



SBA Office of Hearings & Appeals

[Help](#)**IN THE MATTER OF: ACE TECHNICAL, LLC, PETITIONER**

SBA No. SDBA-178

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April 17, 2008



SBA No. SDBA-178, 2008 WL 4628426 (S.B.A.)

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

Small Disadvantaged Business

IN THE MATTER OF:

← **ACE TECHNICAL** →, LLC, PETITIONER

SBA No. SDBA-178

April 17, 2008

Appearances

Alex Kabor

President

← **Ace Technical** →, LLC, Pro Se
Snohomish, Washington
For AppellantSam Q. Le, Esq.
Office of General Counsel
Small Business Administration
Washington, D.C.
For the AgencyDECISION AND REMAND ORDER

ARKOW, Administrative Law Judge:

I. Introduction and Jurisdiction

On January 24, 2008, ← **Ace Technical** →, LLC (Petitioner) timely appealed a Small Business Administration (SBA) determination denying Petitioner certification as a Small Disadvantaged Business (SDB). The SBA concluded that Petitioner did not establish its owner's social disadvantage. The SBA determination, however, failed to address the material facts and reasons for the determination. For this reason, the case is remanded to the SBA to reevaluate the Administrative Record (AR) and issue a new initial determination that affords Petitioner all of the procedural rights provided in the SBA regulations.

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.

II. Issue

Whether the SBA's Initial Determination provided Petitioner adequate notice of the facts and reasons for declining to certify Petitioner as a Small Disadvantaged Business. [13 C.F.R. § 124.1008\(f\)\(2\)](#).

III. Facts

On June 20, 2007, Petitioner filed an application with the SBA for certification as an SDB. AR, Ex. 8. Petitioner's owner, Alex Kabor, was born in Syria and states that his social disadvantaged status is based on his Middle Eastern ethnic origin. AR, Ex. 9. Petitioner cited the following incidents in Mr. Kabor's statement of social disadvantage: (1) Mr. Kabor is frequently selected for searches at airports; (2) Mr. Kabor makes other passengers nervous when he flies; (3) Mr. Kabor's dark skin and accent "make [him] stand out"; (4) Mr. Kabor has been asked by a co-worker how many wives he has and how much money he makes from oil; (5) Mr. Kabor was told he was "driving like a prince" and should "go the f**k home" in a company parking lot and the company did not respond when notified of the incident; (6) Mr. Kabor's friend's convenience store was vandalized and painted with "sand n****r go home" after September 11, 2001; (7) Mr. Kabor's friend moved back to Syria after his son was beaten up at school; and (8) Mr. Kabor is an American citizen, yet he is frequently asked by co-workers if he is an American citizen. AR, Ex. 8.

Petitioner then recounted the following incidents, which pertain to social disadvantage, in Mr. Kabor's statement of economic disadvantage: (1) Mr. Kabor changed his first name and the spelling of his last name to obtain job interviews once he realized his college friends, despite inferior grades, were receiving multiple job offers; (2) Mr. Kabor has "encountered many biased views" after September 11, 2001; (3) Mr. Kabor did not receive a raise one year when co-workers received a four percent raise. His manager explained Mr. Kabor was making more money than others, but Mr. Kabor states that he "knew this to be false"; (4) Mr. Kabor was asked political questions and told by a manager the Middle East needs to be restructured; (5) Mr. Kabor's supervisor made "supposedly joking comments" that Syria is a terrorist state; and (6) Mr. Kabor was passed over for a management position at his company because the company stated he was needed more at his current position. AR, Ex. 8.

IV. SBA Determination

On January 23, 2008, SBA issued an Initial Determination denying Petitioner SDB certification because Petitioner did not establish its owner's social disadvantage. SBA cites the regulations regarding social disadvantage and concludes:

While we do not review opposing evidence; you did not provide evidence, which overcomes and outweighs customary behaviors in the educational, work and living environments. [\[FN1\]](#) The situations as provided by you do not rise to this level. Your arguments did not provide sufficient evidence that articulated your inability to move forward in your education, work and living within the mainstream United States population. Your narrative needs to better define how your ethnicity contributed and or impeded your entry into employment development and capital development. You did not provide evidence that indicates the chronic nature of your discrimination.

...

Based on our review of your narrative for certification, we have concluded that you have not established your social disadvantage by a preponderance of the evidence. More specifically, you have failed to show that your discriminatory treatment was chronic and substantial and that it hindered your entry or advancement in the business world. Consequently, you are not socially disadvantaged.

AR, Ex. 1; Initial Determination, at 2.

Although provided the opportunity to request reconsideration and present additional evidence to overcome the SBA's denial of Petitioner's application, Petitioner appealed the denial to SBA's Office of Hearings and Appeals (OHA) on January 24, 2008. On March 10, 2008, SBA filed its Response and the Administrative Record. [\[FN2\]](#)

V. Discussion

A. Review of SDB Determination

The SBA's determination must be sustained unless a review of the written administrative record demonstrates the SBA acted arbitrarily, capriciously, or contrary to law in concluding that Mr. Kabor is not socially disadvantaged. [13 C.F.R. § 124.1008\(f\)\(4\)\(ii\)](#).

The "review is limited to the facts that were before SBA at the time of its decision and any arguments submitted in or in response to the appeal." *Id.* This includes the applicant's submissions to the SBA, as well as the unprivileged documents the SBA used to evaluate the application. It also includes a review of whether the SBA's determination: (1) adequately addressed the significant evidence submitted by the applicant, (2) informed the applicant of the facts relied upon in reaching the conclusions, and (3) clearly stated the rationale for the conclusions.

My review of the administrative record is narrow and does not permit me to substitute my own judgment for that of the SBA. I must examine the SBA determination to determine whether the SBA considered all of the facts presented as well as the laws and regulations that guide the decision-making process. My examination must review whether the SBA's determination is supported in the administrative record. It is not a de novo review of the administrative record to decide whether the SBA's ultimate conclusions are correct. After examining the record, I must 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. [Matter of Posche Promotions, SBA No. SDBA-162](#), at 5 (2004); 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. [Motor Vehicle Mfrs.](#), 463 U.S. at 43. In sum, the SBA must articulate a reasonable explanation for its action, including a rational connection between the facts the SBA found and its determination. [Posche](#), SBA No. SDBA-162, at 6.

B. Establishing Social Disadvantage

To be certified as a Small Disadvantaged Business, an applicant must establish that it is owned and controlled by socially and economically disadvantaged individuals. [13 C.F.R. §§ 124.1002\(a\), 124.1008\(c\)\(2\)](#). In evaluating whether a firm qualifies as an SDB, the SBA generally applies the same criteria used for the 8(a) Business Development program. [13 C.F.R. § 124.1002\(a\)](#). The issue in this appeal is whether the applicant's owner 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." [13 C.F.R. § 124.103\(a\)](#). An individual who is not a member of one of the groups presumed to be socially disadvantaged ([13 C.F.R. § 124.103\(b\)\(1\)](#)) must establish individual social disadvantage by the preponderance of the evidence. [13 C.F.R. § 124.103\(c\)\(1\)](#).

Evidence of individual social disadvantage must include the following elements: (1) at least one objective distinguishing feature that has contributed to social disadvantage, (2) personal experiences of substantial and chronic social disadvantage in American society, and (3) negative impact on entry into or advancement in the business world because of this disadvantage. [13 C.F.R. §§ 124.103\(c\)\(2\), 124.1008\(e\)\(2\)\(i\)](#).

Ethnic origin is a distinguishing feature that can contribute to social disadvantage, satisfying [13 C.F.R. § 124.103\(c\)\(2\)\(i\)](#). The second requirement, evidence of chronic and substantial disadvantage, is usually met if an applicant describes more than one or two specific, significant incidents. However, only one incident is sufficient if it is so substantial and far-reaching that there can be no doubt that the applicant suffered social disadvantage. For example, job discrimination that lasted over the course of a few years might be both chronic and substantial. [Matter of Seacoast Asphalt Services, Inc., SBA No. SDBA-151](#), at 7-8 (2001).

The applicant must also provide evidence that demonstrates the individual's social disadvantage caused a negative impact on the individual's entry into or advancement in the business world. [13 C.F.R. § 124.103\(c\)\(2\)\(iii\)](#). Any relevant evidence, particularly disadvantage in education, employment, and business history, may show the negative impact, [13 C.F.R. § 124.103\(c\)\(2\)\(iii\)](#), but Petitioner is not required to show disadvantage in each of these areas. [Matter of Bitstreams, Inc., SBA No. BDP-122](#), at 8 (1999).

Each specific incident of social disadvantage in the applicant's claim must be presented in sufficient detail to be evaluated. A claim that fails to provide sufficient detail is deficient. [Seacoast](#), SBA No. SDBA-151, at 8. To present a claim in sufficient detail, it must include certain basic information. Generally, that basic information must describe: (1) when and where the incident occurred, (2) who committed the act, (3) how the incident took place, and (4) how the applicant was adversely affected. *Id.* If an applicant fails to present sufficient detail to establish an incident occurred, the SBA must explain, in its initial determination, the application's deficiencies and advise the applicant what information is needed to establish the incident should the applicant request reconsideration. See [Bitstreams, SBA No. BDP-122](#), at 16. The SBA should recognize that in some situations it may be inappropriate to provide detailed facts concerning an incident when it is necessary to protect an applicant's privacy or prevent embarrassment. In such cases, an applicant must explain why sufficient detail is not provided.

Evidence to support a claim of social disadvantage includes the complete application and other evidence that supports the applicant's statement, including evidence in a request for reconsideration. Other evidence can include statements from witnesses to the incident and written documents that prove or lend credibility to the applicant's statement, such as letters, diplomas, transcripts, financial statements, court documents, certifications, loan applications, checks, tax returns, credit reports, or any other document that proves or lends credibility to a socially disadvantaged claim. [Seacoast](#), SBA No. SDBA-151, at 8. Evidence such as newspaper articles, statistics, and studies that establish discrimination, bias, or prejudice in a particular industry or ethnic group may lend credence to a claim even though, by itself, will not prove a claim. *Id.* The SBA may take into account commonly accepted knowledge, such as discrimination against Middle Easterners after the September 11, 2001, attack on the World Trade Center, as well as anecdotal evidence of discrimination in the applicant's community.

C. SBA's Review of an SDB Application

The applicant bears the burden of establishing social disadvantage by the preponderance of the evidence. [13 C.F.R. §§ 124.103\(c\)\(1\), 124.1008\(e\)\(2\)\(i\)](#). In other words, the SBA must find that the existence of a fact is more probable than its nonexistence to find in favor of the party who has the burden to persuade the SBA of the fact's existence. See [Bitstreams](#),

SBA No. BDP-122, at 9 (citing [Concrete Pipe & Prods, of Cat, Inc. v. Construction Laborers Pension Trust for S Cal, 508 U.S. 602, 622 \(1993\)](#)).

The SBA must recognize that, in evaluating the evidence, the applicant's statements may be the only available evidence. *Seacoast*, SBA No. SDBA-151, at 8. In such a case, the lack of other evidence to support the claim does not necessarily mean the claim has not been proved. However, in instances where other evidence apparently is available to prove a claim, but the applicant fails, without explanation, to present that evidence, the SBA may consider the lack of such evidence in determining whether the applicant established the claim. *Id.*

Further, the SBA may discount or disbelieve an applicant's statement only if it is inconsistent with other, credible evidence in the record showing, for instance, a particular incident complained of is attributable to a nondiscriminatory cause. *Seacoast*, SBA No. SDBA-151, at 9. In evaluating evidence, the SBA must explain its rationale for refusing to believe evidence in the application. In addition, the applicant owner's statements deserve greater weight than, for example, unsworn witness statements as they are made under penalty of criminal sanctions for false statements and thus carry the additional weight of a sworn statement. AR, Ex. 8 (citing [18 U.S.C. § 1001](#) and [15 U.S.C. § 645](#)).

Finally, after evaluating all of the relevant evidence in the administrative record, the SBA decides whether the applicant established individual social disadvantage by the preponderance of the evidence.

D. Petitioner's Application

The SBA determined Petitioner met all of the SDB eligibility requirements except that Petitioner did not establish that its owner, Mr. Kabor, is socially disadvantaged. Mr. Kabor was born in Syria and claims he is socially disadvantaged because of his Middle Eastern ethnicity. Thus, he is not presumed to be socially disadvantaged. [13 C.F.R. § 124.103\(b\)\(1\)](#). However, Mr. Kabor's ethnic origin is a distinguishing feature that can contribute to social disadvantage, satisfying [13 C.F.R. § 124.103\(c\)\(2\)\(i\)](#).

Petitioner presents numerous incidents in support of its claim of Mr. Kabor's social disadvantage. See Facts, *supra*. The SBA concluded that Petitioner did not present sufficient evidence to establish Mr. Kabor's social disadvantage. The SBA's determination does not include any of the facts described by Petitioner upon which SBA relied, an evaluation of the evidence, or a statement of the rationale for discounting evidence submitted by Petitioner. It merely concludes Petitioner did not meet the requirements for SDB certification. See SBA Determination, *supra*.

Thus, the SBA did not include in its determination the facts and reasons for its conclusion as required by SBA regulations and due process. [13 C.F.R. § 124.1008\(f\)\(2\)](#); see generally RICHARD J. PIERCE, JR., 2 ADMINISTRATIVE LAW TREATISE § 9.5 (4th ed. 2002) (discussing procedural protections mandated by the due process clause of the Fifth Amendment). "The fundamental requirement of due process is the opportunity to be heard at 'a meaningful time and in a meaningful manner.'" [Mathews v. Eldridge, 424 U.S. 319, 333 \(1976\)](#) (quoting [Armstrong v. Manzo, 380 U.S. 545, 552 \(1965\)](#)). In the adjudicative context, due process requires an agency to make an individualized determination based on the arguments and evidence submitted by a person and disclosed to that person. See [de la Llana-Castellon v. I.N.S., 16 F.3d 1093, 1096 \(10th Cir. 1994\)](#).

SBA's failure to provide adequate notice of the facts and reasons for denying Petitioner's SDB certification prevented Petitioner from understanding the basis for the SBA's denial of its application. Because the SBA's determination was an initial determination, it denied Petitioner the opportunity to address the SBA's concerns about the incidents cited by Petitioner and make a meaningful request for reconsideration, including the submission of new evidence to persuade the SBA to reevaluate its decision. [13 C.F.R. § 124.1008\(f\)\(3\)\(i\)](#). Also, it prevented Petitioner from meaningfully addressing the SBA's conclusions in its appeal.

SBA counsel, in the Agency Response, attempts to cure the deficient determination by addressing many of Petitioner's claims and providing a rationale for the SBA's declination of Petitioner's application. While counsel's presentation is comprehensive, it cannot be considered. The Supreme Court has held that so-called *post hoc* rationalizations by an agency's counsel may not be accepted to uphold an otherwise deficient agency determination. See [Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168-169 \(1962\)](#); [Motor Vehicle Mrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 \(1983\)](#); see, e.g., [Matter of L.D.V., Inc., SBA No. BDP-257](#), at 6 (2007).

Accordingly, the SBA's initial determination is deficient. Because I cannot discern the SBA's reasons for declining Petitioner's application, I cannot decide whether the determination is arbitrary, capricious, or contrary to law. See [13 C.F.R. § 134.406\(e\)](#). Thus, it is appropriate to return the case to the SBA for a new and adequate initial determination in accordance with the guidance in this Decision and Remand Order and to provide Petitioner a new and meaningful opportunity to request reconsideration and address any deficiencies found by the SBA or to immediately appeal. [\[FN3\]](#)

VI. Conclusion

The case is REMANDED to the SBA for further consideration and a new initial determination of Petitioner's eligibility for SDB certification that is consistent with this Decision and Remand Order. The SBA should review the existing record; evidence need not be resubmitted.

The SBA is ORDERED to follow the procedures mandated by [13 C.F.R. § 124.1008\(f\)\(2\)](#) and set forth SBA's specific

eligibility findings as it relates to each significant incident enumerated by Petitioner in its social disadvantage and economic disadvantage statements.

The SBA is ORDERED to issue, serve, and file its new initial determination with OHA no later than thirty (30) days from the date of this Decision and Remand Order.

If the SBA declines the application, the SBA is ORDERED to treat the decline as an initial decline and afford Petitioner the right to request reconsideration and submit additional information and documentation to support its request. [\[FN4\] 13 C.F.R. § 124.1008\(f\)\(3\)\(i\)](#). SBA must also afford Petitioner the right to appeal the SBA determination without requesting reconsideration within the time periods prescribed by [13 C.F.R. §§ 124.1008\(f\)\(4\)](#) and [134.202\(a\)\(1\)](#).

I retain jurisdiction over this matter during the period of remand.
Richard S. Arkow
Administrative Law Judge

[FN1](#). I note this legal standard does not comport with [13 C.F.R. §§ 124.103, 124.1008\(e\)\(2\)](#).

[FN2](#). In view of the Remand Order, I am not reviewing the SBA's claims of privilege with regard to portions of the AR at this time.

[FN3](#). It is usually beneficial to submit a request for reconsideration rather than immediately appealing because, unlike an appeal, a reconsideration request includes the right to submit new and additional evidence as well as argument.

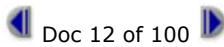
[FN4](#). If the SBA certifies Petitioner, it should file and serve OHA a notice of certification.

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