

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

In the Matter
- of -
the Application of Jobena Corporation
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 20163386

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
April 3, 2025

This matter considers the appeal by Jobena Corporation (“Jobena” 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 22, 2024, Jobena applied for certification as a women-owned business enterprise (“WBE”). Jobena based its application on Ms. Jaime Ruggiero and Ms. Nancy Proulx. (DED Exhibit 1).
2. On May 17, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - a. The 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 interests therein, as demonstrated by but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR §144.2(b)(2);
 - b. The applicant business did not demonstrate that ownership was not allocated to the women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5); and

- c. The minority group or women owner(s) relied upon for certification have not demonstrated that they are the highest-ranking officer and/or control the Board of Directors and/or serve as a general partner, as required by 5 NYCRR § 144.2(d)(1).
3. Jobena submitted a request to appeal the denial determination via hearing, dated June 20, 2024. (DED Exhibit 3).
4. A Notice of Hearing and Conference was sent to all parties on November 26, 2024 (DED Exhibit 4).
5. A hearing was held and concluded on February 20, 2025.

FINDINGS OF FACT

6. Jobena is engaged in the business of providing janitorial products, restaurant equipment, restaurant supplies, small wares, network cabling and equipment for network services. (DED Exhibits 1 and 2; Hearing Testimony of Jaime Ruggiero).
7. Nancy Proulx and Jaime Ruggiero are the women owners relied upon for certification. Nancy Proulx is the CEO and Jamie Ruggiero is the President of Jobena. Each owns 33 shares or 26% of the applicant business. Donald Irving, the non-qualifying owner, is the Vice-President and owns 60 shares or 48%. (DED Exhibits 1, 6, 7, and 17; APP Exhibits 4, 5, 6, 9, 10, and 11; Hearing Testimony of Nancy Proulx; Hearing Testimony of Jaime Ruggiero).
8. Meeting minutes from the first board meeting held on May 11, 2006, state that the par value of the applicant business' shares is \$████ and that 33 shares of the business were sold to John DiGuiseppe for \$████ and 33 shares to Donald Irving for \$████, representing consideration for their shares. Meeting minutes from a special board meeting held on May 14, 2006, state that Nancy Proulx purchased 33 shares of the applicant business for \$████, representing consideration. (DED Exhibit 7; APP Exhibits 4 and 5).

9. The application provides that Nancy Proulx and Donald Irving purchased their shares for \$██████ in May of 2006. Jaime Ruggiero states that the contribution amounts of \$██████ for Nancy Proulx and Donald Irving listed on the application are errors. Nancy Proulx states that she paid \$██████ for 33 shares in 2006. (DED Exhibits 1 and 7; APP Exhibit 5; Hearing Testimony of Nancy Proulx; Hearing Testimony of Jaime Ruggiero).
10. Jaime Ruggiero earned a Bachelor of Science degree in Fashion Textile Technology, with a concentration in Fashion Merchandising in August of 2006. Her work experience, prior to joining the applicant business, includes work as a manager for Sephora, Hollister Co., Abercrombie Kids, and Abercrombie & Fitch. She has experience in marketing, sales, including analyzing sales and marketing trends. (DED Exhibit 18; APP Exhibit 13; Hearing Testimony of Jaime Ruggiero).
11. Jaime Ruggiero was approached by Nancy Proulx sometime before January 2011 and asked to consider doing marketing for the applicant business in an effort to help build and grow the business, which was struggling at that time and not generating a profit. Nancy Proulx advised Jaime Ruggiero that she would be given an opportunity to buy into Jobena. Jaime Ruggiero researched some business trends in the area where Jobena was providing products and services, which at the time was primarily office supplies including the sale of thermal paper rolls and printer ink to restaurants, and discovered that Amazon prime, which had just begun to operate, was negatively impacting these types of sales. Based on her research and on conversations with existing clients, Jaime Ruggiero formulated a sales pitch to expand on items that Jobena could offer to its clients, as well as ways to expand its client pool. (Hearing Testimony of Jaime Ruggiero).

12. Jaime Ruggiero began working for Jobena in 2011 and entered into an Employment Agreement with Jobena on January 1, 2011. Jaime Ruggiero¹ was hired as the Company President with an annual salary of not less than \$██████0. (DED Exhibit 10; APP Exhibit 7; Hearing Testimony of Jaime. Ruggiero).
13. Jaime Ruggiero acquired 33 shares on February 2, 2012, in exchange for one month's salary, totaling \$██████. At the time that Jaime Ruggiero began working for Jobena the business was not profitable and was losing money. Jaime Ruggiero had experience in marketing and sales and was brought on to help turn the business around. (DED Exhibits 5, 6, and 7; APP Exhibits 6, 8, and 12; Hearing Testimony Jaime Ruggiero).
14. Meeting minutes from a joint meeting of directors and stockholders of Jobena, dated January 31, 2011, provide that the business enterprise was "authorized to purchase 3 shares from each of John DiGuiseppe and Donald Irving for a purchase price equal to . . . [\$██████] each." The minutes also reference the employment agreement between Jobena and Jaime Proulx, and provides that, "[a]s consideration for the purchase of shares, [Jaime] Proulx has contributed an amount equal to \$██████ to the Company by foregoing receipt of her salary for the month of January, 2011." The minutes also provide that Jobena is authorized to issue 33 shares to Jaime Proulx pursuant to the terms of the Employment Agreement." (DED Exhibit 7; APP Exhibit 6).
15. A Shareholders' Agreement dated February 1, 2011, between Nancy Proulx, John DiGuiseppe, Donald Irving, Jaime Proulx and Jobena provides the following:

¹ Ms. Ruggiero began employment prior to her marriage, and the employment agreement is in her maiden name of Jaime Proulx. ¹ Ms. Jaime Proulx now uses her married name, Jaime Ruggiero. (DED Exhibit 10; Hearing Testimony of Jaime. Ruggiero).

- a. “[Ms. Jaime Proulx] is purchasing thirty three (33) shares of the Company” pursuant to the terms of the Employment Agreement dated January 1, 2011.
- b. The shares of common stock, owned by the shareholders, are without par value.
- c. Jaime Proulx, Nancy Proulx, John DiGuiseppe, and Donald L. Irving, Jr. are all shareholders and Directors of Jobena.
- d. Certain “corporate actions shall require the affirmative vote of the Shareholders holding at least **seventy percent (70%)** of all of the shares that are then issued and outstanding:”, including, but not limited to, the issuance of any shares of stock or securities, “[t]he sale, lease, exchange or other disposition of any assets of the Company other than in the ordinary course of business; incurrence of indebtedness, the merger or consolidation of the company with another, and the declaration of payment of any dividend or distribution, the authorization of expenditures, or incurring of debt, or execution of any contract or agreement, in excess of \$ [REDACTED]. (emphasis in the original).

(DED Exhibit 5; APP Exhibit 8).

16. John DiGuiseppe sold his shares in Jobena to Donald Irving for \$ [REDACTED] on January 1, 2017, and is no longer affiliated with the applicant business. (DED Exhibit 17; APP Exhibits 9, 10, and 11).
17. The Employment Agreement provides that the President² is “at all times subject to the control of the Company’s Board of Directors,” and will comply with the shareholders agreement, and the Agreement also requires that the Executive adhere and maintain MWBE criteria. The

² The Employment Agreement refers to the President, Jaime Proulx, now Jaime Ruggiero, as the Executive throughout the Agreement. (DED Exhibit 10).

business first sought MWBE certification in 2012 or 2013. (DED Exhibit 10; APP Exhibit 7; Hearing Testimony of Jaime Ruggiero).

18. Approximately 10%, though sometimes less, of Jobena's business has come from MWBE contracts. (Hearing Testimony of Jaime Ruggiero).

19. Jaime Ruggiero, while working for Jobena, has developed, designed, and began the manufacture and sale of a new product, a ¾ ounce disposable shot glass, to sell to Jobena's clients. This product accounts for at least \$ [REDACTED] in sales for Jobena annually. (Hearing Testimony of Jaime Ruggiero).

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 (b)(5) states as follows:

Pro forma ownership. Ownership interests in a business enterprise may not be allocated to minority group members or women, either through business formation

or the transfer of ownership interests, solely for the purpose of securing certification of such business enterprise as a minority or women-owned business enterprise. Where a minority group member or woman relied upon for certification obtains his or her ownership interest in a business enterprise through a transfer from another person, such minority group member or woman must demonstrate that such transfer was supported by reasonable consideration, and must meet all other certification criteria described herein.

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

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

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control of 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 Jobena 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

Terrence Greiner, Esq., of Terrence A. Greiner P.C., appeared at the hearing on behalf of Jobena. The following witnesses testified on behalf of Jobena: Jaime Ruggiero, née Jaime Proulx, Owner and President, Jobena and Nancy Proulx, Owner and CEO, Jobena. Jobena offered APP Exhibits 1 through 16; APP Exhibits 15a, 15b, and 16 were renumbered to 15, 16, and 17. APP Exhibits 1, and 4 through 13 were admitted into evidence.

Ms. Dennie Byam, Esq., Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Ms. Leslie Becraft, Senior Certification Analyst, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence without objection: DED Exhibits 1 – 18.

I. Prior Certification

The Division acknowledges that Jobena was previously certified as a woman-owned business enterprise. The Division asserts that it is not bound to recertify a WBE if its prior determinations were made in error. The Division argues that based on the application and supplemental material submitted by applicant, Division staff correctly determined that applicant was not eligible for recertification.

The Division is correct that it is not obligated to certify Jobena based on its prior determinations. It is well settled that the doctrine of equitable estoppel cannot, as a general rule, be invoked against a governmental agency in the exercise of its governmental function. See *Matter*

of Daleview Nursing Home v. Axelrod, 62 NY2d 30 (1984); *Matter of Atlantic States Legal Found., Inc. v. New York State Dept. of Environmental Conservation*, 119 AD3d 1172 (2014).

With the expiration of its certification, Jobena had the burden to demonstrate compliance with the eligibility criteria outlined at 5 NYCRR §144.2 when it submitted the March 22, 2024, application and supporting materials and cannot rely on the past determinations of the Division.

II. Ownership

The Division denied Jobena’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 *Matter of A.A.C. Contracting, Inc. v. New York State Dept. of Economic Development*, 195 A.D.3d 1284 (3d Dept. 2021).

The Division requires an applicant to demonstrate that the contribution is proportionate to an owner’s equity interest in the business enterprise even if the interest has been inherited or gifted. See *Matter of Coverco, Inc.*, Recommended Order, January 23, 2017 (Final Order 17-06, January 30, 2017); *Matter of Beam Mack Sales & Services, Inc.*, Recommended Order, October 31, 2016 (Final Order 16-55, Nov. 1, 2016); *Matter of Friend Commercial Contracting, Corp.*, Recommended Order May 11, 2016, (Final Order 16-15, May 16, 2016). 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*,

Recommended Order, July 25, 2019 (Final Order 22-02, February 2, 2022); *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 the applicant was denied certification for failing to demonstrate that the women relied on for certification made capital contributions to the business enterprise proportionate to their equity interest therein as required under 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division's denial focuses on contributions made by Jaime Ruggiero and not Nancy Proulx. (DED Exhibit 2) The Division asserts that there are several factors which were considered in denying under this provision. First, the Division argues that the information on the application regarding how Jaime Ruggiero obtained her shares is contradictory, citing to sections of the application which state, individually, that Jaime Ruggiero's ownership interest was "sold to her," another section which states that she "inherited [the] business," and another which states that she was "gifted" her ownership interest. (DED Exhibit 1, §§ 1.T, 1.U., and 2.E. respectively). The Division, in the denial determination, also cites to the application section which states that Nancy Proulx and Donald Irving purchased their ownership interest for \$[REDACTED] each. The denial also references the Shareholders' Agreement, Employment Agreement, and minutes from a board meeting of Jobena's Directors and Stockholders, dated January 31, 2011 which provides that Jaime Ruggiero was issued 33 shares of the applicant business and that "consideration for the purchase of the shares, Ms. [Ruggiero] has contributed an amount equal to \$[REDACTED] to the [Jobena] by

foregoing receipt of her salary for the month of January 1, 2011.” (DED Exhibits 2, 5, 7, and 10; APP Exhibits 6, 7, and 8).

The Division’s witness, Senior Certification Analyst Leslie Becraft, testified that the proof of capitalization documents provided by the applicant were insufficient as proof of capital contribution. (Hearing Testimony of Ms. Becraft). Ms. Becraft referenced sections 2.E. and 2.F. of the application and testified that gifting is not a form of capital contribution and explained that “the owner relied upon for certification must contribute themselves.” Ms. Becraft also testified that Jaime Ruggiero’s giving up one month’s salary was insufficient “because it is not proportionate to her interest in the applicant firm and it’s not really from her personal account. It is monies . . . according to [DED Exhibit 7] [that] alleges that it’s forgone, but I have no way of knowing if that’s really the case.” (Hearing Testimony of Ms. Becraft).

Ms. Becraft also testified that she relied on information on the application which provided that Nancy Proulx and Donald Irving each purchased their ownership interests for \$██████ on May 1, 2006. (Hearing Testimony of Ms. Becraft.). When asked what if any consideration the analyst gave to the purchase of shares by Jobena from Messrs. Irving and DiGuiseppe for \$██████, as provided in the board meeting minutes, dated January 31, 2011, Ms. Becraft did not reply, instead stating that, “it does not appear to me that [Ms. Ruggiero] has purchased any shares, it was like, transferred.” (DED Exhibit 7; APP Exhibit 6; Hearing Testimony of Ms. Becraft).

Counsel for the applicant argues that the Division’s view of business capitalization is incredibly restrictive, and that Jaime Ruggiero’s forfeiture of one month of her salary demonstrates her capital contribution to the business enterprise. In addition, counsel argues, for the first time on appeal, that Jaime Ruggiero’s contribution of expertise should also be considered towards her contribution to the business, citing to her role in increasing the profitability of the business through

her expertise. The issue, raised for the first time on appeal, that Ms. Ruggiero's expertise should have also been considered as a capital contribution, cannot be considered here as it is new information that was not before the Division at the time of the application and does not seek to explain or clarify previously submitted material. (See, *Scherzi Systems, supra*)

In regard to her capital contribution, Nancy Proulx testified that she could not remember the precise amount that she paid for her 33 shares in 2006 but thought it was approximately \$■■■■, and when asked on cross-examination if she had made any other capital contributions to the business, she replied "no." (Hearing Testimony of Nancy Proulx). Jaime Ruggiero testified that there was some confusion when completing the application and errors were made, including the information entered in sections 1.T, 1.U., and 2.E., regarding the transfer of shares (DED Exhibit 1; Hearing Testimony of Jaime Ruggiero). Ms. Ruggiero testified that the purchase amounts of \$■■■■ attributed to Nancy Proulx and Mr. Irving on the application were entered in error, and do not reflect the amount of either's capital contribution to the business. (Hearing Testimony of Jaime Ruggiero). Ms. Ruggiero also testified that she provided meeting minutes from several board meetings of the applicant business as proof of capitalization, as requested by the Division. Those documents state that the par value of the shares was zero and that each of the other owners paid \$■■■■ in total for 33 shares each. (DED Exhibit 7; APP Exhibits 4, 5, and 6).

The meeting minutes also provide that Jaime Ruggiero paid \$■■■■, by foregoing one month's salary, for 33 shares of the applicant business, which is corroborated by the Employment Agreement, the Shareholder's Agreement, and Jaime Ruggiero's testimony. (DED Exhibits 5, 7 and 10; APP Exhibits 6, 7 and 8; Hearing Testimony of Jaime Ruggiero). Accordingly, as the meeting minutes, created at the time of the transactions themselves, provide that Nancy Proulx

paid \$[REDACTED] for her shares, and that Donald Irving paid a total of \$[REDACTED] for his shares, the amount of \$[REDACTED], contributed by Jaime Ruggiero is more than proportionate to her equity interest.

The application, supporting documentation and testimony adduced at the hearing demonstrates that the par value of the company shares is \$[REDACTED], that Donald Irving and John DiGuiseppe were each authorized and approved to buy 33 shares of Jobena for \$[REDACTED] on May 11, 2006, that Nancy Proulx was authorized and approved to purchase 33 shares of Jobena on May 14, 2006 for \$[REDACTED], that the business enterprise was authorized to purchase three shares each from John DiGuiseppe and Donald Irving for \$[REDACTED] on January 31, 2011, that Donald Irving purchased 30 shares of Jobena from John DiGuiseppe for \$[REDACTED] on January 1, 2017 and that the business enterprise was authorized to issue 33 shares to Jaime Proulx for an amount equal to \$[REDACTED], for a capital contribution equal to one month's salary from Jobena. (DED Exhibits 5, 7, and 10; APP Exhibit 4, 5, 6, 7, and 8). At the time of the application, Donald Irving owned 48% of the applicant business, Nancy Proulx owned 26%, and Jaime Ruggiero owned 26%. (DED Exhibits 1 and 17; APP Exhibits 8, 10, and 11).

The Shareholders' Agreement dated February 1, 2011, clearly states that pursuant to the terms of the Employment Agreement, Jamie Proulx is purchasing 33 shares of stock and that all shares of common stock are "without par value." (DED Exhibit 5). In this instance, Jaime Ruggiero's agreement to work for one month without payment and give up 1/12th of her annual salary was the consideration provided in exchange for her ownership interest in Jobena. (DED Exhibits 7 and 10; APP Exhibits 6 and 7; Hearing Testimony of Jaime Ruggiero). The amount of consideration paid by Jaime Ruggiero, at a time when the business was losing money, when the par value of the shares was zero, and where others paid a total of \$[REDACTED] for their ownership interests, clearly establishes that Jaime Ruggiero's contribution was in proportion to her ownership interest.

Based on the foregoing, I find that the Division's determination with regard to 5 NYCRR § 144.2(b)(2) is not supported by substantial evidence.

III. Ownership – Pro Forma

The Division also denied Jobena's application for certification on the grounds that the woman owner relied on for certification sought ownership of the business enterprise solely for the purpose of securing certification. The regulation prohibits the transfer of ownership interest solely for the purpose of securing certification of a business enterprise as a woman-owned business ownership. 5 NYCRR § 144.2(b)(5). In pertinent part, the regulation states that "[w]here a . . . woman relied upon for certification obtains [her] ownership interest in a business enterprise through a transfer from another person, such. . . woman must demonstrate that such transfer was supported by reasonable consideration. . ." 5 NYCRR§ 144.2(b)(5).

The Division argues that the sole reason that Jaime Ruggiero obtained her ownership of the applicant business was to secure and maintain WBE certification, as evidenced by the following section in Ms. Ruggiero's Employment Agreement: "It is the Company's intent and desire to satisfy the requirements of, and operate in accordance with, applicable regulations, governmental pronouncements, and published criteria applicable to Women Owned Enterprises." (DED Exhibits 2 and 10; APP Exhibit 7; Hearing Testimony of Ms. Becraft). The Division argues that the contractual provision entered into in January 2011, combined with the timing of when the business enterprise first applied for WBE certification in 2012, is proof that the sole reason for Jaime Ruggiero's ownership of the business was to obtain and maintain certification.

Counsel for the applicant argues that the reason that Jaime Ruggiero was brought into the business, and provided an opportunity to buy into the business, was to help turn the business around

and to make the business profitable. Counsel argues that Jaime Ruggiero's marketing experience was the catalyst for her employment, and that securing WBE certification was an added benefit to the company, but not the sole reason for her employment.

Jaime Ruggiero explained in detail that at the time she began working for Jobena, the prime source of income was the sale of office supplies, and the market was being negatively impacted by the advent of Amazon Prime services. Jaime Ruggiero testified that she recognized this issue, researched the market, and developed a plan which included expanding the offerings from Jobena to its clients and developed a new product which now accounts for more than \$[REDACTED] in annual sales. (Hearing Testimony of Jaime Ruggiero).

When asked what the impact of WBE certification had on the business, Ms. Ruggiero testified that WBE contracts make up less than 10% of the revenue generated by the business, but that they do look for contracts open to WBE when they are available. (Hearing testimony of Jaime Ruggiero).

Preliminarily, as addressed in section II of this order, Jaime Ruggiero's forgoing one month of salary was reasonable consideration for the share purchase. Additionally, it is clear that the invitation to Jaime Ruggiero to join the business was not made solely for the purpose of securing certification but was based on her knowledge and skills in the hopes that she would help build and grow the business. (Hearing Testimony of Jaime Ruggiero). Obtaining WBE certification was an additional benefit and tool for the business to implement in an effort to help the business expand. Based on the foregoing, I find that the Division did not have substantial evidence in its finding that ownership of shares of Jobena was transferred solely for the purpose of the business enterprise seeking certification as a WBE, as per 5 NYCRR§ 144.2(b)(5).

IV. Control

Minority/women-owners relied on for certification must be the highest-ranking officer of the business enterprise and must control the board of directors or serve as a general partner as required by 5 NYCRR § 144.2(d)(1). In evaluating this regulation, the Division requests a list of the applicant business' corporate directors and regularly examines an applicant's by-laws and operating agreements. See e.g. *Matter of ADK Water Solutions, Inc.*, Recommended Order, June 12, 2023 (Final Order 23-07, Aug. 10, 2023), *Matter of LHS International, Inc.*, Recommended Order, June 26, 2023 (Final Order 23-07, Aug. 11, 2023), and *Matter of S.C. Spencer Electric, Inc.* Recommended Order July 29, 2021 (Final Order 22-04, March 31, 2022).

Counsel for the applicant argues that Nancy Proulx and Jaime Ruggiero do control the decisions made by the company and that the Division's decision to deny certification, because they do not control the Board of Directors, is incorrect. Counsel cites to the fact that Nancy Proulx is the CEO of the applicant business, and that Jaime Ruggiero is the President. (DED Exhibits 1 and 10; APP Exhibit 7; Hearing Testimony of Nancy Proulx; Hearing Testimony of Jaime Ruggiero). Counsel argues that as Nancy Proulx and Jaime Ruggiero each own 26% of the applicant business, for a total of 52%, and that as Donald Irving owns 48%, at least one of the woman owners relied on for certification must be a part of any decision made by Jobena as the Shareholders' Agreement states that 70% of all outstanding shares constitutes an affirmative vote for company actions. (DED Exhibits 5, 6, and 17; APP Exhibits 8, 9, 10, 11, and 12). Thus, counsel argues, as no decision can be made without at least one of the women owners relied upon for certification, this is evidence that they control the Board.

The Division argues that the Shareholders' Agreement states that 70% of the shares are required for the following company actions: the issuance of capital stock, the pledge of, grant or

security interest in, or encumbrance of any assets, the amendment of the Certificate of Incorporation or By-Laws, and the declaration or payment of any dividend or distribution, among other actions. Further, the Division argues that the women owners, even when acting collectively, cannot make any decisions without Donald Irving, as they collectively own 52% of the applicant business, when 70% of the shares are required in making company decisions, thus requiring the inclusion of Donald Irving in all decisions, which does not comport with the regulation. (Hearing Testimony of Ms. Becraft). Therefore, the Division argues that Jaime Ruggiero, as President, is subject to the control of the company's Board of Directors, and there is substantial evidence to support the denial determination. (DED Exhibits 5, 6, and 8; APP Exhibits 8 and 12; Hearing Testimony of Ms. Becraft).

At the hearing, Jaime Ruggiero testified that she and her mother, Nancy Proulx hold the two highest ranked positions at Jobena, President and CEO, respectively, and they can and do control the business enterprise. (Hearing Testimony of Jaime Ruggiero). She also testified that it is her understanding that only a majority of shares owned are required to make business decisions, and that as she and her mother collectively own 66 shares as compared to Donald Irving's 60 shares, they can make decisions as the owners, President, and CEO. (Hearing Testimony of Jaime Ruggiero). However, on cross examination Jaime Ruggiero acknowledged that the Shareholders' Agreement states that 70% of the voting shares are required for a variety of business actions and decisions. (Hearing Testimony of Jaime Ruggiero).

Notwithstanding Jaime Ruggiero's testimony, the Shareholders' Agreement provides, unequivocally, that certain business decisions may only be made by 70% of all of the voting shares. (DED Exhibit 5; APP Exhibit 8). Here, the women owners relied on for certification each own only 26% of the company's shares, thus there are many matters on which they cannot act without

Donald Irving, the non-qualified 48% owner. (DED Exhibits 1, 5 and 6; APP Exhibits 8 and 12). As the regulation specifically requires that the owners relied upon for certification must control the board of directors, and as there are numerous items delineated in the Shareholders' Agreement which demand 70% agreement for certain decisions, the women relied on for certification do not control the Board on all matters. (5 NYCRR §144.2(d)(1)). Additionally, the Employment Agreement states that Ms. Ruggiero "will be subject, at all times, to the control of the Company's Board of Directors". (DED Exhibit 10)

Therefore, the applicant has failed to satisfy their burden that the Division's denial determination was not based upon substantial evidence. The Division's determination that Jobena failed to demonstrate that the women relied upon for certification controls the Board of Directors as required under 5 NYCRR § 144.2(d)(1), is based upon substantial evidence.

CONCLUSION

Jobena met its burden with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(2) and 144.2(b)(5), however, it 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(d)(1) was not based upon substantial evidence.

RECOMMENDATION

The Division's determination to deny Jobena's application for certification as a women-owned business enterprise should be modified in part, and as modified, affirmed.

In the Matter of Jobena Corporation
DED File ID No. 20163386
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Certificate of Incorporation of Jobena Corp. filed May 2, 2006	Y	Y
APP 2	Statement of Incorporator In Lieu of Organization Meeting dated May 11, 2006	Y	N
APP 3	Jobena Corp. Bylaws dated May 11, 2006	Y	N
APP 4	Minutes of the First Meeting of the Board of Directors of Jobena Corp. dated May 11, 2006	Y	Y
APP 5	Minutes of a Special Meeting of the Board of Directors of Jobena Corp. dated May 14, 2006 (authorizing the sale of 33 shares of Jobena common stock to Nancy Proulx for \$██████)	Y	Y
APP 6	Minutes of a Joint Meeting of the Directors and Stockholders of Jobena Corp. dated January 31, 2012 (authorizing the purchase of 3 shares from each of the 3 existing shareholders for \$██████ each, and the issuance of 33 shares to Jaime Ruggerio (nee Proulx) for \$██████)	Y	Y
APP 7	Jaime Ruggerio (nee Proulx) Employment Agreement dated January 1, 2011	Y	Y
APP 8	Jobena Corp. Shareholders' Agreement dated February 1, 2011 (NB: the Shareholders' Agreement is mis-dated; the document was actually executed and adopted on February 1, 2012)	Y	Y
APP 9	Stock Purchase Agreement dated January 1, 2017 between John DiGuiseppe and Donald Irving (DiGuiseppe sells his 30 shares of Jobena to Irving for \$██████)	Y	Y
APP 10	Minutes of a Special Meeting of the Board of Directors of Jobena Corp. dated January 1, 2017 (authorizing the DiGuiseppe stock sale to Irving, and waiving Jobena's stock purchase rights under the Jobena Corp. Shareholders' Agreement)	Y	Y
APP 11	Written Consent of the Shareholders of Jobena Corp. dated January 1, 2017 (authorizing the DiGuiseppe stock sale to Irving, and waiving Jobena's stock purchase rights under the Jobena Corp. Shareholders' Agreement)	Y	Y
APP 12	Jobena Corp. Stock Ledger showing historical stock transactions and current ownership	Y	Y
APP 13	Jaime Ruggerio Resume	Y	Y
APP 14	Jobena 2010 and 2011 Financial Statements as compiled by Jobena's independent accountant, Sixt, Wengewicz & Tharnish	Y	N

APP 15	Jobena 2010 Tax Returns	Y	N
APP 16	Jobena 2011 Tax Returns	Y	N
APP 17	Statement of MWBE contracts and sales thereunder by Jobena for the last 10 years	Y	N
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Letter	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 5	Jobena Shareholder Agreement	Y	Y
DED 6	Jobena Share Ownership Letter	Y	Y
DED 7	Various Meeting Minutes	Y	Y
DED 8	Jobena Corp. By-Laws	Y	Y
DED 9	Certification Application Affidavit	Y	Y
DED 10	Jaime Proulx Employment Agreement	Y	Y
DED 11	Manufacturers and Traders Trust Company Signature Card	Y	Y
DED 12	2775 Broadway, Inc. Lease	Y	Y
DED 13	Nancy Proulx Resume	Y	Y
DED 14	Donald Irving Resume	Y	Y
DED 15	Jobena Owner Roles Narrative	Y	Y
DED 16	Penske Vehicle Lease Service Agreement	Y	Y
DED 17	Jobena Stock Agreement and Stock Certificates	Y	Y
DED 18	Jaime Ruggiero Resume	Y	Y