

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

In the Matter

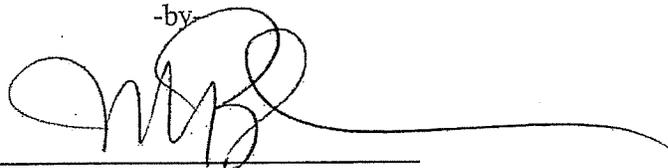
-of-

the Application of United Copier & Business Systems Inc., DBA United Business Systems Inc.
For Certification as a Women-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 61169

RECOMMENDED ORDER

-by-

A handwritten signature in black ink, appearing to read 'JMB', is written over a horizontal line. The signature is stylized and extends to the right with a long, thin flourish.

Jeffrey M. Bernbach
Administrative Law Judge

July 23, 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 United Copier & Business Systems, Inc. (United Copier" or "applicant"), certification as a women-owned business enterprise ("MWBE")¹ be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal by 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 ("NYCRR") Parts 140-144, challenging the determination of the Division that United Copier does not meet the eligibility criteria for certification as a MWBE.

The Division denied the application (Exhibit 1) filed by United Copier for MWBE certification by letter dated July 19, 2017 (Exhibit 10). The letter sets forth 4 grounds under 5 NYCRR 144.2 for the denial. Applicant filed a notice of appeal dated August 17, 2017. The Division advised applicant that the hearing on this matter would be held on March 16, 2018 (letter from the Division to applicant, dated January 21, 2018).

I convened the hearing at approximately 10:00a.m. on March 16, 2018, at the Division's offices located at 633 Third Avenue, New York, NY. Cheryl Kerling and Jennifer Pohlman, along with Jeff Resnick, CPA, appeared, and provided testimony on behalf of United Copier and cross examined the Division's witness and made opening and closing statements on behalf of the applicant. Phillip Harmonick, Esq., Assistant Counsel, New York State Department of Economic Development, represented the Division and called one witness, El Hussain Sarhan, a senior certification analyst for the Division. A list of exhibits received during the hearing is appended to this report.

Consistent with 5 NYCRR 145.1(m), an audio recording of the hearing was made. A copy of the audio recording on a compact disc ("CD") was provided to the undersigned on or about March 23, 2018, whereupon, the hearing record was closed.

ELIGIBILITY CRITERIA

The eligibility criteria pertaining to certification as a MWBE are established by regulation (see 5 NYCRR 144.2). For the purposes of determining whether an applicant should

¹ The term "women-owned business enterprise" applies to an enterprise that meets the requisite criteria on the basis of the ownership and control of one woman or of multiple women (see 5 NYCRR 140.1 [tt] [defining a women-owned business enterprise as one that is, among other things, "at least 51 percent owned by one or more United States citizens or permanent resident aliens who are women"]).

be granted or denied MWBE status, the ownership, operation, control, and independence of the business enterprise are assessed on the basis of information supplied through the application process. The Division reviews the enterprise as it existed at the time that the application was made, based on representations in the application itself, and on information provided in supplemental submissions or 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 MWBE certification for United Copier is not supported by substantial evidence (see State Administrative Procedure Act Section 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

The Division cites four bases for denial of United Copier's application. First, the Division argues that applicant failed to demonstrate that applicant's contribution, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise is proportionate to her equity interest in the business enterprise (5 NYCRR section 144.2 (a)(1); second, the Division argues that applicant does not share in the risks and profits in proportion with her ownership interest in the business enterprise (5 NYCRR section 144.2(c)(2); third, the Division argues that applicant does not make decisions pertaining to the operation of the business enterprise (5 NYCRR section 144.2(b)(1); and, fourth, the Division argues that applicant has not demonstrated adequate managerial expertise or technical competence to operate the business enterprise (5 NYCRR section 144.2(b)(1)(i).

Position of Applicant

Applicant essentially argues that she runs the business, handles all administrative matters and although she has no training or experience with the operation or servicing printers or copiers, such is not necessary as she hires people to do that job.

FINDINGS OF FACT

1. United Copiers is primarily engaged in the sale and servicing of printers and copiers.
2. Cheryl Kerling is President and 51% owner, according to the application, of United Copier, and is primarily responsible for managing accounts receivable and payable and for other financial matters.

3. Ms. Kerling does not possess any training or experience in the operation or servicing of equipment sold by United Copier.
4. On October 15, 2014, Ms. Kerling's husband Wayne Kerling transferred 64% of the outstanding common stock of United Copier to her. Ms. Kerling's sons David, John and Peter each own 9.66% of the common stock.
5. The application represents that the contribution of each of the Kerlings in exchange for their shares of stock was in the form of expertise valued at \$ [REDACTED] for Cheryl Kerling, \$ [REDACTED] for David Kerling and \$ [REDACTED] for John Kerling and Peter Kerling, respectively.
6. Ms. Kerling's sons are primarily responsible for equipment purchasing, sales and servicing.

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification of United Copier as a woman owned business enterprise pursuant to Executive Law Article 15-A. The Division cites four bases in support of the denial, each of which is discussed below.

At the outset, before addressing the Division's criteria, it is important to note that the layman's concept of the fundamentals of business ownership is not what controls the determination whether an applicant has satisfied the criteria set forth in the NYCRR. For example, it is not disputed that Cheryl Kerling is female and the owner of at least 51% of the business. However, to insure that the mission of the Division is successful—that of assisting small and frequently start-up businesses, which are owned by minorities and women, to succeed despite discrimination they may experience—certain particular criteria are applied, including those discussed below as the bases for determining whether to grant certification. By the very nature of family-owned businesses, which often operate with a less formal structure than non-family owned businesses, it can sometimes be more difficult for them to obtain certification than non-family owned businesses.

1. Women do not share in the risks and profits in proportion with their ownership in the business. 5 NYCRR section 144.2(b)(1).

That Cheryl Kerling has not met this criterion is clear from the fact that she did not receive a salary or any distribution from the business enterprise during 2015, while each of her sons received significant salaries. While, as applicant correctly argues, she had every right to take her compensation in the form of rent from the property on which United Copier is located and which she owns, and from other businesses she owns, for tax purposes, the fact remains that applicant has failed to demonstrate the requisite proportionality between her 51% ownership and her zero salary in 2015.

2. The contribution of women is not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise. 5 NYCRR section 144.2(a)(1).

The application represents that in exchange for her ownership interest, Cheryl Kerling contributed \$ [REDACTED] in expertise to United Copier, while her sons, in exchange for their ownership interests, collectively contributed in expertise \$ [REDACTED], which is clearly not proportionate with her ownership of the business enterprise - - a contribution of 35% for a 51% interest.

3. Women do not make decisions pertaining to the operation of the business enterprise. 5 NYCRR section 144.2(b)(1).

Again, while Cheryl Kerling certainly makes business decisions relating to the operation of the business enterprise, none of these go to the core business of selling and servicing equipment, and sales of equipment, which are the responsibility of her sons, and which are the type of decisions contemplated by 5 NYCRR section 144.2(b)(1).

4. The woman owner has not demonstrated adequate managerial experience or technical competence in the business enterprise seeking certification. 5 NYCRR 144.2[b][1][i].

Finally, it is undisputed (a) that applicant does not possess any training or experience in the sale and servicing of the equipment United Copier sells, but rather (b) that it is Peter Kerling who possesses the necessary significant training and experience in the operation and servicing of printing and copying equipment. Thus, Ms. Kerling has not satisfied the requirement of 5 NYCRR 144.2[b][1][i].

CONCLUSION

Applicant has not met the burden of demonstrating that the record lacks substantial evidence to support the Division's determination to deny United Copier's application on the bases stated.

RECOMMENDATION

For the reasons stated herein, the determination of the Division to deny United Copier & Business Systems Inc. certification as a woman owned business enterprise should be affirmed.

Matter of United Copier & Business Systems, Inc.

DED File ID No. 61169

Exhibit List

Exhibit #	
1	United Copier's application, submitted July 19, 2017
2	Minutes of Special Meeting of United Copier, dated October 15, 2014
3	Promissory Note, dated November 4, 2014
4	Schedule to 2014 tax return of United Copier
5	2014 1040 tax return of Wayne and Cheryl Kerling
6	Capital contribution to United Copier
7	Attachments to Tax Return
8	Resume of Cheryl Kerling
9	List of Duties of Shareholders
10	Denial Letter