

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

In the Matter

- of -

the Application of SEK Designs LLC
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 69166

RECOMMENDED ORDER

-by-



David A. Murad
Administrative Law Judge
February 22, 2024

This matter considers the written appeal by SEK Designs LLC, (“SEK” 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 September 14, 2021, Ms. Melissa Woessner, as President, applied on behalf of SEK for certification as a woman-owned business enterprise (“WBE”) (DED Exhibit 1).
2. On April 12, 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 possess adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1).
3. SEK timely filed a Request to Appeal on June 21, 2023 (APP Exhibit A/ DED Exhibit 3).
4. A notice to proceed via written appeal was sent to SEK on June 21, 2023 (DED Exhibit 4).
5. SEK filed its written appeal by letter dated July 16, 2023 with attachments (APP Exhibit B).

6. The Division filed an Affidavit of Eugenio Alcantara, Certification Director, dated December 13, 2023, and a brief of Karen Bernstein Esq., counsel for the Division, dated December 15, 2023.

FINDINGS OF FACT

7. SEK is engaged in the design fabrication/manufacturing, and installation of ornamental products for residential and commercial use (DED Exhibit 1).
8. SEK was established on April 10, 2014. At that time, Mr. Michael Brenseke was the President and 100% owner. On January 1, 2020, Ms. Woessner acquired a 51% ownership interest as part of a “compensation package” after the business restructured and became President. Mr. Michael Brenseke became Vice President and retained a 49% ownership interest. Mr. Brenske and Ms. Woessner are husband and wife (DED Exhibit 1).
9. Ms. Woessner’s resume states that she has a Bachelor of Arts degree in Health Care Administration and a Masters of Business Administration. As President of SEK, her duties include: “Develop and implement long and short term objectives, policies, and procedures”, “Oversee all client contracts”, “Manage financial planning and budget for company”, and “Brand Management and Marketing Strategies”. She previously worked at Eastern Infectious Disease Associates as a Certified Coding Specialist, Practice Administrator and Business Consultant. She was also a Certified Coding Specialist at North Shore Long Island Jewish Health System and a Certified Medical Coder at Atlantic Health Solutions (DED Exhibit 12).
10. Mr. Michael Brenseke has over 25 years of experience in the industry. His resume states: “Design and fabricate custom ornamental steel, Oversee current and future projects in fabrication shop, fabrication, CAD Drawing, Photoshop rendering, Onsite installation and

repairs, Operate and train employees on all machines.” He was previously a Project Manager/Welder at Brenseke Welding & Ironworks from March 2016 to July 2018, a Project Manager at Jaroff Desings from August 2014 to February 2016, and a Welder/Project Manager at Brenseke Welding & Ironworks from 1998 to August 2014. (DED Exhibit 13). He holds certifications as a Site Safety Training Supervisor, Supported Scaffold User, and OSHA 30-Hour Construction Safety and Health (DED Exhibit 11).

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(c) states in relevant part as follows:

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...

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 SEK 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

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).

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).

On January 1, 2020, Ms. Woessner acquired a 51% ownership interest as part of a “compensation package” after the business restructured (DED Exhibit 1). Ms. Woessner’s capital contribution on Exhibit A to The Limited Liability Company Agreement is left blank (DED Exhibit 8). Her ownership interest was given “in consideration for the following: (i) 2019 services and consulting with business operations, HR matters, product procurements, product offerings, etc.; and (ii) inducement to join SEK Designs on a full time basis (including acceptance of reduced w2 salary) ... Ms. Woessner performed work from November 2019 to April 2020 with no financial compensation... the share assignment was inducement to join SEK and help it grow and was also consideration for reduced salary and other negotiated unpaid services performed by Ms. Woessner on behalf of SEK.” (DED Exhibit 5).

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.

Ms. Woessner was compensated in 2020 and 2021 for the performance of her duties (DED Exhibits 9 and 10). While she earned less in 2020 than in 2021, no proof was submitted to show that Ms. Woessner was uncompensated for the first four months of 2020 or took a reduced salary for the year. In addition, the expertise must be specialized and directly applicable to one or more of the critical aspects of the operation of the business. The critical functions of the business are the design, fabrication/manufacturing, and installation of commercial ornamental metal products (DED Exhibit 1). No proof was submitted to show that Ms. Woessner has expertise specialized and directly applicable to the design and fabrication/manufacture of ornamental metal products. In addition, no proof was submitted to show a reasonable assessment of the fair market value of the expertise. Without evidence of an agreement specifically detailing the precise expertise to be used and specific dollar value associated with that expertise, prior work cannot be considered. See *Matter of Darr Construction Equipment Corp.*, Recommended Order dated August 30, 2022, Final Order 22-11 dated November 7, 2022.

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

II. Operation

5 NYCRR §144.2(c)(1) requires that the 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. The Division consistently requires that women-owners be able to perform the core revenue-generating functions of the business. 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 Dept. of Economic Dev.*, 161 AD3d 1582 (3d Dept. 2019).

Ms. Woessner’s resume states that she has a Bachelor of Arts degree in Health Care Administration and a Masters of Business Administration. As President of SEK, her duties include: “Develop and implement long and short term objectives, policies, and procedures”, “Oversee all client contracts”, “Manage financial planning and budget for company”, and “Brand Management and Marketing Strategies”. She previously worked at Eastern Infectious Disease Associates as a Certified Coding Specialist, Practice Administrator and Business Consultant. She was also a Certified Coding Specialist at North Shore Long Island Jewish Health System and a Certified Medical Coder at Atlantic Health Solutions (DED Exhibit 12).

Mr. Michael Brenseke has over 25 years of experience in the industry. His resume states: “Design and fabricate custom ornamental steel, Oversee current and future projects in fabrication shop, fabrication, CAD Drawing, Photoshop rendering, Onsite installation and repairs, Operate

and train employees on all machines.” He was previously a Project Manager/Welder at Brenseke Welding & Ironworks from March 2016 to July 2018, a Project Manager at Jaroff Desings from August 2014 to February 2016, and a Welder/Project Manager at Brenseke Welding & Ironworks from 1998 to August 2014. (DED Exhibit 13). He holds certifications as a Site Safety Training Supervisor, Supported Scaffold User, and OSHA 30-Hour Construction Safety and Health (DED Exhibit 11).

Ms. Woessner does not have any industry specific expertise; her skills are related to general business or office management. She does not possess any academic or technical training relevant to the business’ industry. Her resume confirms that her role at the business is primarily business management and administrative and does not reflect any academic or technical training to manage the employees of the business (DED Exhibit 12).

Applicant submitted information and documentation on appeal regarding Ms. Woessner’s current direct work experience. Applicant states that Ms. Woessner now uses machinery, manipulates materials, writes up fabrication and repair tickets, engages in steel/aluminum materials resale, discusses products with clients, scales and reads blueprints, generates shop fabrication drawings and preliminary engineering drawings, discusses fabrication with shop foreman and fabricators, and oversees CAD drafting and fabrication, and makes custom hydraulic hoses (APP Exhibit B). This is new information not previously before the Division which does not clarify or explain previously submitted materials, and therefore will not be considered. See *Scherzi Systems, LLC v. White*, 197 A.D.3d 1466 (3d Dept 2021). In addition, there is no evidence to support that Ms. Woessner has any relevant training or prior direct work experience to allow her to perform those tasks. Her resume does not list any of the work she now alleges she performs

(DED Exhibit 12). The Meeting Minutes submitted with the application describing her duties is limited to general business management, administrative and financial duties (DED Exhibit 6).

Mr. Brenseke has direct experience designing and fabricating custom ornamental steel, overseeing the projects in the fabrication shop, handling onsite installation and repairs, and operating and training employees on all machines (DED Exhibit 13). There is no evidence demonstrating that Ms. Woessner has the training or experience to properly supervise field operations.

The Division's determination to deny the application on the basis that SEK failed to demonstrate that Ms. Woessner possesses adequate, industry-specific competence to make critical business decisions without relying upon other persons, as required under 5 NYCRR §144.2(c)(1), is supported by substantial evidence.

CONCLUSION

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

In the Matter of SEK Designs LLC
DED File ID No. 69166
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	Membership ledger or narrative	Y	Y
DED 6	Meeting Minutes, 12/31/2019	Y	Y
DED 7	Assignment Agreement, 1/1/2020	Y	Y
DED 8	LLC Agreement, 1/1/2020	Y	Y
DED 9	2020 W-2 and Earnings Summary of Melissa Woessner	Y	Y
DED 10	2021 W-2 and Earnings Summary of Melissa Woessner	Y	Y
DED 11	Licenses, Permits, Certifications and/or Accreditations	Y	Y
DED 12	Resume of Melissa Woessner	Y	Y
DED 13	Resume of Michael Brenseke	Y	Y