

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
207 GENESEE STREET
UTICA, NEW YORK 13501

In the Matter

- of -

the Application of Aspell Services, Inc.
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 67884

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
September 8, 2023

This matter considers the written appeal by Aspell Services, Inc., (“Aspell” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a minority-owned business enterprise (“MBE”).

PROCEDURAL HISTORY

1. On December 31, 2020, Mr. Maurice Doublet III, as President, applied on behalf of Aspell for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On March 9, 2022, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Minority group members relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
 - (c) Minority group members relied upon for certification do not make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2);
 - (d) Minority group members relied upon for certification are not the highest-ranking

officers of the business enterprise and do not control the board of directors or serve as a general partner, as required under 5 NYCRR §144.2(c)(d)(1); and

(e) Minority group members relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).

3. Aspell timely filed a Request to Appeal with an accompanying statement received on April 14, 2022 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Aspell on October 5, 2022 (DED Exhibit 3).
5. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated June 14, 2023, and a brief of Anequa Pond, Esq., counsel for the Division, dated June 15, 2023.

FINDINGS OF FACT

6. Aspell is engaged in information technology solutions, consulting services and recruitment related to network design, enterprise implementations, and application development (DED Exhibit 1).
7. Mr. Maurice Doublet is the President and has a 51% ownership interest. Mr. Patrick Aspell is the Vice President and has a 49% ownership interest. (DED Exhibit 1).
8. Mr. Doublet paid \$[REDACTED] for his 510 shares and made a \$[REDACTED] loan to the company. Mr. Aspell paid \$[REDACTED] for his 490 shares and asserts that he contributed \$[REDACTED] in expertise (DED Exhibit 1).
9. Mr. Doublet has over three decades of experience in sales. He also served in the United States Army Reserve. As President of Aspell, he researches businesses and conducts

market analysis for potential businesses to buy; processes payroll, invoices, payments, contracts and manages human resources duties (DED Exhibit 4).

10. Mr. Aspell holds a Master of Science in Information Technology and earned a Six Sigma Black Belt Certification and is a certified Scrum Master. He has nearly a decade of experience in Information Technology. He has held several IT Project Management roles (DED Exhibit 5).

11. Aspell's bylaws state that the "management of all the affairs, property and interest of the corporation shall be vested in the Board of Directors" (DED Exhibit 6).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

5 NYCRR §144.2(c) states in relevant part as follows:

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
 - (i) The products or services the business enterprise provides to clients; and
 - (ii) The means by which the business enterprise obtains contracts or orders.

5 NYCRR §144.2(d)(1) states as follows:

A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

5 NYCRR §144.2(d)(2) states as follows:

Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Aspell for certification as a MBE 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 Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that

the minority-owner's contribution came from assets belonging solely to the minority-owner. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that he has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Mr. Doublet paid \$[REDACTED] for his 510 shares and loaned the company \$[REDACTED]. Mr. Aspell paid \$[REDACTED] for his 490 shares and claimed to contribute \$[REDACTED] in expertise (DED Exhibit 1). They did not provide any documentation to show the value of the shares and to prove they paid adequate consideration for the shares. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

Loans do not constitute contributions to the enterprise, as they are viewed as an extension of credit in anticipation of repayment. See *Matter of PamTen*, Recommended Order dated June 26, 2018, Final Order 18-38, dated July 30, 2018. Mr. Doublet's \$[REDACTED] loan to the company is therefore not a capital contribution.

To establish whether an owner's contribution of expertise to the business is proportionate to the owner's equity interest, an applicant must provide evidence of the value of the minority-owner's contributions. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022. Mr. Aspell did not provide

evidence of the value of his expertise in the business.

The Division's determination to deny the application on the basis that Aspell failed to demonstrate that Mr. Doublet and Mr. Aspell made contributions to Aspell in proportion to their ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(1) requires that the minority/woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things". In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the minority/woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

The critical functions of the business are obtaining contracts for information technology solutions, consulting services and recruitment related to network design, enterprise implementations, and application development (DED Exhibit 1).

Mr. Doublet does not have any industry specific expertise. His skills are related to general business and sales. He performs sales related tasks such as researching businesses and conducting market analysis for potential business to buy. He processes payroll, invoices, payments, contracts and manages human resources duties (DED Exhibit 4). There are no documents showing that he has any training or experience in the information technology industry. He does not possess any academic or technical training relevant to the industry to make him qualified to supervise the work of the employees (DED Exhibits 1 and 4).

Mr. Aspell holds a Master of Science degree in Information Technology and earned a Six Sigma Black Belt Certification and is a certified Scrum Master. He has been working in the Information Technology field since 2011 where he has held several IT Project Management roles. He has industry-specific experience to perform and supervise the core functions of the business. (DED Exhibit 5).

Applicant has failed to demonstrate that Mr. Doublet possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR §144.2(c)(1).

5 NYCRR §144.2(c)(2) states that “minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders”.

The minority/woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for MWBE certification”. See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

The core functions of Aspell’s business are obtaining contracts for information technology solutions, consulting services and recruitment related to network design, enterprise implementations, and application development (DED Exhibit 1).

Mr. Aspell’s education, certifications and experience demonstrate expertise in the core functions of the business. He has been working in the field of Information Technology for over a

decade and has held several IT management positions. Mr. Doublet's experience does not fall within the core functions that generate revenue for the business. He performs a number of sales related tasks such as researching businesses and conducting market analysis for potential business to buy. He processes payroll, invoices, payments, contracts and manages human resources duties (DED Exhibits 4 and 5). Mr. Doublet failed to show that he makes operational decisions on a day-to-day basis with respect to the critical functions of the business.

The application was also denied on the basis that the minority owner relied upon for certification does not control the Board of Directors, or serve as a general partner, as required by 5 NYCRR §144.2(d)(1). Aspell's bylaws state: "the management of all the affairs, property and interest of the corporation shall be vested in the Board of Directors..." and a "majority of the whole Board of Directors shall be necessary at all meetings to constitute a quorum for the transaction of business" (DED Exhibit 7). The application identifies Mr. Doublet as the President of the Board of Directors and Mr. Aspell as the Vice President (DED Exhibit 1). Since the bylaws require both Directors to manage its affairs, Mr. Doublet does not individually control the Board of Directors.

Minority/Women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a minority/woman-owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

The contracts provided by Aspell with the Application were signed by Mr. Aspell (DED Exhibit 7). Ms. Doublet's signature did not appear on any of the contracts. Therefore, he did not demonstrate appropriate control of the business as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

Aspell did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(c)(1), 144.2(c)(2), 144.2(d)(1) and 144.2(d)(2) was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Aspell's application for certification as a minority-owned business enterprise.

In the Matter of Aspell Services, Inc.
 DED File ID No. 67884
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Resume of Mr. Maurice Doublet III	Y	Y
DED 5	Resume of Mr. Patrick Aspell	Y	Y
DED 6	Aspell Services, Inc. Bylaws	Y	Y
DED 7	Business Contracts	Y	Y
DED 8	Aspell Services, Inc. Stock Issuance Transfer Ledger	Y	Y
APP 1	Request to Appeal	Y	Y