

New York State
Department of Economic Development
633 Third Avenue
New York, NY 10017

In the Matter

-of-

the Application of
JP Race Painting, Inc.
For Certification as a Woman-Owned Business Enterprise
Pursuant to Executive Law Article 15-A

NYS DED File ID No. 57774

Recommended Order

-by-



Aiesha L. Hudson
Administrative Law Judge

March 27, 2018

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 JP Race Painting, Inc. ("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 JP Race Painting, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise ("WBE"). The applicant requested an appeal in writing pursuant to 5 NYCRR 144.5.

JP Race Painting Inc.'s application to recertify as a WBE was submitted on November 19, 2015 (State's Ex. 1).

JP Race Painting Inc.'s application was denied by letter dated February 5, 2016 from Bette Yee, Director of Certification Operations (State's Ex. 2). The letter states that the application was denied for failing to meet two separate eligibility criteria related to Nichole Race's ownership of the applicant.

In a letter received by the Division on August 18, 2016, the applicant appealed the Division's denial determination (Applicant's Ex. 1). The letter consisted of five pages with no attachments.

In a six-page memorandum dated October 20, 2017, the Division responded to the applicant's appeal with five exhibits (labelled as State's Exhibits 1-5 in the attached exhibit chart). On October 20, 2017, this matter was assigned to the Administrative Law Judge Teneka Frost-Amusa. Judge Frost-Amusa was subsequently appointed to the Schenectady City Court, and the matter was re-assigned to me.

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, independence, and net worth are applied on the basis of information received by the Division 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 conclusion 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 N.Y.3d 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 applicant failed to meet two criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Nichole Race, enjoys the customary incidents of ownership and shares in the risks and profits, in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner Nichole Race'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).

Position of the Applicant

The applicant challenges the Division's assessment that Ms. Race failed to prove her enjoyment of the privileges of ownership, as well her share in the risks in the profits of the business, since both Ms. Race and her husband have access to the profits of the business and are signers on all accounts, and Ms. Race manages the accounts payable and receivable for the business on a day-to-day basis. Ms. Race also contends that she shares equally in the risks of the business because her social security number is used in all accounts and loans.

The applicant also disagrees with the determination that Ms. Race's capital contributions were not shown to be proportionate to her equity interest, contending that she made monetary contributions from personal funds at the outset of the business.

FINDINGS OF FACT

1. JP Race Painting, Inc. was established on January 1, 2014, and had been doing business under a different name since June 27, 2012 (State's Ex. 1, at Bates 10).

2. JP Race Painting, Inc. has a business address of 136 Tудо Road, Mexico, NY 13114, and it provides interior and exterior commercial painting (State's Ex. 1, at Bates 9, 11).

3. JP Race Painting, Inc. is organized as a corporation with two shareholders: Nichole Race, who owns 51% of the common stock of the enterprise and serves as its Vice-President, and her husband, Jason Race, who owns the remaining 49% of the enterprise and serves as its President (State's Ex. 1, at Bates 11; Applicant's Ex. 1).

4. On November 19, 2015, JP Race Painting, Inc. filed an application for WBE certification (State's Ex. 1, at Bates 17). The application states that in 2012 Jason and Nichole Race made capital contributions to JP Race Painting, Inc. totaling ██████; Ms. Race contributed ██████ and Mr. Race contributed ██████ (State's Ex. 1, at Bates 11).

5. JP Race Painting, Inc. provided M&T Bank statements for the year 2015 with its application for WBE certification as documented proof of sources of capitalization (State's Ex. 3). The transactions on those statements post-date Ms. Race's alleged 2012 contributions and do not provide any information that can confirm that the contributions were made by Ms. Race (State's Ex. 3).

6. JP Race Painting, Inc.'s 2014 federal tax return indicates that ██████ was contributed to JP Race Painting, Inc. by one or more of the shareholders during the tax year (State's Ex. 3, at Bates 36). It also shows no additional capital contributions were made during that tax year (State's Ex. 4, at Bates 36). The applicant's 2014 federal tax return also shows that Mr. Race was paid ██████ in wages and distributions that year, while Ms. Race was paid ██████ in wages and distributions, approximately two-thirds of what Mr. Race was paid by the applicant (State's Ex. 4, at Bates 39-41).

7. The email correspondence between Ms. Race and the applicant's accountant, Jeffrey Masella, and the attached schedules to JP Race Painting, Inc.'s 2012 federal tax return, which the applicant provided to the Division, shows that Mr. Race made a capital contribution of ██████ to JP Race Painting, Inc. during 2012, and Ms. Race made no contribution (State's Ex. 5).

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 of denial related to ownership of JP Race Painting, Inc. Each basis is discussed individually below.

Ownership: Risks & Profits

The Division cited as a basis for denial that the applicant fails to meet eligibility criteria related to Nichole Race's ownership of the business. In its denial letter, the Division first asserts that the applicant has failed to demonstrate that Nichole Race shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2). The denial letter did not provide any relevant facts supporting the Division's determination that applicant has not satisfied this criterion.

In its appeal, the applicant's owner argues that she shares and in the risks and profits of the business, in satisfaction of the Section 144(c)(2), because both she and her husband have access to the profits of the business and are signers on all accounts; her social security number is on all accounts and loans; and she is "liable for any risks that the business takes financially" (Applicant's Ex. 1).¹

In its response, the Division argues that Ms. Race does not share in the risks and profits in proportion to her ownership interest because the application showed her husband received significantly greater compensation from JP Race Painting, Inc. during the most recent tax year, 2014. JP Race Painting, Inc.'s 2014 federal tax return showed Ms. Race received compensation of ██████ in wages and distributions, while her husband received ██████ in wages in distributions (State's Ex. 4, at Bates 39-41). The Division further argues that the fact that both she and Mr. Race have access to the profits of the business is of no significance. That she and her husband receive distributions of the profits is not at issue, but rather that Ms. Race receives a smaller amount of total compensation despite owning the majority interest in the business.

I find that the Division's determination that Ms. Race does not share in the risks and profits of the business in proportion to her ownership interest is supported by substantial evidence. The Division may consider the disproportionate allocation of wages between male and female owners of a business in determining whether to certify a business as a WBE. *Matter of C.W. Brown Inc. v. Canton*, 216 A.D.2d 841, 843 (3d Dep't 1995). Here, the 2014 federal tax return of JP Race Painting, Inc. indicates that Ms. Pace's compensation was less than her husband, approximately two-thirds of his total compensation, despite her majority ownership. Ms. Race and her husband having equal access to the profits, despite her having a majority share in the company, further supports the determination that Ms. Race does not share in the risks and profits in proportion to her share in the company. *See id.* at 843 (finding evidence of profits deposited in an account shared equally by a woman and her husband was evidence supporting the Division's determination denying the applicant WBE certification).

Title 5 of the NYCRR 144.2(c)(2) requires the woman owner "share in the risks and profits, *in proportion with* their ownership interest in the business enterprise" (emphasis added). That Ms. Race is financially liable for the business' loans and other risks the business takes is expected as she is majority owner. I find that fact inconsequential given there is no evidence that her risk is any greater than her husband's.

Therefore, the record supports the conclusion that the applicant has failed to demonstrate that the woman owner, Nichole Race, shared in the profits of JP Race Painting, Inc. in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2), and the Division's determination was based on substantial evidence.

¹ The applicant also argues that Ms. Race shares in the risks and profits of the business because she "manages the accounts payable and receivable for the business on a day to day basis" (Applicant's Ex. 1). Although the day-to-day control of the applicant is evidence of ownership, it is not relevant to the issue at bar concerning Ms. Race *proportional* share of the risks and profits of the business.

Ownership: Capital Contribution Proportionate to Equity Interest

In its denial, the Division also found that the applicant failed to demonstrate that the woman owner Nichole Race'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). The denial letter did not provide any relevant facts supporting the Division's determination that applicant has not satisfied this criterion.

In its appeal, the applicant's owner states that her capital contribution came in the form of monetary contributions she made at the outset of the business (Applicant's Ex. 1). She states that she initially contributed by using her personal funds to purchase materials directly from the retailer without first depositing them in a business account because she and her husband did not have a business account yet (Applicant's Ex. 1). Ms. Race states that she also used her personal funds to open JP Race Painting, Inc.'s business account (Applicant's Ex. 1).²

The Division argues that applicant has failed to demonstrate that Ms. Race made any capital contribution to the business. In JP Race Painting, Inc.'s MWBE certification application, the applicant stated that Jason Race and Nicole Race contributed [REDACTED], respectively, to JP Race Painting, Inc. in 2012 (State's Ex. 1, Bates at 11). Although the application required the applicant to provide documentary proof of any sources of capitalization, the bank statements the applicant provided as support were dated more than three years after the claimed contributions and did not contain any discernable information relating to the 2012 contributions (State's Ex. 3). Furthermore, when the Division turned to JP Race Painting, Inc.'s 2014 federal tax return for proof of capitalization, it showed the business' shareholders had contributed [REDACTED] to JP Race Painting, Inc. in 2014, which exceeds the [REDACTED] in contributions indicated in the applicant's MWBE application (State's Ex. 5, at Bates 36).

When the Division asked the applicant to clarify the discrepancy, the applicant submitted a 2015 email exchange between Ms. Race and JP Race Painting, Inc.'s accountant, Jeffrey Masella which the Division argues conclusively establishes that Ms. Race made no capital contribution to JP Race Painting, Inc. (State's Ex. 5, at Bates 47-51). In a July 30, 2015 email, Mr. Masella explained to Ms. Race that the sum indicated on the Schedule K-1 of JP Race Painting, Inc.'s 2012 federal tax return that she believed to be her contribution to the business was in fact the allocation of profits to Ms. Race for tax purposes (*see* State's Ex. 5, at Bates 47-49, 55). The Division argues that that evidence shows that although Mr. Race had made a capital contribution that year, Ms. Race did not.

In response to the applicant's contention that Ms. Race made capital contributions by paying for materials out of her personal funds at the start of JP Race Painting, Inc.'s business, the Division argues that the applicant has failed to quantify the claimed contributions and did not provide any evidence documenting them. Further, the Division argues that, even if Ms. Race did

² Ms. Race contends that her ownership of the business is also evident by the extent of her managerial control over operation of the business (Applicant's Ex. 1). However, Ms. Race's control of the business is not at issue.

pay for the materials, there is no evidence that they were capital contributions rather than a loan given the statement she made to her accountant in her email that “the business paid [her] back” (State’s Ex. 5, at Bates 49). The only evidence in the record of a capital contribution to JP Race Painting, Inc. that can be attributed to an identifiable individual is the [REDACTED] capital contribution by Mr. Race evidenced by his 2012 Schedule K-1 (State’s Ex. 5, at Bates 53).

I find that the applicant has failed to provide proof that the Division’s determination is not supported by substantial evidence. The applicant has provided no proof to support the claim that Ms. Race made a [REDACTED] capital contribution in 2012 as stated in JP Race Painting, Inc.’s MWBE certification application. In fact, the 2015 correspondence between Ms. Race and JP Race Painting, Inc.’s accountant essentially negates that claim. Moreover, to extent Ms. Race is claiming she made capital contributions when she contributed personal funds for materials at the outset of the business, those claims lack specificity and proof.

Based on the evidence in the record, the applicant has failed to demonstrate that the woman owner Nichole Race’s capital contributions are proportionate to her equity interest in the enterprise as required by 5 NYCRR 144.2(a)(1). The Division’s denial was based on the substantial evidence.

CONCLUSION

1. JP Race Painting, Inc. has not demonstrated that the woman owner, Nichole Race, enjoys the customary incidents of ownership and shares in the risks and profits, in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

2. JP Race Painting, Inc. has not demonstrated that the woman owner, Nichole Race’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).

RECOMMENDATION

The Division’s determination to deny JP Race Painting, Inc.’s application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**MATTER OF
JP RACE PAINTING INC.
DED FILE ID NO. 57774**

EXHIBIT LIST

| Exhibit# | Description | # of pages |
|-------------------|---------------------------------------|-------------------|
| State's Ex. 1 | WBE Certification Application | 9 |
| State's Ex. 2 | Denial Letter dated February 5, 2016 | 3 |
| State's Ex. 3 | M&T Bank Statements | 8 |
| State's Ex. 4 | 2014 Federal Tax Return | 13 |
| State's Ex. 5 | July 30, 2015 Email Correspondence | 9 |
| Applicant's Ex. 1 | Applicant's Written Appeal Submission | 5 |