

December 31, 2019

Reference No. 20-0004

Joy Zakaria
President and CEO
Application Innovations, LLC
[REDACTED]
Prattville, AL 36066

Dear Ms. Zakaria:

This is in response to your appeal of the decision of the Alabama Unified Certification Program (ALUCP) to deny the application of Application Innovations, LLC (AI) for certification under the Department's Disadvantaged Business Enterprise (DBE) program, under the rules in 49 CFR Part 26 ("the regulation"). The Department affirms ALUCP's decision as supported by substantial evidence. See 26.89(f)(1).

Procedural Background

AI applied to ALUCP for certification on August 9, 2018. ALUCP conducted an on-site interview on January 8, 2019. ALUCP denied the firm's application in a letter of April 24, 2019. AI appealed to the Department on July 26, 2019.¹

Burden of Proof and Standard of Review

(a) Burden of Proof

As provided in 49 CFR 26.61(b) of the rule, an applicant firm generally must demonstrate, by a preponderance of the evidence, that it meets Part 26 requirements concerning business size, social and economic disadvantage, ownership, and control.

A different burden of proof applies to ownership situations addressed by section 26.69(h) of the rule. This provision concerns ownership interests in a business that a non-disadvantaged individual has transferred to a disadvantaged individual without adequate consideration, while the non-disadvantaged individual remains involved in the firm. A related provision concerning control, section 26.71(l), applies to a situation in which a firm was formerly owned and/or controlled by a non-disadvantaged individual who remains involved with the firm, and ownership and/or control was transferred to a disadvantaged individual.

¹We choose to resolve the appeal despite the late filing. See section 26.89(c).

In either case, the firm is presumed not to be owned or controlled by the disadvantaged individual. To rebut this presumption, the firm must show by the more stringent “clear and convincing evidence” standard both that the transfer was made for purposes other than obtaining DBE certification and that the disadvantaged individual actually controls the company, notwithstanding the continued participation of the non-disadvantaged individual who made the gift or transfer.

(b) Standard of review for certification appeals

On receipt of an applicant’s appeal from a denial of certification, the Department makes its decision “based on the entire administrative record as supplemented by the appeal...”² The Department does not make a *de novo* review of the matter....³ The Department affirms (a 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

Issues

AI was founded by Ryan Zakaria in 2012. On May 16, 2016, Mr. Zakaria, a non-disadvantaged individual, and his wife, Joy Zakaria, decided at a company meeting that majority ownership of AI would be transferred to Ms. Zakaria. She was said to own, “by definition, at least 51 percent” of the company. There was no consideration for the transfer. The memorandum of the meeting relates that Ms. Zakaria agreed that she could “apply her management experience to the company, as well as continue to grow in the field of leadership,” while Mr. Zakaria could work directly in the field with clients. Mr. Zakaria retained 49 percent ownership. He is now the Chief Technical Officer (CTO) of the company.

In deciding that AI did not prove its case with respect to control, ALUCP pointed to the resumes of Ms. Zakaria and Mr. Zakaria, respectively. The latter showed significantly more education and experience with respect to the core functions of the company. His work at AI was more focused on IT matters than hers, which included several “business end” functions as well as some IT-related work. ALUCP judged that AI relied heavily on Mr. Zakaria’s technical expertise.

ALUCP also stated that Mr. Zakaria receives a \$72,000 annual salary, while Ms. Zakaria does not take a salary unless the firm generates \$1 million in annual revenue. This suggested to ALUCP that, while owners may often delay their own compensation, the difference gave rise to an inference that Mr. Zakaria controls the firm.

AI’s appeal emphasized the extent of Ms. Zakaria’s involvement in the technical side of the firm’s business as well as her work in the necessary functions of human resources, accounting,

² 49 CFR 26.89(e).

³ Id.

⁴ 49 CFR 26.89(f)(1).

management, etc. As to the salary difference between Ms. and Mr. Zakaria, the appeal points out that as a married couple, their income is joint, deposited in a joint bank account for which she is the primary holder, and reflected as joint income on their tax return.

Discussion

Because there was no consideration for the transfer of 51 percent ownership of AI to Ms. Zakaria and because Mr. Zakaria remains involved with the firm, sections 26.69(h) and 26.71(l) apply. Those provisions create a presumption that Ms. Zakaria does not control AI. To rebut the presumption, AI must prove Ms. Zakaria's control by "clear and convincing evidence -- specifically, that it is much more likely than not that Ms. Zakaria controls the firm's management, policy, and operations. This is a tall order.

Given the disparity in both the education and experience of the respective principals and in their remuneration, ALUCP had substantial evidence to conclude that AI did not meet this high rebuttal standard and that AI is therefore ineligible.⁵

Conclusion

The Department affirms the denial as supported by substantial evidence and consistent with applicable certification standards.

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

Sincerely,

Samuel F. Brooks
DBE Team Lead
Disadvantaged Business Enterprise Division

cc: John L. Huffman

⁵ AI did not carry its burden of proof regarding control; hence we need not address the other rebuttal requirement, which concerns the purpose of the transfer.