

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

IN THE MATTER OF:

Spectrum Contracting Services, Inc.,

Petitioner

SBA No. BDP-378

Decided: October 13, 2010

APPEARANCES

Donnie E. Tucker, President, Spectrum Contracting Services, Inc., Nicholasville, Kentucky, for Petitioner

Meagan Guerzon, Esq., Office of General Counsel, U.S. Small Business Administration, Washington, D.C., for the Agency

DECISION

I. Introduction and Jurisdiction

On June 14, 2010, Spectrum Contracting Services, Inc. (Petitioner) appealed a Small Business Administration (SBA) determination denying Petitioner entry into the 8(a) Business Development (BD) program. The SBA found Petitioner did not establish by a preponderance of the evidence that its President, Mr. Donnie Tucker, is socially disadvantaged, as required by the regulations governing program eligibility. 13 C.F.R. §§ 124.101, 124.103. I find the SBA's denial of Petitioner's 8(a) BD program application is reasonable, supported by the administrative record, and not arbitrary, capricious, or contrary to law.

This appeal petition is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 124 and 134. Petitioner filed this appeal within forty-five days of receiving the SBA's final determination, so the appeal is timely. 13 C.F.R. § 134.202(a)(1). Accordingly, this appeal is properly before the Office of Hearings and Appeals (OHA) for decision.

II. Issue

Was the SBA's determination denying Petitioner admission into the 8(a) BD program arbitrary, capricious, or contrary to law? *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b).

III. Background

A. Petitioner's Application

On March 19, 2009 (the application was dated March 17, but received by the SBA on

March 19), Petitioner submitted its initial application for admission to the 8(a) BD program. On March 30, 2009, the SBA determined that Petitioner's application was incomplete and notified Petitioner that it must resubmit the application with more information. Among other requests for information and documentation, the SBA requested that Mr. Tucker, who suffers from retinitis pigmentosa, expand upon his narrative claiming he is socially disadvantaged due to his physical disability.

On September 16, 2009, Petitioner submitted an updated application including Mr. Tucker's expanded narrative regarding social disadvantage and other requested documentation. On October 19, 2009, the SBA again requested further information from Petitioner. Among other things, the SBA sought more specific and detailed information related to the examples of discrimination Mr. Tucker offered in his social disadvantage narrative. On October 26, 2009, Petitioner responded to the SBA's request. Along with other requested information and documentation, Petitioner provided contact information for third parties who could validate Mr. Tucker's personal experiences with discrimination.

B. SBA's Determination

On April 1, 2010, the SBA issued its determination denying Petitioner admission to the 8(a) BD program. The SBA determined Mr. Tucker had not established that he is socially disadvantaged due to his physical disability. *See* 13 C.F.R. § 124.103. The SBA explained that because Mr. Tucker is not a member of one of the groups specifically recognized as socially disadvantaged in the regulation, he was required to establish his social disadvantage by a preponderance of the evidence. The SBA concluded that, based on the totality of the circumstances, Mr. Tucker failed to demonstrate by a preponderance of the evidence that his ability to compete in the marketplace has been impaired as a result of discrimination against him due to his physical disability.

The SBA first noted that Petitioner provided medical evidence, in the form of a letter from Dr. John E. Musick, O.D., that Mr. Tucker suffers from retinitis pigmentosa. From Dr. Musick's letter, the SBA determined retinitis pigmentosa is "a hereditary condition which at present is correctable to 20/40 vision." AR Ex. 1, at 2. In determining whether Petitioner proved that prejudice based on Mr. Tucker's physical disability had a negative impact on his entry into or advancement in the business world, the SBA reviewed Mr. Tucker's evidence of social disadvantage and, in particular, considered Mr. Tucker's experiences with bias and prejudice in the areas of education, employment, and business history. *See id.*

The SBA concluded that Mr. Tucker had not offered any evidence that he had experienced bias in either education or employment. With regard to business history, the SBA considered each of Mr. Tucker's examples of social disadvantage. First, the SBA considered the chart provided by Mr. Tucker to show that Petitioner's decline in growth corresponded to the decline in his vision. The SBA emphasized that this chart failed to show that the degradation of Mr. Tucker's vision caused the decline in Petitioner's business. The SBA noted that a more likely cause of Petitioner's decline in business may have been the recession following the terrorist attacks of September 11, 2001.

Next, the SBA considered a September 10, 2009, letter from Ms. Tomi Anne Pulliam and Mr. Royce Pulliam indicating that they did not hire Petitioner due to Mr. Tucker's disability. The SBA explained that it could not give much weight to this letter because it was not signed by the Pulliams, and it did not reflect a corporate logo. Additionally, the SBA highlighted that although Mr. Tucker claims to have lost opportunities with the Pulliams due to his disability, Petitioner failed to demonstrate that it was capable of performing such high-value projects. The SBA also noted that even if the Pulliams had discriminated against Mr. Tucker, the bias of one potential client is insufficient to demonstrate chronic and substantial social disadvantage.

The SBA then considered Mr. Tucker's claim that he is no longer invited to networking functions centered around golfing because of his disability. Mr. Tucker submitted a letter from Mr. Ralph Stevens indicating that Mr. Tucker is no longer invited to golfing functions as a result of his disability. The SBA concluded that it is more likely that Mr. Tucker is not invited to golf outings because his disability hampers his ability to see the golf ball, rather than as a result of bias or prejudice based on his disability. Specifically, the SBA indicated that “[g]olf is a sport that requires you to be able to see the ball in order to play.” AR Ex. 1, at 3. The SBA also pointed out that Mr. Tucker does not claim to have been excluded from any other types of networking functions.

Finally, the SBA considered Mr. Tucker's contention that Petitioner's failure to obtain a contract with a Baptist Church in Winchester, Kentucky, was due to Mr. Tucker's disability. Mr. Tucker stepped into a baptism sanctuary and was thereafter forced to present his proposal for the contract in wet clothing. The SBA determined it was likely that Petitioner lost this contract not due to bias based on Mr. Tucker's disability, but due to “this series of unfortunate events.” AR Ex. 1, at 3.

The SBA also emphasized that the other examples of bias offered by Mr. Tucker, which involved Petitioner being denied work, were based only on Mr. Tucker's belief that he had been discriminated against due to his vision problems and not on any concrete evidence of bias or prejudice. The SBA also noted that Mr. Tucker failed to provide sufficiently specific details, such as names and dates, regarding many of the examples of bias and prejudice in his social disadvantage narrative. The SBA concluded that Mr. Tucker did not demonstrate by a preponderance of the evidence that he is socially disadvantaged due to his physical disability.

C. Appeal Petition

On June 14, 2010, (the appeal is dated June 11, but was received by OHA on June 14) Petitioner submitted the instant appeal petition to OHA. Petitioner alleges the SBA's denial of its 8(a) BD program application was arbitrary, capricious, and contrary to law for a multitude of reasons. Petitioner first argues that the SBA failed to properly consider the letter from Dr. Musick, which provides that Mr. Tucker is legally blind. Petitioner contends the SBA interpreted the letter as indicating that Mr. Tucker suffers from correctable central vision loss, when in fact he suffers primarily from peripheral vision loss that renders him legally blind.

Petitioner acknowledges that Mr. Tucker did not suffer bias in education or employment because his disability did not arise until after he achieved his degree and established Petitioner.

Petitioner states that the SBA's application of these standards as a means of determining social disadvantage was arbitrary and capricious. With regard to business history, Petitioner contends the SBA was incorrect in determining that the chart in Petitioner's 8(a) BD application failed to explain the direct correlation between Mr. Tucker's decline in vision and the decline in Petitioner's business. Petitioner explains that its loss of revenues occurred the same year Mr. Tucker lost his drivers license. Petitioner contends the chart amply demonstrates: [T]he real problem is bias against the visually handicapped, not the inability to perform. [Mr. Tucker's] eye sight had deteriorated substantially by 1995 and by 1997 it deteriorated to 20+ degrees, however [Mr. Tucker] could still drive. The market place did not recognize the problem. [Petitioner] made consistent profits during the period of visual impairment, but once it became known in the market place, the bias decreased volume and the lost [sic] of driving license increased cost, resulting in the lost [sic] of net worth. Appeal Petition, at 6. Petitioner also emphasizes that although its income grew in 2002, that growth was not considerable and did not approach the level of growth Petitioner had experienced in previous years. Petitioner challenges the SBA's contention that its decline in business may have been due to economic conditions after the September 11, 2001, terrorist attacks. Petitioner points out that the SBA did not provide any evidence for its contention. Petitioner concludes that in the absence of evidence that its chart is not credible, the SBA "must accept it as true." Appeal Petition, at 7 (citing *Matter of Timely Eng'g Soil Tests, LLC*, SBA No. BDP-297 (2008); *Matter of Woroco Int'l*, SBA No. BDP-174 (2002); *Matter of Bitstreams, Inc.*, SBA No. BDP-122 (1999)).

At various points in its appeal petition, Petitioner argues the SBA applied an incorrect evidentiary standard to this case. Petitioner claims it was error for the SBA to require "concrete evidence" of bias, which Petitioner equates to "clear and convincing evidence," when the standard of proof is a preponderance of the evidence. Petitioner also contends that the SBA's explanation that it could not give great weight to the Pulliam letter because it lacked a corporate logo improperly raised the evidentiary standard to require clear and convincing evidence. Petitioner argues it provided contact information for the Pulliams, as the SBA requested, and the SBA could have contacted the Pulliams to substantiate the letter. Petitioner emphasizes that where the SBA finds evidence unconvincing, it must clearly provide its reasons for such a conclusion. See *Matter of Timely Eng'g Soil Tests, LLC*, SBA No. BDP-297; *Matter of Bitstreams, Inc.*, SBA No. BDP-122.

Petitioner also challenges the SBA's determination that there is no evidence Petitioner would be able to perform the \$10 million contract offered by the Pulliams. Petitioner asserts there is no 8(a) BD program regulation requiring it to prove its ability to perform contracts it was not awarded, but argues the firm's history demonstrates its ability to perform a high-value contract. Petitioner contends the SBA arbitrarily based its conclusion on an analysis of only Petitioner's revenue in the past three years, when it should have considered the firm's revenue in the years before Mr. Tucker's disability impacted the business, particularly the years 1998-1999. Petitioner offers its own and Mr. Tucker's credentials to demonstrate that the firm is capable of handling such a large project.

Petitioner disputes the SBA's observation that even if the Pulliams discriminated against him, one potential client is not sufficient to demonstrate chronic and substantial social disadvantage. Petitioner claims the Pulliams opened an average of four facilities each year for

the past five years, meaning Petitioner was not considered for at least twenty projects based on Mr. Tucker's disability. Petitioner also emphasizes that Mr. Tucker provided six examples of his personal experiences with bias and prejudice based upon his physical disability. "In each of these examples of discrimination in the area of business history, [Mr. Tucker] was discriminated against in terms of award of a contract or an invitation to attend a marketing event that may result in future work." Appeal Petition, at 9. Thus, Petitioner concludes it has demonstrated that Mr. Tucker's social disadvantage is chronic and substantial.

Petitioner next challenges the SBA's statement that one must be able to see the ball to play golf. Petitioner points out that there are multiple associations of blind golfers. Petitioner also explains that he has been excluded from all types of networking functions based on his disability, not just golfing functions.

Petitioner's overarching argument is that it met the standard of proving that Mr. Tucker suffers from substantial and chronic social disadvantage by a preponderance of the evidence. To support this argument, Mr. Tucker argues he provided the only available evidence of discrimination available to him with relation to each of his six examples of bias—in particular, the Commonwealth of Kentucky Chamber of Commerce project and the Baptist Church project—and the SBA must accept his evidence in the absence of evidence casting doubt on the credibility of Mr. Tucker's examples. Petitioner also claims Mr. Tucker offered adequate details, including names and addresses, relating to each of his examples of bias. Petitioner reiterates that the SBA must articulate valid reasons for discrediting Mr. Tucker's version of events or must accept his statements as true.

With regard to the baptistery incident, Petitioner contends the SBA did not properly consider all the facts. In particular, Petitioner claims "a person who is not legally blind is not likely to step into a baptism sanctuary." Appeal Petition, at 11. Petitioner also highlights the fact that it was not chosen for the Baptist Church project even though Petitioner was specifically recommended to the church. Petitioner argues its claim that bias based on Mr. Tucker's visual impairment was the reason Petitioner did not get the contract was not inherently improbable or inconsistent, and the SBA failed to give any cogent reason for disbelieving it. Petitioner emphasizes that it provided all the relevant details related to this example of bias, and it is unlikely that any direct evidence of discrimination by the church exists. Thus, Petitioner argues the SBA's conclusion that Petitioner was not awarded the contract based on a "series of unfortunate events" was arbitrary and capricious.

On the basis of all these arguments, Petitioner concludes the SBA acted arbitrarily, capriciously, and contrary to law in denying its 8(a) BD program application. Petitioner requests that OHA reverse the SBA's determination.

D. SBA's Answer

On July 29, 2010, the SBA submitted the administrative record and filed its answer to the appeal petition. The SBA contends its denial of Petitioner's 8(a) BD program application was reasonable because Petitioner failed to provide sufficiently specific evidence that Mr. Tucker is socially disadvantaged. The SBA asserts that Petitioner "failed to show ... that bias against

individuals with impaired vision, and not other, equally or more plausible factors, caused Mr. Tucker to lose business opportunities.” Answer, at 7. Thus, the SBA claims its determination must be upheld.

The SBA first argues that the new evidence submitted by Petitioner on appeal should not be considered. Specifically, the SBA asserts that the letter from the Pulliams submitted with the appeal petition includes signatures and letterhead, whereas the original letter submitted with Petitioner's application was submitted without letterhead or signatures despite the SBA's request that Petitioner provide a letter with signatures. Thus, the SBA contends OHA should not consider this version of the Pulliam letter. 13 C.F.R. § 134.406(a)-(b).

The SBA then analyzes each of Mr. Tucker's examples of bias with regard to business history. First, the SBA reviews the Pulliam letter, which indicated that the Pulliams had considered Petitioner for a construction project but ultimately decided not to hire Petitioner. The SBA explains that it may find that evidence is not credible as long as it explains its reasoning. U.S. SMALL BUSINESS ADMINISTRATION, STANDARD OPERATING PROCEDURE 80 05 3A, Chapter 2D § 3(b)(1), available at <http://www.sba.gov/tools/resourcelibrary/sops/index.html>; see also *Matter of Superior Piping, Fabricators & Erectors, Inc.*, SBA No. BDP-220 (2005); *Matter of Woroco Int'l*, SBA No. BDP-174 (2002). The SBA emphasizes that it provided its reason for determining the Pulliam letter was not credible in its determination-the letter was not signed by the Pulliams.

Further, the SBA explains that the letter did not provide evidence of bias or prejudice based on Mr. Tucker's disability. Instead, the Pulliams indicated that they were concerned that Mr. Tucker's disability would have hindered his management of the project. The SBA concludes that the letter “does not evidence that the Pulliams are biased against individuals with impaired vision; rather, it indicates a concern about the impact of Mr. Tucker's physical limitations on his ability to manage the project.” Answer, at 9-10. The SBA highlights the distinction between cultural bias or prejudice and the competitive disadvantage that someone with a physical disability may face as a direct result of that disability. See *Matter of PC Partners, Inc.*, SBA No. MSBE-424 (1993); *Matter of Kelly Int'l Sec'y Serv., Inc.*, SBA No. MSBE-414 (1992); see also *Matter of Killdeer Mountain Mfg., Inc.*, SBA No. SDBA-160 (2004); *Matter of Diamond Quality Construction Enters., Inc.*, SBA No. MSBE-523 (1995). The SBA defends its determination that the Pulliam letter is not evidence of prejudice against Mr. Tucker based on his physical disability and cannot prove chronic and substantial social disadvantage.

The SBA next examines the chart provided by Mr. Tucker to demonstrate that Petitioner's decline in business opportunities corresponded to the decline in his vision. The SBA asserts that the chart fails to prove a causal relationship between these factors. The SBA argues that the chart, at best, provides a correlation between these factors, and it would be a logical fallacy to equate evidence of correlation with evidence of causation. Additionally, the SBA points out that even when Mr. Tucker's vision continued to decline, Petitioner's net worth rebounded, indicating that the correlation between Petitioner's business opportunities and Mr. Tucker's decline in vision is weak. The SBA also contends that even if the graph showed a strong correlation between these factors, it cannot show that Mr. Tucker suffered from cultural bias due to his disability or that such bias caused a decline in Petitioner's business. Finally, the SBA disputes Petitioner's

contention that it was error for the SBA to suggest that the decline in Petitioner's growth could have been related to the economic conditions following the September 11, 2001, terrorist attacks. "SBA was merely illustrating that it could not find Petitioner's explanation more probable than any other because another obvious factor was equally likely to explain the fluctuation in net worth." Answer, at 13; *see also Matter of Ace Technical, LLC*, SBA No. SDBA-178(1995).

The SBA goes on to analyze Petitioner's claim that it was denied a contract with the Commonwealth of Kentucky Chamber of Commerce due to bias against people with visual impairments. As support for this contention, Mr. Tucker offered emails from the prime contractor notifying Petitioner that its bid was under review, requesting references, and indicating that a subcontractor would be chosen within forty-five days. Petitioner argued these emails suggested that the prime contractor considered Mr. Tucker's disability when evaluating bids and did not choose Petitioner due to bias. The SBA disputes these conclusions, instead emphasizing that the emails do not even provide evidence that the prime contractor was aware of Mr. Tucker's disability. According to the SBA, Petitioner's argument on this point is mere speculation. The SBA also emphasizes that Petitioner is incorrect in arguing that the SBA raised the evidentiary standard by requiring concrete evidence of bias and that the SBA may dismiss statements that are inherently improbable or conclusory.

Next, the SBA examines Petitioner's claims of bias related to the Baptist Church project. Petitioner asserted that bias caused the church to deny Petitioner's bid on a construction project despite a recommendation from another church. Petitioner argues that the church must have been aware of Mr. Tucker's disability because Mr. Tucker stepped into the baptistery during a project walk-through and was thereafter forced to make his project presentation in wet clothing. The SBA contends Petitioner presented no evidence that the church declined Petitioner's project bid due to prejudice. The SBA acknowledges that the baptistery incident may have played a role in the church's decision not to award the project to Petitioner, but maintains "Petitioner has not provided sufficient, specific evidence to demonstrate the nexus between this lost business opportunity and the Church's cultural bias against the visually impaired." Answer, at 17.

The SBA then looks at Petitioner's claim that Mr. Tucker is no longer invited to golf networking outings due to bias based upon his disability. In support of this claim, Petitioner offered an affidavit from Mr. Ralph Stevens, who took part in organizing the outings. Mr. Stevens indicated that he no longer includes Mr. Tucker in the outings because his deteriorating eyesight is problematic. In its determination letter, the SBA found that Mr. Tucker's decreased ability to see the golf ball is a more probable reason than bias for the fact that he is no longer invited to golf functions. On appeal, the SBA defends its reasoning, pointing out that it could not conclude on the basis of Petitioner's evidence that bias was the most likely factor to have caused Mr. Stevens to stop inviting Mr. Tucker to golf functions. *See Ace Technical*, SBA No. SDBA-178, at 4-5. The SBA again emphasizes the difference between prejudice and the inconvenience Mr. Tucker's disability may cause on the golf course. Additionally, the SBA points out that Petitioner failed to offer any evidence that it has lost any business as a result of Mr. Tucker no longer being invited to these golf outings or that it has suffered any adverse affect as a result of this alleged bias.

Finally, the SBA analyzes Petitioner's claim of bias related to a senior living center

construction project. Petitioner asserted it had performed projects for the same owner before, and the contract in question was awarded to a less qualified contractor. Petitioner contended that when it first performed work for this owner, Mr. Tucker's vision presented no problems. In fact, even after Mr. Tucker's vision deteriorated and the owner became aware of the situation, Petitioner still obtained work from this owner. By the time the contract at issue was to be awarded, there were new directors on the owner's board who awarded the project to another contractor. The SBA concluded in its determination letter that Petitioner's allegations of bias were merely conjecture.

The SBA now argues this determination was reasonable because Petitioner failed to demonstrate that bias was the cause of Petitioner's failure to obtain the contract. *See Bitstreams*, SBA No. BDP-122. The SBA contends Petitioner failed to provide evidence that its previous work for this owner was relevant to the owner's decision-making process and failed to provide evidence that the original board's knowledge of Mr. Tucker's disability was related to the new board's decision not to award Petitioner the contract.

The SBA concludes that each of its determinations was reasonable, and Petitioner was unable to demonstrate by a preponderance of the evidence that Mr. Tucker experienced chronic and substantial social disadvantage based upon his physical disability that negatively impacted his advancement in the business world. The SBA asserts that because its determination was not arbitrary, capricious, or contrary to law, the appeal must be denied.

E. Petitioner's Objections and SBA's Response

On August 12, 2010, Petitioner submitted its objections. Petitioner claims the SBA improperly omitted from the record the email to which the Pulliam letter was attached when it was originally sent to the SBA. Petitioner also disputes the SBA's contentions that the Pulliam letter attached to the appeal petition is new evidence and that the Pulliam letter in the administrative record was not written on letterhead. Petitioner contends the original letter submitted with its 8(a) BD application was, in fact, submitted on letterhead, though it did not include signatures, as does the copy attached to the appeal petition. Finally, Petitioner claims an email it sent to the SBA on November 3, 2009, to supply Tomi Pulliam's cell phone number should be included in the administrative record. Petitioner asserts the record "must contain every document relevant to Petitioner's application that the SBA possessed on the date of its determination." Petitioner's Objections, at 4 (citing 13 C.F.R. § 134.406(c)).

On August 23, 2010, the SBA submitted its response to Petitioner's objections. The SBA reiterates its assertion that the signed Pulliam letter attached to the appeal petition is new evidence. The SBA concedes that the copy of the Pulliam letter in the record is written on letterhead, though it is different letterhead than that of the signed Pulliam letter submitted with the appeal petition. The SBA emphasizes that the copy of the Pulliam letter in the record does not contain signatures and argues the signed copy attached to the appeal petition should be excluded from the record because it was not before the SBA when the SBA issued its determination letter. 13 C.F.R. § 134.407(a). The SBA also contends the email to which the Pulliam letter was originally attached, which Petitioner argues should be in the record, is in the record; it was simply misfiled at Exhibit 9. Finally, the SBA asserts the email with Tomi

Pulliam's cell phone number was never received, and thus could not have been considered by the SBA in making its determination, but does not object to that email being admitted to the record.

IV. Discussion

A. Privilege

The SBA has asserted claims of privilege for multiple exhibits in the administrative record. Specifically, the SBA claims the deliberative process privilege protects exhibit 2, exhibit 3, and parts of exhibit 6 from disclosure. Exhibit 2 is an SBA attorney's analysis and recommendations regarding the case. Exhibit 3 is an SBA business opportunity specialist's analysis of the case. Exhibit 6 is Petitioner's social disadvantage narrative, which contains the business opportunity specialist's handwritten notes. The SBA has redacted the handwritten notes from the administrative record.

The deliberative process privilege permits the government to withhold documents relating to policy formulation to encourage open and independent discussion among those who develop government policy. BLACK'S LAW DICTIONARY 1215 (7th ed. 1999); *see also In re Grand Jury*, 821 F.2d 946, 958-59 (3d Cir. 1987) (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-52 (1975)). The SBA staff and attorney findings contained in the withheld materials were set out by the SBA in support of its determinations. Therefore, I find the deliberative process privilege covers each of the documents for which the SBA claims the privilege.

Even where a privilege is applicable, it is often relevant to consider the extent of harm non-disclosure causes the party requesting disclosure. *See Upjohn Co. v. United States*, 449 U.S. 383, 396-97 (1981); *In re Sealed Case*, 121 F.3d 729, 737-38 (D.C. Cir. 1997). Petitioner argues in its objections that the deliberative process privilege does not apply to exhibit 3, as the SBA claims, because it “may well prove that the SBA did not analyze all the information submitted in the Petitioner's application.” Petitioner's Objections, at 5. In its response, the SBA reiterates its contention that the privilege does apply to exhibit 3.

Despite Petitioner's objection, I find non-disclosure does not cause any harm in this situation. There is nothing in the privileged materials that would provide Petitioner with a new or different factual basis on which to challenge the SBA's decision to deny Petitioner admission into the 8(a) BD program. Thus, I conclude the SBA's withholding of the privileged documents was proper.

B. Objections to the Record and New Evidence

The SBA is responsible for submitting the administrative record, upon which the administrative law judge must base her decision on appeal. 13 C.F.R. § 134.406. Pursuant to 13 C.F.R. § 134.406(c), Petitioner “may object to the absence of a document, previously submitted to, or sent by, SBA, which the petitioner believes was erroneously omitted from the administrative record.” Here, Petitioner treated this opportunity to object to the administrative record as an opportunity to respond to the arguments in the SBA's answer to its appeal petition.

Thus, Petitioner's filing did not consist strictly of objections to the record, but also included supplementary arguments.

As delineated in the regulations, the 8(a) BD appeal process is envisioned to be a two-step process: Petitioner pleads its case in its appeal, and the SBA responds. In accordance with 13 C.F.R. § 134.207(b), if a party moves to file “a supplemental pleading setting forth relevant transactions or occurrences that have taken place since the filing of the original pleading,” the administrative law judge may permit such supplemental filing. Petitioner did not file a motion seeking permission to file a supplemental pleading, and Petitioner's supplemental pleading does not address circumstances arising since the appeal was filed. Further, “[i]n 8(a) program appeals, amendments to pleadings and supplemental pleadings will be permitted by the Judge only upon a showing of good cause.” 13 C.F.R. § 134.207(c). Petitioner failed to show any good cause for his supplemental pleading. Accordingly, I will not consider those portions of Petitioner's objections or the SBA's response that do not relate directly to the administrative record.

The issues Petitioner raises in its objections that can properly be viewed as objections to the administrative record regard the Pulliam letter, as outlined above.¹ The SBA is correct that the signed copy of the Pulliam letter attached to the appeal petition is new evidence that may not be admitted on appeal. Although the text of the letter attached to the appeal petition is identical to the text of the letter in the record, the new letter contains signatures, whereas the letter submitted with Petitioner's application was unsigned. Pursuant to 13 C.F.R. § 134.407, evidence beyond the administrative record may not be admitted to the record on appeal unless there is a substantial showing based upon credible evidence that the SBA determination may have resulted from bad faith or improper behavior. There is no evidence of bad faith or improper behavior in this case. Accordingly, I may not admit new evidence into the record at this stage or consider it in my decision. 13 C.F.R. §§ 134.406(a), 134.407. The signed Pulliam letter is therefore EXCLUDED from the record, and I will consider only the unsigned version in the administrative record in making my decision.

The SBA is also correct that the email to which the original Pulliam letter was attached is included in the record at page 117 of Exhibit 9. Although this email was misfiled in exhibit 9, it is part of the record, and I may consider it in deciding this matter.

Petitioner incorrectly argues that the record “must contain every document relevant to Petitioner's application that the SBA possessed on the date of its determination.” In fact, 13 C.F.R. § 134.406(c) explicitly provides that only those documents “that are relevant to the determination on appeal” and upon which the SBA relied in making that determination, and not “all documents pertaining to the petitioner,” must be included in the record. Nevertheless, I will ADMIT the email of November 3, 2009, containing Tomi Pulliam's cell phone number to the record at Petitioner's request because the SBA does not oppose the request and because it is conceivable that the document may be relevant to the controversy regarding the Pulliam letter.

¹ Petitioner also argues the SBA's service of the administrative record was late under the Notice and Order issued in this case and under 13 C.F.R. § 134.206. To clarify: The SBA's service of the administrative record was timely pursuant to 13 C.F.R. § 134.204(c)(2), which provides that the date of service is “the date of mailing.”

C. Standard of Review

The SBA's determination must be upheld unless a review of the written administrative record demonstrates that the SBA acted arbitrarily, capriciously, or contrary to law in denying Petitioner's 8(a) BD program application. 13 C.F.R. § 134.406(b). This appeal will be decided solely upon review of the contents of the administrative record. 13 C.F.R. § 134.406(a).

I must examine whether the SBA considered all of the facts presented as well as the laws and regulations that guide the decision-making process. I must then determine whether the SBA made a clear error of judgment in its decision before I can find the SBA acted arbitrarily, capriciously, or contrary to law. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A clear error of judgment can be found if the 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 determination that runs contrary to the evidence; or (4) provides an implausible explanation that is more than a difference between my views and those of the SBA. *See id.*

My review of the administrative record is narrow and does not permit me to substitute my own judgment for that of the SBA. The SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its determination. *See id.* As long as the SBA does so and its determination is reasonable, I am compelled to uphold it on appeal. 13 C.F.R. § 134.406(b).

D. Analysis

An applicant firm is eligible to participate in 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.” 13 C.F.R. § 124.101. The issue presented in this appeal is whether Mr. Tucker, the individual upon whom Petitioner's eligibility is based, is socially disadvantaged.

“Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.” 13 C.F.R. § 124.103(a). The regulations set forth certain groups whose members are presumed to be socially disadvantaged. 13 C.F.R. § 124.103(b)(1). If an individual upon whose status as an 8(a) BD program applicant's eligibility is based is not a member of one of these designated groups, as Mr. Tucker is not, he “must establish individual social disadvantage by a preponderance of the evidence.” 13 C.F.R. § 124.103(c)(1).

To meet this burden, the individual must provide evidence of: (1) an “objective distinguishing feature that has contributed to social disadvantage;” (2) “[p]ersonal experiences of substantial and chronic social disadvantage in American society;” and (3) “[n]egative impact on entry into or advancement in the business world because of the disadvantage.” 13 C.F.R. § 124.103(c)(2). The regulations further provide that in analyzing the third element of social

disadvantage—the negative impact of the disadvantage upon the individual's entry into or advancement in the business world—“SBA will consider any relevant evidence In every case, however, SBA will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.” 13 C.F.R. § 124.103(c)(2)(iii). The individual must describe the incidents demonstrating social disadvantage in sufficient detail so that the administrative judge may determine whether Petitioner has proved social disadvantage by a preponderance of the evidence.

1. Distinguishing Feature

Petitioner satisfied the first element of social disadvantage because he presented evidence that he suffers from retinitis pigmentosa that renders him legally blind, as indicted in Dr. Musick's letter. AR Ex. 6, at 10. The SBA does not dispute that Mr. Tucker's physical disability is a distinguishing feature that may contribute to social disadvantage. 13 C.F.R. § 124.103(c)(2)(i).

2. Substantial and Chronic Social Disadvantage

The second element of social disadvantage—personal experiences of substantial and chronic disadvantage—is generally satisfied when the individual describes more than one or two specific, significant incidents. In its letter denying Petitioner's 8(a) BD program application, the SBA did not explicitly distinguish between the second and third elements of social disadvantage. Instead, the SBA analyzed Mr. Tucker's claims of social disadvantage with regard to education, employment, and business opportunities and concluded on the basis of its analysis that Mr. Tucker failed to prove social disadvantage because Mr. Tucker had not “demonstrated, by a preponderance of the evidence, that [his] ability to compete in the market place has been impaired due to discriminatory treatment or practices against [Mr. Tucker] and/or [Petitioner] because of [Mr. Tucker's] physical handicap when the totality of the evidence presented is considered.” AR Ex. 1, at 1.

The only point at which the SBA specifically mentioned substantial and chronic disadvantage was in its analysis of the Pulliam letter. The SBA indicated that it could not credit the Pulliam letter because it was unsigned and did not reflect a corporate logo, but also noted that even if the Pulliam letter had been substantiated, discrimination by one client would not suffice to prove substantial and chronic social disadvantage. This statement implies that the SBA found Petitioner's other examples of alleged bias to be insufficient to demonstrate prejudice based upon Mr. Tucker's physical disability. On appeal, the SBA maintains that Petitioner's examples of personal experiences with bias do not constitute sufficiently specific evidence of prejudice based upon Mr. Tucker's physical disability to establish substantial and chronic social disadvantage.

Petitioner, on the other hand, argues it submitted six specific examples of bias against Mr. Tucker based upon his physical disability. Petitioner did not delineate these six examples in its appeal petition, but Mr. Tucker's social disadvantage narrative offers the following arguments and evidence: Petitioner's revenues declined as Mr. Tucker's eyesight degenerated (as evidenced by the chart Petitioner submitted), Petitioner was denied the Pulliam project contracts, Petitioner was denied the Baptist Church project contract, Mr. Tucker is no longer invited to networking

opportunities, Petitioner was denied the Commonwealth of Kentucky Chamber of Commerce project contract, and Petitioner was denied the second phase of senior living center project contract. I will review the SBA's determination that Mr. Tucker's examples do not constitute sufficiently specific evidence of substantial and chronic social disadvantage with respect to each of Petitioner's allegations.

a. Petitioner's Chart

The SBA's determination that Petitioner's chart cannot prove that Mr. Tucker's loss of vision, or the marketplace's awareness thereof, caused the decline in Petitioner's revenues is reasonable. The determination letter provides that Petitioner "never established that the decline in [Petitioner's] business was related to decline in [Mr. Tucker's] vision." AR Ex. 1, at 2. The SBA correctly points out that evidence of correlation is not the equivalent of evidence of causation. Petitioner argues that its chart is sufficient and that the SBA failed to offer any evidence that its own theory (Petitioner's decline in revenue was due to the recession following September 11, 2001) was true.

However, the SBA is not required to offer evidence. The burden of proof lies with Petitioner alone. 13 C.F.R. § 124.103. The purpose of the SBA offering an alternative theory for Petitioner's decline in revenues (whatever the theory may have been) was to demonstrate that any number of factors could have caused or contributed to Petitioner's decline in revenues. The fact that Petitioner's decline in revenues *coincided* with Mr. Tucker's loss of his drivers license does not in any way prove that the loss of Mr. Tucker's license *caused* the decline in revenues. "Post hoc ergo propter hoc" (or "after this, therefore because of this") reasoning does not withstand logical scrutiny. In other words, the simple fact that one thing happens after another does not compel the conclusion that the second thing caused the first. Petitioner's chart failed to prove any cause-and-effect relationship between Mr. Tucker's eyesight and Petitioner's revenues, and the SBA's determination that this chart does not constitute sufficiently specific evidence to prove social disadvantage was reasonable.

b. The Pulliam Letter

The SBA was "unable to give much credence to the [Pulliam] letter" because the letter was not signed by either Mr. Pulliam or Ms. Pulliam. AR Ex. 1, at 3. Petitioner goes to great lengths to argue that the SBA had no basis for questioning the letter and should have accepted it as true. Petitioner also argues the SBA could have contacted the Pulliams to substantiate the letter because Petitioner provided their contact information, as the SBA requested.

Although the SBA did request contact information for the Pulliams, it was Petitioner's obligation to provide evidence that would prove, by a preponderance of the evidence, that Mr. Tucker faced bias based upon his physical disability. 13 C.F.R. § 124.103. Here, Petitioner provided an unsigned letter designed to demonstrate such bias on the part of the Pulliams. As Petitioner points out, the SBA may only discredit evidence if it gives its reasons for doing so. U.S. SMALL BUSINESS ADMINISTRATION, STANDARD OPERATING PROCEDURE 80 05 3A, Chapter 2D § 3(b)(1), *available at* [http:// www.sba.gov/tools/resourcelibrary/sops/ index.html](http://www.sba.gov/tools/resourcelibrary/sops/index.html). In reviewing the Pulliam letter, the SBA explicitly stated that it would not place

much evidentiary weight on an unsigned letter that also lacked a corporate logo. It was not unreasonable for the SBA to express concern that an unsigned letter may not be authentic. A document lacking the signatures of the purported authors is inherently susceptible to doubts about its veracity. Thus, the SBA offered its reasoning for discrediting the letter, as it was required to do, and the SBA's explanation was sound. I find the SBA's determination that the Pulliam letter does not constitute sufficiently specific evidence to prove social disadvantage was reasonable.

c. Networking Opportunities

The SBA indicated in its determination letter that Mr. Tucker's visual impairment hinders his ability to see a golf ball, and that is likely the reason Mr. Tucker is not invited to golfing events. Petitioner argues that one need not be able to see the ball to play golf and offers an affidavit from Mr. Ralph Stevens, one of the organizers of the golf and other networking functions to which Petitioner refers, to support Petitioner's contention that Mr. Tucker is not invited to networking functions due to bias based upon his disability.

The affidavit from Mr. Stevens provides: "As Mr. Tucker's eyesight deteriorated it became more problematic and in the last few years we have not included Mr. Tucker. This was not an overt action on our part, but a subtle action that occurred due to the difficulties of Mr. Tucker participating in these business networking opportunities." AR Ex. 6, at 14. This affidavit does not constitute evidence of cultural bias against visually impaired people. Mr. Tucker has proved that he has suffered exclusion from opportunities based upon his visual impairment, but he failed to prove that this exclusion results from bias or prejudice against people with visual impairments. Put another way, there is a difference between one suffering the direct negative effects of one's disability (*i.e.*, Mr. Tucker's disability hinders his ability to see the golf ball) and one suffering the effects of prejudice based upon one's disability (*i.e.*, Mr. Tucker is no longer invited to networking outings because the organizers have an unfair and preconceived negative opinion of people with visual impairments). Mr. Tucker failed to present evidence that bias is the reason why he is not invited to networking events. I find the SBA's determination that Mr. Tucker's exclusion from networking opportunities does not constitute sufficiently specific evidence to prove social disadvantage was reasonable.

d. Kentucky Chamber of Commerce and Senior Living Center Projects

In its determination letter, the SBA indicated that Mr. Tucker's other examples of bias (the only examples not specifically named and separately addressed in the letter are the Kentucky Chamber of Commerce and senior living center projects) were based only on Mr. Tucker's own belief that Petitioner was denied work due to bias against the visually impaired. The SBA noted that Petitioner failed to provide any concrete evidence of prejudice and explained that Mr. Tucker's personal belief that he suffered discrimination is not sufficient to prove prejudice by a preponderance of the evidence. In contrast, Petitioner emphasizes that it is difficult to prove discrimination, contends Mr. Tucker offered all the evidence and details he had with regard to these incidents, and argues the SBA must accept his evidence in the absence of evidence casting doubt on the credibility of such evidence. Petitioner also argues the SBA improperly raised the standard of proof to clear and convincing evidence by requiring concrete evidence.

The SBA did not improperly raised the standard of proof to clear and convincing evidence by indicating that Petitioner failed to provide any concrete evidence that these organizations took prejudicial actions against him. It appears Petitioner confuses allegations with evidence. Petitioner alleges that it was not awarded these projects due to bias. However, as the SBA points out, Petitioner cannot even demonstrate that those responsible for awarding these projects were aware of Mr. Tucker's physical disability. With regard to the Kentucky Chamber of Commerce Project, Petitioner asserts the architect asked Petitioner for references despite the fact that the firm was prequalified, Petitioner provided the references, each reference gave a "glowing review," and thereafter Petitioner was unable to determine whether it would be awarded the project. Mr. Tucker provides: "It is my belief that during the due diligence by the architect, they found out about my visual disability" AR Ex. 6, at 2. Thus, Petitioner only guesses that the architect must have known about Mr. Tucker's visual impairment and must have chosen other contractors because of it.

Regarding the senior living center project, Mr. Tucker explains that Petitioner previously completed three full projects for the owner and, although the owner became aware of Mr. Tucker's visual impairment, Petitioner continued to receive work from the owner because Petitioner's performance was good. Thereafter, Petitioner completed the first phase of a new two-phase project, and then "the board members changed and the new members controlled the board," and they did not award the second phase of the project to Petitioner. AR Ex. 6, at 2. Again, Petitioner only guesses that the new board members were even aware of his physical disability. Petitioner can provide no support for its contention that these board members were biased against people with visual impairments. Although Mr. Tucker feels strongly that these experiences were a result of discriminatory practices, he has failed to offer one shred of evidence that his allegations are true.

Petitioner's reliance on *Matter of Timely Engineering Soil Tests, LLC*, SBA No. BDP-297 (2008), is misplaced. There, the petitioner presented evidence that his pay was less than that of other engineers performing similar duties and claimed that the pay reduction was due to his ethnicity. OHA explained that a petitioner need not submit corroborating evidence. Instead, "'an individual's statement of personal experiences in combination with the generalized evidence may be sufficient to demonstrate social disadvantage.'" *Id.* at 9 (quoting *Bitstreams*, SBA No. BDP-122, at 13). The difference between *Timely Engineering* and this case is that whereas the petitioner in *Timely Engineering* provided concrete evidence of a discriminatory practice (he was paid less than other similar employees) in conjunction with his allegations of discrimination, Mr. Tucker simply concludes that he has faced discrimination without providing any such supporting facts or "generalized evidence." Mr. Tucker has failed to provide any link between the alleged bias and the fact that these projects were not awarded to Petitioner.

In the absence of any evidence of prejudice, the SBA was entitled to dismiss Petitioner's conclusory claims of discrimination. Mr. Tucker's own belief that he experienced discrimination is not enough to satisfy his burden to prove prejudice by a preponderance of the evidence. Therefore, the SBA's determination that Mr. Tucker's allegations of bias with regard to the Kentucky Chamber of Commerce and senior living center projects do not constitute sufficiently specific evidence to prove social disadvantage was reasonable.

e. Baptist Church Project

With regard to the Baptist Church project, the SBA determined it was more likely that Mr. Tucker's stepping into the baptistery and making a presentation in wet clothes was the reason Petitioner did not receive the contract than that the church discriminated against Mr. Tucker because of his physical disability. On appeal, the SBA emphasizes that Petitioner failed to demonstrate the nexus between this lost business opportunity and the church's alleged bias against the visually impaired. Petitioner contends the church must have known about his visual impairment after this incident, and bias is the most likely explanation for the church denying Petitioner the project when another church specifically recommended Petitioner for the job.

In contrast with Petitioner's claims involving the Kentucky Chamber of Commerce and senior living center projects, Petitioner at least offers a possible reason that the Baptist Church representatives could have been aware of Mr. Tucker's physical disability. It is possible that stepping into the baptistery alerted the church representatives to Mr. Tucker's visual impairment. However, after offering this explanation, Mr. Tucker immediately concludes that his visual impairment must have been the reason the church did not award Petitioner the project. The fact that the church representatives may have been aware of Mr. Tucker's disability does not make it more likely than not that they discriminated against him because of it. As with the Kentucky Chamber of Commerce and senior living center projects, Petitioner presents no evidence of discriminatory practices, and its allegations are speculative.

Again, Petitioner failed to meet the burden of proof with respect to its claim that Petitioner did not receive the Baptist Church project due to bias based on Mr. Tucker's disability. It was *Petitioner's responsibility* to offer some proof that bias or prejudice was more likely the cause of the church's actions than not. Instead, Petitioner offered a theory, with no supporting generalized evidence, and that is not enough to prove bias by a preponderance of the evidence. The SBA was entitled to dismiss Petitioner's conclusory allegations. The SBA's determination that Mr. Tucker's allegations of bias with regard to the Baptist Church project do not constitute sufficiently specific evidence to prove social disadvantage was reasonable.

Based upon the above analysis of each of Mr. Tucker's examples of alleged bias, I conclude the SBA did not act arbitrarily, capriciously, or contrary to law in concluding that those examples are insufficient to prove by a preponderance of the evidence that Mr. Tucker suffers substantial and chronic social disadvantage.

3. Negative Impact on Advancement in the Business World

In determining that Petitioner failed to prove that Mr. Tucker suffers from social disadvantage, the SBA concluded that Mr. Tucker also failed to meet the third prong of the social disadvantage test—the individual's experiences with bias and prejudice had a negative impact upon his entry into or advancement in the business world. *See* 13 C.F.R. § 124.103(c)(2)(iii). Because I have concluded that the SBA acted reasonably in determining that Petitioner failed to prove that he suffered substantial and chronic disadvantage, I must also conclude that Mr. Tucker failed to meet this third part of the social disadvantage test. If Mr. Tucker did not suffer social

disadvantage, then such disadvantage could not have negatively impacted his entry into or advancement in the business world.

The SBA found, and Petitioner acknowledges in its appeal petition, that Mr. Tucker has not experienced discrimination with regard to education and employment because his visual impairment did not develop until after he had complete his education and founded Petitioner. Thus, the SBA analyzed Mr. Tucker's examples and allegations of bias resulting from his physical disability, as detailed above, in the context of business history. On appeal, the SBA emphasizes that Petitioner failed to demonstrate the nexus between Mr. Tucker's alleged social disadvantage and lost business opportunities. Petitioner contends it has provided sufficient evidence that it has been repeatedly denied work and networking opportunities as a result of unequal treatment based upon Mr. Tucker's physical disability.

Petitioner's examples of Mr. Tucker's personal experiences with the alleged bias and prejudice based upon his disability were properly related to business history. Thus, if Petitioner had proven that he had not been awarded the Pulliam contracts, the Kentucky Chamber of Commerce project, the senior living center project, and the Baptist Church project due to prejudice resulting from his physical disability, Petitioner would have successfully proven that his social disadvantage negatively impacted his business history. If Petitioner was able to prove that bias is the reason he is excluded from networking opportunities, Petitioner may have proven that his social disadvantage negatively impacted his business history. However, as explained above, Petitioner failed to prove that any of these lost business opportunities actually resulted from bias or prejudice.

The SBA acted reasonably in concluding that Mr. Tucker's examples failed to prove that his experiences with bias and prejudice had a negative impact upon his entry into or advancement in the business world in the context of business history. The SBA's ultimate conclusion that Petitioner failed to demonstrate social disadvantage by a preponderance of the evidence was also reasonable. The SBA articulated reasonable explanations for its conclusions, including rational connections between the facts and its determinations. Accordingly, the SBA's conclusion that Mr. Tucker failed to establish social disadvantage by a preponderance of the evidence was not arbitrary, capricious, or contrary to law.

V. Conclusion

For the foregoing reasons, I conclude the SBA's determination denying Petitioner admission to the 8(a) BD program was not arbitrary, capricious, or contrary to law. Accordingly, I deny the instant appeal and affirm the SBA's determination. *See* 15 U.S.C. § 637(a)(9)(C); 13 C.F.R. § 134.406(b). Subject to 13 C.F.R. § 134.409(c), this is the final decision of the U.S. Small Business Administration. *See* 15 U.S.C. § 637(a)(9)(D); 13 C.F.R. § 134.409(a).

BRENDA P. MURRAY
Administrative Law Judge