

**Department of Health and Human Services**  
**DEPARTMENTAL APPEALS BOARD**  
**Appellate Division**

Grassroots Indigenous Multimedia  
Docket No. A-19-91  
Decision No. 2968  
September 16, 2019

**DECISION**

Grassroots Indigenous Multimedia (GIM or Appellant) appeals a decision by the Administration for Native Americans (ANA) disqualifying its application for funding under the Native American Language Preservation and Maintenance Funding Opportunity Announcement, HHS-2018-ACF-ANA-NL-1342 (FOA). ANA found that GIM's application was not eligible to be considered for the grant because, according to ANA, it failed to meet the community representation requirement for such grants, which requires that a majority of the grant applicant's board of directors be representative of the community. GIM contends that it met the requirement, identifying four of its six board members that GIM contends meet the representation requirement. ANA contends that GIM's application failed to show that one of the four identified board members met the representation requirement. We uphold ANA's determination to disqualify GIM's application because the application did not establish that GIM met the community representation requirement.

**Legal Background**

Section 803(a) of the Native American Programs Act of 1974 (NAPA), 42 U.S.C. § 2991b(a), authorizes the ANA Commissioner to provide financial assistance to, among others,

public and nonprofit private agencies, including but not limited to, governing bodies of Indian tribes on Federal and State reservations, Alaska Native villages and regional corporations established by the Alaska Native Claims Settlement Act, and such public and nonprofit private agencies serving Native Hawaiians, and Indian and Alaska Native organizations in urban or rural areas that are not Indian reservations or Alaska Native villages, for projects pertaining to the purposes of [NAPA].

The purpose of NAPA “is to promote the goal of economic and social self-sufficiency for American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives) and Alaska Natives.” 42 U.S.C. § 2991a. Section 803C of NAPA authorizes grants to be used for listed purposes, including, as relevant here, “to assist Native Americans in ensuring the survival and continuing vitality of Native American languages.” 42 U.S.C. § 2991b-3(a)(2).

Regulations implementing NAPA list the categories of applicants eligible to apply for funding for the “Preservation and Enhancement of Native American Languages” program. 45 C.F.R. § 1336.33(a)(1). The regulations also provide that “[i]f the applicant, other than a tribe or an Alaska Native Village government, is proposing a project benefiting Native Americans or Native Alaskans, or both, it must provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” 45 C.F.R. § 1336.33(a). The preamble describes this requirement for assurances that the applicant’s board of directors is representative of the community to be served as “an elaboration of the existing requirement” that to be eligible for funding “an organization had to be in some way representative of a Native American community.” 61 Fed. Reg. 42817-01, 42819 (Aug. 19, 1996).

ANA has issued policy directives and interpretive guidance explaining the criteria necessary to meet the community representation requirement. Section 814 of NAPA, 42 U.S.C. § 2992b-1, provides for an opportunity for public comment on proposed changes to interpretive rules and general statements of policy before any proposed changes take effect. ANA published the most recent guidance for public comment on November 8, 2018 (2018 Guidance). 83 Fed. Reg. 55,893-01, 55,893-894 (Nov. 8, 2018). ANA received no public comments on the 2018 Guidance. ANA incorporated the proposed Guidance in FY 2019 Funding Opportunity Announcements, such as the one at issue here.<sup>1</sup> See ANA Ex. 1, at 14, 33. The 2018 Guidance requires an applicant to show that a *majority* of its board members meet the representation requirement in order to satisfy the community representation requirement. 83 Fed. Reg. at 55893. This requirement reiterates the board composition requirement in prior guidances. See, e.g., 70 Fed. Reg. 6686-02, 6690 (Feb. 8, 2005); 76 Fed. Reg. 1437-01, 1439 (Jan. 10, 2011). The 2018 Guidance also reiterates that the following categories of individuals would be considered representative of the community to be served:

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<sup>1</sup> GIM does not dispute that it had proper notice of the 2018 Guidance; nor does it dispute that the 2018 Guidance applies to the grant application at issue.

- Members of Federally or State-recognized Tribes;
- Persons who are recognized by members of the eligible Native American community to be served as having a cultural relationship with that community; and
- Persons considered to be Native American as defined in 45 C.F.R. § 1336.10 and Native American Pacific Islanders as defined in Section 815 of NAPA.

83 Fed. Reg. at 55,894.<sup>2</sup> The 2018 Guidance also discusses the type of “cultural relationship” necessary to satisfy the second category of community representation, defining such a relationship “as lineage, familial, marriage, or other traditional or social connection to the community and not a business or work relationship, (e.g. person that own a business or is employed by an organization that serves the Native community).” *Id.*

The 2018 Guidance also states, as did prior guidances, that in order to satisfy the community representation requirement, an application must include documentation identifying each board member by name and affiliation or relationship to one of the categories of community representation. *Id.*; 82 Fed. Reg. at 37,864; 78 Fed. Reg. at 13,065. Any application that does not include this documentation, the 2018 Guidance warned, would be considered “non-responsive,” and ANA would not consider the application. 83 Fed. Reg. at 55,894.

ANA’s rejection of an application on the basis of ineligibility may be appealed to the Departmental Appeals Board (Board).<sup>3</sup> 45 C.F.R. § 1336.35(a). However, if the Board determines that the application is eligible, “such eligibility shall not be effective until the next cycle of grant proposals are considered” by ANA. 45 C.F.R. § 1336.35(h); 42 U.S.C. § 2991h(b).

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<sup>2</sup> Beginning in FY 2018, ANA removed another category it had permitted to show community representation: “persons eligible to be a participant in, or beneficiary of the project.” *See* 82 Fed. Reg. 37,861-02, 37,863 (Aug. 14, 2017); 78 Fed. Reg. 13,062-01, 13,065 (Feb. 26, 2013). ANA explained that it removed this category because it did not serve the purpose of assuring funds are awarded to “organizations that directly represent the Native American community that will be served” since ANA “does not “limit project participants or beneficiaries to individuals that represent the community being served.” 82 Fed. Reg. at 37,863.

<sup>3</sup> ANA’s letter to GIM uses the term “disqualification,” rather than “ineligibility” as do some of the interpretive guidances issued by ANA when they discuss the requirements that applications must meet in order to be considered for funding. *See* ANA Ex. 4, at 4; ANA Ex. 6, at 5; ANA Ex. 7, at 5 (referring to “disqualification factors”). In its brief, ANA uses the terms interchangeably, as do we in this decision. The parties do not dispute that for purposes of this appeal, this difference in terminology is not material.

## Statement of Facts

### 1. The FOA

The FOA, under the heading **Assurance of Community Representation on Board of Directors**, states the following:

Applicants other than tribes or Alaska Native Villages applying for funding must show that a majority of board members are representative of a Native American community to be served. Applicants must submit documentation that identifies each board member by name and indicates his/her affiliation or relationship to at least one of ANA's three categories of community representation, which include: (1) members of federally or state-recognized tribes; (2) persons who are recognized by members of the eligible Native American community to be served as having a cultural relationship with that community; or (3) persons considered to be Native American as defined in 45 C.F.R. § 1336.10 and Native American Pacific Islanders as defined in Section 815 of [NAPA]. The second category of community representation requires a "cultural" relationship defined as lineage, familial, marriage, or other traditional or social connection to the community and not a business or work relationship (e.g. person that owns a business or is employed by an organization that serves the Native community). Applicants that do not include this documentation will be considered non-responsive, and the application will not be considered for competition.

ANA Ex. 1, at 14; *see also id.* at 33 (repeating requirement for documentation in section describing Assurance of Community Representation on Board of Directors).<sup>4</sup>

### 2. GIM's application and ANA's determination that it was not qualified

On April 14, 2019, GIM submitted an application for funding under the FOA, identifying itself as a non-profit organization, not as a tribe or Alaska Native Village government. ANA Ex. 2, at 2, 3, 4. GIM's application stated that it sought the funds for a "Restoring Ojibwe Project." *Id.* at 1. GIM included a document entitled "Grassroots Indigenous Multimedia Board of Directors" that it identified as its "Assurance of Community Representation on Board of Directors." *Id.* at 13, 87. The document listed six board members, two of whom (Margaret Ann Noodin, PhD, and Megan Bang, PhD) GIM identified as Anishinaabe women. *Id.* at 87. GIM identified a third board member (Carla Miller) as a "community member at Lac Courte Oreilles, an Ojibwe reservation" and a

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<sup>4</sup> ANA states that it published the FOA on March 1, 2019. ANA Response at 5. Although we see no publication date on ANA Ex. 1, GIM does not dispute ANA's statement of the date, and there is no issue about the timeliness of GIM's application for grant funds.

fourth board member (Wil Meya) as a “national advocate for endangered languages” and a “CEO of the Language conservancy.” *Id.* GIM identified a fifth board member (Kendall King) PhD, as a “professor of second language education at the University of Minnesota” and a sixth board member, Isabelle Trotterchaude as “a graduate of the Waadookodaading immersion school and a rising youth leader in the movement to revitalize the Ojibwe language” as well as a “longtime participant in GIM-sponsored events and activities . . . .” *Id.*

ANA disqualified GIM’s grant application. *See* ANA Denial Letter, DAB E-File Docket #1.a. ANA stated that it had disqualified GIM’s application because it did not document that a majority of GIM’s board members represented the Native American community to be served and, thus, did not provide the required assurances of community representation. *Id.* ANA explained that applicants such as GIM (who are not tribes or Alaska Native Villages) are required to “submit documentation that identifies each board member by name and indicates and include[s] his/her affiliation or relationship to at least one of ANA’s three categories of community representation . . . .” *Id.* ANA’s letter then listed the three categories, which are the categories set out in the 2018 Guidance and the FOA. *Id.*

### **3. GIM’s Appeal**

GIM appealed ANA’s determination that its application was not eligible to be considered for a grant. In its appeal notice, GIM states that four of its board members meet the community representation requirement and identifies those Board members as “Margaret Ann Noodin (Anishinaabe), Megan Bang (Anishinaabe); Carla Miller (Lac Courte Oreilles) and Isabelle Trotterchaude (Lac Courte Oreilles).”

On June 7, 2019, the Board acknowledged GIM’s appeal and asked ANA to clarify its basis for disqualifying GIM’s application. ANA responded to the Board’s order, and on June 27, 2019, the Board issued an order finding that GIM “has the right to appeal Respondent’s ruling pursuant to the procedures set forth in 45 C.F.R. § 1336.35” and set a briefing schedule for ANA’s response to GIM’s appeal and GIM’s reply. ANA filed its response and exhibits on August 9, 2019. GIM did not file a reply.

### **Discussion**

Section 803C of NAPA authorizes the grant funding for which GIM applied. The regulations implementing that funding authority provide that “[i]f the applicant, other than a tribe or an Alaska Native Village government, is proposing a project benefiting Native Americans or Native Alaskans, or both, it must provide assurance that its duly elected or appointed board of directors is representative of the community to be served.” 45 C.F.R. § 1336.33(a). GIM, a self-described non-profit organization, does not dispute

that it is an applicant “other than a tribe or an Alaska Native Village government” and that this provision, therefore, applies to its application. ANA issued a 2018 Guidance (the most recent of various interpretive guidances) that requires an applicant to show that a *majority* of its board members meet the representation requirement in order to satisfy the community representation requirement. 83 Fed. Reg. at 55,893. GIM does not dispute that the 2018 Guidance applies and that the FOA for the funding it seeks gave notice of same. *See* ANA Ex. 1, at 14 (explaining the requirement and stating that applications not meeting it would be disqualified).

The 2018 Guidance lists the three categories of individuals who would be considered representative of the community to be served for purposes of determining whether a majority of the applicant’s board members met the representation requirement. These are: 1) members of Federally or State-recognized tribes; 2) persons having a cultural relationship with the eligible Native American community to be served that is recognized by members of that community; or 3) persons considered to be Native American as defined in 45 C.F.R. § 1336.10 and Native American Pacific Islanders as defined in Section 815 of NAPA. 83 Fed. Reg. at 55,894. The 2018 Guidance also provides that an application must include documentation identifying each board member by name and affiliation or relationship to one of the categories of community representation in order to show that a majority of its board meets the community representation requirement. *Id.*

ANA does not dispute that GIM’s application provided the required documentation of community representation for three of its total six board members. However, ANA correctly points out that the Board has held that three members is not a majority of a six-member board. ANA Response at 7 (citing *Citadel Cmty. Dev. Corp.*, DAB No. 2596, at 8, n.6 (2014) (holding that 50% did not comprise a majority of the board)). ANA disputes that GIM’s application documented that a necessary fourth member of its board met the community representation requirement. Thus, the question presented on appeal, is whether GIM’s application for funding included documentation of a fourth board member who met one of the three categories of community representation.

GIM argues on appeal that Isabelle Trotterchaude is the fourth board member meeting the community representation requirement. In its appeal notice, GIM identifies Ms. Trotterchaude as representing the “Lac Courte Oreilles” Native American community. However, that is not how GIM identified Ms. Trotterchaude in its application. There, GIM described Ms. Trotterchaude as follows:

Ms. Trotterchaude is a graduate of the Waadookodaading immersion school and a rising youth leader in the movement to revitalize the Ojibwe language. She has been a longtime participant in GIM-sponsored events and activities and has been mentored into positions of youth leadership in our organizational structure. Her confidence, courage, and creativity as well as her experiences as a language learner and speaker make her an invaluable new addition to grassroots Indigenous Multimedia.

ANA Ex. 2, at 87. This description does not identify Ms. Trotterchaude as a member of the Lac Courte Oreilles community, or any other Native American community. As ANA points out (ANA Response at 8, n.4), the Board held in *Citadel* that “ANA reasonably interpreted the regulation to preclude consideration of documentation of community representation that is provided after the application due date in determining an applicant’s eligibility.” DAB No. 2596, at 9. The Board explained,

To read the regulation otherwise would make it difficult, if not impossible, for ANA to process grant applications and award grants in a timely fashion. Indeed, the regulations provide that if we determine that an applicant is eligible, “such eligibility shall not be effective until the next cycle of grant proposals are considered by the [ANA].”

*Id.* (citing 45 C.F.R. § 1336.35(h)).

We continue to find ANA’s interpretation reasonable for the same reasons we explained in *Citadel*. Accordingly, we will not reverse ANA’s ineligibility determination based on GIM’s identification of Ms. Trotterchaude as a member of the Lac Oreilles community for the first time in its Appeal Notice.

That leaves the question of whether GIM’s identification of Ms. Trotterchaude in its application met the documentation of community representation requirement under one of the remaining two categories. We conclude that it did not.

One of the remaining two categories is a person considered to be Native American or a Native American Pacific Islander, as defined in 45 C.F.R. § 1336.10 and Section 815 of NAPA, respectively. There is no dispute that GIM’s application did not identify Ms. Trotterchaude as such a person.

The only remaining category is “persons having a cultural relationship with the eligible Native American community to be served that is recognized by members of that community.” 83 Fed. Reg. at 55,894. GIM has not attempted to place Ms. Trotterchaude in this category. As noted above, in its notice of appeal, GIM asserted, albeit too late, that Ms. Trotterchaude met the community representation requirement by way of another category, being a representative of a Native American community (Lac Courte Oreilles).

While GIM had an opportunity to submit a Reply, it did not do so. Moreover, we agree with ANA that GIM's description of Ms. Trotterchaude in its application is not enough to establish the requisite "cultural relationship."

As previously noted, the 2018 Guidance defines a "cultural relationship" with the community to be served as one of "lineage, familial, marriage, or other traditional or social connection to the community and not a business or work relationship, (e.g. person that owns a business or is employed by an organization that serves the Native community)." 83 Fed. Reg. at 55,894. ANA reads GIM's description of Ms. Trotterchaude in its application as "appear[ing] to assert" that [Ms. Trotterchaude] has a 'cultural relationship' with the community." ANA Response at 8. ANA finds no merit in that assertion, stating, in part, that, "at most, GIM's statements that Ms. Trotterchaude graduated from an immersion school, has been involved in the movement to revitalize the Ojibwe language, and is a longtime participant in GIM sponsored activities indicates that Ms. Trotterchaude may have a 'business or work relationship' with the community . . . ." *Id.*

Regardless of whether GIM's identification of Ms. Trotterchaude can properly be characterized as describing a "business or work relationship," we conclude that GIM's application did not establish that Ms. Trotterchaude had the requisite cultural relationship with the community to be served. GIM's description of Ms. Trotterchaude does not identify a connection to any Native American community by way of lineage, family or marriage. Nor does it specifically identify a traditional or social connection to a Native American community. While GIM, the grant applicant, recognizes Ms. Trotterchaude as "a rising youth leader in the movement to revitalize the Ojibwe language" and a "longtime participant in GIM-sponsored events . . . ," GIM does not state that the **community to be served** recognizes her "as having a cultural relationship to the community" because of these attributes or for any other reason. Moreover, the Board has held that mere participation in activities that can be considered cultural is not sufficient to establish the requisite cultural relationship, absent documentation of cultural ties with the community to be served. *Silakkuagvik Commc'ns, Inc.*, DAB No. 1675, at 8 (1998). GIM did not submit such documentation.



**Conclusion**

For the reasons stated above, we uphold ANA’s determination to disqualify GIM’s application because the application did not establish that GIM met the community representation requirement.

\_\_\_\_\_/s/  
Leslie A. Sussan

\_\_\_\_\_/s/  
Constance B. Tobias

\_\_\_\_\_/s/  
Sheila Ann Hegy  
Presiding Board Member