

April 27, 2016

Reference Number: 16-0020

Mr. Scott F. Brown
Niebler, Pyzyk, Roth & Carrig LLP
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P.O. Box 444
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Dear Mr. Brown:

JRT Top Notch, LLC (JRT) appeals the Wisconsin Unified Certification Program's (WUCP's) denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth at 49 C.F.R. Part 26 (the Regulation). After reviewing the full administrative record (Record), we conclude that substantial evidence supports WUCP's denial. We affirm the ineligibility determination under §26.89(f)(1).

In the Denial Letter dated July 13, 2015, WUCP cites the firm's failure to meet the Social Disadvantage requirements of Appendix E and §26.67(d).¹ The applicant does not demonstrate that it satisfies the third element of Social Disadvantage, adverse impact on entry into or advancement in the business world. We therefore affirm WUCP's denial under §26.89(f)(1).

Applicable Regulation Provisions

§26.61(b) provides:

“The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership *or individual disadvantage*, business size, ownership, and control.” (Emphasis added.)

§26.67(a) provides:

¹ The Denial Letter does not cite §26.67(d), which states that an individual may be deemed socially and economically disadvantaged on a case-by-case basis and specifies that, “...*In making these determinations, use the guidance found in Appendix E of this part.*” (Emphasis added.) The Denial Letter, however, makes clear that the rationale for denial is that the applicant fails to demonstrate that it meets the Social Disadvantage requirements of Appendix E of the Regulation. See generally §26.61(b) (applicant's burden of proof applies to each element of eligibility).

“Presumption of disadvantage. (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.”

§26.67(d) provides:

“Individual determinations of social and economic disadvantage. Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$1.32 million shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.”

“Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage
Social Disadvantage

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

- (1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.
- (2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.
- (3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations... ”

§26.89(f)(1) provides:

“The Department affirms [the certifier’s] decision unless it determines, based on the entire administrative record, that [the] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.”

§26.89(g) provides:

“All decisions under this section are administratively final, and are not subject to petitions for reconsideration.”

Operative Facts

JRT performs large capital roof replacements (Uniform Certification Application (UCA) dated December 11, 2014 at 2). The firm may perform “tear offs” or re-roofs and new construction on all types of roof systems. *Id.* Joshua Thull, the firm’s 100% owner, is a Caucasian male. *Id.* at 3. JRT is a subsidiary of JT Companies, LLC, a holding company (On-Site Review Report (OSRR) dated March 5, 2015 at 1; Addendum to the DBE Application, Exhibit A).

In the Appeal Letter dated October 9, 2015, it indicates that Mr. Thull was “socially isolated throughout childhood” due to his being forced to work for his father at a young age in order to keep the family roofing business afloat. It further indicates that Mr. Thull’s alleged social disadvantage “stems from circumstances completely out of his control.” Mr. Thull’s distinguishing feature is that he endured a traumatic childhood, resulting in certain emotional/social deficits that hinder his ability to succeed in business. *Id.* at 2. Mr. Thull claims

that his personal, traumatic childhood experiences, chronicled in his Narrative Statement, have impaired his entry into or advancement within the business world. Id.

In his Narrative Statement submitted with his DBE Application dated December 11, 2014, Mr. Thull describes the objective and distinguishing feature related to his Social Disadvantage, his traumatic childhood. He states:

“I for one really did not have a perfect family. At a young age of 12 years old I was pretty well forced to work at my father’s past company. He was shorthanded and at a very struggling time. He did not have the money to bring in the other people which is why I was forced to work around the warehouse pulling materials, putting away materials, pulling equipment, putting away equipment, and being the one that maintains the grounds whether it be summer or winter by trimming trees, bushes, cutting lawns, picking weeds, shoveling snow, using the snow blower, or slating the entrances. I never really had the time of day to hang out with friends or make friends for that matter. Friends would always be out playing having fun and wondering why I was never around. Before long my friends just stopped talking to me. I feel my childhood was very minimal as to what others had. When my father got home I would always hear my parents arguing loudly. I hated it with a passion. Then the day came where they sat me along with my brother and sister to break the news that they were getting divorced. It shattered me because I just started to see what love was all about rather than not knowing at a young age to where it wouldn’t have taken such a toll on me.”

Mr. Thull does not discuss the second element of social disadvantage, “personal experiences of substantial and chronic social disadvantage in American society,” in his Narrative Statement.

Concerning the third element of social disadvantage, “negative impact on entry into or advancement in the business world because of the disadvantage,” Mr. Thull focuses on the subparts of the element related to education, employment and business history.

i. Education and Employment

Mr. Thull states, "I was never encouraged to take business classes or even go to college. In fact, it was just the opposite. Everyone said it would be a waste of time to take business classes. My education came to a halt when my father needed my help again full time due to his company at the time of a downslide. I was lucky enough to finish my Associate of Science and Arts degree but not lucky enough to go on to achieve a Bachelor’s degree in Business Management because that is when I had to turn my head and work again back at my father’s company (Narrative Statement at 1). Mr. Thull desired to become an Arborist but did not pursue this career because he went back to work for his father’s company. Id. at 1-2.

Mr. Thull’s résumé shows the following positions: Warehouse Attendant for JT Roofing, Inc. from 1999-2002; Roof Work Laborer for JT Roofing Inc. from 2002 to 2004; Crew Leader for JT Roofing Inc. from 2004 to 2006; Crew Management Leader, Supervisor Repair Department and Sales for JT Roofing Inc. from 2006 to 2009; Laborer for Good Will in 2007 and 2008 (Winter Season); and Owner for JT Rams LLC from 2011 to the

present. Mr. Thull completed his Associates of Arts and Science Degree and holds a Business Certificate from the University of Wisconsin-Washington County. Id. His résumé also indicates that he has an Apprenticeship Certificate and is certified as a Journeyman/Roofer & Waterproofer from the Associated Builders & Contractors of Wisconsin.

ii. Business History

Mr. Thull claims that he had difficulty obtaining credit when starting his business (Narrative Statement at 2). However, he has obtained credit lines from some vendors. Id. at 3. He indicates, “Many vendors such as Allied, United Productions Corporation, Roofer’s Mart, Fastenal, Campbellsport Building Supply, Dawes Rental, and ABC Supply will either not grant me credit due to my newness and my father’s past roofing company. The most I have ever received for a credit was through my home town Menards for \$8,000 based off of my personal identity and not the company itself.” Mr. Thull concedes that he has received a REDACTED credit line from Roofer’s Mart, a REDACTED credit line from Fastenal, and a credit line from Milwaukee Insulation.” Id. at 3- 4.

With regard to bonding, Mr. Thull in his narrative states, “...I am told that I do not meet their [bonding companies’] standards. I am told this is due to my company being too new and since I haven’t had enough developed in net worth to seek the bigger scale jobs I desire... For whatever reason, not long after, a little light decided to shine down on us where CG Schmidt, a general contractor was reaching out because they were in a bit of a pinch.” Id. at 4. He further states, “...our next stab at getting bonding in June of 2012 had some degree of achievement.” Id.

“I was personally given REDACTED for my bonding that I am grateful to have achieved but unfortunately will not help me out much. Id. For the bigger scale jobs that are over a million dollars of roofing work, I am useless with my REDACTED.” Id. Mr. Thull further states in his Narrative Statement, “In April 2013, I tried again and was successful in getting REDACTED bonding with R&R Insurance which and that is beginning to help bid more than one roof project to keep my company afloat but also bigger scale roof projects for company growth purposes.”

In the Denial Letter, WUCP indicates that Mr. Thull did not meet the criteria for a socially disadvantaged individual focusing on the third element of social disadvantage, “negative impact on entry into or advancement in the business world because of the disadvantage.” WUCP specifies:

“1. The applicant has not submitted any evidence that his claimed social disadvantage had a negative impact on his education. In fact, the applicant does not even make this claim. The applicant does not make any assertions that he has ever been denied equal access to institutions of higher education, has been excluded from social and professional associations or has been denied any educational honors he had rightfully earned.

2. The applicant has not submitted any evidence that his claimed social disadvantage had a negative impact on his employment. In fact, the applicant does not even make this claim. The applicant does not make any assertion that he has ever been denied unequal [sic] treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment. The applicant does not claim to have been on the receiving end of any retaliatory or discriminatory behavior by an employer or labor union. Also the applicant did not claim to have faced any social patterns or pressures, which have channeled him into non-professional or non-business fields.

3. The applicant has not submitted documentation or sufficient evidence that his claimed social disadvantage has had a negative impact on his business history. Although the applicant does claim that his firm has had unequal access to credit, and bonding, he provided no evidence of this other than anecdotes due to the newness of the business.”

Discussion and Decision

An applicant not presumed to be disadvantaged can make an individual showing of social and economic² disadvantage under §26.67(d) and Appendix E to Part 26. The three elements that an applicant must prove for Social Disadvantage under Appendix E are: (A) an objective distinguishing feature contributing to social disadvantage, (B) personal experiences of substantial and chronic disadvantage experienced in American Society, and (C) adverse or negative impact upon entry into business world focusing on education, employment and business history. *Id.* The applicant assumes the burden of proving disadvantage by a preponderance of the evidence. *See* §26.61(b).

Social Disadvantage

No Negative Impact on Entry or Advancement in the Business World

Mr. Thull attempts to address the third element of Social Disadvantage, negative impact on entry into or advancement in the business world due to disadvantage. He attempts to elaborate on the subparts of the third element, claiming to have suffered adverse impact on his education, employment, and business history.

i. Education

The record shows little evidence of Mr. Thull experiencing adversity or difficulty in obtaining higher education. Mr. Thull concedes that he chose to go back to work for his father’s company, forgoing his aspirations of becoming an Arborist. There is no evidence of coercion. Mr. Thull implies that he would have preferred to obtain a different degree, but he makes no real case that

² In light of our decision, we need not examine the economic disadvantage component of Appendix E. Similarly, although we focus, like Mr. Thull on appeal, on the third element of social disadvantage, we express no opinion on whether Mr. Thull satisfies the other two elements (objective distinguishing feature and personal experiences of substantial and chronic social disadvantage). The applicant must demonstrate that it meets all of the eligibility requirements. A failure to satisfy one of the several elements of social and economic disadvantage renders the firm ineligible under §§26.61(b) and 26.67(d).

social disadvantage prevented his making different choices. Mr. Thull obtained an Associate's degree from the University of Wisconsin. The Narrative merely states that Mr. Thull's family did not encourage him to seek higher education and that they considered it a "waste of time to take business classes." The Narrative Statement at best indicates that Mr. Thull and his family placed different values on different educational paths—not an uncommon phenomenon. We find scant evidence that Mr. Thull's claimed social disadvantage materially affected his educational prospects. In particular, we find no evidence of "unequal access to education" or "exclusion from social and professional association with students or teachers," within the meaning of Appendix E.

ii. Employment

Mr. Thull's résumé shows a continuous work history. It does not appear from the record that Mr. Thull's difficult childhood has hindered or adversely affected his employment. The facts indicate that Mr. Thull started working for his father at a very young age, and progressed to Crew Management Leader for his father's former company. Mr. Thull now runs his own, evidently successful roofing business. We find no evidence that social disadvantage impaired Mr. Thull's employment prospects. Although there is some evidence of social patterns or pressures that may have channeled Mr. Thull into non-professional or non-business fields, there is no evidence of "unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; [or of] retaliatory or discriminatory behavior by an employer or labor union."

iii. Business History

Mr. Thull claims to have encountered difficulty in obtaining credit and bonding, but he concedes that he ultimately secured both. It is not unusual for start-up businesses to experience some difficulty in obtaining credit and bonding. The Appendix E question is whether the applicant experienced additional difficulty, relative to nondisadvantaged businesses, because of social disadvantage. There is no credible evidence that Mr. Thull's difficulties stem from any form of social disadvantage, as opposed to operating a new business with a limited track record. Specifically, the record does not reflect "unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, [or] exclusion from business or professional organizations."

In summary, the applicant failed to prove its case for social disadvantage under §26.67(d) and Appendix E. Substantial evidence supports WUCP's ineligibility determination. We affirm.

Conclusion

We affirm WUCP's decision as supported by substantial evidence and not inconsistent with the Regulation's substantive and procedural provisions relating to certification.

Thank you for your continued cooperation. This decision is administratively final.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: JRT Top Notch Roofs, LLC