

NEW YORK STATE
DEPARTMENT OF ECONOMIC DEVELOPMENT
633 THIRD AVENUE
NEW YORK, NY 10017

In the Matter

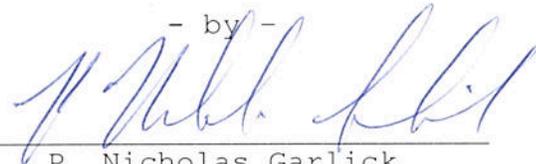
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the Application of
Essentialcom, LLC DBA Essentialcom
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 51265

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

February 22, 2017

SUMMARY

This report recommends that the determination of the Division of Minority and Women's Business Development ("Division") of the New York State Department of Economic Development to deny the application of Essentialcom, LLC DBA Essentialcom ("applicant") for certification as a woman-owned business enterprise ("WBE") be affirmed for the reasons set forth below.

PROCEEDINGS

This matter involves the appeal, pursuant to New York State Executive Law ("EL") Article 15-A and Title 5 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("NYCRR") Parts 140-144, by Essentialcom, LLC challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Essentialcom, LLC's application was received on February 1, 2016 (Exh. DED4 at 1).

The application was denied by letter dated February 17, 2016, from Bette Yee, Director of Certification Operations (Exh. DED8). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Claude Setton's ownership and operation of applicant.

By letter dated March 13, 2016, Claude Setton, on behalf of applicant, appealed from the Division's denial determination.

By letter dated May 31, 2016, the Division notified applicant that applicant's written appeal should be filed on or before July 7, 2016.

By letter dated July 8, 2016, applicant submitted its written appeal, which consisted of a two page letter.

In a five page memorandum dated December 12, 2016, the Division responded to applicant's appeal. Enclosed with the response were nine exhibits, described in the attached exhibit chart as DED1-DED9.

On December 13, 2016, this matter was assigned to me.

By email dated December 21, 2016, Ms. Setton submitted an unauthorized response to the Division's papers.

ELIGIBILITY CRITERIA

For the purposes of determining whether an applicant should be granted or denied woman-owned business enterprise status, regulatory criteria regarding the applicant's ownership, operation, control, and independence are applied on the basis of information supplied through the application process.

The Division reviews the enterprise as it existed at the time the application was made, based on representations in the application itself, and on information revealed in supplemental submissions and interviews that are conducted by Division analysts.

STANDARD OF REVIEW

On this administrative appeal, applicant bears the burden of proving that the Division's denial of applicant's WBE certification 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 the Division's conclusions and factual determinations are not supported by "such relevant proof as a reasonable mind may accept as adequate" (Matter of Ridge Rd. Fire Dist. v Schiano, 16 NY3d 494, 499 [2011] [internal quotation marks and citations omitted]).

POSITIONS OF THE PARTIES

Position of the Division

In its denial letter, the Division asserts that the application failed to meet three separate criteria for certification.

First, the Division found that applicant failed to demonstrate that the woman owner Claude Setton's capital

contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

Second, the Division found that applicant failed to demonstrate that the woman owner, Claude Setton, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) & (ii).

Third, the Division found that applicant failed to demonstrate that the woman owner, Claude Setton, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

Position of the Applicant

Essentialcom, LLC asserts that it meets the criteria for certification and that the Division erred in not granting it status as a woman-owned business enterprise pursuant to Executive Law Article 15-A.

FINDINGS OF FACT

1. Essentialcom, LLC is in the business of providing digital technology solutions, such as digital video, surveillance, burglary, access control, video over IP, intermediate PBX phone system and ongoing service support (Exh. DED5).

2. Essentialcom, LLC established on March 9, 2004 by Eli Hezi and Shlomo Toledano (Exh. DED1). On April 18, 2007 the operating agreement of the LLC was amended to allow Ms. Setton a 51% interest in the firm and Mr. Hezi a 49% stake (Exh. DED2 at 1). Section (ii) of the amended operating agreement of the firm states that Mr. Toledano received certain receivables of the firm as consideration for surrendering his ownership interest (Exh. DED2 at 2).

3. In 2008, the firm was certified as a WBE and this certification expired on November 30, 2013. A recertification application was returned to applicant by letter dated July 14,

2015 and applicant was informed that a new application would be required (Exh. DED3). A new application was submitted on February 1, 2016 (Exh. DED4).

4. Eli Hezi's resume shows over twenty-five years of experience in the IT field and shows him to have no other employment at the time of the application (Exh. DED5).

5. Claude Setton's resume shows over twenty-five years of experience in the finance industry but does not list any IT training or experience. In addition, at the time of the application, Ms. Setton was Director of the European Clients Group for JPMorgan Chase. (Exh. DED6).

DISCUSSION

This report considers applicant's appeal from the Division's determination to deny certification as a woman-owned business enterprise pursuant to Executive Law Article 15-A. The Division's denial letter set forth three bases related to Ms. Setton's ownership and operation of Essentialcom, LLC. Each basis is discussed individually, below.

Ownership

In its denial letter, the Division stated that applicant failed to demonstrate that the woman owner Claude Setton's capital contributions were proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

The appeal states that in 2007, Claude Setton bought out the previous partner and that both she and Eli Hezi have worked actively to grow the business through contributions of money, expertise, and time. No proof of these claims is provided with the appeal. Ms. Setton states that the loss of WBE status has severely impacted the business and maintaining WBE certification is critical to the future of the company.

In its reply, the Division argues that the application shows that no capital contribution was made to the firm by either Mr. Hezi or Ms. Sutton (Exh. DED4 at 3). In response to a Division request for more information on this point, Mr. Hezi

wrote "business founded 3/17/2004 changed women ownership 1/16/2007 Claude Setton 51% and Minority 49% no loan investment done 1/16/2007, see uploaded bank documents" (Exh. DED9). According to Division counsel, the bank records provided bore no relevance to whether Mr. Hezi or Ms. Sutton made contributions of money, property, equipment, or expertise to the firm, though these bank records were not included in the record of the appeal. Based on this information, counsel reports that the Division determined that Ms. Sutton had not made contributions to the business in proportion to her equity interest.

The Division responds to the applicant's claim on the appeal that Ms. Setton "bought out" Mr. Toledano by stating that the claim lacks evidentiary support and is contradicted by the amended operating agreement (Exh. DED2), specifically, section (ii), which states that Mr. Toledano received certain receivables of the firm as consideration for surrendering his ownership interest (Exh. DED2 at 2). The Division concludes that nothing in the application materials demonstrates that Ms. Setton personally made a contribution to the firm when she took an ownership interest.

Based on the evidence in the record and the discussion above, applicant has failed to demonstrate that the woman owner Claude Setton's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1). The Division's denial was based on substantial evidence.

Operation

In its denial letter, the Division asserted two grounds for denying the application for failure to meet certification criteria related to the operation of applicant. First, the Division found that applicant failed to demonstrate that the woman owner, Claude Setton, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) & (ii).

Ms. Setton states that her area of expertise is not technical, but rather financial. She argues that this is a critical set of skills for any small business and that she has

been very involved in the negotiation of contracts and establishing pricing strategies for the company.

In its reply, the Division argues that Mr. Hezi was the only person at the time of the application with IT experience and was the qualifier for the license the company needed to provide alarm installation and maintenance services (Exhs. DED5, DED6, & DED7). Ms. Setton's resume shows a lack of any technical training or practical experience in providing digital video or security services (Exh. DED6).

Because of Ms. Setton's admitted lack of technical expertise, applicant has failed to demonstrate that the woman owner, Claude Setton, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) & (ii). The Division's denial was based on substantial evidence.

The second ground asserted for denial on operational grounds was that applicant failed to demonstrate that the woman owner, Claude Setton, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

On the appeal, Ms. Setton admits that she is employed outside the firm and states that this is necessary to support her family, considering the uncertainty around the firm's WBE status. In addition, she states her family needs the health insurance benefits in light of Mr. Hezi's recent back surgery. She acknowledges that she does not spend as much time as her partner does in the day-to-day running of the operations of the company, but maintains she is a key partner in all important decisions. During her partner's recent medical issues, she has devoted more time to the operations of the company. She lists her involvement in the company as: strategic decisions regarding new business incentives; decisions regarding divestiture; review of subcontractors' agreements; review and approval for new contracts; and financing the company.

In its reply, the Division argues that Ms. Setton did not devote time on an ongoing basis to the daily operations of the company because she was employed by JPMorgan Chase as the

Director of its European Clients Group (Exh. DED6). Mr. Hezi's resume shows he has no other employment other than working for Essentialcom (Exh. DED5). Based on this, the Division concludes that Mr. Hezi manages the firm while Ms. Sutton works elsewhere.

Based on the evidence in the record and the discussion above, the application materials show that decisions regarding the operations of the core, revenue producing functions of the applicant, alarm installation and other IT work, are performed by Mr. Hezi (since the firm has no employees). In addition, Mr. Hezi works for the firm full-time, while Ms. Setton has full-time employment elsewhere. Because of this, applicant failed to demonstrate that the woman owner, Claude Setton, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. Applicant failed to demonstrate that the woman owner Claude Setton's capital contributions are proportionate to her equity interest in the business enterprise as demonstrated by, but not limited to, contributions of money, property, equipment or expertise, as required by 5 NYCRR 144.2(a)(1).

2. Applicant failed to demonstrate that the woman owner, Claude Setton, has the experience or technical competence, working knowledge or ability needed to operate the enterprise, as required by 5 NYCRR 144.2(b)(1)(i) & (ii).

3. Applicant failed to demonstrate that the woman owner, Claude Setton, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operations of the enterprise, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

RECOMMENDATION

The Division's determination to deny Essentialcom, LLC application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Essentialcom, LLC DBA Essentialcom**

**DED File ID No. 51265
Exhibit List**

Exh. #	Description
DED1	Articles of organization
DED2	Second amendment to operating agreement
DED3	Division letter dated July 14, 2015
DED4	Application
DED5	Resume of Eli Hezi
DED6	Resume of Claude A. Setton
DED7	Business license
DED8	Denial letter
DED9	Letter from applicant