

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

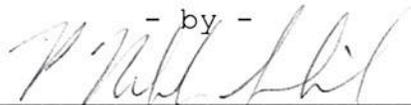
- of -

the Application of
National Recovery Solutions, LLC
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60668

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

May 25, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny the application of National Recovery Solutions, LLC ("NRS" or "applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by National Recovery Solutions, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

National Recovery Solutions, LLC's application was submitted on February 18, 2016 (Exh. 1).

The application was denied by letter dated August 22, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Kinda Baker's ownership of NRS (Exh. 2).

By letter dated September 16, 2016, applicant's counsel appealed from the Division's denial and requested a hearing (Exh. 3).

By letter dated February 16, 2017, the Division notified the applicant that the hearing in this matter would occur at 11:00 am on April 4, 2017 at the Division's office located at 625 Broadway, Albany, New York (Exh. 4).

This matter was assigned to Administrative Law Judge Maria E. Villa who directed the parties to provide copies of all exhibits to be introduced at the hearing as well as the names of all witnesses.

On March 10, 2017, because of a scheduling conflict, I was assigned this matter.

On March 17, 2017, the parties provided their exhibits and witness lists.

On April 4, 2017, a hearing in this matter was convened at the Division's Albany Office at 11:00 am. The applicant was represented by Brian D. Gwitt, Esq., of the law firm Woods Oviatt Gilman LLP, and he called one witness, Kinda Baker. The Division was represented by Phillip Harmonick, Esq. and he called one witness, Matthew Lefebvre, Senior Certification Analyst with the Division. The hearing concluded at approximately noon.

The record closed upon receipt of the audio recording of the hearing on or about May 12, 2017.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's WBE certification is not supported by substantial evidence (see State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of

Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011]
[internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that the application failed to meet two criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Kinda Baker's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that the applicant failed to demonstrate that the woman owner, Kinda Baker, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

Position of the Applicant

National Recovery Solutions, LLC asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. National Recovery Solutions, LLC is a full service debt recovery agency with a business address of 6425 Dysinger Road, Lockport, New York (Exh. 1 at 1-3).

2. National Recovery Solutions, LLC was established on September 1, 2006 with [REDACTED] in cash for startup costs (Exh. 1 at 3). Of this amount, less than [REDACTED] was contributed jointly by Kevin and Kinda Baker (Exh. 29).

3. On February 1, 2015, an amended and restated operating agreement for the firm was executed that named: (1) Kinda Baker as Chief Executive Office ("CEO") with a 51% share of the business; (2) Kevin Baker as president with a 15 2/3% share of the business; and (3) Timothy Mroczek as executive vice

president with a 33 1/3% share of the business (Exh. 5). On this date, Kevin Baker assigned a portion of his ownership interest, 17.67% of the company, to his wife, Kinda, for \$1 (Exh. 30).

4. In 2015, Kinda Baker, Kevin Baker and Timothy Mroczek each received a distribution from the firm of approximately [REDACTED] (Exh. 6 at 8-10). Also in 2015, Kinda Baker and Kevin Baker received a salary from the firm of approximately [REDACTED] (Exh. 32).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter sets forth two bases related to Kinda Baker's ownership of National Recovery Solutions, LLC. Each basis is discussed individually, below.

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner Kinda Baker's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). Specifically, the letter states that the application identifies a capital contribution of [REDACTED]. Documents submitted with the application attribute [REDACTED] to Ms. Kinda Baker and Mr. Kevin Baker, but the application does not identify any contributions by Ms. Baker separately from Mr. Baker.

At the hearing, Ms. Baker testified that in 2015, she became CEO and majority owner of NRS pursuant to the amended and restated operating agreement (Exh. 5). At this time she took on a bigger role at the company, including assuming responsibility for operations, sales, and human resources (Exh. 34 at 8:40). She discussed thirteen exhibits she executed on behalf of the company in her new role (Exhs. 8-20). She also testified that the company has been recognized as a WBE by other organizations (Exh. 21-23).

With respect to her contributions to the business, Ms. Baker testified that she made contributions to the firm in the form of spending time on business affairs, assuming additional roles at the company, and sweat equity (Exh. 34 at 17:30). No value of these contributions was discussed during her direct examination, but on cross she stated that the value of her sweat equity could be measured by the value of a contract she negotiated with Coast Professional, Inc. for the collection of student loans (Exh. 11; Exh. 34 at 22:15). However, this contract does not appear to reference any numerical amount.

In his testimony, Division analyst LeFebvre stated that he reviewed the application which states that the company was started in September 2006 with [REDACTED] in cash (Exh. 1 at 3) and that he requested proof of this contribution (Exh. 1 at 7). The applicant provided three documents in response to this request on February 18, 2016 (Exh. 1 at 7). Mr. LeFebvre testified that the first of these documents, a history of the company (Exh. 26) offered no proof of the [REDACTED] contribution (Exh. 34 at 30:15). The second of the documents, the revised operating agreement (Exh. 5) also did not include information as to the source of the [REDACTED] contribution (Exh. 34 at 30:45). The third document, the partnership ownership statement (Exh. 28) also failed to provide proof of the capital contribution (Exh. 34 at 31:20). He also testified that he reviewed the members' contributions as detailed in a schedule provided by the applicant (Exh. 29) that showed that Ms. Baker's contributions were made jointly with her husband, Kevin Baker, and that their joint contributions were less than 50% of the total contributions made by all owners. No evidence was provided of any independent contribution by Ms. Baker (Exh. 34 at 34:00). He also testified that he reviewed the assignment of membership interest (Exh. 30) which transferred 17.67% of the company to Ms. Baker from her husband for \$1. Finally he discussed the company's 2015 tax return (Exh. 31) that showed that none of the three owners contributed capital during 2015 (Exh. 34 at 34:50).

Applicant counsel's argument that Ms. Baker's increased role at the company and her increased efforts constitute sweat equity that should have been considered by the Division is without merit. There is no claim of sweat equity in the application, which only shows a [REDACTED] cash contribution in

2006, and it is not the responsibility of the Division to attempt to evaluate claims not made in the application. Because of this and based on the evidence in the record, the applicant failed to demonstrate that the woman owner Kinda Baker's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial on this ground was based on substantial evidence.

In its denial letter, the Division also concluded that the applicant failed to demonstrate that the woman owner, Kinda Baker, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). Specifically, the letter states that Ms. Baker, Mr. Baker and Mr. Timothy Mroczek received distributions of [REDACTED], respectively, for the 2015 tax year and that these distributions are not in proportion to the ownership interest of each member.

At the hearing, Ms. Baker testified the 2015 tax return (Exh. 6 at 6-9) shows that she is the 51% owner of the company and that she was assigned 51% of the income of the firm which she paid taxes on and that the other owners were assigned income in accordance with their ownership interests (Exh. 34 at 9:15). This income is reflected in the capital accounts reported on the tax forms (Exh. 6 at 6-9). She testified that there were no distributions in 2015 and all profits were kept in the company (Exh. 34 at 12:30).¹ Applicant's counsel argues that this information shows she is receiving a proportionate share of the firm's profits.

In his testimony, Division Analyst LeFebvre did not contradict Ms. Kinda's testimony that she was allocated a proportionate share of the firm's income and paid tax on it. He noted that he considered the amount of money actually paid out of the firm to its owners (Exh. 34 at 37:00). This information, contained in the firm's 2015 tax returns and W2 forms, showed

¹ The applicant's 2016 tax returns were offered and received into evidence but were not part of the application materials. Because these returns were not before the Division when it issued its denial, they cannot be considered in this appeal.

that Ms. Baker and her husband were paid nearly identical amounts (Exhs. 6, 32) despite the fact that she owns more than three times as much of the company than he does (Exh. 34 at 38:00).

Because Ms. Baker received approximately the same benefit in terms of monies actually paid out by the company as her husband did, the applicant has failed to demonstrate that Kinda Baker shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Kinda Baker's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. The applicant failed to demonstrate that the woman owner, Kinda Baker, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny National Recovery Solutions, LLC's application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
National Recovery Solutions, LLC**

**DED File ID No. 60668
Exhibit List**

Exh. #	Description
1	Application
2	Denial
3	Appeal letter dated September 16, 2016
4	Letter scheduling hearing dated February 16, 2016
5	Amended and restated operating agreement
6	2015 federal income tax return
7	Affidavit of Scott A. Cain, C.P.A.
8	2016 ballot for DBA International
9	Nondisclosure agreement with Transworld Systems, Inc.
10	Letter agreement with RMS-Recovery Management Services, Inc.
11	Customer outsourcing agreement
12	Nondisclosure agreement with Livevox, Inc.
13	Nondisclosure agreement with Greater Niagara Medical Group
14	Nondisclosure agreement with Acumen Solutions Group, LLC
15	Service Agreement with Time Warner Cable
16	Commercial lease application
17	Premium finance agreement
18	Master services agreement

19	Accounts receivable management errors and omissions
20	Accord Agent/Broker Record of Change
21	WBE certification (federal)
22	Article
23	Letter from Lockport, NY regarding WBE status
24	Application (same as 1)
25	Denial (same as 2)
26	Narrative
27	Amended and restated operating agreement (same as 5)
28	Narrative
29	Transactions by account
30	Assignment of membership interest
31	2015 taxes
32	2015 W2 forms
33	2016 taxes
34	Audio recording of the hearing