

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

IN THE MATTER OF:

iHealth Innovative Solution, LLC,

Petitioner

SBA No. BDPE-600

Decided: February 23, 2022

APPEARANCES

Deon Norals, President and CEO of iHealth Innovative Solution, LLC

Mark R. Hagedorn, Esq., Agency Representative, Washington, District of Columbia, for
U.S. Small Business Administration

DECISION

I. Introduction and Jurisdiction

On September 17, 2021, iHealth Innovative Solution, LLC (Petitioner), appealed a determination (Determination) issued by the Small Business Administration (SBA/Agency) denying Petitioner's admission to the 8(a) Business Development (BD) program. *See* 13 C.F.R. parts 124 and 134. The Determination letter was dated August 3, 2021. Therefore, the appeal is timely. 13 C.F.R. § 134.404. SBA could not determine that Deon Norals, the individual upon whom eligibility is based, devoted full-time to the management of Petitioner. For the reasons discussed *infra*, I find that SBA's Determination was reasonable and not arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). Therefore, the appeal is DENIED as SBA's Determination is found to be reasonable.

OHA has jurisdiction to decide this appeal. *See* 15 U.S.C. § 637(a)(9)(A), (B)(ii); 13 C.F.R. Parts 124 and 134.

II. Background

A. 8(a) Application

According to SBA, on March 25, 2020, Petitioner applied for admission to the 8(a) BD program. (Agency's Response, at 1.) Petitioner based its claim of eligibility on the assertion that its sole owner, Mr. Norals, was socially disadvantaged. (Administrative Record (AR), Ex. 12, at 18.) In support of its application, Petitioner submitted Mr. Norals' professional resume, reflecting his current position as President and CEO of Petitioner from October 2013 through present, and

Chief Information Officer at Westover Consultants Inc, from October 2010 through present. (AR, Ex. 13a, at 5.)

During the application screening, Petitioner was asked to submit Mr. Norals' financial reports and answer to a questionnaire. (*Id.*, Ex. 14, at 14-15.) In compliance to the request, Petitioner submitted Mr. Norals' financial reports and tax returns for the years 2016 through 2019, which showed that its principal earned W-2 wages in the amount of \$161,097 in 2016, \$163,537 in 2017, \$168,701 in 2018, and \$172,697 in 2019 from Millennium Challenge Corporation (MCC), an independent Federal foreign aid agency established to combat global poverty. (*Id.*, Ex. 13a, at 436, 452, 500, 554, 593, 698, 701, 704, 707, and 840.)

Particularly, under Question No. 3, Petitioner was informed that:

Current 8(a) BD program regulations require the disadvantaged [sic] holding the highest position to manage the firm on a full-time basis during normal working hours of companies in the same or similar line of business. This precludes any outside employment or outside business interests which would hinder the management and business development objectives of the firm.

(*Id.*, at 893.)

In answering Question No. 3a, Mr. Norals provided the following statement with respect to the number of hours per week and official work schedule at MCC:

As most entrepreneurs, I spend an excess of 75 hours per week (on average) working on my business. MCC is a remote contract, and I am working from my corporate office utilizing tools such as WebEx and Microsoft Teams to attend meetings. My regular scheduled hours are 7:00 am EST to 8:00 pm EST. Extra hours during the day ensures all responsibilities are met as a business owner.

(*Id.*)

For Question No. 3b, Mr. Norals explained how his involvement in MCC does not interfere with his ability to manage and market Petitioner, indicating:

My involvement in [MCC] does not interfere with my ability to manage and market iHealth, as marketing is typically done during the weekends via email marketing campaigns, and I have a flexible and remote schedule that enable me to attend BD events, small business outreach sessions, and potential customer meetings. For example, MCC allowed me to complete an 8 month SBA Emerging Leaders curriculum, while successfully performing my contractual obligations. In addition, all county and federal bids for my product and services sales are done within minutes via ecommerce. Ecommerce takes minutes to respond to a bid request via email from DC Government or Federal Procurements. Next, I submit a quote in QuickBooks Online, order supplies, and input customers contact information for shipments. This is a routine practice, which takes minimal effort

and can be done via mobile device, and/or tablet from anywhere in the world. No issues have reported to date.

(Id.)

Particularly, Question No. 3c indicated “[t]he full-time devotion requirement calls for you to manage the firm at least 40 hours per week during normal marketing hours, such as 8 a.m. or 9 a.m. to 4 p.m. or 5 p.m. on Mondays through Fridays.” In response, Petitioner provided its official work schedule as the following:

iHealth Innovative Solutions' core business hours are from 9:00 am to 5:00 pm. Typically, I extend my workday to accommodate any client related to work and business development within normal business hours. If there is the need for proposal support, financial discussions, and or human resources initiatives, these are scheduled accordantly. Our offices are typically open past 5:00 pm to support our customers who work internationally.

(Id., at 894.)

Petitioner also submitted documents to describe Mr. Norals' contract work for MCC. In a Personal Service Contract (PSC), uploaded on January 4, 2021, the record showed that Mr. Norals is employed by MCC under a full-time PSC as an Infrastructure Management Branch Project Manager. (AR, Ex. 13a, at 612.) According to the PSC, Mr. Norals reports to the OCIO Infrastructure Management Branch Director, which was signed by Lisa Smith Kulley. *(Id., at 612, 617.)*

In addition, Petitioner supplemented a letter from MCC's Contracting Officer (CO), Maxwell B. Sarpong, dated January 21, 2021, that indicated the U.S. Government MCC entered a PSC with Mr. Norals on September 26, 2015. *(Id., at 898.)* Mr. Sarpong explained that MCC may contract with individuals for PSC, who shall not be considered Federal employees for any provision of law administered by the Office of Personnel Management (OPM). *(Id.)* Further, MCC categorizes PSCs as contractors with inherently governmental duties. In this case, the contractor, Mr. Norals, President and CEO of Petitioner, has permission from MCC to work on his primary business duties during the hours of operation of his MCC contract. *(Id.)*

B. Determination

On August 3, 2021, the Associate Administrator of SBA's Office of Business Development (AA/BD) declined Petitioner's application for admission into the 8(a) program. The AA/BD determined that Mr. Norals, the individual upon whom Petitioner's claim of eligibility was based, did not devote full-time to the management of Petitioner, as required by 13 C.F.R. § 124.106. (Determination, at 1.) The AA/BD explained that current 8(a) program regulations require that an applicant firm must be, at the time of application, managed on a full-time basis by one or more individuals who have been found by SBA to be socially and economically disadvantaged, and that such individuals devote full-time during normal working hours of firms in the same or similar line of business. *(Id., at 2.)*

The AA/BD noted that Petitioner submitted a full-time PSC reflecting that Mr. Norals is employed at MCC, a federal agency, as an Infrastructure Management Branch Project Manager. (*Id.*) Mr. Norals had indicated that his regularly scheduled hours at MCC are from 7:00 a.m. to 8:00 p.m., while his regularly scheduled hours at Petitioner are from 9:00 a.m. to 5:00 p.m.

Further, in response to a query from the SBA's Philadelphia Office of Certification & Eligibility, about managing Petitioner full-time during business hours, Mr. Norals provided a letter from Mr. Sarpong, a CO for MCC, that indicated Mr. Norals had permission to do so. (*Id.*) The AA/BD stated that Mr. Sarpong was not the original signer of the MCC contract and more importantly, he was not the person that Mr. Norals reported to regarding his responsibilities under the contract with MCC. According to the MCC contract, Mr. Norals reports to the OCIO Infrastructure Management Branch Director, and the PSC was originally signed by Lisa Smith Kulley. Therefore, SBA disregarded this letter. (*Id.*)

Conversely, the AA/BD noted that even if SBA were to consider the letter, the actual amount of time that Mr. Norals devotes to the Petitioner versus MCC during normal business hours remains unclear. (*Id.*, at 3.) Thus, the AA/BD could not determine whether Mr. Norals manages the firm on a full-time basis, and thus Petitioner's application failed to meet the full-time requirement. (*Id.*)

C. Appeal

On September 17, 2021, Petitioner filed the instant appeal. Petitioner argues that the basis of SBA's denial was inaccurate. (Appeal, at 1.) Petitioner states that it is a Maryland Limited Liability Company (LLC) formed in 2013 by Mr. Norals, and it is managed and owned solely by Mr. Norals, a socially and economically disadvantaged individual as defined by the applicable regulations under 13 C.F.R. §§ 124.103, 124.104.

Petitioner addresses the AA/BD's Determination and basis for denial. (*Id.*, at 1-2.) Then, Petitioner asserts Mr. Norals manages it on a full-time basis. Contrary to the 8(a) Determination, Mr. Norals is not employed full-time by MCC, and cites to a statement that MCC “may contract with individuals for personal services contracts, who shall not be considered [f]ederal employees for any provision of law administered by the [OPM].” (*Id.*, at 2, citing 22 U.S.C. § 7713(a)(8).) Petitioner emphasizes that by MCC's own regulations, Mr. Norals is not an employee. (*Id.*)

In response to the AA/BD's assertion that the letter from the MCC's CO, Mr. Sarpong, should be disregarded, Petitioner indicates that Mr. Sarpong is the supervisory CO for the contract Petitioner is working under. Mr. Sarpong holds a position that had been previously held by Lisa Smith-Kulley. (*Id.*, at 2-3.) As for Ms. Smith-Kulley, she is serving as the Acting Managing Director, Contracts and Grants Management. (*Id.*, at 3.) While Petitioner does not report directly to Mr. Sarpong, the latter is the ultimate manager with authority over the contract, and thus, the most appropriate person to provide insight on Mr. Norals' role. For further clarification, Petitioner submits new evidence, i.e., letters from Ms. Smith-Kulley, Acting Managing Director, Contracts and Grants Management, and Jason Fenwick, Director of Infrastructure Operation, Office of the Chief Information Officer, which Petitioner identifies as

the direct report for the MCC contract, as well as an updated letter from Mr. Maxwell, the Supervisory CO. (*Id.*) Petitioner asserts each letter reiterates that currently and at the time of the initial application, Mr. Norals' primary business is Petitioner and that he is free to manage his business full-time. (*Id.*)

With respect to the actual amount of time that Mr. Norals devotes to Petitioner versus MCC during normal business hours, Petitioner asserts the initial letter from Mr. Sarpong stated that Mr. Norals was allowed to devote time to his primary business, during the hours of the MCC contract. (*Id.*) Petitioner notes that the additional letters from Ms. Smith-Kulley and Mr. Sarpong clarify that the hours of operation for the MCC contract at issue are 24 hours a day, 7 days per week, and that he is able, always, to work on his primary business. (*Id.*) MCC operates internationally and Mr. Norals supports several countries that operate in different time zones on behalf of MCC. (*Id.*)

Petitioner argues that Mr. Norals devotes full-time to its business with the following statement:

. . . the work done by Mr. Norals for MCC is remote in nature, meaning that it is easy for him to work on multiple projects or matters throughout the course of the week. Mr. Norals may have miscommunicated that he worked full-time on the MCC contract during the hours of 7am-8pm; those are the hours he would be focused on his business. As stated in the supplemental letters, the nature of the work for MCC is 24 hours a day, providing Mr. Norals ample ability to perform work on the MCC contract to support various OCONUS projects abroad, and devote 40 hours or more per week to the management of iHealth.

(*Id.*, at 4.)

Lastly, Petitioner asserts that it is managed on a full-time basis during normal business hours by Mr. Norals, and believes it submitted sufficient evidence with the initial application for admission to the 8(a) BD program. As such, the AA/BD's Determination was arbitrary and contrary to law, and should be reconsidered, as Mr. Norals currently manages Petitioner's staff, contracts, human resources, financial department, technology partnerships, and business development strategy on a full-time basis. (*Id.*)

D. Agency Response

On November 4, 2021, SBA filed its response and objection to the submission of new information on appeal.

First, SBA explains Sections 8(a) and 7(j) of the Small Business Act authorize a Minority Small Business and Capital Ownership Development Program, designated the 8(a) BD program, for the purpose of assisting eligible small disadvantaged business concerns to compete in the American economy through business development. (Agency Response at 3, citing 13 C.F.R. § 124.1.) To become certified as a Participant in the 8(a) BD program, applicant firms are required by both, the Small Business Act and by its implementing regulations, to meet certain eligibility

criteria. SBA states that generally, a concern meets the basic requirements for admission to the 8(a) BD program if it is a small business, which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of the U.S., and which demonstrates potential for success. (*Id.*, at 3-4; citing 13 C.F.R. § 124.101.)

SBA asserts the sole issue in this appeal is whether the AA/BD's decision to deny Petitioner's admission was reasonable based on SBA's finding that Petitioner failed to show by a preponderance of the evidence that Mr. Norals, the individual upon whom Petitioner's eligibility is based, does not control Petitioner in accordance with the requirements of 13 C.F.R. § 124.106(a)(1). (*Id.*, at 4.) SBA submits that the AA/BD's Determination was reasonable and supported by the 8(a) BD regulations. (*Id.*)

The regulations governing control require that an applicant or participant must be managed on a full-time basis by one or more disadvantaged individuals who possess the requisite management capabilities. (*Id.*, citing 13 C.F.R. § 124.106(a)(1).) SBA has also clarified in the preamble to the final rule on this requirement, responding to requests that it be more flexible, that it exists to further the statutory business development goals of the program.¹ The applicant firm bears the burden of showing by a preponderance of the evidence that it is managed full-time by a disadvantaged individual. (*Id.*, citing *In the Matter of Raintree Advanced Management Corporation*, SBA No. BDP-407, at 5-6 (2011); 13 C.F.R. § 124.204(c).)

While the same regulations do not specifically define full-time management, the regulatory history of this requirement explains that SBA views full-time management as a function of the number of hours worked, the specific time of day those hours are worked, and where those hours are worked. (*Id.*, at 4-5.) The Agency restated the regulation in the preamble to the proposed rule, which did not change in the final rule:

This means that a disadvantaged individual must be physically located at the offices of the applicant or Participant concern during most normal business hours, or devoting his or her full time efforts to the business away from its offices through marketing and outreach. The term “normal business hours” is intended to mean that the applicant or Participant concern be open during the normal 40 hour work week of most business concerns. Thus, an applicant would not meet this requirement if its disadvantaged owner was present at the applicant's offices only at night or on the weekends and worked outside the applicant during its normal business hours. This rule does not imply that business activities of the applicant or Participant concern could not be conducted by such individual(s) outside the offices of the applicant or Participant concern, nor does it prohibit a disadvantaged individual from establishing a Participant concern at his/her home. Although this proposed revision does not mean that the disadvantaged individual who manages the applicant or Participant concern cannot leave the concern's premises to conduct

¹ 63 Fed. Reg. 35726, 35730 (June 30, 1998) (“SBA believes it is important for the growth and development of the 8(a) BD concern that the disadvantaged individual who manages the concern devote full time to such management.”).

business, it does mean that one or more disadvantaged owners must devote full-time to the business of the applicant or Participant concern.

(*Id.*, at 5, citing 62 Fed. Reg. 43584, 43586-87 (Aug. 14, 1997).)

SBA relies upon OHA precedent, holding that absent evidence to the contrary, devoting 40 hours of work per week would qualify as full-time, and the hours of 8:00 a.m. or 9:00 a.m. to 4:00 p.m. or 5:00 p.m., Monday through Friday, should be considered “normal working hours.” (*Id.*, citing *In the Matter of Sonoran Construction Group aka Sonoran Equipment Appraisal*, SBA No. BDP-581, at 13 (2020); *Raintree*, at 7; *In the Matter of AGB Investigative Services, Inc.*, SBA No. BDP-354, at 5 (2010). While the 8(a) BD regulations do not explicitly preclude outside employment, where the individual seeking to qualify an applicant firm for 8(a) certification also holds outside employment, SBA will — on a case-by-case basis — determine whether the firm is managed on a full-time basis after reviewing the following factors: (1) how much time the individual devotes to the applicant concern during normal working hours of firms in the same or similar line of business; (2) how much time is devoted to outside pursuits; and (3) whether the time devoted to outside pursuits conflicts with the individual's management of the applicant concern. (*Id.*, at 5-6; citing *Raintree*, at 7; *In the Matter of Oak Hill Rehab Specialists, Inc.*, SBA No. BDP-154, at 5 (2001).)

SBA concedes that, in the absence of conflicting evidence, SBA may not summarily conclude that outside employment will inevitably conflict with the full-time management of the applicant firm. (*Id.*, at 6, citing *In the Matter of Balderas General Contractors, Inc.*, SBA No. 513, at 4 (1995).) OHA has nevertheless repeatedly affirmed that the nature of conventional full-time employment outside the applicant firm is inherently at odds with the full-time management requirements of 13 C.F.R. § 124.106(a)(1), citing to OHA precedent that suggests full-time employment outside the applicant firm is only permissible where such employment will not overlap with the normal working hours of the applicant, such as an evening shift. (*Id.*, at 6-7; *see e.g., Balderas; In the Matter of BDS Protective Serv.*, SBA No. BDP-433 (2012).) SBA notes, in both *Balderas* and *BDS Protective Serv.*, the disadvantaged individual upon whom eligibility was based had successfully managed the applicant firm and worked evenings for approximately 10 years before applying to the 8(a) BD program. (*Id.*, at 7.) Thus, while full-time outside employment does not serve as an automatic disqualification, the 8(a) applicant must demonstrate that such employment will not directly conflict with the 8(a) applicant's normal business hours. (*Id.*, citing *Sonoran Construction*, at 15.)

With respect to Petitioner, SBA contends the AA/BD properly characterized Mr. Norals' PSC with MCC as outside employment that could conflict with his ability to manage Petitioner on a full-time basis. “[A] personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel.” *Id.*, citing FAR 37.104(a.)

According to Petitioner's application file, since 2016, Mr. Norals has been serving as a full-time Infrastructure Management Branch Project Manager for MCC. (*Id.*, at 8, citing AR, Ex. 13a, at 612, 617, 621.) In this capacity, Mr. Norals is the Infrastructure Management Branch's “principal network telecommunications advisor, project manager, and lead for all networking

systems matters,” and reports directly to the Infrastructure Management Branch Director. (*Id.*, citing AR, Ex. 13a, at 617.) In addition, he is responsible for supervising and evaluating the performance of work by contractors and other PSCs. (*Id.*, citing AR, Ex. 13a, at 617.) He is compensated in the form of W-2 wages from MCC, and his salary is commensurate with the rates of pay for members of the Senior Executive Service. (*Id.*, citing AR, Ex. 13a, at 698-707.) In sum, and according to MCC, Mr. Norals is a highly skilled contractor with the inherent duties and schedule of a government employee. (*Id.*, citing AR, Ex. 13a, at 898.) Thus, notwithstanding Mr. Norals' statutory and regulatory classification as a non-employee PSC for MCC, SBA decision to treat his role of MCC's Infrastructure Management Branch Project Manager as full-time outside employment was reasonable and supported by the facts in the record. (*Id.*) Even if SBA erred in this finding, such error was harmless and does not undermine the validity of SBA's Determination. (*Id.*) As noted above, the full-time management inquiry turns on whether an individual's “outside pursuits” conflict with his or her ability to manage the applicant firm. (*Id.*, citing *Raintree*; *Oak Hill*.) SBA found it clear from the nature of Mr. Norals' PSC, that his role with MCC as an outside pursuit could detract from his full-time management of Petitioner. (*Id.*)

On July 2, 2020, SBA notified Mr. Norals that his position at MCC could impact Petitioner's 8(a) BD program eligibility and requested: 1) Mr. Norals' official work schedule at MCC, including a breakdown of hours by day and time; 2) an explanation of how Mr. Norals' role with MCC does not interfere with his ability manage and market Petitioner; and 3) Mr. Norals' official work schedule at Petitioner. (*Id.*, at 8, citing AR, Ex. 14, at 15.) In response, on August 7, 2020, Mr. Norals explained that his regularly scheduled working hours at MCC are from 7:00 a.m. to 8:00 p.m. and his normal working hours at Petitioner are from 9:00 a.m. to 5:00 p.m. (*Id.*, at 9, citing AR, Exhibit 13a, at 893.) Mr. Norals further explained that his MCC schedule does not interfere with his ability to manage and market Petitioner because he typically performs marketing activities on the weekend, and his schedule with MCC is flexible to allow for *ad hoc* business development events, small business outreach sessions, and customer meetings. (*Id.*) Subsequently, on January 26, 2021, Petitioner submitted a letter from the CO overseeing Mr. Norals' PSC with MCC explaining that Mr. Norals may conduct business activities for Petitioner during the hours of operations of his MCC contract. (*Id.*, citing AR, Ex. 13a, at 898.)

SBA re-emphasized that a firm seeking to qualify for 8(a) certification bases its claim of eligibility upon an individual engaged in outside employment or other pursuits, that individual must demonstrate to SBA that such employment or pursuits do not conflict with the individual's full-time management of the applicant concern. (*Id.*, citing *Raintree*.) In the context of full-time employment or its equivalent, that individual must demonstrate that the normal working hours of each entity do not overlap. (*Id.*, citing *Sonoran Construction*.) In this case, SBA identified this issue correctly and asked all the right questions to assess Mr. Norals' compliance with the full-time management requirement. It was then incumbent upon Petitioner to demonstrate that Mr. Norals' work at MCC does not conflict with or hinder his ability to manage Petitioner on a full-time basis during its normal working hours. (*Id.*) SBA asserts that Petitioner failed to meet this burden. The record also reveals that Mr. Norals' normal working hours at MCC and Petitioner completely overlap.

As demonstrated in the Determination, the AA/BD considered all the information provided by Mr. Norals and found that his submissions contained insufficient evidence to establish his full-time management of Petitioner. As such, the AA/BD reasonably concluded that it could not determine whether Mr. Norals manages Petitioner on a full-time basis in accordance with 13 C.F.R. § 124.106(a)(1). Because SBA examined the relevant evidence, gave a satisfactory explanation for its determination, and there is a rational connection between the facts and SBA's determination, the AA/BD's Determination to deny the application should be upheld. (*Id.* at 10, citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1961).) SBA concludes that the AA/BD's Determination is reasonable and must be upheld.

As for the submission of new evidence in Petitioner's Exhibits C through G to the Appeal Petition, SBA requests OHA exclude them. SBA asserts, 8(a) appeals are to be decided solely by a review of the written AR. (*Id.*, at 2-3, citing 13 C.F.R. § 134.406(c)(1).) The judge “may not admit evidence beyond the written AR nor permit any form of discovery unless he or she first determines that the petitioner, upon written submission, has made a substantial showing, based upon credible evidence and not mere allegation, that the Agency's determination in question may have resulted from bad faith or improper behavior. (*Id.*, at 2, citing 13 C.F.R. § 134.407; *In the Matter of Spectrum Contracting Services, Inc.*, SBA No. BDP-378 (2010); *In the Matter of Alabasi Construction, Inc.*, SBA No. BDP-368 (2010).)

SBA also asserts the new evidence should be excluded from the Record because these documents were not before SBA at the time the Agency made its Determination. (*Id.*, at 3.) In fact, the documents in Exhibits C, D, E, and F are dated after and in response to the AA/BD's August 3, 2021 letter declining Petitioner's application, while Exhibit G is undated and appears to be a version of Mr. Norals' resume that was not previously submitted in support of Petitioner's application. (*Id.*) As such, these documents could not have been before the AA/BD when making such Determination. Thus, these exhibits constitute evidence beyond the AR. In contrast, Petitioner has neither alleged nor provided evidence suggesting that SBA's Determination was the result of bad faith or improper behavior. (*Id.*) Therefore, SBA requests that the new evidence neither be admitted into the Record nor considered in OHA's decision.

III. Discussion

A. Standard of Review

An SBA determination to deny a concern admission to the 8(a) BD program can be overturned only if the reviewing Judge concludes that (1) the administrative record is complete; and (2) based upon the entire administrative record, SBA's determination was arbitrary, capricious, or contrary to law. *See* 13 C.F.R §§ 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). Therefore, as long as SBA's determination is reasonable, I must uphold it. *See* 13 C.F.R. § 134.406(b)(2), *see also In the Matter of United Global Technologies, Inc.*, SBA No. BDPE-518, at 2 (2014).

OHA may only consider information contained in the written AR. *See* 13 C.F.R. § 134.406(a). Therefore, the AR must be complete before the court may determine whether it supports SBA's conclusion. In determining whether SBA's Determination was based on a

complete record, I must assess “whether the agency articulated an explanation for its conclusion that is rationally connected to the facts found in the record.” *See In the Matter of Southern Aire Contracting, Inc.*, SBA No. BDPE-453, at 2 (2012). In doing so, the agency's determination must show that (1) it considered all of petitioner's evidence; (2) it arrived at its conclusion using only those facts contained in the written administrative record; and (3) its conclusion provides a clear rationale based on those facts. *Id.*

If SBA relied on a complete record, its determination will only be disturbed if it was arbitrary, capricious, or contrary to law. 13 C.F.R. § 134.406(b). Such “clear error of judgment” occurs 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 the Court. *See In the Matter of McMahon Builders, Inc.*, SBA No. BDPE-461, at 3 (2013).

B. Ruling on the AR

Petitioner seeks to submit new evidence with its appeal, namely Exhibits C, D, E, F and G. Section II.C, *supra*. However, 8(a) eligibility appeals are decided based solely upon the written AR before the AA/BD. 13 C.F.R. § 134.406(a). Here, Petitioner seeks to admit evidence beyond the written AR that was before the AA/BD when she made her decision. Indeed, much of this evidence was not in existence at the time the AA/BD made her decision, because it was created after the fact to respond to that decision. I may not admit such evidence into the record, absent a substantial showing, based on credible evidence, that the Agency's Determination resulted from bad faith or improper behavior. 13 C.F.R. § 134.407(a)(1) *Spectrum Contracting, supra, Alabasi Construction, supra*. Petitioner has made no such showing. Accordingly, I hereby EXCLUDE all the information Petitioner seeks to admit into the record, which was not before the AA/BD at the time she made her decision, which includes part of Petitioner's appeal on September 17, 2021.

C. Petitioner's Burden of Proof Before SBA

An applicant seeking entry into the 8(a) BD program 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. To show that a disadvantaged individual has control over the business, the 8(a) applicant must show that the business is managed on a full-time basis by one or more disadvantaged individuals and that the disadvantaged individual “devote[s] full-time to the business during the normal working hours of firms in the same or similar line of business.” *Raintree*, at 6, quoting 13 C.F.R. § 124.106(a)(1), (3); *see also* 13 C.F.R. § 124.204(c). The 8(a) applicant must meet that burden by a preponderance of the evidence. *Id.*, at 19; 13 C.F.R. § 124.103(c)(1).

D. Analysis

My review of this matter is narrowly limited to the issue of whether SBA's denial of Petitioner's admission into the 8(a) BD program was arbitrary, capricious or contrary to law, and I may not substitute my own judgment for that of SBA. *See In the Matter of Tony Vacca Construction, Inc.*, SBA No. BDP-321 (2009). Therefore, in order to sustain SBA's Determination, I must find that it was reasonable and not arbitrary, capricious, or contrary to the law.

First, to analyze whether SBA's finding was reasonable, I must determine whether the AR is complete. *Southern Aire Contracting*, at 2. On November 4, 2021, SBA provided OHA with a copy of the AR along with its response to the instant appeal. Petitioner did not object to the AR. I hereby find that the AR is complete.

Now, having reviewed the AR and the arguments of the parties, I see no basis to conclude that SBA's Determination was arbitrary, capricious, or contrary to law. Here, SBA could not determine whether Mr. Norals manages the firm on a full-time basis, when Mr. Norals stated that his regularly scheduled working hours at MCC are from 7:00 a.m. to 8:00 p.m., and his normal working hours at Petitioner are from 9:00 a.m. to 5:00 p.m. Sections II.A and II.B, *supra*. The issue of whether outside employment conflicts with a manager's full-time devotion to the applicant firm must be decided on a case-by-case basis. *In the Matter of Fletcher Books*, SBA No. MSB-586 (1997).

Notwithstanding a letter from a CO conceding that Mr. Norals is allowed to work for Petitioner during MCC's working hours, SBA noted the actual amount of time that Mr. Norals devotes to Petitioner versus MCC during normal business hours remained unclear. Based on these circumstances, SBA found the full-time requirement was not met. 13 C.F.R. § 124.106 (a)(3). I conclude SBA's finding was reasonable based on the AR.

The regulation at 13 C.F.R. § 124.106(a)(3) requires that one or more disadvantaged individuals who manage the applicant must devote full-time to the business during the normal working hours of firms in the same or similar line of business. While the regulation itself does not define the terms "full time" or "normal working hours," the regulatory history cited above explains the disadvantaged individual who manages the concern must be physically located at the applicant concern's offices during most normal business hours or devoting their full-time efforts to the business away from its offices through marketing and outreach. The term "normal business hours" is intended to mean the normal 40-hour work week of most business concerns. 62 Fed. Reg. 43584, 43586-7 (Aug. 14, 1997). While outside employment is not prohibited by the regulation, the question is whether the dual obligations conflict to the extent that SBA may reasonably conclude that one precludes the other. *Sonoran Construction*, at 12. In the absence of evidence to the contrary, OHA has found devoting 40 hours of work per week qualifies as full-time, and the hours of 8:00 a.m. or 9:00 a.m. to 4:00 p.m. or 5:00 p.m. Monday through Friday may be considered "normal working hours." *Id.* An individual who had a 40-hour a week, Monday through Friday position, and performed work for the applicant firm on evenings, weekends, and breaks, was found to not be devoting full-time to the concern. *AGB Investigative Servs.*, at 8. OHA's cases have held that full-time employment outside the applicant firm is only

permissible where such employment will not overlap with the normal working hours of the applicant, such as an evening shift. *BDS Protective Serv.*, at 11. As noted, *supra*, the stated normal working hours of MCC and Petitioner clearly overlap, and it was reasonable for SBA to conclude full-time work at one would preclude the same effort for the other.

In seeking to overturn SBA's Determination, Mr. Norals reasserts its position that he meets the full-time devotion requirement because he is allowed to work for Petitioner during the working hours at MCC. Section II.C, *supra*. Additionally, Petitioner asserts that MCC is remote in nature, meaning that it is easy for him to work on multiple projects or matters throughout the course of the week. *Id.* However, this information does not show that Mr. Norals maintained or devoted full-time to Petitioner during its business hours. Even if Mr. Norals could work for Petitioner during the scheduled hours at MCC, it continues to remain unclear the actual amount of time Mr. Norals devoted to Petitioner versus MCC during normal business hours, as the AA/BD noted in the Determination. Further, Petitioner did not submit evidence to support its conclusory statement that Mr. Norals worked full-time for Petitioner. Section II.A, *supra*.

In its filing before OHA, Petition asserts that Mr. Norals may have *miscommunicated* that he worked full-time on the MCC contract during the hours of 7 a.m. to 8 p.m. and those are the hours he would be focused on his business. Section II.D., *supra*; emphasis supplied. On appeal, Petitioner now attempts to amend Mr. Norals' response to SBA and provides additional information to establish the full-time devotion requirement. However, this information must be excluded because it was not in the AR before the AA/BD. Sections II.A and II.B, *supra*. The information Petitioner presented to the AA/BD in its application did not show that Mr. Norals maintained or devoted full-time to Petitioner's business hours when working full-time for MCC.

As for SBA's finding that the CO's letter from Mr. Sarpong should be disregarded, and Petitioner's contention that Mr. Sarpong is the supervisor of the contract in question, whether SBA erred in disregarding this letter is at best, harmless. Sections II.A, II.B, and II.C, *supra*. Certainly, SBA found that even considering the letter, the actual amount of time that Mr. Norals devotes to Petitioner versus MCC during normal business hours remains unclear. While a line of OHA cases has found that outside employment is not prohibited by 13 C.F.R. § 124.106, here, Petitioner failed to meet its burden of proof before SBA that Mr. Norals has control of Petitioner. 13 C.F.R. § 124.106(a)(1), (3); 13 C.F.R. § 124.204(c). In fact, Petitioner provided Mr. Norals scheduled working hours at MCC, from 7:00 a.m. to 8:00 p.m., which appeared in direct conflict with the management of Petitioner during its business hours of 9:00 a.m. to 5:00 p.m. Section II.A, *supra*.

I conclude that SBA (1) considered all of Petitioner's evidence, (2) its conclusion was based solely on the facts presented in the AR, and (3) the conclusion provides a clear rationale based on those facts. *Southern Aire*, at 2. The AA/BD outlined Mr. Norals' work hours in MCC and Petitioner and explained why it could not conclude that Mr. Norals met the full-time requirement. Therefore, SBA made its Determination based solely on the complete AR. I found no occurrence of SBA failing to properly apply the law to the facts presented, no failure to consider an important point contained in the record, and no explanation that was implausible or counter to the evidence.

Thus, I find that SBA conducted a thorough review of all the evidence, considered all the evidence presented, based its conclusion on that evidence, and provided a clear rationale for its conclusion. Accordingly, Petitioner has failed to establish SBA's decision was arbitrary, capricious, or contrary to law.

IV. Conclusion

For the foregoing reasons, I conclude SBA's Determination denying Petitioner's admission to the 8(a) BD program was not arbitrary, capricious, or contrary to law. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). I must therefore AFFIRM SBA'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).

CHRISTOPHER HOLLEMAN
Administrative Judge