

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

ADNAN INVESTMENT AND	)	
DEVELOPMENT, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 96-5557
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
_____	)	

**RECOMMENDED ORDER**

Pursuant to notice, a Section 120.569/57(1) hearing was conducted in this case on March 17, 1997, by video teleconference (at sites in West Palm Beach and Tallahassee, Florida) before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

**APPEARANCES**

For Petitioner: Adnan K. Alghita, President  
Adnan Development and Investment, Inc.  
Post Office Box 517  
Jensen Beach, Florida 34958

For Respondent: Murray M. Wadsworth, Jr.  
Assistant General Counsel  
Department of Transportation  
Haydon Burns Building, Mail Station 58  
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**STATEMENT OF THE ISSUE**

Whether Petitioner is entitled to certification as a Disadvantaged Business Enterprise (DBE) pursuant to Section

339.0805, Florida Statutes, and Rule Chapter 14-78, Florida Administrative Code?

**PRELIMINARY STATEMENT**

By letter addressed to Adnan Alghita, Petitioner's president, dated August 7, 1996, the Department of Transportation (Department) advised Petitioner of its intent to deny Petitioner's application for Disadvantaged Business Enterprise certification on the following grounds:

(1) It does not appear that you have established your eligibility to participate in the DBE program in that: (1) you, as the qualifying owner of the firm, have not established that you are a member of any of the groups identified in Rule 14-78.002(18), Florida Administrative Code (F.A.C.), that are presumed to be socially and economically disadvantaged, as required in Rule 14-78.005(7)(b)1. F.A.C.; or, (2) you have not sufficiently documented instances of your social and economic disadvantaged status as required by Rule 14-78.005(7)(b)3., F.A.C. .

. .

By letter dated August 23, 1996, Petitioner requested an administrative hearing on the Department's proposed action. On November 21, 1996, the matter was referred to the Division of Administrative Hearings for the assignment of an Administrative Law Judge.

As noted above, the final hearing in this case was held on March 17, 1997. Two witnesses testified at the hearing: Adnan Alghita, testifying on behalf of Petitioner, and Howard Jemison,

the Department's DBE Certification Manager, testifying on behalf of the Department. In addition to the testimony of these two witnesses, 18 exhibits (Respondent's Exhibits 1 through 18) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, advised the parties of their right to file proposed recommended orders and established a deadline (20 days from the date of the Division of Administrative Hearings' receipt of the transcript of the hearing) for the filing of such proposed recommended orders.

The transcript of the hearing was filed on March 25, 1997. On April 11, 1997, the Department filed its proposed recommended order, which the undersigned has carefully considered. To date, Petitioner has not filed a proposed recommended order.<sup>1</sup>

#### **FINDINGS OF FACT**

1. Adnan Alghita, a licensed general contractor in the State of Florida, is the president and sole owner of Adnan Investment and Development, Inc. (Adnan's).

2. Alghita is a United States citizen<sup>2</sup> of Iraqi origin.

3. He came to the United States from Iraq in 1969 and settled in Atlanta, Georgia, where he attended Georgia Tech.

4. He graduated from Georgia Tech after only 15 months.

5. After graduation, Alghita started his own construction company (Adnan's) in Atlanta.

6. For a number of years, Alghita was a very successful businessman. His company evolved into a multi-million dollar business.

7. He and his company suffered a serious setback, however, when the lending institution he had been dealing with on a regular basis terminated his line of credit and severed its relationship with him.<sup>3</sup>

8. In 1984, Alghita filed for Chapter 11 bankruptcy.

9. Hoping that a change in location would revive his business, Alghita moved (both his residence and business) from Atlanta to Florida in 1990. At the time, he had very little capital.

10. The change has not produced the results Alghita had hoped it would. Like other owners of businesses of marginal financial status, he has continued to have difficulty obtaining bonding and credit for his business and expanding its customer base.<sup>4</sup>

11. Recently, Alghita, on behalf of Adnan's, submitted a bid in response to a request for bids to undertake a construction project for the South Florida Water Management District (SFWMD). Adnan's bid was the lowest priced bid submitted, but it was rejected by SFWMD as non-responsive. There is no indication that Alghita's national origin played any role in SFWMD's decision to reject the bid.

12. On May 2, 1996, Alghita filed an application requesting that the Department certify Adnan's as a Disadvantaged Business Enterprise.

13. On the application, Alghita indicated that the "approximate value of the firm" was \$300,000.00 and that its inventory (which included two homes) was worth \$460,000.00.

14. In a follow-up letter that he wrote to the Department, Alghita advised that in 1989, 1990, 1991, 1993, 1994, and 1995, his "personal income" was "below the minimum income to file an Income Tax return."

15. In further support of the application, Alghita submitted to the Department a statement of credit denial, dated June 7, 1994, that he had received from the First Bank of Indiantown. The statement indicated that he had been denied a "\$5,940 Letter of Credit to Bankers Insurance Co." because of past "bankruptcy" and "lack of collateral."

16. By letter dated August 7, 1996, the Department notified Alghita of its intent to deny the application for DBE certification that he had filed on behalf of Adnan's.

17. Such proposed action (which Alghita has challenged) is the subject of the instant administrative proceeding.

## CONCLUSIONS OF LAW

18. The Department is authorized to certify disadvantaged business enterprises pursuant to Section 339.0805(1)(c), Florida Statutes, which provides as follows:

The [D]epartment shall certify a socially and economically disadvantaged business enterprise, which certification shall be valid for 12 months, or as prescribed by 49 C.F.R. part 23. The [D]epartment's initial application for certification for a socially and economically disadvantaged business enterprise shall require sufficient information to determine eligibility as a small business concern owned and controlled by a socially and economically disadvantaged individual. For recertification of a disadvantaged business enterprise, the [D]epartment may accept an affidavit, which meets [D]epartment criteria as to form and content, certifying that the business remains qualified for certification in accordance with program requirements. A firm which does not fulfill the [D]epartment's criteria for certification shall not be considered a disadvantaged business enterprise. An applicant who is denied certification may not reapply within 6 months after issuance of the denial letter or the final order. The application and financial information required by this section are confidential and exempt from s. 119.07(1).

19. The "[D]epartment's criteria for certification" are found in Rule Chapter 14-78, Florida Administrative Code.

20. Rule 14-78.002, Florida Administrative Code, provides definitions of various words and phrases used in Rule Chapter 14-78, Florida Administrative Code.

21. Subsection (6) of Rule 14-78.002, Florida Administrative Code, provides, that "'Disadvantaged' means socially and economically disadvantaged, whenever used throughout this rule chapter."

22. Subsection (18) of Rule 14-78.002, Florida Administrative Code, defines "socially and economically disadvantaged individuals" as follows:

"Socially and Economically Disadvantaged Individuals" means those individuals:

(a) Who are citizens of the United States (or lawfully admitted permanent residents) and who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, or Asian-Indian Americans, and any other minorities or individuals found to be disadvantaged by the Small Business Administration pursuant to Section 8(a) of the Small Business Act (15 USC 637) and implementing regulations. Individuals in the following groups are presumed to be disadvantaged; however, this presumption is rebuttable:

1. "Black Americans," which includes persons having origins in any of the black racial groups of Africa;

2. "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish or Portuguese culture or origin, regardless of race;

3. "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, the U.S. Trust Territories of the Pacific, and the Northern Marianas;

4. "Asian-Indian Americans," which includes persons whose origins are from India, Pakistan, and Bangladesh; and

5. "Native Americans," which includes persons who are Eskimos, Aleuts, Native

Hawaiians, or persons who have origins in any of the American Indian tribes prior to 1835.

6. Women.

(b) Who are not members of the presumptive groups as defined in 14-78.002, but meet the criteria set out in 14-78.005.

23. Rule 14-78.005, Florida Administrative Code, sets forth the "Standards for Certification of DBE's." It provides, in pertinent part, as follows:

(7) [A] firm seeking certification and recertification as a DBE shall meet the following standards. A firm which does not fulfill all of the Department's criteria for certification shall not be considered a Disadvantaged Business Enterprise. . . .

(b) The firm must be at least 51 percent owned by one or more disadvantaged individuals, or, in the case of a publicly owned business, at least 51 percent of the stock must be owned by one or more disadvantaged individuals; and the management and daily business operations must be controlled by one or more of the disadvantaged individuals who own the firms.

1. Members of the groups named in Rule 14-78.002(18) are presumed to be disadvantaged; however, this presumption is rebuttable and may be challenged pursuant to Rule 14-78.0071. Membership in those groups shall be established on the basis of the individual's claim that he or she is a member of one of those groups and is so regarded by that particular community. [T]o be considered a member of one of these groups, the individual must have held himself or herself out to be a member, have acted as a member of that group, and be capable of being identified by persons in the population at large as belonging to the disadvantaged group. However, the Department is not required to accept this claim if it determines the claim invalid. . .

(3)[I]ndividuals who are not member of the presumed groups but wish to be certified as



disadvantaged must meet the following criteria:

a. Elements of Social Disadvantage. In order to determine that an individual is socially disadvantaged, the Department must conclude that the individual meets the following standards:

(I) The individual's social disadvantage must stem from his or her color; national origin; gender; physical disability; long-term residence in an environment isolated from the mainstream of American society; or other similar cause beyond the individual's control. The individual cannot establish social disadvantage on the basis of factors which are common to small business persons who are not socially disadvantaged. For example, because of their marginal financial status, many small businesses have difficulty obtaining credit through normal banking channels. An individual predicating a social disadvantage claim on denial of bank credit to his or her firm would have to establish that the denial was based on one or more of the listed causes, or similar causes -- not simply on the individual's or the firm's marginal financial status.

(II) The individual must demonstrate that he or she has personally suffered social disadvantage, not merely claim membership in a non-designated group which could be considered socially disadvantaged. This can be achieved, for example, by describing specific instances of discrimination which the individual has experienced, or by recounting in some detail how his or her development in the business world has been thwarted by one or more of the listed causes or similar causes. As a general rule, the more specific an explanation of how one has personally suffered social disadvantage, the more persuasive it will be. In assessing such facts, the Department should place substantial weight on prior administrative or judicial findings of discrimination experienced by the individual. Such findings, however, are not necessarily conclusive evidence of an individual's social

disadvantage; nor are they a prerequisite for establishing social disadvantage.

(III) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries.

(IV) The individual's social disadvantage must be chronic, longstanding, and substantial, not fleeting or insignificant. Typically, a number of incidents illustrating a person's social disadvantage, occurring over a substantial period of time, would be necessary to make a successful claim. Usually, only by demonstrating a series of obstacles which have impeded one's progress in the business world can an individual demonstrate chronic, longstanding, and substantial social disadvantage.

(V) The individual's social disadvantage must have negatively affected his or her entry into, and/or advancement in, the business world. The closer the individual can link social disadvantage to impairment of business opportunities, the stronger the case. For example, the Department should place little weight on annoying incidents experienced by an individual which have had little or no impact on the person's career or business development. On the other hand, the Department should place greater weight on concrete occurrences which have tangibly disadvantaged an individual in the business world.

b. Evidence of Social Disadvantage. Any evidence relevant to the applicant's claim will be considered. In addition to a personal statement from the individual claiming to be socially disadvantaged, such evidence may include, but is not limited to: third party statements; copies of administrative or judicial findings of discrimination; and other documentation in support of matters discussed in the personal statement. Special emphasis will be given to the areas of education, employment, and business history. However, the applicant may present evidence relating to other matters as well. Moreover, the attainment of a quality

education or job should not absolutely disqualify the individual from being found socially disadvantaged if sufficient other evidence of social disadvantage is presented.

(I) Education. The Department shall consider, as evidence of an individual's social disadvantage: denial of equal access to business or professional schools; denial of equal access to curricula; exclusion from social and professional association with students and teachers; denial of educational honors; social patterns or pressures which have discouraged the individual from pursuing a professional or business education; and other similar factors.

(II) Employment. The Department shall consider, as evidence of an individual's social disadvantage, discrimination in hiring; discrimination in promotions and other aspects of professional advancement; discrimination in pay and fringe benefits; discrimination in other terms and conditions of employment; retaliatory behavior by an employer; social patterns or pressures which have channelled the individual into non-professional or non-business fields; and other similar factors.

(III) Business History. The Department shall consider, as evidence of an individual's social disadvantage, unequal access to credit or capital; acquisition of credit under unfavorable circumstances; discrimination in receipt (award and/or bid) of government contracts; discrimination by potential clients; exclusion from business or professional organizations; and other similar factors which have retarded the individual's business development.

c. Economic Disadvantage. [T]he Department shall always make a determination of social disadvantage before proceeding to make a determination of economic disadvantage. If the Department determines that the individual is not socially disadvantaged, it is not necessary to make the economic disadvantage determination.

(I) Elements of Economic Disadvantage. The applicants must show that they are socially

disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same or similar line of business and competitive market area who are not socially disadvantaged.

(II) Evidence of Economic Disadvantage. In determining the degree of diminished credit and capital opportunities of a socially disadvantaged individual, consideration will be given to both the disadvantaged individual and the applicant concern with which he or she is affiliated. The test is not absolute deprivation, but rather disadvantage compared to business owners who are not socially disadvantaged individuals and firms owned by such individuals. Applicants must provide information about their economic situation when they seek eligibility as disadvantaged businesses. The Department shall attempt to become as knowledgeable as possible about the types of businesses with which the Department deals, so that the Department can make a reasonably informed comparison between an applicant firm and other firms in the same line of business. The Department is not required to make a detailed, point-by-point, accountant-like comparison of the businesses involved. The Department is expected to make a basic judgment about whether the applicant firm and its socially disadvantaged owner(s) are in a more difficult economic situation than most firms (including established firms) and owners who are not socially disadvantaged.

24. In determining whether an applicant is eligible for certification as a Disadvantaged Business Enterprise, the Department must examine the certification application in light of the standards set forth in Rule Chapter 14-78, Florida Administrative Code. See State v. Jenkins, 469 So.2d 733, 734

(Fla. 1985)("agency rules and regulations, duly promulgated under the authority of law, have the effect of law"); Buffa v. Singletary, 652 So.2d 885, 886 (Fla. 1st DCA 1995)("[a]n agency must comply with its own rules"); Decarion v. Martinez, 537 So.2d 1083, 1084 (Fla. 1st 1989)("[u]ntil amended or abrogated, an agency must honor its rules").

25. An applicant for certification as a Disadvantaged Business Enterprise whose application is preliminarily denied by the Department is entitled to notice of the grounds for the proposed denial of its application and to an opportunity to have a Section 120.569/57 hearing on the Department's proposed action. See Section 120.60(3), Fla. Stat.

26. At the Section 120.569/57 hearing, the applicant has the burden of proving by a preponderance of the evidence that it is entitled to the certification it has requested. See Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932, 934 (Fla. 1996); Pershing Industries, Inc., v. Department of Banking and Finance, 591 So.2d 991, 994 (Fla. 1st DCA 1991); Cordes v. Department of Environmental Regulation, 582 So.2d 652, 654 (Fla. 1st DCA 1991); Department of Transportation v. J.W.C. Co., 396 So.2d 778, 787 (Fla. 1st DCA 1981); Department of Health and Rehabilitative Services v. Career Service Commission, 289 So.2d 412, 414-15 (Fla. 4th DCA 1974).

27. In the instant case, Petitioner has not met its burden of proof.

28. It does not appear that Petitioner is "at least 51 percent owned by one or more disadvantaged individuals," as required by Rule 14-78.005(7)(b), Florida Administrative Code, inasmuch as the record does not establish that Petitioner's sole owner, Alghita, is a member of any group that, pursuant to Rule 14-78.002(18), Florida Administrative Code, is presumed to be "socially and economically disadvantaged," nor does it establish that Alghita meets the criteria set forth in Rule 14-78.005(7)(b)3, Florida Administrative Code, that must be met by "individuals who are not members of the[se] presumed groups but wish to be [on behalf of their businesses] certified as disadvantaged." While Alghita and his business have struggled financially in recent years, the record evidence is insufficient to support a finding that these financial difficulties have been the result of any chronic, long-standing, and substantial discrimination against him on the basis of his national origin.

29. Because the evidence does not establish that its sole owner is a "socially and economically disadvantaged individual," as defined in Chapter 14-78, Florida Administrative Code, Petitioner "does not fulfill the [D]epartment's criteria for certification . . . as a [D]isadvantaged [B]usiness [E]nterprise"

and its application for such certification should therefore be denied.

**RECOMMENDATION**

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Department issue a final order denying Petitioner's application for certification as a Disadvantaged Business Enterprise

**DONE AND ENTERED** IN Tallahassee, Leon County, Florida, this 16th day of April, 1997.

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**STUART M. LERNER**

Administrative Law Judge  
Division of Administrative Hearings  
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1230 Apalachee Parkway  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of April, 1997.

**ENDNOTES**

<sup>1</sup> On March 25, 1997, Petitioner filed for the undersigned's consideration documents that were neither offered, nor received, into evidence at the final hearing. No finding of fact may be based upon any of these documents inasmuch as they are outside the evidentiary record in this case. See General Development Utilities, Inc., v. Hawkins, 357 So.2d 408, 409 (Fla. 1978); Section 120.57(1)(h), Fla. Stat. ("[f]indings of fact . . . shall be based exclusively on the evidence of record and on matters officially recognized"). In any event, the outcome of this case would be the same regardless of whether these documents were

considered as a part of the evidentiary record (upon which findings of fact may be based).

<sup>2</sup> Alghita enjoys dual citizenship inasmuch as he is still a citizen of Iraq.

<sup>3</sup> Alghita surmises that such action was the product of his lack of support for the Iraqi government.

<sup>4</sup> There is insufficient proof to establish that he has experienced such difficulty because he is of Iraqi origin.

**COPIES FURNISHED:**

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**NOTICE OF RIGHT TO SUBMIT EXCEPTIONS**

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.



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