

December 30, 2019

Reference number 19-0156

Mr. Joseph A. Barra
Robinson + Cole
One Boston Place, 25th Floor
Boston MA 02108-4404

Dear Mr. Barra:

This is in response to your August 24, 2019, appeal of the decision of the New York State Unified Certification Program (NYUCP) to decertify your client, Atlantic Bridge & Engineering Inc. (ABE), from the Department's Disadvantaged Business Enterprise (DBE) program, under the rules in 49 CFR Part 26 ("the Regulation"). The Department affirms NYUCP's decision as supported by substantial evidence and consistent with applicable rules. See 26.89(f)(1).

Procedural Background

This case began with an April 18, 2017, notice from the New York Department of Transportation (NYDOT) to ABE's 100 percent owner, Ms. Victoria Kolenda, initiating an eligibility review of ABE, which had been certified in New York since 2006. Following a lengthy exchange of correspondence in 2017-2018, NYDOT wrote to ABE on January 3, 2019, proposing to decertify the firm. ABE responded on February 13, 2019 opposing this proposal. On May 19, 2019, NYUCP found that Ms. Kolenda was not economically disadvantaged and that ABE should consequently be decertified. On April 24, 2019, ABE appealed the NYUCP decision to the Department.

Burden of Proof and Standard of Review

(a) Burden of Proof

This is a decertification action based on the alleged ability to assume substantial wealth (AASW) of ABE's owner. In such a proceeding,¹ a certifier must follow the same process used for decertification proceedings under section 26.87. The certifier bears the burden of

¹ 49 CFR 26.67(b)(2)-(3).

proof, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged.²

(b) Standard of review for certification appeals

On receipt of a firm's appeal from a decertification decision, the Department makes its decision "based on the entire administrative record as supplemented by the appeal... The Department does not make a *de novo* review of the matter..."³ The Department affirms (the certifier's) decision unless it determines, based on the entire administrative record, that (the certifier's) decision is unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification."⁴

This language means that the Department does not act as though it were the original decision maker in the case or substitute its judgment for that of the certifier. If the certifier's decision in a decertification case – that a preponderance of the evidence shows that the firm now fails to meet certification requirements – is supported by substantial evidence, then the Department will affirm the certifier's decision.

Issues

There is ultimately only one issue in this case: does Ms. Kolenda have AASW, under the terms of section 26.67(b)(1)(ii)(A)? Three important principles frame any discussion of this concept. First is the basic purpose of the provision. The Department has long told certifiers - we published guidance on the matter in 2007 – that they can take account of evidence that indicates assets held by an individual suggest that he or she is not economically disadvantaged, even if the individual's personal net worth (PNW) is less than the rule's \$1.32 million cap. The traditional example used by the Department was someone whose possession of a very expensive house, a yacht, or extensive real or personal property holdings suggested that he or she was not economically disadvantaged.

Second, determining whether an individual has AASW is intrinsically a judgment call by the certifier, based on the totality of the circumstances.⁵ It is not simply a numbers game. The question a certifier is to answer is whether the overall economic situation of an individual suggests that he or she is obviously wealthy, with resources indicating to a reasonable person that he or she is not economically disadvantaged.

² 49 CFR 26.67(b)(3).

³ 49 CFR 26.89(e).

⁴ 49 CFR 26.89(f)(1).

⁵ See for instance 17-0025 Epic Land Solutions (June 12, 2017) and 15-0113 ADF Industries Inc. (January 8, 2015).

Third, in its 2014 final rule that added section 26.67(b)(1)(ii)(A), the Department offered six factors that, among other things, certifiers could choose to use as guidance when making this judgment. These six factors do not constitute an exclusive or exhaustive inventory of what certifiers may consider. A certifier is not required to consider all six items. These factors are not a checklist that certifiers are required to meet with specificity in order to make a finding of AASW. This is a point the Department has made frequently in its certification appeal cases.⁶

This being the case, the extensive back-and-forth involving NYDOT, the appellant's law firm, and the appellant's accountant concerning Ms. Kolenda's AGI, the precise amount she paid in taxes, the value of her businesses, how much of distributions to her from ABE can properly be regarded as having reinvested in the company, the estimated values of her real estate holdings, etc. is at a far more granular level of detail than is necessary for the Department to address in a case of this kind.⁷ Agencies, accountants and lawyers can and frequently do come to different conclusions about such matters. It is not the Department's task, in a certification appeal, to choose between such differing calculations and conclusions. The choice is not binary. Our charge is to assess whether substantial evidence supports the certifier's view of the totality of the circumstances. More specifically, in an appeal of a decertification on AASW grounds, we determine whether there is substantial evidence that the certifier proved its case. See generally sections 26.87(d), 26.89(e), 26.89(f)(1) and (2).

NYUCP, in its May 19, 2019 letter, determined that Ms. Kolenda had average AGI well above the \$350,000 example in section 26.67(b)(1)(ii)(A)(1).⁸ Even had her AGI fallen below

⁶ See for instance 17-1048 Reiner Contracting, Inc. (June 6, 2018) at p. 5 ("The six factors in §26.67(b)(1)(ii)(A) are not a checklist or litmus test for certifiers to examine in an AASW analysis. They are simply examples of the type of evidence that certifiers can evaluate....No single factor or number is likely determinative of an owner's AASW....Again, the proper inquiry is whether the *totality of the owner's economic circumstances* (emphasis in original) indicates that she is presently wealthy or has AASW.")

⁷ As in all certification appeal cases, we thoroughly reviewed the entire – in this case unusually voluminous – administrative record. In doing so, we focus on what light the documents in the record, and the parties' arguments, shed on the basic question that the Department must answer. Here, that question is whether there is substantial evidence that, given the totality of the circumstances, Ms. Kolenda has the ability to accumulate substantial wealth. In answering that question, it is not essential that the Department discuss every argument and counter argument or decide which competing claim about financial numbers is more persuasive. AASW is an area in which exact quantity is less important than general magnitude. The question is not whether a reasonable person would consider the owner of an asset worth [REDACTED] million wealthy. It is whether she would consider the owner of a multimillion dollar asset wealthy, in light of the overall economic profile or, in some cases, outright.

⁸ The AASW provision considers all sums reported to the IRS as AGI to be relevant for this purpose. There is no requirement that pass-through funds reported on an owner's personal tax return for S corporations or LLCs be excluded for AASW purposes. Commenters to the 2014 rule raised the issue of the situation of S corporations; however, the Department did not adopt an exclusion of pass-through income, deciding instead to adopt its totality of the circumstances approach. See 79 FR 59568-69, October 2, 2014. The Department reaffirmed this point in 16-0166 Global Engineering (March 31, 2017), a citation to which the appellant objected because it was "unpublished." The Department is entitled to rely on relevant material in any of its decisions and, had we been asked, would have provided the appellant a copy of the decision.

this level, as ABE's February 13, 2019, letter argues, that would not necessarily mean that she did not have AASW.⁹ As suggested by section 26.67(b)(1)(ii)(A)(4), NYUCP then took into account tax payments and reinvestments, using calculations with which ABE and its accountant disagreed.

NYUCP calculated the fair market value of Ms. Kolenda's assets as exceeding \$6 million. ABE also disagreed with these calculations, particularly with respect to certain real properties (e.g., her interests in residences and horse facilities in New Hampshire and Florida), saying in the February 13, 2019, letter that the value of the assets did not exceed [REDACTED] million. This difference would matter if the [REDACTED] figure in section 26.67(b)(1)(ii)(A)(6) were an outcome-determinative bright line in a mandatory checklist, but it is not.

NYUCP determined that Ms. Kolenda's income placed her in the top 1 percent of earners in the U.S. While the Department did not place this figure in the list of factors suggested as guidance in section 26.67(b)(1)(ii)(A), the Department's preamble did note that Federal courts had upheld the application of a top 1-2 percent of earners criterion for assessing economic disadvantage.¹⁰ Under section 26.67(b)(1)(ii)(A), a certifier may consider factors other than the six listed items. NYUCP also found that Ms. Kolenda has access to substantial credit, a point that the appeal does not contest.

NYUCP presents an overall picture of a person of high income who owns substantial assets of significant value and has ready access to large amounts of credit. That person, Ms. Kolenda has multiple residences and a horse farm, which are assets economically disadvantaged generally cannot afford. These are the kinds of assets – conspicuous trappings of wealth - that the Department had in mind when it devised the AASW rule as a backstop to the more easily gamed PNW cap. We find substantial evidence that NYUCP proved ABE ineligible based on its owner's AASW. Argue as one might about "correct" analyses and exact numbers, a reasonable person who considered Ms. Kolenda's overall economic circumstances would, more likely than not, conclude that she is not economically disadvantaged.

Conclusion

The Department finds, pursuant to section 26.89(f)(1), that there is substantial evidence to support NYUCP's decision that Ms. Kolenda has the ability to accumulate substantial wealth and that she is therefore not economically disadvantaged. It was substantively and procedurally proper for NYUCP to decertify ABE and we therefore affirm the decision.

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

⁹ Id. at 59569. We reiterate that there are no magic numbers, universally determinative thresholds, or required exclusions in the AASW rule. We call to the appellant's attention the rule's "may consider" language.

¹⁰ Id.

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: New York Unified Certification Program