

November 20, 2017

Reference Number 17-0090

Mr. Elyes B. Mastour
REDACTED
Los Angeles, CA 91342

Dear Mr. Mastour:

This letter responds to US Comfort Building Services' (US Comfort) appeal¹ of the California Unified Certification Program's (CUCP) denial² of US Comfort's application for Disadvantaged Business (DBE) certification under the rules of 49 C.F.R. part 26 (the Regulation). CUCP denied US Comfort's application on the grounds that the firm did not demonstrate, by a preponderance of the evidence, that you, the firm's owner, are socially and economically disadvantaged under §26.67(d)³ and Appendix E of the Regulation. After carefully reviewing the entire administrative record, the U.S. Department of Transportation (Department) affirms CUCP's decision as supported by substantial record evidence and consistent with applicable Regulation provisions. *See* §26.89(f)(1).⁴

¹ *See* Appeal Letter (May 10, 2017).

² *See* Denial Letter (March 15, 2017).

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. [Recipients] 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. [Recipients] must require that applicants provide sufficient information to permit determinations under the guidance of [A]ppendix E of this part."

⁴ §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."

FACTS

You are of Tunisian Arab descent. You are the President, sole owner, and sole employee of US Comfort. You started the firm in April 2005.⁵ You immigrated to the U.S. in 1997. In 1998, you enrolled in the Aviation Mechanics program at Van Nuys Airport and began working at a sheet metal factory.⁶ US Comfort provides heating, ventilation, and air conditioning (HVAC) services, as well as plumbing and electrical installation.⁷ You stated that you performed these same services for six years (1999 – 2005) immediately prior to starting US Comfort.⁸

You do not claim a presumption of social and economic disadvantage under §26.5 (membership in one of the enumerated groups) and §26.67(a)(1) (presumption of disadvantage for members of such groups).⁹ Your claim is one of individual social and economic disadvantage as described in §26.67(d), a determination for which Appendix E of the Regulation provides guidance. The Regulation states that a firm applying for DBE certification under §26.67(d)¹⁰ has the burden of demonstrating, by a preponderance of the evidence, that the individual(s) who own and control the firm are socially and economically disadvantaged (SED).

DISCUSSION

APPENDIX E TO PART 26 – 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

⁵ See Uniform Certification Application (UCA) at 1.

⁶ See Social Disadvantage Narrative (SD Narrative) at 2. None of the documents you submitted with your UCA include further information about your employment at the sheet metal factory, *e.g.*, company name, dates of your employment, duties performed, wages earned, etc.

⁷ See *id.*

⁸ See On-Site Report (March 16, 2016) at 2. Neither the On-Site Report nor other documents in the record indicate details about your job history from 1999-2005, *e.g.*, employer names, duties performed, wages earned, etc.

⁹ The Regulation requires that majority owners of DBE firms be “socially and economically disadvantaged.” §26.5 (definition) and §26.67(a) (presumption). The test is conjunctive. Accordingly, a majority owner’s failure to prove social *and* economic disadvantage (or benefit from a §26.67(a) presumption) results in the firm being ineligible for DBE certification.

¹⁰ See *supra* n. 3.

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. (Emphasis added).

(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.

Application of Appendix E Social Disadvantage Criteria

Evidence Provided by Applicant

You named your Tunisian Arab background as the objective distinguishing feature that contributed to your social disadvantage. You stated that Arabs from north African countries are a “micro-minority” compared to other minorities in the U.S.¹¹ You provided the following examples of how your Tunisian Arab background has contributed to substantial and chronic social disadvantage in American society, in such areas as education, employment, and business history:¹²

¹¹ Appeal Letter at 1.

¹² The Department places significant weight on the instructional language of Social Disadvantage I.(C) regarding the totality of the circumstances: “[...] 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.” (emphasis added).

- Although you are Christian, employers and potential clients automatically assume you are Muslim when they learn you are from Tunisia. They associate you with the radical actions of Muslim extremists they see in the news media.
- At the sheet metal factory, you were the only employee who did not speak Spanish and felt like a “minority within minorities.”¹³ You tried to learn as much Spanish as possible, hoping to improve your communication with your co-workers and ensure your job security.¹⁴ Your Hispanic colleagues at the factory called you a camel (based on your Arab descent) and told you that the factory was only for Latinos.¹⁵
- You stated that 18 months of ridicule and alienation at the sheet metal factory caused you severe depression and led you to resign.¹⁶ After resigning, you learned that you did not qualify for government assistance programs, such as unemployment benefits or food stamps. Eventually you had to vacate your apartment and live in your car.
- Your classmates in the Aviation Mechanics program told you on two separate occasions that you looked like a terrorist. They found their comments comical, whereas you did not.¹⁷ You explained that your classmates’ derogatory comments decreased your self-confidence about how others, especially future employers, would perceive you.¹⁸
- On the first day of the General Studies class that was part of the Aviation Mechanics program, the professor told you to “stop wasting his time” after overhearing your accent, and instructed you to take an English as a Second Language course.¹⁹ On the second day of class, the same professor reprimanded you for disobeying his instructions and told you to report to the school administrator. You complied, out of fear that the professor would have you expelled from school because another student had told you he was racist.²⁰ After gaining permission to return to the General Studies class, the professor regularly asked you whether you were an illegal immigrant.
- You graduated from the Aviation Mechanics program at Van Nuys Airport with Air-Frame and Power Plant certifications. You received the highest grade out of all students in your Power Plant class.
- You graduated from the Aviation Mechanics program shortly after the September 11 terrorist attacks in the U.S. You stated that the timing psychologically “devastated” you, based on your prediction that American society, many members of whom already

¹³ See Social Disadvantage Narrative (SD Narrative) at 2.

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ SD Narrative at 2.

¹⁹ See *id.*

²⁰ See *id.*

assumed you were Muslim, would further discriminate against you. You felt that “[f]our years of school were wasted.”²¹

- Soon after graduating from the Aviation Mechanics program, you applied for a job at REDACTED Aircraft Services REDACTED. You faxed your Air-Frame and Power Plant certifications and a copy of your Federal Aviation Administration (FAA) mechanics license²² to the hiring agent. During a subsequent telephone interview, the hiring agent told you that “I am going to be honest with you. I know you have been looking for [a] job for a long time. I don't want you to take this personally; I just want to be straight with you. Between you and me, you seem like a nice guy. I would hire you, but my boss wouldn't. He doesn't want to see Arabs in his company especially after 9/11. I think you should reconsider your career.”²³ You were shocked and did not know how to respond.
- Following your experience at REDACTED, you continued applying for jobs and interviewed with REDACTED Center Company (REDACTED). The hiring agent inquired about your national origin and you told him you were Tunisian Arab. He then stated that he was willing to hire you for \$10/hour. You had previously learned that REDACTED Center offered an equally qualified Caucasian applicant, also a recent graduate with no prior experience, for \$18/hour. You inferred that your Tunisian Arab national origin led to the pay discrepancy. You decided not to accept REDACTED Center's job offer.
- You then applied to several airlines and FAA repair stations but did not receive any responses. You were homeless for a year until you found a job as an air conditioner installation assistant for \$14/hour.
- As a subcontractor, you asked the general contractor who had hired you why he was not paying you a fair wage. He told you that you should be thankful for the work and should return to your home country if you were not happy.
- US Comfort has lost multiple contracting opportunities despite your ability to perform “to the highest standards.”²⁴ Prospective clients decide not to hire you once they finish interrogating you about your ethnic background and religious beliefs.²⁵ Often, potential clients scrutinize your physical appearance and decide not to hire you, before you even given them an estimate.
- One prospective client asked you if you were from the Middle East and you told him you were not. He then asked if you were Mexican. You asked him if you could focus on the work project instead of discussing your national origin. The prospective client seemed offended by your question.
- On another occasion, a prospective client told you at the beginning of your meeting that she had bad experiences with Muslims and would not hire you if you were Muslim. You

²¹ *Id.*

²² The record does not contain a copy of the license.

²³ SD Narrative at 3.

²⁴ *Id.*

²⁵ *See id.*

told her you are Christian. After you told her that her comments were illegal,²⁶ she immediately denied having said anything derogatory to you, naming her husband as her witness, who was not present. You then left her property as fast as possible.

- A past client, who was aware of your Tunisian Arab background and had hired you for inexpensive, small projects, regularly spoke negatively to you about Latinos, Arabs, and Muslims, telling you that they should all be deported.²⁷
- A white woman you met at a DBE program seminar received DBE certification within two months after applying. You do not understand why CUCP determined that she was more disadvantaged than you.²⁸

CUCP's Response to Applicant's Evidence

Based on your ability to graduate from the Aviation Mechanics program and earn related certifications/licenses, CUCP concluded that you did not experience social patterns or pressures that discouraged you from pursuing a professional or business education. CUCP explicitly considered the stated effects that the derogatory comments and actions from your classmates and General Studies professor had on you; specifically, your concerns about how others in your program perceived you, and especially about how future employers would perceive you. Appendix E speaks of *discouragement* rather than outright prevention. Partial success does not necessarily reverse the negative impact of social disadvantage.

In response to the incidents of your classmates calling you a terrorist and your General Studies professor telling you to leave his class and take an English course, CUCP stated that “not once have you produced any documentary evidence of filing discrimination claim against any of your educational institutions or potentials job perspectives, even though there are stringent laws against such discrimination.”²⁹ CUCP appears to have imposed a requirement that does not exist in Appendix E – specifically, that an applicant who did not file a discrimination claim cannot meet the burden of proving social disadvantage. Applicants may not have known they could file a discrimination claim or been afraid to do so out of fear of retaliation.

CUCP did not address the specific examples of disadvantage you described while working at the sheet metal factory or your job interview experiences at Sincro or Jet Center. CUCP stated that instead of accepting Jet Center’s job offer, you “chose to stay unemployed until you decided to accept a job offer as an air-conditioner installation helper.”³⁰ CUCP did not discuss your explanation that you rejected Jet Center’s offer because of the 44% wage disparity between you and an equally qualified Caucasian candidate,³¹ which would appear to be “unequal treatment in

²⁶ The Department does not opine on the legality of the comments.

²⁷ See SD Narrative at 3.

²⁸ See *id.*

²⁹ *Id.* at 4.

³⁰ Denial Letter at 4.

³¹ See *id.*

hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment.”³²

Based on the evidence you provided, CUCP concluded that you did not prove by “clear and convincing evidence”³³ that you are socially disadvantaged under the criteria of §26.67(d) and Appendix E of the Regulation. That conclusion being clearly inconsistent with the applicable §26.61(b) standard of proof (preponderance of the evidence), we cannot affirm it under §26.89(f)(1).

APPENDIX E TO PART 26 – ECONOMIC DISADVANTAGE

- (A) Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.
- (B) *Submission of narrative and financial information.* (1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.
- (C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash), personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.
- (D) *Transfers within two years.* (1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent

³² Appendix E Social Disadvantage I.(C)(2).

³³ Denial Letter at 4.

with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

Application of Appendix E Economic Disadvantage Criteria

Your personal net worth (PNW) is negative REDACTED.³⁴ The fair market value of your assets is REDACTED Your total personal income was REDACTED in 2013³⁵ and REDACTED in 2014.³⁶ US Comfort's business income in 2014 was REDACTED.³⁷ You estimated that US Comfort generated approximately REDACTED of sales revenue in 2015 and that the firm would generate approximately REDACTED in 2016.³⁸ You stated that you lost many contracting opportunities because potential clients often refuse your services after interrogating you about your ethnicity and religion. CUCP countered that "[...] you have been successful in securing capital and credit opportunities as you have received credit from Nation Star Mortgage, credit card companies and car dealerships."³⁹ CUCP also stated that you procured one contract in 2012, one contract in 2013, one contract in 2014, and two contracts in 2015.⁴⁰

An applicant must not have been completely denied capital or credit opportunities in order to demonstrate economic disadvantage under Appendix E. Rather, recipients must make a judgment about whether the applicant firm is in a more difficult economic situation than most non-disadvantaged firms, based on the factors listed in Appendix E Economic Disadvantage. One such factor to be considered is the applicant's financial condition "compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals [...]. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth."⁴¹ You did not provide evidence of any of these benchmarks for non-disadvantaged small businesses in similar business

³⁴ See PNW Statement of Elyes B. Mastour (April 5, 2016) at 1.

³⁵ See U.S. Individual Income Tax Return, Form 1040 of Elyes B. Mastour and Nancy M. Aceituno (2013). Mr. Mastour stated that he and Ms. Aceituno divorced prior to US Comfort's submission of its UCA in 2016. See UCA. You had not yet filed your 2015 tax returns when you submitted your UCA in April 2016. As a result, CUCP considered your 2013 and 2014 personal income.

³⁶ See U.S. Individual Income Tax Return, Form 1040 of Elyes B. Mastour and Nancy M. Aceituno (2014).

³⁷ See U.S. Income Tax Return, Form 1120S of US Comfort Building Services, Inc. (2014). The sales revenue for 2013 is unknown, as Mr. Mastour stated that the firm did not file Form 1120S in 2013.

³⁸ See On-Site Report at 5.

³⁹ Denial Letter at 6.

⁴⁰ See Résumé of Elyes B. Mastour.

⁴¹ Appendix E Economic Disadvantage (C).

lines, and you provided only estimates of US Comfort's revenues (not total assets, pre-tax profit, or sales/working capital ratios) for the two most recent years. In failing to introduce evidence of most of the factors that certifiers may consider, you failed to demonstrate economic disadvantage by a preponderance of the evidence.

CONCLUSION

Substantial evidence supports CUCP's determination that you have not demonstrated economic disadvantage under Appendix E. To be eligible for DBE certification, the applicant firm's owner must demonstrate *both* social and economic disadvantage. Your failure to demonstrate economic disadvantage results in US Comfort's ineligibility DBE certification. Therefore, we affirm CUCP's decision under §26.89(f)(1).

This decision is administratively final and not subject to petitions for reconsideration. US Comfort may reapply for certification when the applicable waiting period expires.

Sincerely,

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

cc: CUCP