

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

In the Matter

- of -

**the Application of La Marche Manufacturing Company
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 66045

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
November 8, 2023

This matter considers the written appeal by La Marche Manufacturing Company, (“LMC” 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 woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On February 13, 2019, Ms. Judith La Marche, as Chair of the Board, applied on behalf of LMC for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 18, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Minority group members or women relied upon for certification do not make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2); and
 - (c) Minority group members or women relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).
3. LMC timely filed a Request to Appeal on April 12, 2023 (APP Exhibit 1).

4. A Notice to Proceed Via Written Appeal was sent to LMC on April 13, 2023 (DED Exhibit 3).
5. LMC submitted its written appeal by letter dated May 8, 2023 (APP Exhibit 2).
6. The Division filed an Affidavit of Abdul Karim Bah, Senior Certification Analyst, dated July 27, 2023, and a brief of Diedre Chuckrow, Esq., counsel for the Division, dated July 28, 2023.

FINDINGS OF FACT

7. LMC is engaged in manufacturing of battery chargers, rectifiers, inverters, and DC power supply products (DED Exhibit 1).
8. Ms. Judith La Marche is the Chair of the Board and has a 51% ownership interest. Mr. Raulf La Marche is the Vice Chair of the Board and has a 48.05% ownership interest. Mr. Richard Rutkowski is the Senior Vice President and has a 0.57% ownership interest. Mr. Rajesh Dhiman is the President and has a 0.38% ownership interest (DED Exhibit 1).
9. LMC was founded in 1945 by Mr. Austin La Marche, the father of Judith and Raulf La Marche. His ownership interest passed equally to Ms. Judith La Marche and Mr. Raulf La Marche by gift and inheritance, resulting in each owning 261,274 shares. On January 1, 2017, Ms. Judith La Marche purchased 7,776 shares from Mr. Raulf La Marche for the sum of \$71,278 (DED Exhibits 1, 4 and 6).
10. Ms. Judith La Marche's resume reflects that she has a PhD in psychology and is a licensed clinician in Alabama and Florida. She was a Sales Manager at LMC between 1982 and 1985. She is responsible for overseeing day-to-day operations, providing long-term guidance, direction, leadership, and decision making to the executive management team, and acting as a liaison between the Board and management of LMC (DED Exhibit 10).

11. Mr. Rajesh Dhiman, the current President, has a degree in electronic engineering and a master's degree in communication. He has worked at LMC since 1988. His duties include overseeing operations and developing and assigning responsibilities and has worked in engineering, sales, marketing, manufacturing and production, materials management and purchasing, IT, human resources, accounting, and quality assurance for more than 30 years (DED Exhibit 12).
12. Mr. Richard Rutkowski has worked for LMC since 1992 and has advanced through financial and managerial positions to become President of LMC. His responsibilities have included running the accounting department, managing payroll, health and property insurance, computer systems, financial reporting, cost accounting and audit. He retired as President in 2020 and continues with LMC as Senior Vice President (DED Exhibits 9 and 11).
13. Ms. Judith La Marche and Mr. Raulf La Marche equally share in managerial responsibilities, including financial decisions, and signing business accounts. Ms. Judith La Marche shares responsibility of negotiating insurance, marketing and sales, hiring and firing, managing and signing payroll, and negotiating contracts with Mr. Richard Rutkowski and Mr. Rajesh Dhiman. Mr. Don Henry, Director of Sales is solely responsible for estimating and Mr. Don Henry and Mr. Rajesh Dhiman are jointly responsible for preparing bids (DED Exhibit 1).

APPLICABLE LAW

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

Capital contribution. Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

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

Operation. Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (2) 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 functions of the business enterprise for which certification is sought. 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.
- (3) Time devoted to operation of the business enterprise. Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 LMC for certification 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

The Division interprets 5 NYCRR §144.2(b)(2) 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 MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

Ms. Judith La Marche holds 269,050 shares. She received 261,274 shares by gift and inheritance. She purchased 7,776 shares on January 1, 2017, for \$71,478. Most of her ownership interest has been obtained by gift without consideration (DED Exhibits 1, 4 and 6). The woman-owner's contribution must be proportionate to her equity interest in the business even if the interest has been gifted or inherited. See *Matter of Coverco, Inc.*, Recommended Order dated January 28, 2017, Final Order 17-06 dated January 30, 2017; *Matter of Beam Mack Sales and Services, Inc.*, Recommended Order dated October 31, 2016, Final Order 16-55 dated November 1, 2016. Ms. Judith La Marche's contribution was for approximately 3% of her ownership interest (7,776 shares out of 261,274 shares), which is not proportionate to her equity interest.

Ms. Judith La Marche argues on appeal that she made additional contributions in the form

of loans to the business totaling over \$640,000 (APP Exhibit 2). Loans do not constitute contributions to the business, and therefore do not satisfy the capital contribution requirement. See *In the Matter of Pamten, Inc.*, Recommended Order dated June 26, 2018, Final Order 18-30, dated July 30, 2018.

The Division's determination to deny the application on the basis that LMC failed to demonstrate that Ms. Judith La Marche made contributions to LMC in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(2) states that "... 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 for which certification is sought. 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".

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". See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

The critical functions of the business involve manufacturing battery chargers, rectifiers, inverters, and DC power supply products (DED Exhibit 1).

Ms. Judith La Marche does not have any industry specific expertise. Her resume reflects a career in the field of psychology. She has a PhD in psychology and is a licensed clinician in Alabama and Florida. Her only employment role at LMC was as a sales manager between 1982 and 1985 (DED Exhibit 10). Ms. Judith La Marche and Mr. Raulf La Marche equally share in

managerial responsibilities, including financial decisions, and signing business accounts. Ms. Judith La Marche shares responsibility of negotiating insurance, marketing and sales, hiring and firing, managing and signing payroll, and negotiating contracts with Mr. Richard Rutkowski and Mr. Rajesh Dhiman (DED Exhibit 1). Mr. Don Henry, Director of Sales is solely responsible for estimating and Mr. Don Henry and Mr. Rajesh Dhiman are jointly responsible for preparing bids. There are no documents showing that she has any training or experience regarding the critical functions of the business. Ms. Judith La Marche does not possess any academic or technical training relevant to the industry to make her qualified to supervise the work of the employees (DED Exhibits 1 and 10).

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The business is located in Des Plaines, Illinois. Ms. Judith La Marche resides in Florida (DED Exhibit 7). Ms. Judith La Marche states that she communicates via email and participates in departmental meetings using Teams. She estimates that she works 30 hours per week for the business. In her appeal, Ms. Judith La Marche indicated that she is physically onsite “at least 1 week per month” (App Exhibit 2) There is insufficient evidence to establish that she is involved in the daily operation of LMC (DED Exhibit 1).

CONCLUSION

LMC did not meet its burden to demonstrate that the Division’s determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(c)(2) and 144.2(c)(3) 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 LMC's application for certification as a woman-owned business enterprise.

In the Matter of La Marche Manufacturing Company
 DED File ID No. 66045
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Basis of Stock Holdings	Y	Y
DED 4	La Marche Manufacturing Company Stock Ledger	Y	Y
DED 5	Supplemental Statement of Judith La Marche	Y	Y
DED 6	Narrative regarding Judith La Marche Duties	Y	Y
DED 7	Narrative regarding Rajesh Dhiman's Role	Y	Y
DED 8	Narrative regarding Richard Rutkowski's Role	Y	Y
DED 9	Judith La Marche Resume	Y	Y
DED 10	Richard Rutkowski Resume	Y	Y
DED 11	Rajesh Dhiman Resume	Y	Y
DED 12	Raulf La Marche Resume	Y	Y
DED 13	La Marche Manufacturing Company Organizational Chart	Y	Y
APP 1	Request To Appeal	Y	Y
APP 2	Written Appeal Submission	Y	Y