

October 3, 2017

Reference Number: 17-0068

Mr. Stuart Maskell
CEO
NwTech, Inc.
12526 High Bluff, Suite 300
San Diego, CA 92130

Dear Mr. Maskell:

NwTech, Inc. (NwTech) appeals¹ the California Unified Certification Program's (CUCP) denial² of its application for certification as a Disadvantaged Business Enterprise (DBE) under 49 C.F.R. Part 26 (the Regulation). CUCP denied NwTech's Uniform Certification Application (UCA) under the Regulation's ownership provisions §§26.69(c), (e), and (h) and control provisions §§26.71(a), (e), (g), (k), and (l). After careful consideration of the full administrative record, the U.S. Department of Transportation (the Department) affirms.³ The Department does so based on §§26.69 (c), (e), and (h).

Background

Stephanie Maskell is NwTech's Chief Financial Officer (CFO) and is presumed socially and economically disadvantaged (SED) under the Regulation. Ms. Maskell's husband, Stuart Maskell, is NwTech's Chief Executive Officer (CEO) and is non-SED under the Regulation. NwTech provides information technology (IT) security services.⁴ Mr. Maskell started an IT security service provider firm named Network Technologies in 1999.⁵ He was the sole proprietor with a 100% ownership interest in the firm. In 2008, Mr. Maskell changed Network

¹ See Appeal Letter (March 31, 2017).

² See Denial Letter (March 10, 2017).

³ Section 26.89(f)(1) of the Regulation: "The Department affirms [a certifier's] decision unless it 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."

⁴ See On-Site Report (Oct. 18, 2016) at 1.

⁵ See *id.* at 2.

Technologies' name to NwTech, while continuing to operate the firm as a sole proprietorship.⁶ In 2015, he filed the necessary documents to convert NwTech from a sole proprietorship to a corporation and, in the process, transferred his 100% ownership interest to Ms. Maskell.

Information Provided During the Application Process

NwTech's UCA states that in 2008 – following the firm's name change – Ms. and Mr. Maskell respectively owned 49% and 51% of NwTech.⁷ However, during the on-site interview Mr. Maskell stated that he owned 100% of the firm until 2015, when NwTech became a corporation.

The UCA also states that Ms. Maskell acquired her ownership interest through “Marital [sic] Division + Investment” and that no other individual(s) provided any financial contributions to start NwTech.⁸ In contrast, Mr. Maskell stated during NwTech's on-site interview that he contributed approximately **REDACTED** of his own funds to start New Technologies (subsequently renamed NwTech) and that no other individual(s) contributed any funds to New Technologies or NwTech.⁹ He explained that the funds originated from his personal savings and severance pay from a prior job.¹⁰ When asked for confirmation of his explanation, Mr. Maskell stated that the funds were his own and did not originate from any joint marital assets. The record does not contain any evidence to explain the discrepancy between Ms. and Mr. Maskell's explanations of when and how Ms. Maskell acquired her ownership interest in the firm. In addition, NwTech did not provide any evidence to confirm the dates, amounts, or origins of Ms. or Mr. Maskell's purported financial contributions to start New Technologies or NwTech. *See generally* §26.69(a) (certifier must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm).

Discussion

Section 26.69(c) states:

(1) The firm's ownership by socially and economically disadvantaged individuals, *including their contribution of capital or expertise to acquire their ownership interests, must be real, substantial, and continuing*, going beyond pro forma ownership of the firm as reflected in ownership documents. Proof of contribution of capital should be submitted at the time of the application. When the contribution of capital is through a loan, there must be documentation of the value of assets used as collateral for the loan.

⁶ *See id*

⁷ Given the firm's business structure as a sole proprietorship, it is not clear how two individuals shared the ownership interest.

⁸ *Id.*

⁹ *See* On-Site Report at 3.

¹⁰ *See id.*

(2) Insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, mere participation in a firm's activities as an employee, or *capitalization not commensurate with the value for the firm*.

(3) The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and be entitled to the profits and loss commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements. Any terms or practices that give a non-disadvantaged individual or firm a priority or superior right to a firm's profits, compared to the disadvantaged owner(s), are grounds for denial.

(4) Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(Emphasis added).

NwTech's UCA and the On-Site Report state that Ms. Maskell is NwTech's majority (and sole) owner. However, the record does not contain any evidence to show that her ownership goes beyond mere pro forma ownership. NwTech did not provide evidence to demonstrate that Ms. Maskell acquired her ownership interest through real, substantial, and ongoing capital contributions, beyond the statement on the UCA that she contributed marital funds and other investments. The firm did not provide any information that would resolve Ms. and Mr. Maskell's contradictory explanations of Ms. Maskell's capital contribution (or lack thereof), and it did not explain the nature of Ms. Maskell's claimed "investments." Section 26.69(c) clearly states that mere participation in a firm's activities as an employee is an insufficient contribution of capital or expertise to demonstrate ownership.¹¹

Section 26.69(e) states:

The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

As discussed above, NwTech did not provide evidence to demonstrate, by a preponderance of the evidence, that Ms. Maskell made real and substantial capital contributions to acquire her ownership interest in the firm. The only evidence NwTech provided was Ms. Maskell's unsupported statement that she contributed marital funds and other (unspecified) investments. However, Mr. Maskell disputed Ms. Maskell's assertion that she contributed marital funds or made any other capital contributions.¹² Again, he asserts that all of the initial capital contribution

¹¹Evidence in the record, such as Ms. Maskell's résumé, indicates that she participates in NwTech's activities as an employee. The record does not appear to contain evidence that Ms. Maskell enjoys the customary incidents of ownership, and shares in the risks and is entitled to the profits and loss commensurate with her ownership interest.

¹² See On-Site Report at 3

(to the predecessor firm) derived from his own funds, and there is no evidence that Ms. Maskell paid anything for the ownership interest she acquired in 2015. Substantial evidence therefore supports the certifier's determination that the firm failed to demonstrate that the SED owner (as opposed to her husband) made a real and substantial capital contribution.

Section 26.69(h) states:

(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is –

- (i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;
- (ii) Involved in the same or a similar line of business; or
- (iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

- (i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and
- (ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

NwTech's UCA states that Ms. Maskell's ownership interest in the firm increased from 49% to 100% on February 2, 2015.¹³ The UCA also states that she acquired her 100% ownership interest through "Martital [sic] Division + Investment."¹⁴ However, the record does not contain any evidence of these financial contributions. Nor does the record contain any evidence of consideration – adequate or otherwise – that Ms. Maskell provided Mr. Maskell in exchange for his transfer of his ownership interest in NwTech to her. Further, Mr. Maskell continues to be involved with NwTech.¹⁵ Accordingly, §26.69(h)(1) presumes that Ms. Maskell does not "own" the transferred shares for purposes of the Regulation.

To rebut the §26.69(h)(1) presumption of Ms. Maskell's lack of ownership, NwTech must satisfy both conditions of §26.69(h)(2). First, NwTech must demonstrate, by clear and convincing

¹³ See *id.* at 7.

¹⁴ *Id.*

¹⁵ As NwTech's CEO, Mr. Maskell sets policy for the firm's direction/scope of operations; bids on and estimates projects; makes major purchasing decisions; performs marketing and sales activities; attends bid openings and lettings; hires and fires management staff; hires and fires field staff and crew; designates profit spending or investment; obligates the firm by contract/credit; purchases equipment; and signs business checks. He solely supervises NwTech's field operations. See *id.*

evidence, that Mr. Maskell transferred his ownership to Ms. Maskell for reasons other than obtaining DBE certification. The record does not contain evidence – let alone evidence that would meet the clear and convincing evidentiary standard – demonstrating a non-DBE purpose for the transfer.¹⁶

In short, substantial evidence supports CUCP's determination under §26.69(h)(1) that Ms. Maskell is presumed not to hold the shares that Mr. Maskell transferred to her in 2015, and the firm therefore cannot satisfy the Regulation's 51% SED ownership requirement.

Conclusion

Substantial evidence supports CUCP's determination that NwTech does not meet the requirements of §§26.69(c), (e), and (h). We therefore affirm under §26.89(f)(1).

This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
Acting Associate Director
Disadvantaged Business Enterprise Division

cc: CUCP

¹⁶ Second, NwTech must prove, by clear and convincing evidence, that Ms. Maskell actually controls NwTech's management, policy, and operations, notwithstanding Mr. Maskell's continuing participation in the firm. While we find no clear and convincing evidence that this is the case, we need not reach §26.69(h)(2)(ii) in light of our conclusion based on condition (i) above and the conjunctivity of the conditions.