

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

In the Matter

- of -

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

NYS DED File ID No. 66916

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
August 24, 2023

This matter considers the written appeal by Specialty Floors, LLC, (“Specialty Floors” 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 June 11, 2019, Ms. Kristy Kulp, as majority owner, applied on behalf of Specialty Floors for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 5, 2022, 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 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);
 - (c) Minority group members or 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, as required under 5 NYCRR §144.2(c)(2); and

(d) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).

3. Specialty Floors timely filed a notice of appeal on May 7, 2022 with an attached letter (APP Exhibit 1).
4. A notice to proceed by written appeal was sent to Specialty Floors on October 5, 2022 (DED Exhibit 3).
5. Specialty Floors submitted no further papers.
6. The Division filed an Affidavit of Raymond Emanuel, Director of Certification, dated May 15, 2023, and a brief of Anequa Pond Esq., counsel for the Division, dated May 22, 2023.

FINDINGS OF FACT

7. Specialty Floors is engaged in installing and sanding hardwood floors, urethane floors and other types of flooring, and light general carpentry (DED Exhibit 1).
8. Ms. Kristy Kulp is a Member and has a 60% ownership interest. Mr. Robert Kulp is a Member and has a 40% ownership interest (DED Exhibit 1).
9. Before the creation of the LLC, the business operated as a DBA under Mr. Robert Kulp. The application alleges that cash contributions came from the DBA account when it closed, and that Ms. Kulp contributed [REDACTED] and Mr. Kulp contributed [REDACTED] (DED Exhibits 1 and 5). In her letter submitted on appeal, Ms. Kulp stated that “all capital put into the business comes from our joint checking” (APP Exhibit 1).
10. The 2018 Individual Tax Return shows Ms. Kulp’s capital contribution as [REDACTED] and Mr. Kulp’s capital contribution as [REDACTED]. The 2020 Individual Tax Return reflects Ms. Kulp’s

capital contribution as [REDACTED] and Mr. Kulp's capital contribution as [REDACTED] (DED Exhibit 5).

11. Ms. Kulp's resume reflects that she holds degrees in Accounting and Finance. (DED Exhibit 6). She is responsible for preparing bid documents, entering and submitting payroll, creating new employee packets, reviewing contracts and receiving insurance forms (DED Exhibits 6 and 7). She has separate employment as an administrative assistant (DED Exhibit 6).

12. Mr. Kulp's resume reflects that he has 22 years of experience in building renovations and repairs (DED Exhibit 9). He works in the field and oversees the employees, and handles repairing of tools and machinery (DED Exhibit 8).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states 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(b)(3) states as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

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

Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or woman-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration and must meet all other certification criteria described herein.

5 NYCRR §144.2(c) states 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...
- (2) 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) 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 Specialty Floors 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).

The application states that cash contributions of [REDACTED] from Ms. Kulp and [REDACTED] from Mr. Kulp came from Mr. Kulp's DBA account when it was closed prior to the creation of the LLC (DED Exhibits 1 and 4). Applicant did not provide any documentary evidence of these contributions.

It is well established that the woman-owner must be able to show that the monetary contribution came from her personal funds. See *Matter of Spring Electric, Inc., supra*. Ms. Kulp stated that she and Mr. Kulp have a joint account, and the capital contributions came from the joint account. She stated that "I could not prove contributions were solely from me" (DED Exhibit 4).

The Division's determination to deny the application on the basis that Specialty Floors failed to demonstrate that Ms. Kulp made contributions to Specialty Floors 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.

The critical functions of Specialty Floors are installation and sanding of hardwood flooring and light general carpentry (DED Exhibit 1). Ms. Kulp does not have any industry specific expertise; her skills are related to accounting and general business or office management. She does not possess any academic or technical training relevant to the industry of hardwood flooring installation and sanding, and light general carpentry. Her duties include processing payroll, invoices, payments, contracts and human resources. (DED Exhibits 6 and 7). She does not have the training or experience in the industry necessary to supervise the work of the employees.

Mr. Kulp has 22 years of experience in building, renovations and repairs. He has experience with floor installation, refinishing and home renovations. He works in the field overseeing the employees (DED Exhibit 8). He performs the core function and revenue generating tasks of the business, while Ms. Kulp manages the administrative and financial aspects of the business.

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).

Specialty Floor’s products and services include the installation and refinishing of hardwood floors and light general contracting (DED Exhibit 1). Mr. Kulp’s duties include working in the field and supervising the employees, and repairing tools and machinery as needed (DED Exhibits 7 and 8). Ms. Kulp’s duties are administrative and financial, including payroll, advertising, bookkeeping, scheduling, paying invoices, and human resources (DED Exhibits 6 and 7). Ms. Kulp does not exercise independent operational control over the core functions of the business. Mr. Kulp is primarily responsible for overseeing the day-to-day operations of the business.

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). Ms. Kulp has separate employment as an administrative assistant (DED Exhibits 5 and 6). She states she works for Specialty Floors “early morning, late evenings, and weekends”, if necessary (App Exhibit 1). This reflects that she is not there during normal business hours to perform the core business functions and demonstrates that Mr. Kulp performs the day-to-day business functions. The denial on the ground of time devoted to the business was based on substantial evidence.

CONCLUSION

Specialty Floors 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)(1), 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 Specialty Floor's application for certification as a woman-owned business enterprise.

In the Matter of Specialty Floors, LLC
 DED File ID No. 66916
 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	Applicant's Capital Contribution Narrative	Y	Y
DED 5	2017, 2018 and 2020 Tax Documents	Y	Y
DED 6	Ms. Kristy Kulp's Resume	Y	Y
DED 7	Applicant's Description of Owner's Duties	Y	Y
DED 8	Mr. Robert Kulp's Resume	Y	Y
APP 1	Notice of Appeal	Y	Y