

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

**In the Matter**

**- of -**

**the Application of M&M Lawn Care, Inc.**  
**for Certification as a Minority/Woman-owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 70461**

**RECOMMENDED ORDER**

**-by-**



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**David A. Murad**  
**Administrative Law Judge**  
**March 28, 2024**

This matter considers the written appeal by M&M Lawn Care, Inc. (“M&M” 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/woman-owned business enterprise (“MWBE”).

### **PROCEDURAL HISTORY**

1. On December 15, 2022, Ms. Rina Saal, as CEO, applied on behalf of M&M for certification as a minority/woman-owned business enterprise (“MWBE”) (DED Exhibit 1).
2. On August 17, 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) Ownership must not have been allocated to the minority group members or women relied upon for certification solely for the purpose of securing certification, as required under 5 NYCRR §144.2(b)(5);
  - (c) 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);

- (d) 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);
  - (e) 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); and
  - (f) Minority group members or women relied upon for certification do not negotiate business contracts and represent themselves to clients as the principals of the business enterprise, as demonstrated by fully executed business agreements, as required under 5 NYCRR §144.2(d)(2).
3. M&M timely filed a Request to Appeal on August 30, 2023 (APP Exhibit A/ DED Exhibit 3).
  4. A notice to proceed via written appeal was sent to M&M on September 5, 2023 (DED Exhibit 3).
  5. M&M filed its written appeal on October 13, 2023 (APP Exhibit B).
  6. The Division filed an Affidavit of Robyn Clarke, Certification Director, dated January 18, 2024, and a brief of Kyle Satchell Esq., counsel for the Division, dated January 30, 2024.

**FINDINGS OF FACT**

7. M&M is engaged in the business of landscaping, hardscaping, and fencing (DED Exhibit 1).
8. Ms. Rina Saal is the CEO and has a 26% ownership interest. Ms. Ana Mizrahi is the Vice President and has a 26% ownership interest. Ms. Saal and Ms. Mizrahi were the women relied upon for certification. Mr. Mordechai Saal is the Secretary and has a 24% ownership

interest. Mr. Moshe Mizrahi is the Treasurer and has a 24% ownership interest. (DED Exhibit 1).

9. Ms. Saal and Ms. Mizrahi each “do not have any proof of contribution to start this business.” (DED Exhibits 5 and 6).
10. M&M was established on September 6, 2008. Mr. Saal and Mr. Mizrahi were each issued 100 shares. Mr. Mizrahi transferred 52 shares to Ms. Mizrahi and Mr. Saal transferred 52 shares to Ms. Saal (DED Exhibit 7). The December 13, 2020, Minutes of the Special Meeting of Shareholders stated the purpose of the meeting was for “including Rina Rivka Saal and Ana Mizrahi as shareholders by gifting 52 shares each for their ownership in M&M Lawn Care Inc – DBA Moshees Landscaping and Fencing for their roles in managing; marketing; and business development of the company since 2008.” (DED Exhibit 8).
11. In 2020, Rina Saal received wages in the amount of \$ [REDACTED] and Ana Mizrahi received wages in the amount of \$ [REDACTED] (DED Exhibits 9 and 10).
12. In 2021, Rina Saal received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], and wages of \$ [REDACTED]; Ana Mizrahi received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], and wages of \$ [REDACTED]; Mordechai Saal received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], compensation of officers of \$ [REDACTED], and wages of \$ [REDACTED]; and Moshe Mizrahi received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], compensation of officers of \$ [REDACTED], and wages of \$ [REDACTED] (DED Exhibits 9, 10, 11, 12 and 13).
13. Rina Saal’s resume states that she was an Executive Officer at M&M from October 2008 to December 2020. The resume lists her duties as “make reports by each division

Landscaping, fencing, and Hardscaping” and “Preparing seasonal service contracts for landscaping service.” She has been the CEO since January 2021. She listed her duties to include: “ensured that the business operated in accordance with policies”, “managing a company’s overall operation”, “weekly minute meeting with COO and CFO”, and “Make new goals on how to expand the business.” (DED Exhibit 14).

14. Ana Mizrahi’s resume states that she has worked at M & M since 2016. Her Profile lists her as a “Dedicated Customer Service Representative.” The resume states she was involved in Payroll and Administration from 2016 to 2020, where she was responsible for processing payroll, managing databases, monitoring sales, and customer service. She has been the Chief of Operations since January 2021, where she is responsible for designing and implementing policies, customer service, and tracking the time frames of jobs (DED Exhibit 15).

15. Moshe Mizrahi’s resume states that he has been the Landscape Supervisor at M&M since October 2008, responsible for planning and organizing production goals with crew members, planning and supervising landscape activities, performing landscape work, project estimating and bidding, reviewing plans and designs, equipment maintenance and operation, and customer service (DED Exhibit 16).

16. Mordechai Saal’s resume states that he has been the Fence Installer at M&M since October 2008, responsible for installing fences, conducting site inspections, gathering measurements, determining project scopes, creating project plans and diagrams, estimating, equipment maintenance and operation, and customer service (DED Exhibit 17).

17. Copies of four estimates were provided with the application. One estimate was signed by Mordechai Saal, and the other three estimates were not signed by any of the owners (DED

Exhibit 19). Copies of Form 941 and Form NYS-45 submitted with the application were all signed by Mordechai Saal (DED Exhibits 20 and 21). The only contract submitted with the application was signed by Mordechai Saal (DED Exhibit 22).

### APPLICABLE LAW

5 NYCRR §144.2(b)(2) states in relevant part 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 woman-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(b)(3) states in relevant part as follows:

Risks and profits. 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:

Operation. 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.

5 NYCRR §144.2(d)(2) states as follows:

Control of business negotiations. Minority group members and women relied upon for certification must negotiate business contracts and represent themselves to clients as the principals of business entities for which certification is sought, as demonstrated by fully executed business agreements.

### **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 M&M for certification as a MWBE 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).

Ms. Saal and Ms. Mizrahi each “do not have any proof of contribution to start this business.” (DED Exhibits 5 and 6). Corporate minutes reflect that the shares were transferred to Rina Saal and Ana Mizrahi “for their roles in managing; marketing and business development of



the company since 2008.” (DED Exhibit 8). However, Ms. Saal and Ms. Mizrahi both received wages in 2020, the year before the shares were gifted (DED Exhibits 9 and 10). There are no tax or financial records to support that they were on payroll prior to 2020. There is no proof in the application that Ms. Saal and Ms. Mizrahi were working uncompensated since 2008, and that their uncompensated work should be considered as expertise. Also, there is no assessment of the fair market value of the claimed expertise.

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.

The Division’s determination to deny the application on the basis that M&M failed to demonstrate that Ms. Saal and Ms. Mizrahi made capital contributions to M&M in proportion to their ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

The Division also denied certification on the ground that the minority/woman owners relied upon for certification were only allocated majority ownership solely for the purpose of securing WBE certification, contrary to 5 NYCRR §144.2(b)(5), which states “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 woman-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.”

Applicant provided no evidence that Ms. Saal and Ms. Mizrahi made any capital contribution in exchange for their ownership interest in the company and thus the transfer of their shares is not supported by reasonable consideration (DED Exhibit 1). They were gifted their ownership interests in 2021 and the business applied for certification in 2022. They were paid no wages prior to 2020 and there is no documentation in the record to establish that they were working in exchange for ownership interests in lieu of wages.

On appeal, applicant states that “many successful business owners retreat from business management to pursue other business interests” and that “agreeing to pass on from business ownership at the right time mustn’t penalize the original founders...” (APP Exhibit B). This indicates that Mr. Saal and Mr. Mizrahi plan to step away from the business, leaving Ms. Saal and Ms. Mizrahi in ownership and executive positions right before applying for certification,

The Division’s determination to deny the application on the basis that Ms. Saal and Ms. Mizrahi did not demonstrate that they were allocated majority ownership other than solely for the purpose of securing MWBE certification, as required under 5 NYCRR §144.2(b)(5), is supported by substantial evidence.

5 NYCRR §144.2(b)(3) requires that the minority/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.

In 2021, Rina Saal received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], and wages of \$ [REDACTED]; Ana Mizrahi received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], and wages of \$ [REDACTED]; Mordechai Saal received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], compensation of officers of \$ [REDACTED], and wages of \$ [REDACTED]; and Moshe Mizrahi received ordinary business income of \$ [REDACTED], distributions of \$ [REDACTED], compensation of officers of \$ [REDACTED], and wages of \$ [REDACTED] (DED Exhibits 9, 10, 11, 12 and 13).

On appeal, applicant argues that “Compensation after a year or so of new ownership would not be ideal factors in current day-to-day responsibility of business functions and management. Many successful businesses have their original founders retreat from active management to pursue other business interests and new owners take the reins for further growth, while said founders continue to receive financial returns for their yearslong sweat and leadership.” (APP Exhibit B).

However, 5 NYCRR §144.2(b)(3) requires that the minority/woman-owner must share in the risks and profits in proportion to her ownership interest in the business. Mr. Saal and Mr. Mizrahi received substantially more income from M&M than Ms. Saul and Ms. Mizrahi. Ms. Saal and Ms. Mizrahi therefore do not share in the profits in proportion to their equity interest.

## II. Operation

5 NYCRR §144.2(c)(1) requires that the minority/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.

Rina Saal’s resume states that she was an Executive Officer at M&M from October 2008 to December 2020. The resume lists her duties as “make reports by each division Landscaping, fencing, and Hardscaping” and “Preparing seasonal service contracts for landscaping service.” She has been the CEO since January 2021. She listed her duties to include: “ensured that the business operated in accordance with policies”, “managing a company’s overall operation”, “weekly minute meeting with COO and CFO”, and “Make new goals on how to expand the business.” (DED Exhibit 14).

Ana Mizrahi’s resume states that she has worked at M&M since 2016. Her Profile lists her as a “Dedicated Customer Service Representative.” She was involved in Payroll and Administration from 2016 to 2020, where she was responsible for processing payroll, managing databases, monitoring sales, and customer service. She has been the Chief of Operations since January 2021, where she is responsible for designing and implementing policies, customer service, and tracking the time frames of jobs (DED Exhibit 15).

Moshe Mizrahi’s resume states that he has been the Landscape Supervisor at M&M since October 2008, responsible for planning and organizing production goals with crew members,

planning and supervising landscape activities, performing landscape work, project estimating and bidding, reviewing plans and designs, equipment maintenance and operation, and customer service (DED Exhibit 16).

Mordechai Saal's resume states that he has been the Fence Installer at M&M since October 2008, responsible for installing fences, conducting site inspections, gathering measurements, determining project scopes, creating project plans and diagrams, estimating, equipment maintenance and operation, and customer service (DED Exhibit 17).

Ms. Saal and Ms. Mizrahi do not have any industry specific expertise; their skills are related to general business or office management. They do not possess any training or experience relevant to fence installation and lawn care. Their responsibilities described in their resumes are administrative in nature (DED Exhibits 14 and 15).

On appeal, applicant does not argue that Ms. Saal and Ms. Mizrahi possess adequate industry-specific competence. They argue that: "Industry-specific tradecraft expertise would also not be ideal factors in current day to day responsibility of critical business functions and management. Many successful businesses have tier-based Chain of Command, where the trained field professionals report to lay persons who own and lead the business." (APP Exhibit B). This argument does not negate the requirement under 5 NYCRR §144.2(c)(1) that the minority/woman-owner possess adequate, industry-specific competence to make critical business decisions without relying upon other persons.

5 NYCRR §144.2(c)(2) states that "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”.

The minority/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 (4<sup>th</sup> Dept. 2018).

As stated above, both Ms. Saal’s resume, and Ms. Mizrahi’s resume reflect duties and responsibilities that are administrative in nature. Neither resume reflects any industry-specific duties or responsibilities (DED Exhibits 14 and 15). Mr. Saal’s resume reflects his job title as Fence Installer, and Mr. Mizrahi’s resume lists him as a Landscape Supervisor. Their resumes reflect that they both have the industry-specific competence necessary to run the business (DED Exhibits 16 and 17). A Home Improvement License was issued to Moshees Fencing under Mordechai Saal, not either Ms. Saal or Ms. Mizrahi. (DED Exhibit 18).

The Division’s determination to deny the application on the basis that M&M failed to demonstrate that Ms. Saal and Ms. Mizrahi possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), and 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.

### III. Control

Minority/women-owners must demonstrate control of negotiations through the production of signed contracts, as required by 5 NYCRR §144.2(d)(2). Negotiating and executing contracts are related to the core business functions. Signing contracts demonstrates that a minority/woman-

owner exercises appropriate control over a business enterprise with respect to business negotiations. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11, dated November 7, 2022.

Copies of four estimates were provided with the application. One estimate was signed by Mordechai Saal, and the other three estimates were not signed by any of the owners (DED Exhibit 19). Copies of Form 941 and Form NYS-45 submitted with the application were all signed by Mordechai Saal (DED Exhibits 20 and 21). The only contract submitted with the application was signed by Mordechai Saal (DED Exhibit 22).

The record does not establish that Ms. Saal and Ms. Mizrahi signed any contracts, estimates, or other business agreements (DED Exhibit 1).

Therefore, applicant failed to demonstrate appropriate control of the business by the women-owners as required by 5 NYCRR §144.2(d)(2). See *Matter of Jaclyn Building Services*, Recommended Order dated May 23, 2016, Final Order 16-21 dated May 25, 2016 (substantial evidence supported denial where no evidence was presented that the minority/woman-owner signs contracts on behalf of the business).

### **CONCLUSION**

M&M did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority/woman-owned business enterprise with respect to the eligibility criteria at 5 NYCRR §§144.2(b)(2), 144.2(b)(5), 144.2(b)(3), 144.2(c)(1), 144.2(c)(2) and 144.2(d)(2) 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 M&M's application for certification as a minority/woman-owned business enterprise.



In the Matter of M&M Lawn Care, Inc.  
DED File ID No. 70461  
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	Request to Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Ana Mizrahi Narrative	Y	Y
DED 6	Rina Saal Narrative	Y	Y
DED 7	Stock Transfer Ledger	Y	Y
DED 8	Minutes of the Special Meeting of Shareholders dated December 31, 2020	Y	Y
DED 9	2020 and 2021 W-2s of Rina Saal	Y	Y
DED 10	2020 and 2021 W-2s of Ana Mizrahi	Y	Y
DED 11	2020 and 2021 W-2s of Moshe Mizrahi	Y	Y
DED 12	2020 and 2021 W-2s of Mordechai Saal	Y	Y
DED 13	M&M Lawn Care1120-S Business Tax Return	Y	Y
DED 14	Rina Saal Resume	Y	Y
DED 15	Ana Mizrahi Resume	Y	Y

DED 16	Moshe Mizrahi Resume	Y	Y
DED 17	Mordecai Saal Resume	Y	Y
DED 18	Home Improvement License	Y	Y
DED 19	Estimates	Y	Y
DED 20	Form 941s	Y	Y
DED 21	NYS-45s	Y	Y
DED 22	Contract	Y	Y