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

In the Matter

- of -

the Application of **First Choice Group CNY, Inc. D/B/A First Choice Staffing**
for Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52628

RECOMMENDED ORDER

- by -

Richard A. Sherman
Administrative Law Judge

March 21, 2023

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 First Choice Group CNY, Inc., d/b/a First Choice Staffing ("First Choice" or "applicant") certification as a women-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the written appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that First Choice does not meet the eligibility criteria for certification as a WBE.

Applicant filed a written appeal ("appeal"), dated May 5, 2020, together with two exhibits.[1] The Division filed a brief in response ("reply"), dated February 15, 2023, together with the affidavit of Francisco Guzman ("Guzman affidavit"), sworn to February 8, 2023, and four attached exhibits. A listing of the exhibits filed by First Choice and by the Division is appended to this report.

The Division denied the application (exhibit 1) filed by First Choice for WBE certification by letter dated April 28, 2017 (exhibit 2). The letter set forth one ground under 5 NYCRR 140.1 for the denial.[2]

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied WBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on

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[1] Applicant attached two exhibits to its written appeal. As noted in the appended exhibit list, I have assigned letter designations A and B to applicant's exhibits.

[2] The Division notes that the minority and women-owned business enterprise (MWBE) regulations were amended in December 2020. Because the denial determination pre-dates the 2020 amendments, the Division evaluated the application for certification under the former regulations (*see* reply at 1, fn 1; *see also Matter of Wood v Axelrod*, 203 AD2d 645, 646 n 2 [3d Dept 1994] ["we apply the regulations as they existed at the time of" the agency's determination]). Similarly, the Division notes that Executive Law Article 15-A was reauthorized in January 2020 and, because of the date of the denial determination, the Division evaluated the application under the prior version of Article 15-A (*see* reply at 1, fn 2). Unless expressly stated otherwise, all references herein to Executive Law Article 15-A and to the MWBE regulations are to the law and regulations that were in effect at the time of the denial determination.

representations in the application itself, and on information revealed in supplemental submissions or 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 WBE certification for First Choice 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

The Division cites one ground for the denial of First Choice's WBE application. The Division argues that First Choice is not a small business because it employs more than 300 individuals (exhibit 2 at 2 [citing 5 NYCRR 140.1(tt)(1)(vi)]). The Division argues that, in evaluating the small business eligibility standard, the Division determines whether the applicant employs more than 300 people, "regardless of whether such people are employed in a part-time, full-time, temporary, seasonal or other capacity" (reply at 3-4 [internal quotation marks omitted]).

Position of Applicant

Applicant argues that it has "not been able to find any portion of the law that changed since our original approved application in 2009 nor since our approved renewal in 2012" (appeal at 1). Applicant asserts that it meets the small business definition under 13 CFR 121.201 and, therefore, should be afforded small business status under Executive Law Article 15-A and the MWBE regulations (*id.*).

FINDINGS OF FACT

1. First Choice is a corporation, established in 1993, and is in the business of staffing and payroll services (exhibit 1 at 1-2 [items 1.C, 1.R, 1.S]; *id.* at 4 [items 5.A-I]; Guzman affidavit ¶ 7).

2. The women owners, Michele Williams and Lynn Loomis, own 60 and 40 percent of the business enterprise, respectively (exhibit 1 at 3 [item 3.A]; Guzman affidavit ¶ 7).

3. The WBE application filed by First Choice states that the business enterprise employs 18 permanent and 2480 temporary or seasonal employees on a part-time or full-time basis (exhibit 1 at 2 [item 1.Q]; Guzman affidavit ¶ 8).

4. Applicant's quarterly federal tax returns for 2016 show that the business enterprise averaged over 660 employees in 2016 (exhibit 4 at 1, 3, 5, 7; Guzman affidavit ¶¶ 9, 10).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of First Choice as a WBE pursuant to Executive Law Article 15-A and 5 NYCRR Parts 140-144. As discussed below, the Division cites one ground in support of upholding the denial.

The Division denied First Choice's WBE application on the basis of its determination that First Choice is not a small business, as required by Executive Law § 310(20) and 5 NYCRR 140.1(tt)(1)(vi) (reply at 4). The Division argues that the Executive Law and the MWBE regulations "are unequivocal in establishing that the certified firm . . . **cannot employ more than 300 persons . . . regardless of the industry of such firm or the full-time, part-time, permanent, temporary or other employment status of such persons**" (reply at 4-5 [emphasis in original]).

The Division notes that the application materials state that First Choice employs 18 full-time and part-time permanent employees and 2,480 full-time and part-time temporary employees, "which exceeds the 300-person limit" (reply at 2; *see also* exhibit 1 at 2 [item 1.Q]). The Division states that it sought to verify the number of employees at First Choice and requested that applicant provide copies of its Employer's Quarterly Federal Tax Return (Form 941) for the 2016 tax year. The Division asserts that these documents demonstrate that First Choice averaged 661 employees in 2016 (*id.*).

Applicant does not challenge the Division's assertion that the Form 941s show that First Choice averaged 661 employees. Rather, applicant argues that the U.S. Small Business Administration (SBA) Table of Small Business Size Standards (SBA Table) (13 CFR 121.201) should control the determination of whether First Choice is a small business (appeal at 1). Applicant notes that 5 NYCRR 140.1(gg) provides that, **"[i]n determining whether the enterprise meets the definition of a small business as herein provided, consideration shall be given to federal small business administration standards prescribed in 13 CFR Section 121.201**" (appeal at 1 [emphasis in original]).

First Choice asserts that it is a temporary help services firm and that the SBA Table designates such firms as small businesses "provided they are under $27.5 million in annual revenue" (appeal at 1-2). Applicant further asserts that its revenue is "**by far under the Small Business Size Standard of $27.5 million**" and states that its "past three years revenue have been: 2016, [redacted] 2015, $[redacted]; and 2014, $[redacted]" (appeal at 2 [emphasis in original]).

The application materials that were before the Division at the time of the denial determination support the denial.

Executive Law § 310(15)(f) provides that, among other things, a WBE must be "an enterprise that is a small business pursuant to" Executive Law § 310(20). Pursuant to Executive Law § 310(20), a small business "employs, based on its industry, a certain number of persons as determined by the director, but not to exceed three hundred." Similarly, 5 NYCRR 140.1(tt)(1)(vi), states that a WBE must be "a small business pursuant to" 5 NYCRR 140.1(gg). Pursuant to 5 NYCRR 140.1(gg), to be classified as a small business, a business enterprise must meet several criteria including that it "in no event employs more than three hundred people." By their plain meaning, these provisions establish that the Division has discretion to set limits on the total number of employees a business enterprise may employ to qualify as a small business but, in no event, may that limit exceed three hundred employees.

As noted by the applicant, the Executive Law also provides that, in determining whether a business enterprise is a small business, the Director is to "tak[e] into consideration factors which include, but are not limited to, federal small business administration standards pursuant to 13 CFR part 121 and any amendments thereto" (Executive Law § 310[20]; *see also* 5 NYCRR 140.1[gg]). There is nothing in the Executive Law or the MWBE regulations that would suggest that taking SBA standards "into consideration" is meant to override the plain meaning of the three hundred employee limit.[3] Moreover, the Division's position that each employee counts regardless of whether they "are employed in a part-time, full-time, temporary, seasonal or other capacity" (reply at 5) is consistent with the definition of employee under the SBA regulations. Pursuant to 13 CFR 121.106, in calculating a business enterprise's number of employees, "SBA counts all individuals employed on a full-time, part-time, or other basis."

The issue of how to calculate the number of employees at a temporary staffing service for purposes of the MWBE program has been addressed in at least two final orders issued by the Division (*see Matter of Superior Workforce Solutions, Inc.*, Final Order March 23, 2017; *Matter of Jennifer Temps, Inc.*, Final Order March 31, 2022). In both instances, the final orders accepted the recommendation of the respective presiding Administrative Law Judge (ALJ) and upheld the Division's determination that employees placed by a temporary staffing service are to be counted as employees of the service (*see Superior Workforce*, Final Order at 1, Recommended Order at 3-5; *Jennifer Temps*, Final Order at 1-2, Recommended Order at 3-5).

In *Superior Workforce*, the business enterprise argued that the temporary workers it supplied to its clients were not its employees, were not under its control and, therefore, such workers should be deducted from the enterprise's total number of employees (*Superior Workforce*, Recommended Order at 3-4). The ALJ rejected this argument and also rejected the enterprise's argument that SBA regulations should control the determination of an enterprise's number of employees (*id.* at 5). The ALJ held that the record "shows [the business enterprise] employed more than 300 people" and concluded that "[t]he applicant failed to demonstrate that . . . it meets the small business criteria, as set forth in 5 NYCRR 140.1" (*id.* at 5).

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[3] Indeed, many of the "size standards" established under the SBA regulations allow for a variety of business enterprises to employee in excess of 1,000 employees (*see* 13 CFR 121.201). This would be in direct conflict with the MWBE standards established under the Executive Law.

In *Jennifer Temps*, the business enterprise argued that "the Division wrongly counted temporary employees as employees [of the enterprise] in determining the business size" (*Jennifer Temps*, Recommended Order at 3). The ALJ rejected the enterprise's argument that temporary staffing workers must be accounted for at the business where they are performing work rather than at the temporary staffing services business. The ALJ cited the decision in *Superior Workforce* and stated that the business enterprise had not presented any legal basis for reversing the final order in that matter (*id.* at 5).

These prior decisions are consistent with the plain language of Executive Law § 310(20) and 5 NYCRR 140.1(gg).

Applicant failed to meet its burden to demonstrate that the record that was before the Division at the time of the denial did not contain substantial evidence to support the Division's determination that First Choice is not a small business because it employs more than 300 individuals (*see* 5 NYCRR 140.1[tt][1][vi]).

CONCLUSION

Applicant failed to meet its burden to demonstrate that the record lacks substantial evidence to support the Division's determination to deny First Choice's application. The basis cited by the Division, that First Choice is not a small business as required by 5 NYCRR 140.1(tt)(1)(vi), is supported by substantial evidence.

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny First Choice Group CNY, Inc. d/b/a First Choice Staffing certification as a women-owned business enterprise should be affirmed.

Matter of First Choice Group CNY, Inc. D/B/A First Choice Staffing
DED File ID No. 52628

Exhibit List

Exhibit	Description
A	First Choice Staffing Invoice
B	New York State Contract System, Vendor Information
1	First Choice WBE Application, dated August 4, 2015
2	Women-owned Business Enterprise Denial Letter, dated April 28, 2017
3	First Choice Appeal Letter, dated May 5, 2017
4	First Choice Quarterly Federal Tax Forms 941 for 2016