July 24, 2017

Reference Number: 17-0028

Mr. Jeff P.H. Cazeau, Esq.
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121 Alhambra Plaza, 10th Floor
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Dear Mr. Cazeau:

Tinsley-Bridgeman, LLC (TBLLC) appeals the Kentucky Transportation Cabinet's (KYTC's) denial of its interstate application for certification as an Airport Concession Disadvantaged Business Enterprise (ACDBE) under criteria set forth at 49 C.F.R. parts 23 and 26 (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) concludes that substantial evidence supports KYTC's decision, which we affirm under §26.89(f)(1).[1]

Specifically, the record supports that KYTC adequately followed the interstate rules set forth under §26.85 and that KYTC rebutted the §26.67(a)(1) presumption for three of the firm's owners, rendering the firm ineligible for certification under §26.73(e)(2).

I. Procedural History

KYTC denied TBLLC's application for interstate certification on November 19, 2015. TBLLC appealed the denial to the Department on December 7, 2015. The Department, on July 5, 2016, remanded the case to KYTC to "reconsider its position and determine eligibility while applying the proper interstate certification procedures." *See* 16-0048, *Tinsley-Bridgeman, LLC* (July 6, 2016).[2] On September 15, 2016, KYTC issued a written Notice of Intent to Deny (NOI)

[1] §26.89(f)(1) provides: "The Department affirms [a certifier's] decision unless [the Department] determines, based on the entire administrative record, that [the certifier's] decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."

[2] Specifically, the Department stated, "[t]he certifier incorrectly considered the firm's interstate certification application as an initial application. As a result, KYTC failed to state §26.85(d)(2) good cause reasons for denial, and ultimately failed to provide the firm an opportunity to respond and substantiate its burden of proof via a hearing. We therefore remand and direct KYTC to reconsider its position and determine eligibility while applying the proper interstate certification procedures." *Tinsley-Bridgeman, LLC* at 1. (Citations omitted.) The Department's remand further instructed KYTC to:

> [T]reat the firm's application as one of interstate certification and make a decision within 60 days of this letter. If KYTC should determine that the firm is eligible for interstate certification, then KYTC should certify Tinsley forthwith. Should KYTC determine that it has a good cause reason listed in §26.85(d)(4) for why the firm is ineligible in Kentucky, then the certifier must give proper

TBLLC's application, which set forth its objections to the firm's eligibility. TBLLC responded to the NOI on October 12, 2016. KYTC denied TBLLC's interstate application for the second time on November 21, 2016. TBLLC appealed the decision to the Department on December 9, 2016. KYTC filed a response to TBLLC's appeal to the Department on January 11, 2017.

II. Background

TBLLC is certified as an ACDBE in its home state of Florida. TBLLC is a subsidiary of two parent companies: Tinsley Family Concessions (TFC) (51% ownership) and FACB, LLC (49% ownership). FACB is 100% owned by a nondisadvantaged individual.[3] TFC is 100% owned by four presumed disadvantaged members of the Tinsley family.[4] Each family member's ownership interest in TFC and TBLLC is as follows:

Family Member	Status	TFC	TBLLC
George William Tinsley, Sr. (Mr. Tinsley)	Disadvantaged	35%	17.85%
Seretha Tinsley (Ms. Tinsley)	Disadvantaged	35%	17.85%
George William Tinsley, Jr.	Disadvantaged	25%	12.75%
Penny Tinsley	Disadvantaged	5%	2.55%
Total Ownership Percentage		100%	51.00%

The NOI objects to TBLLC's interstate certification application for essentially the same reasons stated in the 2015 denial letter. The NOI does not explicitly cite one of the 'good cause' grounds for objecting to an interstate certification application. *See* §26.85(d)(2).[5] However, the NOI

> notice and opportunity to respond in accordance with §§26.85(d)(2) and (4). KYTC must then follow the remaining procedures specified in §26.85 (e.g., knowledgeable decision maker, decision within 30 days of the later of written response or meeting with decision maker).

Id. at 12.

[3] FACB's interest in TBLLC does not count toward TBLLC's ACDBE eligibility because a nondisadvantaged individual owns FACB. *See generally* §26.73(e).

[4] The Appeal characterizes TFC as a holding company. *See* TBLLC Appeal at 1. However, TFC is a fully operating DBE/ACDBE firm and is certified in several states. TFC performs work under several USDOT assisted contracts.

[5] The five "good cause" reasons specified in §26.85(d)(2) are:

> (i)Evidence that State A's certification was obtained by fraud; (ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria; (iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part; (iv) The State law of State B requires a result different from that of the State law of State A; (v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section. (Emphasis added.)

presents three substantive reasons for the proposed denial, from which KYTC's §26.85(d)(2) grounds can be inferred.

First, KYTC found that Ms. Tinsley has a PNW in excess of the **REDACTED** cap under §26.67(a)(2) and is therefore not economically disadvantaged. Specifically, KYTC took issue with a liability entry described as a 'shareholder loan' from TFC to Ms. Tinsley, which is the bulk of her total liabilities stated on the PNW statement.[6] The NOI states, in part, that:

> [T]he loans to shareholders were to Mrs. Tinsley herself. According to Mrs. Tinsley, the loan proceeds were used to pay personal expenses, including college expenses for the Tinsley children. No proof of repayment of the loans was provided to [KYTC]. No promissory notes stating a requirement for repayment was provided; therefore, the transaction must be treated as a distribution to the shareholders, rather than a loan.

NOI at 3.

Second, KYTC found that Mr. and Ms. Tinsley and their son George Tinsley, Jr. demonstrated an ability to accumulate substantial wealth (AASW) under §26.67(b)(1)(ii)(A). KYTC found that Mr. and Ms. Tinsley each had a 3-year average adjusted gross income in excess of **REDACTED** and that Mr. George Tinsley, Jr. had an average adjusted gross income in excess of **REDACTED**. *See* NOI at 4; *See also* §26.67(b)(1)(ii)(A)(1) (owner's average AGI over preceding three years exceeds **REDACTED.** KYTC notes that the "annual income reflected on the IRS forms submitted is not unusual and is likely to recur in the future." NOI at 4. *See* §26.67(b)(1)(ii)(A)(2). KYTC also took issue with the fact that Tinsley family members owned or leased several luxury vehicles. *See* NOI *at* 4-5. Accordingly, the NOI found that Mr. and Ms. Tinsley and Mr. George Tinsley, Jr. are not economically disadvantaged based on AASW grounds.

Third, based on KYTC's conclusions that Mr. and Ms. Tinsley and Mr. George Tinsley, Jr. are not economically disadvantaged,[7] the NOI found that TBLLC does not meet the 51% ownership requirement §26.73(e)(2) Example 2 (DBE may be 51% owned by a parent firm if the parent firm is 100% owned and controlled by disadvantaged individuals). *See* NOI at 6.[8]

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[6] The home state file contains a PNW statement for Ms. Tinsley, dated June 30, 2014, which does not include the shareholder loan liability. Ms. Tinsley submitted a second PNW statement, dated May 31, 2015, with the firm's 2015 interstate certification application for certification in Kentucky. The May 31, 2015 statement lists the loan liability that is at issue in this case.

The total fair market value of Ms. Tinsley's interest in the Tinsley family's other businesses may be undervalued on Ms. Tinsley's 2015 PNW statement. The total reported value of her ownership in TFC on the 2014 statement is **REDACTED** while the 2015 value is **REDACTED**. KYTC did not raise the discrepancy as an issue in this case.

[7] KYTC does not dispute Penny Tinsley's social and economic disadvantaged status.

[8] The NOI's §26.73(e) reasoning is not well articulated, but it can be reasonably inferred, based on the NOI's economic disadvantage analysis, that KYTC argues that TBLLC does not meet the requirements of §26.73(e) Example 2 based on evidence that Mr. and Ms. Tinsley and Mr. George Tinsley, Jr. are not economically disadvantaged.

TBLLC responded in writing to the NOI's objections. The Response stated that TBLLC "will not be responding in writing or requesting a hearing as provided under 49 CFR §26.85(d)(4)(ii)." TBLLC Response (October 12, 2016) at 1. Nevertheless, the Response makes procedural and substantive arguments that contest the merits of each finding within the NOI. *See generally* TBLLC Response at 2-4.[9] TBLLC sent another letter to KYTC on November 2, 2016, which demanded that KYTC issue a final decision so that the firm could file an appeal to the Department. *See* TBLLC Follow-up to October Response (November 2, 2016).

KYTC formally denied TBLLC's interstate application on November 21, 2016. KYTC Denial Letter. The Denial Letter states that KYTC's good cause reason for denial was §26.85(d)(2)(ii) (new information, not available to TBLLC's home state at the time of its certification, revealing that TBLLC does not meet all eligibility criteria). The Denial Letter's substantive grounds for ineligibility are mainly the same as those stated within the NOI, except that the Denial Letter's AASW ground does not take issue with the Tinsleys' ownership or leasing of luxury cars. *See* Denial Letter at 4.

III. Authority

§23.31(a) provides in pertinent part:

> "As a recipient, you must use, except as provided in this subpart, the procedures and standards of part 26, §§26.61-91 for certification of ACDBEs to participate in your concessions program. Your ACDBE program must incorporate the use of these standards and procedures and must provide that certification decisions for ACDBEs will be made by the Unified Certification Program (UCP) in your state (see part 26, §26.81)."

§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."

§26.61(e) provides:

> "You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole."

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[9] Tinsley's Response states that the argument "is provided solely for the purposes of ensuring the following information is in the record for appeal. It is not to be construed as a written response under 49 C.F.R. §26.85(d)(4)(ii)." TBLLC Response at fn.2. The appellant cites no authority for disregarding the substantive arguments and facts that TBLLC presented to KYTC, which are in fact in responsive to the NOI. The Department considers the Response to be a §26.85(d)(4)(ii) response. The information contained is in the record on appeal.

§26.67(a) provides in pertinent part:

> "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.
>
> *(2)(i) You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed $1.32 million.*
>
> (ii) You must require each individual who makes this certification to support it with a signed, notarized statement of personal net worth, with appropriate supporting documentation. To meet this requirement, you must use the DOT personal net worth form provided in appendix G to this part without change or revision. Where necessary to accurately determine an individual's personal net worth, you may, on a case-by-case basis, require additional financial information from the owner of an applicant firm (e.g., information concerning the assets of the owner's spouse, where needed to clarify whether assets have been transferred to the spouse or when the owner's spouse is involved in the operation of the company). Requests for additional information shall not be unduly burdensome or intrusive.
>
> (iii) In determining an individual's net worth, you must observe the following requirements:
>
> (A) Exclude an individual's ownership interest in the 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."

(Emphasis added.)

§26.67(b) provides:

"(1) An individual's presumption of economic disadvantage may be rebutted in two ways.

(i) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds **REDACTED**, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

Example to paragraph (b)(1)(i): An individual with very high assets and significant liabilities may, in accounting terms, have a PNW of less than $1.32 million. However, the person's assets collectively (e.g., high income level, a very expensive house, a yacht, extensive real or personal property holdings) may lead a reasonable person to conclude that he or she is not economically disadvantaged. The recipient may rebut the individual's presumption of economic disadvantage under these circumstances, as provided in this section, even though the individual's PNW is less than $1.32 million.

(ii)(A) If the statement of personal net worth and supporting documentation that an individual submits under paragraph (a)(2) of this section demonstrates that the individual is able to accumulate substantial wealth, the individual's presumption of economic disadvantage is rebutted. In making this determination, as a certifying agency, you may consider factors that include, but are not limited to, the following:

(*1*) Whether the average adjusted gross income of the owner over the most recent three year period exceeds **REDACTED**;

(*2*) Whether the income was unusual and not likely to occur in the future;

(*3*) Whether the earnings were offset by losses;

(*4*) Whether the income was reinvested in the firm or used to pay taxes arising in the normal course of operations by the firm;

(*5*) Other evidence that income is not indicative of lack of economic disadvantage; and

(*6*) Whether the total fair market value of the owner's assets exceed $6 million.

(B) *You must have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.*

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be

regarded as rebutted with respect to that individual. *Your proceeding must follow the procedures of §26.87.*

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. *If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds $1.32 million, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage, so long as his or her PNW remains above that amount*."

(Emphasis added.)

§26.73(e) provides, in pertinent part:

"An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, *you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.*

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

. . . .

Example 2: Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met."

(Emphasis added.)

§26.85 states, in pertinent part:

> "(a) This section applies with respect to any firm that is currently certified in its home state.
>
> (b) When a firm currently certified in its home state ("State A") applies to another State ("State B") for DBE certification, State B may, at its discretion, accept State A's certification and certify the firm, without further procedures.
>
> (1) To obtain certification in this manner, the firm must provide to State B a copy of its certification notice from State A.
>
> (2) Before certifying the firm, State B must confirm that the firm has a current valid certification from State A. State B can do so by reviewing State A's electronic directory or obtaining written confirmation from State A.
>
> (c) In any situation in which State B chooses not to accept State A's certification of a firm as provided in paragraph (b) of this section, as the applicant firm you must provide the information in paragraphs (c)(1) through (4) of this section to State B.
>
> (1) You must provide to State B a complete copy of the application form, all supporting documents, and any other information you have submitted to State A or any other state related to your firm's certification. This includes affidavits of no change (*see* §26.83(j)) and any notices of changes (*see* §26.83(i)) that you have submitted to State A, as well as any correspondence you have had with State A's UCP or any other recipient concerning your application or status as a DBE firm.
>
> (2) You must also provide to State B any notices or correspondence from states other than State A relating to your status as an applicant or certified DBE in those states. For example, if you have been denied certification or decertified in State C, or subject to a decertification action there, you must inform State B of this fact and provide all documentation concerning this action to State B.
>
> (3) If you have filed a certification appeal with DOT (*see* §26.89), you must inform State B of the fact and provide your letter of appeal and DOT's response to State B.
>
> (4) You must submit an affidavit sworn to by the firm's owners before a person who is authorized by State law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States.
>
> (i) This affidavit must affirm that you have submitted all the information required by 49 CFR 26.85(c) and the information is complete and, in the case of the information required by §26.85(c)(1), is an identical copy of the information submitted to State A.

(ii) If the on-site report from State A supporting your certification in State A is more than three years old, as of the date of your application to State B, State B may require that your affidavit also affirm that the facts in the on-site report remain true and correct.

(d) As State B, when you receive from an applicant firm all the information required by paragraph (c) of this section, *you must take the following actions*:

(1) Within seven days contact State A and request a copy of the site visit review report for the firm (*see* §26.83(c)(1)), any updates to the site visit review, and any evaluation of the firm based on the site visit. As State A, you must transmit this information to State B within seven days of receiving the request. A pattern by State B of not making such requests in a timely manner or by "State A" or any other State of not complying with such requests in a timely manner is noncompliance with this Part.

(2) *Determine whether there is good* cause to believe that State A's certification of the firm is erroneous or should not apply in your State. *Reasons for making such a determination may include the following:*

(i) Evidence that State A's certification was obtained by fraud;

(ii) New information, not available to State A at the time of its certification, showing that the firm does not meet all eligibility criteria;

(iii) State A's certification was factually erroneous or was inconsistent with the requirements of this part;

(iv) The State law of State B requires a result different from that of the State law of State A.

(v) The information provided by the applicant firm did not meet the requirements of paragraph (c) of this section.

(3) If, as State B, *unless you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must*, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice that it is certified and place the firm on your directory of certified firms.

(4) If, as State B, you have determined that there is good cause to believe that State A's certification is erroneous or should not apply in your State, you must, no later than 60 days from the date on which you received from the applicant firm all the information required by paragraph (c) of this section, send to the applicant firm a notice stating the reasons for your determination.

(i) This notice must state with particularity the specific reasons why State B believes that the firm does not meet the requirements of this Part for DBE eligibility and must offer the firm an opportunity to respond to State B with respect to these reasons.

(ii) The firm may elect to respond in writing, to request an in-person meeting with State B's decision maker to discuss State B's objections to the firm's eligibility, or both. If the firm requests a meeting, as State B you must schedule the meeting to take place within 30 days of receiving the firm's request.

(iii) The firm bears the burden of demonstrating, by a preponderance of evidence, that it meets the requirements of this Part with respect to the particularized issues raised by State B's notice. The firm is not otherwise responsible for further demonstrating its eligibility to State B.

(iv) The decision maker for State B must be an individual who is thoroughly familiar with the provisions of this Part concerning certification.

(v) State B must issue a written decision within 30 days of the receipt of the written response from the firm or the meeting with the decision maker, whichever is later.

(vi) The firm's application for certification is stayed pending the outcome of this process.

(vii) A decision under this paragraph (d)(4) may be appealed to the Departmental Office of Civil Rights under §26.89 of this part."

(Emphasis added.)

§26.89(f)(1) provides:

"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) provides

"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."

IV. Discussion

TBLLC's Appeal sets forth four main arguments for reversal:

1) KYTC "once again" treated the firm's application as an initial application. *See* Appeal at 3. Therefore, the Department should "overturn KYTC's denial

of certification and immediately grant [TBLLC] certification" on procedural grounds. *Id.* at 4.

2) KYTC improperly concluded that Ms. Tinsley has a PNW in excess of the Regulation's $1.32 million limit.
3) KYTC erred in its AASW conclusion.
4) KYTC's conclusion regarding §26.73(e) is meritless, and the Department's remand rejected the same reasoning.[10]

The Department considers these arguments in the sections below.

A. *KYTC followed the interstate certification rules*

The first question before the Department is whether KYTC followed the Regulation's interstate certification procedures.

The interstate certification provision of the Regulation seeks to facilitate certification, and remove unnecessary barriers to DBE firms that seek to work as a DBE in other states. *See* 76 Fed. Reg. at 5088 (January 28, 2011). Interstate certification is not automatic reciprocity in the sense that each state must honor the other states' certification decisions without review. Rather, under the rule, the home state's (State A) decision is entitled to substantial deference. The scope of the subsequent certifier's (State B's) review is circumscribed and is generally limited to the information described in §26.85(c)(1)-(4). The general constraints of §26.85(c), however, loosen marginally in the unusual circumstance in which an interstate applicant voluntarily offers new information not contained within its home state's file. *See* Preamble to Final Rule, 76 Fed. Reg. 5083 (January 28, 2011) at 5089 (certifier may form additional objections to an applicant firm's certification based on new information that a firm provides).

TBLLC voluntarily gave KYTC new PNW statements, not part of the home state file, for all four of its owners.[11] *See* TBLLC Cover Letter for Interstate Certification Application (August 25, 2015) at 1-2 ("[i]n accordance with the interstate certification process please find enclosed . . . Personal Net Worth Statements for all applicants as of May 31, 2015"). KYTC would be negligent had it not examined the new PNW statements proffered.[12] KYTC used the "new

[10] *See Tinsley-Bridgeman, LLC* at fn.1 ("the Department concurs with [TBLLC]'s analysis. The ownership structure comports with Example 2"). The Department affirms that the ownership *structure* comports with the Example, if all four of the parent company's owners are disadvantaged. In contrast, here KYTC (as we explain below) has rebutted the presumption of economic disadvantage for three of TFC's owners. Therefore, TFC is not 100% owned by disadvantaged individuals, as it must be to meet the requirements of the Example 2 (where the parent owns 51% of the applicant subsidiary).

[11] The record contains no evidence—nor does TBLLC assert on appeal or during the state level proceedings—that KYTC asked for the new PNW statements in violation of the interstate certification rules.

[12] KYTC's request for clarifying financial information related to PNW and AASW was reasonable under the circumstances and permissible under the Regulation. Section 26.67(b)(3), which sets forth procedures to rebut an owners economic disadvantage, states that a certifier "may require the individual to produce information relevant to the determination of his or her [economic] disadvantage." TBLLC opened the door to such examination when it volunteered the new PNW statements, which the interstate rule did not require it to provide.

information" derived from the PNW statements appropriately to form objections to TBLLC's interstate certification. The NOI alerted TBLLC of KYTC's objections to its interstate application and offered the firm an opportunity to respond.[13] We find that KYTC followed applicable interstate certification procedures.

The Appeal further faults KYTC on substantive grounds, for not citing a "good cause" reason in the NOI. However, as noted above, the NOI sets forth specific reasons for objecting to the firm's interstate certification, based upon KYTC's examination of the new PNW information. We can easily infer that KYTC's §26.85(d)(2) reason was that new information, not available to the home state, led KYTC to conclude that TBLLC did not meet the eligibility criteria. *See* 15-0127, *Parr Industries, II, Inc.* (February 11, 2016) at 4 (good cause reason may be inferred).

KYTC, in short, did not treat the interstate application as an initial application. Rather, there is substantial evidence that KYTC satisfied the substantive and procedural requirements of §26.85.

B. *Ms. Tinsley's personal net worth*

KYTC determined that Ms. Tinsley's PNW exceeds the Regulation's **REDACTED**. The disputed line item that creates excess PNW is the purported shareholder loan from TFC to Ms. Tinsley. *See* S. Tinsley PNW Statement (May 31, 2015).[14] The pertinent question is whether substantial evidence supports KYTC's rebuttal of the presumption of Ms. Tinsley's economic disadvantage. *See generally* §26.89(f)(1).

In *Tiare Enterprises, Inc.*, the Department opined that "DBE program integrity *demands that real debts be documented*. Otherwise, debts can easily be manufactured, particularly among related persons (legal and corporeal). . . . It is the applicant's burden, in signing a PFS and attesting to its accuracy, of *proving the existence of a bona fide debt*." 14-0143, *Tiare Enterprises, Inc.* (July 27, 2015) at 14-15, *aff'd, Tiare Enterprises, Inc. v. United States Dep't of Transportation*, 2017 WL 1214394 (D.D.C. Mar. 31, 2017). (Emphasis added.)

TFC's general ledger (shareholder loan account) indicates that Ms. Tinsley used funds from TFC to pay for personal expenses. She also transferred money into trust funds and bank accounts.

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[13] Specifically, the NOI states:

> In accordance with 49 C.F.R. §26.85(d)(4), you are afforded an opportunity to respond with respect to the above findings. You many [*sic*] respond in writing, request an in-person meeting, conference call, or videoconference with the Committee to discuss objections to the firm's eligibility, or both. If you want to address the Committee, the meeting will be scheduled to take place within 30 dates of receipt of your request.

NOI at 6.

[14] KYTC, at one point during the proceedings, asserted that the PNW statement should reflect the entry *as an asset*. The Department acknowledges that a line within the PNW form instructions erroneously reads "Loans *to* Shareholders & Other Receivables." (Emphasis added.) The line should read Loans *from* Shareholders and Other Receivables, as loans from (and repayable to) shareholders constitute assets in the nature of receivables. (Emphasis added.) While the form's error appears to have caused some initial confusion, KYTC did not ultimately include the shareholder loan in its computation of total assets.

See TFC General Ledger at 1. The amounts of the withdrawals from TFC range from a few hundred dollars to as much as **REDACTED**. *Id.* There are no apparent limits on the amount that Ms. Tinsley can withdraw. The ledger transactions suggest that Ms. Tinsley uses TFC as she might use a bank account, taking distributions from corporate funds (and sometimes making deposits) at her convenience. *See generally Epps v. C.I.R.*, T.C. Memo. 1995-297 (1995) (similar advances to petitioner not a valid debt for tax purposes absent a repayment obligation).

There is no persuasive evidence of an obligation to repay **REDACTED** to TFC. TBLLC explains that the PNW statement entry "was an accumulation of personal expenses paid for Mrs. Tinsley by the company and direct cash payments to Mrs. Tinsley with the intention of repayment by Mrs. Tinsley to the company." *See* Letter to KYTC (September 11, 2016) at 1. An "intention" is not an obligation, contractual or otherwise. *See generally* 17-0013, *Jacobsen/Daniels Associates* (June 9, 2017) at 5-7 (an intended transfer is not an actual transfer for purposes of the Regulation).

TBLLC specifically asserts that TFC's general ledger somehow establishes that the underlying distributions were loans. *See* Appeal at 6 and Response at 3. We do not read the general ledger to constitute proof of a repayment obligation. The ledger is simply a record of total net distributions to Ms. Tinsley. *See generally* TFC General Ledger 1-2. Although the ledger shows a number of credits from Ms. Tinsley to the firm, those payments are irregular in time and amount. There is no evidence that those payments constitute service on an actual debt; they could as easily be discretionary capital contributions or some other type of payment to TFC. There is, moreover, no evidence in the ledger, or elsewhere in the record, of any of the usual trappings of debt: no underlying loan document, no borrowing limit, no stated interest, no repayment schedule, and, perhaps most important, no enforceable obligation to repay. Substantial evidence therefore supports KYTC's conclusion that the **REDACTED** entry was not a bona fide debt for purposes of the Regulation. *See* NOD at 3.

Substantial evidence supports KYTC's rebuttal of Ms. Tinsley's presumption of economic disadvantage. Accordingly, Ms. Tinsley's ownership percentage does not count toward meeting the 51% disadvantaged ownership requirement of the Regulation (§26.69(b) and 26.73(e)), and TBLLC is ineligible for certification.

C. *Mr. and Ms. Tinsley and Mr. George Tinsley, Jr. demonstrated AASW*

The question presented is whether the certifier erred in its determination that three of the four Tinsley family members are ineligible based on a demonstrated AASW.

The evidence unequivocally shows that three-year average (individual) adjusted gross income (AGI) for Mr. and Ms. Tinsley is more than **REDACTED** (each) and that Mr. George Tinsley, Jr.'s average AGI exceeds **REDACTED**. The averages are substantially more than the **REDACTED** amount listed as a factor that KYTC may consider under §26.67(b)(1)(ii)(A)(1). KYTC concluded, moreover, based on the underlying tax returns, that "it is evident that the annual income reflected on the IRS forms submitted is not unusual and is likely to recur in the future." Denial Letter at 4. *See* §26.67(b)(1)(ii)(A)(2) (whether income is unusual is another factor in evaluating AASW). KYTC, in short, made explicit findings with respect to two of the Regulation's AASW factors, and those findings are supported by substantial, uncontroverted

evidence in the form of the specified owners' tax returns.[15] KYTC concluded, based on the factors identified, that Mr. and Ms. Tinsley and Mr. George Tinsley, Jr. have demonstrated AASW.

TBLLC presents no evidence or argument for why KYTC's AASW conclusion is erroneous. *See* §26.89(f)(1) (Department reverses a decision only if it is unsupported by substantial evidence or inconsistent with applicable certification provisions.) While TBLLC objects to KYTC's statement that "[t]he firm had an adjusted gross income of **REDACTED** in 2013; and **REDACTED** in 2012," these figures in fact reflect Mr. and Ms. Tinsley's (joint) AGI as reported on their 2012-2014 personal tax returns. Appeal at 7-8. *See* G. & S. Tinsley 1040 (2012-2014) at line 37. KYTC's error in describing them as firm rather than individual income in no way prejudiced TBLLC or impaired its ability to challenge the AGI numbers' accuracy on appeal. *See* §26.89(f)(3). TBLLC also points out a mathematical error: Mr. and Ms. Tinsley's average AGI should be **REDACTED** and not **REDACTED**, as the NOI and denial letter conclude. *See* NOI at 4 and Denial Letter at 4. The correction does not negate KYTC's conclusion or make it erroneous.

In summary, substantial evidence supports KYTC's determination that the Tinsleys' high, apparently recurring income demonstrates AASW. KYTC effectively rebutted the presumption of economic disadvantage for three of the Tinsley owners of TFC on AASW grounds. Mr. and Ms. Tinsley and Mr. George Tinsley, Jr.'s ownership percentages do not count toward the 51% disadvantaged ownership requirement of the Regulation. *See* §26.67(b)(4).

D. *TBLLC's ownership does not satisfy §26.73(e) requirements*

Section 26.73(e)(2) Example 2 states that a DBE may be owned and controlled by another company if "[d]isadvantaged individuals own 100 percent of the [parent company], which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met."

TBLLC is structured under this arrangement, which requires 100% of the owners of TFC (the parent company) to be disadvantaged for TBLLC to be eligible for certification. As discussed above, Mr. and Ms. Tinsley's and Mr. George Tinsley, Jr.'s ownership interests do not count for eligibility purposes because these owners' economic disadvantaged status has been rebutted. TBLLC cannot meet the 51% ownership requirement of §26.73(e)(2) Example 2[16] because three of its owners are not economically disadvantaged. Substantial evidence supports KYTC's determination that TBLLC is ineligible for certification.

V. Conclusion

We affirm KYTC's determination under §26.89(f)(1) because substantial evidence supports the decision and because the decision is consistent with the substantive and procedural provisions of the Regulation.

[15] TBLLC makes no argument and presents no evidence that the income was unusual, offset by losses, reinvested in the firm, or otherwise not indicative of AASW.

[16] *See* §26.69(b) (general requirement of 51% disadvantaged ownership).

This decision is administratively final and not subject to further review.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: KYTC