

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

IN THE MATTER OF:

G. M. Hill Engineering, Inc.,

Petitioner

SBA No. BDPE-485

Decided: April 16, 2013

DECISION

On September 14, 2012, Administrative Law Judge Barbara A. Gunning of the U.S. Environmental Protection Agency issued a *Decision and Remand Order* (“Remand Order”) in the above-captioned proceeding.¹ The *Remand Order* instructed the Small Business Administration (“SBA” or the “Agency”) to reassess Petitioner G.M. Hill Engineering, Inc.'s application for admission into the 8(a) Business Development Program (“8(a) BD Program”). In response, the SBA filed a Determination upon Remand (“Remand Determination Letter” or “Letter”) on October 25, 2012, which declined Petitioner's application.

Petitioner filed a timely *Appeal Petition*, contending that the Remand Determination Letter failed to fully comply with the *Remand Order*, and that the Letter was arbitrary, capricious, or contrary to law. The Agency responded on January 9, 2013, arguing that the Letter was fully responsive to the *Remand Order* and that the Agency's conclusions were reasonable.

The case is now before this Court, pursuant to 13 C.F.R. §§ 124.206(a) and 134.102(j)(1), to determine whether the Agency's decision was arbitrary, capricious, or contrary to law.

I. Procedural History

Petitioner first applied for entry into the 8(a) BD Program on November 4, 2010, on the basis that its owner, Mrs. Gina Hill, had been socially and economically disadvantaged due to her gender. The application included a Personal Experience Statement (“PES”) that recounted several alleged incidents of gender-based bias in Mrs. Hill's professional career and as owner of Petitioner.

On August 3, 2011, the SBA issued an Initial Determination Letter declining Petitioner's application on the grounds that Mrs. Hill was not socially disadvantaged. Petitioner applied for

¹ Prior to October 1, 2012, Administrative Law Judges at the EPA were authorized to hear cases for the SBA, pursuant to an Interagency Agreement between the two agencies. At the conclusion of that agreement, the SBA entered into a similar Interagency Agreement with the U.S. Department of Housing and Urban Development and transferred those cases previously assigned to the EPA to HUD.

reconsideration on September 16, 2011, and filed an updated PES that addressed many of the deficiencies identified in the Initial Determination Letter.

On January 3, 2012, the SBA issued a Determination upon Reconsideration that again found that Mrs. Hill had not shown by a preponderance of the evidence that she was socially disadvantaged because of her gender. Petitioner appealed the SBA's decision on February 17, 2012.

The predecessor court remanded the proceeding to the SBA for further consideration after finding that the Agency had committed multiple errors that rendered the Administrative Record incomplete. The SBA was ordered to file a new initial determination, addressing the errors, on or before October 14, 2012. The Remand Determination Letter and the second *Appeal Petition* followed in due course.

As the SBA has now had an additional opportunity to complete the Administrative Record, it falls upon this Court to determine whether the Agency's treatment of Petitioner's application was arbitrary, capricious, or contrary to law.

II. Program Eligibility Requirements

To gain entry into the 8(a) BD Program, a business entity must be unconditionally owned and controlled by one or more socially or economically disadvantaged individuals who are of “good character,” are citizens of the United States, and who can demonstrate the potential for business success. 13 C.F.R. § 124.101. A socially disadvantaged individual is someone who has been “subjected to racial or ethnic prejudice or cultural bias within American society.” 13 C.F.R. § 124.103(a). There is a rebuttable presumption that members of specific racial and ethnic groups are socially disadvantaged.² 13 C.F.R. § 123.103(b).

Individuals who are not members of any presumptively disadvantaged group must establish individual social disadvantage by providing evidence demonstrating that (1) they have at least one objective distinguishing feature that has contributed to their social disadvantage; (2) they have personally experienced substantial and chronic social disadvantage in the United States because of that distinguishing feature; and (3) the disadvantage has negatively impacted their entry into or advancement in the business world. 13 C.F.R. § 124.103(c).

III. Standard of Review

An SBA determination can be overturned only if (1) the administrative record is complete; and (2) based upon the entire administrative record, the Agency determination was arbitrary, capricious, or contrary to law. 13 C.F.R. §§ 134.402, 134.406(a)-(b); 5 U.S.C. § 706(A)(2). Only information contained in the written administrative record may be

² Those groups are “Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans; and members of other groups designated from time to time by SBA. . . .” 13 C.F.R. § 124.103(b)(1).

considered. *Southern Aire*, SBA No. BDP-453, at 2 (citing 13 C.F.R. § 134.406(a)).

The relevant question is whether the Agency reached a reasonable conclusion in light of the facts available in the administrative record, not whether the conclusion was the best one, or even the correct one. *Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Griffis v. Delta Family-Care Disability*, 723 F.2d 822, 825 (11th Cir. 1984) (“This court's judicial role is limited to determining whether the [agency's] interpretation was made rationally and in good faith—not whether it was right.”); *McMahon Builders, Inc.*, SBA No. BDPE-461, at 3 (“Examination is not a *de novo* review of the administrative record to decide whether the SBA's ultimate conclusions are correct.”). Any reasonable conclusion must be upheld, even if it differs from the conclusion the reviewing court would have reached. *State Farm*, 463 U.S. at 42-43; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); 13 C.F.R. § 134.406(b).

IV. The Agency's Determination

Petitioner's *Appeal Petition* asks the Court to review the SBA's Remand Determination Letter, set aside the Agency's decision, and find that Petitioner should be admitted into the 8(a) BD Program.

An in-depth review of the Letter is not necessary in the case at bar, as it is evident that the SBA failed to fully comply with the *Remand Order*. The Agency was instructed to issue a new initial determination reassessing Petitioner's application in light of the errors identified in the *Remand Order*. This order required the Agency to examine all of Petitioner's claims, including those it addressed in the Initial Determination Letter.

The SBA readily admits that it did not examine all the claims. The first paragraph of the Remand Determination Letter states that “[I]n accordance with [the *Remand Order*], this Letter will address only those specific portions of your narratives which OHA determined to be inadequately addressed” in the Determination upon Reconsideration. Nothing in the *Remand Order* told the Agency to limit the new Determination Letter in this way. To the contrary, the second paragraph of the *Remand Order's* “Conclusion” section explicitly mandated the issuance of a new initial determination. The word “initial” is critical. An initial determination addresses each of the applicant's relevant claims, whereas a reconsideration determination may focus solely on any unresolved claims.

In its *Response* to the *Appeal Petition*, the SBA twice describes the Remand Determination Letter as a new initial determination and argues that the Agency did “exactly what the [Administrative Law Judge] requested.” However, neither the Letter nor the *Response* explains how a limited-scope review can be considered an initial determination. The Remand Determination Letter is, for all intents and purposes, merely a reconsideration determination. It is not the new initial determination that was required, even if the SBA labels it as such. The Agency cannot change the Letter's nature simply by changing its name.

V. Conclusion

The Court finds that the SBA has failed to comply with the *Remand Order* because it did not file a new initial determination within 30 days of the *Order*. Accordingly, the Agency's denial of Petitioner's 8(a) BD Program application was arbitrary, capricious, and contrary to law. It is hereby **ORDERED** that the SBA shall afford Petitioner entry into the 8(a) BD Program within 30 days of the date this becomes final.

ALEXANDER FERNÁNDEZ
Administrative Law Judge