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Dear Mr. Lyons:

Vegas Heavy Haul Inc. d/b/a/ Big Valley Towing appeals the Nevada Department of Transportation's ("NDOT") denial for certification as a Disadvantaged Business Enterprise ("DBE"), under criteria set forth at 49 C.F.R. Part 26 (the Regulations). NDOT denied certification of Vegas Heavy Haul Inc. for failure to meet the control requirements of 49 C.F.R. § 26.71. The U.S. Department of Transportation, Departmental Office of Civil Rights ("USDOT" or "Department"), has carefully reviewed the full administrative record and concludes that substantial evidence supports NDOT's decision. We therefore affirm the denial of certification.

I. BACKGROUND

Vegas Heavy Haul is a towing and hauling firm, formed on May 24, 2006, by Debbie Collins and her late husband Daniel Collins. At the time of business formation, Daniel Collins had a 95% ownership interest in the business and Debbie Collins has a 5% ownership interest. From May 2006 until April 2011, Ms. Collins primarily handled administrative and bookkeeping matters for the company. Starting in 2009, Ms. Collins took on some operational matters, as her work schedule would allow, after Daniel Collins became unable to do physical work associated with loading and unloading vehicles.¹ In August 2011, Mr. Collins passed away and Ms. Collins

¹ The record indicates Ms. Collins had outside employment at the time. She was a Patient Accounts Manager for the County of Riverside Community Health Agency. Around the time of business formation in 2006, she quit her job with Riverside and moved to Las Vegas to work on building up the business with her husband. However, she began working for Riverside again in September 2009 full-time, after Vegas Heavy Haul hired another employee, until July 2011 when she scaled back working there to part-time 30-hours per week telecommuting from Las Vegas.

inherited his 95% ownership of Vegas Heavy Haul. Ms. Collins, a white female, became the president and sole shareholder of the firm.²

On June 20, 2013, Ms. Collins submitted an application for certification as a DBE to NDOT, one of the certifying agencies in the Nevada Unified Certification Program. Pursuant to the DBE certification process, NDOT performed an on-site review of Vegas Heavy Haul and reviewed documentation provided in the application, including the firm's corporate structure and by-laws. On August 26, 2013, NDOT denied Vegas Heavy Haul's application for DBE certification. Vegas Heavy Haul filed a timely appeal with USDOT on November 27, 2013.

II. DISCUSSION AND DECISION

A. Scope and Standard of Review

Under 49 C.F.R. § 26.86(d), a firm may appeal a denial for DBE certification to the USDOT. USDOT does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. 49 C.F.R. § 26.89(e). The Department must affirm the initial decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." 49 C.F.R. § 26.89(f)(1). When reviewing the administrative record provided by the recipient, the Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed. 49 C.F.R. § 26.89(f)(6).

B. Discussion

In order to become certified under the DBE program, an applicant has the burden of demonstrating to the certifying agency that the disadvantaged owner exerts the requisite level of ownership and control of the business. The DBE program regulations require the disadvantaged owner of the firm "possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations." See 49 C.F.R. § 26.71(d).

Under the control provisions of the regulations, in order to determine if the disadvantaged owner exerts the requisite level of control, the examining agency must consider a number of factors. In a corporation, the disadvantaged owner must control the board of directors. 49 C.F.R. § 26.71(d)(2). The regulations mandate that:

A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices . . . that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decisions of the firm.

² After her husband's death, Ms. Collins ceased working for Riverside and solely managed/operated Vegas Heavy Haul.

49 C.F.R. § 26.71(c).

NDOT found that Ms. Collins was the disadvantaged owner of the company and satisfied the ownership requirement for certification as a DBE. However, NDOT also determined Ms. Collins did not meet the standards for control set forth in 49 C.F.R. § 26.71. On appeal, Vegas Heavy Haul contends there are no actual restrictions in the firm's corporate documents which prevent Ms. Collins from making any business decisions. The arguments presented in the November 27, 2013 appeal letter focused on the ability of Ms. Collins to protect her control of the firm through by-laws which prohibited the Board of Directors from removing her, appointing new Directors, or selling stock in the company without her consent. In addition, Vegas Heavy Haul submitted new documentation not available to NDOT during the initial certification application process, which attempted to cure the defective elements in the firm's corporate structure. These actions included amending the firm's by-laws, as well as the removal and subsequent termination of both Brad Stangel and Matt Beatty from the Board of Directors.

Vegas Heavy Haul contests NDOT's conclusion regarding Ms. Collins's lack of control over the three member Board of Directors. While both sides agree that Ms. Collins is the sole owner of the firm, NDOT found the other two Board members wielded significant control over the firm pursuant to the by-laws placing the vast majority of power and authority in the Board of Directors. Pursuant to the regulations, NDOT must consider whether any formal or informal restrictions limit the customary discretion or vote of the disadvantaged owner. In the instant case, NDOT reasonably concluded, based upon their review of the application, that Ms. Collins was restricted from taking actions or making decisions on behalf of the company without at least one of the other non-socially or economically disadvantaged directors cooperating. The inability of Ms. Collins to legally act independently and exert control over the firm is dispositive in this case.

Vegas Heavy Haul cites several examples, in its appeal letter, of steps taken by Ms. Collins to demonstrate control over the firm, including amending the by-laws and removing both of the other non-socially or economically disadvantaged individuals from the Board of Directors. In addition to removing the other two directors, these individuals were subsequently terminated. However, these steps were taken after NDOT rendered a decision on Vegas Heavy Haul's application for DBE certification. Pursuant to the procedural rules, the Department must evaluate the appeal based on the facts and circumstances that existed at the time NDOT processed the application. Departmental regulations limit our review of the appeal to the status and circumstances of Vegas Heavy Haul as they existed on the date of the decision by NDOT.

While NDOT's principal basis for denial of Vegas Heavy Haul's application was the corporation's by-laws, NDOT also determined Ms. Collins lacked the industry experience necessary to meet the standards for control. The Departmental Regulations requires that "socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience, directly related to the type of business in which the firm is engaged and the firm's operations." 49 C.F.R. § 26.71(g). While not requiring the owner to have experience and expertise in every area of the firm's operations, the requirement is in place to ensure the socially and economically disadvantaged owner has the ability to "intelligently and critically evaluate information presented . . . and make independent decisions

concerning the firm's daily operations, management, and policymaking. *Id.* The crux of this requirement is to exclude experience and expertise which is "limited to office management, administration, or bookkeeping functions unrelated to the principal business activities" from being considered to demonstrate sufficient control of the firm. *Id.* Therefore, expertise or experience limited to administrative or clerical duties is insufficient to satisfy the control requirements for DBE certification.

Here, NDOT determined, from an on-site visit and review of Vegas Heavy Haul's application, that Ms. Collins's "day to day activities involved administrative and office management," none of which met the standards for control laid out in 49 C.F.R. Part 26.71. NDOT's denial letter cites the history of how Ms. Collins came to be the owner of Vegas Heavy Haul as a result of the unexpected death of her husband, before which she had a 5% ownership interest in the firm and her involvement was primarily bookkeeping. Additionally, the resume Ms. Collins provided indicated her work experience was primarily in the healthcare industry. While Vegas Heavy Haul provided multiple declaration documents from Ms. Collins, Mr. Beatty and Mr. Stangel, attesting to Ms. Collins's experience running the firm as sole owner in the wake of her husband's death, and the lack of experience Mr. Beatty and Mr. Stangel had in the towing industry, this evidence was not provided to NDOT during their review of Vegas Heavy Haul's application. The burden for demonstrating control, by a preponderance of the evidence, lies with the firm seeking certification. 49 CFR § 26.62(b). The certifying agency must consider all the facts in the record, viewed as a whole, as the facts and circumstances existed at the time it processed the application. Consequently, the appellant's claims are insufficient to demonstrate that NDOT's decision was unsupported by substantial evidence. The additional evidence Vegas Heavy Haul provided as part of its appeal was unavailable to NDOT during their processing of the application and could have been provided to supplement the original documentation of Ms. Collins's control of the firm.

III. CONCLUSION

The evidence in the administrative record supports the conclusion that Vegas Heavy Haul did not meet the criteria for DBE certification at the time NDOT processed their application. Denial of certification was not inconsistent with the substantive provisions of Part 26 governing control. We affirm. This decision is administratively final and not subject to petitions for reconsideration. **The firm may reapply for DBE certification as the applicable waiting period has expired.**

Sincerely,

Sheryl G. Williams
External Civil Rights Programs Division
Departmental Office of Civil Rights

Cc: Nevada Department of Transportation