

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

In the Matter

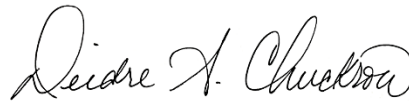
- of -

the Application of PROMINENT LOGISTICS, INC
for Certification as a Woman-Owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62168

RECOMMENDED ORDER

-by-



Deidre A. Chuckrow
Administrative Law Judge
May 3, 2024

This matter considers the appeal by Prominent Logistics, Inc. (“Prominent” 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 May 17, 2022, Prominent applied for certification as a women-owned business enterprise (“WBE”). Prominent based its application on Mrs. Esther Krausz. (APP Exhibit 1; DED Exhibit 1).
2. On March 8, 2023, the Division denied the application on the following grounds (APP Exhibit 48; DED Exhibit 2):
 - a. The 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. The minority group members or women 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 group members or women 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. Prominent submitted a request to appeal the denial determination, dated April 3, 2023. (DED Exhibit 3).
4. A Notice of Hearing was sent to all parties on February 6, 2024 (DED Exhibit 4).
5. A hearing was held on March 20, 2024, and continued and concluded on March 26, 2024.

FINDINGS OF FACT

6. Prominent is engaged in the business of freight brokerage, arranging freight transportation, logistics, freight management, intermodal transportation, and as a dump truck broker for soil removal, and waste treatment and disposal. (APP Exhibit 1; DED Exhibit 1; Hearing Testimony of Esther Krausz).
7. Esther Krausz is the woman owner relied upon for certification and is the CEO and 100% owner of the applicant business. The Vice President of the applicant business is Mr. Rafoel Arye Krausz, and the Controller is Mr. Moshe Monheit (APP Exhibit 1; DED Exhibit 1).
8. The business was established on February 6, 2012, by Mrs. Krausz and Mr. Herman Jacobowitz. Mr. Jacobowitz resigned from the company on February 15, 2012. (APP Exhibits 1, 19, and 21; DED Exhibit 1; Hearing Testimony of Esther Krausz).
9. The Application states that Mrs. Krausz paid \$200 for her ownership interest, of 200 shares of Prominent. There was no par value for the shares. The total number of authorized shares for the applicant business is 200 shares. (APP Exhibits 1 and 30; DED Exhibit 1; Hearing Testimony of Esther Krausz; Hearing Testimony of Glenn Butler).

10. The Application also lists the following capital contributions:

Contribution/Source	Amount/Value Type	Date of Contribution
ADA Business Supplies	\$████ Furniture & Equipment	3/26/2018
ADA Business Supplies	\$████ Furniture & Equipment	11/29/2016
TMW Software	\$████ Computer Software	6/1/2013
Equipment	\$████ Furniture & Equipment	12/15/2013
Leasehold Improvement	\$████ Leasehold Improvements	12/15/2013
Leasehold Improvement	\$████ Leasehold Improvements	6/30/2014

(APP Exhibits 1, 5, 40; DED Exhibits 1, 7, 8; Hearing Testimony of Esther Krausz).

11. The application includes invoices from ADA Business Supply dated December 29, 2016, and April 25, 2018, and a copy of IRS Form 1120S, which list company assets purchased for Prominent. (APP Exhibits 3,4, and 5; DED Exhibits 8,9, and 10).

12. Mrs. Krausz could not obtain bank records referencing the initial capital contribution of \$████ used to the purchase the business in 2012 because the banking institutions no longer had the records, as the record retention policy is seven years, and the date of application was in 2022. (Hearing Testimony of Esther Krausz).

13. The money used to fund the business expenses at its inception came from Mrs. Krausz's personal bank account; the money was hers, not marital money, and from her parents and other sources. Mrs. Krausz provided funds to Prominent, when necessary, based on cash flow needs of the applicant business. \$████ was transferred from Mrs. Krausz's personal checking account to Prominent in November of 2017, and \$████ was transferred in February of 2019. (Hearing Testimony of Esther Krausz; APP Exhibits 49, 50, 51 and 52).

14. Mrs. Krausz shifted the focus of Prominent in 2022, moving away from intermodal and freight transport to focusing on operating as an intermediary and broker for dump trucks for soil removal and waste disposal. (Hearing Testimony of Esther Krausz).
15. The application states that Ms. Krausz is responsible for financial decisions, hiring and firing, managing and signing payroll, negotiating contracts, and is one of the three signatories for the business accounts. Mr. Moshe Monheit's responsibilities are listed as estimating, preparing bids, negotiating bonding, negotiating insurance, supervising field operations, purchasing equipment/sales, and as one of the three signatories for the business accounts. Mr. Krausz's responsibilities are listed as marketing and sales, and as one of three signatories on the business accounts. (APP Exhibit 1; DED Exhibit 1)
16. Ms. Krausz's responsibilities at the beginning of the business, in 2012, included applying for and obtaining the necessary licensing and insurance documents for the applicant business, contacting clients, opening client accounts, renting space, and contracting with carriers. Mrs. Krausz focused on getting appropriate financing to support the company, under the guidance of an accountant. (Hearing Testimony of Esther Krausz).
17. At the inception of the business, Mrs. Krausz personally negotiated contracts with shippers and obtained the necessary insurance, and Mr. Krausz focused on sales. Over time, Mrs. Krausz hired and trained employees to assist in the running of the business, which included training employees on how to source trucking, verifying the legitimacy of trucking companies, how to exchange packets, and how to review contracts for proper insurance. (Hearing Testimony of Esther Krausz; Hearing Testimony of Moshe Monheit).
18. An employee of Prominent prepared the application per the direction of Mrs. Krausz and used materials supplied by Mrs. Krausz which included applications submitted for WBE

certification to the Port Authority and New York City. There was confusion regarding what information was required by the Division in relation to the application. (Hearing Testimony of Esther Krausz).

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 Prominent 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

James P. Youngs, Esq., of Hancock Estabrook, LLP, appeared at the hearing on behalf of Prominent Logistics, Inc. The following witnesses testified on behalf of Prominent: Esther Y. Krausz, CEO and Moshe Monheit, Controller. Prominent offered the following exhibits which were admitted into evidence: APP Exhibits 1 through 52.

Ms. Dennie Byam, Counsel, Department of Economic Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Glenn Butler, Associate Certification Director, Division of Minority and Women Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 13.

I. Ownership

The Division denied Prominent's application for certification as a WBE 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 owner 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). Where an applicant fails to substantiate the source of the capital contribution by the woman owner, the Division will deny the application for MWBE certification. (See *Matter of Otone Mechanical Construction, Inc.* Recommended Order, April 24, 2015 (Final Order 17-28, May 2, 2017), *Matter of Spring Electric, Inc.* Recommended Order, March 17, 2017 (Final Order 17-21, March 27, 2017)). However, in

Matter of Creative Connections, LLC, Recommended Order, December 8, 2016 (Final Order 17-01, January 4, 2017) it was held that a denial for failure to demonstrate a capital contribution under former 5 NYCRR § 144.2(a)(1) based on an absence of documentation of source of funds for a transaction occurring more than ten years prior, where banking retention policy is to only maintain transaction records for seven years, was not supported by substantial evidence.

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).

The Division argued that the applicant was denied certification as she did not provide the source of funds for her capital contributions and that the capital contributions were made years after the business' inception. Included in the list of capital contributions are purchases of furniture, supplies and leasehold improvements. (APP Exhibits 3, 4, and 5; DED Exhibits 8,9, and 10). For the first time on appeal, the applicant provided copies of bank statements from an account held individually by Mrs. Krausz, documenting transfers of money from her personal account to the applicant business in 2017 and 2019. However, as this was not before the Division at the time of the application, the source of funds cannot now be considered. (See *Matter of Lida Strategic Solutions, Inc.* Recommended Order, March 6, 2019 (Final Order 19-02, June 5, 2019), and *Scherzi Systems, supra*).

Counsel for the applicant argued that Mrs. Krausz, the sole owner of the applicant business made the only capital contribution to the business, and as such that amount is in proportion to her ownership interest. The application states that Ms. Krausz paid \$█ for all the common no par value shares of Prominent at the inception of the business. (APP Exhibits 1 and 2; DED Exhibit 1;

Hearing Testimony of Esther Krausz). The source of the \$█ paid in 2012 for those shares was not provided in the May 2022 application, as Mrs. Krausz credibly testified that the bank could not provide her with those records, as they did not keep records for more than seven (7) years. (Hearing Testimony of Esther Krausz). Mrs. Krausz additionally testified that the \$█ came from her personal funds, and that she also used personal funds at the formation of the business for office equipment, furniture, and office rental. (Hearing Testimony of Esther Krausz).

Mrs. Krausz testified that her assistant initially prepared the application and that she directed that employee to use the same source documents and applications that were used for Prominent's New York City and Port Authority MWBE applications. Mrs. Krausz reviewed the application when it was completed, and would then wait for comments from the Division and review those with her employee, and prepare the responses for her staff to send back to the Division. (Hearing Testimony Esther Krausz). Mrs. Krausz testified that her experience in completing other applications similar to the instant application informed her process. Mrs. Krausz admitted that she did not provide proof of the source of the funds for the contributions listed in section 2.E. of the application, as she misunderstood what information the Division was requesting. (Hearing Testimony of Esther Krausz). In response to an email request to provide "Capitalization from Esther Krausz," the applicant provided the same information that had been provided in response to a similar request in an unrelated application for certification as a WBE to the Port Authority. (APP Exhibit 40; DED Exhibit 7; Hearing Testimony of Esther Krausz). Mrs. Krausz testified that she submitted the same letter that she had previously submitted to the Port Authority in answer to the capitalization question from the Division, and after that submission she received no further questions on the subject. (Hearing Testimony of Esther Krausz).

The application, supporting documentation and testimony adduced at the hearing demonstrates that Mrs. Krausz purchased all of the 200 shares of the business in 2012 for a sum of \$████ and is the 100% owner and sole shareholder of the applicant business. (APP Exhibits 1, 2; DED Exhibit 1; Hearing Testimony of Esther Krausz; Hearing Testimony of Glenn Butler). The denial letter did not address this contribution, and instead focused only on the items listed in section 2.E. of the application. (DED Exhibit 2). The Division's witness testified at the hearing that since no proof of the source of the funds was produced for the stock purchase, it could not be considered toward certification. (Hearing Testimony of Mr. Glenn Butler). Regarding the lack of evidence as to the source of the funds for the initial stock purchase, Mrs. Krausz credibly testified that the information relating to the source of the start-up capital could not be produced by her at the time of application because of her banking institution's record retention policy, and that the funds for the original purchase were from her personal holdings. (Hearing Testimony of Esther Krausz). As Prominent applied for certification ten years after Mrs. Krausz began the business, a time frame beyond standard banking retention policies, it is now untenable to require her to produce such documentation. (See, *Creative Connections*, supra).

Based on the foregoing, I find that the Division's determination with regards to 5 NYCRR § 144.2(b)(2) is not supported by substantial evidence.

II. Industry-Specific Competence and Day-to-Day Operations

The Division also denied Prominent's application for certification as a WBE on the basis that the applicant failed to demonstrate that Mrs. Krausz possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required by 5 NYCRR § 144.2(c)(1) and that the applicant failed to demonstrate that she 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). (DED Exhibit 2). As many of the facts used to support the Division's denial are the same, and as some of the criteria for denial overlap, they will be addressed collectively.

The Division interprets these regulations to require an applicant to demonstrate that the 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 women owners 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)). Notwithstanding the Division's requirements, a lack of hands-on experience is not itself enough to deny certification and industry practice should also be considered. (*Matter of Era Steel Constr. Corp. v Egan*, 145 AD2d 795 (1988)). Moreover, the Division's regulations "do not require an applicant to possess formal academic training or to have completed an apprenticeship in order to demonstrate technical competence to operate a business." (*Matter of Northern Scapes Inc.*, Recommended Order, May 18, 2018 (Final Order 18-31, June 5, 2018) (applicant relied on for certification, with more than 20 years in the industry, who has managed projects through oversight of project managers and possesses managerial experience has the competence to operate the applicant business). What is

required is that the woman owner possesses adequate competence to make decisions and to make those decisions on a day-to-day basis. (See *Northern Scapes*, supra).

In considering 5 NYCRR § 144.2(c)(1), regarding industry-specific competence, the Division shall consider:

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

In addition, the regulation under 5 NYCRR 144.2(c)(2) provides that in determining whether a person relied on for certification makes critical business decisions on a day-to-day basis without relying on others, 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 Applicant bears the burden of establishing that the minority group member 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).

The Division argued that the applicant failed to provide sufficient evidence to establish that Mrs. Krausz possesses industry-specific competence and makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise. In its determination the Division relied heavily on section 4.A. of the application, Mrs. Krausz’s work history prior to her

starting the applicant business in early 2012, without regard to her experience at the applicant business, and the resumes of Mr. Monheit and Mr. Krausz. (APP Exhibits 1, 11, 12, and 13; DED Exhibits 1, 5, 6, and 12).

Counsel for the applicant argued that in its determination denying certification, the Division dismissed Mrs. Krausz's ten years of experience gained while working as CEO for Prominent as evidence of her industry-specific competence and her ability to make operational decisions on a day-to-day basis.

In addition, applicant's counsel argued that the evidence provided to the Division, clarified by the testimony of Mrs. Krausz and Mr. Monheit, demonstrates that she both possesses industry-specific competence and makes decisions as to the critical functions of the business and runs the day-to-day operations of Prominent.

Mrs. Krausz's testimony regarding the details of what Prominent does, and how it operates, supported by the evidence before the Division at the time of application, establishes that she has more than adequate industry-specific competence to make critical business decisions, without relying on others, and does make operational decisions on a day-to-basis for the business. (Hearing Testimony of Esther Krausz)

Prominent is an intermediary transportation business, and engages in transportation logistics by brokering freight shipping, 3PL, freight management, delivery, intermodal transportation, topsoil removing, and dump trucks for waste treatment and disposal. (DED Exhibit 2; Hearing Testimony of Esther Krausz; Hearing Testimony of Moshe Monheit; Hearing Testimony of Glenn Butler). As the business operates as a broker it does not own any of its own trucking equipment, and instead works as an intermediary between trucking companies and clients requiring their services. (Hearing Testimony of Esther Krausz; Hearing Testimony of Moshe

Monheit). Mrs. Krausz is the CEO, Mr. Krausz is the Vice President and Mr. Monheit is the Controller. (APP Exhibits 1, 11, 12, 13, and 41; DED Exhibits 1, 5, 6, 11, and 12).

At the hearing, Mrs. Krausz credibly testified that she began the business in 2012, and that initially the only employees were her and her husband, Mr. Krausz. (Hearing Testimony of Esther Krausz). Mrs. Krausz stated that her initial responsibilities were calling and sourcing carriers, renting space for business operations, bringing in capital, and applying and obtaining licenses and insurance, and that she had Mr. Krausz focus on sales. Mrs. Krausz also testified that as the business grew, she hired additional staff, including the hiring of Mr. Monheit in 2014, and trained all employees herself. In 2015 the business had approximately 15 employees, and Mrs. Krausz was responsible for overseeing all aspects of the business. (Hearing Testimony of Esther Krausz and Moshe Monheit).

Mrs. Krausz established her intimate knowledge of the business in her explanation of how the business transitioned in 2022, from transporting freight generally to becoming a broker for dump trucks. Mrs. Krausz testified that she saw a need for dump trucks locally and that she began to source dump trucks and form contracts with those carriers. Mrs. Krausz testified credibly that it was her decision to shift the business, and that this change allowed the business to downsize its staff and move away from freight transportation and focus on work as a broker for dump truck services. (Hearing Testimony of Esther Krausz).

Mrs. Krausz also testified that she attends trade shows and webinars regarding working as a transportation intermediary, and relays information learned at those trainings to her staff. (Hearing Testimony of Esther Krausz). Mrs. Krausz testified in detail about the specific work that each staff member is delegated, how the business operates, and the work that she does as a

supervisor, and also went over in great detail the nuances of everyone's job roles and duties. (Hearing Testimony of Esther Krausz, APP Exhibit 41; DED Exhibit 11).

Mr. Monheit testified that he was hired and trained by Mrs. Krausz, and that he had no specific industry experience prior to joining Prominent in late 2014. (Hearing Testimony of Moshe Monheit). The application incorrectly lists Mr. Monheit as starting at Prominent in February of 2012, however, his resume, also submitted with the application lists his starting date as November of 2014, which was corroborated by both Mrs. Krausz and Mr. Monheit's testimony. (APP Exhibits 1, 12; DED Exhibits 1, 6; Hearing Testimony of Esther Krausz; Hearing Testimony of Moshe Monheit). (APP Exhibits 1, 12; DED Exhibits 1, 6).

Mr. Monheit testified that he has always reported directly to Mrs. Krausz, and that she taught him the business of shipping and logistics, and that his work was overseen and continues to be overseen by her. (Hearing Testimony of Moshe Monheit). Mr. Monheit testified that while he prepares bids he does so under the guidance of Mrs. Krausz and that all bids and estimates are reviewed by her. Regarding Mr. Monheit's work in securing insurance, Mr. Monheit explained that while he is responsible for renewing insurance contracts, those contracts were all negotiated and originally secured by Mrs. Krausz, and that the renewal process is very simple. (Hearing Testimony of Moshe Monheit). Mr. Monheit further testified that Mrs. Krausz makes sure that every contract is covered by appropriate insurance, and reviews all contracts prior to their execution by others, such as Mr. Monheit. (Testimony of Esther Krausz; Testimony of Moshe Monheit). In addition, both Mr. Monheit and Mrs. Krausz testified that Mrs. Krausz is responsible and manages all operations, and that she delegates and supervises all of the work done by all staff, including Messrs. Monheit and Krausz.

Mrs. Krausz stated that she works for Prominent 30 hours a week, and that Messrs. Monheit and Krausz each work for Prominent for approximately 15-20 hours a week. (APP Exhibit 41; DED Exhibit 11). In addition, Mrs. Krausz testified that she is in the office every day, and that while she also has the ability to work from home, it “rarely happens” that she is not in the office. (Hearing Testimony of Esther Krausz). On cross examination Mr. Monheit testified that he splits his time between the job sites and the office, and when questioned about his knowledge of Mrs. Krausz’s schedule he stated that she is frequently at meetings with clients, and when she is not at those meeting or at a job site, she is working in the office. (Hearing Testimony of Mr. Monheit). He also stated that Mrs. Krausz is in the office when he is “most of the time” unless “she is running to meetings with vendors”, and that she is in the field with him from “time to time to check up.” (Hearing Testimony of Mr. Monheit).

The Division’s witness, Associate Certification Director Glenn Butler, testified that he wrote the denial letter for the instant case, and was the final person to review the file before the determination was made. (Hearing Testimony of Glenn Butler). He testified that many documents are relied upon to determine whether the individual relied upon for certification has the technical competence to operate the applicant business under this regulation, including reviewing employee resumes. Mr. Butler emphasized that work history, prior to starting an applicant business, is of importance as it relates to industry competence, and stated that the Division looks at work history to see if aligns to the work of the applicant business. (Hearing Testimony of Glenn Butler). In explaining his analysis of the denial under 5 NYCRR 144.2(c)(1), Mr. Butler testified that Mrs. Krausz’s work history prior to the start of the business was not related to the applicant business, but instead was focused on childcare, and distinguished her experience, prior to the start of the business to her husband who had worked in transportation logistics before Mrs. Krausz entered

the industry. Mr. Butler went on to emphasize that her resume jumps from childcare to the applicant business, without any prior experience or expertise to show that she can perform the core functions of the business. Mr. Butler also stated that her time spent gaining experience while learning on the job did not qualify, stating that the owner relied upon would have to rely on others for direction and to conduct the business of the applicant, suggesting that there was no consideration as to her gaining experience while on the job. (Hearing Testimony of Glenn Butler).

Mr. Butler also stated that in analyzing whether Mrs. Krausz operated the business on a day-to-day basis he reviewed who “was around from the start of the business.” (Hearing Testimony of Glenn Butler). In obtaining that information, Mr. Butler stated that he reviewed the application, the narrative, and the resumes supplied by the applicant. (Hearing Testimony of Glenn Butler). Mr. Butler emphasized section 2.H. of the application which lists both Messrs. Monheit and Krausz as company board members with a start date of February 2012.¹ While Mr. Butler credits Mr. Krausz’s history in the industry, he gives no weight to the time that Mrs. Krausz has spent as CEO of Prominent, and never speaks to the information in the narrative regarding the time spent by each of the employees performing their duties. In addition, Mr. Butler spoke of the resumes and testified to the information contained in both Messrs. Monheit’s and Krausz’s resume, but said nothing about the discrepancy between the start date at Prominent on Mr. Monheit’s resume and the date on the application, notwithstanding his testifying to the document itself during his direct examination. (Hearing Testimony of Glenn Butler) (APP Exhibit 12; DED Exhibit 6; Hearing Testimony of Glenn Butler).

The regulation provides that industry specific experience obtained through direct work experience shall be considered by the Division in their evaluation for certification. (5 NYCRR §

¹ The discrepancy of these dates is addressed in Section II, supra.

144.2(c)(1)(iii). Yet, nothing in Mr. Butler’s testimony demonstrates that any questions were asked regarding Mrs. Krausz’s specific work history over the past ten years, other than asking for a general narrative, or that any consideration was given to Mrs. Krausz’s gaining of experience during her more than ten-year history at Prominent prior to the application. (Hearing Testimony of Glenn Butler). In addition, little weight is given by the Division to the narrative supplied by the applicant listing Mrs. Krausz’s current responsibilities including HR, Financial, and Management, and instead the denial appears to focus instead on her lack of formal education and employment prior to the start of the instant business. (Hearing Testimony of Esther Krausz; Hearing Testimony of Glenn Butler).

The testimony of Mrs. Krausz and Mr. Monheit provides credible detail regarding the extent of Mrs. Krausz’s knowledge of all operations of the business, and clarifies information already before the division at the time of application. Under *Scherzi Systems* “it is not only appropriate for an agency to consider the testimony offered at an administrative hearing in rendering its determination, it is required, as ‘[n]o decision, determination or order shall be made except upon consideration of the record as a whole.’” *Scherzi, supra*, citing *Matter of Haug v State Univ. of NY at Potsdam*, 32 NY3d 1044, 1046 [2018]; *Matter of A.A.C. Contr., Inc. v NYS Dept. of Economic Dev.*, 179 AD3d 1343, 1344 [2020]; and SAPA § 306[1]. Further, in *Scherzi*, as in this case, the “testimony at issue did not constitute new evidence previously unavailable at the time of the application but, instead, served to explain and clarify” information “submitted as part of [the] application . . .” *Scherzi, supra*, at 1469.

The application, the resumes and the narrative provided with the application, along with the testimony of Mrs. Krausz and Mr. Monheit demonstrated that Mrs. Krausz does have adequate, industry-specific competence to make critical decisions without relying on other persons, and does

make operational decisions on a day-to-day basis. Based on the foregoing, I find that Division's determination to deny Prominent's certification was not based on substantial evidence. Mrs. Krausz's role as CEO, her managerial experience, obtained over her tenure at the applicant business, as presented in the application and its supporting documents, coupled with the testimony received at the hearing, demonstrates that she has adequate industry-specific competence and that she 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)(1) and (2).

CONCLUSION

Applicant met its burden with respect to the eligibility criteria at 5 NYCRR §§ 144.2(b)(2), 144.2(c)(1), and 144.2(c)(2).

RECOMMENDATION

The Division's determination to deny Prominent Logistics Inc.'s application for certification as a woman owned business enterprise should be reversed.

In the Matter of Prominent Logistics, Inc.
DED File ID No. 62168
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP 1	Certification Application	Y	Y
DED 1	Certification Application	Y	Y
APP 2	Prominent Logistics Stock Ledger	Y	Y
APP 3/ DED 10	Evidence of CC – ADA Invoice 11/29/16	Y	Y
APP 4/ DED 9	Evidence of CC – ADA Invoice 3/26/18	Y	Y
APP 5/ DED 8	Sources of Capitalization – Form 1120S	Y	Y
APP 6	Rafoel and Esther Krausz 2020 NY Tax Return	Y	Y
APP 7	Rafoel and Esther Krausz 2020 Fed Return	Y	Y
APP 8	Prominent Logistics, Inc. 2020 US Fed Return	Y	Y
APP 9	Prominent Logistics, Inc. 2021 W2s	Y	Y
APP 10	Resume – Malka Bondo	Y	Y
APP 11/ DED 5	Resume – Esther Krausz	Y	Y
APP 12/ DED 6	Resume – Moshe Monheit	Y	Y
APP 13/ DED 12	Resume – Rafoel Arye Krausz	Y	Y
APP 14	NYC Business Integrity Comm approval 7/9/2020	Y	Y
APP 15	NYC Small Business Services WBE 4/4/2017	Y	Y
APP 16	NMFTA SCAC Certif 4/27/2021	Y	Y

APP 17	Port Authority WBE New Cert. 4/21/21	Y	Y
APP 18	Us Dept of Transport License	Y	Y
APP 19	Prominent Logistics Cert. of Incorp	Y	Y
APP 20	Prominent Logistics Bylaws 2/20/2012	Y	Y
APP 21	First Meeting Minutes 2/15/2012	Y	Y
APP 22	Prominent Logistics Bylaws, undated	Y	Y
APP 23	Signed Commercial Lease 170 LLC-PLI	Y	Y
APP 24	Malka Bondo – signed non compete	Y	Y
APP 25	Malka Bondo – signed SOP / Ee handbook	Y	Y
APP 26	Moshe Monheit – signed non compete	Y	Y
APP 27	Moshe Monheit – signed SOP and Ee Handbook	Y	Y
APP 28	Contract 1: Tri-state Fencing Contract	Y	Y
APP 29	Contract 2: J. Coffey Contracting Contract	Y	Y
APP 30	Contract 3: Lettire Construction Contract	Y	Y
APP 31	JC Transport – Proof of Payment	Y	Y
APP 32	Form NYS45 Q1 2021	Y	Y
APP 33	Form NYS45 Q2 2021	Y	Y
APP 34	Form NYS45 Q3 2021	Y	Y
APP 35	Form NYS45 Q4 2021	Y	Y
APP 36	Addendum for MWBE Certification with NYC Department of SBS	Y	Y

APP 37	Addendum for MWBE Certification with PANYNJ	Y	Y
APP 38	Pending jobs contingent upon MWBE State Certification	Y	Y
APP 39	Issued Stock Certificates	Y	Y
APP 40 / DED 7	Letter from Esther Krausz re: Capital Contributions dated December 18, 2020	Y	Y
APP 41 / DED 11	Narrative of Employee responsibilities	Y	Y
APP 42	BIC approval	Y	Y
APP 43	NMFTA SCAC Certificate	Y	Y
APP 44	NY/NJ Port Authority WBE Certification Letter April 21, 2021	Y	Y
APP 45	US Department of Transportation License	Y	Y
APP 46	Krausz Rafoel A and Esther 2021 Federal Amended Tax Returns	Y	Y
APP 47	Prominent Logistics Inc 2021 Federal Tax Return	Y	Y
APP 48 / DED 2	Denial Determination Letter dated 3/8/2023	Y	Y
APP 49	Prominent Logistics, Inc. Bank Statement 02/2019	Y	Y
APP 50	Prominent Logistics, Inc. Bank Statement 11/2017	Y	Y
APP 51	Esther Krausz Bank Statement 11/2017	Y	Y
APP 52	Esther Krausz Bank Statement 11/2019	Y	Y
DED 3	Request to Appeal	Y	Y
DED 4	Notice of Hearing	Y	Y
DED 13	Certification App Affidavit	Y	Y