

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

In the Matter

- of -

**the Application of CBA Contracting Corp.
for Recertification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 58188

RECOMMENDED ORDER

-by-



**David A. Murad
Administrative Law Judge
June 5, 2023**

This matter considers the written appeal by CBA Contracting Corp, (“CBA” 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 recertification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. Bianca Cauchi, as the President, applied on behalf of CBA for recertification as a WBE on October 12, 2017 (DED Exhibit 1).
2. In a letter dated November 2, 2020, the Division denied CBA’s application (DED Exhibit 3).
3. CBA timely filed a notice of appeal on December 23, 2020 (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to CBA on March 15, 2021 (DED Exhibit 3).
5. Applicant submitted its written appeal by letter received on May 12, 2021 (APP Exhibit 2).
6. The Division responded by filing an Affidavit of Raymond Emanuel dated March 16, 2023 and a brief submitted by Candace C. Williamson, Esq., counsel for the Division, dated April 7, 2023.

FINDINGS OF FACT

7. CBA is an architectural manufacturer and fabricator of aluminum storefronts, doors, curtain walls and windows, based in Milton, New York (DED Exhibit 1).

8. Bianca Cauchi is the President and 60% owner of CBA. Her brother, Angelo Cauchi, is the treasurer and 40% owner of CBA (DED Exhibit 1).
9. In 2019, Ms. Cauchi received compensation from CBA in the amount of \$ [REDACTED] in Quarter 1, \$ [REDACTED] in Quarter 2, and \$ [REDACTED] in Quarter 4; while Mr. Cauchi received compensation from CBA in the amount of \$ [REDACTED] in Quarter 1, \$ [REDACTED] in Quarter 2 and \$ [REDACTED] in Quarter 4 (DED Exhibit 3).
10. In 2018, Ms. Cauchi received a salary from CBA in the amount of \$ [REDACTED]; while Mr. Cauchi received a salary from CBA in the amount of \$ [REDACTED] (DED Exhibit 4).
11. Ms. Caruchi's duties include day to day business activities including "negotiating, purchase orders, billing, payroll, payables, receivables, and reviewing estimates, project management" (DED Exhibit 5). Prior to working for CBA, she worked in the human resources field, including managing personnel and staffing (DED Exhibit 6).
12. Angelo Caruchi's duties include estimating, engineering and project management, including pricing the project and developing fabrication sheets for the shop (DED Exhibit 6).
13. John Alverson is a non-owner employee. He is the Fabrication Supervisor. His duties include reviewing fabrication sheets for each task, training and scheduling project completion. He receives all fab sheets from Angelo Cauchi and breaks down the tasks to functions or each of the working staff (DED Exhibit 5).

APPLICABLE LAW

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

The ownership and control by the ... woman must be real, substantial, and continuing and must go beyond the pro forma ownership of business... The ... woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

5 NYCRR former §144.2(b)(1) states in relevant part as follows:

Decisions pertaining to the operations of the business enterprise must be made by women...claiming ownership of that business enterprise.

In 2020, 5 NYCRR §§ 140-145 were amended, updating the regulations and clarifying the Division's interpretations of its regulations. See 2020 NY REG TEXT 548304 (NS)

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

Operational decisions. 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... 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.

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 CBA Contracting Corp. for recertification as a WBE 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

5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

Ms. Cauchi holds a 60 percent ownership interest in CBA and Mr. Cauchi holds a 40 percent ownership interest in CBA. Division staff argues that Ms. Cauchi's compensation from CBA is not proportionate to her ownership interest in the business. The documents submitted by applicant show that Bianca Cauchi received \$ [REDACTED] and Angelo Cauchi received \$ [REDACTED] in 2018 (DED Exhibit 4). The documents also show that in 2019, Bianca Cauchi received \$ [REDACTED] in Quarter 1, \$ [REDACTED] in Quarter 2 and \$ [REDACTED] in Quarter 4, while Angelo Cauchi received \$ [REDACTED] in Quarter 1, \$ [REDACTED] in Quarter 2 and \$ [REDACTED] in Quarter 4 (DED Exhibit 3). No other documentation was submitted establishing any share in the risks and profits proportional with her ownership interest.

CBA explained that Ms. Cauchi was paid significantly less than Mr. Cauchi because Mr. Cauchi worked beyond 40-hour weeks and has been indispensable while Ms. Cauchi faced personal challenges (DED Exhibit 8). The regulations require the woman owner to share in the risks and profits in proportion to their equity interest. (5 NYCRR former §144.2(c)(2)) Applicant has not indicated that the woman-owner was compensated in any other way or given any other benefits to reflect her majority ownership.

The arguments raised by applicant do not undermine the Division's determination that Ms. Cauchi does not share in the risks and profits of CBA in proportion to her ownership interest. The wage and compensation documentation that was before the Division at the time of the denial

supports the Division's determination on this issue, and applicant did not proffer evidence of other compensation.

The Division's determination to deny the application on the basis that CBA failed to demonstrate that Bianca Cauchi shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR former §144.2(c)(2) is supported by substantial evidence.

II. Operations

The Division also denied the application on the basis that the woman-owner relied upon for certification did not make decisions pertaining to the operation of the business enterprise, as required by 5 NYCRR former §144.2(b)(1). The Division stated that the minority shareholder, Angelo Cauchi, and non-owner employee, John Alverson, are primarily responsible for managing significant operations of the business related to the core revenue generating functions. The core revenue generating functions of CBA are the fabrication of aluminum storefronts, doors, curtain walls and windows (DED Exhibit 1). Ms. Cauchi stated her duties were day to day business activities including negotiating, purchase orders, billing, payroll, payables, receivables and reviewing estimates (DED Exhibit 5). Those functions are common to most businesses and do not generate income for the business. Prior to working for CBA, Ms. Cauchi worked in the human resources field where her responsibilities were administrative and included managing personnel and staffing, among other responsibilities (DED Exhibit 6).

Mr. Cauchi's duties are estimating, engineering and project management, including pricing the project and developing fabrication sheets for the shop (DED Exhibit 5). Mr. Alverson is the fabrication supervisor. He reviews fabrication sheets received from Mr. Cauchi for each task and breaks down the task to functions for the working staff (DED Exhibit 5).

Mr. Cauchi and Mr. Alverson are responsible for performing the core revenue generating functions of CBA and have the expertise and knowledge necessary to perform those functions. Ms. Cauchi has no direct fabrication experience and is responsible for the administrative aspects of the business (DED Exhibits 5, 6).

Applicant failed to demonstrate that the record that was before the Division at the time of its determination to deny the WBE application does not contain substantial evidence to support the Division's determination that Bianca Cauchi does not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1).

CONCLUSION

CBA Contracting Corp. did not meet its burden to demonstrate that the Division's determination to deny its application for recertification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR former §144.2(c)(2) and 5 NYCRR former §144.2(b)(1), 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 CBA Contracting Corp's application for recertification as a woman-owned business enterprise.

In the Matter of CBA Contracting Corp.
 DED File ID No. 58188
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Recertification – 10/12/2017
DED 2	Denial Letter – 11/2/2020
DED 3	Notice to Proceed via Written Appeal – 3/15/2021
DED 4	2019 Quarterly Wage Reporting Forms
DED 5	2018 W-2 Forms
DED 6	Applicant's Response to 4/20/2020 Request for Information
DED 7	Resumes of Bianca Cauchi and Angelo Cauchi
APP 1	Applicant's Notice of Appeal – 12/23/2020
APP 2	Applicant's Appeal Letter – 5/12/2021