

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

In the Matter

- of -

**the Application of Advanced Arch Grilleworks, Inc. dba Advanced Arch Grilles
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 7762784

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
March 13, 2024

This matter considers the written appeal by Advanced Arch Grilleworks, Inc. dba Advanced Arch Grilles (“AAG” 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. Lynne Bruhnke, as President, applied on behalf of AAG for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On June 1, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1);
 - (b) Minority group members or women relied upon for certification do not 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
 - (c) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors, as required under 5 NYCRR §144.2(d)(1).
3. AAG timely filed a Request to Appeal on June 12, 2023 (APP Exhibit A/ DED Exhibit 3).

4. A notice to proceed via written appeal was sent to AAG on June 16, 2023 (DED Exhibit 4).
5. AAG filed its written appeal by undated letter with attachments (APP Exhibit B).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated December 29, 2023, and a brief of Karen Bernstein Esq., counsel for the Division, dated December 29, 2023.

FINDINGS OF FACT

7. AAG is engaged in the business of the manufacture and supply of ornamental and architectural grilles, such as linear bar grilles, supply and return HVAC grilles, ventilation grilles, wall/ceiling/floor grilles, perforated metal grilles and panels, decorative metal panels, radiator grilles, convector grilles, and linear bar vents (DED Exhibit 1).
8. Ms. Lynne Bruhnke is the President and has a 55% ownership interest. Mr. Daniel Roeper is the Vice President and has a 45% ownership interest (DED Exhibit 1).
9. The Board of Directors is made up of Ms. Bruhnke, Mr. Roeper, Mr. Andres Pineda, Vice President of Engineering/Quality, Mr. Angelo Reyes, Jr., Manager of Shop Production and Safety, and Ms. Diane Smith, Assistant Vice President/Secretary (DED Exhibit 1).
10. Article III, Section 2 of the By-Laws states “The Board of Directors shall be responsible for the control and management of the business and affairs, property and interests of the Corporation...” Article III, Section 6 states “...the presence of a majority of the entire Board... shall constitute a quorum for the transaction of business...” Article III, Section 7 states “ At all meetings of the Board of Directors, each Director present shall have one vote, irrespective of the number of shares of stock, if any, he may hold.” (DED Exhibit 12).

11. Ms. Bruhnke's resume reflects that she has a bachelor's degree in accounting. She was previously Vice President of AAG from March 2012 to December 2019 and President from January 2020 to present. As Vice President, her "areas of expertise" are listed as: implemented new practices for manufacturing; managed staffing levels and operating expenses; resolved sales, HR, legal, financial, and operational issues; developed full line of stock products; streamlined shipping operations; increased customer base and new business regions; created/designed company website and marketing material; managed inventory levels; oversaw financial reporting; budgeting, forecasting, and reporting; prepared annual financial statements. As President, her "areas of expertise" are listed as: strategic planning and organizational leadership; budget and cost management; sales, marketing, and new business development; client development; process design and productivity improvement; corporate and investment finance; growth and expansion strategies; profitability and cost analysis; systems and technology utilization; team building and performance improvement; collaborated on U.S. patented products (DED Exhibit 5).
12. Mr. Roeper's resume reflects that he has a master's degree in business administration. He was the CEO of AAG from March 2012 to December 2019, and Vice President from January 2020 to present (DED Exhibit 5). He shares responsibilities for financial decisions, preparing bids, negotiating bonding, marketing and sales, supervising field operations, managing and signing payroll, negotiating contracts, and acting as signatory for business accounts (DED Exhibits 1 and 10).
13. Mr. Reyes' resume reflects that he has training in the use of HFE Press Brake and EMLK 3510 NT machines, which are machines used for bending and forming metal. As Safety Manager at AAG. He ensures operations are being performed safely and correctly

according to OSHA standards through leadership, training, follow-up and delegation; and trains employees to follow safety plans and requirements. As Shop Production Manager, he oversees employee operations, production processes, and efficiencies; and develops work schedules for each department with departmental managers (DED Exhibit 5). He holds a 30-hour General Industry Safety and Health card and an OSHA 30-hour Outreach for General Industry Safety certificate (DED Exhibits 7 and 8).

14. Ms. Smith's resume reflects that she has a bachelor's degree in Consumer Sciences and an MBA in Business Management. Prior to working at AAG, she held positions in customer relations, as an executive assistant, as a financial secretary, and a physical therapy aide. As Assistant Vice President at AAG, her tasks are related to general business management and are administrative in nature (DED Exhibit 6).

15. Mr. Pineda's duties and responsibilities are: head of engineering and product design; review of major project design requirements; programming and software management; develop tooling and designs to smooth production; assist shop foreman to maximize material yield and minimize waste; management of 3-D printing; assist in new production design; prepare submittal drawings; quality control manager; and trainer (DED Exhibit 11).

APPLICABLE LAW

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...

- (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.

5 NYCRR §144.2(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

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 AAG 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. 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.

Ms. Bruhnke’s resume reflects that she has a bachelor’s degree in accounting. She was previously Vice President of AAG from March 2012 to December 2019 and President from January 2020 to present. As Vice President, her “areas of expertise” are listed as: implemented new practices for manufacturing; managed staffing levels and operating expenses; resolved sales, HR, legal, financial, and operational issues; developed full line of stock products; streamlined shipping operations; increased customer base and new business regions; created/designed company website and marketing material; managed inventory levels; oversaw financial reporting; budgeting, forecasting, and reporting; prepared annual financial statements. As President, her “areas of expertise” are listed as: strategic planning and organizational leadership; budget and cost management; sales, marketing, and new business development; client development; process design and productivity improvement; corporate and investment finance; growth and expansion strategies; profitability and cost analysis; systems and technology utilization; team building and performance improvement; collaborated on U.S. patented products (DED Exhibit 5).

Ms. Bruhnke does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant

to the business' industry. Her resume reflects experience in administrative functions which do not involve the critical functions of the manufacture and supply of ornamental and architectural grilles, such as linear bar grilles, supply and return HVAC grilles, ventilation grilles, wall/ceiling/floor grilles, perforated metal grilles and panels, decorative metal panels, radiator grilles, convector grilles, and linear bar vents (DED Exhibits 1 and 5) which are specific to this business. Her resume confirms that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 5).

Mr. Reyes' resume reflects that he has training in the use of HFE Press Brake and EMLK 3510 NT machines, which are machines used for bending and forming metal. As Safety Manager at AAG. He ensures operations are being performed safely and correctly according to OSHA standards through leadership, training, follow-up, and delegation; and trains employees to follow safety plans and requirements. As Shop Production Manager, he oversees employee operations, production processes, and efficiencies; and develops work schedules for each department with departmental managers (DED Exhibit 5). He holds a 30-hour General Industry Safety and Health card and an OSHA 30-hour Outreach for General Industry Safety certificate (DED Exhibits 7 and 8).

Mr. Roeper's resume reflects that he has a master's degree in business administration. He was the CEO of AAG from March 2012 to December 2019, and Vice President from January 2020 to present (DED Exhibit 5). He shares responsibilities for financial decisions, preparing bids, negotiating bonding, marketing and sales, supervising field operations, managing and signing payroll, negotiating contracts, and acting as signatory for business accounts (DED Exhibits 1 and 10).

Mr. Pineda's duties and responsibilities are: head of engineering and product design; review of major project design requirements; programming and software management; develop tooling and designs to smooth production; assist shop foreman to maximize material yield and minimize waste; management of 3-D printing; assist in new production design; prepare submittal drawings; quality control manager; and trainer (DED Exhibit 11).

Mr. Reyes and Mr. Pineda have direct experience in engineering, design, production, manufacture, and supply of architectural grilles, including operation of the production machinery. Mr. Roeper shares in many operational responsibilities, including preparing bids and supervising field operations (DED Exhibits 5, 10 and 11). There is no evidence demonstrating that Ms. Bruhnke has the training or experience to properly supervise field operations (DED Exhibits 1 and 5).

On appeal, applicant claims that Ms. Bruhnke performs take-offs; provides technical guidance; addresses field conditions; and is responsible for the quality, form, fit, and function of grilles; and provides 61 pages of supporting documentation (APP Exhibit B). This is new evidence that was not before the Division at the time of the denial and will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Also, there is no evidence in the submissions to show that Ms. Bruhnke has the experience to perform those tasks (DED Exhibits 1, 5 and 11).

Applicant also listed on appeal seven (7) projects as "a small representation of the type of projects on which [Ms. Bruhnke] was fully engaged on all levels" (APP Exhibit B). However, no details were provided to show what Ms. Bruhnke did on those projects. Also, applicant stated that Ms. Bruhnke is co-inventor of four (4) U.S. Patents, "unique designs developed for industry based on the knowledge gained working with numerous clients and helping to solve the challenges they

face.” The patents submitted list Ms. Bruhnke and Mr. Roeper as the inventors. However, no details were offered to show how she collaborated on the patents and her specific contributions to the design of products (APP Exhibit B).

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).

The application states that Ms. Bruhnke shares responsibility for all managerial operations except negotiating bonding, which Mr. Roeper controls, and negotiating insurance, which Ms. Bruhnke controls (DED Exhibit 1). Ms. Bruhnke allegedly shares responsibility for estimating with Mr. Cywinski, who assists in the engineering of submittals. Mr. Cywinski’s duties include preparing customer estimates, engineering, production, and coordinating with the shop foreman (DED Exhibits 1 and 11). However, there is no evidence that Ms. Bruhnke has the training or experience to do the estimating (DED Exhibits 1 and 5). The application states that Ms. Bruhnke and Mr. Roeper share responsibility for preparing bids. The narrative regarding Ms. Bruhnke’s responsibilities states she is involved in “major bid review” (DED Exhibit 11). Even if this was considered the same as preparing bids, she shares responsibility and therefore does not exercise independent control. The application states the Ms. Bruhnke shares responsibility for supervising

field operations with Mr. Roeper (DED Exhibits 1 and 10). Again, there is no evidence to support that Ms. Bruhnke has the credentials or experience to supervise field operations. Also, since she shares in this responsibility, she does not exercise independent control.

The Division's determination to deny the application on the basis that AAG failed to demonstrate that Ms. Bruhnke possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

II. Control

The Division also denied certification on the ground that Ms. Bruhnke is not the highest-ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

The Board of Directors is made up of Ms. Bruhnke, Mr. Roeper, Mr. Andres Pineda, Vice President of Engineering/Quality, Mr. Angelo Reyes, Jr., Manager of Shop Production and Safety, and Ms. Diane Smith, Assistant Vice President/Secretary (DED Exhibit 1).

Article III, Section 2 of the By-Laws states "The Board of Directors shall be responsible for the control and management of the business and affairs, property and interests of the Corporation..." Article III, Section 6 states "...the presence of a majority of the entire Board... shall constitute a quorum for the transaction of business..." Article III, Section 7 states "At all meetings of the Board of Directors, each Director present shall have one vote, irrespective of the number of shares of stock, if any, he may hold." (DED Exhibit 12).

There are five Directors. The Board cannot transact business and act without at least one other Director voting the same as Ms. Bruhnke. Therefore, she does not control the Board.

Also, there is no provision in the By-Laws stating which officer serves as the highest-ranking officer. Therefore, it is unknown who serves as the highest-ranking officer (DED Exhibit 12).

The Division's determination to deny the application on the basis that AAG failed to demonstrate that Ms. Bruhnke is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

CONCLUSION

AAG 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(c)(1), 144.2(c)(2) and 144.2(d)(1) 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 AAG's application for certification as a woman-owned business enterprise.

In the Matter of Advanced Arch Grilleworks, Inc. dba Advanced Arch Grilles
 DED File ID No. 7762784
 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	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Resumes of Lynne Bruhnke, Dan Roeper and Angelo Reyes, Jr.	Y	Y
DED 6	Resume of Diane M. Smith	Y	Y
DED 7	OSHA 30-hour General Industry Safety and Health Card of Angelo Reyes	Y	Y
DED 8	OSHA 30-hour Outreach for General Industry Certificate of Angelo Reyes	Y	Y
DED 9	Narrative Regarding Licenses, Certifications, and Accreditations	Y	Y
DED 10	Narrative Regarding Responsibility of Managerial Operations	Y	Y
DED 11	Narrative Regarding Daily Duties and Responsibilities	Y	Y
DED 12	By-Laws	Y	Y