

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

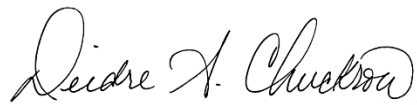
- of -

the Application of D.S. Meyer Enterprises, LLC
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 72688

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
July 28, 2025

This matter considers the written appeal by D.S. Meyer Enterprises, LLC (“DS Meyer” 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 July 25, 2024, DS Meyer applied for certification as a women-owned business enterprise (“WBE”). DS Meyer based its application on Ms. Marlene Meyer. (DED Exhibit 1).
2. On November 26, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The woman owner relied upon for certification has not demonstrated having made a capital contribution to the business enterprise proportionate to her 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) The woman owner relied upon for certification does not share in the risks and profits of the business enterprise in proportion to her equity interest therein, as required under 5 NYCRR § 144.2(b)(3);
 - (c) The woman owner relied upon for certification does 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);

- (d) The woman owner relied upon for certification is not the highest-ranking officer of the business enterprise and/or does not control the board of directors, or serve as a general partner, as required under 5 NYCRR § 144.2(d)(1); and
 - (e) The woman owner relied upon for certification does not negotiate business contracts and represent themselves to clients as the principal of the business enterprise, as demonstrated by full executed business agreements, as required under 5 NYCRR § 144.2(d)(2).
3. DS Meyer timely filed a Request to Appeal on December 27, 2024. (DED Exhibit 3).
 4. A Notice to Proceed via Written Appeal was sent to DS Meyer on December 30, 2024. (DED Exhibit 4).
 5. A written appeal letter, with exhibits A through E, was submitted by Joshua Hirshey, Esq. of Kang Haggerty LLC, on January 27, 2025. (APP Exhibits A through E).
 6. The Division filed an Affirmation of Eugenio Alcantara, Certification Director, dated July 2, 2025, and a brief of Candace C. Williamson, Esq., counsel for the Division, dated July 8, 2025.
 7. On July 22, 2025, the Division submitted Exhibits 21 and 22.

FINDINGS OF FACT

8. DS Meyer is a construction company providing sitework, utility installation, concrete, milling, and paving services. (DED Exhibit 1; APP Exhibit A).
9. Ms. Marlene Meyer, the woman-owner relied upon for certification is the 51% owner and Mr. Douglas Meyer is the 49% owner of the applicant business. (DED Exhibit 1; APP Exhibit A).
10. The application lists both Ms. Meyer and Mr. Meyer as Members. The Amended Operating Agreement lists both Ms. and Mr. Meyer as Members and Managers, and the 2022 and 2023 Schedule K-1s list Mr. Meyer as the “General Partner or LLC member manager” and Ms.

Meyer as the “Limited partner or other LLC member of the applicant business.” (DED Exhibits 1, 15, 16, and 17; APP Exhibit A).

11. DS Meyer was established on May 1, 2014. Mr. Meyer made a capital contribution, in the form of a loan in the amount of \$ [REDACTED] on May 4, 2014. (DED Exhibit 1; APP Exhibit A).

12. “[Ms.] Meyer has been involved in the majority management of [DS Meyer] since its inception. As Douglas and Marlene are husband and wife, [DS Meyer] has effectively been a joint business.” (DED Exhibits 5 and 7).

13. Majority ownership of 51% was transferred to Ms. Meyer sometime in 2021 or 2022. The Amended Operating Agreement and Membership Ledger provide that Ms. Meyer took 51% ownership on April 29, 2022, while 2021 tax documents indicate that she was the 51% owner in 2021. “There were no initial capital contributions made by Douglas or Marlene Meyer during the foundation of D.S. Meyer Enterprises, LLC or during the amended agreement in 2022.” The reason for the increase in ownership to Ms. Meyer is because,

It became clear in 2022 that Marlene took on a larger role in managing operations when gross sales significantly increased from approximately \$ [REDACTED] in 2021 to \$ [REDACTED] in 2022. Gross sales again increased in 2023 and we have projected similar sales for 2024. Marlene has driven the company to significant growth which has been reflected in the ownership interest.

(DED Exhibits 1, 7, 17, 21, and 22; APP Exhibit A).

14. “[N]o additional considerations were made” towards Ms. Meyer’s ownership interest, because the owners are married. “[Ms. Meyer’s] profit earnings were not given to her, therefore increasing her capital and majority ownership of the company.” No capital contributions were made in 2017, 2018, 2019, 2020, 2021, or 2022. (DED Exhibits 1 and 7; APP Exhibit A).

15. “On January 19, 2023, Douglas and Marlene Meyer contributed \$ [REDACTED] in cash from their joint account. There was no change in equity interest.” (DED Exhibits 1 and 7; APP Exhibit A).
16. Compensation for work at the business is a joint determination between Ms. Meyers and Mr. Meyers, and everything is “split down the middle.” 51% of the risks and profits are “technically” and “legally” assigned to Ms. Meyer, but not financially. (DED Exhibit 5)
17. Tax documents state that Ms. Meyer’s percentage in profit sharing, loss sharing, and capital ownership is 51%. (DED Exhibit 22).
18. DS Meyers has loans and finance agreements for equipment. The loan documents are between DS Meyer and different lenders. All but two of the documents are signed by Mr. Meyer as Member of the applicant business. (DED Exhibits 1 and 9; APP Exhibit A).
19. A commercial lease between DS Meyer and the lessor, 102 Braen Ave LLC runs from January 1, 2024, to December 31, 2029 and is signed by Mr. Meyer. (DED Exhibit 8).
20. The critical function of the applicant business is commercial construction, specializing in site work, utility installation, concrete, milling and paving. (DED Exhibits 1 and 5; APP Exhibit A).
21. The responsibility of the managerial operations of the business are as follows:

Managerial Operation	Person(s) Responsible, Title
Financial Decisions	Douglas Meyer, Member Marlene Meyer, Member
Estimating	Douglas Meyer Ryan Meyer, Operations
Preparing Bids	Karly Savas, Office Manager Douglas Meyer
Negotiating Bonding	Douglas Meyer Marlene Meyer

Negotiating Insurance	Karly Savas Marlene Meyer
Marketing & Sales	Karly Savas Marlene Meyer
Hiring & Firing	Douglas Meyer
Supervising Field Operations	Douglas Meyer
Purchasing Equipment/Sales	Douglas Meyer Marlene Meyer
Managing & Signing Payroll	Marlene Meyer Karly Savas
Negotiating Contracts	Douglas Meyer
Signatories for Business Accounts	Douglas Meyer Marlene Meyer

22. Ms. Meyer’s duties include business management, administration, client oversight, and team leadership. She leads a team of six employees and oversees all aspects of business operations including financial management, budgeting, and strategic planning, manages correspondence, scheduling of meetings, and records maintenance. She also maintains client relationships and addresses client inquiries and issues, handles bookkeeping tasks, including payroll and expenses, and works with accountants for tax preparation and financial reporting. corporate policies. (DED Exhibit 12).

23. Mr. Meyer’s duties include overseeing and participation in all aspects of fieldwork, including site inspections, project execution, and quality control. He is OSHA certified and ensures compliance with OSHA regulations and industry safety standards and conducts risk assessments and training sessions. Mr. Meyer also plans and manages projects from inception to completion, including scheduling, resource allocation, and client communication. He leads and supervises field teams, negotiates contracts, manages procurement, and addresses any on site issues. Mr. Meyer makes the day-to-day operational decisions and is the field organizer. (DED Exhibits 5 and 13).

24. DS Meyer's Amended Operating Agreement ("the Agreement") states that both Douglas Meyer and Marlene Meyer are Managers, with Ms. Meyer holding a 51% interest and Mr. Meyer holding a 49% interest. Article 5 of the Agreement provides that "[t]he Members shall share in the assets, liabilities, net income, net loss and distributions of the Company . . . in proportion to their percentage interests in the Company. . ." Article 6, §6.1 states that [t]he Managers shall be responsible for the operation of the Company's business in the ordinary course and shall have the authority to do all things, without the consent of the Members. ." and that the Managers may act "in their sole discretion" and "have the right to enter into and execute all contracts, documents and other agreements on behalf of the Company and thereby fully bind the Company." In addition, a Manager may, without the written consent of other Members, among other provisions: borrow money in the name of the company, utilize collateral owned by the applicant business for security for any loans; lend money in the name of the business; assign, transfer, pledge, compromise or release any claims of or debts due to the business. (DED Exhibit 17).
25. Mr. Meyer has the final say in the negotiation of contracts for the applicant business. (DED Exhibit 5).
26. An agreement for work between Brookfield (E&A), LLC ("Brookfield") and DS Meyer for milling, paving, and striping, was signed by Mr. Meyer. An agreement between Island Transportation Corp. ("Island Transport") and DS Meyer for milling and grading a parking lot, has an illegible signature by someone from DS Meyer. (DED Exhibits 10 and 11).

APPLICABLE LAW

5 NYCRR § 144.2 (b)(2) states as follows:

Capital contribution. 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 or 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(b)(3) states as follows:

Risks and profits. Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

5 NYCRR § 144.2 (c)(2) states as follows:

Operational decisions. Minority group members and 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.

5 NYCRR § 144.2 (d)(1) and (2) states as follows:

Control. Minority group members or women relied upon for certification must have the power to control the business enterprise for which certification is sought. The division shall assess whether minority group members and women possess such control based upon the following criteria:

- (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.
- (2) Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

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 DS Meyer 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 – Capital Contribution

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the minority/woman-owner's contribution came from assets belonging solely to the minority/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, April 25, 2017 (Final Order 17-28, May 08, 2017), *Matter of Spring Electric, Inc.*, Recommended Order, March 17, 2017 (Final Order 17-21, 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).

DS Meyer was established on May 1, 2014, and is owned by Ms. Marlene Meyer and her husband Mr. Douglas Meyer. (DED Exhibits 1, 5, and 7; APP Exhibit A). Ownership of the business was originally divided equally with both Ms. Meyer and Mr. Meyer owning 50%, but the ownership changed in either 2021 or 2022 with Ms. Meyer's ownership interest increasing to 51% and Mr. Meyer's interest decreasing to 49%. (DED Exhibits 1, 5, 7, 17, and 21; APP Exhibit A).

Section 2E of the application states that Mr. Meyer contributed \$██████, in the form of a loan, to the business on May 4, 2014. (DED Exhibit 1; APP Exhibit A). The applicant also states that, "[t]here were no initial capital contributions made by Douglas or Marlene Meyer during the foundation of [the applicant business] or during the amended agreement in 2022." (DED Exhibits 1 and 6; APP Exhibit A). Specifically, "[t]here were no capital contributions in 2017, 2018, 2019,

2020, 2021 or 2022.” However, “[i]n 2023, Douglas and Marlene Meyer contributed \$ [REDACTED] in cash. . . This was made from the joint account of Marlene and Douglas Meyer.” (DED Exhibit 1 and 7; APP Exhibit A). Further, Applicant explains the reason for the change in ownership was that Ms. Meyer:

Ha[d] been involved in the majority management of [DS Meyer] since inception. As Douglas and Marlene are husband and wife, [DS Meyer] has effectively been a joint business. It became clear in 2022 that Marlene took on a larger role in managing operations when gross sales significantly increased. . . Marlene has driven the company to significant growth which has been reflected in the ownership interest. Since they are married, no additional considerations were made. Throughout the years in business, Marlene[‘]s profit earnings were not given to her, therefore increasing her capital and majority ownership of the company.

(DED Exhibits 1 and 7; APP Exhibit A).

Here, as per the application and supporting documentation, no capital contribution was contributed by either party at the inception of the applicant business. Mr. Meyer’s contribution of \$ [REDACTED], made in 2014 at the time of the formation of the company, was not a contribution but instead a loan. Loans, generally, “do not constitute contributions to [a] business, as they are viewed as an extension of credit in anticipation of repayment.” *Matter of Arkhouse Management Co. LP*, Recommended Order, November 2, 2024 (Final Order 24-12, January 8, 2025), see also *Matter of PamTen, Inc.*, Recommended Order, June 26, 2018 (Final Order 18-38, July 30, 2018).

Ms. Meyer became the 51% owner of the business in either 2021 or 2022. (DED Exhibits 1, 5, 17, 21, and 22; APP Exhibit A). Applicant concedes on appeal that no monetary capital contributions were made when Ms. Meyer obtained her majority ownership interest and argues that Ms. Meyer’s contribution was her “sweat equity and expertise in growing sales by more than 50% year over year from 2021 to 2024.” While the application asserts that the change in ownership was because of Ms. Meyer’s role in increasing the profitability of the business there was no evidence presented then, or on appeal, that her expertise was uncompensated, nor was any

documentation provided regarding the valuation of Ms. Meyer's claimed expertise. (DED Exhibits 1 and 7; APP Exhibit A).

The regulation is clear that in order for expertise to be considered as a source of capital contribution, it "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(b)(2)(i)(4)). Further, it is the responsibility of the applicant to clearly document and provide "a reasonable assessment of the fair market value of the expertise" to be considered a capital contribution." 5 NYCRR § 144.2(b)(2)(i)(4) and *see Matter of CCS Custom Construction Services*, Recommended Order, March 25, 2025 (Final Order April 11, 2025); *Matter of Jobena Corporation*, Recommended Order, April 3, 2025 (Final Order April 18, 2025).

Here, there is no evidence that the work done by Ms. Meyer was uncompensated and no valuation of the fair market value of her expertise, in exchange for the increase in ownership, was provided. Where there is no evidence that the person relied upon for certification's expertise was uncompensated, and where there is no documentation of the value of the claimed expertise, expertise cannot be considered as a capital contribution. See *Matter of Casara Construction Supply Inc.*, Recommended Order, February 23, 2024 (Final Order 24-03, July 18, 2024); *Matter of Darr Construction Equipment Corp.*, Recommended Order, August 30, 2022 (Final Order 22-11, November 7, 2022); *Matter of JVR Electric, Inc.*, Recommended Order, August 31, 2016 (Final Order 16-43, September 9, 2016) (applicant provided no valuation of owner's contributions of expertise. Without such information, the Division was unable to ascertain whether the owner's contribution was proportionate).

Based on the foregoing, the Division's determination to deny the application on the basis that DS Meyer failed to demonstrate that Ms. Meyer made capital contributions to DS Meyer in proportion to her ownership interest, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Ownership - Risks and Profits

The Division also denied DS Meyer's application on the basis that the woman owner, relied upon for certification did not share in the risks and profits of the business enterprise in proportion to her ownership interest as required by 5 NYCRR §144.2(b)(3).

The Division routinely denies certification where there is a disparity in compensation and in risk between the majority shareholder and other owners of the business. See *Matter of Arkhouse, supra*, and see *Matter of Spring Electric, Inc., supra*, *Matter of Keith Titus Corporation, Inc.* Recommended Order, October 9, 2019 (Final Order 19-29, January 16, 2020), and *Darr Construction, supra*. In addition to a review of compensation and wages received, the Division also considers the risks taken by those holding ownership interests. See *Arkhouse Management, supra*; *Matter of Meltek, Inc.*, Recommended Order, November 17, 2023 (Final Order 23-12, May 29, 2024). The owner relied upon for certification must share in both the risks and profits in proportion to their ownership interest in the applicant business. *Matter of The Loren Group, Ltd.*, Recommended Order, May 9, 2024 (Final Order 24-09, October 31, 2024);

The Applicant bears the burden of establishing that the minority/woman group member relied upon for certification has met this 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).

In this instance, the ordinary business income distributions as reported on the business tax returns, is divided in proportion to the ownership interests of Ms. Meyer and Mr. Meyer. (DED Exhibits 15, 16, and 22). The Division's denial is thus based exclusively on its assessment of the risks held by the applicant. (DED Exhibit 2; APP Exhibit B). Here, documents regarding risks held by the business include equipment leases, business financing documents, and commercial leases. These documents are all between DS Meyer and the individual lenders with Mr. Meyer being the signatory on the majority of the documents. (DED Exhibits 8 and 9).

The Division contends that because Mr. Meyer signed the loan documents, and not Ms. Meyer, he is the guarantor on the loans and thus bears a disproportionate percentage of the risks held by the applicant business. (DED Exhibit 2; APP Exhibit B). However, the loans themselves are not between Mr. Meyer and a lender, but are between DS Meyer, with Mr. Meyer signing as a member or agent of the business, and the lenders. Thus, the guarantor of the loans is the business enterprise, and not Mr. Meyer individually.

Applicant produces new documents on appeal, including an American Express line of credit, to be considered regarding this denial ground, which were not before the Division at the time of the application and are not clarifying and therefore inadmissible under *Scherzi Systems, supra*. (APP Exhibit E).

Applicant is correct in its argument that it is immaterial who signs the loan documents on behalf of DS Meyer, as it relates to this regulation. The Amended Operating Agreement states unequivocally that both Ms. Meyer and Mr. Meyer share in the assets, liabilities, net income, and net losses in proportion to their ownership interests, and the loans and documents signed by Mr. Meyer, are all between the business and the lenders, with Mr. Meyer signing as an agent for the

business, and not in his personal capacity. (DED Exhibits 9 and 17). Thus Ms. Meyer does share in the risks of the business in proportion to her ownership interest.

Based on the foregoing, I find that the Division’s determination with regards to 5 NYCRR § 144.2(b)(3) is not supported by substantial evidence.

III. Day-to-Day Operations

The Division denied DS Meyer’s application for certification as a WBE on the basis that the applicant business failed to demonstrate that Ms. Meyer makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise as required by 5 NYCRR § 144.2(c)(2). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) “The products or services the business enterprise provides to clients; and” (2) “The means by which the business enterprise obtains contracts or orders.” 5 NYCRR § 144.2 (c)(2).

The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. *Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 A.D.3d 1682 (3d Dept. 2019), see also *Upstate Electrical, LLC v New York State Department of Economic Development*, 179 A.D.3d 1343 (3d Dept. 2020); *Matter of Jason Office Products Inc.*, Recommended Order, November 22, 2023 (Final Order 23-12, March 8, 2024).

In its evaluation, the Division reviewed the application, narratives supplied by applicant and the resumes of Ms. Meyer and Mr. Meyer and conducted an interview. (DED Exhibit 2; APP Exhibit B). The application states that Marlene Meyer does not participate in Estimating, Preparing

Bids, Hiring and Firing, Supervising Field Operations, or Negotiating Contracts. Instead, Douglas Meyer is solely responsible for Supervising Field Operations, Negotiating Contracts, and Hiring and Firing, and shares the responsibility with other employees for Estimating and Preparing Bids. (DED Exhibit 1; APP Exhibit A). In addition, Ms. Meyer shares responsibility for Financial Decisions, Negotiating Bonding, Negotiating Insurance, Marketing and Sales, Purchasing Equipment/Sales, and as a Signatory for Business Accounts with either Douglas Meyer or other DS Meyer employees. (DED Exhibit 1; APP Exhibit A).

A review of Ms. Meyer's resume corroborates the information contained in the application and indicates that her role in the applicant business is administrative and financial in nature, with her responsibilities including financial management, budgeting, strategic planning, administrative duties, and financial oversight. (DED Exhibits 1 and 12; APP Exhibit A). Mr. Meyer's resume, in contrast, states that his role in the applicant business relates to its daily operations, and includes project management, training employees, compliance with safety regulations, and planning, managing, and executing projects. (DED Exhibit 13). In addition, Ms. Meyer, during her interview, confirmed that it is Mr. Meyer who is the person who makes the day-to-day operational decisions for the applicant business, and that her role is on the "administrative side." (DED Exhibit 5). Further, Ms. Meyer states Mr. Meyer "has the expertise," and is "on the [job] site." (DED Exhibit 5).

On appeal, Applicant argues that the Division's definition of "critical functions" is flawed and that Ms. Meyer's role in developing and maintaining the business was ignored. While Applicant concedes that the site work, utility installation, concrete milling, and paving is its primary revenue source, it argues that the functions performed by Ms. Meyer are also critical to the operation of the business and relies on *Panko Electrical, supra*, to argue that Ms. Meyer is not

required to “have the expertise in installation/concrete/milling/paving . . . to be a WBE-certified business.” However, Applicant’s reliance on *Panko* is misplaced. In *Panko*, the Court reasoned that an owner relied upon for certification must maintain operational control of the applicant business and determined that where the owner relied upon did not visit work sites, did not supervise field operations, was not involved in the bidding process, and did not approve estimates, she was not independently in control of the day-to-day business operations.

Here, while the administrative and financial functions of a business are important, and Ms. Meyer does manage the administration of the business, she, herself, states that it is Mr. Meyer who handles the day-to-day operations, a statement supported by the application and its supporting documents. (DED Exhibit 5). In addition, during the interview the Meyers both state that the business is run jointly. (DED Exhibit 5). Businesses where the non-eligible spouse has the education and expertise to perform the specialized work and the owner spouse relied upon for certification handles the administrative aspects is considered a family-owned business, which does not meet the criteria for WBE certification. See *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 A.D.3d 1582 (3d Dept. 2019). It is well settled that where the non-qualifying owner or other employee, with more significant experience, actively engages in the core functions of the business, denial based on lack of operational control is appropriate. See *Panko, supra*, and *Upstate Electrical, supra*.

Here, the evidence presented establishes that Ms. Meyer is not responsible for the day-to-day operations of the business enterprise, and that the business functions as a family-owned business, not a WBE. Thus, the Division’s determination that DS Meyer has not demonstrated that Ms. Meyer makes 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), is supported by substantial evidence.

IV. Control - Highest Ranking Officer

The Division also denied DS Meyer's application on the grounds that the woman relied upon for certification is not the highest-ranking officer of the business enterprise, does not control the board of directors, or serve as a general partner as required by 5 NYCRR § 144.2(d)(1). In evaluating this regulation, the Division requests a list of the applicant business' corporate directors and regularly examines an applicant's by-laws and operating agreements. See e.g. *Matter of ADK Water Solutions, Inc.*, Recommended Order, June 12, 2023 (Final Order 23-07, Aug. 10, 2023), *Matter of LHS International, Inc.*, Recommended Order, June 6, 2023 (Final Order 23-07, Aug. 11, 2023), and *Matter of S.C. Spencer Electric, Inc.* Recommended Order, July 29, 2021 (Final Order 22-04, March 31, 2022).

Here, the Amended Operating Agreement provides that Ms. Meyer and Mr. Meyer are the two Members of the applicant business, and that both are designated as "Managers." (DED Exhibit 17). The Amended Operating Agreement Article 6, §6.1 states that [t]he Managers shall be responsible for the operation of the Company's business in the ordinary course and shall have the authority to do all things, without the consent of the Members. . .", and that they may act "in their sole discretion" and "have the right to enter into and execute all contracts, documents and other agreements on behalf of the Company and thereby fully bind the Company." (DED Exhibit 17). Further, the federal tax return K-1 Schedules for 2022 and 2023 list Mr. Meyer as the "General partner or LLC member manager" and Ms. Meyer as a "Limited partner or other LLC member." (DED Exhibits 15 and 16).

On appeal, Applicant argues that the designation of Mr. Meyer as the General Partner on the Schedule K-1s for both 2022 and 2023 are errors, and that DS Meyer is working to correct the errors with an accountant. (APP Exhibit A) In addition, Applicant argues that the Division ignored the Operating Agreement, stating that Ms. Meyer’s 51% ownership and her ability “to be a signatory on any and all contracts,” as evidence of her role as the highest-ranking member and managing member. (DED Exhibit 17).

While it is undisputed that Ms. Meyer is the 51% owner of the applicant business, nothing in any of the documents presented demonstrates that she is or holds herself out to be the highest ranking member or managing member of DS Meyer. The tax documents state specifically that Mr. Meyer is the “General partner or managing member” and Ms. Meyer is a “limited partner or non-managing member.” (DED Exhibits 15 and 16). Updates or edits to those tax filings have not been produced, and even if they were could not be considered as they would be new information and therefore inadmissible under *Scherzi Systems, supra*. Further, the Amended Operating Agreement is clear that both members, notwithstanding their difference in ownership percentage, share equally in the management of the applicant business. (DED Exhibit 17).

Thus, the Division’s determination that the woman owner, relied upon for certification, is not the highest-ranking officer of the business enterprise, and does not control the board of directors, as required by 5 NYCRR § 144.2(d)(1) is supported by substantial evidence.

V. Control - Business Negotiations

An owner relied upon for certification must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. See *Matter of C EZ Key Service*, Recommended Order, January 5, 2024 (Final Order 24-01, February 22, 2024). Signing contracts

demonstrates that a minority/woman owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Darr Construction, supra*. Substantial evidence supports the Division's denial where no evidence was presented that the minority owner signs contracts on behalf of the business. (See *Matter of Jaclyn Building Services, Inc.* Recommended Order, May 23, 2016 (Final Order 16-21, May 25, 2016).

Here, the application is explicit, and states that Mr. Meyer is solely responsible for the contract negotiations. (DED Exhibit 1; APP Exhibit A). In addition, the commercial lease for the applicant business and the Brookfield contract for milling, paving, and striping are both only signed by Mr. Meyer. (DED Exhibits 8 and 10). In addition, the applicant acknowledges that Mr. Meyer reviews all proposals and has the final say on all contracts. (DED Exhibit 5). The fact that Ms. Meyer is permitted by the Amended Operating Agreement, to negotiate and sign contracts, is not evidence that she negotiates and executes contracts. (DED Exhibit 17).

The information contained in the record before the Division at the time of its determination, does not demonstrate that Ms. Meyer engages in negotiations or executes contracts. Thus, the MWBE application contains substantial evidence to support the Division's finding that DS Meyer failed to demonstrate that Ms. Meyer negotiates business contracts, as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

DS Meyer 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)(2), 144.2(d)(1), and 144.2(d)(2) was not based on substantial evidence. DS Meyer did however, meet its burden with respect to the eligibility criteria at 5 NYCRR § 144.2(b)(3).

RECOMMENDATION

The Division's determination to deny D.S Meyer Enterprises, LLC's application for certification as a woman-owned business enterprise should be modified in part, and as modified, affirmed, and a final order be issued.

In the Matter of D.S. Meyer Enterprises, LLC
DED File ID No. 72688
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	WBE Application (7/25/2024)	Y	Y
APP B	Denial Determination	Y	Y
APP C	Request to Appeal	Y	Y
APP D	Notice to Proceed via Written Appeal	Y	Y
APP E	American Express Statement (Closing 1/16/2025); Columbia Bank Loan Documents	Y	N
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal Via Written Submission	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Virtual Interview Recording and Transcript	Y	Y
DED 6	Letters Addressing Capital Contribution and Stock Ledger	Y	Y
DED 7	Narrative Response Re: Contribution	Y	Y
DED 8	Commercial Lease	Y	Y
DED 9	Equipment Leases	Y	Y
DED 10	Agreement between Brookfield (E&A) LLC and DS Meyer dated March 15, 2024	Y	Y
DED 11	Proposal and Agreement between Island Transportation Corp. and DS Meyer dated 4/30/24	Y	Y
DED 12	Resume of Marlene Meyer	Y	Y
DED 13	Resume of Douglas Meyer and OSHA Certification	Y	Y
DED 14	Narrative in Response to Responsibilities	Y	Y
DED 15	2022 Partnership Tax Returns	Y	Y

DED 16	2023 Partnership Tax Returns	Y	Y
DED 17	Amended Operating Agreement	Y	Y
DED 18	2021 W-2s	Y	Y
DED 19	2022 W-2s	Y	Y
DED 20	Certificate of Formation	Y	Y
DED 21	Membership Ledger	Y	Y
DED 22	2021 Business Tax Returns NY and NJ	Y	Y