

December 20, 2017

Reference Number 17-0106

Ms. Julie Olson, President
Mountain Trucking, LLC
REDACTED
North Pole, AK 99705

Dear Ms. Olson:

Mountain Trucking LLC (MTLLC) appeals the Alaska Unified Certification Program's (AUCP) March 8, 2017 determination that the firm is ineligible for Disadvantaged Business Enterprise (DBE) certification under the standards of 49 C.F.R. part 26 (the Regulation). After considering the entire administrative record, the U.S. Department of Transportation (the Department) affirms AUCP's decision. *See* Regulation §26.89(f)(1).

Specifically, we find that substantial evidence supports AUCP's conclusion that you failed to overcome the presumption of non-ownership of the 1% interest in MTLLC that your nondisadvantaged husband transferred to you. *See* §26.69(h).¹ Your remaining 50% interest does not satisfy the 51% disadvantaged ownership requirement of §26.69(b), and MTLLC is therefore ineligible for certification.

I. Authority

§26.61(b) states:

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.

§26.69(b) states:

¹ AUCP concluded that MTLLC is ineligible for several other reasons related to disadvantaged control. We decline to opine on the control-related grounds light of the sufficiency of our disposition on the basis of disadvantaged ownership. *See generally* §§26.61(b) (applicant must demonstrate that it meets subpart D requirements, including disadvantaged ownership) and 26.69(h)(2) (when §26.69(h)(1) applies, owner must rebut presumption of non-ownership by clear and convincing evidence, not general preponderance standard).

To be an eligible DBE, a firm must be at least 51 percent owned by socially and disadvantaged individuals.

§26.69(c) provides, in pertinent part:

(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.

(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.

§26.69(e) provides:

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.

§26.69(h) provides:

(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.

§26.89(f)(1) provides:

The Department affirms [the certifier's] 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.

II. Discussion

You and your nondisadvantaged husband, Scott Olson, formed MTLIC as equal owners in 2002. On-Site Review Report (March 9, 2017) (OSRR) at 2. On August 10, 2016, Mr. Olson transferred a 1% ownership interest to you for no consideration. *Id.* Mr. Olson is still involved in the firm as its 49% owner and as an employee. Thus, under §26.71(h)(1), for eligibility purposes, you are presumed to not hold the transferred 1% interest.

To overcome the presumption of non-ownership and to allow the transferred interest to count for purposes of determining disadvantaged ownership, you must prove by *clear and convincing* evidence that: (i) the transfer of ownership was made for reasons other than to obtain DBE certification; and (ii) that you actually control the management, policy, and operations of the firm, notwithstanding the continuing participation of Mr. Olson. *See* §§26.69(h)(2)(i) & (ii) (rebuttal conditions).²

AUCP relied on your own statements to conclude that you failed to overcome the presumption of non-ownership under §26.69(h)(2)(i). Specifically, you submitted a statement to AUCP on January 16, 2017, in which you explain that “when [the firm changed] to a LLC, we just went

² The firm's failure to prove either condition (here, condition (i)) means that the presumption stands, with the result that the Regulation considers you to own just 50% of MTLIC.

with the default 50-50 split. *We never needed it any other way because we were not doing any government contracts.*” M. Olson Statement (Statement) (January 16, 2017). (Emphasis added.) Also, the OSRR states that “[o]n August 10, 2016 the ownership was changed with the State of Alaska Corporations, Business, & Professional Licensing to 51% ownership Julie Olson and 49% Scott Olson. *The LLC was formed as 50% ownership because [MTLLC] never needed it any other way because [MTLLC was] not doing any government contracts.*” OSRR at 2. (Emphasis added.) The DBE program is a government contracting program. Furthermore, MTLLC applied for DBE certification just four months after your husband transferred his ownership interest to you. *See generally* MTLLC Uniform Certification Application. In short, your statements, and the timing of the ownership transfer, provide substantial evidence to support AUCP’s determination that the transfer occurred so that MTLLC could pursue DBE certification. *See* AUCP Denial Letter (March 8, 2017) at 2.

You argue on appeal that the transfer of ownership happened for non-DBE purposes. First, you assert that the transfer occurred before MTLLC “even contemplated the DBE program.” Appeal at 1. However, as previously discussed, you acknowledge that MTLLC had no reason to change the firm’s ownership structure (from 2009-2016) until you and Mr. Olson decided to apply for government contracts. *See generally* Statement and OSSR. Second, you state, “[e]ven if we did it to get DBE certification, the government is the only one who has ever cared what the percentage is. So, in short, the change was to represent how our company has always been run, not to solely get DBE status.” Appeal at 1. But the 51% disadvantaged ownership threshold is not a formality; it is a requirement. We find that one uncorroborated assertion of a partial non-DBE purpose, standing alone, is not clear and convincing evidence that the transfer “was made for reasons other than obtaining certification as a DBE.”

In summary, substantial evidence supports AUCP’s determination that you did not carry your heightened burden of proof under §26.69(h)(2)(i), which renders the transferred 1% interest uncountable for certification purposes. Thus your ownership interest in MTLLC amounts to 50%, which is insufficient to meet the 51% ownership requirement of §26.69(b). We affirm under §26.89(f)(1).

III. Conclusion

We affirm AUCP’s ineligibility determination regarding ownership as supported by substantial evidence and not inconsistent with the Regulation’s substantive and procedural provisions relating to certification.

This determination is administratively final and is not subject to petitions for reconsideration. You may reapply for DBE certification once the applicable waiting has expired.

Sincerely,

Samuel F. Brooks
DBE Appeal Team Lead
External Civil Rights Programs Division

cc: AUCP