

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

In the Matter

- of -

the Application of Artisan AD Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 67307

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 12, 2024

This matter considers the written appeal by Artisan AD Inc. (“Artisan” 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 January 24, 2020, Ms. Amy Duffy, as President, applied on behalf of Artisan for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 21, 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);
 - (c) Minority group members or 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, as required under 5 NYCRR §144.2(c)(2); and

(d) 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 §144.2(c)(3).

3. Artisan timely filed a Request to Appeal on April 25, 2023 (APP Exhibit A, DED Exhibit 11).
4. A notice to proceed via written appeal was sent to Artisan on May 5, 2023 (DED Exhibit 11).
5. Artisan filed its written appeal on May 16, 2023 (APP Exhibit B).
6. The Division filed an Affidavit of Amanda Brennan, Project Director, dated November 17, 2023, and a brief of Laurel Wedinger-Gyimesi Esq., counsel for the Division, dated November 22, 2023.

FINDINGS OF FACT

7. Artisan is engaged in the business of new construction and renovations (DED Exhibit 1).
8. Ms. Amy Duffy is President and has a 100% ownership interest (DED Exhibit 1).
9. Ms. Duffy made no contribution for her ownership interest (DED Exhibit 1). She stated, “I did not put any personal capital contribution into Artisan...” (DED Exhibit 5). The company’s 2020 New York State Tax Return reflects that there was \$0 investment capital into the business (DED Exhibit 6).
10. The 2020 personal tax return reflects Ms. Duffy’s occupation as “Office Admin.” and Mr. Duffy’s occupation as “Construction Manager”. It also reflects that Ms. Duffy received wages in the amount of \$ [REDACTED] from Royal Environmental Services (DED Exhibit 7).
11. Ms. Duffy’s responsibilities include overseeing proposals, invoicing, and tax documents, obtaining permits to perform jobs and handle insurance requirements. She has also been employed by Royal Environmental Services Corp. as a “Purchase-Office Manager” from

2018 to present and at Best One Oil as a Purchase-Office Manager” from 1997 to present (DED Exhibit 8).

12. Mr. Duffy has “Twenty-five (25) years of experience in the residential and commercial construction and renovation field as a project manager with oversight for small and major jobs.” He performs detailed walk-throughs, estimates, bids, and proposals; hiring and supervising sub-contractors representing multiple trades; managing all aspects of each job working with clients and architects; overseeing and supervising budgets, schedules, code compliance, and permits; purchasing, supplier sources, logistics and material planning (DED Exhibit 9).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part 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...
- (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.
- (3) Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

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 Artisan 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. Given this criterion, the Division consistently denies applications for MWBE certification where, as here, an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

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." *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

Ms. Duffy made no contribution for her ownership interest (DED Exhibit 1). She stated, "I did not put any personal capital contribution into Artisan..." (DED Exhibit 5). The company's 2020 New York State Tax Return reflects that there was \$0 investment capital into the business (DED Exhibit 6).

On appeal, applicant argues that "I did not and still do not think that it makes a difference how my company bank account started. Had I known it would make a difference for the first

deposit into my checking account, I would have deposited personal money.” (APP Exhibit B). This does not negate the requirement of a personal capital contribution under 5 NYCRR §144.2(b)(2).

The Division’s determination to deny the application on the basis that Artisan failed to demonstrate that Ms. Duffy made capital contributions to Artisan 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.

Ms. Duffy 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 responsibilities include overseeing proposals, invoicing, and tax documents, obtaining permits to perform jobs and handling insurance requirements. She has been employed by Royal Environmental Services Corp. as a “Purchase-Office Manager” from 2018 to present, and by Best Oil as a “Purchase-Office Manager” from 1997 to present (DED Exhibit 8).

Mr. Duffy has twenty-five years of experience in residential and commercial construction and renovation as a project manager with oversight over small and major jobs. He performs detailed walk-throughs, estimates, bids, and proposals; hiring and supervising sub-contractors representing multiple trades; managing all aspects of each job working with clients and architects;

overseeing and supervising budgets, schedules, code compliance, and permits; purchasing, supplier sources, logistics and material planning (DED Exhibit 9).

Ms. Duffy's resume reflects 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 8).

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).

Artisan is engaged in new construction and renovation (DED Exhibit 1). Ms. Duffy does not have experience in the business' critical functions (DED Exhibit 8). Mr. Duffy's duties include working in the field, supervising subcontractors, and managing the work. He oversees "all aspects of each job" performed by Artisan. Mr. Duffy handles the critical functions of the business and is primarily responsible for overseeing the day-to-day operations of the business. (DED Exhibit 9). Ms. Duffy manages the administrative and financial aspects of the business (DED Exhibit 8).

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

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-06, dated June 2, 2020.

Ms. Duffy’s resume reflects that she also works for Royal Environmental Services Corp. as a “Purchase-Office Manager” and for Best One Oil as a “Purchase-Office Manager” (DED Exhibit 8). Her 2020 Form 1040 indicates that the only wages she received was wages in the amount of \$ [REDACTED] from Royal Environmental Services (DED Exhibit 7).

On appeal, Ms. Duffy states that she has cut back on the amount of time she devotes to Royal Environmental, and she no longer works full-time for that company. She also claims that she now receives income from Artisan (APP Exhibit B). This information was not before the Division at the time of the application and is therefore new evidence which will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

The Division’s finding that Ms. Duffy does not devote time to the daily operation of the business as required under 5 NYCRR §144.2(c)(3) is supported by substantial evidence.

CONCLUSION

Artisan 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), 144.2(c)(2), and 144.2(c)(3) and 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 Artisan's application for certification as a woman-owned business enterprise.

In the Matter of Artisan AD Inc.
DED File ID No. 67307
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	Home Improvement License	Y	Y
DED 4	Artisan Articles of Incorporation	Y	Y
DED 5	Narrative dated July 29, 2022	Y	Y
DED 6	Artisan's 2020 NYS Form CT -3	Y	Y
DED 7	Duffy 2020 Form 1040	Y	Y
DED 8	Resume of Amy Duffy	Y	Y
DED 9	Resume of Joseph Duffy	Y	Y
DED 10	Narrative dated August 8, 2022	Y	Y
DED 11	Request to Appeal with Notice to Proceed Via Written Appeal	Y	Y