

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

In the Matter

- of -

the Application of Kostow Greenwood Architects, LLP
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 58358

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
May 16, 2025

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

PROCEDURAL HISTORY

1. On August 5, 2024, Michael Kostow, as Principal, applied on behalf of Kostow as a minority-owned business enterprise (“MBE”). (DED Exhibit 1)
2. On December 12, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification must have demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2); and
 - (b) Minority group members or women relied upon for certification must be the highest-ranking officer of the business enterprise, and, where applicable, control the board of directors, or serve as a general partner as required under 5 NYCRR §144.2(d)(1).
3. Kostow timely filed a Request to Appeal on December 19, 2024. (DED Exhibit 3)
4. A notice to proceed via written appeal was sent to Kostow on December 26, 2024. (DED Exhibit 4)

5. Kostow submitted its written appeal by letter dated January 30, 2025, with attachments (APP Exhibit A).
6. The Division filed an Affidavit of Matthew LeFebrve, Associate Certification Director, dated April 8, 2025, and a brief of Anequa Pond, Esq., counsel for the Division, dated April 8, 2025.

FINDINGS OF FACT

7. Kostow is engaged in the business of providing architectural services. (DED Exhibit 1)
8. Ms. Lena Fan and Mr. Gary Li are the minority owners relied upon for certification. Ms. Lena Fan became a principal in July 2023 with a 25.5% ownership interest. Mr. Gary Li also became a principal in July 2023 with a 25.5% ownership interest. Mr. Michael Kostow is a principal and a 49% owner of the business since 2003. (DED Exhibit 1)
9. Mr. Kostow contributed expertise as his capital contribution on January 13, 2003, with a dollar value of \$0. Ms. Fan and Mr. Li contributed expertise as their capital contributions on July 1, 2023, with the dollar value of each contribution listed as \$0. (DED Exhibit 1)
The initial capital contributions are based on the partners' expertise. (DED Exhibit 5)
10. Kostow generated gross receipts of \$[REDACTED] in 2023 and \$[REDACTED] in 2022. (DED Exhibits 9 and 11)
11. Ms. Fan, Mr. Li and Mr. Kostow are all partners in the business, and no one is a general partner. (DED Exhibit 1)
12. The partnership agreement states, "The parties acknowledge and agree that in the event of Michael Kostow's death, the Purchase Price for his Partnership Interest shall [be] not less than [REDACTED] (\$[REDACTED])." (DED Exhibit 8)

13. Section 6.1 of the Partnership Agreement states, “All Partners shall be responsible for administering and be permitted to administer, the general business affairs of the Partnership, and carrying out and putting into effect the general policies and specific instruction of the majority of the Partners.” (DED Exhibit 8)
14. Section 6.4 of the Partnership Agreement states, “At all meetings of the Partners, the presence of all partners shall be necessary and sufficient to constitute a quorum for the transaction of business.” Section 6.7 requires the unanimous written consent of all other Partners for acts including: borrowing money in the Partnership’s name; encumbering his or her Partnership interest; and making any purchases on behalf of the Partnership in excess of \$5,000. (DED Exhibit 8)

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 or 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(d)(1) states as follows:

- (1) Control of business management. A minority group member or woman relied upon for certification must be the highest-ranking officer of the business enterprise for which certification is sought, and, where applicable, control the board of directors or serve as a general partner. Any agreements describing the management of the business enterprise shall be consistent with the foregoing.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proof to establish that Division staff's determination to deny the application filed by Kostow for certification as a MBE is not supported by substantial evidence (*see* State Administrative Procedure Act § 306[1]). The substantial evidence standard "demands only that a given inference is reasonable and plausible, not necessarily the most probable," and applicant must demonstrate that Division staff's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact." (*Matter of Ridge Rd. Fire Dist. v Schiano*, 16 NY3d 494, 499 [2011]).

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain previously submitted materials will be considered, however new evidence will not be considered. *See Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the minority-owner's contribution came from assets belonging solely to the minority-owner. Given this criterion, the Division consistently denies applications for MBE certification where, as here,

an applicant fails to substantiate the source of the capital contribution by the minority-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 the minority-owner 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).

Mr. Kostow contributed expertise as his capital contribution on January 13, 2003, with a dollar value of \$0. Ms. Fan and Mr. Li contributed expertise as their capital contributions on July 1, 2023, with the dollar value of each contribution listed as \$0. (DED Exhibit 1) Applicant stated that the initial capital contributions are based on the partners’ expertise. (DED Exhibit 5)

Kostow generated gross receipts of \$[REDACTED] in 2023 and \$[REDACTED] in 2022. (DED Exhibits 9 and 11)

The partnership agreement states, “The parties acknowledge and agree that in the event of Michael Kostow’s death, the Purchase Price for his Partnership Interest shall [be] not less than [REDACTED] (\$[REDACTED]).” (DED Exhibit 8)

5 NYCRR §144.2(b)(2)(i) states that “Minority group members or women may demonstrate a capital contribution by providing documentary evidence of ... (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.” Where applicant provided no valuation of the owner’s expertise, the Division was not able to ascertain whether the contribution was proportionate. *Matter of JVR Electric, Inc.*, Recommended Order dated August 31, 2016, Final Order 16-43 dated September 9, 2016. There is no documentation to show the expertise was uncompensated, specialized and directly applicable to one or more critical aspects of the operation of the business, and no reasonable assessment of fair market value of the expertise.

The stated \$0 contributions by Mr. Li and Ms. Fan are not proportional to their equity interest. Evidence of the value of the business is contained in the Partnership Agreement which assessed Mr. Kostow’s 49% ownership interest at not less than \$[REDACTED]. (DED Exhibits 8-11) Considering the value of Mr. Kostow’s 49% interest is at least \$[REDACTED], the \$0 contributions of Mr. Li and Ms. Fan are not proportionate.

On appeal, applicant states that Mr. Li and Ms. Fan each contributed \$[REDACTED] in capital to the business as of July 1, 2023, when they became owners. (APP Exhibit A) This is new evidence that was not before the Division at the time of the denial determination and will not now be considered. See *Scherzi Systems, LLC v. White*, 197 A.D. 3d 1466 (3d Dept 2021). Also, this contradicts the information provided in the application, which valued their contributions at \$0, and is unsupported by any documentation. (DED Exhibit 1)

The Division’s determination to deny the application on the basis that Kostow failed to demonstrate that Mr. Li and Ms. Fan made contributions to Kostow in proportion to their

ownership interest, as required under 5 NYCRR §144.2(b)(2), is supported by substantial evidence.

II. Control

The Division also denied certification on the ground that Mr. Li and Ms. Fan are not the highest-ranking officers of the business, and/or control the board of directors or serve as a general partner, as required under 5 NYCRR §144.2(d)(1).

Mr. Kostow, Mr. Li and Ms. Fan all serve as Principals of Kostow. They are all partners in the business, and no one is a general partner. (DED Exhibit 1) Since all three individuals are equally titled, Mr. Li and Ms. Fan are not the highest-ranking officers of Kostow and do not serve as a general partner.

Section 6.1 of the Partnership Agreement states, “All Partners shall be responsible for administering and be permitted to administer, the general business affairs of the Partnership, and carrying out and putting into effect the general policies and specific instruction of the majority of the Partners.” Section 6.4 states, “At all meetings of the Partners, the presence of all partners shall be necessary and sufficient to constitute a quorum for the transaction of business.” Section 6.7 requires the unanimous written consent of all other Partners for acts including: borrowing money in the Partnership’s name; encumbering his or her partnership interest; and making any purchases on behalf of the Partnership in excess of \$5,000. (DED Exhibit 8) Therefore, Mr. Kostow, the non-qualifying owner, is necessary to transact business.

On appeal, applicant provided an updated Partnership Agreement, which was amended after the denial determination, and an updated resume (APP Exhibit A) This is new evidence that was not before the Division at the time of the denial determination and will not now be considered. See *Scherzi Systems, LLC v. White*, 197 A.D. 3d 1466 (3d Dept 2021).

The Division's determination to deny the application on the basis that Kostow failed to demonstrate that Mr. Li and Ms. Fan are the highest-ranking officers and/or control the board of directors, or serve as a general partner, as required under 5 NYCRR §144.2(d)(1), is supported by substantial evidence.

CONCLUSION

Kostow did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), and 144.2(d)(1), was not based on substantial evidence.

RECOMMENDATION

For the reasons set forth above, I recommend that the Director affirm the Division's determination to deny Kostow's application for certification as a minority-owned business enterprise.

In the Matter of Kostow Greenwood Architects, LLP
 DED File ID No. 58358
 Exhibit Chart

Exhibit #	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Capital Contribution Letter	Y	Y
DED 6	Lena Fan Resume	Y	Y
DED 7	Gary Li Resume	Y	Y
DED 8	Partnership Agreement	Y	Y
DED 9	2023 Business Tax Return	Y	Y
DED 10	Mr. Li's 2023 W-2	Y	Y
DED 11	2022 Business Tax Return	Y	Y
DED 12	Ms. Fan's 2023 W-2	Y	Y
DED 13	Mr. Li's Duties	Y	Y
DED 14	Ms. Fan's Duties	Y	Y
DED 15	Mr. Kostow's Duties	Y	Y