

January 30, 2017

Reference No: 16-0125

Mr. John C. Nitta, President
High Ranch Nursery, Inc.
REDACTED
P.O. Box 1410
Loomis, CA 95650

Re: High Ranch Nursery, Inc. Appeal of DBE Certification Denial

Dear Mr. Nitta:

This letter responds to the May 26, 2016 appeal by High Ranch Nursery, Inc. (HRN) of the California Unified Certification Program's (CUCP)¹ denial of the firm's application for certification as a Disadvantaged Business Enterprise (DBE) under criteria set forth in the DBE Program Regulation, 49 C.F.R. Part 26. HRN applied for DBE certification in April 2016. CUCP denied HRN's application for DBE certification on April 29, 2016, determining that your personal net worth exceeded **REDACTED**, as defined by §26.67.

Scope and Standard of Review

The U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) 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. §26.89(e). The Department must affirm the 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." §26.89(f)(1). When reviewing the administrative record provided by the certifying agency, the Department's decision is based on the status and circumstances of the firm as of the date of the decision appealed. §26.89(f)(6). *See also* §26.73(b)(1) (certifier's decision likewise based on "present circumstances" as described at time of decision). In summary, the Department must affirm the certifier's decision if substantial evidence supports it.

The U.S. Department of Transportation, Departmental Office of Civil Rights (the Department) has carefully reviewed the full administrative record and concludes that substantial record evidence supports CUCP's decision that the firm is ineligible for certification as a DBE based on the record evidence before CUCP. Upon reviewing the record as a whole, the Department affirms CUCP's decision.

¹ The certifier in this case was the California Department of Transportation, a member of the CUCP.

Discussion

HRN's application for DBE certification included your personal net worth statement listing your assets and liabilities as of December 31, 2015. You indicated a total net worth of **REDACTED**. CUCP added **REDACTED** to this figure, representing your one-half share of a **REDACTED** loan to the firm reflected on Schedule L of HRN's 2015 corporate tax return. CUCP then concluded that your personal net worth was **REDACTED**.

In your appeal, you allege that you and your wife, Sarah Nitta (HGN's 8.5 percent owner), made loans to the firm since it was incorporated in 1993. You stated that you anticipate never being reimbursed for the amounts loaned, and you argue these amounts should be discounted as personal assets on your personal net worth statement. You allege that **REDACTED** of the **REDACTED** loan is principal and **REDACTED** is deferred interest, which is an unpaid accounting obligation.

A for-profit small business is eligible for DBE certification if it meets the following criteria: (1) The firm 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." §26.5.

The certifying agency, CUCP, must rebuttably presume that citizens of the United States (or lawful 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 Small Business Administration ("SBA"), are socially and economically disadvantaged. §26.67(a)(1). 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 certification as well.² §26.67(d). The applicant firm has the burden of demonstrating to the certifying agency, by a preponderance of the evidence, that the individual who owns and controls the firm is socially and economically disadvantaged. An individual whose personal net worth exceeds **REDACTED** shall not be deemed to be economically disadvantaged. §26.67(a)(2)(i). The definition of personal net worth is found in §26.65; and §26.67 defines how recipients are to determine this amount:

§26.65 states: "The net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse."

§26.67(a)(iii) states: "In determining an individual's net worth, you must observe the following requirements: (A) Exclude an individual's ownership interest in the

²For these situations, the certifying agency must make a case-by-case determination of whether the individual, whose ownership and control are relied upon for DBE certification, is socially and economically disadvantaged.

applicant firm; (B) Exclude the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). The equity is the market value of the residence less any mortgages and home equity loan balances. Recipients must ensure that home equity loan balances are included in the equity calculation and not as a separate liability on the individual's personal net worth form. Exclusions for net worth purposes are not exclusions for asset valuation or access to capital and credit purposes. (C) Do not use a contingent liability to reduce an individual's net worth. (D) With respect to assets held in vested pension plans, Individual Retirement Accounts, 401(K) accounts, or other retirement savings or investment programs in which the assets cannot be distributed to the individual at the present time without significant adverse tax or interest consequences, include only the present value of such assets, less the tax and interest penalties that would accrue if the asset were distributed at the present time.”

The loan(s) you made to HRN is/are counted on the firm's tax return in the “loans from shareholders” entry and is appropriately included by CUCP on your personal net worth statement. We therefore affirm CUCP's decision to deny HRN certification as a DBE under §26.89(f)(1)³ This decision is administratively final and is not subject to petitions for reconsideration.

Sincerely,

Marc D. Pentino
Lead Equal Opportunity Specialist
Disadvantaged Business Enterprise Program Division
Departmental Office of Civil Rights

cc: CUCP

³The Department must affirm the 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.” See §26.89(f)(1). We note that CUCP did not hold a hearing as required under §26.67(b)(2) to rebut the presumption of your economic disadvantage. However, the Department is not required to reverse the recipient's decision if this procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity to present its case. Here, there is no dispute of the existence of the shareholder loans to HRN.