

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

In the Matter

- of -

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

NYS DED File ID No. 66148

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
January 15, 2025

This matter considers the written appeal by ItCon Inc. (“ItCon” 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 minority and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On October 17, 2023, Ms. Leah Freiman, as CEO, applied on behalf of ItCon for certification as a minority and woman-owned business enterprise (“MWBE”) (DED Exhibit 1).
2. On February 7, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification must have 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 must devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3).
3. ItCon filed a Request to Appeal on May 5, 2024 (DED Exhibit 14).
 4. A notice to proceed via written appeal was sent to ItCon on June 10, 2024 (DED Exhibit 15).
 5. ItCon filed its written appeal by letter dated August 28, 2024 (APP Exhibit A).
 6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated December 23, 2024, and a brief of Laurel Wedinger-Gyimesi Esq., counsel for the Division, dated December 27, 2024.

FINDINGS OF FACT

7. ItCon is engaged in the business of Technology Consulting, IT Managed Services and IT Managed Security Services (DED Exhibit 1).
8. Ms. Leah Freiman is the CEO and has a 100% ownership interest. (DED Exhibit 1).
9. Section 1R of the application states that ItCon “was first owned by Moshe Freiman, in March of 2018 ownership was transferred to [Leah Freiman].” Section 2E of the application and the Stock Ledger both state that Ms. Freiman purchased 200 shares of common stock for “\$0” on March 1, 2018 (DED Exhibits 1 and 5).
10. Applicant submitted a “Transfer of Business Ownership Agreement” dated January 2018, between Moshe Freiman and Leah Freiman which states “I, Moshe Freiman (the

“Transferor”) do hereby agree to transfer all of my ownership rights of ItCon, Inc. to Leah Freiman (the “Transferee”).” (DED Exhibit 6).

11. A Narrative submitted with the Application states “Moshe and Leah are married and they decided that it would be best if the business is under Leah’s name. There was no transfer of funds, it was a mutual agreement.” (DED Exhibit 1).
12. A Narrative submitted with the Application states that Ms. Freiman “doesn’t have any formal education. She learn[ed] how to manage her business by starting small and growing slowly. She took a course on the Steven Covey Course on the 7 Habits of Highly Effective People. She spoke to business owners to get tips and help from them. She has a business coach and Mentors.” (DED Exhibit 1).
13. Ms. Freiman’s resume reflects that she had prior experience as a graphic designer and a mortgage loan officer. It identifies her skills as “Judgment and Decision Making, Critical Thinking, Sales and Marketing, Administration and Management, Quality Control and Systems Analysis, and Computers and Electronics.” It states her job responsibilities include directing/coordinating an organization’s financial or budget activities; interpret and explain policies, rules, regulations, or laws; deliver speeches, write articles or present information at meetings or conventions; identify opportunities; negotiate or approve contracts or agreements with suppliers, distributors, federal or state agencies, or other organizational entities; conduct or oversee contingency plan integration and operation; and create business continuity and disaster recovery budgets. (DED Exhibit 8).
14. Moshe Freiman’s resume reflects that he is an IT and Cybersecurity Engineer. He is the Chief Technical Officer at ItCon. His duties include “Lead and coach a team of 10

technicians.” He has IT Certification, and his skills include CompTIA A+, CompTIA Net+, CCNA, Mitel Certified, MCSE, and MCSA. (DED Exhibit 9).

15. A Narrative submitted with the application states “ItCon, Inc. is open 8:30 am – 6 pm, Monday-Friday. The CEO works every day from 9 am to 3 pm and she is involved with the leadership team, Management, Sales, Customer Relationships, and other CEO related duties.” (DED Exhibit 1).

16. In response to the Division’s request as to who was in charge of the business when Ms. Freiman was not available during hours of operation, applicant stated “we have a service manager that is in charge of the service department to make sure that it is always running smoothly and there is always someone on call. We have a marketing/sales manager that’s second in command and she makes sure everything on marketing and sales are running smoothly.” (DED Exhibit 1).

17. In response to the Division’s request to provide a “detailed narrative regarding time devoted daily by key employees as well as day-to-day duties/responsibilities concerning the critical functions by which the applicant obtains contracts or work”, applicant stated “[w]e get our contracts through marketing. We have techs working 8 – 6:30 with someone staying on call for 24 hours to make sure everything gets done.” (DED Exhibit 1).

18. Ms. Freiman’s “knowledge and understanding of the business are exceptionally deep. Although she does not hold formal certifications, Leah has acquired a thorough grasp of every facet of the company’s operations. Her proficiency is not limited to traditional business practices but encompasses a detailed understanding of technology and cybersecurity. Despite not being a technician herself, Leah is well-versed in the technical aspects and principles that underpin the company’s services.” (APP Exhibit A).

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 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 as follows:

Operation. 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) Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:
 - (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
 - (ii) The extent to which academic credentials exist for persons employed in the industry; and
 - (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

- (2) 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 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) Time devoted to operation of the business enterprise. 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 ItCon for certification as a MWBE 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 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 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).

Section 1R of the application states that ItCon “was first owned by Moshe Freiman, in March of 2018 ownership was transferred to [Leah Freiman].” Section 2E of the application and the Stock Ledger both state that Ms. Freiman purchased 200 shares of common stock for “\$0” on March 1, 2018 (DED Exhibits 1 and 5).

Applicant submitted a “Transfer of Business Ownership Agreement” dated January 2018, between Moshe Freiman and Leah Freiman which states “I, Moshe Freiman (the “Transferor”) do hereby agree to transfer all of my ownership rights of ItCon, Inc. to Leah Freiman (the “Transferee”).” (DED Exhibit 6). No consideration was listed for the transfer.

A Narrative submitted with the Application states “Moshe and Leah are married and they decided that it would be best if the business is under Leah’s name. There was no transfer of funds, it was a mutual agreement.” (DED Exhibits 1 and 5).

The application clearly shows that Ms. Freiman did not make any capital contribution for her equity interest in ItCon. (DED Exhibit 1).

On appeal, applicant argues that Ms. Freiman made a capital contribution of her expertise in business management and client communication (APP Exhibit A; DED Exhibit 14). However, this information was not submitted with the certification application. Arguments raised for the first time on appeal and documents presented that were not presented during the certification process should not be considered on the appeal. See *Matter of Lido Strategic Solutions, Inc.*, Recommended Order dated March 6, 2019, Final Order 19-02, dated June 5, 2019. This is not evidence that seeks to clarify and explain previously submitted materials. It is new evidence which will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). Additionally, applicant makes no attempt to quantify the value of the alleged expertise, and there is no claim that Ms. Freiman was not paid for services rendered to the business. Applicant failed “to clearly identify, quantify, and explain on the certification application, what is considered a capital contribution.” *Scherzi Systems*, supra.

The Division's determination to deny the application on the basis that ItCon failed to demonstrate that Ms. Freiman made capital contributions to ItCon 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 minority/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 minority/woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

5 NYCRR §144.2(c)(2) states that "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".

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". See *J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018).

Ms. Freiman does not have any industry-specific expertise; her skills are related to general business or office management. She does not possess any education, licensing, technical training,

or job experience relevant to ItCon's critical functions of Technology Consulting, IT Managed Services, or IT Managed Security Services. A Narrative submitted with the Application states that Ms. Freiman "doesn't have any formal education. She learn[ed] how to manage her business by starting small and growing slowly. She took a course on the Steven Covey Course on the 7 Habits of Highly Effective People. She spoke to business owners to get tips and help from them. She has a business coach and Mentors." (DED Exhibit 1).

Ms. Freiman's resume reflects that she had prior experience as a graphic designer and a mortgage loan officer. It identifies her skills as "Judgment and Decision Making, Critical Thinking, Sales and Marketing, Administration and Management, Quality Control and Systems Analysis, and Computers and Electronics." It states her job responsibilities include directing/coordinating an organization's financial or budget activities; interpret and explain policies, rules, regulations, or laws; deliver speeches, write articles or present information at meetings or conventions; identify opportunities; negotiate or approve contracts or agreements with suppliers, distributors, federal or state agencies, or other organizational entities; conduct or oversee contingency plan integration and operation; and create business continuity and disaster recovery budgets. (DED Exhibit 8).

Moshe Freiman's resume reflects that he is an IT and Cybersecurity Engineer. He is the Chief Technical Officer at ItCon. His duties include "Lead and coach a team of 10 technicians." He has IT Certification, and his skills include CompTIA A+, CompTIA Net+, CCNA, Mitel Certified, MCSE, and MCSA. (DED Exhibit 9).

Mr. Freiman, not Ms. Freiman, has the technical background related to ItCon's business. He is the lead person over the technicians working at ItCon. His duties are aligned with the critical

functions of the business, and he has the industry-specific competence to make the critical business decisions. (DED Exhibit 9).

On appeal, applicant argues that Ms. Freiman’s “knowledge and understanding of the business are exceptionally deep. Although she does not hold formal certifications, Leah has acquired a thorough grasp of every facet of the company’s operations. Her proficiency is not limited to traditional business practices but encompasses a detailed understanding of technology and cybersecurity. Despite not being a technician herself, Leah is well-versed in the technical aspects and principles that underpin the company’s services.” (APP Exhibit A). However, as Ms. Freiman is not a technician, she must rely upon the technicians to perform the critical business functions. Additionally, Ms. Freiman does not maintain independent operational control of the business as Mr. Freiman supervises the technicians, many of whom have multiple IT certifications. (DED Exhibit 7).

The Division’s determination to deny the application on the basis that ItCon failed to demonstrate that Ms. Freiman 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 minority/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.

A Narrative submitted with the application states “ItCon, Inc. is open 8:30 am – 6 pm, Monday-Friday. The CEO works every day from 9 am to 3 pm and she is involved with the leadership team, Management, Sales, Customer Relationships, and other CEO related duties.” (DED Exhibit 1).

In response to the Division’s request as to who was in charge of the business when Ms. Freiman was not available during hours of operation, applicant stated “we have a service manager that is in charge of the service department to make sure that it is always running smoothly and there is always someone on call. We have a marketing/sales manager that’s second in command and she makes sure everything on marketing and sales are running smoothly.” (DED Exhibit 1).

In response to the Division’s request to provide a “detailed narrative regarding time devoted daily by key employees as well as day-to-day duties/responsibilities concerning the critical functions by which the applicant obtains contracts or work”, applicant stated “[w]e get our contracts through marketing. We have techs working 8 – 6:30 with someone staying on call for 24 hours to make sure everything gets done.” (DED Exhibit 1).

The Division consistently denies certification where the woman-owner relied upon does not perform full-time duties for the business. See, e.g., *Matter of HVAC Systems Corp.*, Recommended Order dated August 9, 2023, Final Order 23-08 dated August 17, 2023.

Ms. Freiman does not work for ItCon for many of its operational hours. She works 6 hours per day, while the technicians work “8-6:30” and some are “on call for 24 hours” Since she is not a technician, she is not “on call” making sure “everything gets done”. She is not available for a sizable portion of the working hours on a daily basis. Her service manager is in charge during those hours and the marketing/sales manager is “second in command”. (DED Exhibit 1).

On appeal, applicant did not address Ms. Freiman's time devoted to the business (DED Exhibit 14; APP Exhibit A). Accordingly, the Division's finding that Ms. Freiman 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

ItCon did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority and 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), 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 ItCon's application for certification as a minority and woman-owned business enterprise.

In the Matter of ItCon Inc.
DED File ID No. 66148
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission (Letter from Leah Freiman and Letter from Accountant)	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Agreement to be Bound by the Certification Application Affidavit	Y	Y
DED 4	ItCon Inc. Certificate of Incorporation	Y	Y
DED 5	ItCon Inc. Stock Ledger	Y	Y
DED 6	Transfer of Business Ownership Agreement	Y	Y
DED 7	Certifications of Employees of ItCon Inc.	Y	Y
DED 8	Leah Freiman Resume	Y	Y
DED 9	Moshe Freiman Resume	Y	Y
DED 10	July 17, 2023, quote to Highview National Ins. Co.	Y	Y
DED 11	August 3, 2023 quote to Yedei Chesed	Y	Y
DED 12	August 7, 2023 quote to ODA Primary Health Care Network	Y	Y
DED 13	2021 Certification Application	Y	Y
DED 14	Notice of Appeal	Y	Y
DED 15	Notice to Proceed Via Written Appeal	Y	Y