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IN THE MATTER OF: Seacoast Asphalt Services, Inc., Petitioner

Docket No. SDBA-2001-02-02-01, SBA No. SDBA-151

Small Business Administration Office of Hearings and Appeals

2001 SBA LEXIS 60

June 29, 2001

HEADNOTES:

To prove social disadvantage, the applicant must provide the SBA evidence of chronic and substantial disadvantage. Usually, this means there must be more than one or two specific, significant incidents. However, in an unusual case, 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. 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.

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 discriminated, (3) how the discrimination took place, and (4) how the applicant was adversely affected by the discrimination.

If the applicant presents the claim in sufficient detail, then the SBA must evaluate or weigh the evidence presented to determine if it is more likely than not that the incident happened. If the evidence establishes that it is more likely than not that the incident happened, then the applicant has proved the claim by a preponderance of the evidence.

Evidence to support a claim of social disadvantage includes the firm's SDB application, the individual's personal eligibility statement, and any other documents, such as letters, diplomas, transcripts, financial statements, court documents, certifications, loan applications, checks, tax returns, credit reports, and witness statements concerning alleged incidents, that support or lend credibility to the applicant's claim of having personally experienced chronic and substantial discrimination.

Evidence, such as newspaper articles, statistics, and studies, may prove gender discrimination generally exists in a particular industry. Such evidence also may lend credence to an individual's claim even though, by itself, this evidence will not prove an individual's claim of chronic and substantial discrimination.

Statements in the SDB application and everything submitted to the SBA by the applicant in connection with the SDB application are made under penalty of criminal sanctions for false statements and thus carry the additional weight of sworn statements.

The mere fact that a state has certified an SDB applicant as a disadvantaged business enterprise or a women's business

enterprise does not establish that the individual is socially disadvantaged, because (1) the certification provides no evidence showing that the requirements of the state are the same as the SBA's SDB requirements to prove social disadvantage, and (2) it provides no evidence showing what the applicant presented to that jurisdiction to prove social disadvantage.

The SDB regulations permit the SBA to "adopt" the DBE certification of a Department of Transportation (DOT) recipient as an SDB certification when determined to be appropriate. The Judge in an SDB appeal cannot review the propriety of the SBA's failure to consider whether to "adopt" an SDB applicant's DBE/DOT certifications, because the review in this case is limited to the issue of whether the SBA's conclusion that the individual is not socially disadvantaged is arbitrary, capricious, or contrary to law.

COUNSEL:

[*1] Edward J. Byrnes, Esq., for Petitioner Seacoast Asphalt Services, Inc.

Gene Marie M. Pade, Esq., Robert L. Gangwere, Esq., Acting General Counsel, for Respondent Small Business Administration.

JUDGES: RICHARD S. ARKOW, Administrative Law Judge

OPINION BY: ARKOW

OPINION:

INITIAL DECISION

ARKOW, Administrative Law Judge:

Petitioner Seacoast Asphalt Services, Inc. (Seacoast), appeals a decision by Respondent Small Business Administration (SBA) denying it certification as a Small Disadvantaged Business (SDB). The SBA found Seacoast ineligible for SDB certification because Seacoast's owner, Jennifer L. Nicolai, has not proven her social disadvantage. Seacoast claims the SBA's decision is arbitrary, capricious, and contrary to law. The SBA reached a reasonable decision. Thus, the SBA's decision is not arbitrary, capricious, or contrary to law, and the appeal must be denied.

Jurisdiction

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. The appeal is timely. 13 C.F.R. §§ 134.202(a), 134.204(e)(1).

Issue

Whether the action of the SBA denying Seacoast SDB certification [*2] is arbitrary, capricious, or contrary to law. 13 C.F.R. § 124.1008(f)(4)(ii).

Procedural Background

On June 22, 1999, Seacoast, a firm specializing in the supply, transportation, and application of asphalt products and aggregates, applied for SDB certification. AR, Ex. L. M. Seacoast claimed it is owned, controlled, and managed by Jennifer L. Nicolai, a socially and economically disadvantaged individual. AR, Ex. L. On February 7, 2000, the SBA denied Seacoast SDB certification. AR, Ex. F. On November 1, 2000, Seacoast requested the SBA reconsider its determination. AR, Ex. D. On December 20, 2000, the SBA denied the request for reconsideration, because Seacoast did not establish Ms. Nicolai was socially disadvantaged. AR, Ex. A. Seacoast appealed that determination on February 2, 2001. Appeal Petition.

Facts

In Seacoast's SDB application, Ms. Nicolai states she personally suffered social disadvantage as a woman in the construction industry. AR, Ex. L at 3. She stated:

The majority of construction firms are male owned and controlled. When dealing with clients it is very hard to do as well as the male owned firms in their minds. There is an assumption that as a woman, [*3] I do not have the knowledge needed for this industry regardless [of] my background.

AR, Ex. L at 3. Also, she stated, "[I]n dealing with the banking industry back in 1992, it was hard to prove that I could run my own business." *Id.* Loan papers in the record show Seacoast borrowed \$ 400,000 in 1997, and \$ 205,000 in 1999, from BankBoston. AR, Ex. R.

Seacoast presented additional facts pertaining to Ms. Nicolai's background in support of her claim of gender discrimination. These facts, stated in her resume, include her receipt of a Bachelor of Science degree in business from the University of Massachusetts n1 and her participation in an internship with the Boston Red Sox from December 1982 to June 1983. AR, Ex. O. The resume also shows continuous full-time employment since 1982. *Id.*

n1 The resume does not state when she received her degree.

Further, Seacoast presented evidence of participation in disadvantaged business enterprise (DBE) or woman business enterprise (WBE) programs. [*4] This evidence includes DBE or WBE certifications or renewals from six states. These states are: Connecticut (DBE certification renewal), Maine (WBE certification renewal), Massachusetts (WBE and DBE certification renewals), New Hampshire (DBE certification renewal), New York (Woman-owned Business Enterprise certification), and Rhode Island (Minority Business Enterprise program recertification). AR, Ex. Y, D. Three of these state certifications mention the U.S. Department of Transportation or cite to its regulations: Maine, Massachusetts (DBE certification renewal only), and New Hampshire. AR, Ex. Y, D.

With its reconsideration request, Seacoast submitted Ms. Nicolai's affidavit (Aff.) regarding her social disadvantage. AR, Ex. D. This affidavit, she stated, contains not all, but significant examples of the discrimination she experienced. AR, Ex. D at 3 (Aff. at P 9(d)). It elaborates on Seacoast's earlier claims about the general conditions in the construction industry:

On more than one occasion, while conducting the business of Seacoast, I have been discriminated against by male-owned companies in many ways, including, but not limited to, being prohibited from purchasing [*5] products from male-owned manufacturers for resale to their customers, having male-owned competitors lowering their prices in areas where I conducted business to such a level that I could not possibly compete at even a 'break even' basis in certain areas of my business, being required to adhere to different payment terms than those made available to male-owned competitive firms, and at one point, when discussing the expansion of my paving business with a male-owned supplier, I was asked whether or not 'my paver would be pink.'

AR, Ex. D at 3 (Aff. at P 9(c)). Ms. Nicolai's affidavit also describes a loan denial incident:

In August 1994, during an interview concerning a loan application submitted to Fleet Bank, and after explaining my business plans for Seacoast, I was asked 'how a girl like me actually got into the construction business.' This loan was denied.

AR, Ex. D at 3 (Aff. at P 9(b)). The affidavit also discussed an incident of alleged gender discrimination related to Ms.

Nicolai's education:

While I was a student at the University of Massachusetts, both the Director of the Sports Management Department and my college advisor consistently attempted [*6] 'to date' me and when I refused I was subjected to recrimination by them. The Director refused to grant me full point credit for my internship which was spent with the Boston Red Sox. As a result, I was not able to graduate with my class and was required to attend school on a part-time basis to obtain my Bachelor's Degree while working full-time. This took a period of nine years. Because of this, I was unable to pursue a Master's Degree program which has had, and continues to have, negative effects on my business.

AR, Ex. D at 2-3 (Aff. at P 9(a)).

Seacoast also submitted three short articles discussing the difficulty women-owned businesses have in obtaining contracts and securing credit in the construction industry, and the industry dominance by male-owned firms. *See* AR, Ex. D at 3-4 (Aff. at PP 10-12).

SBA Determination

The SBA, in its February 7, 2000, initial denial, concluded that Ms. Nicolai, Seacoast's President, and the individual claiming disadvantaged status, was not socially disadvantaged. AR, Ex. F. The SBA found that "[e]vidence has not been presented that would allow us to conclude that your ability to compete in the market place has been [*7] impaired due to discriminatory practices against you/or your firm because of [Ms. Nicolai's] gender." *Id.*

The SBA reasoned that there was insufficient documentation and evidence to establish that Ms. Nicolai was subjected to cultural bias because of her gender. The SBA addressed the claims Seacoast presented to establish Ms. Nicolai's claim of gender discrimination. The SBA found Seacoast's claim about the general conditions in the construction industry "lacks sufficient detail to conclude that you have been subjected to discrimination based on your gender." AR, Ex. F. Regarding Seacoast's claim about its difficulties with banks in 1992, SBA stated, "This assertion fails to meet the burden of proof that you have experienced chronic and substantial discriminatory treatment, and that this impeded the advancement of your business." *Id.* The SBA also found the six state certifications did not further Seacoast's claim that Ms. Nicolai's gender had impeded her advancement in business. *Id.*

The SBA further concluded that Ms. Nicolai's social disadvantage has not been established by the required preponderance of the evidence, and the determination is reasonable in light of the [*8] absence of sufficient evidence to the contrary.

After evaluating Seacoast's request for reconsideration, the SBA adhered to its original conclusion. Regarding the education claim, SBA stated, "These incidents did not hinder you from continuing your education, nor did you establish that it negatively impacted your advancement in the business world." AR, Ex. A. Regarding the claim about gender discrimination in the construction industry, SBA stated:

You stated you have been discriminated against by male-owned companies in many ways. The example you provided which indicated unequal treatment as a woman in which a male-owned supplier asked if your 'paver would be pink.' You have not supplied any specific instances, which would indicate chronic and substantial discrimination.

AR, Ex. A. Finally, regarding the loan denial, SBA stated that there is no evidence the loan was denied because Ms. Nicolai was a woman. *Id.* The SBA also found that these incidents were not chronic and have not resulted in discrimination or unequal treatment. Further, Seacoast's ability to compete in the marketplace has not been impaired due to discriminatory practices against Ms. Nicolai [*9] or her firm because of her gender. *Id.*

Petitioner's Position

Seacoast argues that the SBA's action in denying Seacoast SDB certification is arbitrary, capricious, and contrary to law because Seacoast has established the social disadvantage of Ms. Nicolai.

Seacoast contends it presented sufficient evidence to prove Ms. Nicolai's social disadvantage. Further, Seacoast contends its disadvantaged status has been established because six states have determined that Ms. Nicolai is disadvantaged. Thus, the SBA's determination to the contrary is illogical.

Respondent's Position

The SBA argues its action in denying Seacoast SDB certification is not arbitrary, capricious, or contrary to law.

The SBA contends Seacoast failed to establish by a preponderance of the evidence that Ms. Nicolai was subjected to chronic and substantial discrimination that impeded her entry into or advancement in the business world. Specifically, the SBA argues Seacoast did not establish Ms. Nicolai's social disadvantage.

Discussion

I.

The SBA's determination must be sustained unless a review of the written administrative record demonstrates the SBA acted arbitrarily, capriciously, or contrary [*10] to law in concluding that Ms. Nicolai is not socially disadvantaged. 13 C.F.R. § 124.1008(f)(4)(ii).

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 whether the SBA considered all of the facts presented as well as the laws and regulations that guide the decision-making process. Then, 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. *See Motor Vehicle Mfrs. Ass'n of the United States, 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. In sum, the SBA must articulate a reasonable explanation for its action, including a rational connection between the facts found and its [*11] determination. *See id.*

II.

To be certified as an SDB, Seacoast must establish that Ms. Nicolai owns and controls Seacoast, and that she is socially and economically disadvantaged. 13 C.F.R. §§ 124.1001(b), 124.1008(c)(2). To determine whether a firm meets these requirements, the SBA generally applies the same criteria used for the 8(a) program. 13 C.F.R. § 124.1002(a); *Matter of SKJ & Associates, Inc.*, SBA No. SDBA-134, at 4-5 (2000). The SBA concluded Seacoast met all of these requirements, except that Seacoast did not establish that Ms. Nicolai suffered social disadvantage. This appeal reviews whether the SBA's determination that Ms. Nicolai is not socially disadvantaged is arbitrary, capricious, or contrary to law. 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.* That would include all of the applicant's submissions to the SBA, as well as all of the unprivileged documents the SBA used to evaluate the application.

"Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within [*12] American society because of their identities as members of groups and without regard to their individual qualities." 13 C.F.R. § 124.103(a). Because Ms. Nicolai is not a member of one of the groups the SBA presumes to be

socially disadvantaged, Seacoast bears the burden of establishing Ms. Nicolai's social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(b)(1), (c)(1). Gender is a distinguishing feature that can contribute to social disadvantage. 13 C.F.R. § 124.103(c)(2)(i). Seacoast must establish Ms. Nicolai's social disadvantage by showing her claim of gender discrimination was based on personal experiences of substantial and chronic social disadvantage in American society. These experiences must include specific incidents that demonstrate her social disadvantage and had a negative impact on her entry into or advancement in the business world. 13 C.F.R. § 124.103(c)(2)(ii), (iii). Any relevant evidence, particularly discrimination in education, employment, and business history, may show the negative impact. 13 C.F.R. § 124.103(c)(2)(iii).

III.

To prove social disadvantage, the applicant must provide the SBA evidence of chronic and substantial disadvantage. [*13] Usually, this means there must be more than one or two specific, significant incidents. However, in an unusual case, 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. 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. *Matter of Bitstreams, Inc.*, SBA No. BDP-122, at 15 (1999).

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 discriminated, (3) how the discrimination took place, and (4) how the applicant was adversely affected by the discrimination. *See id.*

If the applicant presents the claim in sufficient detail, then the SBA must evaluate or weigh the evidence presented to determine if it is more likely than not that the incident happened. If the evidence establishes that it is more likely [*14] than not that the incident happened, then the applicant has proved the claim by a preponderance of the evidence. *Bitstreams*, SBA No. BDP-122, at 9 (citing *Concrete Pipe and Products v. Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993)).

Evidence to support a claim of social disadvantage includes the firm's SDB application, the individual's personal eligibility statement, and any other documents, such as letters, diplomas, transcripts, financial statements, court documents, certifications, loan applications, checks, tax returns, credit reports, and witness statements concerning alleged incidents, that support or lend credibility to the applicant's claim of having personally experienced chronic and substantial discrimination.

Evidence, such as newspaper articles, statistics, and studies, may prove gender discrimination generally exists in a particular industry. Such evidence also may lend credence to an individual's claim even though, by itself, this evidence will not prove an individual's claim of chronic and substantial discrimination.

Statements in the SDB application and everything submitted to the SBA by the applicant in connection with the SDB [*15] application are made under penalty of criminal sanctions for false statements and thus carry the additional weight of sworn statements. AR, Ex. L at 8 (citing 18 U.S.C. § 1001 and 15 U.S.C. § 645).

In evaluating the evidence, the applicant's statements may be the only available evidence. *Bitstreams*, SBA No. BDP-122, at 13. In such a case, the statement alone may prove the claim. However, in instances where other evidence apparently is available, but the applicant fails, without explanation, to present that evidence, the SBA may consider the lack of such evidence in determining whether the applicant has established the claim. *Bitstreams*, SBA No. BDP-122, at 14, 16.

Further, the SBA may discount or disbelieve applicant statements that are inconsistent with other, credible evidence in the record showing, for instance, a particular incident complained of is attributable to a nondiscriminatory cause. *SKJ & Associates*, SBA No. SDBA-134, at 6; *Matter of MJ King & Associates*, SBA No. SDBA-129, at 6

(2000); *Bitstreams*, SBA No. BDP-122, at 17.

Finally, after evaluating all of the relevant evidence in the administrative [*16] record, the SBA decides whether the applicant proved the incident.

IV.

Seacoast presents the following to support its claim of Ms. Nicolai's social disadvantage: (1) general discriminatory practices against Seacoast; (2) denial of a bank loan; (3) the inability to graduate college with her class because of gender discrimination; and (4) Seacoast's certification as a disadvantaged or woman's business in six states, which shows other jurisdictions have found Ms. Nicolai was disadvantaged. Also, Seacoast presented evidence of gender discrimination in the construction industry. The SBA determined that Seacoast did not present sufficient evidence to establish Ms. Nicolai's social disadvantage. That conclusion is reasonable and not arbitrary, capricious, or contrary to law.

First, Ms. Nicolai claims that being a woman in the construction industry is a disadvantage. In support of this claim, she asserts that male-owned suppliers refused to sell to her and that male-owned competitors engaged in unfair pricing practices against her. Also, she asserts male-owned companies made derogatory statements to her, such as asking whether her paver "would be pink." *See Facts, supra*. Her statements [*17] do not identify when or where these incidents occurred or who discriminated against her business. Accordingly, these examples failed to include sufficient detail to permit the SBA to evaluate the claims. Thus, the SBA properly concluded these examples were insufficient to demonstrate discriminatory practices against Seacoast because of Ms. Nicolai's gender.

Second, Fleet Bank denied Ms. Nicolai a loan in August 1994. Ms. Nicolai states she was asked, during the loan interview, how a "girl" like her got into the construction business. AR, Ex. D at 3 (Aff. at P 9(b)). Seacoast presented no other evidence to prove this discrimination claim, or even to describe the loan it tried to obtain. Although the use of the word "girl" in this context can be considered derogatory or disparaging, the question asked of Ms. Nicolai, standing alone, does not amount to gender discrimination. Denial of the loan because Ms. Nicolai was a woman would be gender discrimination. The SBA concluded there was no evidence that Fleet denied the loan because Ms. Nicolai was a woman. Given that Seacoast had not submitted to the SBA even such basic evidence as its loan application and the bank's denial letter, documents [*18] which should be readily available to Seacoast and which might indicate why the loan was denied, the SBA's conclusion, that there was a failure to prove the claim, is reasonable. Moreover, even if Seacoast had been able to prove the 1994 loan denial was due to gender discrimination, the record shows Seacoast was able to secure loans from another bank in 1997 and 1999. AR, Ex. R.

Third, Ms. Nicolai states her graduation from the University of Massachusetts was delayed nine years because of her refusal to date two faculty members, which led to a loss of credit for an internship. AR, Ex. D at 2-3 (Aff. at P 9(a)). Further, she claims she had to attend school part-time, while working full-time. The only evidence in the administrative record relevant to these claims is Ms. Nicolai's affidavit and her resume, which states she received a Bachelor of Science degree from the University of Massachusetts, and which shows her internship lasted seven months. AR, Ex. O. Ms. Nicolai does not state either when she started her studies or when she received her degree. She presents no evidence, such as her college transcript, which would show her attendance, and which might shed light on her [*19] internship. Ms. Nicolai does not explain why she had to attend school part-time or why it took nine more years to earn her degree after the school denied her credit for her internship. Without proving there was a nine-year delay and explaining how it resulted from gender discrimination, her allegation is insufficient to establish her claim of gender discrimination. Accordingly, the SBA properly and reasonably concluded that Ms. Nicolai did not establish this claim of gender discrimination.

Fourth, Seacoast's claim that it established Ms. Nicolai's social disadvantage by evidence it was certified by six states as either a disadvantaged business enterprise or a woman's business enterprise is without merit. *See AR, Ex. D, Y*. The mere fact that six jurisdictions certified Seacoast for special status does not establish Ms. Nicolai's social

disadvantage. First, there is no evidence showing that the requirements of any of these six jurisdictions are the same as the SBA's SDB requirements to prove social disadvantage. n2 Second, there is no evidence showing what Seacoast and Ms. Nicolai presented to these jurisdictions to prove social disadvantage.

n2 The SDB regulations permit the SBA to "adopt" the DBE certification of a Department of Transportation (DOT) recipient as an SDB certification when appropriate. 13 C.F.R. § 124.1008(i). This regulation provides no guidance on when such adoption is appropriate. There is no evidence in the administrative record that the SBA considered whether to "adopt" Seacoast's DBE/DOT certifications; however, the SBA appears to have unfettered discretion in granting or denying reciprocity. Because this appeal can only review whether the SBA's conclusion that Ms. Nicolai is not socially disadvantaged is arbitrary, capricious, or contrary to law, I cannot review the propriety of the SBA's failure to consider whether to "adopt" Seacoast's DBE/DOT certifications. 13 C.F.R. § 124.1008(f)(4).

[*20]

This issue has not arisen in an SDB appeal. It has been considered, however, in an 8(a) appeal. In *Matter of Arteaga Construction, Inc.*, SBA No. MSB-584 (1997), it was recognized that an 8(a) program applicant cannot use a state or local disadvantaged business enterprise certification to prove that a firm satisfies a particular requirement for admission into the 8(a) program. *Arteaga*, SBA No. MSB-584, at 7. The same principle applies to SDB certifications. To permit SDB applicants to rely on certifications from other jurisdictions to prove social disadvantage would risk allowing individuals who are not socially disadvantaged to be certified. For example, unlike SBA's SDB certification requirements, New York's Women-owned Business Enterprise Program does not require women to prove their social disadvantage and does not require United States citizenship. *Compare* 13 C.F.R. §§ 124.1002(a), (d), 124.103(c) with N.Y. Executive § 310 P 15. Thus, the New York certification is not helpful in establishing Ms. Nicolai's social disadvantage.

Accordingly, the SBA's conclusion that certifications of other jurisdictions do not establish social disadvantage [*21] is reasonable and not arbitrary, capricious, or contrary to law.

For these reasons, the SBA reasonably concluded, solely on the facts before it, that Seacoast has failed to meet its burden of establishing Ms. Nicolai is socially disadvantaged because of her gender. Accordingly, the administrative record supports the SBA's determination to deny SDB certification, and the SBA's determination is reasonable and not arbitrary, capricious, or contrary to law.

Conclusion

Respondent Small Business Administration's determination denying Seacoast Asphalt Services, Inc., Small Disadvantaged Business Program certification is NOT ARBITRARY, CAPRICIOUS OR CONTRARY TO LAW. The appeal petition is DENIED.

This is the initial decision of the SBA. Absent a request for review, this decision will become the SBA's final decision 30 days after the date of this decision. 13 C.F.R. §§ 134.227(b), 134.228(a).

RICHARD S. ARKOW

Administrative Law Judge

Legal Topics:

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