

Court Ruling Leads to Major Change in SBA 8(a) Social Disadvantage Determination Policy

Some significant (perhaps short-term) changes have rapidly come to the U.S. Small Business Administration's (SBA) 8(a) Business Development Program (8(a) or the Program) following a U.S. Federal District Court for the District of Tennessee ruling.

THE PROGRAM – A Brief Primer

The Program allows for small businesses owned by proven socially and economically disadvantaged individuals to benefit from access to certain set-aside or preferential federal government procurements, including sole-source and set-aside contracts under various circumstances. This program has been in place for over 30 years and has had little in the way of changes relating to the establishment of social and economic disadvantage since its inception. Over the past decades, the SBA had traditionally instituted a legal presumption that individuals in certain identified groups (based on racial or ethnic status) were inherently socially disadvantaged. That presumption is no longer automatic as a result of a recent court ruling.

THE CHANGE - *Ultima Services v. U.S. Department of Agriculture*

The District Court ruled in *Ultima Services Corporation v. U.S. Department of Agriculture et al.*¹ that the SBA was no longer permitted to presume that individuals were socially disadvantaged solely based on their membership in an identified group (these groups included certain racial and ethnic minorities) when making 8(a) participation and admission determinations. Indeed, the Court ruled that this practice, also known as the "rebuttable presumption of social disadvantage," violates the Due Process Clause of the Fifth Amendment of the U.S. Constitution. As a result, the Court enjoined the SBA from any longer having this presumption in federal procurement policy, at least for the time being. In light of this holding, the SBA issued a notification/guidance on its website, temporarily suspending all new 8(a) application submissions "to comply with the Court's decision."² This has a direct implication on pending and future applicants, but may also have a significant effect on currently certified 8(a) small business participants.

IMPLICATIONS

Current Program participants know that to qualify for participation in the Program, one of the required criteria holds that the applicant: "Be at least 51% owned and controlled by U.S. citizens who are socially and economically disadvantaged."³ The term of art for owners of small businesses falling into this category is *qualified owners*. However, current 8(a) participants may have some work to do to continue to participate in the Program.

Which 8(a) Participants does this ruling (and SBA's suspension) impact?

To comply with the Court's ruling, SBA is requiring existing 8(a) participants who were previously admitted to the Program as a result of the social disadvantage presumption to now complete and submit a *social disadvantage narrative* to establish that the participant is personally and actually socially disadvantaged. Participants in this category will have to submit this information through the SBA website establishing personal social disadvantage in order to receive new 8(a) contracts. Per the SBA website, "all current 8(a) participants...(were to) receive a direct communication from SBA on...August 21, 2023," informing participants whether they need to provide a narrative or if they have already met the social disadvantage requirements.⁴ Participants who did not receive a message from SBA regarding their 8(a) status one way or the other should contact SBA directly.



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Which 8(a) Participants will be unaffected by this ruling?

However, it bears noting that not all 8(a) participants will be impacted by this ruling. If an 8(a) participant was admitted to the program after the qualifying owner of the small business independently established by a preponderance of the evidence that the owner was socially disadvantaged, then said participant will not be required to submit a narrative in order to receive new 8(a) contracts. Similarly, if a qualifying owner has previously submitted a social disadvantage narrative that SBA relied upon in admitting the concern to the Program, then there is no need to submit another one. It is also important to note that this ruling will have no impact on tribal entity-owned firms (Alaska Native Corporations and other like tribal entities) due to the separate statutory presumption existing under law.⁵ Participants that fall into one of these categories should not be concerned regarding their ability to receive new 8(a) contracts.

If I have been impacted by this ruling, and I submit a narrative to SBA, what should I expect to happen next?

Participants who have submitted a social disadvantage narrative to SBA should expect to receive either an approval or denial from SBA pertaining to the determination of personal social disadvantage. If approved, the 8(a) participant will receive a letter notifying the qualified owner that said owner may “continue to receive 8(a) contracts and otherwise participate in the 8(a) program).”⁶ The big question is “how long will this approval take.” There is no answer to this other than to state that the sooner you get your narrative submitted, presumably, the sooner you will get your answer/approval.

How will this ruling impact submissions of annual reviews?

The ruling will have no impact on annual compliance reviews and the submission of continuing eligibility materials. Importantly, this ruling does not impact the need to only establish social disadvantage once for the Program term, absent a change in ownership or control that impacts eligibility. The obvious exception to this is the need to provide a social disadvantage narrative if informed by the SBA that one is required in the light of the ruling.

How will this ruling impact the use of the Program?

SBA has made it clear that the 8(a) Program “remains open for business.”⁷ As such, 8(a) participants should press forward in seeking out new contracts and taking full advantage of all other benefits available through the Program, subject to the need to submit the narrative and getting the approval from SBA, as applicable.

CONCLUSION

Per the Court’s ruling, the rebuttable presumption that has been on the books for years is unconstitutional. It presently appears that SBA is not going to appeal this decision, given the guidance it has issued just after the Court’s decision was issued. Assuming there is no such appeal, then as long as the law and this guidance remain in place, this will result in:

- a. all applicants to the 8(a) program having to provide a narrative supporting their social disadvantage, where applicable; and
- b. a likely increase in size status protests to SBA and its Office of Hearings and Appeals, wherein other bidders/offerors can claim that a given business is, in this case, not socially disadvantaged and therefore not qualified as a proper 8(a) participant.

Please contact the authors with questions or concerns on this matter.

¹ *Ultima Servs. Corp. v. U.S. Dep’t. of Agric.*, Case No. 2:20-CV-00041-DCLC-CRW, 2023 WL 463348 (E.D. Tenn. July 19, 2023)

² See, certify.sba.gov.

³ Small Business Administration, 8(a) Business Development program

⁴ Small Business Administration, 8(a) Business Development program

⁵ 13 CFR §124.103(b)(1).

⁶ Small Business Administration, 8(a) Business Development program

⁷ Small Business Administration, 8(a) Business Development program
