

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

In the Matter

- of -

the Application of Premier Floors, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 64830

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 13, 2023

This matter considers the written appeal by Premier Floors, Inc., (“Premier” 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 January 24, 2023, Ms. Lisa Caswell, as President, applied on behalf of Premier for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 16, 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); and
 - (b) Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1).
3. Premier timely filed a Request to Appeal on March 13, 2023 (APP Exhibit 1).
4. A notice to proceed via written appeal was sent to Premier on March 14, 2023 (DED Exhibit 3).

5. Premier filed its written appeal by letter dated April 14, 2023 (APP Exhibit 2).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated June 29, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated June 29, 2023.

FINDINGS OF FACT

7. Premier is engaged in the business of the installation of resinous floors (DED Exhibit 1).
8. Ms. Lisa Caswell is the President and has a 60% ownership interest. Mr. Jeffrey Caswell is the Vice President and has a 40% ownership interest (DED Exhibit 1).
9. Mr. Caswell established the business in 2015, having a 100% ownership interest. On January 1, 2017, Mr. Caswell transferred a 60% ownership interest to Ms. Caswell (DED Exhibits 6 and 7).
10. Ms. Caswell's resume reflects her experience as secretarial/clerical prior to joining Premier. She "oversees the day-to-day operations of the company and its employees" (DED Exhibit 4).
11. Mr. Caswell has been working in flooring installation for over 30 years and has held the positions of laborer, foreman and management for several flooring installation companies. His work experience includes the installation and oversight of installation of flooring in commercial and industrial structures, as well as the management of product installers (DED Exhibit 5).

APPLICABLE LAW

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

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:

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:

- (1) Minority group members and women relied upon for certification must possess adequate, industry-specific competence to make critical business decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things...

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 Premier 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.

It is well settled that ownership acquired solely by virtue of marital or community property does not satisfy the requirements of 5 NYCRR §144.2(b)(2). 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).

On January 1, 2017, Ms. Caswell received a 60% ownership interest from Mr. Caswell. No proof of any capital contribution from Ms. Caswell for those shares on that date was submitted (DED Exhibits 1 and 6). Appellant stated on appeal that the initial cash contribution was from a joint checking account of Lisa and Jeffrey Caswell (APP Exhibit 2). The Division has consistently denied certification where the source of the capital contribution came from a jointly owned bank account. See *Matter of Hertel Steel, Inc.*, Recommended Order dated February 10, 2017 (Final Order 17-12, dated March 15, 2017).

Appellant also asserts that loans made by V&J Service Corp., a consulting company in which Ms. Caswell has 50% ownership, to Premier are her capital contributions (DED Exhibits 1, 8 and 9). Loans do not constitute contributions to the business and are not relevant to determining whether the applicant has satisfied the capital contribution requirement. See *In the Matter of Pamten, Inc.*, Recommended Order dated June 26, 2018 (Final Order 18-38, dated July 30, 2018).

The Division's determination to deny the application on the basis that Premier failed to demonstrate that Ms. Caswell made contributions to Premier 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)(1) requires that the woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things". In *Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Caswell does not have any industry specific expertise; her skills are related to general business or office management. Her resume reflects her experience as secretarial/clerical prior to joining Premier. She does not possess any academic or technical training relevant to the flooring installation industry (DED Exhibits 1 and 4). She "oversees the day-to-day operations of the company and its employees". Her role in the company is mainly administrative and relates to office management (DED Exhibit 4). She does not have the training or experience in the industry necessary to supervise the work of the employees.

Mr. Caswell has been working in flooring installation for over 30 years and has held the positions of laborer, foreman and management for several flooring installation companies. His work experience includes the installation and oversight of installation of flooring in commercial and industrial structures, as well as the management of product installers (DED Exhibit 5).

The Division's determination to deny the application on the basis that Premier failed to demonstrate that Ms. Caswell possesses adequate industry-specific competence to make critical business decisions without relying upon others, as required under 5 NYCRR §144.2(c)(1) is supported by substantial evidence.

CONCLUSION

Premier 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) and 144.2(c)(1) 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 Premier's application for certification as a woman-owned business enterprise.

In the Matter of Premier Floors, Inc.
DED File ID No. 64830
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	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Ms. Caswell's Resume	Y	Y
DED 5	Mr. Caswell's Resume	Y	Y
DED 6	Stock Certificate and Transfer Form	Y	Y
DED 7	Appellant Narrative Describing Corporate Stocks Issued	Y	Y
DED 8	Promissory Notes Between V&J Service Corp. and Premier Floors	Y	Y
DED 9	Promissory Notes Between V&J Service Corp. and Premier Floors	Y	Y
DED 10	V&J Service Corp. Shareholder Agreement	Y	Y
DED 11	Q & A Responses November 2021	Y	Y
APP 1	Request to Appeal	Y	Y
APP 2	Appeal letter with attachments	Y	Y