

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

In the Matter

- of -

the Application of EduTech Computer Services, Inc.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 71717

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
October 8, 2024

This matter considers the written appeal by EduTech Computer Services, Inc., (“EduTech” or “applicant”) pursuant to New York State Executive Law Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York (5 NYCRR) parts 140-144, challenging the determination of the Division of Minority and Women’s Business Development (“Division”) of the New York State Department of Economic Development (“DED”) that the business enterprise does not meet the eligibility criteria for certification as a woman-owned business enterprise (“WBE”).

PROCEDURAL HISTORY

1. On December 11, 2023, Ms. Marisol Catucci, as President, applied on behalf of EduTech for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On February 12, 2024, 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 must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4); 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. EduTech timely filed a Request to Appeal on February 27, 2024 (DED Exhibit 3).
4. A notice to proceed via written appeal was sent to EduTech on February 28, 2024 (DED Exhibit 4).
5. EduTech filed its written appeal by letter from its accountant, Anthony Roccamo, CPA, of DiMaggio and Roccamo, CPA's LLP dated April 10, 2024 (APP Exhibit A).
6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated August 9, 2024, and a brief of Dennie Byam Esq., counsel for the Division, dated August 13, 2024.

FINDINGS OF FACT

7. EduTech is engaged in the business of computer related sales, services, website design and maintenance services (DED Exhibit 1).
8. The application states that Ms. Marisol Catucci is the President and has a 95% ownership interest. William Catucci is the Secretary and has a 5% ownership interest. (DED Exhibit 1).
9. Section 2E of the application states Ms. Catucci contributed \$█████ in cash on March 20, 2007 and William Catucci contributed \$█████ on January 6, 2003 (DED Exhibit 1).
10. A narrative submitted with the application stated "Regarding business contributions, at its inception on January 6th, 2003, EduTech reported \$█████ of capital received from William Catucci in exchange for 200 shares of no-par stock of EduTech. There have been no other

contributions of capital, whether of money or tangible or intangible property since that date.” (DED Exhibits 6 and 7).

11. A Consent to Action Taken In Lieu of the Annual Meeting of the Shareholders dated January 13, 2005, stated that William Catucci owned 50 shares, and Marisol Catucci owned 50 shares. (DED Exhibit 8).
12. An undated Minutes of the Annual Meeting of Shareholders states that William Catucci and Marisol Catucci turned in their shares and reissued the shares, resulting in William Catucci owning 5 shares, or 5%, of EduTech, and Marisol Catucci owning 95 shares, or 95% of EduTech (DED Exhibit 8).
13. Article II Section 11 of the Bylaws states “Any action which may be taken at any annual or special meeting of the shareholders may be taken without a meeting on written consent, setting forth the action so taken, signed by the holders of all outstanding shares entitled to vote thereon. Written consent thus given by the holders of all outstanding shares entitled to vote shall have the same effect as a unanimous vote of the shareholders.” (DED Exhibit 9).
14. Section 2H of the application lists the Board of Directors as Marisol Catucci and William Catucci (DED Exhibit 1).
15. Article III, Section 4 of the By-Laws states “The business of the Corporation shall be managed by the Board of Directors ...” Article III, Section 6 states “A majority of the entire Board of Directors shall constitute a quorum.” Article V Section 1 states “The salaries of all officers of the Corporation shall be fixed by the Board of Directors.” Article V Section 2 states “Subject to the direction of the Board of Directors, [the President] shall be the chief executive officer of the Corporation. He shall have power to select and appoint

all necessary officers and employees of the Corporation, except those selected by the Board of Directors, and to remove all such officers and employees except those selected by the Board of Directors” (DED Exhibit 9).

APPLICABLE LAW

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

Sources of a 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 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(b)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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 EduTech 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 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).

EduTech was established on January 6, 2003, by William Catucci and he was the sole owner. (DED Exhibit 1) Marisol Catucci, the minority woman relied upon for certification, became the President and 95% owner of EduTech approximately 4 years later, on March 20, 2007. At that time, William Catucci transferred 95 shares and became the Secretary and 5% owner of EduTech.

Section 2E of the application states Ms. Catucci contributed \$[REDACTED] in cash on March 20, 2007, and William Catucci contributed \$[REDACTED] on January 6, 2003, however no documentation was submitted to support this claim. Additionally, the information that was provided is inconsistent. (DED Exhibit 1).

A narrative submitted with the application stated “Regarding business contributions, at its inception on January 6th, 2003, EduTech reported \$[REDACTED] of capital received from William Catucci in exchange for 200 shares of no-par stock of EduTech. There have been no other contributions of capital, whether of money or tangible or intangible property since that date.” (DED Exhibits 6 and 7).

A Consent to Action Taken In Lieu of the Annual Meeting of the Shareholders dated January 13, 2005, stated that Willima Catucci owned 50 shares, and Marisol Catucci owned 50 shares. (DED Exhibit 8).

An undated Minutes of the Annual Meeting of Shareholders states that William Catucci and Marisol Catucci turned in their shares and reissued the shares, resulting in William Catucci owning 5 shares, or 5%, of EduTech, and Marisol Catucci owning 95 shares, or 95% of EduTech (DED Exhibit 8).

Ms. Catucci failed to identify what her capital contribution was, and did not substantiate the source of her capital contribution. She provided inconsistent information throughout the application, narrative responses and arguments on appeal (DED Exhibits 1 and 6; APP Exhibit A).

On appeal, applicant argues that “The Catucci’s pool their resources, as do many married couples, and the minor start-up capital of \$ [REDACTED] came from their combined holdings at the time.” (APP Exhibit A). However, these are not assets solely belonging to the 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). Also, Ms. Catucci was not an owner in 2003, when the capital contribution was made and the contribution must be contemporaneous with the exchange of shares to establish adequate consideration. See *Matter of MS Analytical, LLC*, Recommended Order dated August 8, 2018, Final Order 18-47 dated January 30, 2019,

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

NYCRR §144.2(b)(4) requires that the woman-owner must not be encumbered in her ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest. See *Matter of FIS Blue, Inc.*, Recommended Order dated February 1, 2024, Final Order 24-02 dated May 7, 2024 (“FIS is managed by the Board of Directors. The Board determines the duties and authority of all officers. The President is subject to the Board’s control. Therefore, the [woman relied upon for certification] does not control the Board.”).

Article II Section 11 of the Bylaws states “Any action which may be taken at any annual or special meeting of the shareholders may be taken without a meeting on written consent...signed by the holders of all outstanding shares entitled to vote thereon. Written consent thus given by the holders of all outstanding shares entitled to vote shall have the same effect as a unanimous vote of the shareholders.” (DED Exhibit 9).

Section 2H of the application lists the Board of Directors as: Marisol Catucci and William Catucci (DED Exhibit 1).

Article III, Section 4 of the By-Laws states “The business of the Corporation shall be managed by the Board of Directors ...” Article III, Section 6 states “A majority of the entire Board of Directors shall constitute a quorum.” Article V Section 1 states “The salaries of all officers of the Corporation shall be fixed by the Board of Directors.” Article V Section 2 states “Subject to the direction of the Board of Directors, [the President] shall be the chief executive officer of the Corporation...” (DED Exhibit 9).

EduTech is managed and controlled by the Board of Directors. In order to transact business, a majority of the Board of Directors must be present in order to constitute a quorum. Therefore, both Ms. Catucci and Mr. Catucci are needed to transact business. The Board determines the duties

and authority of all officers. The President is elected by the Board and may be removed by the Board at any time with or without cause. Article V states that the salaries of all officers of the Corporation shall be fixed by the Board of Directors, therefore the Board has control over the salaries of the officers and Ms. Catucci is encumbered in her ability to realize the benefits of her ownership (DED Exhibit 9).

The Division's determination to deny the application on the basis that EduTech failed to demonstrate that Ms. Catucci is not encumbered in her ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4) is supported by substantial evidence.

II. Control

The Division also denied certification on the ground that Ms. Catucci does not control the board of directors, as required under 5 NYCRR §144.2(d)(1).

As noted above, EduTech is managed and controlled by the Board of Directors. In order to transact business, a majority of the Board of Directors must be present in order to constitute a quorum. Therefore, both Ms. Catucci and Mr. Catucci are needed to transact business. The Board determines the duties and authority of all officers. The President is elected by the Board and may be removed by the Board at any time with or without cause. The Board has control over the salaries of the officers (DED Exhibit 9).

Applicant's appeal states " Since being elected as corporation President, this firm has filed years of tax returns... showing Ms. Catucci as President of Edutech. As a S Corporation, K-1 forms showing stock ownership are part of those returns, and they show Ms. Catucci owning 95% of the stock. Income and expenses are apportioned to Ms. Catucci at 95%. Finally, Ms. Catucci's salary is \$█████ annually, and Mr. Catucci's salary is \$█████... The Catucci's believe they have

demonstrated that Ms. Catucci does run the corporation and certainly realizes more of the benefits of ownership than William.” (APP Exhibit A). However, the Division did not deny on the ground that Ms. Catucci is not the highest-ranking officer or that she was not compensated proportionately with her ownership interest. The denial ground was that Ms. Catucci does not control the Board of Directors. Since there are two people on the Board of Directors, and a majority of the Board needs to be present to constitute a quorum, both Directors are needed to transact business. Therefore, Ms. Catucci does not control the Board. (DED Exhibit 9).

The Division’s determination to deny the application on the basis that EduTech failed to demonstrate that Ms. Catucci controls the board of directors, as required under 5 NYCRR §144.2(d)(1) is supported by substantial evidence.

CONCLUSION

EduTech 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(b)(4), 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 EduTech’s application for certification as a woman-owned business enterprise.

In the Matter of EduTech Computer Services, Inc.
 DED File ID No. 71717
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant's Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	March 20, 2007 Stock Certificate for Marisol Catucci	Y	Y
DED 6	January 10, 2024 Application Narrative	Y	Y
DED 7	January 8, 2024 Application Narrative	Y	Y
DED 8	Meeting Minutes, various dates 2003 -2020	Y	Y
DED 9	EduTech's Bylaws	Y	Y
DED 10	Proof of Business Capitalization	Y	Y
DED 11	Certification Application Affidavit	Y	Y