

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

In the Matter

- of -

the Application of Laura Li Industries, LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 63524

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 20, 2023

This matter considers the written appeal by Laura Li Industries, LLC, (“Laura Li” 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 December 1, 2022, Ms. Laura Etre, as Member, applied on behalf of Laura Li for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 12, 2023, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) Minority group members or women relied upon for certification have not demonstrated having made a capital contribution to the business enterprise proportionate to their equity interest therein, as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required under 5 NYCRR § 144.2(b)(2);
 - (b) Minority group members or women do not share in the risks and profits of the business enterprise in proportion to their equity interests therein, as required under 5 NYCRR §144.2(b)(3);
 - (c) 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, as required under 5 NYCRR §144.2(c)(1);

- (d) Minority group members or women relied upon for certification must make operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required under 5 NYCRR §144.2(c)(2);
 - (e) Minority group members or women relied upon for certification do not devote time on an ongoing basis to the daily operation of the business enterprise, as required under 5 NYCRR §144.2(c)(3); and
 - (f) The business enterprise does not operate independently, as required under 5 NYCRR § 144.2(e).
3. Laura Li timely filed a Request to Appeal on April 21, 2023 (APP Exhibit A).
 4. A notice to proceed via written appeal was sent to Laura Li on May 4, 2023 (DED Exhibit 3).
 5. Laura Li filed its written appeal on May 10, 2023 (APP Exhibit B).
 6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated August 30, 2023, and a brief of Diedre Chuckrow Esq., counsel for the Division, dated September 18, 2023.

FINDINGS OF FACT

7. Laura Li is engaged in the business of excavating, asphalt and concrete paving, and gravel and topsoil hauling (DED Exhibit 1).
8. Ms. Laura Etre is a Member and has a 75% ownership interest. Mr. Marc Etre is a Member and has a 25% ownership interest. (DED Exhibit 1).
9. The two Operating Agreements provided with the application both provide that the members “shall not be providing any initial capital contributions to the Company” (DED Exhibits 4 and 5). The application states that Ms. Etre made a capital contribution through a \$ [REDACTED] down payment towards the purchase of a truck on May 29, 2015, and made three

monetary investments in the business in 2015 totaling \$ [REDACTED] and one in 2022 for \$ [REDACTED] (DED Exhibit 1).

10. The 2020 personal tax return provides that Ms. Etre received \$ [REDACTED] in wages from Lauri Li, while Mr. Etre received \$ [REDACTED] in wages (DED Exhibit 6). The 2021 personal tax return provides that Ms. Etre received \$ [REDACTED] in wages from Laura Li, while Mr. Etre received \$ [REDACTED] (DED Exhibit 8).
11. The 2020 corporate tax return provides that Ms. Etre received \$ [REDACTED] in compensation, while Mr. Etre received \$ [REDACTED] in compensation (DED Exhibit 7). The 2021 corporate tax return provides that Ms. Etre received \$ [REDACTED] in compensation, while Mr. Etre received \$ [REDACTED] in compensation (DED Exhibit 9).
12. Mr. Etre's resume provides that he holds a B.S. Degree in Program Business Management and has been the Operations Manager and Project Superintendent for Laura Li since 2015. He carries out all daily operations, estimates and reviews all job bids, manages and supervises all projects, and coordinates all paving and milling operations. He has over 27 years of experience in the business, including 19 years at ELQ Industries, where he managed all field employees, coordinated all paving and milling operations, and carried out all operational duties (DED Exhibit 12). He is solely responsible for hiring and firing, supervising field operations, and purchasing equipment (DED Exhibit 1).
13. Ms. Etre's duties include making financial decisions, estimating, preparing bids, negotiating bonding and insurance, marketing, sales, managing and signing payroll, negotiating contracts, and acting as the signatory for business accounts (DED Exhibit 1). Her resume reflects that her roles are primarily business management and administrative (DED Exhibit 11).

14. Ms. Etre’s resume states that she has been employed at [REDACTED] since July 2015 (DED Exhibit 11). Her primary source of wages is from her position with [REDACTED] (DED Exhibits 6 and 7). She works 28 hours per week for Laura Li and 35 hours per week for [REDACTED] (DED Exhibit 18).
15. Laura Li entered into a joint venture agreement with Remus Industries on June 9, 2019, to merge the “two companies together in order to have a stronger financial position for bonding purposes.” The agreement provides that the parties “shall not engage in any other business or activity without the written consent of the Joint Venturers.” The agreement equally divides the interest and profits between the two companies (DED Exhibit 19). The application states that Remus Industries is responsible for administrative functions, including “bidding, estimating, accounts payable, accounts receivable, project managing and storage of Laura Li Industries, LLC equipment...” and Laura Li “was to provide labor... and equipment” (DED Exhibit 1).
16. The application states that Laura Li shares both yard space/warehouse space and equipment with Remus Industries (DED Exhibit 1).

APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part as follows:

Minority group members and women relied upon for certification must demonstrate a capital contribution to the business enterprise for which certification is sought proportionate to their equity interest therein.

- (i) Sources of capital contribution. Minority group members and women may demonstrate a capital contribution by providing documentary evidence of, for example and without limitation, one of more of the following:
 - 1. Money;
 - 2. Property;
 - 3. Equipment; or

4. Expertise, provided that the contribution of such expertise must be uncompensated, the expertise must be specialized and directly applicable to one or more critical aspects of the operation of the business enterprise, and a reasonable assessment of the fair market value of the expertise must be clearly documented.

5 NYCRR §144.2(b)(3) states in relevant part as follows:

Minority group members and women relied upon for certification must share in the risks and profits of the business enterprise for which certification is sought in proportion to their equity interest therein...

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

Minority group members and women relied upon for certification must make day-to-day decisions concerning the operation of the business enterprise for which certification is sought. The division shall evaluate whether minority group members or women operate a business enterprise for which certification is sought based upon the following criteria:

- (1) 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...
- (2) Minority group members and women relied upon for certification must make operational decisions on a day-to-day basis with respect to the functions of the business enterprise for which certification is sought. The critical functions of a business enterprise shall be determined by the division based upon the following factors, but is not limited to:
 - (i) The products or services the business enterprise provides to clients; and
 - (ii) The means by which the business enterprise obtains contracts or orders.
- (3) Minority group members and women relied upon for certification must devote time on an ongoing basis to the daily operation of the business enterprise for which certification is sought.

5 NYCRR §144.2(e) states as follows:

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

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

STANDARD OF REVIEW

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

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

DISCUSSION

I. Ownership

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

an applicant fails to substantiate the source of the capital contribution by the minority/woman-owner. See *Matter of Otone Mechanical Construction, Inc.*, Recommended Order dated April 24, 2015 (Final Order 17-28, dated May 2, 2017), *Matter of Spring Electric, Inc.*, Recommended Order dated March 17, 2017 (Final Order 17-21, dated March 27, 2017).

The Applicant bears the burden in establishing that she has met this certification requirement. Failure to satisfy this burden is proof that the denial was supported by substantial evidence. See *A.A.C. Contracting, Inc. v. NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021).

It is the responsibility of the applicant “to clearly identify, quantify, and explain on the certification application, what is to be considered a capital contribution.” *Matter of Scherzi Systems*, Final Order 19-16, dated September 6, 2019, *Scherzi Systems, LLC v. White*, 197 AD 3d 1466 (3d Dept. 2021).

The two Operating Agreements provided with the application both provide that the members “shall not be providing any initial capital contributions to the Company” (DED Exhibits 4 and 5). However, Ms. Etre claims that she made the following capital contributions (DED Exhibit 1):

<u>CONTRIBUTION</u>	<u>AMOUNT</u>	<u>DATE</u>
Down payment for truck	\$ [REDACTED]	5/29/2015
Investment	\$ [REDACTED]	7/10/2015
Investment	\$ [REDACTED]	10/22/2015
Investment	\$ [REDACTED]	10/27/2015
Investment	\$ [REDACTED]	8/03/2022

A sales invoice for the 2009 truck is included with the application. It provides that a down payment of \$ [REDACTED] was received, is signed by Ms. Laura Guercio, nee Laura Etre, and lists Laura Li Industries as the shipping address (DED Exhibit 16). No information is provided regarding how the vehicle was paid for, including the source of the funds.

The monetary contributions listed have no supporting documentation regarding where the money originated, where they were deposited, nor any information regarding the source of the funds within those accounts. Bank statements from 2015 from Ally Bank listing Laura E. Guercio as the account holder, for the months of January through November, and Capital One, listing Laura Li Industries as the account holder, for the months of April through October, were provided (DED Exhibits 14 and 15).

The only transaction in the amount of \$ [REDACTED] located on the July statements is a deposit into Ms. Etre's Ally account (DED Exhibit 14). Regarding the two \$ [REDACTED] investments listed, the only amount matching is a debit in the amount of \$ [REDACTED] from Ms. Etre's Ally account dated 10/22/2015, to a Chase Bank account entitled "Laura Li Industries, LLC" (DED Exhibits 14 and 21). An additional debit dated 10/29/2015, is listed on the November Ally Bank Statement, also in the amount of \$ [REDACTED] and again from the Ally account to the Chase account (DED Exhibit 14). No information regarding the source of the funds is provided regarding either transaction. Also, the November Ally Bank statement lists a credit from the Chase Bank account in the amount of \$ [REDACTED] on November 5, 2015, offsetting the two debits made on October 22 and October 29 (DED Exhibit 14).

On appeal, applicant argues that the documents provided with the application were sufficient but provided no additional clarifying information regarding the source of the funds, such as copies of checks, or other information to establish that the funds are solely from Ms. Etre (APP Exhibit B).

Applicant further argued that a previous application which was denied in 2019 provided that the business was "started with loans" (APP Exhibit B). However, no such information was included with this appeal. Both the mention of the loan, and the additional documents regarding

payment of the loan are new information which will not 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 Laura Li failed to demonstrate that Ms. Etre made capital contributions to Laura Li in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

5 NYCRR §144.2(b)(3) requires that the woman-owner must enjoy the customary incidents of ownership and must share in the risks and profits in proportion to her ownership interest in the business.

The Division routinely denies certification where there is a disparity in compensation between the majority shareholder and other owners of the business. See *Matter of Keith Titus Corporation*, Recommended Order dated October 9, 2019, Final Order 19-28, dated January 16, 2020; *Matter of Quality Industries, Inc.*, Recommended Order dated June 4, 2019, Final Order 19-15, dated August 2, 2019; *Matter of Spring Electric*, Recommended Order dated March 17, 2017, Final Order 17-21, dated March 27, 2017.

The 2020 personal tax return provides that Ms. Etre received \$ [REDACTED] in wages from Lauri Li, while Mr. Etre received \$ [REDACTED] in wages (DED Exhibit 6). The 2021 personal tax return provides that Ms. Etre received \$ [REDACTED] in wages from Laura Li, while Mr. Etre received \$ [REDACTED] (DED Exhibit 8). The 2020 corporate tax return provides that Ms. Etre received \$ [REDACTED] in compensation, while Mr. Etre received \$ [REDACTED] in compensation (DED Exhibit 7). The 2021 corporate tax return provides that Ms. Etre received \$ [REDACTED] in compensation, while Mr. Etre received \$ [REDACTED] in compensation (DED Exhibit 9).

Applicant argues on appeal that the income referenced on the form K-1 should also be factored into the calculation regarding income earned from the business (APP Exhibit B). This is

correct. However, when factoring in the wages and corporate compensation for both Ms. Etre and Mr. Etre in both 2020 and 2021, the only amounts received in proportion to their ownership interests, are reflected in the K-1 nonpassive income. In 2020, Ms. Etre received substantially less overall compensation than Mr. Etre. In 2021, Ms. Etre received 61% of the overall compensation paid to both owners, which is again not in proportion to the 75%/25% ownership split (DED Exhibits 6, 7, 8 and 9).

The Division's determination to deny the application on the basis that Laura Li failed to demonstrate that Ms. Etre shared in the risks and profits in proportion to her ownership interest, as required under 5 NYCRR §144.2(b)(3) is supported by substantial evidence.

II. Operation

5 NYCRR §144.2(c)(1) requires that the woman-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 *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 woman-owner had no training or experience in the industry to make her qualified to supervise the work of her employees.

Ms. Etre does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business's industry. Her responsibilities include making financial decisions, estimating, preparing bids, negotiating bonding and insurance, marketing, sales, managing and signing payroll, negotiating contracts, and acting as the signatory for the business accounts (DED Exhibit 1). These are administrative functions which do not involve the critical functions of excavating,

paving, and hauling, which are specific to this business. Her resume confirms that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 11).

Mr. Etre's resume provides that he holds a B.S. Degree in Program Business Management and has been the Operations Manager and Project Superintendent for Laura Li since 2015. He carries out all daily operations, estimates and reviews all job bids, manages and supervises all projects, and coordinates all paving and milling operations. He has over 27 years of experience in the business, including 19 years at ELQ Industries, where he managed all field employees, coordinated all paving and milling operations, and carried out all operational duties (DED Exhibit 12). He is solely responsible for hiring and firing, supervising field operations, and purchasing equipment (DED Exhibit 1).

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

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

Laura Li is engaged in excavation contracting, paving and gravel and topsoil hauling (DED Exhibit 1). Ms. Etre does not have experience in the business's critical functions (DED Exhibit 11). Mr. Etre is relied upon for managing the core functions of the business, such as supervising

field operations (DED Exhibits 1 and 12).

The Division's determination to deny the application on the basis that Laura Li failed to demonstrate that Ms. Etre 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.

The application was also denied on the ground that the woman-owner does not devote sufficient time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR§144.2(c)(3). The Division has consistently found that part-time work for a business does not qualify as devoting time to the daily operation of the business. See *Matter of Brandt Equipment*, Recommended Order dated April 28, 2020, Final Order 20-06, dated June 2, 2020.

Ms. Etre's resume reflects that she has worked for [REDACTED] since July of 2015, and is still employed there (DED Exhibit 11). She works 28 hours per week for Laura Li and 35 hours per week for [REDACTED] (DED Exhibit 18). The tax returns submitted with the application provide that her primary source of wages is from her position with [REDACTED] (DED Exhibits 6 and 7). On appeal, Ms. Etre states that the 28 hours per week is inaccurate. She states that she takes her phone and laptop to her [REDACTED] job and is constantly working for Laura Li. She engages in company business via electronic means but does not provide any evidence that she checks on the status of the projects on a day-to-day basis or oversees the day-to-day operations of the business (APP Exhibit B). Mr. Etre is relied upon for supervising field operations for the work of the business (DED Exhibits 1 and 12).

The Division's finding that Ms. Etre does not devote time to the daily operation of the business as required under 5 NYCRR §144.2(c)(3) is supported by substantial evidence.

III. Independence

The Division further found that Laura Li is not an independent business enterprise, as required under 5 NYCRR §144.2(e). This section considers “whether the business enterprise shares resources with another entity, including, but not limited to, personnel, office space, warehouse and other storage space, and yard space... 5 NYCRR §144.2(e)(1), and “whether the business enterprise receives tangible benefits as a result of a connection to another entity...”. 5 NYCRR §144.2(e)(3).

Laura Li entered into a joint venture agreement dated June 9, 2019 to “merge the two companies together in order to have a stronger financial position for bonding purposes.” The agreement provides that the parties “shall not engage in any other business or activity without consent of the Joint Venturers.” The agreement equally divides the interest and profits between the two companies (DED Exhibit 19). Remus Industries is responsible for administrative functions, including “bidding, estimating, accounts payable, accounts receivable, project managing and storage of Laura Li Industries, LLC equipment... and Laura Li “was to provide labor... and equipment.” (DED Exhibit 1). The application states that Laura Li shares yard space/warehouse space and equipment with Remus Industries (DED Exhibit 1). Laura Li generated substantial income from the joint venture, receiving \$ [REDACTED] in 2020 and \$ [REDACTED] in 2021 (DED Exhibits 8 and 9). These factors support the Division’s finding that Laura Li does not operate independently.

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

CONCLUSION

Lauri Li did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(2), 144.2(b)(3), 144.2(c)(1), 144.2(c)(2), 144.2(c)(3) and 144.2(e) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Laura Li Industries, LLC
DED File ID No. 63524
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Request to Appeal	Y	Y
APP B	Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Notice to Proceed Via Written Appeal	Y	Y
DED 4	Original Operating Agreement dated 4/20/2015	Y	Y
DED 5	New Operating Agreement dated 11/20/2022	Y	Y
DED 6	2020 Federal Tax Return for Laura and Marc Etre	Y	Y
DED 7	2021 Federal Tax Return for Laura and Marc Etre	Y	Y
DED 8	2020 Applicant Business Tax Return	Y	Y
DED 9	2021 Applicant Business Tax Return	Y	Y
DED 10	W2's for Laura Li Industries, LLC	Y	Y
DED 11	Laura Etre Resume	Y	Y
DED 12	Marc Etre Resume	Y	Y
DED 13	Current Contract "82358" for Remus Industries/Laura Li Industries	Y	Y
DED 14	2015 Statements from Ally Bank	Y	Y
DED 15	2015 Statements from Capital One	Y	Y

DED 16	Sales Invoice 2009 International Truck	Y	Y
DED 17	Vehicle Registration for 2009 International Truck	Y	Y
DED 18	Narrative regarding Hours Per Week	Y	Y
DED 19	Joint Venture Agreement	Y	Y
DED 20	2022 Property Tax Bill	Y	Y
DED 21	Bank Letter from Chase Bank	Y	Y