

# SBA's 8(a) Business Development Program Responds to District Court Ruling

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In a July 2023 district court case, *Ultima Servs. Corp. v. U.S. Department of Agriculture*, the U.S. District Court for the Eastern District of Tennessee enjoined SBA from continuing to operate its [8\(a\) Business Development Program](#) as it had been doing. SBA's 8(a) program offers federal contracting preferences, such as contract set-asides and sole-source contracts, to small "socially and economically disadvantaged" business owners. The district court found SBA program's presumption of social disadvantage for certain program applicants to be unconstitutional. While the SBA is making program changes to comply with the court's ruling, [the agency says](#) it "is encouraging [the program's] continued use." The SBA has, however, temporarily suspended new 8(a) program applications and issued new guidance for current program participants (which includes submitting documentation regarding one's social disadvantage to the SBA).

Prior to the ruling, the SBA applied a "presumption of social disadvantage" to individuals applying for its 8(a) program from the following groups: Asian Pacific Americans, Black Americans, Hispanic Americans, Subcontinent Asian Americans, and Native Americans. Applicants were required to attest to membership in one of these groups or provide a personal narrative to the SBA if they did not belong to one of the groups. In addition, all applicants were and continue to be required to submit evidence documenting their economic disadvantage to the SBA.

The SBA issued its earliest regulations for the 8(a) program during the Nixon Administration in 1970, declaring an SBA policy of using Section 8(a) of the Small Business Act to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place." A 1973 regulation then defined disadvantaged persons as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."

Because the district court has ruled that SBA cannot presume social disadvantage based on ethnic or racial group membership, the SBA has stopped presuming social disadvantage. Any program participant who previously relied on the presumption of social disadvantage for program eligibility must now submit a narrative to SBA, a procedure that is already required of individuals who are not members of one of the racial groups listed in the regulation.

[SBA reports](#) that it is currently developing a new personal narrative requirement for applicants to demonstrate their social disadvantage. Until the new process is in place, SBA says it will assess social

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disadvantage using the process it devised for non-group member applicants seeking to claim disadvantage.

SBA has stated it intends to directly notify all current program participants, “detailing the process for establishing social disadvantage” or “clarify[ing] that the participant has already established social disadvantage [as a non-group member applicant].” Once a participant has submitted a narrative “verifying personal social disadvantage” to the SBA if needed, SBA would provide “a letter indicating it has established social disadvantage,” so that the firm “may continue to receive 8(a) contracts and otherwise participate in the 8(a) program.”

Per existing SBA regulations (13 C.F.R. §124.103(c)(1)), an individual may prove social disadvantage by submitting “evidence to support his or her claim(s)” to the SBA. The applicant should demonstrate their claims “by a preponderance of the evidence.” This burden of proof is met if the applicant can show that there is a greater than 50% chance the applicant’s claims are true. The regulations reflect a 1998 rule, which “liberalize[d] the standard of review for non-group members seeking disadvantaged status from a clear and convincing evidence test to a preponderance of the evidence standard.” This rule reduced the burden on program applicants in the wake of the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña* (1995).

According to the “Guide for Writing a Social Disadvantage Narrative” issued by the SBA, the “key elements” of a narrative include (1) a description of a program participant’s identity or characteristics and “how [they] have been subject to discrimination,” and (2) descriptions of two “incidents of bias” that demonstrate “chronic and substantial social disadvantage.” SBA notes that these incidents “should be related to education, employment, and business history.” SBA advises that each incident description include “who, what, where, why, when, and how discrimination or bias occurred” as follows:

- **Who** refers to “who committed the discriminatory action;”
- **What** refers to what “discriminatory conduct” took place;
- **Where** explains where the conduct occurred;
- **Why** provides “reason(s) that the conduct was more likely motivated by bias or discrimination than other non-discriminatory reasons;”
- **When** provides the “exact dates, if available,” when the conduct occurred; and
- **How** explains how the discriminatory conduct affected a participant’s “entry into or advancement in the business world.”

Although they must recertify their economic disadvantage annually, program participants must “establish social disadvantage” once. SBA is advising current program participants to “continue to submit their annual review and continuing eligibility materials to SBA,” in addition to the social disadvantage narrative, if applicable.

There are currently 5,288 SBA-certified 8(a) program participants registered as active in the System for Awards Management (SAM.gov), the registration portal required of federal contractors. There are an additional 443 entities registered as certified 8(a) joint-ventures, which are partnerships between 8(a) participants and larger firms that mentor them. According to the FY2022 Small Business Goaling Report available through the SAM.gov data bank’s “status reports,” 3.45% or \$20.96 billion of federal contract awards in FY2022 went to 8(a) firms.

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