

March 5, 2018

Reference Number 17-0132

Mr. Yoel Yeshurun
Chief Executive Officer
Arrownet Group
REDACTED
Reseda, California 91335

Dear Mr. Yeshurun:

This letter responds to Arrownet Group's (Arrownet) appeal¹ of the Los Angeles County Metropolitan Transportation Authority's (LACMTA) denial² of Arrownet's application for Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R. Part 26 (the Regulation). LACMTA found that you did not prove, by a preponderance of the evidence, that you are socially and economically disadvantaged under §26.67(d) and Appendix E of the Regulation. After carefully reviewing the entire administrative record, the U.S. Department of Transportation (Department) affirms LACMTA's decision as supported by substantial evidence under §26.89(f)(1).³

FACTS

You founded Arrownet in December 2012 and are the sole owner and Chief Executive Officer (CEO). Arrownet designs and implements information technology (IT) solutions for government and private sector clients.⁴ You do not claim a presumption of social and economic disadvantage under §26.5 and §26.67(a)(1) of the Regulation.⁵ Your claim is one of individual social and economic disadvantage as described in §26.67(d), a determination for which Appendix E in the

¹ See Appeal Letter (undated).

² See Denial Letter (May 17, 2017).

³ §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."

⁴ See Uniform Certification Application (UCA) at 1.

⁵ 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 either social or economic disadvantage (or benefit from a §26.67(a) presumption) results in the firm being ineligible for certification.

Regulation provides guidance. The Regulation states that a firm applying for DBE certification under §26.67(d) 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).⁶ You contend that you are SED under Appendix E because of your Middle Eastern origin and Jewish religion.⁷

DISCUSSION

Appendix E to Part 26 – Individual Determinations of Social Disadvantage (in pertinent part):

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 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.

(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

⁶ §26.67(d): “[...] You 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. You must require that applicants provide sufficient information to permit determinations under the guidance of [A]ppendix E of this part.”

⁷ See Letter of DBE & SBE Consideration (Feb. 14, 2017).

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 Social Disadvantage Criteria

(A) Objective Distinguishing Feature(s): You named your Middle Eastern origin and Jewish religion as the objective distinguishing features that have contributed to your social disadvantage.

(B) Examples of Substantial and Chronic Social Disadvantage in American Society: You provided the following examples of how your Middle Eastern origin and Jewish religion caused you substantial and chronic social disadvantage in American society:⁸

- Employers have asked you to work during Shabbat despite knowing that you are Jewish and observe Jewish holidays.
- After receiving a verbal job offer with assurance of a written offer, you told the interviewer that you cannot work on Shabbat. You did not receive the written job offer.
- A manager once told you that you cannot express yourself because you are from the Middle East.
- A colleague told you that your manager did not promote you because you are Jewish and from the Middle East.
- You were a senior manager in Israel but after 17 years of working in the U.S. you are still working as a standard engineer and never received a promotion.
- A colleague told you to return to the Middle East because you “don’t understand.”⁹
- Following several rounds of job interviews at a firm, you received positive feedback from the interviewer. At the final interview, the hiring manager asked you what country you are from. You responded that you came to the U.S. from Israel and were born in Iran. The hiring manager said he would make a decision soon but you never heard back from him.
- During your first 8 years in the U.S. you were paid 30-35% less than the market rate.
- You sent out approximately 650 job applications to various organizations but were “not accepted by any company for any job.”¹⁰

⁸ See Response for Social Disadvantage Supporting Documentation (Feb. 13, 2017).

⁹ *Id.*

¹⁰ *Id.*

(C) Negative Impact on Entry into or Advancement in the Business World:

- (1) Education: Your résumé states only that you received a Master's Degree from Fairleigh Dickinson University, with no information about your prior education.¹¹ You did not provide evidence of 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 you from pursuing a professional or business education.
- (2) Employment: Section (B) above describes your evidence of unequal treatment in hiring, promotions and other aspects of professional advancement, including retaliatory or discriminatory behavior by an employer. Your résumé indicates you maintained consistent employment for 16 years preceding your founding of Arrownet. All of your employment positions appear to have related to Arrownet's primary business activity of designing and implementing IT solutions. Your résumé shows that your professional responsibilities increased as your career progressed.¹² However, you contend that your résumé does not accurately portray your employment history, explaining that "I had to make my résumé to look good in front of hiring companies, while competing on few positions among thousands of candidates...the titles and experience and responsibilities details were customized based on recruiters' recommendations, so could compete on positions."¹³ You did not specify which portions of your résumé accurately reflect your employment history and which portions you altered to "look good."¹⁴
- (3) Business History: You did not provide any evidence of unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances. As evidence of 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, you stated that:

"In September 2016, I submitted by skills for a project opportunity with a company. Although I know I have all the skill set for the project and was above all the other, the project was awarded to a Caucasian person because he is white and not from the Middle East. I spoke with several vendors and one of the vendors called an internal employee who he knows. That employee told him that the manager selected the Caucasian person because of race."¹⁵

¹¹ See Résumé of Yoel Yeshurun. You did not provide the subject of your Master's Degree or the year in which you earned it.

¹² From 1999-2002 you worked at Converse Network Systems as a Senior Solution Engineer; from 2002-2004 you worked at Sterling Testing as an IT Manager; from 2004-2006 you worked at the New York Stock Exchange as a Senior Consultant; from 2004-2008 you worked at Strategictop as a Senior IT Manager; from 2008-2010 you worked at Symantec as a Senior Security Architect; from 2010-2011 you worked at REDACTED as a Senior Security Architect; and from 2011-2015 you worked at REDACTED as an Enterprise Architect. See *id.*

¹³ Letter from Y. Yashurun to LACMTA (undated).

¹⁴ *Id.*

¹⁵ Response for Economic Disadvantage Supporting Documentation (Feb. 20, 2017).

Although you provided multiple examples of disadvantage regarding your employment history, you stated that your résumé does not accurately reflect your true employment history and did not provide clarifying information. As stated above, you did not provide evidence of disadvantage related to education and provided scant evidence of disadvantage regarding your business history.¹⁶ Substantial evidence supports LACMTA's determination that you are not socially disadvantaged under Appendix E. We affirm.

Appendix E to Part 26 – Individual Determinations of Economic Disadvantage:

- (A) *General.* 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.
- (2) [Reserved]
- (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.

¹⁶ LACMTA did not comment on your education or business history under Appendix E Social Disadvantage I.(C)(1) and (3).

- (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 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 Economic Disadvantage Criteria

Appendix E defines economically disadvantaged individuals as “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.”¹⁷ As substantial evidence in the record supports LACMTA’s conclusion that you are not socially disadvantaged, an analysis of your purported economic disadvantage is not necessary for the Department to affirm LACMTA’s denial.

CONCLUSION

Substantial evidence supports LACMTA’s decision that you are not socially and economically disadvantaged under Appendix E of the Regulation. We affirm under §26.89(f)(1). This decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

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

cc: LACMTA

¹⁷ Appendix E, Economic Disadvantage, (A).