

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

In the Matter

- of -

**the Application of LHS International, Inc. dba Solar HVACR Supply
for Certification as a Minority and Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 64298

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
June 26, 2023

This matter considers the written appeal by LHS International, Inc. dba Solar HVACR Supply (“LHS” 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 and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On April 4, 2018, Hasik Lim, as President, on behalf of Sukhee Lim, CEO, applied on behalf of LHS for certification as a MWBE (DED Exhibit 1).
2. On April 21, 2020, the Division denied the application (DED Exhibit 2) on the following grounds:
 - (a) The contributions of minority group members or women are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women do not share in the risks and profits in proportion with their ownership interest in the business enterprise, as required under 5 NYCRR former §144.2(c)(2);
 - (c) Minority group members or women do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1);
 - (d) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the

business enterprise; and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§144.2(b)(1)(i) and 144.2(b)(1)(ii); and

(e) Relevant business agreements do not permit minority group members or women to make decisions without restrictions, as required under 5 NYCRR former §144.2(b)(2).

3. LHS timely filed a notice of appeal on May 19, 2020, which included their arguments (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to LHS on June 26, 2020 (DED Exhibit 13).
5. The Division filed an Affidavit of Matthew LeFebvre, Associate Certification Director, dated May 9, 2023, and a brief of Ashley Lherisson-Fortune, Esq., counsel for the Division, dated May 10, 2023.

FINDINGS OF FACT

6. LHS provides heating, air-conditioning, ventilation and refrigeration equipment installation, repair and maintenance services, located in Commack, New York (DED Exhibit 1).
7. LHS was formed in 2008, with Mr. Hasik Lim being the sole owner (DED Exhibit 3). On January 1, 2017, Mr. Lim transferred 51% of his shares to Ms. Sukhee Lim (DED Exhibit 4).
8. Ms. Sukhee Lim is the CEO of LHS and owns 51% of the business. Mr. Hasik Lim is the President of LHS and owns 49% of the business (DED Exhibit 1).

9. Mr. Lim is certified by the EPA for refrigerant transition and recovery (DED Exhibit 8).
His resume indicates that he is the owner and operator of LHS providing HVACR equipment sales, installation and service (DED Exhibit 9).
10. Ms. Lim's resume indicates that she provides financial management and customer service for the business (DED Exhibit 10).
11. In 2017, Mr. Lim was paid \$ [REDACTED] while Ms. Lim was paid \$ [REDACTED]. In 2016, Mr. Lim was paid \$ [REDACTED], while Ms. Lim, who at the time was an employee, was paid \$ [REDACTED].
12. Section 2 of the LHS Corporate Bylaws state that "the Board of Directors shall be responsible for the control and management of the business and affairs, property and interests of the Corporation, and may exercise all powers of the Corporation..." (DED Exhibit 6).
13. The original meeting minutes name Mr. Lim as the sole director of the business and Mr. Lim holds all officer positions (DED Exhibit 5).

APPLICABLE LAW

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) or woman owner must be proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise.

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

...The minority group member or 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:

(1) Decisions pertaining to the operations of the business enterprise must be made by minority group members or women claiming ownership of that business enterprise. The following will be considered in this regard:

- (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
- (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.

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

Articles of incorporation, corporate bylaws...or other agreements must permit minority group members or women who claim ownership of the business enterprise to make those decisions without restrictions.

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(b)(5) states in relevant part as follows:

Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration...

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

- (2) Operational decisions. Minority group members or 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 LHS for certification as a MWBE 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 former §144.2(a)(1) to require an applicant to demonstrate that the woman-owner’s contribution came from assets belonging solely to the woman-owner. Given this criterion, the Division consistently denies applications for WBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

Mr. Lim transferred 51% of the shares in LHS to Ms. Lim (DED Exhibit 4). The only capital contribution referenced in the “source of funds” letter is the initial capitalization made by Mr. Lim in 2008, which he originally asserted came from his own personal funds (DED Exhibit 4). On appeal, Mr. Lim asserts those funds came from joint “household funds” (DED Exhibit 13). Ms. Lim did not demonstrate that she made an independent capital contribution for her shares of LHS.

5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents and must share in the risks and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017). In *Matter of C.W. Brown, Inc. v. Canton*, 216 AD 2d 841 (3rd Dept. 1995), the Court found that the Division’s review of tax returns provided substantial evidence supporting the Division’s consideration of whether a woman-owned business enterprise met the eligibility criterion at 5 NYCRR former §144.2(c)(2). See also *Matter of Darr Construction, Inc.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022; *Matter of S.C. Spencer Electric Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 31, 2022.

In 2017, Ms. Lim was paid \$ [REDACTED] while Mr. Lim was paid \$ [REDACTED] (DED Exhibit 11). In 2016, Ms. Lim was paid \$ [REDACTED] while Mr. Lim was paid \$ [REDACTED] (DED Exhibit 12). The tax documents submitted reflect that Ms. Lim, as 51% owner, makes substantially less than Mr. Lim, a 49% owner. She is not sharing in the risks and profits in proportion to her equity interest in the business enterprise.

II. Operations

The eligibility criteria for MWBE certification requires that the woman-owner “exercises the authority to control independently the day-to-day business decisions of the enterprise”. See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The woman-owner “must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE

certification...” *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

LHS provides heating, air-conditioning, ventilation and refrigeration equipment installation, repair and maintenance services. The core revenue generating functions of the business involve HVACR sales, installation and services (DED Exhibit 1). Mr. Lim is certified by the EPA for refrigerant transition and recovery (DED Exhibit 8). He is solely responsible for supervising field operations (DED Exhibit 1). Ms. Lim handles the finances and customer service (DED Exhibit 1).

The Division’s finding that Ms. Lim does not exercise independent operational control over the core functions of the business, as required by 5 NYCRR former § 144.2(b)(1), is supported by substantial evidence.

With regard to technical competence, where the woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division’s determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

“Working knowledge” is established by demonstrating an ability to review and evaluate other employees’ work. See *Upstate Electrical, LLC*, *supra* at 1346.

Mr. Lim is certified by the EPA for refrigerant transition and recovery (DED Exhibit 8). His resume reflects that he is the owner and operator of LHS providing HVACR sales, installation

and service since 2008 (DED Exhibit 9). He is the only owner who supervises field operations (DED Exhibit 1). Ms. Lim has no such certification or work history in the industry. Her resume reveals no background, expertise, managerial experience or technical competence in the business seeking certification (DED Exhibit 5).

Ms. Lim oversees the administrative portions of the business, while Mr. Lim performs the revenue generating operations of the business.

The Division's finding that Ms. Lim did not establish that she, as the woman-owner of LHS had adequate managerial experience, technical competence, nor knowledge and ability needed to operate the business, as required by 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii), is supported by substantial evidence.

III. Control

5 NYCRR former §144.2(b)(2) requires that the relevant business agreements must permit the woman-owner to make decisions without restrictions. In determining whether the applicant meets this requirement, the Division may consider the company's bylaws. See *Matter of S.C. Spencer Electric, Inc.*, Recommended Order dated July 29, 2021, Final Order 22-04 dated March 31, 2022.

The original meeting minutes name Mr. Lim as the sole director of the business and he holds all officer positions (DED Exhibit 5). Section 2 of the LHS Corporate Bylaws state that "the Board of Directors shall be responsible for the control and management of the business and affairs, property and interests of the Corporation, and may exercise all powers of the Corporation..." (DED Exhibit 6).

The Division's finding that the relevant business agreements do not permit Ms. Lim to make decisions without restrictions, as required by 5 NYCRR former §144.2(b)(2), is supported by substantial evidence.

CONCLUSION

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

In the Matter of LHS International, Inc. dba Solar HVACR Supply
 NYS DED File No 64298
 Exhibit Chart

Exhibit #:	Description of the Exhibits
DED 1	Application for Certification dated April 4, 2018
DED 2	Division's denial letter dated April 21, 2020
DED 3	Articles of Incorporation
DED 4	Source of Funds Letter
DED 5	First Meeting Minutes
DED 6	Corporate Bylaws
DED 7	Bank Signatory Card Authorization Documents
DED 8	Hasik Lim EPA License
DED 9	Hasik Lim Resume
DED 10	Sukhee Lim Resume
DED 11	2017 LHS Business and Lim Personal Tax Returns
DED 12	2016 Lim Personal Tax Returns
DED 13	Notice to Proceed by Written Appeal dated June 26, 2020
APP 1	Applicant's Notice of Appeal dated January 27, 2020