

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

In the Matter

- of -

**the Application of An Excelsior Elevator Corporation
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 52298

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
May 29, 2024

This matter considers the appeal by An Excelsior Elevator Corporation (“Excelsior” 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 August 31, 2017, Ms. Nancy Petzold, as President, applied on behalf of Excelsior for certification as a woman-owned business enterprise (“WBE”). (APP Exhibit 1)
2. On December 31, 2019, the Division denied the application on the following grounds (APP Exhibit 2):
 - (a) The contributions of minority group members or women relied upon for certification are not proportionate to their equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR former §144.2(a)(1);
 - (b) Minority group members or women relied upon for certification do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR former §144.2(c)(2);
 - (c) Minority group members or women relied upon for certification do not make decisions pertaining to the operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1);

(d) Minority group members or women relied upon for certification have not demonstrated adequate managerial experience or technical competence to operate the business enterprise, and have not demonstrated the working knowledge and ability needed to operate the business enterprise, as required under 5 NYCRR former §§ 144.2(b)(1)(i) and 144.2(b)(1)(ii); and

(e) Minority group members or women relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(iii).

3. On February 28, 2020, Excelsior submitted a Request to Appeal via Hearing. (APP Exhibit 3).
4. On May 9, 2023, a Notice of Hearing was sent to all parties (Hearing Officer Exhibit 3).
5. A hearing was held before Administrative Law Judge John W. Scott on June 6, 2023, continued June 7, 2023, and concluded on August 24, 2023.
6. The case was assigned to Administrative Law Judge David A. Murad on May 13, 2024.

FINDINGS OF FACT

7. Excelsior is engaged in the business of commercial and residential vertical transportation of elevators, escalators, dumbwaiters, and handicap lifts, performing installation and modernization of new devices, as well as maintenance and repair of existing devices. (APP Exhibit 1).
8. Ms. Nancy Petzold is the President and 60% owner of Excelsior. Eric Petzold is the Secretary/Treasurer and 40% owner of Excelsior. (APP Exhibit 1).
9. Excelsior was established in 2000 by Eric Petzold and Vincent DiTucci. Each owner held 100 shares. In 2007, Eric Petzold purchased Mr. DiTucci's shares for \$[REDACTED], becoming

the 100% owner. The application provides that in 2008, Eric Petzold sold 120 of his 200 shares to Nancy Petzold for \$ [REDACTED] (APP Exhibit 1).

10. In 2014, Nancy Petzold was compensated \$ [REDACTED] from Excelsior, while Eric Petzold was compensated \$ [REDACTED]. In 2015, Nancy Petzold was compensated \$ [REDACTED] from Excelsior, while Eric Petzold was compensated \$ [REDACTED]. In 2016, Nancy Petzold was compensated \$ [REDACTED] from Excelsior, while Eric Petzold was compensated \$ [REDACTED]. In 2017, Nancy Petzold was compensated \$ [REDACTED] from Excelsior, while Eric Petzold was compensated \$ [REDACTED] (DED Exhibits 6, 7, 8 and 9).

11. The application states that (1) Nancy Petzold is responsible for the following managerial operations: financial decisions, estimating, negotiating bonding, negotiating insurance, marketing and sales, hiring and firing, purchasing equipment/sales, managing and signing payroll, and is a signatory for business accounts; (2) Nicole Regano is responsible for preparing bids, and marketing and sales; (3) Eric Petzold is responsible for Financial Decisions, hiring and firing, supervising field operations, and is a signatory for business accounts; and (4) Raymond Baruso is responsible for estimating. (APP Exhibit 1).

12. The application further states that Nancy Petzold and Eric Petzold are jointly or individually owners and officers of twelve other business entities (APP Exhibit 1).

13. Nancy Petzold's duties as President/CEO of Excelsior from January 2008 to present include managing and overseeing day-to-day operation of the business; supervising employees in the field and office; conducting weekly staff meetings; estimating projects, as well as budgeting to assure project is completed under budget and on time; and contract negotiations, legal matters, and insurance/bonding. She holds a bachelor's degree in business administration. (DED Exhibit 10).

14. Eric Petzold's resume reflects that he has worked consistently in the elevator business industry since 1988 and is a Certified Elevator Inspector and Elevator Agency Director (DED Exhibit 11).

APPLICABLE LAW

5 NYCRR former §144.2(a)(1) states as follows:

The contribution of minority group member(s) or woman owner must be 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 former §144.2(b)(1) states as follows:

- (1) Decisions pertaining to the operation of the business enterprise must be made by minority members or women claiming ownership of that business enterprise. The following will be considered in this regard:
 - (i) Minority group members or women must have adequate managerial experience or technical competence in the business enterprise seeking certification.
 - (ii) Minority group members or women must demonstrate the working knowledge and ability needed to operate the business enterprise.
 - (iii) Minority group members or women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise.

5 NYCRR former §144.2(c)(2) states in relevant part as follows:

...The minority group member or woman owner must enjoy the customary incidents of ownership and must share in the risks and profits, in proportion with their ownership interest in the business enterprise.

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 Excelsior 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

Mr. Joshua Spitalnik, Esq., of Spitalnik & Spitalnik, PC, appeared at the hearing on behalf of Excelsior. The following witnesses testified on behalf of Excelsior: Nancy Petzold, President, and Nando Riola, accountant. Excelsior offered the following exhibits: APP Exhibits 1-4, 6 and 13. Exhibit 1 was received into evidence with the exception of KK, LL, NN, OO and PP. Exhibits 2, 3 and 13 were received into evidence. Exhibits 4 and 6 were not received into evidence. APP Exhibit 2 was also referenced as Hearing Officer Exhibit 1. APP Exhibit 3 was also referenced as Hearing Officer Exhibit 2.

Ms. Dennie Byam, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Matthew LeFebvre, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1, 4. and 6 - 36.

I. Ownership

The Division denied Excelsior’s application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Petzold made a contribution proportionate to her equity interest in the business enterprise, as demonstrated by, but not limited to, contributions of money, property, equipment or shared in the risks and profits in proportion to her equity interest therein, as required by 5 NYCRR former § 144.2(b)(3).

Nancy Petzold testified that she purchased 120 shares from Eric Petzold on January 18, 2008, for the sum of \$[REDACTED]. She stated the purchase amount was calculated by her prior accountant. No documentation or testimony was offered to substantiate this claim. She stated that she withdrew this amount from her Morgan Stanley account and deposited it into her personal account. She identified attachment QQ to APP Exhibit 1 as the letter from Morgan Stanley which enclosed the \$[REDACTED] check. She did not pay Eric Petzold directly. Subsequently, three checks totaling \$[REDACTED] were “infused into the business.” (Hearing Testimony of Nancy Petzold).

Nando Riola testified that he is the accountant for the Petzolds and their businesses. He testified that the \$[REDACTED] was deposited into a joint bank account held by Nancy and Eric Petzold. He stated that Eric Petzold made three transfers from the joint account into the business account: two (2) \$[REDACTED] payments and one (1) \$[REDACTED] payment, totaling \$[REDACTED]. He obtained this information from the Company’s QuickBooks statement which showed the following (APP Exhibit 13):

9/12/2008	Cash Transaction – <i>Deposit from Personal Account</i>	\$ [REDACTED]
9/16/2008	Transfer from Personal – <i>Due to Eric</i>	\$ [REDACTED]
9/17/2008	Funds Transfer – <i>Personal</i>	\$ [REDACTED]

Matthew LeFebvre testified that no proof was submitted to show that Nancy Petzold made the \$ [REDACTED] payment to Eric. There is no documentation to show any monies transferred from an account solely held by Nancy Petzold to Eric Petzold. (Hearing Testimony of Matthew LeFebvre).

Nancy Petzold testified that she attempted to get the documentation from her bank, but the records were no longer kept by the bank. (Hearing Testimony of Nancy Petzold). In *Matter of Creative Connections, LLC*, Recommended Order, December 8, 2016 (Final Order 17-01, January 4, 2017) it was held that a denial for failure to demonstrate a capital contribution under 5 NYCRR former § 144.2(a)(1) based on an absence of documentation of source of funds for a transaction occurring more than ten years prior, where banking retention policy is to only maintain transaction records for seven years, was not supported by substantial evidence.

Matthew LeFebvre testified that even if the \$ [REDACTED] payment for the shares was properly made, this amount was not proportionate to her equity interest; since Eric Petzold paid \$ [REDACTED] for 100 shares (\$ [REDACTED] share) in 2007, and Nancy Petzold paid \$ [REDACTED] for 120 shares in 2008 (\$ [REDACTED] share). He stated Nancy Petzold paid approximately half the value that Eric paid the year before. (Hearing Testimony of Matthew LeFebvre).

Based on the foregoing, I find that the Division's determination with regard to 5 NYCRR former § 144.2(a)(1) is supported by substantial evidence.

The Division further denied Excelsior's application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Petzold shared in the risks and profits in proportion to her equity interest therein, as required by 5 NYCRR former § 144.2(c)(2). 5 NYCRR former §144.2(c)(2) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business. It is well settled that the Division may rely upon financial records as support for the

determination that an applicant does not share in the risks and profits in proportion with her ownership interest. See *Sunrise Credit Services, Inc. v. Zapata*, 57 Misc. 3d 1225 (Sup. Ct. NY County, 2017).

Matthew LeFebvre testified regarding DED Exhibits 6, 7, 8 and 9, which are Excelsior's tax returns for 2017, 2016, 2015 and 2014, respectively. In 2014, Nancy Petzold was compensated \$[REDACTED] from Excelsior, while Eric Petzold was compensated \$[REDACTED]. In 2015, Nancy Petzold was compensated \$[REDACTED] from Excelsior, while Eric Petzold was compensated \$[REDACTED]. In 2016, Nancy Petzold was compensated \$[REDACTED] from Excelsior, while Eric Petzold was compensated \$[REDACTED]. In 2017, Nancy Petzold was compensated \$[REDACTED] from Excelsior, while Eric Petzold was compensated \$[REDACTED]. He stated that this clearly demonstrates that Nancy Petzold does not share in the profits in proportion to her equity interest. (Hearing Testimony of Matthew LeFebvre).

Nancy Petzold acknowledged that Eric Petzold's salary exceeded her salary. She testified that Eric Petzold is a member of the Union and his salary and benefits are mandated by the Union. She stated that she takes a nominal paycheck and distributions from the net profits of the business. She stated that the tax returns show that the "ordinary business income" for each year was properly allocated according to ownership percentages. (Hearing Testimony of Nancy Petzold).

Matthew LeFebvre testified that the reporting of ordinary business income on Nancy and Eric Petzold's tax returns is just an accounting entry to show what they pay their taxes on. This amount is not actually received by them and therefore is not considered in the calculation of profits received by them from the business. (Hearing Testimony of Matthew LeFebvre).

Appellant's argument regarding allocation of ordinary business income on the 2014 through 2017 tax returns is unpersuasive. As testified by Matthew LeFebvre and their own accountant, this amount is not the amount distributed to the shareholder. It is a tax reporting

requirement to allocate the corporate tax liability among the shareholders. The amounts actually distributed to each of Nancy Petzold and Eric Petzold show that Nancy Petzold did not share in the profits in proportion to her equity interest (DED Exhibits 6, 7, 8 and 9; Hearing Testimony of Nando Riola and Matthew LeFebvre).

Based on the foregoing, I find that the Division's determination with regard to 5 NYCRR former § 144.2(c)(2) is supported by substantial evidence.

II. Operation

The Division also denied Excelsior's application on the grounds that:

- (1) Nancy Petzold does not make decisions pertaining to the operation of the business, as required by 5 NYCRR former § 144.2(b)(1):
- (2) Nancy Petzold has not demonstrated adequate managerial experience or technical competence to operate the business, as required by 5 NYCRR former § 144.2(b)(1)(i);
and
- (3) Nancy Petzold has not demonstrated the working knowledge and ability to operate the business, as required by 5 NYCRR former § 144.2(b)(1)(ii).

The eligibility criteria for MWBE certification requires that the minority/woman owner "exercises the authority to control independently the day-to-day business decisions of the enterprise". See *In the Matter of Upstate Electrical, LLC v. New York State Department of Economic Development*, 179 AD 3d 1343 (3rd Dept. 2020). The minority/woman-owner "must exercise independent operational control over the core functions of the business in order to establish the requisite control for WBE certification..." *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD 3d 1517 (4th Dept. 2018).

With regard to technical competence, where the minority/woman-owner has no training or experience, and the operations staff have more substantive and more significant experience, the Division's determination denying certification is supported. See *In the Matter of Upstate Electrical, LLC*, Recommended Order dated June 11, 2018, Final Order 18-39, dated August 20, 2018.

With regard to managerial experience, the minority/woman-owner must identify the management experience and day to day management activities she engaged in. See *Scherzi Systems, LLC v. White*, 187 AD3d 1466 (3rd Dept. 2021).

"Working knowledge" is established by demonstrating an ability to review and evaluate other employees' work. See *Upstate Electrical, LLC*, supra at 1346.

Matthew LeFebvre testified that Eric Petzold is a Certified Elevator Inspector and Elevator Agency Director. He holds the licenses necessary for the business to operate. He has worked consistently in the industry since 1988. Mr. LeFebvre stated that Nancy Petzold's resume shows no industry-specific training or experience for the elevator installation/repair industry. He stated that Eric Petzold is responsible for critical revenue generating decisions for the business, including supervising field operations. He testified that Eric Petzold has the skill, training, expertise and licensing to perform, oversee, evaluate and certify the work of the company, while Nancy Petzold's contribution is "largely administrative." He discounted Nancy Petzold's claim on her resume that indicates she's responsible for supervising field operations and estimating projects. (Hearing Testimony of Matthew LeFebvre).

Nancy Petzold testified she is the "final decision maker", with "full control of everything." She negotiates the contracts, signs all contracts with clients and vendors, handles all insurance, bonding, estimating, hiring, and firing. She stated she does not need to be the license holder for

the business to operate. She reviewed the management responsibilities listed in the application which stated that she is responsible for financial decisions, estimating, negotiating bonding and insurance, marketing and sales hiring and firing, purchasing equipment/sales, managing and signing payroll, and is a signatory for the business accounts. She stated she routinely performs site visits approximately once per week. She took courses run by Minnesota Elevator and MIE University, which she stated are the same courses her elevator technicians and others in the industry take. She had been the President of Excelsior for nine years prior to making the application for WBE certification. (Hearing Testimony of Nancy Petzold).

The application and the testimony of Nancy Petzold demonstrated that:

- (1) She does make operational decisions on a day-to-day basis, as required by 5 NYCRR former § 144.2(b)(1); (2)
- (2) She has adequate managerial experience to operate the business, as required by 5 NYCRR former § 144.2(b)(1)(i); and
- (3) She has the working knowledge and ability to operate the business, as required by 5 NYCRR former § 144.2(b)(1)(ii).

Based on the foregoing, I find that the Division's determination to deny Excelsior's certification under 5 NYCRR former §§144.2(b)(1), 144.2(b)(1)(i) and 144.2b(1)(ii). was not based on substantial evidence.

The Division further denied Excelsior's application for certification as a WBE on the basis that Nancy Petzold does not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR former §144.2(b)(1)(iii).

Matthew LeFebvre testified that Nancy Petzold and Eric Petzold own twelve different businesses, several of which pay Nancy Petzold annual distributions. He stated that she has at least

some material involvement in these businesses, and the tax returns reflect that she receives income from these businesses, indicating that she devotes time to those businesses, which takes away from her ability to devote herself full-time to Excelsior. (Hearing Testimony of Matthew LeFebvre).

Nancy Petzold testified that she devotes no time to the other businesses, that she does not operate or manage the other businesses, that the income from those businesses is passive and that she devotes all her time to Excelsior. (Hearing Testimony of Nancy Petzold).

Nando Riola testified that the distributions received by Nancy Petzold are mostly the result of “passive income”, where she has no management responsibilities and devotes no time to those businesses. In 2017, the largest distribution of \$ [REDACTED] was the result of real estate that had sold. He knows this because he is the accountant for all the businesses and is in regular contract with the managers of those businesses. (Hearing Testimony of Nando Riola).

Based on the foregoing, I find that the Division’s determination to deny Excelsior’s certification under 5 NYCRR former § 144.2b(1)(iii). was not based on substantial evidence.

CONCLUSION

Excelsior met 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 found at 5 NYCRR former §§144.2(b)(1), 144.2(b)(1)(i), 144.2(b)(1)(ii) and 144.2(b)(1)(iii) was not based on substantial evidence. Excelsior 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 found at 5 NYCRR former §§144.2(a)(1) and 144.2(c)(2).

RECOMMENDATION

For the reasons set forth above, I recommend that the Director modify the Division's determination to deny Excelsior's application for certification as a woman-owned business enterprise, and as modified, affirm the determination.

In the Matter of An Excelsior Elevator Corporation
 DED File ID No. 52298
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Certification Application (except KK, LL, NN, OO and PP)	Y	Y
APP 2 / Hearing Officer 1	Denial Letter	Y	Y
APP 3 / Hearing Officer 2	Excelsior Appeal Letter	Y	Y
APP 4	George Deering License	Y	N
APP 5	Revised Package to DOB	N	N
APP 6	Rider attached to Contracts	Y	N
APP 7	General Contractor Pre-Start Requirement	N	N
APP 8	Incentive to Pay	N	N
APP 9	Mod Survey Checklist	N	N
APP 10	Mod Survey Sheet	N	N
APP 11	Test Check List	N	N
APP 12	Construction Price Guide	N	N
APP 13	Bank Ledger 8/1/08 – 9/30/08	Y	Y
Hearing Officer 3	Notice of Hearing	Y	Y
DED 1	Certification Application	Y	Y
DED 2	Denial Letter	N	N
DED 3	Appellant's Appeal Letter	N	N
DED 4	2007 Buyout Agreement	Y	Y

DED 5	Morgan Stanley Withdrawal Confirmation	N	N
DED 6	2017 Excelsior S Corp Tax Return	Y	Y
DED 7	2016 Excelsior S Corp Tax Return	Y	Y
DED 8	2015 Excelsior S Corp Tax Return	Y	Y
DED 9	2014 Excelsior S Corp Tax Return	Y	Y
DED 10	Nancy Snyder-Petzold Resume	Y	Y
DED 11	Eric Petzold Resume	Y	Y
DED 12	Eric Petzold NYC Elevator Agency Director Card	Y	Y
DED 13	Eric Petzold QEI Card	Y	Y
DED 14	2017 S Corp Tax Return – Frantic Realty	Y	Y
DED 15	2017 S Corp Tax Return – Fat Ernies Cheesesteaks Corp.	Y	Y
DED 16	2017 S Corp Tax Return – Ultra Sonic Express Inc.	Y	Y
DED 17	2017 S Corp Tax Return – Ultra Elevator Inc.	Y	Y
DED 18	2017 S Corp Tax Return – Ultra Sonic Inc.	Y	Y
DED 19	2017 S Corp Tax Return – Ultra Sonic RVC Inc.	Y	Y
DED 20	2017 S Corp Tax Return – Smoke-N-Coffee Realty Inc.	Y	Y
DED 21	2017 US Return of Partnership Income – 1 Merrick Road LLC	Y	Y
DED 22	2017 US Return of Partnership Income – 32 Houston Ave LLC	Y	Y
DED 23	2017 US Return of Partnership Income – Island Air LLC	Y	Y
DED 24	2017 US Return of Partnership Income – Paradise Citi RI LLC	Y	Y

DED 25	2017 US Return of Partnership Income – Phase 228 LLC	Y	Y
DED 26	2017 Lease Agreement between Frantic Realty and Excelsior	Y	Y
DED 27	2016 Nancy Petzold W2	Y	Y
DED 28	2016 Eric Petzold W2	Y	Y
DED 29	Stock Certificates	Y	Y
DED 30	Stock Ledger	Y	Y
DED 31	Certification Application Notarization	Y	Y
DED 32	Excelsior Stock Purchase Agreement	Y	Y
DED 33	2017 Eric and Nancy Petzold Tax Return	Y	Y
DED 34	2015 Eric and Nancy Petzold Tax Return	Y	Y
DED 35	2015 Eric and Nancy Petzold W2s	Y	Y
DED 36	2016 Eric and Nancy Petzold Tax Return	Y	Y