

## CHAPTER 9-4 CERTIFICATION PROCEDURES FOR CERTIFIED

### INDIAN BUSINESSES

#### §9-4-1 Criteria for Certification

A business may be certified as a certified Indian business by satisfying the criteria set forth in this section.

(a) Ownership. The firm must be 51% or more Indian-owned. The applicant must demonstrate the following:

(1) Formal Ownership. That an Indian or Indians own(s) 51% or more of the partnership, corporation, or other arrangement for which the application is

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being submitted. Such ownership must be embodied in the firm's organic documents, such as its stock ownership or partnership agreement.

Ownership includes (i) financial ownership i.e., the Indian(s) own(s) 51% or more of the firm's assets upon dissolution, and will receive 51% or more of the profits; and (ii) control i.e., the Indian(s)' 51% or more ownership provides him or her with a majority of voting rights or other decisional authority and that all decisions of the firm are to be made by a majority vote except where otherwise required by law.

(2) Value. The Indian owner(s) provided real value for his or her 51% or more ownership by providing capital, equipment, real property, or similar assets commensurate with the value of his or her ownership share. It will not be considered "real value" if the Indian(s) purchased his or her ownership share, directly or indirectly, through a promissory note, the ultimate creditor of which is the non-Indian owner of the firm or an immediate relation thereof, of any similar arrangement, unless a convincing showing can be made that the Indian owner(s) brought such special skills, marketing connections, or similar benefits to the firm that there is a good reason to believe the arrangement would have been entered into even if there were not an Indian preference program in existence.

Where the Indian participant can demonstrate that he or she could not pay good value for his or her 51% or more Indian ownership because the normal capital sources were closed to him or her because he or she is an Indian, that person may satisfy this requirement by demonstrating further that he or she expended his or her capital-raising capability as far as possible, such that the Indian participant clearly is at risk in the business in relationship to his or her means.

(3) Profit. The Indian owner(s) will receive 51% or more of all profits. If there is any provision that gives the non-Indian owner a greater share of the profits, in whatever form and under whatever name, such as through management fees, equipment rental fees, or bonuses tied to profits, certification will be denied. Salary scales will be reviewed to ensure the relative salaries being paid Indian and non-Indian owners are consistent with the skills of the parties and are not being used to circumvent the requirement that Indian owners receive 51% or more of the profits.

(b) Management Control. The firm must be under significant Indian management and control. The firm must be able to demonstrate that:

(1) Unitary firms (Non-joint Ventures). One or more of the Indian owners must be substantially involved, as a senior level official, in the day-to-day management of the firm as his or her primary employment activity. The Indian owner does not have to be Chief Executive Officer. However, he or she must, through prior experience or training, have substantial occupational ties to the area of business in which the firm is engaged such that he or she: (i) is qualified to serve in the senior level position; and (ii)

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is sufficiently knowledgeable about the firms activities to be accountable to the tribe for the firms activities.

This provision may be waived when (i) the firm is 100% Indian owned and the Chief Executive Officer is the spouse and/or parent of the

owner(s) the family lives on or near the Reservation, and the majority of employees are Indian: or (ii) the firm is modeled on a publicly-held corporation such that it is owned, the Chief Executive Officer and the highest salaried employee in the firm is/are Indian and a majority of the employees are Indian.

(2) Joint Ventures. No joint ventures will be certified. However, an Indian/non-Indian joint venture that otherwise satisfies the requirements of these criteria shall be given preference over wholly non- Indian business when no certified Indian business is available.

(c) Integrity of Structure. There must be good reason to believe that the firm was not established solely or primarily to take advantage of this Title. In evaluating an applicant under this criterion the Director will consider the factors set out below. The Director shall exercise broad discretion in applying these criteria in order to preserve the integrity of this Title and, in questionable cases, shall deny certification.

(1) History of the firm. Whether the history of the firm provides reason to believe it was established primarily to take advantage of this Title, and in particular whether the firm, or key factors in the firm originally were associated with a non-Indian business that gained little business value in terms of capital, expertise, equipment, etc., by adding ownership or by merging with an Certified Indian business.

(2) Employees:

(A) Whether key non-Indian employees of the applicant are former employees of a non- Indian business with which the certified Indian business is or has been affiliated, through a joint venture or other arrangement, such that there is reason to believe the nonIndian business is controlling the applicant.

(B) Whether Indians are employed in all or most of the positions for which qualified Indians are available. A high percentage of nonIndian employees in such positions will provide reason to believe

the firm was established primarily to benefit non-Indians.

(C) Relative Experience and Resources

Whether the experience, expertise, resources, etc., of the non-Indian partner(s) that there is little sound business reason for the non-Indian to accept a junior role in the firm or venture other than to be able to take advantage of this Title.

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§9-4-2 Certification Procedures (4/8/08)

- (a) Application for Certification. A firm seeking certification as a certified Indian business shall submit a completed application to the TERO Office on a form provided by the Office. Office staff shall be available to assist a firm in filling out the application.
- (b) Director Assessment and Recommendation. Utilizing the criteria set forth in '9-4-1, the Director shall provide a written analysis and recommendation to the Tribal Employment Rights Commission (TERC). The Director shall provide the analysis and recommendation within 21 days of receiving a complete application and shall have discretion to request additional information from the applicant. The Director's analysis and recommendation shall be made available to the applicant, and TERC, but shall otherwise be kept confidential.
- (c) Commission Disposition. The Commission shall review the Director's analysis and recommendation and allow the applicant to submit additional information or explanation with respect to the governing criteria for certification. The Commission may grant or deny the certification or request further information prior to making a disposition.
- (d) Commission Re-Hearing of Denial. Any application for certification that is denied by the TERC may be re-heard by TERC at the applicant's request. Upon such request in writing, the TERC shall direct the TERO Director and Applicant to submit any new information and shall conduct a re-hearing.
- (e) Judicial Review. The Commission's decision under subsection (d) shall be considered final agency action, and subject to review by the Tribal Court by an aggrieved person pursuant to Chapter 2-5.