

**NEW YORK STATE**  
**DEPARTMENT OF ECONOMIC DEVELOPMENT**  
**625 BROADWAY**  
**ALBANY, NEW YORK 12245**

**In the Matter**

**- of -**

**the Application of Ksander Group Corp.**  
**for Certification as a Minority-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 67402**

**RECOMMENDED ORDER**

**-by-**



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**Theresa Wells**  
**Administrative Law Judge**  
**May 1, 2024**

This matter considers the written appeal by Ksander Group Corp., (“Ksander” 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 March 15, 2020, Cesar Valentin, as CEO, applied on behalf of Ksander, for certification as a minority-owned business enterprise (“MBE”). (DED Exhibit 1).
2. On March 31, 2023, the Division denied the application on the grounds that: (DED Exhibit 2)
  - (a) Minority group member relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying upon other persons as required under NYCRR §144.2(c)(1); and
  - (b) Minority group member relied upon for certification does not make 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); and
  - (c) Minority group member relied upon for certification is not the highest-ranking officer and/or controls the board of directors and/or serves as a general partner, as required by 5 NYCRR §144.2(d)(1).
3. Ksander submitted its Request to Appeal by letter dated June 2, 2023. (APP Exhibit A).
4. A Notice to Proceed via Written Appeal was sent to the Applicant on June 6, 2023. (DED Exhibit 4).

5. Applicant did not send a written appeal submission.
6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director dated March 13, 2024, and a brief of Dennie Byam Esq., counsel for the Division, dated March 14, 2024.

### **FINDINGS OF FACT**

7. Ksander is a construction company which provides waterproofing and Exterior Insulation and Finish System (EIFS) siding. (DED Exhibit 1).
8. Cesar Valentin is the CEO and owns 120 shares which is a 60% ownership interest in Ksander. Aleksander Haxhitasi is the COO and owns 80 shares which is a 40% ownership interest in Ksander. (DED Exhibit 1).
9. Cesar Valentin and Aleksander Haxhitasi are both equally responsible for all managerial operations for the business. (DED Exhibits 1 and 7).
10. Cesar Valentin has expertise and experience in business development and operations management. His day-to-day business activities include managing profit and loss statements; monitoring YoY (year-over-year) growth; acquiring new partnerships and business opportunities; hiring construction talent; training contractors on water proofing and EIFS system best practices; contract negotiating and job bidding; managing payment for independent contractors. He provides management and leadership of workers, and business development. He is fluent in English and Spanish, and provides advanced computer and technical solutions. Prior to being President at Ksander, Cesar Valentin was a liberal arts major at La Guardia Community College. (DED Exhibit 5).
11. Aleksander Haxhitasi has expertise as a project manager, site manager, general foreman, masonry laborer, and as a labor worker. He has experience with new construction and renovation, project management, multi-site operations, construction management, heavy

equipment operation, residential construction, HVAC systems, drywalling, plumbing, roofing, project estimation and bidding, electrical installation and repair, and technical support. His day-to-day business activities include adjusting project plans to account for dynamic targets; staffing changes and operational specifications; closely collaborating with project members to identify and quickly address problems; acquiring knowledge of industry trends; and developing solutions and strategy through effective research. He is aligned with staff members to develop, identify and achieve assigned goals and initiatives. (DED Exhibit 6).

12. Cesar Valentin and Aleksander Haxhitasi do not engage in physical labor for the business. Therefore, neither person has construction worker licenses, such as for the use of scaffolds or to do work on buildings. (DED Exhibits 1, 5 and 6).

13. Ksander's by-laws state that both Cesar Valentin and Aleksander Haxhitasi are Ksander's only shareholders and Directors and all decisions need to be made with the consent and approval of both Cesar Valentin and Aleksander Haxhitasi. (DED Exhibit 8).

14. Sections of the by-laws state the following: (DED Exhibit 8)

Section 3: "Management of this corporation is vested in its Directors."

Section 6: "...no shareholder may transfer their stock in the corporation to any third party without the remaining shareholders approving sale."

Section 10: "No Member may perform any act in contravention of this agreement."

Section 11: "These By-Laws may only be amended when 100% of Directors approve of the amendment."

Section 12: "Amendment will require unanimous written consent of all Directors."

### **APPLICABLE LAW**

5 NYCRR § 144.2 (c)(1) states in relevant part as follows:

Competence in the industry. Minority group members or women relied upon for certification must possess adequate, industry-specific competence to make critical business

decisions without relying upon other persons. This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including, but not limited to:

- (i) Whether individuals employed by the business enterprise for which certification is sought are required to obtain licenses or certifications to provide products or services to the clients of the business enterprise;
- (ii) The extent to which academic credentials exist for persons employed in the industry; and
- (iii) The extent to which industry-specific expertise may be obtained via direct work experience.

5 NYCRR § 144.2(c)(2) states in relevant part 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.

5 NYCRR § 144.2(d)(1) states in relevant part 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 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 Ksander 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. Operation

5 NYCRR §144.2(c)(1) requires that the minority-group owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, and that "this requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things". In the *Matter of Upstate Electrical, LLC v. N.Y. State Dept. of Economic Development*, 2020 NY Slip Op. 340 (N.Y. App. Div. 2020), the Court affirmed the denial where the owner had no training or experience in the industry to make the owner qualified to supervise the work of the employees. The Applicant bears the burden of establishing that the person relied upon for certification has met this requirement. Failure to satisfy

this burden is proof that the denial was supported by substantial evidence. (See *Matter of A.A.C. Contracting, Inc.*, Recommended Order dated September 23, 2019, Final Order 19-23 dated October 22, 2019.)

The Division consistently denies certification where an applicant fails to demonstrate they possess the required competence consistent with the eligibility criteria. (See *Matter of cSide Tech, LLC*, Recommended Order dated August 14, 2023, Final Order 23-08 dated September 12, 2019.)

Mr. Valentin does not have industry specific expertise; his skills are related to general business or office management. He does not possess any academic or technical training relevant to the business' industry. His background is in business development and operations management. His responsibilities include managing profit and loss statement; monitoring YoY growth; acquiring new partnerships and business opportunities; hiring construction talent; training contractors on water proofing and EIFS best practices; contract negotiating and job bidding; and managing payment for independent contractors. (DED Exhibits 5 and 7).

The critical function of the business is construction, specifically waterproofing and siding for buildings. He does not have the training or experience in the industry necessary to supervise the work of the employees. Mr. Valentin does not perform the physical labor and does not possess any construction licenses. (DED Exhibits 1 and 5).

5 NYCRR §144.2(c)(2) states that "... minority group member relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to: (i) the products or services the business enterprise provides to clients; and (ii) the means by which the business enterprise obtains contracts or orders". The minority group member owner "must

exercise independent operational control over the core functions of the business in order to establish the requisite control.” for MBE certification. (See *Matter of J.C. Smith, Inc. v. New York State Department of Economic Development*, 163 AD3d, 1517 (4th Dept. 2018)).

Mr. Valentin and Mr. Haxhitasi are both equally responsible for all managerial operations of the business. Section 3 of the by-laws state: “Management of this corporation is vested in its Directors.” Therefore, Mr. Valentin relies upon Mr. Haxhitasi to make business decisions. The application narrative states that Mr. Valentin and Mr. Haxhitasi are the “only ones who run the company there are no other key employees.” The critical function of Ksander is construction, specifically waterproofing and EIFS for buildings. Mr. Valentin’s responsibilities include managing profit and loss statement; monitoring YoY growth; acquiring new partnerships and business opportunities; hiring construction talent; training contractors on water proofing and EIFS system best practices; contract negotiating and job bidding; and managing payment for independent contractors. Mr. Valentin does not have the expertise to exercise independent control over the core functions of the business. (DED Exhibits 1, 5, 7 and 8).

Aleksander Haxhitasi has expertise as a project manager, site manager, general foreman, masonry laborer, and as a labor worker. He has experience with new construction and renovation, project management, multi-site operations, construction management, heavy equipment operation, residential construction, HVAC systems, drywalling, plumbing, roofing, project estimation and bidding, electrical installation and repair, and technical support. His day-to-day business activities include adjusting project plans to account for dynamic targets; staffing changes and operational specifications; closely collaborating with project members to identify and quickly address problems; acquiring knowledge of industry trends; and developing solutions and strategy through effective research. Mr. Haxhitasi also works with staff members to develop, identify and achieve



assigned goals and initiatives. The record establishes that Aleksander Haxhitasi has the industry specific experience necessary to make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise for which certification is sought. (DED Exhibits 6 and 7).

Applicant argues on appeal that Mr. Valentin has been running his company since 2017 without having to rely on other persons and he would not be able to run a successful business without making operational decisions every day. (APP Exhibit B) However, the evidence in the record establishes that Mr. Valentin relies on Mr. Haxhitasi to make the managerial and operational decisions for the business. (DED Exhibits 1 and 7).

The Division's determination to deny the application on the basis that Ksander failed to demonstrate that Mr. Valentin possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and make operational decisions on a day-to-day basis with respect to the critical functions of the business, as required under 5 NYCRR §144.2(c)(2) is supported by substantial evidence.

## II. Control

The Division also denied certification on the ground that Applicant failed to demonstrate that Mr. Valentin is the highest-ranking officer of the business enterprise and/or controls the board of directors, and/or serves as a general partner, as required under 5 NYCRR §144.2(d)(1).

Cesar Valentin is the CEO and owns 60% of the shares of Ksander. The by-laws state that Cesar Valentin and Aleksander Haxhitasi are Ksander's only shareholders and Directors. The by-laws state that the management of the corporation is vested in its Directors, and that shareholders may not transfer their stock in the corporation to any third party without the remaining shareholders approving the sale. The by-laws may only be amended when 100% of Directors approve of the

amendment and the amendment requires unanimous written consent of all Directors. (DED Exhibits 1 and 8).

The by-laws make it clear that all decisions need to be made with the consent and approval of both Directors, Cesar Valentin and Aleksander Haxhitasi. Mr. Valentin, as one of the two Directors of Ksander, where each has an equal vote, does not have control of the Board of Directors. Also, Cesar Valentin and Aleksander Haxhitasi are both equally responsible for all managerial operations for the applicant business. The by-laws evidence the Applicant's failure to demonstrate that Cesar Valentin is the highest-ranking officer and/or controls the board of directors and/or serves as a general partner of Ksander. (DED Exhibits 1 and 8).

Applicant argues on appeal that Mr. Valentin would not be able to run the business without making operational decisions every day, and that in his position as CEO he is the highest-ranking officer, and Mr. Valentin controls the Board of Directors. (APP Exhibit B). The record and most specifically the by-laws fail to support these claims.

The record before the Division at the time of its determination to deny the MBE application contains substantial evidence to support its finding that the party relied upon for certification is not the highest-ranking officer and/or controls the board of directors and/or serves as a general partner, as required by 5 NYCRR §144.2(d)(1).

### **CONCLUSION**

Ksander 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(c)(1) and (2) and (d)(1) was not based on substantial evidence.

## **RECOMMENDATION**

The Division's determination to deny Ksander's application for certification as a minority-owned business enterprise should be affirmed.

In the Matter of Ksander Group Corp.  
DED File ID No. 67402  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Applicant Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Cesar Valentin Resume	Y	Y
DED 6	Aleksander Haxhitasi Resume	Y	Y
DED 7	Duties and Responsibilities Narrative	Y	Y
DED 8	Ksander By-laws	Y	Y