

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

In the Matter

- of -

the Application of **Ark Digital Imaging, Inc.**
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60877

RECOMMENDED ORDER

- by -



Maria E. Villa
Administrative Law Judge

March 16, 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 Ark Digital Imaging, Inc. (“Ark” or “applicant”) certification as a woman-owned business enterprise¹ (“WBE”) be affirmed, for the reasons set forth below.

PROCEEDINGS

This matter involves the 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 Ark does not meet the eligibility criteria for certification as a WBE.

The Division denied Ark’s application for WBE certification (Exhibit 1) by letter dated March 28, 2017. Exhibit 2. The denial letters set forth four grounds under 5 NYCRR Section 144.2 for the denial. Specifically, according to the Division,

- (1) applicant failed to demonstrate that the contributions of Sheila Khoury, the woman owner, are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise (see Section 144.2(a)(1) (“Ownership”));
- (2) applicant did not show that Ms. Khoury shares in the risks and profits in proportion with her ownership interest in the enterprise (see Section 144.2(c)(2) (“Ownership”));
- (3) applicant failed to demonstrate that Ms. Khoury made decisions pertaining to Ark’s operation (see Section 144.2(b)(1) (“Operation”)); and
- (4) applicant did not establish that Ms. Khoury has the managerial experience or technical competence, working knowledge or ability needed to operate the enterprise (see Section 144.2(b)(1)(i) (“Operation”)).

Exhibit 2. On April 14, 2017, applicant requested a hearing on the denial, and the Division responded by letter dated February 2, 2018, advising applicant that a hearing had been scheduled. Exhibits 3 and 4.

The hearing took place as scheduled on February 20, 2018. Ms. Khoury testified on her own behalf. Division Staff was represented by Phillip Harmonick, Esq., and called Carlita Bell, a senior certification analyst employed by the Division.

A list of exhibits is attached to this recommended order. The hearing was recorded by Division staff. This audio recording is approximately one hour long, on one compact disc.

¹ The term “women-owned business enterprise” applies to an enterprise that meets the requisite criteria based upon the ownership and control of one woman or of multiple women (see Section 140.1(tt) of 5 NYCRR (defining a women-owned business enterprise as one that is, inter alia, “at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women”)).

References to testimony from the hearing are identified by the time on the recording at which the testimony occurs (“HR at ____”).

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are established by regulation (see 5 NYCRR Section 144.2). For the purposes of determining whether an applicant should be granted WBE status, the ownership, operation, and control of the business enterprise are assessed based on information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and any interviews that the Division’s analyst may have conducted.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that the Division's denial of Ark’s application for WBE certification is not supported by substantial evidence (see State Administrative Procedure Act Section 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 N.Y.3d 494, 499 (2011) (internal quotation marks and citations omitted)).

POSITIONS OF THE PARTIES

Applicant

On appeal, applicant addresses the bases cited by the Division for the denial of Ark’s WBE application. According to applicant, she made the decision to contribute her compensation back to the company, and that her husband is paid a salary. Ms. Khoury stated that “[w]e share one household and one joint bank account. I determine how much has to be deposited weekly to run my household, regardless of whose name is on check [sic]. I do share the risks.” Exhibit 3, at 1. Applicant went on to note that in order to become a Canon dealer, an owner must possess “strong management skills and business experience. It is not required that an owner be a technician.” Id., at 2.

Applicant asserted further that Ms. Khoury is “very much involved in the operation of this business,” and that she is “on the front line of troubleshooting service calls.” Id. Applicant stated that Ms. Khoury is involved in every sale, managing the house accounts, as well as a growing list of her own accounts.

Division

The Division contends that its determination is supported by substantial evidence, and that applicant failed to satisfy certification criteria related to ownership and operation of the business enterprise by a woman owner. Specifically, the Division asserted that with respect to

ownership, applicant failed to demonstrate that Ms. Khoury's 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. Moreover, the Division pointed out that Ms. Khoury received less compensation than her non-minority male partner, and thus did not share in Ark's profits in proportion with her ownership interest. With respect to operation, the Division contended that applicant failed to show that Ms. Khoury has the managerial experience or technical competence, working knowledge or ability to operate Ark, and argued that Ms. Khoury did not make decisions pertaining to Ark's operations. Accordingly, the Division requested that its determination to deny WBE certification to Ark be upheld.

FINDINGS OF FACT

1. Ark Digital Imaging, Inc. is located at 745 Center Road, West Seneca, New York. Exhibit 1, at 1.
2. Ark provides office equipment sales and service including copiers, printers, wide format plotters, fax machines, scanners, toner and ink supplies. Exhibit 1, at 3.
3. Ark's application indicated that the cash and capital contributions made to Ark by the owners consisted of [REDACTED] Exhibit 1, at 3.
4. In 2015, Ms. Khoury received less in compensation from the business than her husband, Amine Khoury, a male owner. Exhibit 7.
5. Ms. Khoury's resume indicates that she has a bachelors' degree in architecture and environmental design. Exhibit 12. Her previous work experience was as a project assistant for the Buffalo Enterprise Development Corp., and as a site construction manager for the Buffalo Municipal Housing Authority. *Id.*
6. Mr. Khoury has an associate of applied science degree in electronics, and is a Canon trained senior technician, as well as a Canon sales representative. Exhibit 13.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny Ark certification as a woman-owned business enterprise, pursuant to Executive Law Article 15-A.

Ownership

Section 144.2(a)(1) of 5 NYCRR requires an applicant to demonstrate that the woman owner's 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. In addition, an applicant must show that a woman owner shares in the risks and profits in proportion with her ownership interest in the business enterprise (see Section 144.2(c)(2) of 5 NYCRR).

In the denial letter, the Division stated that with respect to contribution, applicant failed to satisfy the ownership criteria, based upon the following “relevant facts”:

- Ms. Sheila Khoury owns approximately fifty-five percent of the outstanding common stock of Ark Digital Imaging, Inc. (“Ark”) and Mr. Amine Khoury owns approximately forty-five percent of the outstanding common stock of Ark.
- The application represents that Ms. Khoury and Mr. Khoury contributed [REDACTED] to Ark.
- The application does not include any documentation demonstrating that Ms. Khoury has individually made contributions to Ark proportionate to her ownership interest therein.

Exhibit 2, at 2. On this record, it was reasonable for the Division to determine that Ms. Khoury had not contributed money, property, equipment, or expertise sufficient to entitle Ark to WBE certification. All the information provided in the application, and in response to requests for information by the Division, showed that the contribution consisted of [REDACTED], part of the [REDACTED]. Exhibit 1, at 2(C); Exhibit 7. The February 10, 2006 [REDACTED] lists only Mr. Khoury as the borrower, and only his signature appears on that document. Exhibit 7. Although Ms. Khoury provided a [REDACTED] dated May 27, 2005 which also bore her signature (Exhibit 24), this document was not before the Division during its evaluation of Ark’s application.

As the Division pointed out, even if Ms. Khoury’s signature had appeared on the 2006 [REDACTED], when Ms. Khoury became the majority owner in 2015 the business had significant value. Despite this, Ms. Khoury did not make any contribution proportionate to her equity interest, and it was reasonable for the Division to conclude that Ms. Khoury’s assumption of majority ownership was structured to qualify for certification as a woman-owned business. The Division’s determination to deny certification to Ark based upon the lack of a capital contribution was supported by substantial evidence.

The denial letter went on to state that Ms. Khoury did not share in the risks and profits in proportion with her ownership interest, citing the following fact:

- Mr. Khoury’s compensation from Ark significantly exceeds Ms. Khoury’s compensation from Ark.

Exhibit 2, at 2. It is undisputed that Mr. Khoury’s compensation was greater than Ms. Khoury’s in 2015, and that Ark did not make distributions to Ms. Khoury that would offset that discrepancy. Exhibits 10 and 11; see *Matter of C. W. Brown v. Canton*, 216 A.D.2d 841, 843 (3rd Dept. 1995) (finding substantial evidence to support determination to deny certification as a woman-owned business enterprise where husband earned disproportionate salary compared to woman owner). Applicant argued that the money she earns is part of the Khoury’s joint income, and that it should not be necessary for her to earn more simply to qualify for certification. HR at 45:35. In response, the Division observed that the purpose of the WBE program is to ensure that profits from a business enterprise will flow proportionately to the women owners. Although

applicant offered updated salary information at the hearing (Exhibit 22), this information was not provided as part of the application. Consequently, it cannot be considered on appeal. Under the circumstances, the Division's determination was reasonable, and supported by substantial evidence. The Division's denial based upon the ownership criteria should be affirmed.

Operation

Section 144.2(b)(1) of 5 NYCRR requires that decisions pertaining to the operations of the business enterprise must be made by the woman owner. In this regard, Section 144.2(b)(1)(i) of 5 NYCRR mandates that an applicant demonstrate that the woman owner has adequate managerial experience or technical competence in the business enterprise seeking certification.

With respect to operation, the Division's denial letter set forth the following facts:

- Ark is primarily engaged in wholesaling office equipment, such as copiers and printers.
- Mr. Khoury is primarily responsible for managing significant operations of the business related to selling, servicing, and selecting products.
- Ms. Khoury is primarily responsible for managing administrative functions, human resources, and accounts receivable.

Exhibit 2, at 3.

At the hearing, Ms. Khoury testified that when the business first started, her husband had more experience selling and servicing copiers, but maintained that she now can troubleshoot first line service calls, and can handle a sale from beginning to end on her own. HR at 31:54; 32:25. Applicant argued that the business would not exist without Ms. Khoury's managerial expertise. HR at 44:20.

In response, the Division observed that in its application, Ark stated that it was in the business of selling and servicing copiers. Exhibit 1, 3(C). The Division noted that Mr. Khoury has significant experience (more than thirty years) in selling and servicing Canon copiers. Exhibits 13, 15 and 16. He has an associate of applied science degree in electronics. Exhibit 13.

In contrast, Ms. Khoury's education is in the field of architecture and environmental design. Exhibits 10 and 14. Ms. Khoury was also a site construction manager for a municipal housing authority. Exhibit 12. The Division took the position that in the abstract, Ms. Khoury's education and experience are more impressive than those of her husband, but argued that his skills were more closely related to the copier sales and servicing that Ark performs. At the hearing, applicant offered revised descriptions of Mr. and Ms. Khoury's responsibilities, but this information was not before the Division at the time of the denial, and therefore cannot be considered on appeal.

The record supports the Division's determination regarding the operation of Ark. It was reasonable for the Division to conclude that Mr. Khoury, a non-minority male, operated the significant functions of the business. The Division's denial of certification was supported by substantial evidence, and should be affirmed.

CONCLUSION

As discussed above, applicant failed to meet its burden to demonstrate that the Division's determination to deny Ark's application for certification was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, the Division's determination to deny Ark's application for WBE certification should be affirmed.

Matter of Ark Digital Imaging, Inc.
 DED File ID No. 60877
Exhibit Chart

Exhibit No.	Description	Rec'd
1	December 28, 2015 application	✓
2	March 28, 2017 denial letter	✓
3	April 14, 2017 letter requesting hearing	✓
4	February 2, 2018 letter scheduling hearing	✓
5	Transfer ledger	✓
6	Certificate of Directors' Action	✓
7	[REDACTED]	✓
8	[REDACTED]	✓
9	Narrative response to question #1 and #2	✓
10	2015 U.S. Corporation Income Tax Return	✓
11	2015 W-2s	✓
12	Resume: Sheila A. Khoury	✓
13	Resume: Amine Khoury	✓
14	Ark Employee Responsibilities: Sheila Khoury	✓
15	Ark Employee Responsibilities: Amine Khoury	✓
16	Schedule A: Office Products Division Retail Dealer Agreement	✓
17	Letters from customers	✓
18	Canon retail dealer agreement	✓
19	Ingram Micro partner letter	✓
20	Letters from Documentelligence and Copyfree	✓
21A	Revised list of employee responsibilities – Sheila Khoury	✓
21B	Revised list of employee responsibilities – Amine Khoury	✓
22	Salary reports	✓
23	July 7, 2006 Canon personal guaranty	✓
24	[REDACTED]	✓