

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

In the Matter

- of -

the Application of J&L Communications LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 70651

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 21, 2024

This matter considers the written appeal by J&L Communications LLC (“J&L” 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 November 11, 2022, Ms. Jennifer Compton, as CEO, applied on behalf of J&L for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On August 10, 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 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);
 - (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);and

(d) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).

3. J&L timely filed a Request to Appeal on August 17, 2023 (DED Exhibit 3).
4. A notice to proceed via written appeal was sent to J&L on August 21, 2023 (DED Exhibit 4).
5. Applicant filed an undated written appeal with attachments. (APP Exhibit A)
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated December 13, 2023, and a brief of Kyle Satchell, Esq., counsel for the Division, dated December 19, 2023.

FINDINGS OF FACT

7. J&L is engaged in the business of marketing consulting including, but not limited to, public relations, digital communications, graphic design, and event production (DED Exhibit 1).
8. Ms. Jennifer Compton is the CEO and has a 100% ownership interest. (DED Exhibit 1).
9. A Narrative submitted by applicant for proof of business capitalization stated that “J&L is a communications and marketing business, therefore we are a service business. No material was required up front” and “This business was bootstrapped by me. I started it but we didn’t need to purchase anything to start the business.” (DED Exhibit 1). Schedule 1 attached to the Operating Agreement lists Jennifer Compton as a Class A Member, with a 51% interest and Rob Henderson as a Class A member, with a 49% interest. The capital contribution for each member is blank (DED Exhibit 6).
10. Ms. Compton’s duties as CEO are “Business development; creating and implementing the Company’s vision and mission; Evaluating the Work of other executives; Maintaining awareness of the competitive landscape; Maintaining awareness of products, services, and

capabilities that would further benefit clients; Maintaining social responsibility and maintaining WBENC status; Assessing overall risk; Setting strategic measurable goals; Managing client relationships; Delegating and directing agendas; Driving profitability; Managing the Company's organizational structure and strategy; and hiring." (DED Exhibit 6).

11. Mr. Rob Henderson is the Chief Operating Officer and Head of Client Services. His duties are "Managing the Company's overall day-to-day operations; Managing client relationships; Delegating and directing agendas; Driving profitability; Managing the Company's organizational structure and strategy; Hiring; Business development; and Financial management and oversight, including, billing, payments, and maintaining P&L per client to ensure profitability." (DED Exhibit 6).

12. Section 2.1 (a) of the Operating Agreement states "The management of the Company is vested in the Managing Members. No Member shall have any unilateral power to participate in the management of the Company except as expressly authorized by the Act, this Operating Agreement, or the Certificate of Formation." Section 2.8 states that Jennifer Compton and Rob Henderson are the Managing Members for the business. Section 3.1 of the Operating Agreement provides that the "business and affairs of J&L is managed under the direction of the Class A Members by Unanimous Consent ("the Managing Members") (DED Exhibit 6).

13. The number of employees listed in the application is: full-time: 1, part-time: 0, and contract personnel: 40. Ms. Compton stated in the application "I am the owner and only employee..." (DED Exhibit 1).

14. Ms. Compton's 2021 tax return indicates that the business's gross receipts were \$ [REDACTED], the business paid \$ [REDACTED] in wages and \$ [REDACTED] for subcontractors and direct client costs (DED Exhibit 5). The 2022 forms 1096 and 1099 indicate that the business paid \$ [REDACTED] for non-employee compensation (DED Exhibits 9 and 10).

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:

- (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.

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.

5 NYCRR §144.2(e) states as follows:

Independence. Business enterprises for which certification is sought must operate independently. In order to determine whether such business enterprises operate independently, the division shall consider but not be limited to the following criteria:

- (1) Whether the business enterprise shares resources with another entity, including, but not limited to, personnel, equipment, office space, warehouse and other storage space, and yard space;
- (2) Whether the business enterprise transacts business primarily with one other entity; and
- (3) Whether the business enterprise receives tangible benefits as a result of a connection to another entity, and whether such benefits are consistent with standard industry practices.

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 J&L 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).

A Narrative submitted by applicant for proof of business capitalization stated that "J&L is a communications and marketing business, therefore we are a service business. No material was

required up front” and “I started it but we didn’t need to purchase anything to start the business.” (DED Exhibit 1). Schedule 1 attached to the Operating Agreement lists Jennifer Compton as a Class A Member, with a 51% interest and Rob Henderson as a Class A member, with a 49% interest. The capital contribution for each member is blank (DED Exhibit 6). Therefore, no capital contribution was made by Ms. Compton for her ownership interest.

Applicant argues on appeal that “the ongoing success of the business is driven by my expertise and skills.” (APP Exhibit A). In order for expertise to be considered as a capital contribution, it must be uncompensated, specialized and directly applicable to one or more of the critical aspects of the business, and a reasonable assessment of the fair market value must be clearly documented. 5 NYCRR §144.2(b)(2)(i)(4). Applicant did not allege in the application that expertise was to be considered as a capital contribution. Applicant provided no documentation to show that the alleged expertise was uncompensated or was specialized and directly applicable to the business and did not provide a reasonable assessment of the fair market value of the expertise.

On appeal, applicant stated that she purchased a laptop, monitor, cell phone and desk and provided a receipt for \$ [REDACTED] representing opening a business account with Chase Bank. (APP Exhibit A). The receipt does not indicate that the funds were deposited into an account for J&L. Also, no documentation was submitted to support the claim that the laptop, monitor, cell phone and desk were purchased for the business. Applicant also submitted an invoice showing that applicant paid \$ [REDACTED] for “dedicated work space for the business.” (APP Exhibit A). However, no documentation was submitted to show the source of the funds used to pay for the workspace.

Applicant also submitted on appeal a statement from Chase showing ATM and Debit withdrawals totaling \$ [REDACTED] between October 19, 2016, and October 26, 2016, of which

\$ [REDACTED] were for initial legal fees to set up the business (APP Exhibit A). Again, there is no documentation to show that the account in question is the business account for J&L.

The Division's determination to deny the application on the basis that J&L failed to demonstrate that Ms. Compton made capital contributions to J&L 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)(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 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. *Matter of Panko Electrical and Maintenance Corp. v. Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019).

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).

Ms. Compton's duties as CEO are "Business development; creating and implementing the Company's vision and mission; Evaluating the Work of other executives; Maintaining awareness of the competitive landscape; Maintaining awareness of products, services, and capabilities that would further benefit clients; Maintaining social responsibility and maintaining WBENC status;

Assessing overall risk; Setting strategic measurable goals; Managing client relationships; Delegating and directing agendas; Driving profitability; Managing the Company's organizational structure and strategy; and hiring." (DED Exhibit 6).

Mr. Rob Henderson is the Chief Operating Officer and Head of Client Services. His duties are "Managing the Company's overall day-to-day operations; Managing client relationships; Delegating and directing agendas; Driving profitability; Managing the Company's organizational structure and strategy; Hiring; Business development; and Financial management and oversight, including, billing, payments, and maintaining P&L per client to ensure profitability." (DED Exhibit 6).

Mr. Henderson, as a non-owner, is responsible for the day-to-operation of the business (DED Exhibit 6), not Ms. Compton.

Applicant states on appeal that Ms. Compton is the CEO and is thereby responsible for all business decisions, including all operating decisions, for the business (APP Exhibit A). Applicant did not explain why the Operating Agreement lists Mr. Henderson's duties as "Managing the Company's overall day-to-day Operations" and why the CEO has no control over management of the day-to-day operations of the business.

The Division's determination to deny the application on the basis that J&L failed to demonstrate that Ms. Compton makes 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.

III. Control

The Division also denied certification on the ground that Ms. Compton is not the highest-ranking officer or control the board of directors, as required under 5 NYCRR §144.2(d)(1).

Section 2.1 (a) of the Operating Agreement states “The management of the Company is vested in the Managing Members. No Member shall have any unilateral power to participate in the management of the Company except as expressly authorized by the Act, this Operating Agreement, or the Certificate of Formation.” Section 2.8 states that Jennifer Compton and Rob Henderson are the Managing Members for the business. Section 3.1 of the Operating Agreement provides that the “business and affairs of J&L is managed under the direction of the Class A Members by Unanimous Consent (“the Managing Members”) (DED Exhibit 6).

Ms. Compton therefore does not have control over the business and affairs of J&L, since unanimous consent of both Managing Members is required.

The Division’s determination to deny the application on the basis that J&L failed to demonstrate that Ms. Compton is the highest-ranking officer and/or controls the board of directors, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

The Division also found that J&L is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

A company failed to demonstrate that it operated independently of any other entity when the documents demonstrated the Applicant business provided the same services as the entity with which it provided work for, and with whom it shared resources, business offices, and staff members. *Matter of Acme Lightning Rod, LLC*, Recommended Order dated February 25, 2020, Final Order 20-02 dated April 21, 2020.

The number of employees listed in the application is: full-time: 1, part-time: 0, and contract personnel: 40. Ms. Compton stated in the application “I am the owner and only employee...” (DED Exhibit 1).

Ms. Compton's 2021 tax return indicates that the business's gross receipts were \$ [REDACTED], the business paid \$ [REDACTED] in wages and \$ [REDACTED] for subcontractors and direct client costs (DED Exhibit 5). The 2022 forms 1096 and 1099 indicate that the business paid \$ [REDACTED] for non-employee compensation (DED Exhibits 9 and 10).

J&L is therefore reliant upon subcontractors to perform the revenue-generating critical functions of the business. Without the subcontractors, J&L would not be able to perform the critical functions of its business.

On appeal, applicant states that it is an "independent Marketing and Communications agency with no outside investors or directors." Applicant argues that contractors work is "ad-hoc" and outsourced where needed and that "this is part of the business model, where contractors are commonly used in our industry." (APP Exhibit A). However, applicant has only one employee, pays \$ [REDACTED] in wages, and pays millions of dollars to subcontractors. It has therefore failed to show that it operates independently.

The Division's determination to deny the application on the basis that J&L failed to demonstrate that the business is an independent enterprise, as required under 5 NYCRR §144.2(e), is supported by substantial evidence.

CONCLUSION

J&L 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(e), 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 J&L's application for certification as a woman-owned business enterprise.

In the Matter of J&L Communications LLC
 DED File ID No. 70651
 Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Narrative	Y	Y
DED 6	Operating Agreement	Y	Y
DED 7	Jennifer Compton Tax Return (2021)	Y	Y
DED 8	NYC-202 Business Tax Return (2022)	Y	Y
DED 9	Form 1099 (2022)	Y	Y
DED 10	Form 1096 (2022)	Y	Y
DED 11	Chase Deposit Account Balance Summary	Y	Y