

**JULY 10, 2009 TESTIMONY BEFORE THE CHICAGO CITY COUNCIL
SUBCOMMITTEE ON MBE/WBE AFFIRMATIVE ACTION MATTERS
IN SUPPORT OF PROPOSED AMENDMENT TO MBE/WBE PROGRAM**

SUBMITTED BY ASIAN AMERICAN INSTITUTE

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I. Introduction

Asian American Institute (AAI) supports the enactment of the June 30, 2009 proposed amendment to Chapter 2-92 (“Proposed Ordinance”) regarding the City of Chicago’s Minority-Owned and Women-Owned Business Enterprise Program for construction contracts (“MBE Program”) that is currently being considered by the City Council. AAI is a pan-Asian, non-partisan organization whose mission is to empower and advocate for the Asian American community through research, education, and coalition-building. AAI partners with affiliate organizations located in Washington, D.C., San Francisco, and Los Angeles; the organizations collectively have local and national expertise on civil rights issues that affect Asian Americans.

AAI applauds the drafters of the Proposed Ordinance for justly including Asian Americans as a category of presumptively socially disadvantaged minorities. The Proposed Ordinance reflects the City of Chicago’s continued efforts to remedy past and existing discrimination against Asian American-owned businesses in the construction industry. There is indeed a sufficient evidentiary and legal basis for the continued inclusion of Asian Americans in the MBE Program. The research commissioned by the City of Chicago shows that Asian American-owned businesses are appropriately included as a presumptively socially disadvantaged category. This conclusion is echoed in the research and testimony submitted to the City Council by AAI and others in past years.

As background, Asian Americans were previously removed from the categories of presumptively socially disadvantaged minorities in the MBE Program. AAI, Association of Asian Construction Enterprises, and other community members advocated for the reinclusion of Asian Americans and, in 2007, Asian Americans were reincluded as a presumptive category.

AAI submits the current testimony to convey that Asian Americans do face discrimination and, for all the reasons explained below, it is crucial for Asian Americans to remain a presumptive category in the MBE Program.

II. The Proposed Ordinance Properly Includes Asian Americans As a Category of Presumptively Disadvantaged Minorities.

A. Governing Legal Standards

According to the United States Constitution and corresponding case law, a minority public contracting program such as the City of Chicago's MBE Program must pass the test of strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476-511 (1989). In other words, the MBE Program is required to (1) serve a compelling interest of the local government *and* (2) be narrowly tailored to remedying past or existing discrimination. *Id.* Analyzed under these standards, the City of Chicago has a sufficiently compelling interest in redressing racial discrimination so that the City will not function as a passive participant in a discriminatory marketplace. The race-conscious goals of the Proposed Ordinance are narrowly tailored to remedy past and existing discrimination against Asian Americans and other minority groups and women.

B. Summary of Why Asian Americans Should Remain a Presumptive Category in the MBE Program

The pervasive discrimination against Asian American-owned businesses in the Chicago area prevent them from competing on equal footing for public contracts and justify the limited remedial measures of the Proposed Ordinance. Extensive evidence of discrimination against Asian Americans is documented in various sources, including the June 10, 2009 report by Dr. David Blanchflower ("2009 Blanchflower Report") whose recommendations were adopted in the Proposed Ordinance. Asian American-owned businesses face discrimination in obtaining government contracts – as well as in obtaining bonding, credit, fair prices from suppliers, access to social networks, and information about contracting opportunities.

In addition to the data presented by Blanchflower, the unique history, culture, and demographics of Asian Americans must also be considered in order to accurately assess discrimination against Asian American-owned businesses in the Chicago area. Asian Americans have experienced racial discrimination in virtually all areas of life. Since this nation's earliest days, discriminatory federal, state, and private actions have denied Asian Americans equal rights not only in the sphere of government contracting, but also in the areas of citizenship, immigration, land ownership, education, marriage, and business. Discrimination against Asian Americans continues to this day, particularly in government contracting.

Past and existing discrimination against Asian Americans more than justifies their inclusion as a presumptively socially disadvantaged category in the MBE Program. Accordingly, members of this Subcommittee should unanimously approve the Proposed Ordinance and recommend its enactment to the City Council.

C. Evidence of Discrimination Against Asian Americans

As set forth in detail by the 2009 Blanchflower Report, Asian Americans do face discrimination that justifies their continued inclusion as a presumptive category in the MBE

Program. Importantly, Blanchflower clearly states, “My recommendation is that minorities are defined as - African-Americans or Blacks; Hispanics, *Asians/Pacific Islanders* and Native Americans.” 2009 Blanchflower Report at v (emphasis added).

Blanchflower goes on to explain that a recent study of Asian American construction contractors in the Chicago area “*found that a significant majority had experienced discrimination in the last five years.* These [Asian American contractors] reported that without the City’s program they could not survive. Prime contractors did not hire them as a subcontractor on private sector projects despite using them on public sector projects with goals. They also reported of difficulties in obtaining bonding and working capital.” *Id.* at 64 (emphasis added). Blanchflower also states that “[t]here is now evidence that Asians are discriminated against in the credit market.” *Id.* at 59.

In his 2009 Report, Blanchflower also referred to and relied upon his 2007 report regarding the City of Chicago MBE Program (“2007 Blanchflower Report”): “In [the 2007 Blanchflower Report], I argued that Asians should be included in the program...*These arguments remain valid.*” 2009 Blanchflower Report at 99-100, emphasis added. Specifically, Blanchflower quoted his 2007 Report by stating, “There is a good deal of new evidence on how Asian-owned businesses have fared since the review that was taken after Judge Moran’s decision where he opined that there was insufficient evidence to include Asians in the program. There is quantitative evidence –especially from the credit market and on unemployment and wages, plus anecdotal evidence of discrimination that is stronger than it was in 2004 which convinces me that there is now enough evidence to suggest that Asian-owned firms be brought back into the program.” *Id.*

Blanchflower’s statements about overall discrimination in the Chicago construction market further convey the need for the City Council to enact the Proposed Ordinance:

My first conclusion is that, in my view, there remains a basis in the evidence to justify the existence of a goals program. This evidence suggests that discrimination continues to exist in the Chicago construction market. It is exacerbated by discrimination in the credit market that acts as a market failure, which means this discrimination persists. Firms owned by minorities...are unable to obtain loans when they apply for them, even with the same characteristics as white men. When they do get them they have to pay higher interest rates. When banks do not know the race of the owner, there is no difference, suggesting this is...due to...to discrimination. The City of Chicago in my view is then justified in maintaining its goals program. There is **no evidence** that I have seen that suggests that, in comparison with my earlier reports to the City, the observed discrimination has diminished over time.

2009 Blanchflower Report at 94-95.

As explained above, the 2009 Blanchflower Report clearly recommends that Asian Americans be included as a presumptive socially disadvantaged category in the MBE Program, due to the strong evidence of discrimination. Blanchflower does state his concern that the recession is harming Asian Americans and other business owners; however, this concern, while

appreciated, should not be mistakenly interpreted as being the only basis for the Proposed Ordinance. The stronger basis for the Proposed Ordinance, as set forth clearly elsewhere in the Report, is the finding of discrimination against Asian Americans and other specified groups of business owners. *See, e.g.*, 2009 Blanchflower Report at 59, 94-95, 99-100. Moreover, Blanchflower’s recommendation that an “interim review be undertaken by the end of 2012 to allow for an examination of the impact of the recession” (*id.* at vi) applies to all groups included in the MBE Program and not solely Asian Americans.

It should be noted that, in addition to the evidence set forth in the 2009 Blanchflower Report, other evidence demonstrates that there Asian American contractors justly belong in the MBE Program. A full review of such evidence is beyond the scope of the current testimony, but one source of relevant data is Equal Access (“Equal Access”), a booklet published in 2008 by Asian American Justice Center, an affiliate of AAI. A copy of this booklet is attached to the main copy of this testimony, and additional copies are available upon request. Furthermore, research commissioned by Cook County showed that Asian subcontractors received *zero dollars* during the time period where Cook County was enjoined from continuing its M/WBE program for construction contracts. *See* Colette Holt, *Review of Compelling Evidence of Discrimination Against Minority- and Women-Owned Business Enterprises in the Chicago Area Construction Industry and Recommendations for Narrowly Tailored Remedies for Cook County, Illinois* (2006) (providing further documentation of discrimination against Asian American contractors in the Chicago area).

D. Context for Understanding Discrimination Against Asian Americans

The City Council should consider the unique history and demographics of Asian Americans in order to accurately assess and understand discrimination against Asian American-owned businesses in the Chicago area. Asian Americans are an extremely diverse group in terms of socio-economic status, education, language, religion, and other factors. Research conducted on Asian American contractors – and the interpretation of such research – should account for this diversity. In particular, lawmakers and researchers should guard against concluding that all Asian Americans are economically successful, because it is merely a myth that Asian Americans are the “model minority”. AAI recommends that, in the future, the City employ more rigorous research techniques that account for the unique ways in which Asian American-owned businesses experience discrimination.

1. Past and Present Discrimination Against Asian Americans

From the very beginnings of American history, Asian Americans have faced governmental discrimination that has prejudiced their ability not only to obtain government contracts, but also to exercise the most basic rights. For many years, laws banned Asian Americans and other minorities from becoming naturalized citizens and severely restricted the ability of Asians to enter the United States as immigrants. The few Asians who overcame the discriminatory immigration laws then faced significant barriers in exercising even basic rights, such as the rights to marry¹ and to obtain an education.² Asian Americans’ business rights were also unfairly hampered; for example, local ordinances in Chicago unfairly restricted the economic growth and advancement of Chinese-owned businesses.³ Further, until as recently as

the late 1940s, Illinois and several other states prohibited Asian Americans, *including American-born citizens of Asian descent*, from acquiring land.⁴ Yet, the most egregious example of the effects of discrimination against Asian Americans was the brutal internment of approximately 120,000 Japanese Americans during World War II,⁵ including many who resettled in Chicago and Cook County (including relatives of some members of the Association of Asian Construction Enterprises).

Ominously, another study shows that many Americans continue to harbor racist views against Asian Americans. This study found that approximately 25% of the American public hold decisively negative views of Chinese Americans, and 46% of those surveyed believe that “Chinese Americans passing on information to the Chinese government is a problem.”⁶ Moreover, approximately 15% of those polled believed that Chinese Americans were “[m]ore willing than others to use shady practices,” and also that Chinese Americans are “twofaced” and “conceited.”⁷ In the past decade, Chicago has seen a number of hate crimes and hate incidents involving Asian Americans. And post-9/11, South Asian Americans and other Asian Americans have increasingly faced unjust racial profiling on the local and national levels.⁸

Although often touted as a “model minority,” Asian Americans nationally and locally face many economic problems, as shown by data from the United States Census of 2000. In Chicago, Korean Americans have a poverty rate of 30% – higher than the poverty rates of whites, Latinos, and African Americans. The overall poverty rate for Asian Americans is 14% (compared to 9% for whites) and certain subsets of Asian Americans, such as Hmong and Cambodian Americans, have extremely high poverty rates of 60% and 40% (much higher than the rates of African Americans and Latinos).

2. Discrimination Against Asian Americans in Business

Discrimination against Asian Americans continues to this day, particularly in the business setting. Asian Americans receive unduly low returns on their education, as compared to whites. Equal Access at 33. “Even in Chicago, where educational attainment for Asians is significantly higher than for non-Hispanic whites, Asians earn only 71 cents to every dollar earned by non-Hispanic whites. In other words, Asians are having difficulties translating their education into earnings.” *Id.* Asian Americans often have the “inability to find job opportunities commensurate with [their] education and training.”⁹

Similarly, the United States Commission on Civil Rights has found that being of “Asian descent” had a “negative effect” on an employee’s chance to move upward into management.¹⁰ Indeed, one study stated that Asian Americans “face the worst chance [among all racial groups] of being advanced into management positions.”¹¹

Disturbingly, the underlying racism that gave rise to the internment of Japanese Americans during World War II still appears to be with us today, and it forms the backdrop that this Subcommittee should consider in assessing the concerns of Asian Americans. The City’s attempt to remedy discrimination through the MBE Program represents an appropriate effort to begin to break the cycle of discrimination and disadvantage.

3. Implications for City Council's Consideration of Proposed Ordinance

Asian Americans have a unique history of discrimination and, as such, a one-size-fits-all assessment will not exhaustively measure the discrimination that Asian Americans currently face. Thus, there are inherent limitations of the 2009 Blanchflower Report in measuring discrimination against Asian Americans. The 2009 Blanchflower Report correctly concludes that Asian Americans have faced discrimination that justifies continued inclusion in the MBE Program. However, when interpreting the 2009 Blanchflower Report and its recommendations, the City Council should consider the following points.

- a. "Household income" (*see, e.g.*, 2009 Blanchflower Report at 99) is not always a reliable indicator of the success or disadvantage faced by Asian Americans. Many Asian American families live in joint or multi-generational households; plus, the household income might not account for unpaid or marginally paid family members who assist with the business.
- b. "Self-employment" or "entrepreneurship" is not always a reliable indicator of the success or disadvantage faced by Asian Americans. For example, statistics on relatively high self-employment rates of Asians can indicate discriminatory racial barriers that drive Asian Americans to be self-employed – such as workplace discrimination in the mainstream market, inability to advance meaningfully in businesses that are owned by others, or underemployment in mainstream markets commensurate with their levels of education.
- c. As explained above, Asian Americans in Chicago and elsewhere experience an unduly low return on their education. Therefore, numbers depicting "net worth," "household incomes," and "self-employment" (*see, e.g.*, 2009 Blanchflower Report at 93-94, 99) do not paint a complete picture of whether Asian Americans suffer discrimination or social disadvantage, because Asian Americans with a seemingly high net worth or income might still be receiving an unfairly low return on education.
- d. Asian Americans in Chicago are quite diverse in terms of ethnicities, socio-economic status, languages spoken, and several other factors. In order to obtain more comprehensive facts regarding discrimination against Asian American contractors, data regarding the subgroups within the Asian American community would need to be disaggregated.
- e. In describing certain weaknesses in data regarding Asian Americans (2009 Blanchflower Report at 99-100), Blanchflower relies upon a book by Fairlie and Robb that appears to be about general businesses in the United States and not specifically about construction businesses in the Chicago area. *Id.* at 34. Blanchflower also acknowledges the following about the Fairlie and Robb book: "A good deal of this evidence is considerably out

of date given it is seventeen years old...” *Id.* Nonetheless, as discussed above, the 2009 Blanchflower Report *does* contain recent evidence showing discrimination against Asian American construction contractors in Chicago.

- f. Asian Americans construction contractors in Chicago have suffered ongoing repercussions from previously being excluded as a presumptive category in the MBE Program. Confusion still exists among contractors and the general public regarding whether Asian Americans are a presumptive category in the program. This confusion was exacerbated when the Chicago Sun-Times incorrectly stated in article dated June 29 and June 30, 2009 that Asian Americans were not included as a “presumptively socially disadvantaged” minority group in the Proposed Ordinance. The Sun-Times subsequently apologized for the errors and printed corrections, but this is just one example of the continuing detriments caused by Asian Americans’ previous exclusion from the MBE Program.
- g. Asian American construction contractors in Chicago face discrimination not only in obtaining government contracts, but also in obtaining bonding, credit, fair prices from suppliers, access to social networks, and information about contracting opportunities. Asian American contractors also have concerns regarding enforcement and monitoring of the MBE Program, because misuse of the MBE Program – such as by fraud, pass-throughs. Some of these types of discrimination and disadvantage are outlined in the 2009 Blanchflower Report, but future research that the City undertakes should further investigate these practices as they affect Asian Americans.

III. Conclusion

Asian American contractors in the Chicago area have suffered and continue to suffer discrimination. Therefore, the City Council should include Asian Americans as a presumptive socially disadvantaged category in the MBE Program by enacting the Proposed Ordinance.

¹ See, e.g., Ancheta, Angelo N., *Race, Rights and the Asian American Experience*, at 30 (1985) (noting that laws prohibiting intermarriage with Asians were common and remained on the books until the United States Supreme Court ruled them to be unconstitutional in *Loving v. Virginia*, 388 U.S. 1 (1967)). Even Illinois had a statute in 1829 that prohibited interracial marriage between whites and people of color. See Karthikeyan, Hrishi, *Preserving Racial Identity: Population Patterns and the Application of Anti-miscegenation Statutes to Asian Americans, 1910-1950*, 9 Asian L.J. 1 (2002).

² Like other racial minorities, Asian American children were required to attend segregated schools. See, e.g., Ronald Takaki, *A History of Asian Americans: Strangers From A Different Shore* at 201 (1998); *Lum v. Rice*, 275 U.S. 78, 86-87 (1927) (applying separate-but-equal doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), to Chinese citizens).

³ See *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (striking down ordinances as a violation of equal protection because of the discriminatory manner in which they were enforced).

⁴ See Dudley O. McGovney, *The Anti-Japanese Land Laws of California and Ten Other States*, 35 Cal. L. Rev. 7 (1947) (detailing the history of preclusion of Japanese Americans from land-ownership in eleven states).

⁵ See *Korematsu v. United States*, 323 U.S. 214 (1944); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 235-36 (recognizing that the internment of Japanese Americans upheld in *Korematsu* was “illegitimate” and noting Congressional finding that “these actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership”) (citation omitted).

⁶ See Committee of 100, *American Attitudes Toward Chinese Americans and Asian Americans* at 12, 15 (Apr. 25, 2001).

⁷ See *id.* at 13; Thomas B. Edsall, *25% of U.S. View Chinese Americans Negatively, Poll Says*, Washington Post at A-4, Apr. 26, 2001 (discussing Committee of 100 survey results).

⁸ See Chandrasekhar, Charu, *Flying While Brown: Federal Civil Rights Remedies to Post-9/11 Airline Racial Profiling of South Asians*, 10 Asian L.J. 215, 216 (2003); Lan, Shanshan, *Chinese Americans in Multiracial Chicago: A Story of Overlapping Racializations*, 13 Asian L.J. 31, 37 (2006) (detailing various incidents of violence in Chinatown and adjacent areas).

⁹ See Deborah Woo, *The Glass Ceiling and Asian Americans: A Research Monograph* at 44 (July 1994) (unpublished manuscript) at 44.

¹⁰ *Id.* at 42 (citing to the U.S. Comm’n on Civil Rights, *Economic Status of Americans of Asian Descent: An Exploratory Investigation* (1988)) (“Glass Ceiling and Asian Americans”).

¹¹ LEAP Asian Pacific American Pub. Policy Inst. & UCLA Asian American Studies Ctr., *The State of Asian Pacific America* at 215-216 (1993).