

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

IN THE MATTER OF:

Sonoran Construction Group, aka Sonoran  
Equipment Appraisal,

Petitioner

SBA No. BDPT-581

Decided: June 18, 2020

APPEARANCES

David A. Rose, Esq., Rose Consulting, LLC, Valdosta, Georgia, for Appellant Sonoran Construction Group, aka Sonoran Equipment Appraisal

Beverley E. Hazlewood, Esq., Agency Representative, Washington, District of Columbia, for U.S. Small Business Administration

DECISION

I. Introduction and Jurisdiction

On March 20, 2020, Sonoran Construction Group, aka Sonoran Equipment Appraisal (Petitioner/Company) appealed a U.S. Small Business Administration (SBA) determination terminating its status as a Participant in SBA's 8(a) Business Development (BD) program. SBA found that because Petitioner's owner had outside employment Petitioner failed to meet the standards for control of the firm. 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 because SBA's determination is reasonable.

SBA's Office of Hearings and Appeals (OHA) has jurisdiction to decide appeals from termination from the 8(a) BD program. *See* 15 U.S.C. § 637(a)(9)(A), (B)(ii); 13 C.F.R. Parts 124 and 134. Petitioner filed its appeal within 45 days of its receipt of SBA's determination, and so the appeal is timely. *See* 13 C.F.R. § 134.404.

II. Facts and Procedural History

Petitioner is owned, controlled, and managed by Mr. Lez McKenzie, the individual upon whom its claim of eligibility is based. On November 25, 2016, Petitioner was approved and certified as a Participant in the SBA 8(a) BD Program with a 9-year program term beginning on that date. (Administrative Record (AR), Exh. 20; *see also* Exh. 13 at 35.) On July 28, 2017, SBA approved Petitioner's mentor-protégé agreement (MPA) between Fortis Networks, Inc. (mentor) and Petitioner (protégé). (AR, Exh. 19.)

On December 14, 2017, Petitioner executed the 8(a) Program Participation Agreement, signed by Mr. McKenzie. (AR, Exh. 18.) In the participation agreement, Mr. McKenzie agreed to submit annual financial statements (§ 1.0), personal and business income tax returns (§ 2.0), business plan (§ 6.0), annual review documentation (§ 7.0), annual benefits reports (§ 8.0), and requested additional information (§ 9.0). (*Id.*) Mr. McKenzie further agreed that his firm may be terminated from the 8(a) BD program upon the occurrence of one of more of the examples cited at 13 C.F.R. § 124.303, and acknowledged that SBA may use other grounds for terminating a participant from such program (§ 3.0). Mr. McKenzie gave assurance that the concern will comply with discriminatory prohibitions (§ 4.0) and fully cooperate with access to records (§ 5.0).

On December 19, 2017, Petitioner submitted its annual review documentation and affirmed that the Company received no payment, compensation, or distributions for the period of December 31, 2016 through December 18, 2017. (AR, Exh. 13 at 33, 45.) In the individual information section of the submission, Mr. McKenzie denied being employed outside the applicant firm. (*Id.*, at 58.)

Thereafter, on February 7, 2019, Petitioner submitted a subsequent annual review with documents. (*Id.*) Mr. McKenzie's 2017 and 2018 tax returns reflected he had received earnings of \$66,810 and \$110,605, respectively, from BMO Harris Bank, N.A. (BMO Harris). (*Id.*, at 19, 156.) In its submission, Petitioner stated that Mr. McKenzie is working as an Equipment Manager for BMO Harris Equipment Finance, from 7:00am to 3:00pm Monday through Friday, 40 hours per week. (*Id.*, at 8.) Mr. McKenzie's responsibilities included setting residuals on equipment, such as railcars and marine vessels. Petitioner asserted that this position does not conflict with Mr. McKenzie's ability to manage the concern because Mr. McKenzie dedicates his time to Petitioner from 4:00pm to midnight, if necessary, conducting all business-related activities. Petitioner is now at an early stage in its business, has only one project awarded to date, and does not require a full 40-hour commitment to effectively manage all its current activities. Additionally, Mr. McKenzie's job with BMO Harris does not prevent him from managing Petitioner because the two concerns are in completely different lines of business. (*Id.*)

On February 28, 2019, SBA informed Petitioners that its annual review documents were deficient and could not be processed until the firm had submitted all the required documents to SBA. (AR, Exh. 17.) SBA requested the submission of Petitioner's 2016 and 2015 financial statements (profit and loss and balance sheet), response to the question of ownership, mentor-protégé worksheet, current business plan, capability statement, and Mr. McKenzie's current personal resume, as well as his 2017 and 2016 tax returns. (*Id.*) SBA also asked Mr. McKenzie to verify that his firm did not perform any 8(a) contracts during the past program year from November 25, 2017 to November 25, 2018, or otherwise, to revise it accordingly.

In the Disadvantaged Individual Section of its letter, SBA informed Petitioner that Mr. McKenzie must have ownership and control of the company, pursuant to 13 C.F.R. § 124.106, which includes him devoting himself to the concern's business on a full-time basis. (*Id.*) SBA noted that Mr. McKenzie currently holds a secondary employment and it was not approved by SBA prior to his taking the position. (*Id.*) SBA asked Mr. McKenzie to submit a formal request for approval of outside employment. This was to include the nature and anticipated duration of

the outside employment, Petitioner's hours of operation, Mr. McKenzie's specific time commitment to the firm, and his duties in the company. (*Id.*)

On March 9, 2019, Petitioner submitted to SBA a request for approval of secondary employment on behalf of Mr. McKenzie. (AR, Exh. 15.) Petitioner first indicated that “the nature of [Mr. McKenzie's secondary] employment is full-time Monday through Friday, 8:00 A.M. to 4:00 P.M. MST. There is no duration to [this] employment.” (*Id.*) Petitioner added that since it is not able to pay Mr. McKenzie a salary at the present time, Mr. McKenzie has no other options to acquire the financial means to meet his financial obligations. Further, Mr. McKenzie has no intention of resigning his secondary position until Petitioner can pay him and his employee a living wage. (*Id.*)

Petitioner stated its regular hours of operation are Monday through Friday, 8:00am to 5:00pm MST. (*Id.*) Mr. McKenzie works at Petitioner from 4:00pm to 11:00pm MST. Mr. McKenzie's role remains that of Petitioner's CEO, while Petitioner's Project Manager handles the day-to-day operations, marketing efforts, client visits, etc. (*Id.*) Petitioner is not in a financial position to allow Mr. McKenzie to terminate his secondary employment, which has allowed him to meet his financial obligations to himself and his children, but also to dedicate his time towards making sure Petitioner is positioned for success going forward. Mr. McKenzie stated that committing himself fully to a standard 8:00am to 5:00pm work schedule is not feasible at this time, because Petitioner cannot pay him a living wage. Mr. McKenzie maintains he would be irresponsible both to the company and to his family if he were to do so. Petitioner conceded it was fully aware of the provisions at 13 C.F.R. § 124.106 regarding outside employment. However, Mr. McKenzie maintains having such employment does not mean giving up control of the Company. In his case, it simply is not an option when he must make a living to support his family and work toward growing the business. (*Id.*)

On March 11, 2019, Petitioner submitted a subsequent request for approval of Mr. McKenzie's secondary employment. (AR, Exh. 14.) Petitioner informed SBA that Mr. McKenzie is employed by BMO Harris as an Equipment Manager on a full-time basis, from 6:00am to 3:00pm, Monday through Friday. (*Id.*) His duties include residual forecasting for BMO Harris's rail, marine, and industrial and commercial assets, industry forecasting, risk analyzing, remarketing of leased assets, providing semi-annual review on existing equipment, and developing relationships with third party industry experts. Petitioner maintained Mr. McKenzie's outside employment does not negatively impact his ability to lead Petitioner. Rather, it has the opposite effect, because the outside employment permits him to meet his financial obligations when the Company is unable to provide at this stage.

Petitioner renewed its assertion that Mr. McKenzie dedicates the hours of 4:00pm to 11:00pm to its business, while the Project Manager handles day-to-day operations, marketing, client visits, etc. (*Id.*) Petitioner stated its intention to hire more key personnel in the coming weeks. Mr. McKenzie will focus his efforts as Petitioner's CEO, the decision maker and leader of the company, formulating policy, hiring, and motivating employees, overseeing operations, and marketing the company. Petitioner reasserted its earlier statements about McKenzie's financial position, his financial obligation to himself and his children, his inability to commit to the concern 100% during a standard 8:00am to 5:00pm work schedule, and his understanding of the

regulatory language regarding outside employment. Nonetheless, Petitioner maintains Mr. McKenzie has control of the Company. (*Id.*)

On July 5, 2019, Petitioner submitted a supplement to its request for approval of secondary employment, including Mr. McKenzie's 2018 W-2 from BMO Harris. (AR, Exh. 9.) Petitioner expected to succeed due to its new relationship with a Mentor and asserted Mr. McKenzie is working hard to establish clients and it has “many bids out.” (*Id.*) Petitioner indicated it requires an influx of capital to succeed and seeks to obtain this partly through Mr. McKenzie's outside employment. Mr. McKenzie also received valuable experience through his outside employment.

Petitioner further asserted it “is not in a 9-to-5 type performance currently, but in more of a business development phase.” (*Id.*) Mr. McKenzie also worked many hours after 5:00pm. Petitioner thus argued that because SBA has discretion to determine what constitutes full-time employment, it should consider Mr. McKenzie's evening work in granting the waiver. (*Id.*, at 2-3.)

On July 10, 2019, Petitioner provided further responses to SBA. (AR, Exh. 8, 10.) Petitioner stated that Mr. McKenzie's employment status with BMO Harris is full-time and indefinite, until Petitioner can pay Mr. McKenzie a living wage. (AR, Exh. 8, at 1.) Petitioner also explained that its prior reference to the term “Bid List” and having “many bids out” simply meant it was pursuing contract opportunities and has submitted one bid proposal. (*Id.*) Petitioner had also obtained one contract since participating in the program and has completed one Task Order thus far.

On August 20, 2019, SBA gave notice of its intent to terminate Petitioner's participation in the 8(a) BD program for good cause, pursuant to 13 C.F.R. § 124.303. (AR, Exh. 4.) SBA noted that on March 11, 2019, Mr. McKenzie had submitted a request for an outside employment waiver for his position with BMO Harris, which job Mr. McKenzie had held since 2017. (*Id.*, at 1.) SBA had to approve this request before Mr. McKenzie began his employment, yet he engaged in the outside employment and knowingly failed to disclose the information to SBA. In December 2017, Petitioner answered “no” to the outside employment question on its annual review. In March 2018, Mr. McKenzie's 2017 tax returns submitted with the most current annual review showed that he earned \$66,810 at BMO Harris and his employment continued into 2018, as his 2018 tax returns showed wages of \$110,605 from the same employer. SBA also noted that Mr. McKenzie received no wages from the Company in 2017. In addition, Petitioner's 2017 tax returns showed business revenues of \$401,785, all generated by one federal contract. The Company did not report other contracts in 2017 and no business revenues in 2018. (*Id.*)

SBA noted Mr. McKenzie's request for a waiver stated his work with BMO Harris was of indefinite duration, and the hours were 8:00am to 5:00pm, Monday through Friday, and that he dedicated the daily hours of 4:00pm to 11:00pm to Petitioner. Petitioner's Project Manager handles day-to-day operations. (*Id.*)

Thus, SBA concluded that it could not determine that Mr. McKenzie, the individual upon whom Petitioner's eligibility is based, is able to manage and control the day-to-day operations of

the firm and work full-time for BMO Harris during normal working hours. (*Id.*, at 2.) SBA found that Mr. McKenzie's schedule with BMO Harris is in direct conflict with his management of the Company and could hinder the Company from achieving the objectives of its business development plan. SBA further found Mr. McKenzie's failure to maintain full-time, day-to-day management and control of the Company constituted good cause for termination. In accordance with 13 C.F.R. § 124.304, Petitioner had 30 days from the receipt of the Letter of Intent to Terminate to submit a written response to SBA explaining how the firm plans to proceed and justifying the retention of the Company in the 8(a) BD Program. (*Id.*)

On September 20, 2019, Petitioner submitted a response to SBA's letter of intent to terminate Petitioner's participation. (AR, Exh. 3.) Petitioner conceded that having outside employment could be considered good cause for termination. (*Id.*) In addition, Petitioner did not dispute SBA's findings, but asked SBA to consider the progress the Company has made, resulting from a combination of developing a clear vision, combined with a very focused strategy for growing the business, hiring the right team and paying competitive salary, providing customer service, and working hard, to reasonably conclude that Mr. McKenzie's outside employment had not impacted his ability to grow the business and more importantly, provide quality service and results to its customers to date. (*Id.*, at 1.)

Petitioner admitted the regulations are clear and took full responsibility for not informing SBA of Mr. McKenzie's intent to seek outside employment. (*Id.*) Petitioner conceded its action warranted good cause for termination under the stated regulation and apologized for such action, which has now placed at risk Petitioner's 8(a) status and its employees' livelihoods. Petitioner conceded violating the regulations, but asked SBA to consider extending a 12-month waiver. Petitioner maintained it did intend to violate SBA's regulations and did not believe that Mr. McKenzie's outside employment has conflicted with his ability to grow the business. (*Id.*, at 2.)

### III. SBA's Determination

On January 31, 2020, SBA's Associate Administrator for the Office of Business Development (AA/BD) terminated Petitioner's participation in SBA's 8(a) BD program. (AR, Exh. 1.) SBA stated the reason for the termination was failure by the concern to maintain full-time day-to-day management and control of the concern by disadvantaged individuals. (*Id.*, at 1, citing 13 C.F.R. § 124.303(a)(3).) The AA/BD noted SBA regulations required that any disadvantaged manager who wishes to engage in outside employment must notify SBA of the nature and anticipated duration of the outside employment and obtain prior written approval of SBA for that employment. SBA will deny a request for outside employment which could conflict with the management of the firm or could hinder it in achieving the objectives of its business development plan. (*Id.*, citing 13 C.F.R. §§ 124.106(a)(4).)

The AA/BD found that upon review of Petitioner's outside employment waiver request, Mr. McKenzie, Petitioner's principal, and the individual upon whom its claim of eligibility was based, accepted an outside position with BMO Harris in 2017. Therefore Mr. McKenzie engaged in outside employment without Petitioner's obtaining prior written approval of that employment from SBA. (*Id.*, at 1-2.) Further, the AA/BD concluded Petitioner knowingly failed to disclose this outside employment to SBA when it answered "no" to the outside employment question on

its annual review submitted in December 2017. The AA/BD further noted that Mr. McKenzie earned \$66,810 from BMO Harris in 2017, and \$110,605 from BMO Harris in 2018, according to his tax returns. (*Id.*, at 2.)

The AA/BD found that Petitioner's request for an outside employment waiver states Mr. McKenzie's work with BMO is to be indefinite, Monday through Friday, from 8:00am to 5:00pm, and that he worked at Petitioner from 4:00pm to 11:00pm on weekdays. Petitioner has stated its Project Manager handles day-to-day operations, marketing efforts, client visits, etc. Nevertheless, the AA/BD concluded Mr. McKenzie's outside employment is detrimental to the firm and hinders Petitioner in achieving the objectives of its business development plan because Petitioner did not generate any revenue in 2018. (*Id.*)

As a result, the AA/BD concluded Petitioner had not overcome the reason for termination and terminated the Company from the 8(a) Business Development program.

#### IV. Petitioner's Appeal

On March 20, 2020, Petitioner filed the instant appeal. Petitioner asserts that to provide the firm with an influx of capital, Mr. McKenzie sought out a mentor and went to work at another job using a portion of his salary to support Petitioner's operations. Mr. McKenzie was not aware that he could not have outside employment. He was also not aware of the procedure to request a waiver. Petitioner maintained that Mr. McKenzie did not abandon his Company. He adjusted his working hours from 4:00pm to 11:00pm or midnight. In those hours, he reviewed proposals, signed contracts, made decisions, and met with clients. (Appeal at 2.)

Petitioner asserts it was Mr. McKenzie's honesty in admitting his outside employment, which led to the termination. Petitioner has established a bonding line, a line of credit, and a mentor-protégé relationship, and has pursued contracts with that mentor, making good progress for a new concern. Petitioner was moving towards Mr. McKenzie being able to leave his outside employment. (*Id.* at 2-3.)

Petitioner further asserts the regulations do not define the terms “full-time” or “normal working hours,” and cites to a number of OHA cases that recognized a disadvantaged individual holding a full-time position outside an 8(a) BD firm does not necessarily preclude that individual from also managing a firm full-time and that found the issue is whether the dual obligations conflict to the extent that SBA may reasonably conclude that one precludes the other, discussed in Section VII, *infra.* (*Id.*, at 4.)

Particularly, Petitioner argues that its case is closely analogous to *In the Matter of Balderas General Contractors, Inc.*, SBA No. 513 (1995), when the disadvantaged individual worked the second shift for an outside employer, and OHA found the regulations do not prohibit outside employment, faulting SBA for not analyzing whether “full-time employment,” managing the firm had to consist of 8-hour days or could consist of several hours a day during the week and long days on the weekend. (*Id.*, at 5.)

Petitioner thus argues SBA failed to consider outside employment is not prohibited and Mr. McKenzie's primary duties as owner of the firm. (*Id.*) Petitioner is a construction firm and as such, Mr. McKenzie would not be expected to be at construction sites supervising work. He must review daily reports, accident reports to ensure his insurability, bonding levels, line of credit levels, contracts, prepare proposals, and make calls to his field staff. While he may have delegated certain decisions to his Project Manager (common in the construction industry), there is no evidence the major decisions were made by anyone other than Mr. McKenzie. Petitioner maintains SBA's conclusions assumed that a small construction firm operated from Monday to Friday, from 8:00am to 5:00pm, and that Mr. McKenzie would have to work those same hours. (*Id.*, at 5-6.) Petitioner further asserts it demonstrated growth by increasing bonding levels and lines of credit and entering a mentor-protégé relationship, as well as obtaining larger and more profitable contracts. (*Id.*, at 6.)

#### V. SBA's Response

On August 20, 2018, SBA responded to Petitioner's appeal. SBA asserts that Petitioner failed to overcome the allegations set forth in SBA's Letter of Intent to Terminate, dated August 21, 2019, that Mr. McKenzie, the individual upon whom Petitioner's 8(a) BD program eligibility was based, does not maintain full-time day-to-day control and management of the participant company. Petitioner has necessarily failed to maintain its program eligibility and materially breached the Participation Agreement. SBA's decision to terminate Petitioner from the 8(a) BD program was reasonable and not arbitrary, capricious, or contrary to law. Thus, OHA should deny Petitioner's appeal. (SBA's Response, at 1.)

SBA asserts an applicant or Participant's management and daily business operations must be conducted by one or more disadvantaged individuals. (*Id.*, at 2, citing 13 C.F.R. § 124.106.) SBA may terminate an 8(a) BD program participation prior to the expiration of participant's program term for good cause, including but not limited to, “[f]ailure by the concern for any reason, including the death of an individual upon whom eligibility was based, to maintain ownership, full-time day-to-day management, and control by disadvantaged individuals.” (*Id.*, at 2-3, citing 13 C.F.R. § 124.303(a)(3).)

SBA presented a chronological statement of facts, supported by the Administrative Record. (AR, Exh. 1, at 3-7.) SBA states that in the first year of program participation, Petitioner accepted outside employment without prior approval from SBA. (*Id.*, at 9.) Petitioner's claim that he did not even know he could not have outside employment on appeal is not credible. Petitioner executed a Participation Agreement on December 14, 2017, in which he acknowledged that he had read and agreed to abide the program regulations including the requirement he must obtain approval of SBA for outside employment. (*Id.*)

SBA asserts “[t]he 8(a) BD program is a business development program, focusing on the development of *the disadvantaged individual* to manage and grow the business into a successful, thriving, competitive concern.” (*Id.*, emphasis in original.) Thus, Petitioner knew or should have known that outside employment required prior SBA approval. Petitioner knowingly misrepresented his employment status when he answered “no” to the outside employment question on his annual review documentation. (*Id.*)

SBA asserts that when the second-year program review came, the submission of Petitioner's 2017 tax returns would have disclosed Mr. McKenzie's outside employment. (*Id.*, at 10.) In response to Petitioner's contention that SBA failed to consider that outside employment was not prohibited, SBA points out it requested a formal letter from Petitioner in February of 2019, setting forth the nature and anticipated duration of the outside employment, an explanation of Petitioner's hours of operation, and Mr. McKenzie's time commitment and duties to Petitioner. (*Id.*) Petitioner responded to the request and provided conflicting information regarding the nature and hours of his outside employment. At first, Petitioner indicated that the hours were full-time, Monday through Friday, from 8:00am to 4:00pm, then the hours were full-time, without duration, Monday through Friday, from 6:00am to 3:00pm, and then the outside employment was referred to as "temporary." (*Id.*, at 4-5, 10.) SBA notes that Petitioner has established that its hours of operations are Monday to Friday, from 8:00am to 5:00pm. (*Id.*) SBA further asserts that in its response to SBA's request for information, Mr. McKenzie provided no documentation as to the duties he performed for the participant. (*Id.*, at 10-11.)

SBA asks OHA to ignore Petitioner's invitation to speculate as to Mr. McKenzie's duties. SBA found Petitioner had obtained only one contract by the time the termination proceedings began, and Petitioner admitted that his "Project Manager handles the day-to-day operations, marketing efforts client visit (sic), etc." (*Id.*, at 11.) Petitioner provided no evidence that Mr. McKenzie was involved in the day-to-day operations of the participant, no evidence that he reviewed daily reports and accident reports, no evidence that he had interactions with contracting officers, and no evidence that he made major decisions to SBA. (*Id.*) Petitioner could not even provide SBA with a list of bid proposals he had submitted since entering the 8(a) BD program, whether they had culminated into awards or not. (*Id.*) SBA took note that Petitioner entered a Mentor Protégé Agreement (MPA) to learn how to conduct marketing, estimating, and project management, which are critical skills to successfully growing a business. Yet, Petitioner turned over the day-to-day operations of its first contract to a Project Manager, rather than using the opportunity to gain the experience for himself. SBA noted, "[a]lthough a disadvantaged individual need not have technical expertise in order to be found in control of a concern, where that individual can demonstrate ultimate managerial control over those with the expertise, the disadvantaged individual must have managerial experience of the extent and complexity needed to run the concern." (*Id.*, citing 13 C.F.R. § 124.106.)

SBA maintains that whether a disadvantaged individual is providing full-time devotion to the participant concern is determined on a case by case basis. (*Id.*, at 12, citing *In the Matter of Raintree Advanced Management Corporation*, SBA No. BDP-407 (2011).) The relevant standards for the determination are: (1) the amount of time devoted to the participant concern; (2) the amount of time devoted to outside employment and interests; and (3) the potential for conflicts between the participant concern's schedule and the outside employment. (*Id.*) Factors considered when determining full-time devotion include numbers of hours worked, the time of day those hours are worked, i.e., whether the disadvantaged individual is working during normal business hours, and the disadvantaged individual's availability to take phone calls or deal with the applicant concern's problems while engaged in outside employment. (*Id.*)



SBA argues Petitioner's reliance on *Balderas*, SBA No. 513 (1995), is misplaced. There, the disadvantaged individual worked at the applicant concern during the day, and his outside employment during the evenings. SBA asserts here Petitioner's outside employment is in direct and substantial conflict with the operating hours of the participant concern. (*Id.*) Particularly, SBA emphasizes the question here is not whether Petitioner has the mental or physical ability to sustain long hours working two jobs, but whether Petitioner's outside day job conflicts with or hinders his ability to control and manage the day time operations of the participant. Here, Petitioner is missing from the daily operations for almost the entire day, each day. Petitioner provided vague, general resume statements of Mr. McKenzie's, the CEO duties, and described his role as "more strategic focused." (*Id.*, citing AR, Exh. 14.) However, SBA regards control as including both the strategic policy setting and day-to-day management of the business operations. (*Id.* at 13, citing 13 C.F.R. § 124.106.) SBA also questions Petitioner's statement that Mr. McKenzie's time is used to build relationships with potential customers and business partners and working hard to "fill up our pipeline with 8a opportunities" and how likely it is that these pursuits could be taking place during the evenings and weekends. (*Id.*, citing email, L. McKenzie to M. Pedraza, July 10, 2019.)

Finally, SBA maintains its termination of Petitioner from the 8(a) BD program was not arbitrary, capricious, or contrary to law. (*Id.*, at 14.) SBA correctly applied the regulations to the facts found and did not commit an error of judgment. Although Mr. McKenzie engaged in full-time outside employment for almost two years without prior SBA knowledge or approval, SBA gave Petitioner the opportunity to remedy its violation of the regulation. However, Petitioner failed to demonstrate how the outside employment did not conflict with or hinder Mr. McKenzie's ability to control and manage the day-to-day operations of the concern, and only sought to extend the same outside employment for an additional 12-month period, through September 2020. (*Id.*, citing to AR, Exh. 3.) Had the Agency approved Petitioner's extension request, Mr. McKenzie would have been engaged in full-time outside employment that was in direct and substantial conflict with the participant's daily operations for the first four years of Petitioner's participation in the 8(a) BD program. Because Petitioner failed to overcome the grounds set forth in SBA's Letter of Intent to Terminate, SBA asserts the termination was rational and reasonable and not arbitrary, capricious, or contrary to law. (*Id.*)

## VI. Objections to the Administrative Record

With its Response, SBA filed the Administrative Record on which the Agency based its decision to terminate Petitioner. SBA asserted privilege over portions of the record and withheld five documents in full and redacted one document, pursuant to the deliberative process privilege, attorney-client privilege, and attorney work-product privilege. On May 15, 2020, Petitioner filed an objection to SBA's claims of privilege, arguing that withholding these documents from the record denied Petitioner's due process. Petitioner filed a request for a protective order and asked that the materials SBA claims are privileged be released to Petitioner's counsel under that protective order.

## VII. Discussion

### A. Standard of Review

An SBA determination to terminate a concern from 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 administrative record. *See* 13 C.F.R. § 134.406(a). Therefore, the administrative record 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 McMahan Builders, Inc.*, SBA No. BDPE-461, at 3 (2013).

### B. Ruling on the Administrative Record

SBA has withheld from Petitioner Exhibits 2,5,6,7, and 12, and one redacted document, Exhibit 4 of the Administrative Record, claiming the deliberative process privilege, but provided those Exhibits to OHA for *in camera* review. SBA counsel included an appropriate index of these Exhibits. On May 18, 2020, I found that the withheld documents properly fall within the claimed privileges. Specifically, the internal analyses of SBA analysts are protected under the deliberative process privilege. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975). Further, the withheld material contains nothing “that would provide Petitioner with a new or different factual basis on which to challenge the SBA's decision to deny it eligibility in the 8(a) program.” *In the Matter of Avellan Sys. Int'l, Inc.*, SBA No. BDP-332, at 7 (2009). The rationales and bases for SBA's decisions articulated within these documents are presented fully in the Letter of Intent to Terminate and the Notice of Termination.

### 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 Adv. Mgmt.*, SBA No. BDP-407, at 6 (2011) (quoting 13 C.F.R. § 124.106(a)(1), (3)). Because Petitioner claims eligibility through Mr. McKenzie, it must establish by the preponderance of the evidence that Mr. McKenzie manages Petitioner on a full-time basis within the meaning of 13 C.F.R. § 124.106(a). *Id.*

### D. Analysis

My review of this matter is narrowly limited to the issue of whether SBA's denial of Petitioner 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.

The first step in the analysis of whether SBA's finding was reasonable is to determine whether the administrative record is complete. *See In the Matter of Southern Aire Contracting*, SBA No. BDPE-453, at 2 (2012). On May 8, 2020, SBA provided OHA with a copy of the administrative record along with its response to the instant appeal. Petitioner did not object to the Administrative Record, apart from five privileged documents and one unredacted document. I hereby find that the administrative record is complete.

Next, having reviewed the administrative record and the arguments of the parties, I see no basis to conclude that SBA's determination was arbitrary, capricious, or contrary to law. SBA found that Mr. McKenzie did not devote full-time to the Company, he engaged in outside employment without obtaining prior written approval from SBA for two consecutive years, he was a participant in the 8(a) BD program requiring prior approval of outside employment, and his outside employment conflicted or hindered the Company from achieving the objectives of its business development plan. Section II, *supra*; 13 C.F.R. § 124.106 (a)(4).

In seeking to overturn SBA's determination, Mr. McKenzie argues that he meets the full-time devotion requirement because he devotes to Petitioner the hours of 4:00pm to 11:00pm or midnight per week, reviewing proposals, signing contracts, making decisions, and meeting with clients. Section VI, *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. *See In the Matter of Fletcher Books*, SBA No. MSB-568 (1997). I conclude SBA's finding that Mr. McKenzie's outside employment interferes with his ability to manage Petitioner was reasonable.

While 13 C.F.R. § 124.106(a) does not define the terms “full-time” or “normal working hours,” a line of OHA cases found that outside employment is not prohibited by the regulation, discussed *infra*. The question is “whether the dual obligations conflict to the extent that SBA may reasonably conclude that one precludes the other.” *Id.*, see also, *In the Matter of Oak Hill Rehabilitation Specialists, Inc.*, SBA No. BDP-154 (2001), at 5; see *In the Matter of Barkley Security Agency, Inc.*, SBA No. BDP-105, at 4 (1998) (discussing changes in full-time control requirements). The mere fact that the disadvantaged individual has another business is not enough to find the individual is not devoting full-time to the applicant concern. *Oak Hill*, at 5. Rather, the test is to inquire “(1) how much of the time [the owner] devoted to [the concern]; (2) how much time [the owner] devoted to the [outside employment]; and (3) whether time devoted to the [outside employment] conflicted with [its] management of [the concern].” *Id.*

Absent evidence to the contrary, OHA found devoting 40 hours of work per week qualify as “full-time,” and the hours of 8:00am or 9:00am to 4:00pm or 5:00pm, Monday through Friday, may be considered “normal working hours.” See *In the Matter of BDS Protective Services, LLC*, SBA No. BDP-433, at 3; *In the Matter of AGB Investigative Services, Inc.*, SBA No. BDP-354, at 6 (working or operating hours); *In the Matter of KRW Inc.*, SBA No. MSBT-379, at 24 (1991) (full-time); see also 8(a) Business Development/Small Disadvantaged Business Status Determinations, 62 Fed. Reg. 43584, 43586 (August 14, 1997) (preamble to proposed rule stating that the “term ‘normal business hours’ is intended to mean . . . the normal 40-hour work week of most business concerns”).

OHA has dealt with the issue of outside employment in a number of cases, with outcomes depending upon the particular facts of each case. In *In the Matter of Balderas General Contractors, Inc.*, SBA No. 513 (1995), the disadvantaged individual owned a real estate and contracting business, but was denied entry to the 8(a) BD program because he worked on the applicant during the day and worked second shifts from 4:00pm to midnight at a brewing company since 1984. *Id.*, at 2-4. SBA determined the outside employment detracted from the owner's ability to manage the applicant on a full-time basis. *Id.*, at 3. On appeal, OHA overturned the determination, finding that SBA made “no analysis of whether full-time employment is an eight hour day or whether full-time in running a small contracting business could not be accomplished, for example, by several hours a day during the week and long days on the weekend.” *Id.*, at 4. Absent conflicting evidence, the petitioner's statement — that he had worked a fifteen- or sixteen-hour day and run its business in a similar manner for about 10 years— is fact. *Id.*

In contrast, in *AGB Investigative Servs.*, SBA No. BDP-354 (2010), the petitioner was a security and investigative services firm, who was denied entry to the 8(a) BD program because the disadvantaged owner engaged in full-time employment as an investigator for a district attorney's office, working 40 hours a week, from 8:00am to 5:00pm, Monday through Friday, and performed work for the applicant concern on weekends, evenings, and while on breaks. *Id.*, at 1. On appeal, OHA affirmed SBA's determination, finding SBA reasonably determined that the owner devoted only minimal time to petitioner during normal working hours, he failed to demonstrate he could conduct business while being an investigator for a district attorney's office, and he was unavailable to deal with matters affecting his business for most of the normal business day. *Id.*, at 7-8.

Further OHA cases affirmed an individual's ability to manage its concern and engage in outside employment. In *In the Matter of Raintree Adv. Mgmt.*, SBA No. BDP-407 (2011), the disadvantaged owner was denied entry to the 8(a) BD program because the owner received most of his income from working as a teacher and as executive director of another organization. *Id.*, at 2. SBA concluded the owner would not be able to manage the concern on a full-time basis. However, OHA found the owner had submitted adequate documentary evidence of appointments during normal business hours and a schedule supporting his claim that he worked full-time on the applicant's business, while performing his online teaching. Whereas outside employment is a factor in determining whether the individual is working full-time for the business, the applicant concern had established its owner devoted full-time to its business. *Id.*, at 10-12.

In *BDS Protective Serv.*, SBA No. BDP-433 (2012), the owner of the applicant firm had extensive experience in security services, and had run the firm for 10 years, devoting over 40 hours a week to the business. He also held a position at the Government Printing Office (GPO), working the 11:30pm to 8:00am shift. SBA denied its application and concluded that the individual's outside employment "conflict[ed] with program intent related to business development." *Id.*, at 6. OHA, however, found the owner's schedule at the GPO did not directly conflict with his ability to manage the petitioner. *Id.*, at 8-10. Particularly, there was no evidence that he devoted "minimal time" to petitioner during normal working hours, and SBA did not show why the owner could not adequately perform his managerial duties outside of his evening shift at the GPO. *Id.*, at 10.

Here, Petitioner first indicated that its regular hours of operation are Monday through Friday, from 8:00am to 5:00pm. Section II, *supra*. Mr. McKenzie's outside employment is full-time, Monday through Friday, from 8:00am to 4:00pm, on a permanent basis. Mr. McKenzie's outside employment thus directly conflicts with Petitioner's stated hours of operations. Further, Petitioner agreed that it had failed to inform SBA of Mr. McKenzie's continuing outside employment. Sections II, IV, *supra*.

Petitioner failed to overcome the grounds in SBA's Letter of Intent to Terminate, when given the opportunity to demonstrate how Mr. McKenzie's outside employment did not conflict with or hinder his ability to control and manage the day-to-day operations of the concern. Mr. McKenzie continues to engage in outside employment at BMO Harris during Petitioner's own stated hours of operation. In its September 20, 2019 letter, Petitioner conceded it had violated SBA's regulations and there was good cause to terminate its participation, but only asked to extend the same outside employment for an additional 12-month period. Section II, *supra*.

During SBA's investigation, Petitioner's submissions revealed that Mr. McKenzie lacked experience in the applicant concern, thereby entering into a mentor-protégé agreement to gain knowledge and working for an outside employer during the business hours. As the CEO, Mr. McKenzie did not handle the day-to-day operations, marketing efforts, client visits, etc., because such duties were reassigned to the Project Manager. Mr. McKenzie's mere assertion that he dedicates the hours of 4:00pm to 11:00pm, and weekends to Petitioner, to review daily reports, accident reports to ensure his insurability, bonding levels, line of credit levels, and contracts, to prepare proposals, and to make calls to his field staff, is not consistent with Petitioner being

unable to provide a list of bids to SBA, and only obtaining one contract since inception to the program. Notably, when Mr. McKenzie worked full-time for BMO Harris in 2017 and 2018, Petitioner did not report other contracts in 2017 and had no revenues in 2018 from its business. Based on the administrative record, it is clear that SBA considered all the relevant facts to terminate Petitioner's participation and was under its purview to do so, when considering these findings and Petitioner's denial of outside employment on his first 2017 annual review, as well as failure to report ongoing outside employment for over two years. Section II, *supra*; 13 C.F.R. §§ 124.106(a)(4); 124.303(a)(3).

It is true that outside employment is not prohibited by the regulation. Earlier cases, such as *Balderas* and *BDS Protective Serv.*, *supra*, where OHA found the outside employment did not conflict with managing the applicant concern involved outside employment at hours other than the challenged concern's normal operational hours. Indeed, in such cases, each of these individuals upon whom the claim of eligibility was based worked night shifts and handled the business of the applicant concern during normal business hours. In *Raintree Adv. Mgmt.*, the applicant concern furnished documentation that its owner had devoted full-time to the concern, while performing his teaching duties online. Here, Petitioner's situation is distinguished from these cases because the hours of Mr. McKenzie's outside employment directly conflicts with Petitioner's normal business hours, and the owner cannot devote his full-time attention to the firm during that time. Petitioner's case is more analogous to *AGB Investigative Servs*, where the disadvantaged individual engaged in outside employment during normal business hours and tried to perform his duties for the applicant concern at odd hours. OHA found the owner of *AGB Investigative Servs* failed to devote full-time to the management of the concern, which supports a similar finding in this case.

Under the *Oak Hill* test, Mr. McKenzie devotes time to Petitioner only in the evenings and weekends after he completes a full workweek at another firm, which conflicts with Petitioner's normal business hours. There is a great potential for conflict between his outside employment and Petitioner's business. Therefore, it is clear that Mr. McKenzie's outside employment supports a conclusion that he does not devote full-time to Petitioner' management.

I conclude 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.

VIII. Conclusion

For the foregoing reasons, I conclude SBA's determination terminating Petitioner's status as a Participant in 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