

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12207

In the Matter

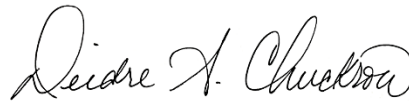
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**the Application of Niko Construction Trucking Services, Inc., DBA Niko Trucking
for Certification as a Minority and Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 62518

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
December 10, 2024

This matter considers the written appeal by Niko Construction Trucking Services, Inc. DBA Niko Trucking (“Niko Trucking” 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 and woman-owned business enterprise (“MWBE”).

PROCEDURAL HISTORY

1. On September 27, 2023, Niko Trucking applied for certification as a minority and women-owned business enterprise (“MWBE”). Niko Trucking based its application on Ms. Paula Ghigliazza. (DED Exhibit 1).
2. On March 15, 2024, the Division denied the application on the following grounds (DED Exhibit 2):
 - (a) The minority and woman owner relied upon for certification did not make capital contributions to the business enterprise proportionate to her equity interest therein as demonstrated by, but not limited to, contributions of money, property, equipment, or expertise (5 NYCRR § 144.2(b)(2));
 - (b) The minority and woman owner relied upon for certification does not 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
 - (c) The minority and woman owner 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 under 5 NYCRR § 144.2(c)(2).

3. Niko Trucking submitted a request to appeal the denial determination, dated April 25, 2024. (DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent to Niko Trucking on May 1, 2024 (DED Exhibit 4).
5. Applicant submitted a written appeal letter with submissions on May 13, 2024. (APP Exhibit 1).
6. The Division filed an Affidavit of Abdul Karim Bah, Associate Certification Director, dated October 24, 2024, and a brief of Dennie Byam, counsel for the Division, dated October 25, 2024.

FINDINGS OF FACT

7. Niko Trucking is engaged in the business of construction materials trucking services and freight trucking. (DED Exhibits 1, 2, and 19).
8. The critical functions of the business include trucking and hauling construction materials. (DED Exhibits 1 and 19).
9. Paula Ghigliazza, the minority and woman owner relied upon for certification, is the President and 100% owner of Niko Trucking. Ms. Ghigliazza acquired her ownership interest on November 29, 2013. (DED Exhibit 1).
10. The application states that Ms. Ghigliazza acquired her ownership shares for \$0 on November 29, 2013, and that on January 1, 2015, she contributed a 2007 dump truck valued at \$[REDACTED]. (DED Exhibit 1).
11. Ms. Ghigliazza stated that she opened Niko Trucking as a DBA in 2005 with the purchase of a 1979 Mack truck, and then some years later purchased the 2007 Freightliner, and then in late 2013 opened the instant corporation Niko Trucking. A copy of the title for the 2007

Freightliner, dated 12/19/12 listed Ms. Ghigliazza as the title holder, without liens, was provided to the Division. In responding to a request for documentation for the purchase of the 2007 Freightliner, Ms. Ghigliazza stated that she cannot recall the exact purchase date and no longer has the paperwork for the purchase, and further explains that the date provided on the application regarding the acquisition date of the 2007 truck was an error. The 1979 Mack truck was purchased in 2005 for \$[REDACTED] in cash, and there are no purchase records for the purchase of the 2007 freightliner. (DED Exhibits 5, 6, 7 and 8; APP Exhibit A).

12. Ms. Ghigliazza made both capital contributions of money through the purchase of the trucks and in expertise, stating that her “business experience is essential to running the corporation.” (APP Exhibit A)

13. Ms. Ghigliazza has an associate degree in applied science accounting. Her core competencies, as listed on her resume include ledger maintenance, transaction verification, accounts payable and receivable, payroll processing, QuickBooks, information tracking, petty cash handling, record-keeping, financial reporting, and vendor dealing. The application lists Ms. Ghigliazza’s as being solely responsible for all managerial operations at Niko Trucking which includes: Preparing Bids, Negotiating Bonding, Negotiating Insurance, Marketing & Sales, Hiring & Firing, Supervising Field Operations, Purchasing Equipment/Sales, Managing & Signing Payroll, Negotiating Contracts, and Signatory for Business Accounts. Her resume lists the same responsibilities found on the application with the addition of general managing, supervising operations, and addressing customer’s requests and concerns. A narrative, also submitted with the application, includes the same responsibilities and competencies listed above, and also includes ensuring compliance with transportation regulations and safety standards, with federal, state, and local laws, and registering, obtaining licensure, and insuring

of the business applicant's vehicles. Her prior work experience is as a bookkeeper. (DED Exhibits 1, 9, and 11).

14. Ms. Ghigliazza bids on and provides quotes to "all. . . State and Government jobs," arranges "the terms, conditions and rate of . . . contracts," and handles the billing. The manager conducts driving evaluations and determines if the drivers pass, and then passes the information onto Ms. Ghigliazza for processing, which includes obtaining DMV records, background check, and checking with previous job references. The manager trains the drivers and verifies that they are in compliance. (APP Exhibit A).

15. Jose Ghigliazza, Ms. Ghigliazza's husband, is both a driver and the manager of Niko Trucking. He has worked at the applicant business since 2007. As manager he tracks drivers' attendance and health, ensures drivers' compliance with regulations, maintains constant communication with drivers, assists in the recruitment and discipline of drivers, sets the driving schedules, monitors, mentors, coaches, rewards, and corrects driving behaviors and operations, and trains drivers on risk management protocols and safety standards. Mr. Ghigliazza also oversees the daily maintenance of the fleet, conducts vehicle inspections, engages in real-time vehicle location tracking, assigns vehicle repair and maintenance duties, inspects load and prevents overloading, directs dispatching, routing, and tracking of vehicles, and keeps and transmits complete and accurate records for each vehicle. Mr. Ghigliazza has been a truck driver for more than two decades, holds a New York State, Class A, commercial driver's license ("CDL"), and drives for the applicant business when other drivers are unavailable. (DED Exhibits 10, 11, 25, and 28).

16. The applicant business has a New York State Waste Transporter Permit, and a Westchester County Solid Waste Commission license. (DED Exhibit 12).

17. The applicant business employs seven drivers with CDLs. Ms. Ghigliazza does not have a CDL. (DED Exhibit 13).

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 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 (c)(1) states as follows:

Competence in the industry. 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. In evaluating whether a minority group member or woman possesses adequate, industry-specific competence, the division shall consider factors including but not limited to:

- (ii) 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;

- (iii) The extent to which academic credentials exist for persons employed in the industry; and
- (iv) The extent to which industry-specific expertise may be obtained via direct work experience.

5 NYCRR § 144.2 (c)(2) states 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.

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 Niko Trucking for certification as an 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 denied Niko Trucking's application for certification as an MWBE on the basis that the applicant business failed to demonstrate that the party relied upon for certification made capital contributions proportionate to her equity interest therein, as required by 5 NYCRR § 144.2(b)(2). (DED Exhibit 2). The Division interprets this regulation to require an applicant to demonstrate that the minority/woman owners contributed, "as demonstrated by, but not limited to, contribution of money, property, equipment, or expertise," in proportion "to their equity interest in the business enterprise." 5 NYCRR § 144.2(b)(2) and see *A.A.C. Contracting, Inc. v NYS Dept. of Economic Development*, 195 A.D. 3d 1284, 151 NYS 3d 187 (3d Dept. 2021). The applicant must substantiate that the source of the capital contribution is by the minority group member or 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 Division consistently denies applications for certification where an applicant fails to substantiate the source of the capital contribution consistent with the eligibility criteria. (See, *Darr Construction Equipment Corp.*, Recommended Order August 30, 2022 (Final Order 22-11, Nov. 7, 2022) and *Matter of Coverco, Inc.*, Recommended Order, Jan. 23, 2017 (Final Order 17-06, Jan. 30, 2017) aff'd by *Coverco, Inc. v. NYS Dept. of Econ. Development*, 159 AD 3d 1538 (4th Dept. 2018)). However, where an applicant is denied based on a failure to demonstrate a capital contribution due to an absence of documentation of a source of funds for a transaction occurring more than ten years prior, where banking retention policies are only to maintain transaction records for seven years, the denial was not supported by substantial evidence. (See, *Matter of Prominent*

Logistics, Inc., Recommended Order, May 3, 2024 (Final Order 2024-06, July 5, 2024), and *Matter of Creative Connections, LLC*, Recommended Order, December 8, 2016 (Final Order 17-01, January 4, 2017).

The Applicant bears the burden in establishing that they have 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).

Here, the application, narratives, and supporting documentation demonstrate that Ms. Ghigliazza owned a 2007 Freightliner Truck in 2012, and that she supplied that vehicle to the business. (DED Exhibits 5-8). While Ms. Ghigliazza explained in her response, to questions by the Division, that the 2015 date listed on the application was an error and provided a copy of the title for the vehicle, for which she is listed as the sole title holder, which predates the incorporation date of the applicant business, she provided no information regarding what she paid for the truck nor the basis for its valuation. (DED Exhibits 6, 7, and 8). Even accepting Ms. Ghigliazza's statement that she no longer owns the 2007 vehicle and does not have the purchase paperwork from 19 years ago, the issue regarding how the vehicle was purchased by her, or how much she paid for the vehicle was never provided to the Division. (DED Exhibit 6; APP Exhibit A)). On appeal applicant provided an additional copy of the registration for the freightliner, which was already before the Division. (APP Exhibit A)

In addition, the applicant now argues, for the first time on appeal, that Ms. Ghigliazza's experience should have also been considered as a capital contribution, stating in the appeal letter that Ms. Ghigliazza made both capital contributions of money through the purchase of the trucks and in expertise, stating that her "business experience is essential to running the corporation."

(APP Exhibit A). However, no additional information was provided regarding Ms. Ghigliazza's expertise as a capital contribution, either in the application nor in the appeal submission. (DED Exhibit 1; APP Exhibit A) While the regulation does provide that expertise may qualify as a capital contribution, the applicant must demonstrate that the expertise is "uncompensated" and is "specialized and directly applicable to one or more critical aspects of the operation of the business enterprise." (5 NYCRR § 144.2(b)(2)(i)(4)). It is the responsibility of the applicant "to clearly identify, quantify, and explain on the certification application, what is considered a capital contribution." (*Scherzi Systems, supra.*) Further, it is the responsibility of the applicant to clearly document a "reasonable assessment of the fair market value of the expertise." (5 NYCRR § 144.2(b)(2)(i)(4)). Here, the applicant has failed to clearly identify, quantify, and explain the value of Ms. Ghigliazza's capital contributions.

Based on the foregoing, I find that the Division's determination to deny certification under 5 NYCRR § 144.2(b)(2) is based upon substantial evidence.

II. Industry-Specific Competence

The Division denied Niko Trucking's application for certification as an MWBE on the basis that the applicant failed to demonstrate that Ms. Ghigliazza possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1). (DED Exhibit 2). "This requirement cannot be satisfied by expertise or experience in office management or general business administration, among other things." (5 NYCRR § 144.2(c)(1)). The Division interprets this regulation to require an applicant to demonstrate that the woman-owner, relied on for certification, has the working knowledge necessary to review or evaluate the work of more experienced employees. (See *In the Matter of Upstate Electrical, LLC v New York State Department of Economic Development*, 179 AD3d 1343

(3d Dept. 2020) citing to *C.W. Brown, Inc. v Canton*, 216 AD 841, 842 (1995) (where 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.)) The Division consistently requires that the owner relied upon for certification be able to perform the core revenue generating functions of the business enterprise. (See *Matter of Bore Tech LLC*, Recommended Order dated June 1, 2021 (Final Order 21-05, dated December 22, 2021)), see also, *Matter of Occupational Safety & Environmental Assoc. Inc. v New York State Department of Economic Development*, 161 AD3d 1582 (3d Dept. 2019)).

The Applicant bears the burden of establishing that the woman-owner relied upon for certification has met this 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 this instance there was no evidence before the Division that Ms. Ghigliazza has adequate, industry-specific competence in trucking services. Specifically, Ms. Ghigliazza does not possess a CDL and therefore cannot perform the revenue generating functions of the business which include trucking and hauling construction materials. (DED Exhibits 1, 2, 9, 19, and 20). Ms. Ghigliazza's experience, as presented to the Division, includes an associate degree in applied science accounting and her core competencies, include ledger maintenance, transaction verification, accounts payable and receivable, payroll processing, QuickBooks, information tracking, petty cash handling, record-keeping, financial reporting, and vendor dealing. (DED Exhibits 9 and 21). While the application, resume, and narrative lists Ms. Ghigliazza as being responsible for all managerial operations at Niko Trucking, her education and work experience is in accounting, bookkeeping, and general office management, with no evidence of experience

specific to the core revenue generating functions of the applicant business. (DED Exhibits 1, 9, and 11).

By contrast, Mr. Ghigliazza has a CDL and more than 25 years of experience as a driver and mechanic and is listed as the applicant firm's manager. (DED Exhibits 1, 10, and 13). His experience includes conducting vehicle inspections, overseeing the daily maintenance of vehicles, assisting vehicle repair and maintenance duties, maintaining accurate delivery records, planning travel routes, making punctual deliveries, and following driving safety regulations. (DED Exhibits 10 and 11). Thus, Mr. Ghigliazza. has the industry specific experience and competence. (DED Exhibits 1, 9, 10, 11, and 13).

On appeal the applicant provides additional information regarding the roles of Ms. Ghigliazza and for the manager, listed on the application materials as Mr. Ghigliazza. This information clarifies the information provided with the application regarding the industry specific competence of Ms. Ghigliazza and therefore is admissible under *Scherzi*, supra. However, the information further supports the Division's finding regarding industry specific competence as it explains that it is the manager of the business, and not Ms. Ghigliazza, who trains the drivers, evaluates the drivers' skills and competence, and verifies their compliance with applicable laws and regulations. (APP Exhibit A). Further, Mr. Ghigliazza, not Ms. Ghigliazza, can operate the trucks should a driver not be available. (DED Exhibits 10, 11, 13, and 28).

Thus, the Division's determination that the party relied upon for certification does not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required under 5 NYCRR § 144.2(c)(1) is supported by substantial evidence.

III. Operation

The Division also denied Niko Trucking's application for certification as an MWBE on the basis that the applicant failed to demonstrate that Ms. Ghigliazza makes 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). According to the regulation, the critical functions of the business enterprise shall be determined by the Division based upon, but not limited to, the following factors: (1) "The products or services the business enterprise provides to clients; and" (2) "The means by which the business enterprise obtains contracts or orders." 5 NYCRR § 144.2 (c)(2). The Division consistently denies certification where the woman-owner has no training, experience, or working knowledge in the core business functions and other employees or owners have more significant or substantive experience, and exercise that experience, such as by supervising or controlling field operations. (See *Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

In its evaluation, the Division reviewed, in addition to the application, narratives and contracts submitted by Niko Trucking to determine what products and services the applicant business provides to clients. (DED Exhibits 1, 11, 12, 13, 16, 17, 18, 19, and 20). The applicant business is engaged in the business of trucking, specifically, hauling construction materials for both residential and commercial properties. (DED Exhibits 1, 2, and 19). Ms. Ghigliazza's experience is in accounting, bookkeeping, and general office management. (DED Exhibit 9). Her role at Niko Trucking is primarily administrative in nature and involves general office management such as making financial decisions, managing and signing payroll, marketing and purchasing. (DED Exhibits 9, 11, and 21). While Ms. Ghigliazza is involved in negotiating contracts, estimating jobs, and providing bids, she cannot perform the contracts as she does not possess a

CDL, nor does she have any experience in operating trucks. (DED Exhibits 9, 11, and 21). Further, the application and its supporting documents provide that it is Mr. Ghigliazza, the applicant firm's manager who handles all aspects of training and managing the drivers employed by Niko Trucking. (DED Exhibits 10, 11, and 28). Mr. Ghigliazza oversees all aspects, outside of payroll, relating to the drivers and truck maintenance, the aspects of the business which make up the critical functions of the business. (DED Exhibits 10, 11, and 28)

The information provided for the first time on appeal, regarding Mr. Ghigliazza's health issues, which took him away from the business for a period of time, is new information, not admissible under *Scherzi*, supra. (APP Exhibit A).

It is well settled that where the owner relied upon for certification has no training or experience in the critical functions of the business enterprise and others, with more significant experience, such as an employee or non-qualifying owner, actively engage in the core functions of the business, denial based on lack of operational control is appropriate. (See *Matter of Panko*, supra, and *Matter of Upstate Electrical*, supra). Here, the evidence presented establishes, that Ms. Ghigliazza's role at Niko Trucking is administrative while others, not relied on for certification, are responsible for the day-to-day operations of the business enterprise.

Based on the foregoing, I find that the Division's determination that Niko Trucking has not demonstrated that the minority/woman owner relied upon for certification makes 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) is supported by substantial evidence.

CONCLUSION

Niko Trucking did not meet its burden to demonstrate that the Division's determination to deny its application for certification as a minority and woman-owned business enterprise with

respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(2), 144.2(c)(1), and 144.2(c)(2) was not based on substantial evidence.

RECOMMENDATION

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

In the Matter of Niko Construction Trucking Services, Inc., DBA Niko Trucking
DED File ID No. 62518
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Written Appeal and Submissions	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Appellant's Appeal Form	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	September 21, 2023 Sources of Capitalization and Investments Narrative	Y	Y
DED 6	November 6, 2023 Initial Source of Capital Contributions Narrative	Y	Y
DED 7	December 1, 2023 MWBE Question 4 Narrative	Y	Y
DED 8	December 1, 2023 MWBE Question 5 Narrative	Y	Y
DED 9	Paula Ghigliazza's Resume	Y	Y
DED 10	Jose Nicolas Ghigliazza's Resume	Y	Y
DED 11	November 6, 2023 Day to Day Duties and Responsibilities Narrative	Y	Y
DED 12	Niko Waste Permits	Y	Y
DED 13	November 15, 2023 List of employees with commercial driver license with copies of the license	Y	Y
DED 14	November 3, 2023 Initial Deposit Narrative	Y	Y
DED 15	MWBE Certification Application Affidavit	Y	Y
DED 16	De Rosa Sports Construction Contract Documents	Y	Y

DED 17	January 18, 2023 Jett Industries Contract	Y	Y
DED 18	June 17, 2021 Benimax Inc. Contract	Y	Y
DED 19	November 6, 2023 Type of work Niko performance and work for subcontractors Narrative	Y	Y
DED 20	November 6, 2023 Owner and employees' experience in the industry Narrative	Y	Y
DED 21	November 16, 2023 Owner's experience and knowledge regarding the main functions of Niko Narrative	Y	Y
DED 22	May 30, 2023 F.N.B. Equipment Finance Invoice	Y	Y
DED 23	All Roads Company Invoice for a 2023 Kenworth T880	Y	Y
DED 24	November 13, 2023 Niko's ownership and function history from 2005 to present Narrative	Y	Y
DED 25	November 6, 2023 Licenses and Certifications Narrative	Y	Y
DED 26	November 10, 2023 Financial Evidence the Owners Paid for the 1979 Mack Truck Narrative	Y	Y
DED 27	December 1, 2023 MWBE Question 1 Narrative	Y	Y
DED 28	November 10, 2023 Jose Ghigliazza Duties Narrative	Y	Y
DED 29	December 1, 2023 MWBE Question 2 Narrative	Y	Y
DED 30	December 1, 2023 MWBE Question 6 Narrative	Y	Y