

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

**In the Matter**

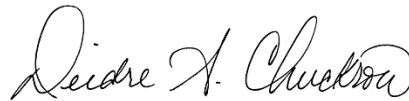
**- of -**

**the Application of UTICA EXPRESS PHARMACY INC.**  
**for Certification as a Minority-Owned Business Enterprise**  
**pursuant to Executive Law Article 15-A.**

**NYS DED File ID No. 71012**

**RECOMMENDED ORDER**

**-by-**



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**Deidre A. Chuckrow**  
**Administrative Law Judge**  
**August 22, 2024**

This matter considers the appeal by Utica Express Pharmacy, Inc. (“Utica Exp” 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 March 8, 2023, Utica Exp applied for certification as a minority-owned business enterprise (“MBE”). Utica Exp based its application on Mr. Marc Jeris Louis Jean. (DED Exhibit 1).
2. On July 6, 2023, the Division denied the application on the following grounds (APP Exhibit E; DED Exhibit 2):
  - a. The 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); and
  - b. The minority group members or women relied upon for certification do 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. Utica Exp submitted a request to appeal the denial determination, dated August 3, 2023. (TRIB Exhibit I).
4. A Notice of Hearing was sent to all parties on April 5, 2024 (TRIB Exhibit II).
5. A hearing was held on July 30, 2024.

## **FINDINGS OF FACT**

6. Utica Exp is engaged in the business of pharmaceutical goods and services and medicine manufacturing. (APP Exhibit 1; Hearing Testimony of Mr. Louis Jean).
7. Mr. Louis Jean is the minority owner relied upon for certification and is the President and 100% owner of the applicant business. (DED Exhibit 1).
8. The critical functions of Utica Exp are providing pharmaceutical goods and services and medicine manufacturing (DED Exhibit 1; Hearing Testimony of Mr. Louis Jean; Hearing Testimony of Ms. Brennan).
9. Utica Exp is required to hold a New York State Board of Pharmacy License. Utica Exp also has a controlled substance registration from the United States Drug Enforcement Administration. (APP Exhibit D; DED Exhibit 3; Hearing Testimony of Mr. Louis Jean; Hearing Testimony of Ms. Brennan).
10. A pharmacy is required to have a supervising pharmacist to control the practice of pharmacy, and the supervising pharmacist must direct and control the practice of pharmacy in a registered pharmacy and cannot assign responsibility to another person. (Hearing Testimony of Mr. Louis Jean; Hearing Testimony of Ms. Brennan; NYS Education Law Article 137).
11. Mr. Louis Jean's work history includes work as a non-licensed pharmacy technician, and he received a certificate of completion in a 3-month online Pharmacy Technician program from Ashworth College in Georgia in 2011. The Ashworth Certificate does not qualify in New York towards a pharmacy technician's license. Mr. Louis Jean is not a licensed pharmacist nor a licensed pharmacy technician. (APP Exhibit J; Hearing Testimony of Mr. Louis Jean; Hearing Testimony of Ms. Brennan).

12. Mr. Louis Jean has been a pharmacy owner and manager since 2016. His responsibilities include the hiring and firing of employees, business development, managing inventory, bookkeeping, and training employees to use the applicant business' computer system. (DED Exhibit 8; Hearing Testimony of Mr. Louis Jean).
13. Utica Exp employs a supervising pharmacist. Ms. Eva Marie Rodriguez is a licensed pharmacist and is the current supervising pharmacist for Utica Exp. Prior to Ms. Rodriguez, Mr. Jamal Najib was the supervising pharmacist for Utica Exp. Both Ms. Rodriguez and Mr. Najib are licensed pharmacists. (DED Exhibits 5, 6, 7, 9 and 10; Hearing Testimony of Mr. Louis Jean; Hearing Testimony of Ms. Brennan).

### **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.

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 Utica Exp for certification as an 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**

Lachlan H. Tyler, Esq., of Sauchik & Giyaur, P.C., appeared at the hearing on behalf of Utica Express Pharmacy, Inc. The following witness testified on behalf of Utica Exp: Marc J. Louis Jean, President, Utica Exp. Utica Exp offered the following exhibits which were admitted into evidence: APP Exhibits B, D, E, J, and K.

Ms. Lisa Berk, Senior Counsel, Empire State Development, appeared at the hearing on behalf of the Division. The following witness testified on behalf of the Division: Amanda Brennan, Vice President, Certification, Division of Minority and Women's Business Development. The Division offered the following exhibits which were admitted into evidence: DED Exhibits 1 through 11.

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

The Division denied Utica Exp's application for certification as an MBE on the basis that the applicant failed to demonstrate that Mr. Louis Jean 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 he 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 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 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)). Expertise or experience in office management or general business administration will not satisfy these requirements. (5 NYCRR § 144.2(c)(1)). 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.

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 Division consistently denies certification where the 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. (*Matter of Panko Electrical and Maintenance Corp. v Zapata et. al*, 172 AD3d 1682 (3d Dept. 2019), see also *Matter of Upstate Electrical, supra*).

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).

Counsel for the applicant argued that Mr. Louis Jean has decades of experience in the pharmacy industry, has industry specific knowledge, and is at the helm of the applicant business. Counsel also argues that the critical function of the business is not the provision of pharmaceutical goods and services and medicine manufacturing but is instead, essentially, the running of the pharmacy as a business. Counsel supports this argument by the fact that Mr. Louis Jean, as the sole owner, controls the hiring and the firing of a pharmacist, and as such the business cannot operate without him.

The Division argued that the applicant failed to provide sufficient evidence to establish that Mr. Louis Jean possesses industry-specific competence and makes operational decisions on a day-to-day basis with respect to the critical functions of the business enterprise, as required by the regulations. In making its determination the Division relied on the information provided by the applicant business in its application, determined what the critical functions of the business enterprise were based upon the application, and reviewed New York State's professional licensing requirements and credentialing processes for pharmacies. (DED Exhibits 1, 3, 4, 5, and 6).

Mr. Louis Jean testified that he has worked in the pharmacy industry for seventeen years. (Hearing Testimony of Mr. Louis Jean; DED Exhibit 8). He stated that he began working in the retail pharmacy industry in 2007 as a technician and as a manager, and that he opened his own pharmacy in 2016. (Hearing Testimony of Mr. Louis Jean). He testified that he reviews all the credentials of the pharmacists, that he controls their hiring and firing, trains them on the policies



and procedures of the pharmacy, and on how to use the business' software. (Hearing Testimony of Mr. Louis Jean).

On cross examination Mr. Louis Jean confirmed that he is not now, nor has he ever been a licensed pharmacy technician. He also confirmed that only a licensed pharmacist can counsel patients, dispense prescription medications, and that only licensed technicians can measure and compound medications under the supervision of a licensed pharmacist. In addition, he confirmed that a licensed pharmacist must initial the information entered into the computer system as accurate. Mr. Louis Jean also admitted that for the applicant business to operate a supervising pharmacist must be on staff, and is the only one who can direct the dispensing of prescription medications. (Hearing Testimony of Mr. Louis Jean). Mr. Louis Jean also testified that the New York State Education Law requires that a Supervising Pharmacist ensure that the pharmacy always has coverage by a licensed pharmacist, and that they must also ensure that a copy of those regulations be readily accessible at the pharmacy. (Hearing Testimony of Mr. Louis Jean). Mr. Louis Jean also confirmed that the applicant business' obtaining of the required licensure is dependent on the business having a Supervising Pharmacist. (See, NYS Education Law Art. 137).

The Division's witness, Amanda Brenna, Vice President of Certification, Associate Certification, testified that she 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 Ms. Brennan). She testified that based on §§ 4(a) and 4(c) of the application, which include the business' description of the business and the commodities and services they provide, it was determined that the critical functions of the business included pharmacy services and manufacturing of medicine. (DED Exhibit 1; Hearing Testimony of Ms. Brennan). The application also stated that the business is required to hold both a New York State license and a federal license to operate, and Ms. Brennan

explained that she researched what those requirements included. (DED Exhibit 1; Hearing Testimony of Ms. Brennan). Ms. Brennan also testified that she reviewed the one contract provided by the applicant in her review, as well as the North American Industry Classification System (“NAICS”) codes provided by the applicant. DED Exhibit 1; Hearing Testimony of Ms. Brennan).

Ms. Brennan testified that the licensing authority in New York is codified under New York Education law §§ 6800 et. seq. NYS Education Law governs the credentialing process for a licensed pharmacy and sets out the rules by which those pharmacies must operate. (Hearing Testimony of Ms. Brennan; see also, NYS Education Law Art. 137). To gain a New York State license a pharmacy must employ a pharmacist with a bachelor’s degree accompanied by an internship, or a doctorate degree, from an accredited program, and pass required state testing. (DED Exhibits 4, 5, 6, and 7; Hearing Testimony of Ms. Brennan). Further, the pharmacy must employ a supervising pharmacist to manage and control the dispensing of prescriptions and durable medical goods, and it is the supervising pharmacist who is held accountable for any failures to comport with the State’s regulations. (Hearing Testimony of Ms. Brennan; NYS Education Law Art. 137).

Ms. Brennan testified that she reviewed Mr. Louis Jean’s resume and because he does not have the required degree and is not a licensed pharmacist, he is disqualified, by law, to control the practice of the pharmacy, including the compounding or manufacturing of medication, dispensing medication, counseling of customers receiving medication, and the supervision of pharmacists or licensed technicians. (Hearing Testimony of Ms. Brennan). As the Utica Exp describes itself as a business engaging in the sale of pharmaceutical goods and services and medicine manufacturing, and the NAICS code listed on the application all apply to pharmaceutical applications, including preparation and manufacturing, the critical functions of the business are the creation of and

dispensing of pharmaceutical products. (Hearing Testimony of Ms. Brennan; DED Exhibit 1). Ms. Brennan explained that even when analyzing Mr. Louis Jean under each of the criteria under 5 NYCRR § 144.2(c)(1), he did not meet the threshold of adequate industry competence. Mr. Louis Jean does not have the appropriate degree to qualify him as a pharmacist in New York, therefore, he does not qualify for the requisite license, and as a license is required to complete the critical functions of the business, he cannot gain that experience in the workplace. (Hearing Testimony of Ms. Brennan; DED Exhibit 8; 5 NYCRR§ 144.2(c)(1)). The evidence presented to the Division is that Mr. Louis Jean's experience is in general business management and not in the practice of pharmacy. (Hearing Testimony of Ms. Brenna).

Ms. Brennan also testified that Mr. Louis Jean does not make operational decisions as required under 5 NYCRR§ 144.2(c)(2) with respect to the critical functions of the business enterprise, because the critical functions of Utica Exp must be conducted by a licensed pharmacist. Further, the products and services provided to the clients of the applicant business involve pharmaceuticals, and the one contract submitted by Utica Exp is one regarding the prescribing of pharmaceuticals to individuals. (DED Exhibits 1 and 11). Thus, Mr. Louis Jean must rely on the pharmacists, who are the only individuals with the education, training, experience to engage in the critical business functions of the applicant business, and the only ones who are able to supervise the functions of the business. (NYS Education Law Article 137, *Matter of Panko, supra, Electrical and Maintenance Corp. v Zapata et. al, supra, and Matter of Upstate Electrical, supra*).

The application, the resumes, the contract, and the testimony of Mr. Louis Jean and Ms. Brennan demonstrate that Mr. Louis Jean does not have adequate, industry-specific competence to make critical decisions without relying on other persons and does not make operational decisions on a day-to-day basis. Based on the foregoing, I find that the Division's determination

to deny Utica Exp's certification was based on substantial evidence. Although Mr. Louis Jean is an experienced business manager and understands the business of pharmacy, the critical functions of the business require that a supervising pharmacist oversee all aspects related to the distribution and manufacture of pharmaceuticals. Mr. Louis Jean does not possess adequate industry competence without relying on others and cannot make operational business decisions as to the critical functions of the applicant business, as required under 5 NYCRR §§ 144.2(c)(1) and (2).

### **CONCLUSION**

Applicant has not met its burden with respect to the eligibility criteria at 5 NYCRR §§ 144.2(c)(1) and 144.2(c)(2).

### **RECOMMENDATION**

The Division's determination to deny Utica Express Pharmacy, Inc.'s application for certification as a minority owned business enterprise should be affirmed.

In the Matter of Utica Express Pharmacy, Inc.  
DED File ID No. 71012  
Exhibit Chart

Exhibit #:	Description of the Exhibits	Offered (Yes/No)	Admitted (Yes/No)
APP A	Letter from Susan Zelezniak, NYS DOH	N	N
APP B	Limited Service Laboratory Registration by NYS DOH	Y	Y
APP C	MBE Certificate, NYC Small Business Services	N	N
APP D	NYS Board of Pharmacy License	Y	Y
APP E	ESD Denial Determination	Y	Y
APP F	NYS Board of Pharmacy Registered Wholesaler of Drugs and/or Devices License	Y	N
APP G	Utica Express Pharmacy Inc Capability Statement	Y	N
APP H	NYC Small Business Services Vendor Profile	N	N
APP I	Former Employer Reference Letter, Amad Mirza	Y	N
APP J	Ashworth College Diploma	Y	Y
APP K	Compliance Program	Y	Y
APP L	Parkside Express Pharmacy Medicaid Enrollment Provider Application	Y	N
DED 1	MBE Application	Y	Y
DED 2	Denial Letter	Y	Y
DED 3	DEA License	Y	Y
DED 4	Utica Express Pharmacy License	Y	Y
DED 5	NYS Dept of Ed Registration for Eva Marie Rodriguez	Y	Y

DED 6	Pharmacist License Eva Marie Rodriguez	Y	Y
DED 7	Pharmacist License Jamal Nabi Najib	Y	Y
DED 8	Resume Marc Jeris Louis Jean	Y	Y
DED 9	Resume Eva Marie Rodriguez	Y	Y
DED 10	Resume Jamal Najib	Y	Y
DED 11	Humana Contract	Y	Y
TRIB I	Request to Appeal	N	Y
TRIB II	Notice of Hearing	N	Y