

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NEW YORK 10017

In the Matter

- of -

the Application of Jason Office Products Inc.
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 49048

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
November 22, 2023

This matter considers the written appeal by Jason Office Products Inc., (“JOP” 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 March 9, 2021, JOP applied for certification¹ as a woman-owned business enterprise (“WBE”). JOP based its application on Jill Novatt, President and 80% owner of JOP. (DED Exhibit 1).
2. On March 31, 2022, 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 do not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under 5 NYCRR § 144.2(c)(1); and

¹ Appellant’s letter brief mistakenly states that the applicant applied for recertification, however, the application provided with the Division’s exhibits is a New Certification Application. (See DED Exhibit 1).

- (c) Minority group members or women relied upon for certification do 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).
3. JOP submitted a request to appeal the denial determination, dated April 22, 2022. (DED Exhibit 15).
 4. JOP submitted an Appeal Brief, dated May 25, 2022. (App. Exhibit A)
 5. A Notice to Proceed Via Written Appeal was sent to JOP on October 5, 2022 (Tribunal Exhibit 1).
 6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated August 4, 2023, and a brief of Laurel A. Wedinger-Gyimesi, Esq., counsel for the Division, dated August 9, 2023.

FINDINGS OF FACT

7. JOP is a full-service supplier engaged in the business of selling office products, office furniture, janitorial and breakroom products, and printing and promotional products. (DED Exhibit 1).
8. Jill Novatt is the President and has an 80% ownership interest in JOP. Robert Novatt, Jill Novatt's father-in-law, is listed as Vice President with a 20% ownership interest in the business enterprise, and Jason Novatt, Jill Novatt's husband, is listed as the Secretary and Treasurer.² (DED Exhibit 1).

² During the pendency of the Certification Application process a "Separation Agreement" between the JOP and Robert Novatt was provided to the Division, along with a "stock power" document, indicating that Robert Novatt's ownership interest (in JOP) was transferred to Jason Novatt effective November 22, 2021. The total shares transferred, per the "stock power" are 40 shares. (DED Exhibits 7 and 8).

9. JOP was started by Robert Novatt in the late 1970's and Harriet Novatt, Robert Novatt's wife, became the majority owner, with an 80% ownership interest in 1988. The business was incorporated in 1997. (DED Exhibits 3 and 4).
10. Harriet Novatt signed over her JOP ownership shares to Jill Novatt in January of 2020, and Jill Novatt became the President and 80% owner of the business enterprise on January 24, 2020. (DED Exhibit 1).
11. The certification application states that Jill Novatt made a capital contribution of \$ [REDACTED] on January 24, 2020, for her 80 shares common stock, but also states that she paid \$ [REDACTED] for the same shares on January 24, 2020. The application also states that Robert Novatt made an initial contribution of \$ [REDACTED] in 1976 and also paid \$ [REDACTED] in 1976, for 20 shares of common stock. (DED Exhibit 1).
12. Jill Novatt, in a letter accompanying the application, states that her mother-in-law, Harriet Novatt "signed her ownership over to me, her daughter-in-law" in January of 2020, and that at that time she, Jill Novatt, "did not provide any capital." Jill Novatt also states that in the Spring of 2020 she "took out an SBA loan³ for \$ [REDACTED] to officially buy into the business", and that she has been investing "over 80% of [her] paychecks back into the business since assuming" the Presidency of JOP. (DED Exhibit 4).
13. Heavily redacted TD Bank statements for a joint account between Jill and Jason Novatt show eight transfers in the amount of \$ [REDACTED], thirty-eight in the amount of [REDACTED], and one in the amount of \$ [REDACTED] from Jason Novatt to an unknown recipient. (DED Exhibit 5). Signature

³ This Tribunal has been provided with one page of a document entitled "Loan Authorization and Agreement" which states that it is an Economic Injury Disaster Loan. The borrower is listed as Jason Office Products. (DED Exhibit 9).

Bank statements for JOP show nine deposits matching amounts referenced in the TD Bank statements. (DED Exhibit 6). No additional information is provided regarding these payments.

14. Jill Novatt states that she shares her “personal checking account with [her] husband, Jason. (DED Exhibit 1).
15. The critical function of the business, based on the products and services provided, and the means by which the business obtains contracts or orders, are office furniture and supplies, and office products, as set forth in the Application. (DED Exhibit 1).
16. According to the Application, Jill Novatt shares operational control of JOP with several individuals. Financial Decisions, Negotiating Bonding, Hiring and Firing, Purchasing Equipment/Sales, Negotiating Contracts, and Signatories for Business Accounts are all shared with Jason Novatt. Estimating and Field Operations are shared with both Jason Novatt and Joe Ogno. Negotiating Insurance and Managing and Signing Payroll are shared with Pamela Mason, and finally Marketing and Sales are handled by Joe Ogno and Jason Novatt, and not by Jill Novatt. (DED Exhibit 1).
17. Jill Novatt’s resume provides that she oversees “key financial decision making and day to day operations.” The resume states that she oversees all aspects of MWBE clients, and oversees contract negotiations, is responsible for hiring and firing of employees, manages day to day operation of the corporate account and retail business, and oversees orders and financials. (DED Exhibit 10). A letter dated September 28, 2021, provided with the Application states that her responsibilities at JOP include all personnel decisions, payroll and accounting, purchasing, all decisions regarding budget, and oversight of select contracts. (DED Exhibit 11).

18. Jill Novatt holds degrees in Nonfiction Writing and in Culinary Arts and Restaurant Management. Her employment history includes her role as Vice President of Culinary and as Director of Culinary Production, both at Discovery, Inc. In those roles at Discovery, Inc. she grew social media presence, trained talent in culinary skills and recipe development, and oversaw development, testing, and advertorial culinary content for products at Kohls, and oversaw production of cooking shows. (DED Exhibit 10).
19. Jason Novatt's resume provides that he has a degree in Communications and Business, and that he worked as a sales representative and account sales representative prior to working at JOP. He has worked at JOP since 2000 where he served as the Sales and Marketing Manager until 2002. In 2002 he became Vice President. As Sales and Marketing Manager he was responsible for acquiring new business, he redesigned website for online commerce, and managed employees in retail, delivery, sales, customer service, and warehouse and shipping. As Vice President, he oversees daily operations, which includes billing, purchasing for both retail and commercial divisions, website, marketing, advertising and sales, and manages the full-service copy center and commercial printing division. (DED Exhibit 13).
20. Jill Novatt, in an additional letter dated September 28, 2021, states that she and her husband, Jason Novatt, "decided that I should give up my previous career and we should work together to keep this family business running." She goes onto state that "Jason Office Products is a small, family-owned and operated business." (DED Exhibit 12).

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)(1) states as follows:

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:

- (ii) 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;
- (iii) The extent to which academic credentials exist for persons employed in the industry; and
- (iv) The extent to which industry-specific expertise may be obtained via direct work experience.

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.

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 JOP 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 denied JOP's application for certification as a WBE on the basis that the business enterprise failed to demonstrate that the party relied upon for certification made capital contributions proportionate to their equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the woman owner contributed, “as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise,” in proportion “to their equity interest in the business

enterprise.” 5 NYCRR § 144.2(b)(2) and see *A.A.C. Contracting, Inc. v NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021). The applicant must substantiate that the source of the capital contribution is by the minority group member or 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). Further, it is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is considered a capital contribution.” *In the Matter of Scherzi Systems*, Final Order 1916 dated September 6, 2019; *Scherzi Systems, LLC v White*, 197 AD3d 1466 (3d Dept 2021).

The Applicant bears the burden in establishing that they have 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).

The Division argues that JOP failed to provide sufficient evidence regarding Jill Novatt’s, the person relied upon for certification, capital contribution for her 80% ownership interest in the business enterprise. The certification application provides contrary information regarding Ms. Novatt’s contributions for her ownership interest. (DED Exhibit 1). Section 2.E. of the application states that she made a capital contribution of \$ [REDACTED] for her 80% interest in JOP, while Section 2.F. provides that she paid \$ [REDACTED] for the same shares. (DED Exhibit 1). The Division also cites to the TD Bank records, which are alleged to document the payment of \$ [REDACTED] for Jill Novatt’s shares. (DED Exhibit 5). The TD account is listed as a joint account between Jason Novatt and Jill Novatt. (DED Exhibit 5).

The Applicant admits in her appeal letter that the account in which money was transferred to the JOP Signature checking account is a joint account shared by Jason and Jill Novatt but asserts that the money transferred from that account to JOP came from Ms. Novatt's former career and should therefore be considered as payments for her ownership interest. (App. Exhibit A) The funds for payment of Jill Novatt's ownership interest were all made from the joint checking account. The Division consistently denies applications for WBE certification where the source of the capital contribution comes from a jointly owned bank account and repeatedly interprets the regulation "to require the woman owner to demonstrate that she made a capital contribution to the business enterprise from her own personal assets, not from jointly held assets." (*Matter of S.C. Spencer Electric Inc.*, Recommended Order, dated July 29, 2021 (Final Order 22-04, dated March 31, 2022); and *Matter of OTONE Mechanical Construction, Inc.*, Recommended Order, dated April 25, 2017 (Final Order 17-28, dated May 8, 2017); see also *Matter of Hertel Steel, Inc.*, Recommended Order, dated Feb. 10, 2017 (Final Order 17-12, dated March 15, 2017) (business not eligible for WBE certification where the money to purchase the business was from a jointly owned bank account)). Here, not only have the alleged payments been made from a joint account, but they have also been made to the business enterprise, not to the seller of the shares, nor to her estate, and no evidence has been presented regarding the source of those funds used to make those payments⁴.

Applicant also argues that the Division failed to consider Jill Novatt's expertise and continued investment in the business enterprise when determining her capital contributions. In

⁴ Statements from Signature Bank before this Tribunal, only list nine deposits, while the TD Bank statements purport to show 47 payments to JOP's business account. The TD Bank statements do not indicate the account that received the debits indicated on the statements.

support of this argument, Appellant asks this Tribunal to consider additional documents including profit and loss and balance sheets for JOP. (App. Exhibit A).

The argument, made for the first time on appeal, that the Division should have considered Jill Novatt's expertise must fail. While the regulation does allow for expertise to be considered as a capital contribution, in order to qualify the contribution must not only be "specialized and directly applicable to one or more critical aspects of the operation" it also must be uncompensated. (5 NYCRR § 144.2(b)(2)). It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is to be considered as capital contribution." (*In the Matter of Scherzi Systems*, Final Order 19-16, September 6, 2019; *Scherzi Sys., LLC v. White*, 197 A.D.3d 1466 (3d Dept. 2021)). Further, the applicant must provide an assessment, clearly documented, of the fair market value of their expertise. (*Matter of Darr Construction Equipment Corp.*, Recommended Order, dated August 30, 2022 (Final Order 22-11, dated November 7, 2022) and *Matter of JVR Electric, Inc.*, Recommended Order, dated August 31, 2016 (Final Order 16-43, dated September 9, 2016)). Here, no evidence has been presented that, at the time of the transfer, or at any time thereafter, Jill Novatt's expertise was to be considered as compensation for the shares gifted to her, nor was any valuation provided regarding the value of the shares or the value of her expertise.

Applicant's argument that Jill Novatt's not taking distributions from the business enterprise, and instead leaving those funds with the business enterprise, serves as a capital contribution, also fails to support a finding of capital contribution. Money earned by the business, are not independent funds, and are also not funds paid at the time of the acquisition of the ownership shares, nor was there any indication that this was to be considered as a capital contribution at the time Ms. Novatt was gifted her shares. Therefore, those funds cannot be considered as capital contributions. In addition, Applicant's argument that she made more money

working “in the private sector” prior to working for JOP, and that her high earnings potential should be considered, is irrelevant to the issue at hand. (App. Exhibit A).

Applicant’s arguments, regarding expertise and not taking distributions, are both made for the first time on appeal, and as such cannot now be considered by this Tribunal. In addition, even if this information was permitted to be considered at this time, no evidence has been provided regarding prior work and its valuation, nor has any valuation of the shares been provided, thus there is no evidence supporting Applicant’s arguments.

The Division also argues that a U.S. Small Business Administration loan, also relied on by Jill Novatt as evidence of payment for her ownership interest, fails to suffice as a capital contribution, as the loan is in the name of JOP, and secured by collateral also owned by JOP. (DED Exhibit 9). Additionally, no evidence was provided regarding the source of the funds used to repay the loan.

Applicant’s secondary reliance on the Small Business Association loan also fails as evidence of a capital contribution. The loan is a disaster relief loan taken in the name of JOP and based on collateral owned by JOP. Additionally, no evidence was presented that the loan was repaid by Jill Novatt. While an applicant is not automatically disqualified from certification as an WBE because the woman owner finances the purchase of the business through loans, the Division will evaluate the terms of the loan to determine that the loan is guaranteed and repaid by the woman owner, and thus qualifies as a capital contribution. (See *Matter of Mac Fhionaghaile & Sons Electrical Contracting*, Recommended Order dated November 16, 2017, Final Order 18-01, dated January 3, 2018). This loan is clearly a business loan, taken out by the business and not by Jill Novatt, and as such cannot be considered as a capital contribution made by Ms. Novatt. (DED Exhibit 9).

I find that JOP did not demonstrate that Jill Novatt, the woman owner relied upon for certification, made capital contributions to JOP in proportion to her ownership interest. Thus, the Division's determination that the party relied upon for certification failed to demonstrate that they made a capital contribution to the business enterprise proportionate to their equity interest therein, as required under 5 NYCRR § 144.2(b)(2) is supported by substantial evidence.

II. Industry-Specific Competence

The Division also denied JOP's application for certification as a WBE on the basis that JOP failed to demonstrate that Jill Novatt possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)).

The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, have the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343 (3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where the Court affirmed the denial where the woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.)) The Division consistently requires that women owners be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)). Notwithstanding the Division's

requirements, a lack of hands-on experience is not itself enough to deny certification, industry practice should also be considered. (*Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988)). In considering this regulation, the Division shall consider:

- (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.

(5 NYCRR 144.2(c)(1)).

The Applicant bears the burden of establishing that the woman-owner 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).

The Division argues that the applicant failed to provide sufficient evidence regarding Jill Novatt's industry-specific competence. The application provides that all the operational controls of the business enterprise are shared among several people including Jason Novatt, Robert Novatt, and manager Joe Ogno. (DED Exhibit 1). Ms. Novatt's resume details her educational and work experience as being in the field of writing, culinary arts, restaurant management, production of cooking television programs, recipe development, and development and testing of advertorial culinary content, and oversight of a partnership with Kohl's which included more than 1000 stocked items. (DED Exhibit 10). The Division asserts that nothing in the resume cites to any education, experience, or certifications related to the core, or critical, functions of JOP, which involve the contracts and sales of office furniture and supplies. (DED Exhibit 1). Further, the

Division cites to a narrative, provided with the application, which states that Jill Novatt worked up to 30 hours a week outside of JOP, freelancing in recipe development and product testing. (DED Exhibit 12).

Resumes of Jason and Robert Novatt were also included in the application. (DED Exhibits 13 and 14)⁵. Jason Novatt's resume, provides that he has worked in sales since 1997, including as a Sales and Marketing Manager for JOP beginning in 2000, and transitioning to Vice President of JOP in 2002, a position he still holds today. Jason Novatt's current role is to oversee the daily operation of JOP, which includes billing, purchasing for both the retail and commercial division, the website, marketing, advertising, and sales. He also manages the full-service copy center and commercial printing divisions.

The Applicant, on appeal, argues that Jill Novatt's experience as a corporate vice president for Discovery, Inc. where she oversaw "a team of 7 direct reports and dozens of freelancers" and oversaw an overall department budget was not adequately considered by the Division in their denial, as it relates to her competence in the instant industry. (DED Exhibit 10). Applicant, in their appeal brief, states that Ms. Novatt's prior experience included the management of creative and strategic teams, creating and administering budgets, and allocating resources to optimize production quality and efficiency. (App. Exhibit A) Applicant argues that JOP's business, involving the sales of office products, including furniture and coffee and snack products, does not require any specific academic degree or licensure. Finally, Applicant also states that Ms. Novatt worked on a part-time basis, for approximately 10 years, at the business enterprise, however, this is not included on Ms. Novatt's resume. Essentially, Applicant asserts that Ms. Novatt's experience

⁵ Robert Novatt is no longer an owner in the company, having transferred his shares to Jason Novatt in November of 2021, and signed a separation agreement from JOP at the same time. (DED Exhibits 7 and 8).

in upper-level management easily crosses over into the field of sales and should have been considered by the Division.

I find Applicant's arguments regarding Jill Novatt's competence persuasive. (App. Exhibit A). While the evidence presented indicates that Jill Novatt's prior experience was not in sales, her overall experience involving management, transfers to the duties and responsibilities at JOP. Here, in analyzing the facts and the criteria to be considered under this regulation, there is no specific technical ability required in this industry, no certifications, licensure, or degrees are necessary, and any industry specific knowledge can be gained via direct work experience. In addition, the applicant explains that Jill Novatt worked part-time for the business enterprise, over the years, and while that may not have been before the Division I find it clarifies and explains further Ms. Novatt's experience with JOP, and is thus admissible under *Scherzi Systems, supra*. Importantly, a woman's lack of technical competence is not dispositive of the ineligibility of WBE certification if such woman owner possesses relevant managerial experience. (See *Matter of Era Steel Constr. Corp v Egan*, 145 AD2d 795 (1988)). Unlike other cases, where the Division routinely denies certification for lack of technical competence, here, no specific technical expertise is required by the business enterprise, and as such, I find that Division's determination to deny JOP's certification, on this ground was not based on substantial evidence.

III. Operation

Finally, the Division denied JOP's application for certification as a WBE on the basis that JOP failed to demonstrate that Jill Novatt 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. (*Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division reviewed, in addition to the application, narratives and the resumes of Jill, Robert, and Jason Novatt. The Division points specifically to the answers in the certification application regarding operational control of the business enterprise. The application states that all the operational control and responsibility for JOP is shared. (DED Exhibit 1). Financial Decisions, Negotiating Bonding, Hiring and Firing, Purchasing Equipment/Sales, Negotiating Contracts, and Signatories for Business Accounts are all shared with Jason Novatt. Estimating and Field Operations are shared with both Jason Novatt and Joe Ogno. Negotiating Insurance and Managing and Signing Payroll are shared with Pamela Mason, and finally Marketing and Sales are handled by Joe Ogno and Jason Novatt, and not by Jill Novatt. In addition, the Division notes that Jill Novatt worked outside the business as a freelancer, for as much as 30 hours a week. The Division also points to Jason Novatt’s resume, which states that he “oversees daily operations,” has worked for JOP for more than 20 years, and has more than 25 years of experience in the sales industry.

On appeal, Applicant admits that she primarily oversees accounting, financials, accounts payable and receivable, and that Jason Novatt focuses on direct sales, bringing in new business, and negotiating contracts with vendors. (App. Exhibit A). Sales, including the acquisition of new

contracts, and negotiating vendor contracts are clearly critical business function to JOP, however, these are areas that the applicant admits Ms. Novatt does not participate.

In addition, several times, in a narrative provided with the Application, Jill Novatt states that JOP is a “family run business.” She states that after the death of Harriet Novatt, she and her husband, Jason Novatt, decided that they “should work together to keep [the] family business running.” (DED Exhibit 12). 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. (*Matter of Occupational Safety, supra* at 1583). Here, by the Applicant’s own admissions, Jill Novatt appears to run the financial and administrative side of the business, while Jason Novatt runs the specialized, critical business function side of the business. 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 *Matter of Panko, supra*, and *Matter of Upstate Electrical, supra*).

Here, the evidence presented establishes that Jill Novatt’s role at JOP is administrative while Jason Novatt is responsible for the day-to-day operations of the business enterprise, and that the business functions as a family-owned business, not a WBE. That, coupled with Ms. Novatt’s freelance work, and time away from the business enterprise, leads to my determination that JOP has not demonstrated that Jill Novatt 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.

CONCLUSION

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

RECOMMENDATION

The Division's determination to deny Jason Office Products, Inc.'s application for certification as a woman-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of Jason Office Products Inc.
DED File ID No. 49048
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Appeal and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Determination	Y	Y
DED 3	Filing Documents / Articles of Incorporation	Y	Y
DED 4	Letter Dated Sept. 27, 2021	Y	Y
DED 5	TD Bank Statements (redacted)	Y	Y
DED 6	Signature Bank Statements	Y	Y
DED 7	Separation Agreement	Y	Y
DED 8	Stock Power Document	Y	Y
DED 9	SBA Economic Injury Disaster Loan Document	Y	Y
DED 10	Resume, Jill Novatt	Y	Y
DED 11	Letter Dated Sept. 28, 2021	Y	Y
DED 12	Narrative Letter Dated Sept. 28, 2021	Y	Y
DED 13	Resume, Jason Novatt	Y	Y
DED 14	Resume, Robert Novatt	Y	Y
DED 15	Request to Appeal dated April 22, 2022	Y	Y
TRIBUNAL 1	Notice to Proceed via Written Appeal	N	Y