Psalms Freightline, LLC. (*Id.*) The broker stated that Petitioner ran its business “[p]robably how they operate in whatever [country] they come from. . .but not here in America.” (*Id.*) As a result of this negative review, potential clients may have chosen not to work with Petitioner. (*Id.*)

F. Incident 6: Rick and Sons

Petitioner's final incident, raised on reconsideration, involves an asphalt company, Rick and Sons, in July 2019. (*Id.*) Petitioner pre-paid Rick and Sons to repair the asphalt of its truck parking yard but was dissatisfied with the quality of the work. (*Id.* at 10.) [Individual] confronted Rick and Sons's owner regarding the incompleteness of the job, who replied “you all immigrants are like that,” although the owner “didn't clarify what he meant.” (*Id.*) Petitioner argues that this discrimination resulted in lost money because Petitioner had to engage a different company to fix the deficient work. (*Id.*) Petitioner considered suing Rick and Sons for damages, but decided against it. (*Id.*)

IV. AA/BD's Final Determination

On July 27, 2020, the AA/BD denied Petitioner's request for reconsideration. (AR, Exh. 1.) The AA/BD addressed each of Petitioner's six incidents of alleged social disadvantage, and concluded Petitioner had failed to establish “a case of chronic and substantial social disadvantage based on a preponderance of the evidence that has negatively impacted [Individual's] entry and/or advancement in the business world.” (*Id.* at 10.)

Regarding Incident 1, the AA/BD found no indication that the attendee's questioning at the Board of Education meeting negatively impacted [Individual's] entry or advancement in the business world. (*Id.* at 3.) Petitioner did not identify any “specific incidents of individuals refusing to support [Petitioner] due to [Individual's] ethnicity or religious beliefs.” (*Id.*)

The AA/BD determined that while although the moderator's questioning in Incident 2 may have brought unwelcome attention to [Individual's] immigrant status, there was no information to show that this incident negatively impacted [Individual's] campaign or the election results. (*Id.* at 5.) The AA/BD agreed that the loss of the election, and the associated loss of salary, may have resulted in Petitioner being unable to open a new real estate division, but this incident by itself was “insufficient to establish chronic and substantial social disadvantage that negatively impacted [Individual's] entry into and/or advancement in the business world.” (*Id.* at 5-6.)

Turning to Incident 3, the AA/BD agreed that [Bookkeeper] made inappropriate comments referring to [Individual's] immigrant status and religion. (*Id.* at 7.) The remarks occurred, however, during a confrontation in which [Individual] accused [Bookkeeper] of fraud, so “it appears [Bookkeeper] made such comments because he was upset he had been caught.” (*Id.*) Petitioner offered no evidence to suggest that [Bookkeeper] was motivated to commit the alleged fraud by [Individual's] national origin, race, ethnicity, or religion. (*Id.*)

Similarly, the AA/BD concluded that, in Incident 4, the negative comment posted on FreightGuard may have been due to the business dispute over Petitioner's decision to discontinue the line of credit it extended to Pioneer Transfer. (*Id.* at 8.) There was no indication that the FreightGuard comment was motivated by, or related to, [Individual's] religion, ethnicity or national origin. (*Id.*) Further, Petitioner acknowledged that the negative comment was removed, and the AA/BD found it unclear that Petitioner had, in fact, lost business based on a negative comment that was removed. (*Id.*) Petitioner did not provide information as to how long the comment had remained on FreightGuard, and did not quantify how many potential clients might have seen the comment, so the notion that Petitioner lost business due to the comment was largely speculative. (*Id.*)

For Incident 5, the AA/BD found that Petitioner inaccurately characterized the negative review as being unrelated to Petitioner's business. In actuality, the negative review largely did address Petitioner's work, as it stated: “If you enjoy having your freight held hostage and being extorted to pay for a shipment up front th[e]n [Petitioner] is the way to go! We had to contact the authorities because they held a Coast Guard engine hostage demanding payment before delivery.” (*Id.* at 9.) The AA/BD concluded that the comments were primarily motivated by a

business or payment dispute, not by [Individual's] ethnicity or religion. (*Id.*) Further, Petitioner provided no information, beyond mere assertion, to show that potential clients gave sufficient weight to the one negative review that they refused to do business with Petitioner. (*Id.*) According to the AA/BD, “[o]n any review site, reviews range from extremely favorable to extremely unfavorable.” (*Id.*)

With regard to Incident 6, the AA/BD concluded that the owner of Rick and Sons appears to have been upset over a work-related dispute. (*Id.* at 10.) Petitioner offered no basis to find that the poor-quality work allegedly performed by Rick and Sons was connected to [Individual's] ethnicity or immigrant status. (*Id.*)

Overall, the AA/BD determined that Petitioner did not provide sufficient information and supporting detail to establish that [Individual] experienced bias due to his race, ethnicity, religion, national origin, or immigrant status. (*Id.*) Rather, in several of the presented examples, the information provided suggested that other factors were the likely reasons behind the incidents. (*Id.*) The incidents and information provided did not substantiate Petitioner's claim of chronic and substantial social disadvantage and did not demonstrate that [Individual's] experiences negatively impacted his entry into or advancement in the business world. (*Id.*)

V. Appeal

On August 13, 2020, Petitioner filed the instant appeal. Petitioner insists that its owner, [Individual], is a socially-disadvantaged individual. (*Appeal* at 1.) Specifically, [Individual] is an Azerbaijani Turkish-American, Muslim, and an immigrant, and his business advancement has been hampered by discrimination based on national origin, ethnicity, and religious belief. (*Id.*)

Petitioner observes that, when an individual claiming social disadvantage is not a member of a group presumed to be socially disadvantaged, the individual must establish social disadvantage by a preponderance of the evidence. (*Id.* at 3, citing 13 C.F.R. § 124.103(c).) Under the regulation, such evidence consists of four primary elements. First, the evidence must describe at least one objective distinguishing feature that contributed to social disadvantage which is not common to individuals who are not socially disadvantaged. (*Id.*) Second, the social disadvantage must be rooted in treatment which the individual experienced in American society, rather than in other countries. (*Id.* at 3-4.) Third, the individual's social disadvantage must be chronic and substantial, not fleeting or insignificant. (*Id.* at 4.) Finally, the social disadvantage must have negatively impacted the individual's entry into or advancement in the business world. (*Id.*)

Petitioner contends that evidence of substantial and chronic social disadvantage is established if the applicant can describe “more than one or two specific, significant incidents.” (*Id.*, quoting *Matter of United Global Techs., Inc.*, SBA No. BDPE-518, at 3 (2014).) Even a single incident “may be sufficient if it is so substantial that there is no doubt the applicant suffered social disadvantage.” (*Id.*) Each individual incident need not show chronic and substantial injury. (*Id.*, citing *Matter of StrategyGen Co.*, SBA No. BDPE-460, at 7 (2012).) Corroborating evidence to support a claim of social disadvantage is recommended, but not necessarily required, to meet the preponderance standard. (*Id.*) Further, an applicant is “not required to convince the fact-finder that an incident was motivated by bias”; rather, the applicant

need only “present evidence to lead the fact-finder to conclude that it is more likely than not that bias was a factor.” (*Id.* at 4-5, citing *Matter of Bartkowski Life Safety Corp.*, SBA No. BDPE-516 (2014).)

Petitioner argues that the AA/BD incorrectly concluded that Incident 1 failed to satisfy the third and fourth elements to show social disadvantage. (*Id.* at 6.) For the third element, Petitioner argues that it only needed to show that it was “more likely than not that bias was a factor.” (*Id.*, citing *Bartkowski*.) Here, the meeting attendee raised questions about [Individual's] ethnicity and religion rather than his qualifications, which should have been sufficient to show that the attendee had bias against [Individual]. (*Id.*) For the fourth element, Petitioner argues that it was not required to produce corroborating evidence that an individual refused to work with Petitioner based on [Individual's] social status. (*Id.* at 6-7.) “Indeed, it is highly unlikely that [Individual] would be able to acquire or provide a corroborating statement from any individual who refused to utilize his business because of his ethnicity or religion.” (*Id.* at 7.)

Turning to Incident 2, Petitioner argues that the AA/BD incorrectly rejected the attack ad and the moderator's questioning as incidents of bias. (*Id.* at 7-8.) Petitioner claims that it was not required to conclusively prove that [Individual's] campaign for election was negatively impacted, merely that it was more likely than not. (*Id.* at 9, citing 13 C.F.R. § 124.103(c)(1).) It was more likely than not that bias was a factor because of the specific questioning regarding [Individual's] immigrant status and national origin. (*Id.* at 10.) Furthermore, the local party chairman received calls concerned about [Individual's] religion, indicating a larger community bias. (*Id.*) The AA/BD also erred in viewing Incident 2 in isolation. (*Id.*) Petitioner argues that when this incident is viewed with the other incidents, there is chronic and substantial injury. (*Id.*)

For Incident 3, Petitioner argues that the AA/BD incorrectly concluded that [Bookkeeper's] comments did not show bias. (*Id.* at 12.) The AA/BD “ignored the direct connection [Bookkeeper] made between a business dispute and [Individual's] religious beliefs and ethnicity.” (*Id.*) Further, Petitioner argues, the AA/BD apparently viewed the statements from [Bookkeeper's] perspective rather than [Individual's]. (*Id.*) Petitioner claims that it was not required to show that [Bookkeeper] defrauded Petitioner solely because of [Individual's] religion and ethnicity. (*Id.* at 13.) Regardless of whether [Bookkeeper] was initially motivated to defraud Petitioner based on [Individual's] religion or ethnicity, [Bookkeeper] chose not to resolve the dispute because of his prejudice. (*Id.*)

Petitioner argues, next, that the AA/BD erred in rejecting Incident 4 by concluding that there was no indication that the derogatory comment was left due to [Individual's] national origin. (*Id.* at 15.) Petitioner claims that the AA/BD again failed to consider the events from [Individual's] view, and failed to address that the threat to call Immigration and Customs Enforcement could only have meaning if it were made to seek leverage over, or punish, [Individual]. (*Id.*) Additionally, the AA/BD erred in concluding that this incident did not have a “chronic and substantial impact” on Petitioner, as any single event cannot be chronic. (*Id.*) Finally, the AA/BD erred by discounting [Individual's] description of a broker who declined to work with Petitioner because of the negative review. (*Id.* at 15-16.)

For Incident 5, Petitioner argues that the AA/BD was incorrect to attribute the negative review to a payment dispute rather than to bias. (*Id.* at 16-17.) Petitioner argues that it only needed to show that bias was a factor in the conduct, not that the conduct was predominantly motivated by bias. (*Id.*) Here, the payment dispute was tied together with [Individual's] immigrant status. (*Id.* at 17.) Further, the AA/BD was incorrect to disregard the importance of internet reviews in how individuals choose to do business. (*Id.*) Petitioner argues that from [Individual's] perspective, the internet reviews are an important business asset. (*Id.* at 18.) Additionally, the AA/BD's conclusion that there was no harm to Petitioner from one negative review because of other positive reviews amounts to an “ultimate success” rationale, which OHA has long rejected. (*Id.*, citing *Matter of DSI Assocs., Inc.*, SBA No. BDP-413 (2011).) (*Id.*)

Finally, for Incident 6, Petitioner claims that the AA/BD erred in concluding that there was no indication that Rick and Sons' poor work was connected to prejudice. (*Id.* at 19.) Petitioner argues that the connection between the poor work and bias was clear because the Rick and Sons owner dismissed concerns over work performance because [Individual] looked like an immigrant. (*Id.* at 19-20.) Petitioner argues that the AA/BD in effect expected Petitioner to show that bias was the sole basis for adverse treatment. (*Id.* at 20.) However, Petitioner only needed to show that bias was a factor in the treatment. (*Id.*, citing *Bartkowski*.)

VI. SBA's Response

On October 2, 2020, SBA responded to the appeal. SBA argues that the decision to deny Petitioner entry into the 8(a) BD program was proper because Petitioner did not establish that the incidents of bias claimed in the narrative negatively impacted [Individual's] entry into or advancement in the business world. (Response at 2.) SBA highlights that OHA is “not a forum for a second chance at certification.” (*Id.*) Instead, OHA must uphold the AA/BD's decision so long as it is not arbitrary, capricious, or contrary to law. (*Id.* at 2-3.)

SBA argues that the AA/BD may properly disregard a claim of social disadvantage where a legitimate alternative ground for the perceived adverse action exists and the applicant has not presented evidence that would render the claim of social disadvantage more likely than the alternative ground. (*Id.* at 3-4, citing 13 C.F.R. § 124.103(c)(3)(ii).) Further, each instance of alleged discriminatory conduct must be accompanied by the negative impact that the conduct had on the individual's entry or advancement in the business world. (*Id.* at 4.) The AA/BD may discount a claim that is: “(1) inherently improbable; (2) inconsistent with other credible evidence in the record; (3) lacking in sufficient detail; (4) merely conclusory; or (5) if the applicant failed to provide apparently available supporting evidence without explanation.” (*Id.* at 5-6, quoting *Bartkowski*, SBA No. BDPE-516, at 3.)

SBA argues that for a claimed event to be presented with sufficient detail, the applicant must describe “(1) when and where the allegedly discriminatory incident occurred; (2) who discriminated; (3) how the incident occurred; and (4) how the applicant was adversely affected by the incident.” (*Id.* at 7, citing *Matter of Southern Aire Contracting, Inc.*, SBA No. BDP-453, at 4 (2012) and *Matter of Loyal Source Gov't Servs., LLC*, SBA No. BDP-434, at 5 (2012).) Petitioner here did not provide this detailed information. (*Id.*) The incidents described in

Petitioner's narrative "failed to meet the basic who, what, where when, or how elements" necessary to evaluate what transpired in the event. (*Id.*)

SBA claims that Petitioner failed to provide the necessary details for the AA/BD to conclude that the incidents involved bias and/or negative impact on [Individual's] entry into or advancement in the business world. (*Id.* at 9.) Contrary to Petitioner's suggestions, the AA/BD did not insist on corroborating evidence, but merely sought clarification. (*Id.* at 10.) For Incident 1, Petitioner failed to establish how the questioning individual knew that [Individual] was Turkish, Muslim, or an immigrant. (*Id.* at 12.) Further, Petitioner did not describe how such questions impacted the business. (*Id.*) Petitioner did not address how a meeting attendee's questions at a single meeting impacted [Individual's] four years on the Board or his promotion to President. (*Id.* at 12-13.) SBA argues that additional information was needed to show that Petitioner lost business. (*Id.* at 13.) According to the information Petitioner provided, [Individual] won the Board of Education election and served for four years, and so Petitioner should have been able to provide more specific details regarding how the incident impacted Petitioner. (*Id.*) Additionally, notwithstanding Petitioner's arguments on appeal, Petitioner did not demonstrate that the attendee's questioning pertained to "[Individual's] ethnicity and religion." (*Id.*) Rather, the questions were related more generally to demographics and representation. (*Id.*) Thus, SBA argues that there were no details in the narrative to indicate that the "speaker was biased against Azerbaijani Turks or Muslims." (*Id.*) SBA reiterates that one person questioning credentials in a single meeting does not establish substantial and chronic bias. (*Id.* at 14.)

SBA argues that the incidents described do not show [Individual] experienced negative impact to his entry into or advancement in the business world that was chronic and substantial. (*Id.* at 15.) SBA argues that the narrative incidents did not have sufficient detail to establish a nexus between the alleged bias and [Individual's] business advancement. (*Id.*)

VIII. Discussion

A. Standard of Review

An 8(a) BD eligibility determination may be disturbed on appeal only if OHA concludes, based upon the entire administrative record, that SBA's determination was arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406. OHA's task is to decide whether SBA reached a reasonable conclusion in light of the facts available in the administrative record. 13 C.F.R. § 134.406(b)(2); *Matter of United Global Techs., Inc.*, SBA No. BDPE-518, at 2 (2014). An SBA determination may be found arbitrary and capricious if SBA: (1) fails to properly apply the law and regulations to the facts of the case; (2) fails to consider an important aspect of the problem; (3) offers an explanation for its decision that runs counter to the evidence; or (4) offers an explanation that is so implausible that it cannot be ascribed to a mere difference in view between SBA and OHA. *Matter of MJL Enterprises, LLC*, SBA No. BDPE-566, at 5 (2017); *Matter of McMahon Builders, Inc.*, SBA No. BDPE-461, at 4 (2013).

B. Administrative Record

In conducting its review, OHA may only consider information contained in the written administrative record. 13 C.F.R. § 134.406(a). As a result, the administrative record must be complete before OHA can ascertain whether it supports SBA's determination. *Matter of Southern Aire Contracting, Inc.*, SBA No. BDPE-453, at 2 (2012). A complete administrative record must contain all documents that are relevant to the determination on appeal, and upon which the SBA decision-maker, and those SBA officials that recommended either for or against the decision, relied. 13 C.F.R. § 134.406(c)(1).

In the instant case, SBA filed a comprehensive administrative record with OHA, and Petitioner has not objected to the absence of any documents from the administrative record or to any SBA claim of privilege. I therefore find that the administrative record is complete. *Id.* § 134.406(c)(3).

C. Petitioner's Burden of Proof Before SBA

A concern meets the basic requirements for admission into the 8(a) BD program if it is a small business that is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and are citizens of the United States, and if it demonstrates the potential for business success. 13 C.F.R. § 124.101. A “socially disadvantaged individual” for purposes of the program is someone who has been the subject of racial or ethnic prejudice or cultural bias within American society. *Id.* § 124.103(a). Members of certain racial and ethnic groups, enumerated in the regulation, are presumed socially disadvantaged. *Id.* § 124.103(b).

Those who are not members of any presumptively-disadvantaged group must establish individual social disadvantage by a preponderance of the evidence. *Id.* § 124.103(c)(1). Essentially, the applicant's evidence must demonstrate that “it is more likely than not that bias was a factor.” *Matter of Express Plus Staffing LLC*, SBA No. BDPE-533, at 2 (2014). Evidence is generally in the form of a narrative statement, recounting specific, bias-motivated events in the individual's education, employment history, and/or as owner of the applicant business demonstrating that (1) the individual has at least one objective distinguishing feature that has contributed to their social disadvantage; (2) the individual has experienced social disadvantage in the United States because of that distinguishing feature; (3) the social disadvantage has been “chronic and substantial, not fleeting or insignificant”; and (4) the social disadvantage negatively impacted the individual's “entry into or advancement in the business world.” 13 C.F.R. § 124.103(c).

When reviewing the information presented, SBA “may not arbitrarily disbelieve credible evidence.” *Matter of Bitstreams, Inc.*, SBA No. BDP-122 at 10 (1999). However, SBA may discount or disregard an incident included in the narrative statement if it is (1) inherently improbable, (2) inconsistent with other credible evidence in the record, (3) lacking in sufficient detail, (4) merely conclusory, or (5) if the applicant failed to provide apparently available supporting evidence without explanation. *Matter of Southern Aire Contracting, Inc.*, SBA No. BDPE-453, at 4 (2012). A sufficiently-detailed allegation will specify (1) when and where the

incident occurred, (2) who discriminated, (3) how the discrimination took place, and (4) how the individual claiming disadvantage was adversely affected by the discrimination. *Id.* at 6.

In order to be considered an instance of social disadvantage, each instance of alleged discriminatory conduct must be accompanied by the negative impact on the individual's entry into or advancement in the business world. 13 C.F.R. § 124.103(c)(3)(i). SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impacted his or her entry into or advancement in the business world. *Id.* § 124.103(c)(3)(iii). SBA may request an applicant claiming to be disadvantaged provide additional facts to support his or her claim in order to show a negative outcome was based on discriminatory conduct rather than a legitimate nondiscriminatory reason. *Id.* § 124.103(c)(4). SBA must then assess whether the totality of the described events shows the requisite negative impact. *Id.* § 124.103(c)(6).

The chronic and substantial social disadvantage requirement is usually met if the applicant describes “more than one or two specific, significant incidents.” *Matter of Tony Vacca Construction, Inc.*, SBA No. BDP-321, at 6 (2009). A single incident may be sufficient, however, if it is “so substantial and far-reaching that there can be no doubt that the applicant suffered social disadvantage.” *Matter of Southern Aire Contracting, Inc.*, SBA No. BDP-505, at 6 (2013).

D. Analysis

Having reviewed the administrative record and the arguments of the parties, I see no basis to conclude that the AA/BD's determination was arbitrary, capricious, or contrary to law. As a result, this appeal must be denied.

SBA contends, and Petitioner does not dispute, that much of the information initially offered to support [Individual's] claim of social disadvantage was vague, conclusory, insufficiently detailed, and/or unrelated to [Individual's] personal experiences. Section II, *supra*. Petitioner failed to establish a nexus between the instances of alleged bias and how those instances impacted [Individual's] entry and/or advancement in the business world. *Id.*

Petitioner provided more concrete information with its request for reconsideration, but the AA/BD addressed each of Petitioner's claims and reasonably determined that they were not sufficient to show social disadvantage. A principal flaw with several of Petitioner's claims was its failure to present evidence that would render discrimination more likely than alternative explanations. The regulations provide the following examples to illustrate the importance of presenting such evidence:

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because

he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional development was available at the time she requested to attend the conference.

13 C.F.R. § 124.103(c)(3)(ii).

Several of Petitioner's claims also were flawed in that Petitioner did not show that the alleged incidents of discriminatory conduct adversely affected [Individual's] entry into, or advancement in, the business world. The applicable regulations stipulate that “[e]ach instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.” *Id.* § 124.103(c)(3)(i). Further, SBA may disregard a claim of social disadvantage “where an individual presents evidence of discriminatory conduct but fails to connect the discriminatory conduct to consequences that negatively impacted his or her entry into or advancement in the business world.” *Id.* § 124.103(c)(3)(iii). The regulations set forth the following example with regard to this issue:

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

Id.

In the instant case, the AA/BD analyzed each of the incidents of bias or discriminatory conduct raised by Petitioner, and found them to be inadequate, because Petitioner did not present evidence that made discrimination more likely than alternative explanations, and/or because

Petitioner did not demonstrate a nexus between the allegations and [Individual's] entry into, or advancement in, the business world. With regard to Incident 1, involving [Individual's] tenure on the Dayton Board of Education, Petitioner initially asserted that some prospective voters had stated that they would not vote for a Muslim candidate. The AA/BD found this incident insufficiently detailed, and in any event, Petitioner did not show how such voter attitudes negatively impacted [Individual's] entry into or advancement in the business world. On the contrary, [Individual] not only won the race, but held the seat for several years, rising to the position of President. Sections III.A and IV, *supra*.

On reconsideration, Petitioner provided additional information about questions that a meeting attendee posed to [Individual] during a Board of Education meeting. The AA/BD found, however, that Petitioner did not provide sufficient supporting details to make a persuasive case that the questioning was motivated by bias or that it had an adverse effect on [Individual's] business endeavors. *Id.* It was unclear from the information Petitioner provided how the questioner, or other meeting attendees, would have known about [Individual's] ethnicity, religion, or immigrant status. Although Petitioner understood the questioning to have been directed at [Individual] personally, this may have been due to his role as President of the Board. In addition, while the questioning occurred during a public meeting, the questioning appeared to have been a one-time occurrence, and it was not evident how information about the questioning would have been disseminated beyond those physically in attendance. Petitioner failed to cite any specific example of individuals or entities refusing to support Petitioner due to questions posed at the Board of Education meeting. Given the record before her, then, the AA/BD could reasonably conclude that Petitioner did not persuasively show that this incident involved discriminatory conduct which negatively impacted [Individual's] entry into or advancement in the business world.

The AA/BD appears to have considered Incident 2, [Individual's] unsuccessful campaign to become Montgomery County Recorder, to be the most compelling of Petitioner's examples of discrimination. Based on the supplemental information provided on reconsideration, the AA/BD agreed that losing the race had a negative impact on Petitioner's business development, because it prevented Petitioner's planned expansion into the real estate industry. Sections III.B and IV, *supra*. Further, although Petitioner devoted much of its reconsideration narrative to discussing a moderator's questioning of [Individual] during a campaign event at a local church, which the AA/BD did not find to have had a material effect on the race, the AA/BD did agree that the Facebook attack ad was an incident of discrimination which negatively impacted [Individual's] campaign, and thereby undermined the planned business expansion. *Id.* Nevertheless, beyond this one incident, Petitioner did not, in the AA/BD's view, provide sufficient additional evidence to conclude that [Individual] had suffered the necessary "chronic and substantial" social disadvantage.

For Incident 3, involving the fraud allegedly perpetrated by Petitioner's former bookkeeper, [Bookkeeper], the AA/BD could reasonably conclude that Petitioner presented insufficient evidence to show that [Bookkeeper] defrauded Petitioner due to [Individual's] religion or ethnicity. Petitioner did not offer reason to believe that [Bookkeeper] would have known of [Individual's] religion or ethnicity at the time he committed the alleged fraud. Sections III.C and IV, *supra*. Further, while the AA/BD agreed that [Bookkeeper] later made

inappropriate remarks about [Individual's] religion and immigrant status, the remarks occurred after the alleged fraud was committed, and in the midst of a confrontation in which [Individual] directly accused [Bookkeeper] of fraud. *Id.* Given this record, the AA/BD could reasonably conclude that it was no more likely that [Bookkeeper] was motivated by [Individual's] religion and ethnicity to commit the alleged fraud, than that [Bookkeeper] was simply “upset he had been caught.” *Id.*

Turning to Incident 4, involving Petitioner's relationship with Pioneer Transfer, the AA/BD again reasonably determined that Petitioner did not present evidence that made bias more likely than other alternative explanations, and that Petitioner did not show a nexus between the allegations and [Individual's] entry into, or advancement in, the business world. Petitioner stated that a representative of Pioneer Transfer threatened to report [Individual] to immigration authorities, and that Pioneer Transfer posted negative comments about Petitioner on FreightGuard. Sections III.D and IV, *supra*. It was not evident, however, that the same person who threatened to report [Individual] to immigration authorities also was associated with the FreightGuard comments. *Id.* Petitioner did not explain the substance of the FreightGuard comments, and acknowledged that the comments were made at the time of a “sour” business relationship with Pioneer Transfer. *Id.* It therefore was not evident that the comments related to [Individual's] ethnicity or religion, as opposed to a legitimate business dispute between Petitioner and Pioneer Transfer. Petitioner further indicated that the comments were subsequently removed from FreightGuard, but did not state how long the comments had remained, nor attempt to quantify how many firms may have been aware of the comments or may have chosen not to do business with Petitioner because of the comments. *Id.* Petitioner pointed to one potential client who stated that he would not “work with anyone who has negative reviews on [FreightGuard] for any reason,” but it was not clear whether even this one potential client would have refused to work with Petitioner, given that the negative review was subsequently removed from FreightGuard. As such, it was reasonable for the AA/BD to conclude that Petitioner did not present evidence that made bias more likely than alternative explanations, nor did Petitioner show a nexus between the allegations and [Individual's] entry into, or advancement in, the business world.

Similarly, with regard to Incident 5, the 1-star Google review posted by Psalms Freightline, the AA/BD could properly conclude that Petitioner did not provide enough information to establish that the negative review was motivated by ethnic or religious bias, as opposed to an ordinary business or payment dispute. The AA/BD found that, when read in its entirety, much of the negative review did pertain to business matters. Sections III.E and IV, *supra*. Further, although Petitioner posited that some firms might have attached sufficient weight to this single review that they would have chosen to avoid working with Petitioner altogether, the AA/BD found this assertion implausible, unsupported, and speculative. *Id.* The AA/BD thus reasonably concluded that Petitioner did not present sufficient evidence to support this claim of social disadvantage.

Finally, for Incident 6, the faulty paving work performed by Rick and Sons, the AA/BD observed that Petitioner again did not provide evidence to suggest that the faulty work was motivated by bias or discrimination. Sections III.F and IV, *supra*. Further, although the owner of Rick and Sons later remarked about [Individual's] immigrant status, Petitioner itself

acknowledged that the meaning of the owner's remark was unclear, and in any event, the remark occurred during a disagreement between the owner and [Individual] over the deficient work. *Id.* The AA/BD could thus reasonably conclude that Petitioner did not show that discrimination was more likely than alternative explanations.

Based on the foregoing, I find that the AA/BD (1) considered all of Petitioner's evidence, (2) her determination was based solely on the facts presented in the administrative record, and (3) the determination provides a clear rationale based on those facts. The AA/BD recognized that, because [Individual] is not a member of one of the groups that SBA presumes to be socially disadvantaged, he was required to show individual social disadvantage by a preponderance of the evidence, and the AA/BD appropriately determined that he did not do so. *Matter of 7Skyline, LLC*, SBA No. BDPE-574 (2019); *Matter of Hruckus, LLC*, SBA No. BDPE-572 (2018). Accordingly, Petitioner has failed to demonstrate that the AA/BD's decision was arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

VIII. Conclusion

For the above reasons, I AFFIRM the AA/BD's determination and DENY this appeal. Subject to 13 C.F.R. § 134.409(c), this is the final decision of the Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

KENNETH M. HYDE
Administrative Judge