

December 14, 2017

Reference Number 17-0087

Jeff P. H. Cazeau, Esq.  
Becker & Poliakoff  
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Coral Gables, FL 33134

Dear Mr. Cazeau:

Mast Industrial Painting, Inc. (MIP) appeals the Ohio Unified Certification Program's (OUCP)<sup>1</sup> denial of its application for certification as a Disadvantaged Business Enterprise (DBE) under the standards of 49 C.F.R. part 26 (Regulation). OUCP determined in its Denial Letter dated April 25, 2017 that MIP did not demonstrate, by a preponderance of the evidence, that it satisfies the requirements of Regulation §§26.71(g), (j), (m), and (n). MIP appealed to the U.S. Department of Transportation (Department) on May 3, 2017. After considering all of the evidence in the administrative record, as §26.89(e) requires, we conclude that substantial evidence supports OUCP's decision, which we affirm under §26.89(f)(1).

## **I. Facts**

### **A. Application**

MIP submitted its Uniform Certification Application (UCA) on January 3, 2017. MIP states that Nomiki Tsarnas, a person whom the Regulation presumes to be disadvantaged, formed MIP on July 15, 2011. UCA at 5; *see also* Articles of Incorporation. MIP was inactive until at least December 2016—Appeal Letter at 2; *see also* Forms 1120S for MIP's 2013 and 2014 fiscal years; UCA at 12—but “[t]he primary activity of the Company was to be Industrial Painting.” Appeal Letter at 3. MIP describes its business, UCA at 5, as “*industrial Painting, Bridge, building, coating, fire proofing structural steel, preparation for construction platform Heavy Construction.*” (Emphasis added.)

Ms. Tsarnas is MIP's sole owner, officer, and director. *See, e.g.*, Subscriptions to the Capital Stock of [MIP] (July 15, 2011); UCA at 7, 9; First Directors Meeting of [MIP] (same date). MIP has neither employees nor equipment (no tools, no vehicles but some office equipment)<sup>2</sup> to

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<sup>1</sup> The Ohio Department of Transportation (ODOT), a member of OUCP, is the certifier in this case.

<sup>2</sup> Onsite Interview Memo (April 13, 2017) at 1-2, 5-6. Ms. Tsarnas stated at the interview that “the business will need a pick up truck with a hitch, a small trailer, hand tools, a power washer, and a pressure washer” and that she plans to lease such equipment when MIP secures a contract.

perform its work. *See* Denial Letter at 2; Appeal Letter at 4, 7; Analysis and Recommendation (A&R) Memo to ODOT (April 13, 2017) at 3; Onsite Interview Memo (same date) at 6; UCA at 10. Ms. Tsarnas states that she “always” controls all of MIP’s activities specified (at 9) in the UCA. Ms. Tsarnas also works full time as a partner at the law firm Kisling Nestico & Redick and part time for her husband’s firm, A-1 Industrial Maintenance, Inc. UCA at 7; Appeal Letter at 2.

OUCP conducted its site visit and interviewed Ms. Tsarnas on April 3, 2017. Onsite Memo at 1. Ms. Tsarnas explained at the interview that she is familiar with the painting business because her father was a bridge painter. *Id.* She further stated that after her husband was involved in a serious accident on May 29, 2011, she became “involved in the daily communication of her husband’s business [A-1], which is heavy industrial painting.” *Id.* After this, she created MIP, *id.*, which she runs in her “spare time” and “when she can” for up to 20 hours a week. *Id.* at 3, 6. Her current responsibilities for MIP are “reviewing bids with a subscription to Bid tracker.” *Id.* at 3. Ms. Tsarnas advised that she has not yet bid on a job but will “very soon.” *Id.*

Ms. Tsarnas’s resume indicates that her current duties at A-1 include “interior administration of the company” from “2/2004 – Present.” *Id.* at 6; Resume at 1. However, during the on-site interview, Ms. Tsarnas suggests that her only technical experience in the painting industry was with A-1, for the brief period from May 30 to July 15, 2011, and she clarifies that she has no formal education or training in the business. Onsite Memo at 6; A&R Memo at 2-3; *but see* n.3, *infra.* Finally, and apparently contradicting the resume, the A&R Memo states Ms. Tsarnas’s experience at A-1 is “limited to communication tasks...from 5/29/11 to mid-July 2011.” A&R Memo at 3. The A&R Memo concludes that although Ms. Tsarnas is “well educated” and has “significant experience as a lawyer, the basis for *an understanding of and managerial and technical competence in the painting business is not documented.*” (Emphasis added.)

## **B. Ineligibility Determination**

OUCP concluded with respect to §§26.71(g), (m), and (j), respectively, that:

Ms. Tsarnas's resume does not mention any specific experience in any of the work types listed. Her resume describes experience in the "interior administration" of A-1 Industrial Maintenance, Inc. ("A-1"), a painting business owned by her husband. Ms. Tsarnas also advised that she performed communication tasks for her husband's business from May 29, 2011 to mid-July 2011. However, responses to questions during the on-site visit *confirmed that she herself has no further experience or training<sup>3</sup> in the management or technical aspects of the painting business.* Mast has no equipment, neither owned nor leased, with which to perform work. (49 CFR 26.71(m): “In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work.”) Mast has no employees and no formal or informal agreements in place which would provide workers for jobs. At the on-site visit Ms. Tsarnas did not know what, if any, bonding capacity the

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<sup>3</sup> However, Ms. Tsarnas states that she “can attest that in 2005 I took the ODOT Work Type 26 Class which provides an overview of the Ohio Department of Transportation (ODOT) Construction and Material Specifications Item 514 - Painting of Structural Steel, and other contract requirements for painting structural steel in the fabricators' facilities and in the field.” Although the subject matter of the class appears to be directly related to MIP’s business, the record contains no documentation of its technical rigor or successful completion.

firm had. She advised the team that the company would serve as a subcontractor. Nonetheless, no formal or informal agreements have been put in place with prime contractors. The preponderance of the evidence does not indicate that Ms. Tsarnas exercises sufficient control over Mast with respect to *any* specific type(s) of work.

To be eligible for certification, the disadvantaged owner must not engage in outside employment or other business interests that conflict with the management of the firm or prevent the owner from devoting sufficient time and attention to the business. (49 CFR 26.71(j)) Ms. Tsarnas advised during the on-site visit that she had not been affiliated with A-1 since starting Mast in July 2011. However, the resume submitted with Mast's application indicates Ms. Tsarnas's role with A-1 is ongoing. The tax returns in the file reflect W-2 wage income from A-1 to Ms. Tsarnas for the years following 2011. Finally, Ohio Secretary of State records list Ms. Tsarnas as the statutory agent for A-1. Mast's application and Ms. Tsarnas's resume indicate that she is an attorney with Kisling, Nestico and Redick, L.L.C. Ms. Tsarnas confirmed during the on-site visit that her attorney position is full time. She advised the interview team that she performed functions for Mast in her "spare time." The preponderance of the evidence does not indicate that Ms. Tsarnas exercises sufficient control over Mast.

Based upon the aforementioned facts, the application of Mast Industrial Painting, Inc. for certification as a Disadvantaged Business Enterprise is denied. (Emphasis added.)

Denial Letter at 1-2.

### C. Appeal

On Appeal, MIP counters that:

A painting business is labor intensive. Should Ms. Tsarnas ever obtain a contract for this type of work she will need to hire many individuals to perform the work. She will need to know how to manage those individuals, handle work schedules, payment etc. This the "interior administration" experience indicated in Ms. Tsarnas' resume which is critical in controlling such a labor intensive business.

\* \* \*

[C]ontrary to ODOT's assertion, Ms. Tsarnas is 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. *See e.g. EIDEAS*, Ref. No.: 13-0016 (over-stringent application of certification rules, no universal "self-perform" requirement); *Nancy's Tree Planting*, Ref. No.: 13-0122 (disadvantaged owner need not personally perform all tasks associated with the business to control a particular activity, particularly in lower-tech fields of activity); *C2PM*, Ref. No.: 13-0073 (disadvantaged owner need not prove that she perform [sic] every task that the business performs in order to control the line of business). Ms. Tsarnas *need only 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. (Emphasis added.)

\* \* \*

Given that ODOT argues that Ms. Tsarnas lacks control of the company because it has no equipment, employees or contracts, it is hard to understand why Ms. Tsarnas couldn't control the Company in her "spare time". *See E.g. Brooks Bus Service*, Ref. No.: 13-0156 (2014) ('Section 26.7(j) does not prohibit outside employment per se. It prohibits outside activities "that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities.')

*See also, Mason Consultants, Inc.*, Ref. No.: 13-0125 ("there is a §26.71(j) "conflict only if [the disadvantaged owner] is unable to manage scheduling and operator assignments and make related operational decisions remotely".)

Appeal Letter at 4, 6-7.<sup>4</sup>

## II. Authority

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*. (Emphasis added.)

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

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<sup>4</sup> MIP also makes a §26.73(b)(2) argument:

In the Denial Letter, ODOT cites the following as evidence that Ms. Tsarnas does not control the Company:

1. Mast has no equipment, neither owned nor leased, with which to perform work.
2. Mast has no employees.
3. No formal or informal agreements in place which would provide workers for jobs.
4. The firm has no bonding capacity.
5. The firm has no formal or informal agreements in place with prime contractors.

The evidence cited above is proof that ODOT simply denied the Applicants certification because the Company has not yet done any work in the field. This is completely contrary to 49 CFR § 26.73(b)(2) and accordingly, we seek a determination from the Department overturning ODOT's denial decision and granting Mast Industrial Painting, Inc. DBE certification.

management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control. (Emphasis added.)

Section 26.71(j) states:

In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

Section 26.71(m) states:

In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

Section 26.71(n)<sup>5</sup> states:

You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You must not require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

Section 26.73(b)(2) states:

You must not refuse to certify a firm *solely* on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success. *If* the firm meets disadvantaged, size, ownership, and control requirements of this Part, the firm is eligible for certification. You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. (Emphasis added.)

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<sup>5</sup> OUCP cites this section essentially as a gateway to its substantive discussion of the other cited control provisions, which we address *infra*.

Section 26.86(a) states:

When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

Section 26.89(c) states:

If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and setting forth a full and specific statement as to *why the decision is erroneous, what significant fact that the recipient failed to consider, or what provisions of this Part the recipient did not properly apply*. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal or in the interest of justice. (Emphasis added.)

### III. Discussion and Decision

First, we resolve the §26.73(b)(2) issue and then the substantive control provisions that OUCP cites as its denial bases. We find MIP's §26.73(b)(2) argument meritless based on the plan language of the provision. Section 26.73(b)(2) prohibits certification denials *solely* on the basis that, e.g., the applicant "has not completed projects or contracts at the time of its application." OUCP cites, with the supporting evidence that §26.86(a) requires, at least three other reasons for determining MIP ineligible. OUCP specifically relies on MIP's lack of necessary equipment under §26.71(m) and failure to prove under §26.61(b) the owner's directly related managerial and technical competence and experience, which §26.71(g) requires, or the lack of conflict with its owner's acknowledged full-time outside employment, which 26.71(j) requires.

MIP attempts to bootstrap these clearly separate rationales (and shoehorn unfavorable underlying facts) into the limited purview of §26.73(b)(2),<sup>6</sup> but the argument fails on the facts and because of the "solely" limitation. As a factual matter, OUCP did not refuse to certify based only on the ground that MIP, at the time of its application, had not performed any work or derived revenue. Accordingly, the denial does not run afoul of the prohibition, and OUCP's analysis is consistent with §26.73(b)(2). *See also* §26.89(f)(1).

Section 26.71(m) contains a similar "must not" limitation, in this case paired with a "may consider" provision. The language of permission *authorizes* OUCP, in assessing the disadvantaged owner's control, to *consider* whether MIP owns the equipment that its work requires. The evidence, UCA at 10, that Mast owns no such equipment, other than office

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<sup>6</sup> "Interestingly, in the Denial Letter, ODOT correctly acknowledges that the regulations governing the DBE program, specifically 49 CFR 26.73 § (b)(2) does not allow ODOT to 'refuse to certify a firm solely on the basis that it is a newly formed firm, has not completed projects or contracts at the time of its application, has not yet realized profits from its activities, or has not demonstrated a potential for success.' However, ODOT goes on to deny the Applicants certification *on that very basis*." Appeal Letter at 6 (emphasis added).

equipment, is uncontroverted.<sup>7</sup> OUCP properly considered that evidence in making its control determination.

MIP's equipment argument, *supra* n.7, relies on a "startup company" exception to the equipment rule. Section 26.71(m) contains no such explicit exception.<sup>8</sup> There is, however, a "solely" limitation very similar to the one in §26.71(b)(2). Here, OUCP "must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm." OUCP did not make its ineligibility determination solely on the basis that MIP plans to lease equipment when it secures a job that requires it. As noted above, OUCP also cites MIP's failure to prove §26.71(g) and (j) control as other reasons for its ineligibility conclusion. Thus, neither the analysis nor the denial contravenes the limitation, and MIP fails to state reversible error under §26.89(c).

MIP contests OUCP's §26.71(g) denial grounds on the bases that the provision does not require Ms. Tsarnas to (1) have greater experience or expertise than other participants or (2) self-perform all of MIP's work. We generally concur. However, these assessments do not address or rebut OUCP's actual §26.71(g) denial rationale, italicized at 1, *supra*, which we read to be MIP's failure to demonstrate that its owner has directly related technical competence and experience. MIP produces scant evidence of either, in any event, and we find that it was well within OUCP's purview to determine that the proffered evidence is simply unpersuasive.

Ms. Tsarnas contends only that she is "familiar" with the industrial painting business because her father was in that line of work.<sup>9</sup> The assertion does not amount to possession of related technical competence or experience, and Ms. Tsarnas must demonstrate both for MIP to be eligible under subsection (g). Ms. Tsarnas's own testimony (via her resume and OUCP's onsite interview descriptions of the work as alternatively "interior administration" or "daily communication") is that her A-1 experience is neither directly related to MIP's business nor technical in nature. There is in fact no evidence of directly related technical competence/experience except Ms. Tsarnas's assertion that she attended one class in 2005, and that assertion suffers from the

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<sup>7</sup> Appeal Letter at 4-5, quoting Ms. Tsarnas as stating:

Mast Industrial Painting Inc. should be considered a startup company. Until I have the contracts in hand I do not intend to purchase equipment and instead will probably rely on leasing equipment. Under the Regulations, specifically, 49 CFR § 26.71(m) the question of whether the firm owns any equipment is only a consideration in determining whether the firm is controlled by socially and economically disadvantaged owners. Additionally "you must not determine that a firm is not controlled by a socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm."

<sup>8</sup> The implicit §26.73(b)(2) limitation does not apply on these facts for the reasons specified above.

<sup>9</sup> The Department reads the rule to require more than simply having a relative who performed similar work in a different business, particularly when there is no evidence whatever that the applicant's owner ever worked with her father.

evidentiary defects described above, which significantly impair its probative value. Finally, the Appeal Letter all but concedes that Ms. Tsarnas has no experience with actual “*industrial Painting, Bridge, building, coating, fire proofing structural steel, preparation for construction platform Heavy Construction.*”<sup>10</sup>

We conclude that substantial evidence supports OUCP’s determination that MIP failed to demonstrate, by a preponderance of the evidence, that Ms. Tsarnas has managerial *and technical competence and experience* directly related to the business MIP describes in the UCA at 5, *supra* pp. 2, 7-8.

MIP’s argument for eligibility under §26.71(j) is that “it is hard to understand why Ms. Tsarnas couldn’t control the Company in her ‘spare time.’” Appeal Letter at 7.<sup>11</sup> The argument fails because it would shift the burden of proof to OUCP. The applicant, not the certifier, must demonstrate the absence of a conflict or time-based impediment. Accordingly, the question is not why Ms. Tsarnas *couldn’t* control MIP in her spare time. The question is *whether MIP demonstrated* that she *can* (because of the absence of a conflict or time requirements that prevent demand on her time. OUCP answered the question in the negative, and we concur. The argument also fails because MIP did not carry its burden.

There is no actual evidence of non-conflict/prevention and substantial evidence that suggests some. The evidence is that Ms. Tsarnas works full time in a law firm<sup>12</sup> and up to 20 additional hours per week at A-1. It follows in some weeks she devotes as many as 60 hours to her two outside employers. That fact alone leaves her little apparent time to attend to MIP’s affairs and management. *MIP, not OUCP*, must demonstrate that whatever time Ms. Tsarnas can spare for MIP’s affairs is nevertheless “sufficient.” MIP fails in that endeavor.

There is no evidentiary showing at all when those 60 hours fall or on which days. Similarly, there is no evidence that establishes when MIP operates, other than in its owner’s “spare time.” Finally, there is no hard evidence that MIP is a part-time business that operates only in the evenings and/or on weekends. These times *could* be when Ms. Tsarnas is free of conflicting obligations and thus has time that she can “spare,” but MIP fails to demonstrate that that is the case. Substantial evidence therefore supports OUCP’s conclusion that MIP is ineligible because it failed to prove the absence of a §26.71(j) conflict with or pre-emption by Ms. Tsarnas’s outside business and/or employment obligations.

#### **IV. Conclusion**

The Department affirms OUCP’s ineligibility determination under §26.89(f)(1) as supported by substantial evidence and consistent with applicable certification rules, substantive and procedural.

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<sup>10</sup> Again, our emphasis. MIP’s own description of its work suggests significant technical challenges, and MIP makes no argument that its business is instead a “lower-tech” business that requires little technical competence or experience. MIP simply states that the business is labor-intensive. See Appeal Letter at 4, where MIP also appears to argue that “interior administration” connotes managerial, not technical competence.

<sup>11</sup> See also Appeal Letter at 8: “ODOT’s decision to deny the Company certification *based on Ms. Tsarnas operating it on a part-time basis is baseless.*” (Emphasis added.)

<sup>12</sup> Although it is common knowledge that most full-time attorneys work more than 40 hours per week, for purposes of this appeal we assume Ms. Tsarnas works the standard 40.

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

Sincerely,

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

cc: OUCP/ODOT