

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

In the Matter

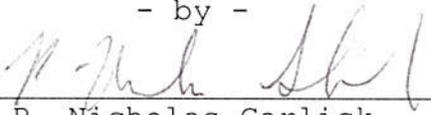
- of -

the Application of
Robert Busse & Co., Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 57154

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

February 8 ,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 Robert Busse & Co., Inc. ("applicant") for certification as a woman-owned business enterprise ("WBE") be reversed 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 Robert Busse & Co., Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Robert Busse & Co., Inc.'s application was received on January 27, 2016 (Exh. DED1 at 1).

The application was denied by letter dated March 20, 2017, from Raymond Emanuel, Director of Certification Operations (Exh. DED2). As explained in an attachment to Mr. Emanuel's letter, the application was denied because Robert Busse & Co., Inc. is not a small business, as required by 5 NYCRR 140.1(tt)(1)(vi).

By letter dated March 23, 2017, the applicant filed a notice of appeal from the Division's denial determination.

By letter dated November 20, 2017, the Division notified the applicant that a hearing would be held on December 12, 2017 at the Division's office in New York City.

On December 12, 2017, a hearing was convened at 10:00 a.m. at 633 Third Avenue, New York, New York. The Division was represented by Phillip Harmonick, Assistant Counsel and called one witness, Raymond Emanuel. The applicant appeared through Michele Joyce, C.P.A., treasurer and CFO of the applicant, who testified, as did the firm's payroll and benefits administrator, Ms. Donna Lovelace, and the firm's owner, Jane Cardinale. The hearing concluded at approximately 11:00 am.

The record closed upon receipt of the recording of the hearing on December 13, 2017.

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 Robert Busse & Co., Inc. is not a small business, as required by 5 NYCRR 140.1(tt)(1)(vi).

Position of the Applicant

Robert Busse & Co., 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. Robert Busse & Co., Inc. is in the business of manufacturing and supplying medical supplies and accessories (Exh. DED1 at 3). The firm has a business address of 75 Arkay Drive, Hauppauge, New York (Exh. DED1 at 1)

2. Jane Cardinale became the 100% owner of Robert Busse & Co., Inc. on April 17, 2012 after a transfer from her husband who died on May 11, 2012 (Exh. DED1 at 3).

3. During no pay period in 2016, did Robert Busse & Co., Inc. employ more than 287 people (Exh. A6).

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 asserts that the application failed to demonstrate that Robert Busse & Co., Inc. is a small business, as required by 5 NYCRR 140.1(tt)(1)(vi). The relevant fact cited is that the firm employs more than three hundred individuals (Exh. DED2 at 2).

At the hearing, Mr. Emanuel testified that the Division reviewed the firm's quarterly filings of IRS form 941 and determined that the firm employed more than 300 people, on average, in 2016 (Exh. DED3). These forms show that the number of employees who received wages, tips, or other compensation for the first quarter was 298; for the second quarter, 306; for the third quarter, 303; and for the fourth quarter, 305 (DED3 at 1, 4, 7, and 11, respectively). Mr. Emanuel concluded that because the average of the quarterly reports exceeded 300 employees, the firm did not meet certification requirements (Exh. DED4 at 9:30). Division employees used the IRS form 941 to calculate the number of employees.

In her testimony, Ms. Joyce presented a summary of the number of employees for each weekly pay period during 2016 as well as individual reports for each week (Exh. A6). These reports show that during 2016, the number of employees varied from a low of 272 for the week of May 10, 2016 to a high of 287

for the week of November 29, 2016 (Exh. A6 at 1). At no time during the year were there ever more than 300 people employed by the firm (Exh. DED4 at 15:30). The documents included in Exh. A6 are forms prepared by a third-party, ADP, under the supervision of Donna Lovelace, the firm's payroll and benefits administrator (Exh. DED4 at 16:30). The applicant also provided a listing of employees terminated during each quarter during 2016, which range between 25 and 33 individuals (Exh. A7), and serve to lower the quarterly totals found in the IRS form 941. Ms. Lovelace testified that the data included in exhibits A6 and A7 was accurate (Exh. DED4 at 21:00).

Ms. Joyce testified that because the business is a manufacturer, it experiences very high turnover. Because of this, the IRS form 941 quarterly reports include individuals terminated as well as those hired to replace them causing these forms to overstate the number of employees at the firm (Exh. DED4 at 14:15). She also testified that the weekly employment reports were not submitted with the application materials because they were too large to upload to the Division's application website (Exh. DED4 at 21:30). This assertion was not challenged by the Division.

In his closing statement, Division counsel argues that the agency's use of the data reported to the IRS on form 941 is a reasonable interpretation of the applicable regulation defining a small business found in 5 NYCRR 140.1(tt)(1)(vi) and 140.1(gg). This reasonable interpretation results in a quarterly average of 304 individuals employed by the applicant (Exh. DED3), and exceeds the 300 employee maximum set forth in the regulation. The applicant responds that the use of the IRS form 941, in this case, does not accurately measure the number of employees at the firm, because of the high turnover and the fact that it employs slightly fewer than 300 people.

While counsel for the Division is correct that the agency's interpretation of its own regulations is entitled to deference, that is not at issue in this case. The only stated relevant fact for denial of the application in the denial letter is that the firm employs more than 300 employees. This is incorrect. The application states that the firm has 275 full-time and 4 part-time employees (Exh. DED1) and the information provided at

the hearing shows that at no time during 2016 did the firm employ more than 287 people (Exhs. A6 and A7). The agency's reliance on quarterly totals that do not reflect actual employment levels on a weekly basis is misplaced.

Based on the evidence in the record, the applicant has demonstrated Robert Busse & Co., Inc. employs less than 300 people and, therefore, is a small business, as required by 5 NYCRR 140.1(tt)(1)(vi). Accordingly, the Division's denial, based upon IRS form 941, was not based on substantial evidence.

CONCLUSION

The applicant has demonstrated that Robert Busse & Co., Inc. is a small business, as required by 5 NYCRR 140.1(tt)(1)(vi).

RECOMMENDATION

The Division's determination to deny Robert Busse & Co., Inc.'s application for certification as a woman-owned business enterprise should be reversed, for the reasons stated in this recommended order.

**Matter of
Robert Busse & Co., Inc.**

**DED File ID No. 57154
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Denial letter
DED3	2016 quarterly reports IRS form 941
DED4	Recording of hearing on disc
A1	Denial letter
A2	Excerpt from state MWBE regulations
A3	Excerpt from state MWBE regulations
A4	Excerpt from federal MWBE regulations
A5	Excerpt from federal MWBE regulations
A6	Weekly payroll information
A7	Appeal letter