

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

In the Matter

- of -

**the Application of Photography in New York Incorporated
for Certification as a Minority-owned Business Enterprise
pursuant to Executive Law Article 15-A.**

NYS DED File ID No. 69236

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 8, 2024

This matter considers the written appeal by Photography in New York Incorporated, (“Photograph” 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 May 5, 2021, Mr. Anthony Beale, as President, applied on behalf of Photograph for certification as a minority-owned business enterprise (“MBE”) (DED Exhibit 1).
2. On April 11, 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 must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests, as required under 5 NYCRR §144.2(b)(4).
3. Photograph timely filed a Request to Appeal on May 2, 2023 (APP Exhibit A; DED Exhibit 4).

4. A notice to proceed via written appeal was sent to Photograph on May 8, 2023 (DED Exhibit 3).
5. Photograph filed its written appeal by letter dated June 7, 2023 (APP Exhibit B; DED Exhibit 5).
6. The Division filed an Affidavit of Raymond Emanuel, Certification Director, dated November 29, 2023, and a brief of Anequa Pond Esq., counsel for the Division, dated November 30, 2023.

FINDINGS OF FACT

7. Photograph is engaged in the business of “digital format publication that presents new voices in contemporary photography.” (DED Exhibit 1).
8. Mr. Anthony Beale is the President and has a 100% ownership interest. (DED Exhibit 1).
9. The company was founded by Mr. William Mindlin in 1991 (DED Exhibit 6). On January 1, 2017, Mr. Mindlin transferred all of his shares to Mr. Beale “without monetary consideration” (DED Exhibit 7).
10. The Stock Transfer Agreement requires Mr. Beale to pay to Mr. Mindlin “an amount equal to 50% of the net consideration” paid to Mr. Beale or the Corporation upon sale of the stock or “all or substantially all of the assets of the Corporation” (DED Exhibit 7).

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)(4) states as follows:

Customary incidents of ownership. Minority group members and women relied upon for certification must not be encumbered in their ability to realize the benefits of ownership of the business enterprise for which certification is sought, or subject to undue restrictions against alienating such ownership interests.

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

The review is limited to such information that was before the division at the time of the denial determination (5 NYCRR 145.2(b)(1)). Evidence that seeks to clarify and explain

previously submitted materials will be considered, however new evidence will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021).

DISCUSSION

I. Ownership

The Division interprets 5 NYCRR §144.2(b)(2) to require an applicant to demonstrate that the minority/woman-owner's contribution came from assets belonging solely to the minority/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 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).

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 company was founded by Mr. William Mindlin in 1991 (DED Exhibit 6). On January 1, 2017, Mr. Mindlin transferred all of his shares to Mr. Beale "without monetary consideration" (DED Exhibit 7). Applicant submitted no proof of any contribution for his ownership interest.

On appeal, applicant contends that the denial “is due to the incorrect address on our 1099 forms. Our accountant forgot to update the address on the 1099 filings to the new address and we can reprint 1099s with the new address if it becomes an issue.” (APP Exhibit A; DED Exhibit 4). However, the denial was not based on an incorrect address (DED Exhibit 2).

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

NYCRR §144.2(b)(4) requires that the minority-owner must not be encumbered in his ability to realize the benefits of ownership of the business enterprise and/or be subject to undue restrictions against alienating such ownership interest.

The Stock Transfer Agreement restricts Mr. Beale from selling or transferring his shares by providing that he is then required to pay to Mr. Mindlin “an amount equal to 50% of the net consideration received or to be received.” (DED Exhibit 7). Mr. Beale is therefore not unencumbered in his ability to realize the benefits of ownership of the business.

On appeal, applicant provided information that it has an MBE certification from the New York City Department of Small Businesses (APP Exhibit B; DED Exhibit 5). However, certification from another entity has no bearing on the current application as the eligibility criteria of this program are different and it is applicant’s burden to establish how it meets this program’s criteria.

The Division’s determination to deny the application on the basis that Photograph failed to demonstrate that Mr. Beale is not encumbered in his ability to realize the benefits of ownership of the business and/or be subject to undue restrictions against alienating such ownership interest, as required under 5 NYCRR §144.2(b)(4) is supported by substantial evidence.

CONCLUSION

Photograph 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(b)(4) 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 Photograph's application for certification as a minority-owned business enterprise.

In the Matter of Photography in New York Incorporated
 DED File ID No. 69236
 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	Applicant's Request to Appeal	Y	Y
DED 5	Applicant's Appeal Submission	Y	Y
DED 6	Applicant's Articles of Incorporation	Y	Y
DED 7	Applicant's Stock Purchase Agreement	Y	Y