

March 19, 2019

Reference Number 18-0098

Mr. Horace Flowers
Attorney at Law
1120 Ave. of the Americas, 4th floor
New York, NY 10036

Dear Mr. Flowers:

This letter responds to the appeal you filed on behalf of your client Nova Electric, LLC¹ following the Port Authority of New York and New Jersey's (PANYNJ) denial² of Nova Electric's application for Disadvantaged Business Enterprise (DBE) certification under the rules of 49 C.F.R. Part 26 (the Regulation). After considering the full administrative record, we affirm.³

FACTS

Nova Electric provides electrical contracting services.⁴ Tatiyana Nicholson is the 51% owner and President. She and her husband, Joel Nicholson, founded the firm in April 2014. Mr. Nicholson is not presumed socially and economically disadvantaged (SED) under the Regulation. He owns 49% of Nova Electric and is the Vice President as well as one of the staff electricians. Diogenes Brito, who is presumed SED, holds the sole Master Electrician license on behalf of Nova Electric. He is not an owner, officer, or employee of the firm.

Ms. Nicholson's résumé states that as President of Nova Electric her "[m]ain responsibilities" are bookkeeping, marketing, advertising, accounting, human resources management, payroll management, purchasing, and other administrative tasks.⁵ The record indicates that she

¹ See Appeal Letter (April 10, 2018) (unpaginated).

² See Denial Letter (Jan. 12, 2018). PANYNJ concluded that Nova Electric does not meet the requirements of

³ 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."

⁴ Uniform Certified Application (UCA) at 2.

⁵ See Résumé of Tatiyana Nicholson. See also On-Site Report (Dec. 21, 2017) at 2.

“always”⁶ performs those tasks, along with “anything outside of the electrical work.”⁷ Ms. Nicholson claims that Mr. Nicholson taught her about the electrical contracting industry and concedes that she does not perform any of the electrical work.⁸ Prior to joining Nova Electric in April 2014, Ms. Nicholson worked at real estate and property management firms where she primarily focused on marketing activities.⁹ She completed an OSHA Construction Safety course in August 2016 and earned a Construction Project Management Certificate in September 2016. She has a Bachelor of Arts degree in International Affairs.¹⁰

Before his involvement with Nova Electric, Mr. Nicholson worked for at least 10 years at a variety of electrical contracting firms, holding the titles Electrician and Project Manager.¹¹ His responsibilities have included reading and transcribing architectural drawings, day-to-day project management, installing electrical wires, pipes, fire alarms, and light fixtures, and landing and terminating smoke and heat detector cables.¹²

DISCUSSION

A firm seeking DBE certification must prove that more likely than not, it meets the Regulation’s requirements concerning group membership or individual disadvantage, business size, ownership, and control.¹³ PANYNJ denied Nova Electric’s UCA under control provisions §§26.71(g)¹⁴ and (h).¹⁵ We affirm on both grounds.

⁶ See UCA at 6.

⁷ On-Site Report at 2.

⁸ See On-Site Report.

⁹ See Résumé of Tatiyana Nicholson.

¹⁰ See *id.*

¹¹ See Résumé of Noel Nicholson.

¹² See *id.*

¹³ Section 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.”

¹⁴ Section 26.71(g) states: “The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.”

¹⁵ Section 26.71(h) states: “If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local

Overall Understanding, Managerial & Technical Competence, Administrative Role

PANYNJ acknowledged that Ms. Nicholson might have the necessary skills and experience to run a business efficiently from an administrative standpoint. However, PANYNJ concluded that she does not meet the requirements of §26.71(g) because her “skillset is not specific to the electrical contracting industry in which Nova Electric, LLC conducts its day to day technical and business operations.”¹⁶

Section 26.71(g) of the Regulation requires Ms. Nicholson to have an overall understanding of, and managerial and technical competence and experience directly related to electrical contracting. You do not explain how her background in performing marketing activities at real estate and property management firms allow her to satisfy these requirements. Section 26.71(g) also requires Ms. Nicholson to be able to intelligently and critically evaluate information that Mr. Nicholson presents to her and use that information to make independent decisions regarding Nova Electric’s daily operations, management, and policymaking. We are not persuaded that Mr. Nicholson having taught her about the electrical contracting industry, as she claims he did, equips her to intelligently and critically evaluate information and make independent decisions. Ms. Nicholson’s résumé states that as President of Nova Electric her “[m]ain responsibilities” are bookkeeping, marketing, advertising, accounting, human resources management, payroll management, purchasing, and other administrative tasks.¹⁷ The record indicates that she “always”¹⁸ performs those tasks, along with “anything outside of the electrical work.”¹⁹ Section 26.71(g) clearly states that expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

We find that substantial evidence supports PANYNJ’s conclusion that Ms. Nicholson does not control Nova Electric within the meaning of §26.71(g). We affirm.

Professional License

PANYNJ found that Ms. Nicholson does not control Nova Electric within the meaning of §26.71(h) because she does not have a Master Electrician license. PANYNJ explained that the Electrical Code of New York City²⁰ provides that a business holding itself out as an

law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.”

¹⁶ Denial Letter at 3.

¹⁷ See Résumé of Tatiyana Nicholson. See also On-Site Report (Dec. 21, 2017) at 2.

¹⁸ See UCA at 6.

¹⁹ On-Site Report at 2.

²⁰ See NYC Electrical Code Title 27 Chapter 3004 & 27-3013 (b) 4(ii).

electrical contracting firm can only operate through the license of a Master Electrician, and further, the license holder must be a partner or officer of the firm.²¹ You agree that Mr. Brito is not a partner, officer, or even an employee of Nova Electric. Nonetheless, you argue that PANYNJ misinterpreted the Electrical Code of New York City by failing to acknowledge that the license holder need only be an officer, and not an owner, of the firm. Even if your interpretation of the Electrical Code of New York City is accurate, the fact remains that Mr. Brito is not an officer of Nova Electric and you concede that he is not.

Section 26.71(h) permits PANYNJ to consider Ms. Nicholson's lack of a Master Electrician license as one factor in determining whether she controls Nova Electric. PANYNJ did not base its denial decision solely on that ground. We find that substantial evidence supports PANYNJ's conclusion that Ms. Nicholson does not control Nova Electric within the meaning of §26.71(h). We affirm.

Conclusion

We affirm PANYNJ's decision under §26.89(f)(1) as supported by substantial evidence and consistent with applicable certification provisions. Nova Electric did not meet its burden of proving that Ms. Nicholson controls the firm. *See* §26.61(b). Our decision is administratively final and not subject to petitions for reconsideration.

Sincerely,

Samuel F. Brooks
Appeal Team Lead
Disadvantaged Business Enterprise Division

cc: PANYNJ

²¹ *See* Denial Letter at 3.