



Column: SBA continues to review social disadvantage narratives under the wrong evidentiary standard

By Peter B. Ford, associate, PilieroMazza PLLC

With increased competition for government contracts, many firms not owned by members of presumptively disadvantaged groups are trying to get admitted to the Small Business Administration's (SBA) 8(a) Business Development Program.

The individual owners of these firms, who often feel as though they have been subjected to the same level of discrimination suffered by members of designated groups, are required to prove social disadvantage by a preponderance of the evidence, that is, a showing that it is more likely than not that a claimed incident of discrimination was motivated by bias, through the submission of a social disadvantage narrative.

Nevertheless, in recent cases decided by the SBA's Office of Hearings and Appeals (OHA), the OHA has criticized the SBA for continuing to analyze social disadvantage claims under a "clear and convincing standard" rather than the preponderance standard. In this regard, the following is a summary of some of the common mistakes noted by OHA as signaling SBA's application of this heightened (and improper) evidentiary standard.

Corroborating Evidence

Statements in a social disadvantage narrative are made under penalty of criminal sanctions for false statements. Furthermore, certain types of incidents of discrimination are rarely witnessed. For these reasons, direct proof (i.e., corroborating evidence) of prejudice or bias is generally not required to establish social disadvantage; circumstantial or inferential evidence will suffice.

Thus, if a woman claims she suffered gender discrimination during college which negatively impacted her grades, the SBA cannot reject that claim of bias simply because the woman did not provide the SBA with a college transcript to prove she had a lower grade point average.

Similarly, if a man alleges that he was denied a bank loan because of his ethnicity, the SBA should accept that claim as true even if the man does not submit documentation from the bank evidencing the loan denial.

Hypothetical Alternate Explanations

An individual claiming social disadvantage has no way to anticipate what justifications the SBA may provide to disregard an alleged incident of discrimination. As such, the SBA cannot require an applicant to disprove hypothetical alternate explanations as to why a claimed incident of bias may have occurred.

In other words, absent evidence of a non-discriminatory explanation, if an individual believes that he or she has been subjected to discriminatory treatment, the SBA must accept that belief as true.

Thus, if a man claims that he was repeatedly denied pay raises by his employer because of his race, the SBA cannot disregard that claim on the basis that the individual failed to demonstrate in his social disadvantage narrative how the lack of pay increases was not the result of the employer's current economic situation.

Offender's Viewpoint

In determining whether an alleged incident of discrimination evidences social disadvantage, the SBA cannot look at the incident from the viewpoint of the alleged offender. Instead, the SBA must look at the claimed bias or prejudice from the applicant owner's viewpoint.

This means, for example, if a woman claims that her male boss refused to allow her to attend a golf outing because potential clients would be present that would not want to do business with a woman, the SBA cannot disregard that claim by reasoning that the boss' refusal was based on a business decision that the company would lose busi-

ness because potential clients would not want to work with a woman.

Immaterial Evidence

The SBA's decision to deny a claim of social disadvantage must be based on the relevant evidence submitted as part of a social disadvantage narrative. Accordingly, the SBA errs when it disregards a discriminatory incident based on evidence that is clearly not relevant or material.

For instance, if a religious man claims that his company was in line for a valuable contract award but was later withdrawn from consideration after the owner had his first face-to-face meeting with the customer and was dressed in religious attire, the SBA cannot refuse to accept that claim as preponderant simply because the narrative did not mention the name of the company ultimately awarded the contract. This is because the identity of the awardee is irrelevant. What is relevant is that the potential customer did not award the contract to the applicant firm after seeing the owner in his religious attire.

Conclusion

In conclusion, firms not owned by members of presumptively disadvantaged groups already face an uphill battle in demonstrating to the SBA that they satisfy the social disadvantage requirement for 8(a) program participation, and the application process grows even more difficult when the SBA applies the wrong evidentiary standard.

Peter Ford is an associate with PilieroMazza PLLC in Washington, DC and works in the firm's Government Contracts Group. For over 25 years, PilieroMazza has helped small and mid-sized businesses to successfully navigate a diverse array of legal matters, including government contracting, SBA's procurement programs, litigation, labor and corporate law. Visit www.pilieromazza.com.