

March 2, 2018

Reference Number: 17-0137

Mr. Jay Tourgoutian
Principal
SEC, LLC
9003 Reseda Blvd., Suite 202
Northridge, CA 91324

Dear Mr. Tourgoutian:

SEC, LLC (SEC) appeals¹ the Los Angeles County Metropolitan Transportation Authority's (LACMTA) second denial² of its application for certification as a Disadvantaged Business Enterprise (DBE)³ under the criteria set forth in 49 C.F.R Part 26 (the Regulation). After considering all the facts in the record viewed as a whole, pursuant to §26.61(e), the U.S. Department of Transportation (the Department) affirms LACMTA's decision under §26.89(f)(1).⁴

BACKGROUND

You founded SEC in 2014 and are the sole owner and Principal. The firm provides construction management, engineering and inspection services.⁵ You self-identify as a Caucasian male.⁶ You became a lawfully admitted permanent U.S. resident on July 1, 2015.⁷ You earned a Bachelor of Science degree in Electrical Engineering and Master of Science degree in Civil Engineering, with a minor in Construction Management.⁸ You have more than 15 years of project

¹ See Appeal Letter (July 30, 2017).

² See Second Denial Letter (May 16, 2017). LACMTA denied SEC's first Uniform Certification Application (UCA) in 2016. See First Denial Letter (Feb. 11, 2016). You filed a timely appeal. See First Appeal Letter (Feb. 23, 2016). The Department affirmed the denial. See 16-0090 SEC, LLC (Nov. 2, 2016).

³ See UCA (April 13, 2017).

⁴ See §26.89(f)(1): "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."

⁵ See UCA at 3.

⁶ See *id.* at 5.

⁷ See Zirair K. Tourgoutian United States Permanent Resident Card.

⁸ See Résumé of Jay K. Tourgoutian.

management experience in the Engineering, Architecture, and Construction (EAC) industry, concurrently managing multiple projects for public and private clients.⁹ You are a member of 10 EAC-related associations, such as the Construction Management Association of America, American Society of Civil Engineers, and the Los Angeles City and County Engineers Association.¹⁰ You have won three awards in recognition of your EAC-related professional achievements.¹¹

You do not claim a presumption of social and economic disadvantage under the Regulation.¹² Rather, you claim that you are socially and economically disadvantaged (SED) under §26.67(d) of the Regulation, a determination for which Appendix E provides guidance. 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 SED.¹³

DISCUSSION

You state that you qualify for DBE certification under §26.67(d) and Appendix E because your former employer BRJ & Associates, LLC (BRJ) discriminated against you because you are an immigrant.¹⁴ Specifically, you allege that in 2013, BRJ failed to submit and falsified documents to the United States Department of Homeland Security regarding your H1-B visa renewal. You claim that BRJ did so “without any regard to [your] professional and personal qualities.”¹⁵ You state that BRJ’s actions created “undeniable stress” for you, caused you to incur “tens of thousands of dollars” in legal fees, and your immigration status was “jeopardized.”¹⁶

⁹ See Résumé of Jay K. Tourgoutian. Your résumé does not indicate any significant gaps in employment.

¹⁰ See *id.*

¹¹ See *id.*

¹² See §26.67(a)(1): “*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.”

¹³ §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.”

¹⁴ See Appeal Letter at 1.

¹⁵ *Id.*

¹⁶ *Id.*

LACMTA’s denial letter focuses on the adequacy of the evidence regarding your claim that BRJ discriminated against you, stating at various points that “[Y]ou failed to submit evidence that supported your allegations [...]”;¹⁷ “you failed to submit any evidence that documented that your former employer engaged in discriminatory behavior in the processing of your H1B- Visa Application;”¹⁸ “you have failed to produce any evidence of having filed any claims against your employer;”¹⁹ and “USDOT stated ‘when reviewing the totality of the circumstances surrounding this case, there is nothing in the record, beyond anecdotal evidence, demonstrating falsification or failure to submit immigration documentation to the U.S. Department of Homeland Security.’”²⁰

You state that your “approach and angle for the DBE certification request and appeal is very similar to the previous approach, with simply the addition of evidence, documentation, and communications as requested by [the Department] to prove social and economic disadvantage clearly and undeniably.”²¹ The additional evidence you submitted includes a letter from your attorney verifying your account of BRJ’s actions and the effects they had on you,²² as well as four emails among you, your former attorney, and BRJ.²³

Appendix E of the Regulation states:

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 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

¹⁷ Second Denial Letter at 1.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ *Id.* We clarify that the portion of our decision letter quoted here is an observation of what type of evidence SEC provided. We did not state that anecdotal evidence is insufficient for SEC to have met its burden of proof. *See* 16-0090 SEC, LLC (Nov. 2, 2016) at 4.

²¹ Appeal Letter at 1.

²² *See* Letter from John Buda. (Aug. 2, 2017).

²³ *See* Emails dated Sept. 10, 2013, Oct. 2, 2013, Oct. 9, 2013, and Oct. 31, 2013.

- (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 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:* You do not explicitly state an objective distinguishing feature that has contributed to your social disadvantage. The Department reasonably infers that you consider your objective distinguishing feature to be BRJ's purported discrimination against you.
- (B) *Personal Experiences:* You claim that **REDACTED** discriminated against you because you are an immigrant.²⁴ Specifically, you allege that in 2013, BRJ failed to submit and falsified documents regarding your H1-B visa renewal. The letter from Mr. **REDACTED**, nor any of the four emails you submitted, contain any indication of your claim. An immigration matter affecting an individual's ability to lawfully remain in the U.S. is decidedly substantial in nature. However, a single experience cannot reasonably be characterized as chronic. In addition, you became a lawfully admitted permanent U.S. resident in 2015.

- (C) *Negative Impact on Business Opportunities:*

(1) *Education:* You earned a Bachelor of Science degree in Electrical Engineering and Master of Science degree in Civil Engineering, with a minor in Construction Management.²⁵ You did not provide evidence indicating you were denied equal

²⁴ See Appeal Letter at 1.

²⁵ See Résumé of Jay K. Tourgoutian.

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*: You have more than 15 years of project management experience in the EAC industry, concurrently managing multiple projects for public and private clients.²⁶ You are a member of 10 EAC-related associations, such as the Construction Management Association of America, American Society of Civil Engineers, and the Los Angeles City and County Engineers Association.²⁷ You have won three awards in recognition of your EAC-related professional achievements.²⁸ You did not provide evidence of unequal treatment in hiring, promotion, and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment. Nor did you submit evidence of social patterns or pressures that channeled you into non-professional or non-business fields. You claim that **REDACTED** discriminated against you based on your immigrant status.²⁹ You explain that **REDACTED** failure to submit, and falsification of, visas renewal documents created “undeniable stress” for you “without any regard to [your] professional and personal qualities.”³⁰ You also state that you incurred “tens of thousands of dollars” in legal fees and your immigration status was “jeopardized.”³¹ We acknowledge the significant challenges a precarious immigration matter can impose. However, stress and legal fees do not sufficiently demonstrate that **REDACTED** purported actions negatively impacted your advancement in the business world or channeled you into non-professional or non-business fields. You did not provide evidence demonstrating how **REDACTED** acted without regard to your professional and personal qualities. The letter from Mr. Buda and the four emails you provided as supporting evidence do not contain any information indicating that **REDACTED** disregarded your professional and personal qualities.

(3) *Business History*: You did not provide evidence of 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. To the contrary, you are a

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See id.*

²⁹ *See* Appeal Letter at 1.

³⁰ *Id.*

³¹ *Id.*

member of 10 EAC-related associations, such as the Construction Management Association of America, American Society of Civil Engineers, and the Los Angeles City and County Engineers Association.³² You have won three awards in recognition of your EAC-related professional achievements.

Substantial evidence supports LACMTA's determination that you are not socially disadvantaged under the criteria of Appendix E.

ECONOMIC DISADVANTAGE

II. 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."³³ 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.³⁴

CONCLUSION

Substantial evidence supports LACMTA's determination that you did not prove, by a preponderance of the evidence, that you are socially and economically disadvantaged under the criteria of Appendix E. We affirm under §26.89(f)(1).

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

Sincerely,

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

cc: LACMTA

³² See Résumé of Jay K. Torgoutian.

³³ Appendix E, Economic Disadvantage, (A).

³⁴ 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.