

July 6, 2015

CERTIFIED MAIL
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Reference No.: 14-0035

Attorney Lewis Tesser
500 Madison Avenue
New York, NY 10022

Dear Attorney Tesser:

This letter responds to the November 26, 2013 correspondence on behalf of your client, Rear View Safety, Inc. (Rear View), appealing the New York Metropolitan Transportation Authority's (MTA) August 28, 2013, denial of the firm's application for certification as a Disadvantaged Business Enterprise (DBE) under the rules of 49 C.F.R. Part 26 (the Regulation). MTA denied Rear View's application on the grounds that the firm's socially and economically disadvantaged majority owner and President, Ms. Gila Newman, did not demonstrate that she contributed capital to acquire her ownership interest in the firm or that she controls the firm as required by §§ 26.69 and 26.71.¹ We affirm MTA's decision because substantial evidence in the administrative record supports the denial.²

Facts

Rear View is a Brooklyn, New York-based corporation owned by Ms. Gila Newman, a socially and economically disadvantaged individual, and her husband Mr. Joseph Schechter, a non-disadvantaged individual. Rear View was formed in 2007 with an initial investment of \$10,000 from a bank account under Mr. Schechter's name. (Hearing Transcript 13, 49.) Mr. Schechter was the 100% owner of Rear View at that time. In 2009, 51% of the shares were transferred to Ms. Newman, and she was named President of the company. (DBE Application 4; Hearing Transcript 49.) This transfer was done on the basis of a reallocation of \$5,000 of the initial investment as having come from Ms. Newman, based on the premise that Mr. Schechter's bank account constituted joint marital assets because it was used for joint marital expenses, even

¹ Section 26.61(b) of the Regulation requires that applicant firms prove by a preponderance of the evidence that they satisfy each eligibility requirement concerning group membership or individual disadvantage, business size, ownership and control. The firm's failure to meet its burden of proof regarding any substantive certification requirement results in a determination that it is ineligible.

² See 49 C.F.R. § 26.89(f)(1). In accordance with § 26.89(e), we base our decision solely on the entire administrative record as supplemented by the appeal.

though Ms. Newman's name was not on the account. (Hearing Transcript 14, 49-50; Appeal Ex. E.)

Rear View sells cameras and digital video recording safety equipment for vehicles, but does not install them or service them, so the business is mainly driven by sales,³ as confirmed in the appeal and in the eligibility hearing. (Hearing Transcript 4; Appeal Ex. L.) Ms. Newman's resume and her statements during Rear View's eligibility hearing indicate that her professional experience is limited to teaching positions and several years as a personal assistant. (Hearing Transcript 4-5.) Mr. Schechter's resume shows six years of sales experience. As President, Ms. Newman states that she oversees the day-to-day office administration and operations, and makes financial and personnel decisions. (DBE Application 5; Hearing Transcript 29, 41-42.) Mr. Schechter's stated main role as Executive Vice President is in sales, though Mr. Schechter also is the Field/Production Operations Supervisor, and shares office management duties with Ms. Newman along with the authority to negotiate and execute contracts, sign company checks for any purpose, and make financial transactions. (DBE Application 5.) Ms. Newman and Mr. Schechter are the sole members of the Board of Directors. (*Id.*, New York Department of State Division of Corporations Entity Information.) According to the corporate bylaws, a quorum of board members, constituting a majority, must be present in order to conduct the company's business. (Bylaws 10.)

Among several other reasons for its denial of certification, MTA determined that because the original investment for the company originated from Mr. Schechter's personal account, which was not jointly owned by Ms. Newman, the reallocation of the initial capital investment under Ms. Newman's name was insufficient to demonstrate that Ms. Newman actually made a capital contribution to acquire her ownership interest in Rear View. Additionally, MTA found that Ms. Newman's comparative lack of sales experience as compared to Mr. Newman indicated she did not possess the requisite level of control over the business. MTA further determined that the corporate bylaws' requirement for a quorum in order for the Board of Directors to act placed an undue restriction on Ms. Newman's ability to act without the consent of a non-disadvantaged individual and thus demonstrated lack of control. MTA thus denied Rear View's application for DBE certification, and you filed a timely appeal.

Standard of Review

Under 49 CFR § 26.86(d), a firm may appeal its DBE denial to the US Department of Transportation (Department). The Department does not make a de novo review or conduct a hearing; its decision is based solely on a review of the administrative record as supplemented by the appeal. *Id.* § 26.89(e). Finally, the Department must affirm the below decision unless it determines, based upon its review of the entire administrative record, that the decision was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification." *Id.* § 26.89(f)(1).

³ Rear View applied for DBE certification under NAICS code 423410, Photographic Equipment and Supplies Merchant Wholesalers

Discussion:

Ownership

Under the Regulation, in assessing a disadvantaged individual's ownership interest, the certifying agency "must consider all the facts in the record viewed as a whole, including the origin of all assets and how and when they were used in obtaining the firm." 49 CFR § 26.69(a). Additionally, ownership, including the disadvantaged individual's capital contribution, must be "real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents." *Id.* § 26.69(c)(1), (e). When marital assets are used by the disadvantaged owner to acquire his or her ownership interest, the ownership interest must be considered as acquired by individual resources only if "the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled." *Id.* § 26.69(i)(1). Further, a copy of the legal document transferring and renouncing those property rights must be included in the firm's application. *Id.* § 26.69(i)(2).

If the capital used to acquire the firm came from another individual and cannot be considered marital assets, the certifying agency must presume as not being held by a disadvantaged individual all interests obtained as a gift or transfer without adequate consideration from a non-disadvantaged individual or non-DBE firm who is involved in the same firm as the DBE certification seeker. *Id.* § 26.69(h)(1)(i). To overcome this presumption, the disadvantaged individual must demonstrate by clear and convincing evidence both that "the gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE" and that "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." *Id.* § 26.69(h)(2).

In Rear View's appeal, you claim that the money used to capitalize the company came from the couple's account, and because under 49 C.F.R. § 26.69(i), marital assets may be used to acquire an ownership interest, Ms. Newman's contribution was therefore real and substantial. You also state that the irrevocable revocation of Mr. Schechter's property interest required under § 26.69(i)(1) was met by Mr. Schechter simply transferring 51% of the shares of the company to Ms. Newman.

While it is true that marital assets held jointly by both spouses may be used to acquire ownership interest on behalf of the disadvantaged half of a married couple, the operative word is "jointly." Here, the bank account had only Mr. Schechter's name on it. Whether the bank account was used for marital expenses does not matter when Ms. Newman had no ownership rights to the account – without her name on the account, she could not unilaterally access its funds or make any bank transactions. Mr. Schechter had full ownership rights and control over the funds. Further, even if the bank account at issue did qualify as community property, Mr. Schechter's simply transferring the shares to Ms. Newman did not establish the required irrevocable renunciation of his ownership interest sanctioned by the laws of the state in which either spouse or the firm is domiciled. As it stands now, the "renunciation" rationale is circular – transferring shares to Ms.

Newman required Mr. Schechter renouncing his interest, but evidence of the renunciation is that he transferred the shares. More is required to establish an irrevocable renunciation.⁴

Because Ms. Newman's ownership interest in Rear View cannot be considered to have been acquired with her own resources, it must be presumed to be a gift without consideration, as per § 26.69(h)(1)(i). Appellant has not presented clear and convincing evidence to rebut this presumption.⁵ Thus, a careful review of the administrative record shows that substantial evidence supports MTA's conclusion that Ms. Newman did not demonstrate ownership of Rear View.

Control

In order to demonstrate control, the Regulation stipulates that the disadvantaged owner must have the power to direct the "management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations." 49 CFR § 26.71(d). Further, there must be no formal or informal restrictions limiting the customary discretion of the disadvantaged individual, such as through corporate charter or bylaw provisions that prevent the disadvantaged owner from making any business decision without the cooperation or vote of a non-disadvantaged person. *Id.* § 26.71(c). Similarly, the disadvantaged owner must control the board of directors. *Id.* § 26.71(d)(2).

Additionally, the disadvantaged owner "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." *Id.* § 26.71(g). Expertise limited to the administrative business activities of the company is insufficient to demonstrate control. *Id.*

Finally, where a firm was formerly owned or controlled by a non-disadvantaged individual (whether or not an immediate family member), and this individual remains involved with the firm in any capacity, there is a rebuttable presumption of control by the non-disadvantaged individual. *Id.* § 26.71(l).⁶

In the appeal you state that because Ms. Newman is the majority shareholder, and the shareholders elect the Board of Directors, she therefore controls the Board of Directors as required by the Regulation. You also note that neither Ms. Newman nor Mr. Schechter have any specialized knowledge of camera operation or installation and, therefore, Ms. Newman's lack of experience should have no bearing on whether she has the ability to exercise the requisite control as compared to Mr. Schechter.

⁴ No renunciation document was provided with the application as required by 49 C.F.R. § 26.71(i) and no citation to New York state law was provided that authorizes a renunciation in the manner claimed by the applicant.

⁵ Under § 26.69(h)(2), applicant must demonstrate that both that the gift was not made for DBE certification purposes and that the disadvantaged individual actually controls the firm.

⁶ Similar to the equivalent ownership provision, as per § 26.71(l), the presumption can be rebutted by clear and convincing evidence that both "transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE" and that "the disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm."

Your analysis regarding Ms. Newman's ability to control the Board of Directors is unsound. As required by its corporate bylaws, the Board needs a quorum to act. A quorum is a majority, and as there are only two members of the Board, a majority requires both people. While Ms. Newman is indeed the majority shareholder and, therefore, theoretically controls who is elected to the Board of Directors, the ability to elect someone to the Board does not equate to the ability to control that person's actions as a Board member. The quorum requirement in the corporate bylaws indicates that Ms. Newman cannot independently make decisions for the business without Mr. Schechter's consent and, thus, she does not possess the requisite control.

Similarly, Ms. Newman's and Mr. Schechter's equivalent lack of technical background in camera operation is not relevant in this analysis. While it's true that neither Ms. Newman nor Mr. Schechter have demonstrated experience in camera operation or installation, the record shows that Rear View's business is driven by sales, not technical expertise. Thus, the experience that matters in this comparison is sales experience. Mr. Schechter has a background in sales and continues to be the main salesperson for the business. Ms. Newman has no sales experience, and her tasks are mainly limited to administrative functions, which under § 26.71(g) is insufficient to demonstrate control.

Finally, because the firm was formerly owned and controlled by Mr. Schechter, a non-disadvantaged individual who remains involved in the firm, under § 26.71(l), the appellant must rebut with clear and convincing evidence the presumption that he still controls the firm by demonstrating that the transfer was not made for DBE certification purposes and that Ms. Newman actually does control the company. This was not accomplished.⁷

Thus, substantial evidence within the administrative record supports MTA's conclusion that Ms. Newman did not possess control over Rear View needed to qualify for DBE certification.

Conclusion

Based on the above, the Department affirms MTA's denial of DBE certification as supported by substantial evidence and not inconsistent with any substantive or procedural certification provisions. This decision is administratively final and not subject to petitions for review. Rear

⁷ Ms. Newman claims that the business idea was always hers, despite that the company was originally solely in the name of Mr. Schechter, and that the transfer occurred because "I wanted to focus on sales and I was committing myself to doing it full-time..." (Eligibility Evaluation 6.) This explanation is not sufficiently substantiated to meet the higher clear and convincing evidence standard required to rebut the presumption.

View may reapply to the DBE program at this time if it can satisfy the eligibility criteria, as the applicable waiting period has passed.

Sincerely,

Sheryl G. Williams
Acting Associate Director
External Civil Rights Programs Division
Departmental Office of Civil Rights