

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

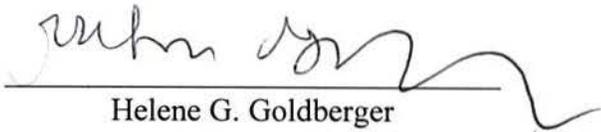
In the Matter

-of-

The Application of THINKERSDESIGN,
for Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52517

RECOMMENDED ORDER

A handwritten signature in black ink, appearing to read 'Helene G. Goldberger', is written over a horizontal line.

Helene G. Goldberger
Administrative Law Judge

October 15, 2019

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 (DED or Respondent) to deny the recertification application filed by Thinkersdesign (Thinker or applicant) for certification as a woman-owned business enterprise (WBE) be affirmed for the reasons set forth below.

PROCEEDINGS

Thinker applied for recertification as a woman-owned business enterprise on April 6, 2015. *See*, Exhibit (Ex.) DED-1. By letter dated March 16, 2017 (Ex. DED-3), the Division determined that Thinker does not meet the eligibility requirements to be certified as a woman-owned business enterprise and denied its application. By letter dated March 31, 2016 [sic], Stephanie Tohill, Owner appealed from the Division's determination to deny Thinker's application for WBE certification (Exs. App-1 and DED-4 and 5). Attorney for Respondent DED submitted a Memorandum of Law in Response to the Appeal (MOL) dated September 18, 2019 and a September 17, 2019 Affidavit (Aff.) of Glenn Butler, a Senior Certification Analyst for DED, who had reviewed Thinker's application. Attached to Mr. Butler's affidavit are five exhibits including the documents that were annexed to Thinker's appeal letter – the March 28, 2017 letter from Kenneth H. Gach, CPA, a Form 1099 from 2015, and a Schedule C from 2015 for Thinker. (Exs. DED- 4 and 5). A list of the exhibits is attached hereto.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a woman-owned business enterprise are set forth in the regulations at Title 5 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (5 NYCRR) § 144.2. To determine whether an applicant should be granted WBE status, the Division assesses the ownership, operation, control, and independence of the business enterprise based on information supplied through the application process. The Division reviews the business enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information presented in supplemental submissions as well as any interviews that the Division's analyst may have conducted. *See*, 5 NYCRR § 144.4(e).

STANDARD OF REVIEW

On this administrative appeal, Thinker bears the burden of proving that the Division's denial for 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 the 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

The Division

The Division denied the application filed by Thinker for recertification as a woman-owned business enterprise with a letter dated March 16, 2017 from Raymond Emanuel, Director of Certification Operations to Ms. Tothill (*see*, Ex. DED-3). The Division determined that Thinker failed to demonstrate: (1) that women own at least a fifty-one percent interest in the business enterprise as required by 5 NYCRR § 144.2(a)(3)-(4) and (2) that women share in the risks and profits in proportion with their ownership interest in the business enterprise as required by 5 NYCRR § 144.2(c)(2). The Division made its determination based on Thinker’s application that did not include any evidence that Ms. Tothill owns a greater interest in the company than does Mr. Tothill. In addition, the 2015 Schedule C of the U.S. Individual Income Tax Return for Ms. Tothill and Mr. Tothill provided that Thinkerdesign is a sole proprietorship of which Mr. Tothill was the proprietor.

With respect to the issue of proportionate risks and profits, the Division found that all net profits of Thinkersdesign were allocated to Mr. Tothill in 2015 and the application did not show that Ms. Tothill received any compensation from the company.

Thinkerdesign

In Thinkersdesign’s appeal letters of March 31, 2016 [sic] and July 19, 2017¹, Ms. Tothill provides a letter from CPA Ken Gach. (DED-Ex. 5). In this letter dated March 28, 2017, Mr. Gach sets forth that the Schedule C for 2015 “was inadvertently filed with the name of the proprietor shown as Mark Tothill.” Mr. Gach enclosed a copy of the Schedule C with Ms. Tothill now listed as the proprietor and a Form 1099 showing her as the payee.

FINDINGS OF FACT

1. Thinkersdesign is located at 382 Commerce Street, Hawthorne, New York. The company provides graphic design and related services such as annual reports, brochures, posters, advertisements, signage, logs, website design and web banners. Ex. DED-1, §§ 1.E, 5.A.

¹ In the appeal record I received, there are two almost identical appeal letters from Ms. Tothill – one dated March 31, 2016 (Ex. DED-4) and one dated July 19, 2017 (Ex. App-1). It appears that the March 31st letter was misdated because the Division’s denial was dated March 16, 2017. In addition, the accountant’s letter attached to Ms. Tothill’s appeal letter is dated March 28, 2017.

2. In Thinker's application to DED, it states that Ms. Stephanie Tohill owns 51% of the company as of October 15, 1999 and Mr. Mark Tohill owns 49.0% as of March 15, 2001. Ex. DED-1, § 3.A.
3. Stephanie Tohill and Mark Tohill are married and file a joint tax return. Ex. DED-1, § 3.D; Ex. DED-2.
4. The Schedule C of the 2015 Form 1040 of the couple's U.S. Individual Tax Return indicates that Mr. Tohill is the proprietor for Thinkersdesign. DED Ex. 2.
5. The Schedule C of the 2015 Tax Return also indicates that Thinker's net profit for that year was [REDACTED]. Ex. DED-2. The return also shows that the couple's joint income for the year was [REDACTED] and Schedule SE of the return states that this amount was self-employment income from Mr. Tohill. *Id.*
6. Annexed to Thinker's appeal is a letter from the accountant for Thinker dated March 28, 2017 to Mr. Emanuel indicating that the 2015 Schedule C had incorrectly shown that Mr. Tohill and not Stephanie was the proprietor for the company. He attached a 1099 to show Ms. Tohill as payee and a revised Schedule C with Ms. Tohill as proprietor. Ex. DED-5.

DISCUSSION

This Recommended Order considers Thinker's appeal (March 31, 2017) from the Division's March 16, 2017 determination to deny the company's application for certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. Exs. DED-4, 5. The discussion below addresses the bases for the Division's denial.

The standards for determining whether an applicant is eligible to be certified as a woman-owned business enterprise are set forth in 5 NYCRR § 144.2. According to the Division's March 16, 2017 denial letter (*see*, Ex. DED-3), Thinker did not demonstrate that women owned at least a fifty-one percent interest in the business enterprise or shared in the risks and profits in proportion with their ownership interest in the business enterprise. 5 NYCRR §§ 144.2(a)(3)-(4), 144.2(c)(2).

I. Ownership

The eligibility criterion at issue requires that a sole proprietorship must be owned by a minority group member or woman and a partnership must demonstrate that minority group members or women have a fifty-one percent or greater share of the partnership. 5 NYCRR §§ 144.2(a)(3)-(4). The analyst who reviewed this application states in his affidavit in support of the Division's response to the appeal that while the application indicated that Ms. Tohill owned 51% of Thinker, the Schedule C submitted to the Division showed that Mr. Tohill was the proprietor. Butler Affidavit (Aff.), ¶¶ 7, 8. In addition, Mr. Butler notes that the application

does not contain any support for the assertion that Ms. Tothill owns a greater share than her husband. Butler Aff., ¶ 10.

While Ms. Tothill submitted documentation from an accountant that the Schedule C submitted with the application was incorrect, this record was not part of the application and therefore, I am unable to consider it on this review. 5 NYCRR § 144.5(a). But, as Mr. Martin points out, even if I could consider this new information, it differs from the application which provides that Ms. Tothill owns 51% not 100% of the company. Division Memorandum of Law, p. 4.

Based on this record, Thinker has not shown sufficient evidence of majority ownership in the woman partner. Therefore, I conclude that the Division's determination with regard to the requirement of 5 NYCRR § 144.2(a)(3)-(4) is supported by substantial evidence.

II. Proportional Share in the Risks and Profits

The eligibility criterion at issue requires that the "woman owner . . . must share in the risks and profits, in proportion with [her] ownership interest" (5 NYCRR 144.2[c][2]). This provision ensures that women and minority business owners receive the benefits that accrue to a business as a result of State contracting preferences from a MWBE certification and that persons who are not members of a protected class do not receive a disproportionate share of such benefits.

Analyst Butler, who reviewed the Thinker application, noted in his affidavit that Schedule C of the 2015 return set forth a net profit of [REDACTED] and that this sum represented Mr. Tothill's self-employment income. Butler Aff., ¶ 9. Thinker's application also does not provide evidence that Ms. Tothill receives any compensation from the company. *Id.*, DED Exs.-1, 2.

Based on this record, Thinker has not shown sufficient evidence that Ms. Tothill shares in the risks and profits in proportion to her stated ownership interest. The Division has consistently held that the woman owner must realize the majority of profits from the business enterprise to satisfy the criteria under 5 NYCRR § 144.2(c)(2) (*see, e.g., Matter of Spring Electric*, Recommended Order, [https://esd.ny.gov/sites/default/files/02172017_Spring Electric%20_RO.pdf](https://esd.ny.gov/sites/default/files/02172017_Spring%20Electric%20_RO.pdf) [March 17, 2017 and Final Order 17-21] [business not eligible for WBE certification when the woman owner's husband received significantly more compensation than she did]). Rather it appears that Thinker is a family-owned business which does not meet the qualifications for a WBE. *See, Matter of C.W. Brown, Inc., v. Canton*, 216 AD2d 841, 843 (3d Dep't 1995). Therefore, I conclude that the Division's determination with regard to the requirement of 5 NYCRR § 144.2(c)(2) is supported by substantial evidence.

CONCLUSION

For the reasons set forth above, Thinker failed to demonstrate that Ms. Tothill maintained majority ownership and shared in the risks and profits in proportion with her ownership interest pursuant to 5 NYCRR §§ 144.2(a)(3)-(4) and 144.2(c)(2).

RECOMMENDATION

For the reasons set forth above, the Director should affirm Division staff's March 16, 2017 determination to deny Thinker's application for certification as a woman-owned business enterprise.

Attachment: Exhibit Chart

MATTER OF THINKERSDESIGN
DED FILE No. 52517
EXHIBIT LIST

Exhibit No.	Description	ID	Rec'd	Notes
DED-1	Thinker's Application – 4/6/15	√	√	
DED-2	2015 Joint Tax Returns – Mark and Stephanie Tothill	√	√	
DED-3	Division Denial - 3/16/17	√	√	
DED-4	Appeal Letter – 3/31/16 [sic]	√	√	
DED-5	Gach Letter – 3/28/17 w/Form 1099 and Schedule C	√	√	
APP-1	Thinker Appeal Letter – 7/19/17 w/enclosed Gach Letter, Form 1099 and Schedule C	√	√	