

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
625 BROADWAY
ALBANY, NEW YORK 12245

In the Matter

- of -

the Application of Top Set Trucking Corp.
for Certification as a Woman-owned Business Enterprise
pursuant to Executive Law Article 15-A.

NYS DED File ID No. 67832

RECOMMENDED ORDER

-by-



Theresa Wells
Administrative Law Judge
April 3, 2024

This matter considers the written appeal by Top Set Trucking Corp., (“Top Set” 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 21, 2022, Brittany Cuzzi, as President, applied on behalf of Top Set for certification as a woman-owned business enterprise (“WBE”). (DED Exhibit 1).
2. On July 24, 2023, the Division denied the application on the grounds that (DED Exhibit 2):
 - (a) 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. Top Set submitted a request to appeal the denial determination dated August 21, 2023. (APP Exhibit A; DED Exhibit 3).
4. A Notice to Proceed Via Written Appeal was sent on August 24, 2023. (DED Exhibit 4).
5. A written appeal letter with submissions was filed on October 10, 2023, by Applicant’s counsel, David Meglino, Esq. of Cole Schotz P.C. (APP Exhibit B).
6. The Division filed an Affidavit of Amanda Brennan, Project Director dated January 19, 2024, and a brief of Karen Bernstein, Esq., counsel for the Division, dated January 19, 2024.

FINDINGS OF FACT

7. Top Set is engaged in the business of commercial trucking of materials such as gravel, sand, and topsoil, along with the disposal of excavated material. (DED Exhibit 1).
8. Brittany Cuzzi is the President of Top Set and has a 50% ownership interest. At Top Set, her primary responsibilities include administrative functions, hiring of drivers and contract review. (DED Exhibit 1). She holds a degree in Business Management. Her prior work experience includes being an executive assistant at car dealerships, and working as a receptionist and patient care coordinator/office manager for a plastic surgery practice. (DED Exhibit 5).
9. Alexa Cuzzi is Vice President of Top Set and has a 50% ownership interest. Her primary responsibilities include administrative functions, hiring of drivers and contract negotiations. (DED Exhibit 1). She holds degrees in education and literacy. She has prior work experience as a teacher. (DED Exhibit 6).
10. Peter Baez is the Driver and Manager of Top Set who supervises field operations. (DED Exhibit 1; APP Exhibit B). In addition to being the supervisor, Mr. Baez is the shop steward for the drivers. (APP Exhibit B). Mr. Baez has a CDL license to operate the dump trucks. (DED Exhibit 8).
11. Additional Top Set drivers, including Benitez Solano, Jordan Janela, and Victor Ramirez have CDL Licenses to operate the dump trucks. (DED Exhibit 8).
12. The core and critical functions of the business, based on the products or services provided and the means by which the applicant obtains contracts or orders, are driving dump trucks, picking up materials, and hauling materials to the required destination and disposal of excavated material. (DED Exhibits 1 and 2).

13. Since Top Set is hauling materials in commercial grade motor vehicles, e.g. dump trucks, Top Set drivers require a CDL license to operate the equipment. Top Set owns three dump trucks. (DED Exhibits 1 and 2).

APPLICABLE LAW

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:

- (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.

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 Top Set 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 AD3d 1466 (3d Dept 2021)).

DISCUSSION

The Division denied Top Set’s application for certification as a WBE on the basis that Top Set failed to demonstrate that Brittany Cuzzi and Alexa Cuzzi, the women relied upon for certification, possess 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-owners, relied upon for certification, have 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).

The core and critical functions of Top Set include driving dump trucks, picking up materials, and hauling materials to the required destination and disposal of excavated material, all in commercial grade vehicles. (DED Exhibits 1 and 2). The record does not establish that Brittany Cuzzi and Alexa Cuzzi possess industry-specific competence in these core and critical functions. It is not clear from the record that Brittany Cuzzi and Alexa Cuzzi are able to operate the dump trucks without relying on their drivers in order to complete the business' core functions.

Brittany Cuzzi's resume which details her education and work experience includes working as an executive assistant and as a receptionist and patient care coordinator/office manager. (DED Exhibit 5). At Top Set, her primary responsibilities are administrative and financial in nature. (DED Exhibits 1 and 5). Brittany Cuzzi's experience and education is in office management and general business administration, which does not satisfy the requirement for demonstrating industry competence. (5 NYCRR §144.2(c)(1)). Brittany Cuzzi does not have a CDL License to operate the dump trucks. (DED Exhibit 7). Alexa Cuzzi's education and experience is in education and literacy and working as a teacher. (DED Exhibit 6). At Top Set, her primary responsibilities are also administrative and financial in nature. (DED Exhibits 1 and 6). Alexa Cuzzi does not have a CDL license to operate the dump trucks. (DED Exhibit 7). The women relied upon for certification do not possess the experience or expertise related to the core, or critical, functions of Top Set. Their expertise and experience at Top Set are in office management and administrative in nature.

The job responsibilities of Peter Baez include being the Driver/Manager and supervising field operations. (DED Exhibit 1). Mr. Baez has a CDL license and is the shop steward for the other unionized drivers who also have CDL licenses. (APP Exhibit B; DED Exhibits 7 and 8). As Brittany Cuzzi and Alexa Cuzzi do not have the prior requisite training, expertise or experience in the hauling and disposal of materials, they must rely on other individuals, including Mr. Baez and

the other drivers, to make critical business decisions regarding Top Set field operations, and dump truck operations including driving, hauling and disposal of material, which are the core revenue generating functions of the business.

On appeal, applicant states a CDL license is not required to demonstrate industry-specific competence. Next, Applicant states the owners' involvement in the administrative and financial functions are related to making managerial decisions for Top Set to demonstrate their industry-specific competence. Applicant states that while Mr. Baez supervises field operations, it is Brittany Cuzzi and Alexa Cuzzi, with their education and backgrounds in business management, who are responsible for all managerial operations. Applicant states that Brittany Cuzzi and Alexa Cuzzi manage, control and have ultimate authority over every aspect of Top Set's business, and make all decisions for the business. Applicant clarifies that Mr. Baez is the business' shop steward. Therefore, it is Mr. Baez who manages and supervises the unionized drivers in the field. (APP Exhibit B).

These arguments explain and clarify the day-to-day management of the business, and the unionized drivers, and have been considered in determining whether the denial is supported by substantial evidence. Information that was before the Division as part of its review at the time of the application to certify the Applicant, along with materials that seek to clarify and explain, are relevant to whether the Division's denial was supported by substantial evidence. (See *Scherzi Systems*, 197 AD3d 1466.) While in *Scherzi, LLC v. White*, 197 AD3d 1466 (3rd Dept. 2021), the Court found there are instances whereby new information shall be considered, *Scherzi* is clear those circumstances are limited to matters that seek to clarify documents and information that were submitted with the certification application.

In evaluating whether a person possesses adequate, industry-specific competence, the Division must consider, but is not limited to: (i) whether the individual is required to obtain licenses or certifications in the industry; (ii) the extent that academic credentials exist for person employed in the industry; and (iii) the extent to which industry-specific expertise can be obtained through direct work experience. The Applicant bears the burden of establishing that the women-owners relied upon for certification have 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 AD3d 1284, 151 NYS 3d 187 (3d Dept. 2021)).

While clarifying that licensure and certification are not required to manage a business in this industry, the Applicant's remaining arguments on appeal are unpersuasive in determining that the women relied upon for certification possess industry-specific competence. Brittany Cuzzi has years of education, training, experience and expertise in management and administrative office responsibilities. (DED Exhibit 5). Alexa Cuzzi has years of training and experience in teaching. (DED Exhibit 6). Brittany Cuzzi and Alexa Cuzzi possess academic and work-related credentials related to Top Set's day to day managerial operations. (DED Exhibits 1, 5 and 6). However, there is no indication in the record that either woman possess training in the core and critical functions of the business, e.g. how to operate and haul materials with a commercial grade dump truck, nor evidence about industry-specific experience gained during their employ at Top Set, which would allow them to make critical business decisions without relying upon other persons.

Their resumes and detailed work experience highlight their business management skills but not industry-specific skills in commercial trucking, which include "driving commercial grade dump trucks, picking up materials and hauling those materials, along with disposal of excavated materials." (DED Exhibits 1, 6 and 7). There is no evidence that Brittany Cuzzi and Alexa Cuzzi

are working in and directing the field operations. Peter Baez is Top Set's manager and supervisor of field operations, is the shop steward for the unionized drivers, along with being one of the drivers. (APP Exhibit B; DED Exhibits 1, 7 and 8). The other drivers also operate the dump trucks. (DED Exhibit 8).

The record does not support that the women relied upon for certification are able to operate the dump trucks or make the industry-specific decisions related to the core functions, or supervise field operations, without relying on other persons. Applicant's failure to satisfy this burden is proof that the denial was supported by substantial evidence. The Division's determination that the parties relied upon for certification do not possess adequate, industry-specific competence to make critical business decisions without relying on others, as required by 5 NYCRR § 144.2 (c)(1) is supported by substantial evidence.

CONCLUSION

Top Set 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(c)(1) was not based on substantial evidence.

RECOMMENDATION

The Division's determination to deny Top Set's application for certification as a woman-owned business enterprise should be affirmed.

In the Matter of Top Set Trucking Corp.
DED File ID No. 67832
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Applicant Request to Appeal	Y	Y
APP B	Applicant Appeal Submission	Y	Y
DED 1	Application for Certification	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	Request for Appeal	Y	Y
DED 4	Notice to Proceed Via Written Appeal	Y	Y
DED 5	Resume of Brittany Cuzzi	Y	Y
DED 6	Resume of Alexa Cuzzi	Y	Y
DED 7	Narrative Regarding Licenses/Permits/Certifications	Y	Y
DED 8	CDLs	Y	Y