

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

In the Matter

- of -

the Application of Mischler Financial Group, Inc.
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 1187300

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
December 15, 2023

This matter considers the written appeal by Mischler Financial Group, Inc., (“MFG” 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 September 28, 2021, Mr. Dean Chamberlain, as CEO, applied on behalf of MFG for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On February 24, 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); and
 - (b) 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. MFG timely filed a Request to Appeal on February 27, 2023 (APP Exhibit A/ DED Exhibit 9).
4. A notice to proceed via written appeal was sent to MFG on March 2, 2023 (DED Exhibit 10).
5. MFG filed its written appeal on April 21, 2023, with attachments (APP Exhibit B).

6. The Division filed an Affidavit of Glenn Butler, Associate Certification Director, dated August 30, 2023, and a brief of JaMone Turner Esq., counsel for the Division, dated September 1, 2023.

FINDINGS OF FACT

7. MFG is a broker-dealer that provides investment banking/underwriting services for primary debt and equity capital market transactions, as well as secondary market executions for domestic and international equities, exchange-traded funds, foreign exchange market and options transactions, and fixed income products (DED Exhibit 1).
8. Mr. Dean Chamberlain is the CEO and has a 55.7% ownership interest. Mr. Doyle Holmes is the President and has a 27.9% ownership interest. GTS Holdings LLC has a 16.4% ownership interest (DED Exhibit 1).
9. The application reflects that Mr. Chamberlain and Mr. Rob Karr, a non-qualifying employee, each made a \$ [REDACTED] cash “investment/credit/loan” in MFG and that GTS Holdings LLC, a non-qualifying owner, made a \$ [REDACTED] cash “investment/credit/loan” in MFG (DED Exhibit 1). A narrative provide by applicant references Mr. Chamberlain’s initial capital contribution of \$ [REDACTED] but does not list any of the three “investment/credit/loan” contributions cited in the application (DED Exhibit 1).
10. All MFG operations are split equally between Mr. Chamberlain and Mr. Holmes, including responsibility for negotiating bonding, insurance, and contracts, and as signatories for the business accounts (DED Exhibit 1).
11. The lease for MFG’s headquarters in California was signed by Mr. Holmes, the President of MFG and a non-qualifying owner (DED Exhibit 7). Bank signature cards give equal signatory to Mr. Chamberlain and Mr. Holmes (DED Exhibit 8).

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(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 MFG for certification as an 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

5 NYCRR §144.2(b)(2) requires an applicant to demonstrate a capital contribution that is (1) in proportion to their ownership interest in the business, and (2) sources of that contribution include, without limitation, money, property, equipment, and expertise. In *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021, Final Order 21-05, dated February 7, 2022, the woman owner relied upon for certification was found to have failed to make a contribution in proportion to her ownership interest where she owned 51% of the business but only contributed 40% of the capital contributed to start the business.

The Applicant bears the burden in establishing that he 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).

In a narrative provided with the application, applicant stated that Mr. Chamberlain purchased 33% of MFG for \$ [REDACTED] in 2012 and GTS Holding Group, LLC purchased a 16.4% ownership interest for \$ [REDACTED] (DED Exhibit 4) in 2018. No other documentation was provided to show that Mr. Chamberlain made any capital contribution for the ownership interest he obtained in 2018. The application stated both Mr. Chamberlain and Mr. Karr each made a \$ [REDACTED] cash

“investment/credit/loan” in MFG (DED Exhibit 1), but these are not reflected in the Stock Purchase Agreement (DED Exhibit 6).

On appeal, Mr. Chamberlain concedes that the \$ [REDACTED] “investment/credit/loan” he and Mr. Karr each made were not capital contributions to MFG. Applicant argues “That leaves only the discrepancy between Chamberlain’s \$ [REDACTED] capital contribution for (at the time) 33.0 percent of MFG’s voting equity and 24.8 percent of MFG’s full diluted equity and GTS’s \$ [REDACTED] for its 16.4 percent equity interest in MFG as a justification for finding that Chamberlain’s capital contributions do not satisfy the Subject Ownership Certification Criterion.” (APP Exhibit B). However, the discrepancy between the \$ [REDACTED] capital contribution Mr. Chamberlain made in 2012 to acquire a 33% ownership interest and the \$ [REDACTED] capital contribution GTS Holdings made in 2018 to acquire a 16.4% ownership interest are irrelevant. The issue is whether Mr. Chamberlain made a capital contribution proportionate to his 55.7% ownership interest. No documentation was provided to show any capital contribution for the additional 22.7% ownership interest Mr. Chamberlain received in 2018.

The Division’s determination to deny the application on the basis that MFG failed to demonstrate that Mr. Chamberlain made capital contributions to MFG in proportion to his ownership interest, as required under 5 NYCRR §144.2(b)(2) is supported by substantial evidence.

II. Control

Minority-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-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.

All of the responsibilities for MFG’s managerial operations were shared equally between Mr. Chamberlain and Mr. Holmes. These responsibilities included negotiating bonding, negotiating insurance, negotiating contracts, and as signatories for business accounts (DED Exhibit 1).

The lease for MFG’s corporate headquarters in California was signed by Mr. Holmes, the President of MFG and a non-qualifying owner (DED Exhibit 7). Business bank signature cards give equal signatory authority to both Mr. Chamberlain and Mr. Doyle, a non-qualifying owner (DED Exhibit 8).

On appeal, applicant states “Chamberlain possesses absolute control over MFG at every level... Chamberlain holds an absolute majority of 55.7 percent of the total issued and outstanding Capital Stock of all classes, as compared to the only other shareholder combined 44.3 percent...” (APP Exhibit B). However, the issue is not whether Mr. Chamberlain owns a majority interest as required under 5 NYCRR §144.2(d)(1), but rather whether he meets the control requirements under 5 NYCRR §144.2(d)(2).

Applicant further argued that “Chamberlain himself takes the lead in maintaining and growing MFG’s business and relationships with customers and potential customers – the lifeblood of a brokerage business such as MFG’s – including securing the Representative Stock Repurchase Agreements, each of which Chamberlain personally signed...” (APP Exhibit B).

As stated above, Mr. Chamberlain and Mr. Holmes equally split all MFG operations, including negotiating contracts, and as signatories for business bank accounts. Also, the lease for the company’s headquarters was signed by Mr. Holmes, a non-qualifying owner. Therefore,

applicant failed to demonstrate appropriate control of the business by the minority-owner as required by 5 NYCRR §144.2(d)(2).

CONCLUSION

MFG 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)(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 MFG's application for certification as a minority-owned business enterprise.

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DED File ID No. 1187300
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	Applicant's Subordinated Loan Agreement	Y	Y
DED 4	Applicant's Capitalization Narrative	Y	Y
DED 5	Applicant's Stock Ledger	Y	Y
DED 6	Applicant's Stock Purchase Agreement	Y	Y
DED 7	Applicant's Office Lease Agreement	Y	Y
DED 8	Applicant's Bank Signature Cards	Y	Y
DED 9	Request to Appeal	Y	Y
DED 10	Notice to Proceed Via Written Appeal	Y	Y