

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

In the Matter

- of -

the Application of Sugar Shack's Water, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69533

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 24, 2023

This matter considers the written appeal by Sugar Shack’s Water, Inc., (“Sugar Shack” 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 October 27, 2022, Ms. Kimberly Bristol, as President, applied on behalf of Sugar Shack for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On March 3, 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 not be encumbered in their ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4).
3. Sugar Shack timely filed a Request to Appeal on March 14, 2023 (APP Exhibit 1).

4. A notice to proceed via written appeal was sent to Sugar Shack on March 16, 2023 (DED Exhibit 3).
5. Sugar Shack filed its written appeal by letter dated April 24, 2023 (APP Exhibit 2).
6. The Division filed an Affidavit of Kanasha Blue, Associate Certification Director, dated July 20, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated July 21, 2023.

FINDINGS OF FACT

7. Sugar Shack is engaged in the business of hauling water for various customers and the manufacture and assembly of crane mats (DED Exhibit 1).
8. Ms. Kimberly Bristol is the President and has a 60% ownership interest. Mr. Todd Bristol is the Vice President and has a 40% ownership interest (DED Exhibit 1).
9. Mr. Bristol established the business in 2015, having a 100% ownership interest. On January 1, 2021, Mr. Bristol transferred a 60% ownership interest to Ms. Bristol in consideration of her prior work for the company and a capital contribution in the amount of \$ [REDACTED]. The contribution was from a home equity line of credit, a joint account held by Mr. Bristol and Ms. Bristol (DED Exhibits 1, 6 and 7).
10. The Shareholder Voting Rights – Shareholder Agreement restricts the transfer of stock, in that no shareholder can sell, assign, or otherwise transfer stock to anyone else, other than the corporation, “without first obtaining the prior written consent of the other Shareholder”. The Agreement provides for a right of first refusal, which requires any shareholder to have prior written consent prior to selling stock, and also requires a vote of 66% of outstanding shares for corporate actions (DED Exhibit 11).

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(b)(4) states as follows:

Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or be subject to undue restrictions against alienating such ownership interests.

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 Sugar Shack 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, 2021, Mr. Bristol transferred a 60% ownership interest in Sugar Shack to Ms. Bristol in consideration of her prior work for the company and a capital contribution in the amount of \$ [REDACTED] (DED Exhibit 7). It is the responsibility of the applicant "to clearly identify, quantify and explain on the certification application, what is considered a capital contribution". In *the Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019; *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept 2021). No evidence was provided regarding Ms. Bristol's prior work and its valuation. Without evidence detailing the specific expertise and the specific dollar value associated with that expertise, the claimed expertise cannot be considered as a capital contribution. See *Matter of Whitman Engineering*, Recommended Order dated March 20, 2017 (Final Order 17-23 dated March 27, 2017).

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). Applicant asserts that Ms. Bristol made a capital contribution of \$ [REDACTED] towards the purchase of

her shares. The contribution amount was from a home equity line of credit, a joint account held by Mr. Bristol and Ms. Bristol (DED Exhibit 6). The contribution was therefore not made from assets belonging solely to Ms. Bristol.

The Division's determination to deny the application on the basis that Sugar Shack failed to demonstrate that Ms. Bristol made capital contributions to Sugar Shack in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

5 NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business or be subject to undue restrictions against alienating her stock ownership interest.

The Shareholder Agreement requires written consent of the other shareholders to sell, assign, pledge or otherwise transfer stock. The Agreement also provides a right of first refusal which requires written consent of the other shareholders prior to selling stock. The Agreement further requires a vote of 66% of the outstanding shares in order to take certain corporate actions (DED Exhibit 11). Applicant acknowledges in its appeal that this Agreement encumbers the woman-owner (APP Exhibit 2). Applicant submitted a Termination of Shareholder Agreement dated March 3, 2023, the same date as the denial determination, with the appeal to argue that the encumbrance no longer applies (APP Exhibit 2). This was not part of the application and does not clarify or explain previously submitted documents and therefore must be disregarded.

The Division's determination to deny the application on the basis that Sugar Shack failed to demonstrate that Ms. Bristol was not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating her stock ownership interest, as required under 5 NYCRR §144.2(b)(4) is supported by substantial evidence.

CONCLUSION

Sugar Shack 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(b)(4) 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 Sugar Shack's application for certification as a woman-owned business enterprise.

In the Matter of Sugar Shack's Water, Inc.
DED File ID No. 69533
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	Stock Certificates	Y	Y
DED 5	Stock Ledger	Y	Y
DED 6	Updated Proof of Capitalization	Y	Y
DED 7	Special Meeting Re: Transfer of Shares	Y	Y
DED 8	Stock Purchase and Assignment Agreement	Y	Y
DED 9	Letter from Bank	Y	Y
DED 10	Sugar Shack's Answers to Question Attachment 1	Y	Y
DED 11	Shareholders Voting Rights – Shareholder Agreement	Y	Y
DED 12	Deed for Shady Lake Road Properties	Y	Y
DED 13	Answers to Questions dated 2/15/2023	Y	Y
APP 1	Request to Appeal	Y	Y
APP 2	Appeal letter with attachments	Y	Y