

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

In the Matter

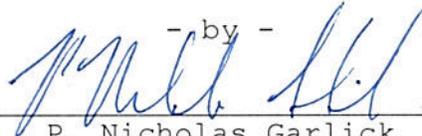
- of -

the Application of
JAL Signs, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60331

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

March 5, 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 JAL Signs, 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 JAL Signs, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

JAL Signs, Inc.'s application was submitted on November 5, 2015 (Exh. DED1).

The application was denied by letter dated October 12, 2016, from Bette Yee, Director of Certification Operations (Exh. DED3). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet two separate eligibility criteria related to Agnes Lindner's ownership and control of the applicant.

In a letter dated January 10, 2017, the Division notified the applicant that its appeal should be submitted no later than March 6, 2017.

By letter dated February 24, 2017, applicant submitted its written appeal which consisted of a two-page letter. Enclosed with the appeal were seven exhibits, described in the attached exhibit chart as A1-A7.

In a five-page memorandum dated February 8, 2018, the Division responded to the applicant's appeal. Enclosed with the response were three exhibits, described in the attached exhibit chart as DED1-DED3.

On February 9, 2018, this matter was 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, and independence are applied on the basis of 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 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 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 the application failed to meet two separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Agnes Lindner'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).

Second, the Division found that the relevant business agreements do not permit the woman owner, Agnes Lindner, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

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

FINDINGS OF FACT

1. JAL Signs, Inc. has a business address of 540 Merrick Road, Baldwin, New York (Exh. DED 1 at 2). The firm is in the business of designing, producing, and selling a variety of signage and is a franchisee of Speedy Sign "A" Rama, Inc. (Exh DED2 at 6).

2. JAL Signs, Inc. was established on January 29, 1999. Agnes Lindner serves as the corporation's president and owns 51% of its stock; her husband, James A. Lindner serves as secretary and owns 14% of the firm; and her son, James E. Lindner serves as vice president and owns 35%. (Exh. DED1 at 1 & 5).

3. JAL Signs, Inc.'s application did not list any contributions made to the firm by any of the owners (Exh. DED1 at 6).

4. The franchise agreement between JAL Signs, Inc. and Speedy Sign "A" Rama, Inc. restricts Ms. Lindner's ability to make business decisions, including: the materials, supplies, and equipment to be used; how the firm may advertise; hours of operation; and who may be employed as managers. In addition, the agreement requires operation of the firm in accordance with an operating manual and limits the termination of the franchise agreement. (Exh. DED2 at 17).

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 set forth two bases related to Ms. Lindner's ownership and control of JAL Signs, Inc. Each basis is discussed individually, below.

Ownership

In its denial, the Division found that the applicant failed to demonstrate that the woman owner Agnes Lindner'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 relevant facts cited in the denial letter are: (1) Agnes Lindner owns 51% of the outstanding common stock of JAL Signs, Inc. and the balance is owned by James A. Lindner and James E. Linder; (2) the applicant does not represent that any of the owners have made any contributions of money, property, equipment, or expertise to the firm; and (3) the application does not demonstrate that Ms. Lindner's contributions to the firm are proportionate to her 51% ownership interest therein.

On the appeal, Ms. Lindner states that in December 1998, she and her husband purchased the franchise from another franchisee (Exh. A1) and shortly thereafter incorporated the business into its current form. In 2009, 2013, and 2015, they made large equipment purchases (Exhs. A2, A3, A4, A5, & A6).

In its response, the Division notes that the application did not list any contributions made to the firm by any of the owners (Exh. DED1 at 6). From this, the Division states it reasonably concluded that the Lindner family arbitrarily assigned ownership interests between each other and, therefore, the business is not eligible for WBE certification. The Division argues that the information provided in the appeal regarding the joint purchase of the business in 1998 is irrelevant because it was not included with the application and only shows that Ms. Lindner and her husband each contributed equally to the business.

Based on the evidence in the record, specifically the fact that no information regarding capital contributions was included with the application, the applicant has failed to demonstrate that the woman owner Agnes Lindner'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). The Division's denial was based on substantial evidence.

Control

In its denial letter, the Division found that the relevant business agreements do not permit the woman owner, Agnes Lindner, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter are: (1) the firm sells signs pursuant to a franchise agreement; (2) this agreement significantly restricts Ms. Lindner's ability to control the firm; (3) the agreement restricts her ability to select supplies and equipment; (4) the agreement restricts her ability to select managers; and (5) the agreement restricts her ability to terminate the agreement or cease doing business.

In the appeal, Ms. Linder does not directly address the restrictions cited in the denial letter but give a brief summary of her role at the firm and states that she does whatever is necessary to run the business efficiently. She attaches a letter from Jay Kahn, the vice president of operations for the franchisor which does not address the specific concerns raised in the denial letter; rather, Mr. Kahn speaks generally about the great flexibility afforded franchisees and the accommodating resale model for owners who wish to terminate a business relationship (Exh. A7).

In its response, the Division argues the franchise agreement between JAL Signs, Inc. and Speedy Sign "A" Rama, Inc. restricts Ms. Lindner's ability to make business decisions making it ineligible for WBE certification. Specifically, the Division notes that the franchise agreement dictates: the materials, supplies, and equipment to be used; how the firm may advertise; hours of operation; and who may be employed as managers. In addition, the agreement requires operation of the firm in accordance with an operating manual and limits the termination of the franchise agreement. (Exh. DED2 at 17). The Division concludes that these restrictions are impermissible

limits on fundamental elements of Ms. Lindner's control of the business.

Based on the evidence in the record, specifically the restrictions in the franchise agreement, the applicant failed to demonstrate that the relevant business agreements permit the woman owner, Agnes Lindner, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Agnes Lindner'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).

2. The applicant failed to demonstrate that the relevant business agreements permit the woman owner, Agnes Lindner, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

**Matter of
JAL Signs, Inc.**

**DED File ID No. 60331
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Franchise agreement
DED3	Denial letter
A1	Sale of business document
A2	Loan amortization table
A3	Purchase order
A4	Equipment lease
A5	Equipment purchase agreement
A6	Combination loan and security agreement
A7	Letter from Signarama