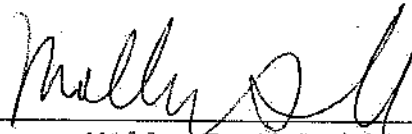


NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter
- of -
the Application of
Jennifer Temps, Inc.
For Certification as a Minority and Woman-owned
Business Enterprise Pursuant to Executive Law Article
15-A.
NYS DED File ID No. 52745

RECOMMENDED ORDER



Molly T. McBride
Administrative Law Judge
March 16, 2022

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 ("DED") to deny the application of Jennifer Temps, Inc. ("Jennifer Temps", "applicant") for re-certification as a woman-owned and minority-owned business enterprise ("MWBE") 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 Jennifer Temps challenging the determination of the Division that the applicant does not meet the eligibility requirements for re-certification as a minority-owned and woman-owned business enterprise. Jennifer Temps' application for re-certification was received on November 17, 2017 (Exhibit 12). The application was denied by Division letter dated March 18, 2018 (Exhibit 2). Applicant appealed the denial by letter dated April 9, 2018, and a hearing was held on July 22, 2021 (Exhibit 4). The parties submitted Stipulated Facts dated May 26, 2021. Applicant submitted a post-hearing brief on August 23, 2021, DED submitted its Reply brief on September 20, 2021, and applicant submitted its reply to the DED brief on October 15, 2021. The application was denied on the grounds that Jennifer Temps is not a small business (See Exhibit 2).¹

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied minority-owned and/or woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied, based on 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

¹ 5 NYCRR 140 was amended effective December 2, 2020. The denial was issued prior to the effective date of the amended regulations, therefore, the regulations cited are those in effect on March 18, 2018.

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 MWBE certification is not supported by substantial evidence (see State Administrative Procedure Act §306). 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 Jennifer Temps is not a small business, as required by 5 NYCRR 140.1(tt)(1)(vi) as it had 500+ employees at the time of the application.

Position of the Applicant

Jennifer Temps asserts that it meets the criteria for certification and that the Division erred in not granting it status as a minority-owned and woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Jennifer Temps is in the business of temporary employment services, North American Industry Classification System (NAICS) number 561320 (Exhibit 1).
2. Jennifer Singleton, a minority woman, is the owner and President of Jennifer Temps (Exhibit 1).

3. Jennifer Temps applied for re-certification as a minority and woman-owned business enterprise on November 14, 2017 (Exhibit 1).
4. To qualify for MWBE certification in New York, one criteria that must be met is that the business must not exceed 300 employees [5 NYCRR 140.1(aa)(6) and 140.1(at)(1)(vi)].²
5. Jennifer Temps stated in its application for re-certification that it employed [REDACTED] "permanent" employees and [REDACTED] "Temporary/seasonal" employees (Exhibit 1).
6. Submitted with the application for re-certification were four 2017 Form NYS-45, one for each quarter of 2017 (Exhibits 6-9).
7. Form NYS-45 filed by Jennifer Temp for each quarter of 2017 indicates the following: Jennifer Temps paid wages to [REDACTED] employees for the first quarter, [REDACTED] employees for the second quarter, [REDACTED] employees for the third quarter and, [REDACTED] employees for the fourth quarter of 2017 (Exhibits 1,6-9).

DISCUSSION

This report considers the appeal of the applicant from the Division's determination to deny certification as a minority and woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter asserts that the applicant failed to demonstrate that Jennifer Temps is a small business, as required by 5 NYCRR 140.1(aa)(6) & (at)(1)(vi). The relevant fact cited is that the firm employs more than three hundred individuals (Exhibits 1,2, 6-9). Applicant provided Form NYS-45³ for each quarter of 2017 which indicated applicant employed well over 300 employees for each quarter of 2017 (Exhibits 1, 6-9). Because the applicant employed more than 300 employees, the application for re-certification was denied (Exhibit 2).

Applicant acknowledges that the NYS MWBE program requires a business to be identified as a "small business" and has set a cap, for purposes of identifying small businesses, as a business that employs a maximum of 300 employees. The argument presented by applicant is that the Division wrongly counted temporary employees as employees in determining the business size.

² Cite to regulations in effect on March 18, 2018.

³ NYS Tax Form 45 is Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Returns.

The Division is tasked with applying Article 15-A of New York Executive Law to determine what constitutes a "small business" for purposes of certification. Pursuant to New York Executive Law Section 310 (20) small business is defined, in part, as "... a certain number of persons as determined by the director, but not to exceed three hundred, taking 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." The purpose of the MWBE program is to provide opportunities to minority and/or woman-owned small businesses. The argument in this matter centers on whether an agency which provides temporary employees to clients is considered to be employing the temporary workers.

Applicant argues that if the Federal Small Business Administration (SBA) standards are used to define what constitutes an employee, then workers placed by temporary agencies will not be considered employees of the agency placing them. (See Applicant Brief at 3). Applicant argues that the Federal SBA standards provide: "In determining a concern's number of employees, SBA counts all individuals employed on a fulltime, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee or leasing concern." 13 CFR § 121.106(a) (Applicant Brief at 3-5). In other words, temporary staffing workers must be accounted for at the enterprise for which they are performing work. This argument does not provide a clear definition for the Division to follow, but instead uses an interpretation of an SBA rule. It fails to address specifically how a temporary placement agency is to classify workers. Applicant fails to note that 13 CFR 121.106 also states that federal tax rules must also be used to calculate what defines an employee.⁴ I note that when reviewing applicant's own application for re-certification, the number of employees is identified as 600+. That is the applicant's own identification of its business. Also on tax filings, applicant identified the personnel it placed at temporary jobs as employees.⁵ How an employee is defined is not a simple question to be decided by interpreting an SBA sentence.

The Division notes that this issue has already been decided in the 2017 Final Order in *In the Matter of Superior Workforce*

⁴ 13 CFR 121.106(a) SBA will consider the totality of the circumstances, including criteria used by the IRS for Federal income tax purposes, in determining whether individuals are employees of a concern.

⁵ Exhs. 6-9).

Solutions, Inc. (Final Order of Lourdes Zapata, March 23, 2017). The issue addressed in *Superior Workforce* was does a temporary staffing agency employee calculation include personnel it places in temporary jobs. Administrative Law Judge P. Nicholas Garlick agreed with the Division's position that the State MWBE program does not allow for an adjustment based on temporary workers and to do so would contradict the plain language of Executive Law § 310(20) (Recommended Decision *Superior Workforce* at 5). Executive Director of the Division of Minority and Women Owned Business Development, Lourdes Zapata, accepted the Recommended Decision of ALJ Garlick in the Final Order dated March 23, 2017.⁶ The Final Order held that temporary staffing agencies must count the temporary employees placed through the agency as employees of the business. The Final Order in *Superior Workforce* is controlling in this matter. Although Executive Law § 310(20) incorporates by reference federal Small Business Administration standards contained in 13 CFR part 121, the standards do not define employee as applicant proposes. Applicant has not presented any legal basis for reversing the Division's determination in *Superior Workforce*, or demonstrated that the facts of this denial differ from *Superior Workforce*. The Division's denial was based on substantial evidence.

Based on the evidence in the record, the applicant has failed to demonstrate that Jennifer Temps employed less than 300 people at the time of the application for re-certification and, therefore, is a small business, as required by 5 NYCRR 140.1 (at) (1) (vi) & (aa) (6). Accordingly, the Division's denial was based on substantial evidence and the application was properly denied.

CONCLUSION

The applicant has not demonstrated that Jennifer Temps is a small business, as required by 5 NYCRR 140.1(at) (1) (vi) & (aa) (6).

RECOMMENDATION

The Division's determination to deny Jennifer Temps's application for certification as a minority and woman-owned business enterprise should be affirmed, for the reasons stated in this recommended order.

⁶ In the Matter of *Superior Workforce Solutions, Inc.*, Final Order of Lourdes Zapata, March 23, 2017.

JENNIFER TEMPS, INC.
DED File ID No. 52745
Hearing Exhibit List

| Exhibit # | Description |
|-----------|--|
| 1 | Stipulation of Undisputed Facts dated May 26, 2021 |
| 2 | Application for Re-certification submitted November 14, 2017 |
| 3 | Denial of Minority Business status dated March 21, 2018 |
| 4 | Denial of Woman Business status dated March 21, 2018 |
| 5 | Applicant Appeal letter dated April 9, 2-18 |
| 6 | NYS Tax Form 45, 1 st quarter 2017 |
| 7 | NYS Tax Form 45, 2 nd quarter 2017 |
| 8 | NYS Tax Form 45, 3 rd quarter 2017 |
| 9 | NYS Tax Form 45, 4 th quarter 2017 |
| 10 | Certification Application Affidavit dated November 2, 2017 |
| 11 | DED letter of October 24, 2019 advising of hearing date on appeal |