

August 26, 2016

Reference Number: 16-0095

Mr. Frank J. Hetem
Full Circle Supply Company, LLC
REDACTED
Linden, New Jersey, 07036

RE: DBE Certification Denial of Full Circle Supply Company, LLC

Dear Mr. Hetem:

Full Circle Supply Company, LLC (FCSC) appeals to the U.S. Department of Transportation, Departmental Office of Civil Rights (the Department), the determination by the Port Authority of New York and New Jersey (PANYNJ), dated September 29, 2015, that FCSC is ineligible for Disadvantaged Business Enterprise (DBE) certification under criteria set forth by DBE Program Regulation, 49 C.F.R. Part 26.

The Department requested the administrative record and PANYNJ's response to the issues raised in the firm's appeal dated October 4, 2015. We received the administrative record on January 28, 2016, and reviewed this along with the appeal. After careful review of the administrative record, we affirm PANYNJ's decision as supported by substantial evidence and consistent with substantive or procedural provisions relating to DBE certification for the following reasons. *See* 49 C.F.R. §§26.89(f)(1) & (3).¹

Standard of Review

Under 49 C.F.R. §26.86(d), a firm may appeal a denial of DBE certification to the Department. The Department does not conduct a de novo review or 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 a 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."

¹ §26.89(f)(1) states: "The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

§26.89(f)(3) states: "The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case."

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).

Discussion and Decision

I. Section §26.61(b) of the Regulation requires that applicant firms satisfy each eligibility requirement.² A firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

A firm may be considered a DBE if it is "a for-profit small business concern (1) that is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it." See §26.5.

Under the Regulation, an applicant may be rebuttably presumed to be socially and economically disadvantaged. This option is limited to women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, "or other minorities found to be disadvantaged by the Small Business Administration. (§§26.5 and 26.67(a)(1)).

Persons who are not presumed to be socially and economically disadvantaged may make an individual showing of social and economic disadvantage under §26.67(d) and the guidelines of Appendix E to Part 26. The applicant bears the burden of proving disadvantage by a preponderance of the evidence.³ Section §26.67(d) further states that recipients must require applicants to provide sufficient information to permit determinations under the guidance of Appendix E.⁴ The guidance states that evidence of individual social disadvantage must include the following elements:

² §26.61(b) states that "the firm seeking certification has the burden of demonstrating to [the recipient], 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." As explained in the Department's decision, CUCP appropriately applied the higher burden of proof standard found in §26.71(l).

³ §26.67(d) states: "*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."

⁴ Regulation §26.67(d) and Appendix E require a case-by-case showing of both social and economic disadvantage; and a failure to demonstrate either element renders an applicant ineligible.

(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.

PANYNJ denied DBE certification after concluding that your race/ethnicity (white) did not meet the definition of a “socially and economically disadvantaged” individual within the meaning of §26.5 and §26.67. In assessing whether you made an individual showing under §26.67(d), the agency reviewed your education, employment, and business history. PANYNJ noted that there was no education information included in your résumé and insufficient evidence elsewhere in the record to show that your education has impeded your entry or advancement in the business world. As PANYNJ indicated, you had steady employment from 1979 to the present—employed by Hetem Brothers (June 1979 to September 2005), FCSC (October 1996 to the present), and National Shipping of America (2009 to the present). In regard to business history, PANYNJ

cited FCSC's operations since 1996 and earning gross receipts of \$505,022 in 2012; \$521,446 in 2013; and \$564,494 in 2014. (FCSC Uniform Certification Application, p. 6).⁵

You make four central points in your rebuttal letter: (1) you did not include educational information in your résumé because there was no continuation of education after high school; (2) income was not generated from Hetem Brothers and National Shipping of America; (3) FCSC did not exceed the statutory gross receipts cap of \$22.41 million; and you, as its owner, do not exceed the \$1.32 million personal net worth threshold; and (4) anyone who is not presumed to be disadvantaged can make an individual showing of social and economic disadvantage and participate in the program on the same basis as any other disadvantaged person pursuant to §26.67 of the Regulation.

We agree with PANYNJ's conclusion that FCSC is not eligible as a DBE. You presented no evidence of an objective distinguishing feature nor did you describe any personal experiences of substantial and chronic social disadvantage. You also presented no evidence of negative impact on entry into or advancement in the business world because of the disadvantage. (*See* §26.67 and Appendix E above). For example, you presented no evidence that you were denied equal access to institutes of higher learning, excluded from social and professional association with students or teachers, experienced unequal treatment in hiring, promotions, and other aspects of professional advances; or experienced retaliatory or discriminatory behavior by an employer or labor union. It is this type of experiential history (pursuant to the Appendix E elements listed above) that is not contained in the record. In summary, the record contains insufficient proof to support your claim of being socially disadvantaged.

Substantial evidence supports PANYNJ's determination that FCS is ineligible for DBE certification. Therefore, we affirm the denial under §26.89(f)(1). This decision is administratively final. The firm may reapply for DBE certification once the applicable waiting period has elapsed, which is one year from PANYNJ's September 29, 2015 decision.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
External Civil Rights Program Division

cc: PANYNJ

⁵ FCSC's work history speaks positively to your own abilities and advancement in the business world, which is a factor to be assessed under Appendix E.