

Department of Justice  
Washington, D.C. 20530

28 MAR 1980

*By [signature]  
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MEMORANDUM FOR STUART E. EIZENSTAT  
Assistant to the President for Domestic Affairs and Policy

Re: Are Hasidic Jews "Socially Disadvantaged" for Purposes  
of Section 8(a) of the Small Business Act?

You have requested the views of this Office on the question whether the Small Business Administration can or should determine that Hasidic Jews are "socially disadvantaged" for purposes of § 8(a) of the Small Business Act. See 15 U.S.C. § 637 (a), as amended by P.L. No. 95-507, § 202, 92 Stat. 1761-62. The question is a significant one because small business concerns qualify for preferential treatment under the § 8(a) contracting program only when they are owned in the requisite percentage by individuals who are "socially disadvantaged" within the meaning of the Act.

The Act defines the operative term. Individuals are "socially disadvantaged" if they have been "subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." See § 8(a)(5). Moreover, the Act contains express legislative findings, supporting the preferential treatment for "socially disadvantaged" individuals, that provide additional guidance regarding the nature of the favored class: (1) "many . . . persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," and (2) "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities" (emphasis supplied). See § 2(e)(1)(B) and (C).

In our view, under these provisions the question whether an Hasidic Jew may be deemed "socially disadvantaged" for purposes of § 8(a) is largely a question of fact, committed by the Act to the sound discretion of the Small Business Administration. Clearly, an Hasidic Jew is a member of an ethnic or cultural "minority," see § 2(e)(1)(C), and thus it is possible that he or she, being a member of a minority, has been subjected to "discrimination" because of his or her membership in a "group" within the contemplation of the Act. See § 2(e)(1)(B). The principal question, in our judgment, is whether that possibility has been

realized in fact. Have Hasidic Jews been subjected to "ethnic prejudice or cultural bias because of their identity" as Hasidic Jews? The statute does not answer that question as a matter of law, but we know of no reason to believe that the SBA may not review the facts and determine that the answer is yes.

We are aware of the argument that there is a legal bar to such a determination -- that the Hasidim embrace their culture voluntarily, that cultural discrimination against them, if any, does not therefore result from "circumstances over which they have no control"; and that they cannot, for that reason, be "socially disadvantaged" in the sense intended by the statute. See § 2(e)(1)(B). In our opinion, that argument is without merit. The operative definition makes it plain that social disadvantage may result from mere "cultural bias," § 8(a)(5); and cultural differences, the source of "cultural bias," always result, in some sense, from the "voluntary" retention of cultural patterns on both sides.

You have also asked whether it would be possible to conclude that Hasidic Jews are not socially disadvantaged within the meaning of the Act. Again, we think that this is largely a question of fact, committed to the sound discretion of the SBA. We would add only that an administrative determination adverse to the Hasidim could be tested in court in a proper case. At the very least the determination is subject to review for arbitrariness or abuse of discretion. The SBA would have to defend the determination on the ground that it was not arbitrary or abusive, given the statutory purpose and the treatment accorded other cultural minorities under the Act. Moreover, although the law is unsettled here, the constitutional sensitivity of differential treatment for minority groups is evident. See United Jewish Organizations v. Carey, 430 U.S. 144 (1976). That fact counsels caution and demands an administrative determination firmly rooted in fact, whatever the scope of the authority conferred by the statute.

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cc: Joe Onek, Esq.  
Deputy Counsel to  
the President