December 19, 2019

Reference Number 19-0146

Dori Schweitzer
Andis, LLC
[redacted]
Highland Heights, KY 41076

Dear Ms. Schweitzer:

This is in response to your appeal of the Ohio Department of Transportation's (ODOT) decision to deny the application of Andis, LLC for Disadvantaged Business Enterprise (DBE) interstate certification under the rules of 49 CFR Part 26 (the Regulation). The U.S. Department of Transportation (the Department) is reversing ODOT's decision and directing ODOT to certify the firm immediately.

Procedural Background

Andis has DBE certification in Kentucky[1] and applied for interstate certification to ODOT on March 1, 2019. ODOT made an initial determination on April 12, 2019 that there was good cause to deny the application. Following a May 9, 2019 meeting between Andis' owners and ODOT staff, ODOT finally denied the firm's application on June 6, 2019. Andis appealed to the Department on July 18, 2019.

Applicable Rule

Section 26.85 of the Regulation governs interstate certification. Under that section, there are only five grounds on which a state can reject the application of a firm already certified in another state. One of the grounds that ODOT cites is section 26.85(d)(2)(iii), namely that Kentucky's certification of Andis was factually erroneous or inconsistent with Part 26 requirements. From ODOT's perspective, Kentucky's decision was mistaken with respect to nine ownership and control provisions of Part 26.

The Department explained the meaning of section 26.85(d)(2)(iii) in the notice of proposed rulemaking leading to its adoption:

[1] The appeal states that Andis is also certified in Indiana and Florida. As the home state is apparently Kentucky, we mean the Kentucky Transportation Cabinet when we refer to State A or the original certifier.

The proposed language would permit State B to find good cause if the home state's certification was factually erroneous or inconsistent with Part 26. For example, suppose State B reviews the documentation used by the home state to certify Firm Y and finds an outcome-determinative fact about Firm Y that the home state overlooked, or State B notices that the home state had based its decision on what is clearly a misreading or misinterpretation by the home state of Part 26 or DOT guidance. In these cases, under the proposal, State B could find good cause to begin a proceeding to deny reciprocal certification. On the other hand, it is often the case that reasonable people can differ in their conclusions about whether the facts surrounding a firm's application demonstrate that the firm meets Part 26 criteria. We would not want this provision simply to become a way for what amounts to no more than differences of opinion to obstruct interstate certification.[2]

The final rule's language is identical to that of the proposed rule, with the preamble to the final rule adding that "mere interpretive disagreements about the meaning of a regulatory provision" were not to be a ground for an objection to an application for interstate certification.[3]

Discussion

ODOT alleges a lot of factual error or rule misapplication in Kentucky, many more reasons than would normally rise to the level of section 26.85 "good cause."

ODOT wanted to see more evidence of majority ownership than was in the file, for example, and it drew a different conclusion from uncontroverted evidence about the owner's weekly hours. The disadvantaged and non-disadvantaged owners shared certain powers and responsibilities. They both had relevant experiences, and so forth. These reservations amount to differences of opinion about the adequacy or import of evidence, not a home state certification that is inconsistent with Part 26 rules. They involve quantity or degree, not substantive incompatibility. Section 26.85(d) requires a much more definitive error.

In the several respects in which ODOT found the firm's evidence of ownership and control lacking, ODOT essentially looked at evidence *de novo*, as if it were making an initial certification application. But Kentucky previously had looked at the same evidence and come to a different conclusion. ODOT essentially substituted its judgment for Kentucky's. Making an interstate certification decision based on such a difference of opinion in weighing the evidence is precisely what the Department, in section 26.85(d), sought to avoid.[4]

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[2] 75 Fed. Reg. 25820, May 10, 2010.

[3] 76 Fed. Reg. 5089, Jan. 28, 2011.

[4] It is highly important for certifiers to recognize that finding grounds for disagreement with another state's certification decision falls far short of the stringent and highly specific section 26.85(d) standards for rejecting an interstate certification application, which require a much more definitive error, fraud, new outcome-determinative evidence, etc.

Conclusion

Because ODOT applied section 26.85(d)(2)(iii) overbroadly, its decision is inconsistent with the provisions of the Regulation. For this reason, the Department reverses the decision and directs ODOT to certify Andis without delay.

This decision is administratively final and not subject to petitions for review.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: Deborah M. Green, ODOT