

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

In the Matter

- of -

**the Application of Cathryn Taylor Truck n' Trailer
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 68453

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 11, 2023

This matter considers the written appeal by Cathryn Taylor Truck n' Trailer, ("CTTNT" 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 December 15, 2020, Ms. Cathryn Calabria, as President, applied on behalf of CTTNT for certification as a woman-owned business enterprise ("WBE") (DED Exhibit 1).
2. On April 5, 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);
 - (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); and
 - (c) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. CTTNT timely filed a Request to Appeal on April 24, 2023 (APP Exhibit A).

4. A notice to proceed via written appeal was sent to CTTNT on May 5, 2023 (DED Exhibit 3).
5. CTTNT filed its written appeal by undated letter with attachments (APP Exhibit B).
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated August 24, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated August 25, 2023.

FINDINGS OF FACT

7. CTTNT is engaged in the business of providing dump truck material hauling services, earth moving and clearing for general construction and landscaping projects (DED Exhibit 1).
8. Ms. Cathryn Calabria is the President and has a 100% ownership interest (DED Exhibit 1).
9. The application states that the capital used to start the business was a 1999 Ford dump truck purchased through a rent-to-own agreement between Ms. Calabria and her father, Mr. Frank Calabria (DED Exhibits 1 and 6), and the purchase of a 2011 International Workstar dump truck (DED Exhibit 5).
10. The application states that Ms. Calabria's responsibilities include driving and hauling aggregate, and traffic control and safety. Her resume attached to the application makes no reference of experience or industry specific certifications relating to the trucking and hauling service. Her resume reflects her experience in marketing, contract administration and administrative roles (DED Exhibit 1).
11. CTTNT shares an address with Lakeview Development and Construction ("Lakeview Development"), a business owned by Ms. Calabria's father, Frank Calabria, and brother, Carson Calabria (DED Exhibit 1). CTTNT is a sub-contractor for Lakeview Development.

In 2021, CTTNT earned \$ [REDACTED] in gross receipts and paid Lakeview Development \$ [REDACTED] for contract labor (DED Exhibits 12 and 14).

12. Ms. Calabria works as a contract administrator for Lakeview Development, as well as a project coordinator for Genesee Building Restoration (DED Exhibit 1).
13. CTTNT has no employees, and the 2020 and 2021 business tax returns show no wages paid by CTTNT (DED Exhibits 1, 9 and 10).

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.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
 1. Money;
 2. Property;
 3. Equipment; or
 4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

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...

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 CTTNT 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 the responsibility of the applicant to "clearly identify, quantify, and explain on the certification application, what is to be 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 (3de Dept. 2021). The Division routinely denies applications for WBE certification where an applicant fails to substantiate the source of the capital contribution. 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 capital contribution for the business included two dump trucks (DED Exhibit 1). Ms. Calabria obtained a 1999 Ford dump truck from her father, Frank Calabria, with a rent-to-own option (DED Exhibit 1). Applicant provided a copy of a promissory note dated July 30, 2019, listing Ms. Calabria as the borrower and Frank Calabria as the noteholder (DED Exhibit 6). Also, a "release of promissory note" dated October 20, 2020, states that the note was paid in full in March of 2020 (DED Exhibit 4). Applicant provided no proof that the source of funds used to pay for the Ford truck came from Ms. Calabria. Ms. Calabria also claimed to purchase a 2011 International Workstar dump truck. A copy of an invoice for the purchase of the dump truck dated October 10, 2020 and stamped paid in full was provided (DED Exhibit 5). The purchase amount was stated as \$ [REDACTED], but there is no information regarding the source of funds used to pay for the dump truck.

On appeal, applicant provided receipts for monthly payments made by Ms. Calabria to Frank Calabria alleged to be made towards the purchase of the Ford truck. Applicant also provided a copy of a bank check in the amount of \$ [REDACTED] dated October 13, 2020, as payment for the Workstar truck (APP Exhibit B). The receipts which purport to cover cash payments for the Ford truck do not provide any information as to the source of the funds. Nor was there any proof provided to show the source of the funds for the Workstar truck.

The Division's determination to deny the application on the basis that CTTNT failed to demonstrate that Ms. Calabria made contributions to CTTNT 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.

CTTNT is engaged in the business of trucking and hauling aggregate materials via dump truck (DED Exhibit 1). The critical function of the business requires experience and expertise in handling heavy equipment and a commercial driver's license ("CDL") to perform the work contracted by the business. The application reflects that Ms. Calabria's responsibilities include driving and hauling aggregate, and traffic control and road safety (DED Exhibit 1). Her resume, however, makes no mention of any experience or industry specific certifications relating to the

trucking and hauling service (DED Exhibit 7). The application states that no specific licenses or certifications are required to operate the business. The application provides no reference to Ms. Calabria's experience in the use of heavy equipment and does not provide a copy of her driver's license or refer to her having a CDL license. The application, resume and supporting documents refer to Ms. Calabria's marketing, contract administration, and administrative experience (DED Exhibits 1 and 7).

On appeal, applicant seeks to provide new information, including copies of her driver's license indicating she holds a CDL, and an updated resume, and industry specific licenses and trainings received by Ms. Calabria (APP Exhibit B). None of this information was before the Division at the time of the application and is therefore new information and will not be considered on appeal. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

The Division's determination to deny the application on the basis that CTTNT failed to demonstrate that Ms. Calabria 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.

III. Independence

The Division further found that CTTNT is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers "whether the business enterprise receives tangible benefits as a result of a connection to another entity...". 5 NYCRR §144.2(e)(3).

A business which shares office space, rents garage space and acts as a subcontractor, as well as sharing employees is not considered to operate independently. See *Matter of Acme Lightning Rod, LLC*, Recommended Order dated March 6, 2020, Final Order dated April 21, 2020 (holding that where the same family owns two businesses, operates out of the same premises, and

where one business leases space to the other, and where the applicant business is dependent on the other business for capitalization, office, and basic functions, the business is not independent as required by the regulations). See also, *Matter of Skyline Specialty Systems, Inc. v. Gargano*, 294 AD 2d 742 (3rd Dept. 2002) (holding the applicant business was so entangled with another business by sharing personnel, office, etc. that it clearly was not independent).

CTTNT shares an address with Lakeview Development, a business owned by Ms. Calabria's father, Frank Calabria, and her brother, Carson Calabria. The two businesses share office space, yard and warehouse space (DED Exhibit 1). CTTNT is a sub-contractor for Lakeview Development. CTTNT paid no wages in 2020 and 2021 (DED Exhibits 9 and 10). CTTNT has no employees and only Ms. Calabria works for the business. Ms. Calabria is affiliated with Lakeview Development as a Contract Administrator. Frank Calabria is a business consultant for CTTNT and lends the business an operating truck when the CTTNT equipment is broken (DED Exhibit 1). In 2021, CTTNT had \$ [REDACTED] in gross receipts and paid \$ [REDACTED] to Lakeview Development (DED Exhibit 10).

On appeal, applicant explains that the business was in no position to hire until this year, and stressed the need for reliable, operable equipment in place before being able to hire employees. Applicant also stated that it hires "contract labor", but the only 1099 Form provided is to Lakeview Development, the family business in which CTTNT shares space, rents from, and borrows equipment (APP Exhibit B).

The Division's determination to deny the application on the basis that CTTNT failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

CTTNT 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) and 144.2(e) 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 CTTNT's application for certification as a woman-owned business enterprise.

In the Matter of Cathryn Taylor Truck n' Trailer
DED File ID No. 68453
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
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	Vehicle Bill of Sale for Ford Dump Truck	Y	Y
DED 5	Invoice for Purchase of International Workstar Dump Truck	Y	Y
DED 6	Promissory Note and Release	Y	Y
DED 7	Cathryn Calabria's Resume	Y	Y
DED 8	OSHA Certification Certificate	Y	Y
DED 9	2020 Individual Tax Return	Y	Y
DED 10	2021 Individual Tax Return	Y	Y
DED 11	Lease Agreement	Y	Y
DED 12	Business Resume	Y	Y