

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

In the Matter

- of -

the Application of
Occupational Safety & Environmental Associates, Inc.
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 9830

RECOMMENDED ORDER

 by 

P. Nicholas Garlick
Administrative Law Judge

April 12, 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 Occupational Safety & Environmental Associates, Inc. ("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 Occupational Safety & Environmental Associates, Inc. challenging the determination of the Division that applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Occupational Safety & Environmental Associates, Inc.'s application was submitted on August 6, 2013 (Exh. DED1).

The application was denied by letter dated February 25, 2016, from Bette Yee, Director of Certification Operations. As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet three separate eligibility criteria related to Gina Coniglio's ownership, operation, and control of applicant (Exh. DED7).

By letter dated March 15, 2016, applicant appealed from the Division's denial.

By letter dated June 20, 2016, the Division notified applicant that the written appeal should be submitted on or before August 1, 2016.

Applicant subsequently filed its appeal consisting of a two page letter dated July 6, 2016. Attached to the letter were six exhibits, labeled A1-A6 in the attached chart.

In a five page memorandum dated February 1, 2017, Division counsel Phillip Harmonick, Esq. provided its response. Attached

to the response were nine exhibits, labeled DED1-DED9 in the attached chart.

On February 2, 2017, this matter was assigned to me.

In an email dated February 7, 2017, Ms. Coniglio requested an opportunity to respond in writing to the Division's papers and on February 13, 2017, I granted the request, setting a submission deadline of March 24, 2017.

On March 22, 2017, applicant's response was received and consisted of a five page memorandum from applicant's counsel, Patricia Gillen, Esq., of Duke, Holzman, Photiadis & Gresens LLP, and a two page affidavit from Ms. Coniglio.

In an email dated March 28, 2017, the Division stated that it would not file a sur-reply to applicant's response and the record closed.

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 criteria for certification.

First, the Division found that applicant failed to demonstrate that the women owners' capital contributions are proportionate to their 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, Gina Coniglio, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Third, the Division found that applicant failed to demonstrate that the women owners are permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Occupational Safety & Environmental Associates, Inc. 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. Occupational Safety & Environmental Associates, Inc. provides safety, environmental, and industrial hygiene consulting and training (Exh. DED1 at 3). It has a business address of 3740 California Road, Orchard Park, New York (Exh. DED1 at 1).

2. On July 21, 1983, a firm known as Rabbit Run Enterprises, Inc. was incorporated. Its name was changed to

Occupational Safety & Environmental Associates, Inc. on November 15, 1991 (Exh. DED2 at 1).

3. At the time of the application, Gina Coniglio owned 52 shares of stock or 49.5% of the firm, Liz Bermingham owned 5 shares or 4.8%, and John P. Coniglio owned 48 shares or 45.7% (Exhs. DED1 at 3 & DED3).

4. Information supplied with the application regarding the contributions of the owners of Occupational Safety & Environmental Associates, Inc. claimed all the owners contributed money to the firm (Exh. DED8). The calculations of monetary contributions (which includes loans) show the women owners provided [REDACTED] and John Coniglio provided [REDACTED] (Exh. DED8 at 1). If loans are excluded from the calculation Gina Coniglio provided 50% of the capital to the firm and John Coniglio provided the other 50% (Exh. DED8).

5. Information supplied with the application regarding the contributions of the owners of Occupational Safety & Environmental Associates, Inc. claimed all the owners contributed expertise to the firm, but the value of this expertise was not quantified. Gina Coniglio contributed expertise in administration, finance and budgeting, program development and project planning, long-range and short-term goal development, employee evaluation, training and grant writing. Liz Bermingham contributed expertise in accounting, payroll, human resource management and office administration. John Coniglio contributed expertise in safety, and environmental and industrial hygiene technology. (Exh. DED8 at 1).

6. Gina Coniglio's responsibilities at the firm include: planning, fiscal management, ensuring regulatory compliance, human resources, brokering insurance, and directing training (Exh. DED4 at 1). John Coniglio serves as the principal consultant for all technical activities for both domestic and international consulting, holds a Ph.D. in Safety Engineering, has qualified as an expert witness in several states, is a certified safety professional, and is a master trainer for both pipelines and construction site safety (Exh. DED5).

7. Gina Coniglio serves as the CFO of the firm (Exh. DED4 at 1). John P. Coniglio serves as Managing Director (Exh. DED5). Joseph J. Coniglio serves as President of the firm (Exh. DED6). The firm's by-laws state that the President shall be the chief executive officer of the corporation (Exh. DED2 at 12).

8. In the past the firm was certified as a WBE by the Division and is presently certified by Erie County (Exh. A6).

DISCUSSION

This report considers the appeal of applicant 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 sets forth three bases related to Gina Coniglio's ownership and operation of Occupational Safety & Environmental Associates, Inc. Each basis is discussed individually, below. There is, however, a preliminary matter that must be addressed first.

Applicant's response papers, which were prepared and signed by Patricia Gillen, Esq., a partner at the law firm of Duke, Holzman, Photiadis & Gresens LLP, makes the following statement (this is a direct quote):

"The individuals performing a review of Ms. Coniglio's expertise, contributions and control were men, and, apparently of Middle Eastern origin/ancestry (El Hussein Sarhan and Abdul Karim Caulker^[1]). It is not surprising that they found that Ms. Coniglio does not make decisions pertaining to the business because of her involvement in 'fiscal, marketing, administrative, and human resource matters.' (Harmonick Letter at 4). It is well known that the Middle Eastern culture has a skewed view of woman [sic] in business and largely views woman [sic] as second-class citizens who are unable to work competently without men."

¹ [Mr. Caulker has since changed his last name to Bah.]

Counsel's prejudiced and unsubstantiated assumption -- that the analysts who performed the review of her client's file were unable to properly do their jobs because of apparent Middle Eastern descent -- is completely unacceptable and unprofessional. Accordingly, I reject this argument by counsel.

As an administrative law judge for the New York State Department of Environmental Conservation for more than fifteen years, I have never come across such an offensive comment in papers submitted by an attorney. While I have had only limited contact with Mr. Sarhan and Mr. Bah in the course of other hearings for the Division, I have found both individuals to be nothing but professional, unbiased, and competent. Moreover, their analyses are completely consistent with the analyses applied in other MWBE appeals, regardless of the ethnic background of the analysts.

Ownership

In its denial letter, the Division concluded that the applicant failed to demonstrate that the women owners' capital contributions are proportionate to their 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).

On the appeal, Ms. Coniglio states that the ownership and control of the business has not changed for twenty-five years. She holds a master's degree in education and a post master's degree in administration and supervision. She also states that she has owned the business for twenty-five years and gained considerable expertise demonstrating an increasing contribution.

In its response, the Division argues that applicant failed to demonstrate that the women owners had contributed money, property, equipment, or expertise in proportion to their ownership interests. In response to the Division's request for information showing contributions proportionate to the ownership interests of the women owners (Exh. DED1 at 7), applicant provided documents summarizing the financial contributions of the owners as well as their contributions of expertise to the business (Exh. DED8).

With respect to financial contributions, this document (which includes monies loaned to the firm) shows John Coniglio contributed [REDACTED] to the firm while Gina Coniglio contributed [REDACTED] and Liz Bermingham contributed [REDACTED] (Exh. 8 at 1).² The Division argues that this shows that the male owner of the firm contributed more than the women owners, combined. If the loan amounts are subtracted from the totals above, this document shows John and Gina Coniglio each contributed an equal amount to the firm. In neither case does it show that the women owners contributed more than half the financing for the firm.

Applicant also provided a copy of a September 19, 2004 letter from Richard D. Yellen, Esq., which provides a corporate history of the firm beginning in 1983 (Exh. A3 at 1-6). In this letter, reference is made to a loan by John Coniglio on February 1, 1992, the conversion of [REDACTED] of loans from John Coniglio to paid-in capital on June 15, 1992, and a loan from Gina Coniglio to the corporation on May 14, 1993 (Exh. A3 at 4-5). None of these transactions is reflected in Exhibit DED8 which applicant submitted as proof of capital contributions. These discrepancies call into the question the veracity of both exhibits A3 and DED8.

With respect to contributions of expertise, applicant claims that the owners contributed the following, unquantified experience to the firm. Gina Coniglio contributed expertise in administration, finance and budgeting, program development and project planning, long range and short term goal development, employee evaluation, training and grant writing. Liz Bermingham contributed expertise in accounting, payroll, human resource management and office administration. John Coniglio contributed expertise in safety, and environmental and industrial hygiene technology. (Exh. DED8 at 1).

In the reply, applicant's counsel argues that Ms. Coniglio's ownership is real and proportionate to her equity. Counsel acknowledges that the documents submitted with the application show Mr. Coniglio contributed more cash (Exh. DED8). But, counsel argues, the Division's denial on this ground was a

² This calculation assigns half of the contributions made jointly by John and Gina Coniglio to each.

paper determination because the Division made no physical observations of Ms. Coniglio's performance nor any inquiry of customers or clients about her role at the firm. Counsel continues that the application shows Ms. Coniglio worked up to 60 hours a week and was primarily responsible for all major decisions concerning the operation and strategic management of the company. Counsel concludes her argument on this point with the ethnic slur directed at the Division employees who reviewed the application (addressed above) and goes on to question their experience. Counsel does not cite to anything in the record that quantifies the value of Ms. Coniglio's experience or that of any other owner of the firm.

The regulations place the burden on the applicant to demonstrate that the women owners' capital contributions are proportionate to their equity interest. In this case, the applicant has failed to provide proof of such capital contributions. As discussed above, the written evidence of financial contributions is contradictory and no quantification of the value of the experience brought by the owners was provided. The evidence submitted is insufficient to conclude that applicant has met its burden.

Based on the evidence in the record, applicant failed to demonstrate that the women owners' capital contributions are proportionate to their 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 determination on this ground was based on substantial evidence.

Operation

In its denial letter, the Division found that applicant failed to demonstrate that the woman owner, Gina Coniglio, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

On the appeal, Ms. Coniglio responds to this denial ground by stating that she is mystified by it and questioning if the certification process has changed since the last recertification.

In its response, the Division argues that applicant failed to demonstrate that Ms. Coniglio managed significant operations of the firm related to preparing proposals and delivering consulting services, which are managed by John Coniglio. The Division cites Ms. Coniglio's curriculum vitae (CV) which describes her role at the firm as primarily oriented around fiscal, marketing, administrative, and human resource management (Exh. DED4 at 1). John Coniglio's CV, in contrast, demonstrates that he is responsible for the management of substantially all of the technical aspects of the operation of the business (Exh. DED5 at 3). The Division concludes that it is John Coniglio who ensures the delivery of substantially all of the services provided to the firm's clients while Ms. Coniglio manages the supporting functions.

In her reply, applicant's counsel argues that the Division's basis for denial on this ground is in direct violation of the New York regulations and the federal regulations upon which New York's program is based. Counsel argues that Ms. Coniglio's responsibilities making decisions involving legal, financial, marketing, long and short-term planning and government compliance indicate that she makes decisions pertaining to the operations of the company. Counsel argues that the Division has narrowly interpreted the word "operations" to mean "work in the field." Counsel then renews her attack on the Division analysts' ethnicity and competence. She then cites federal regulations regarding professional qualifications (49 CFR 26.71[h]) which is neither applicable in this case nor on point. The regulation in question relates to the licensing of professionals, which was not a ground for denial cited in this matter (see 5 NYCRR 144.2(b)(1)(i) requiring technical competence). Rather, the ground for denial here is that the women owners do not make decisions pertaining to the operation of the enterprise (see 5 NYCRR 144.2(b)(1)). These are different certification criteria and can each be a separate grounds for denial.

Applicant's counsel does not address the Division's argument that it is John Coniglio who manages the technical aspects of the operations, and therefore, is responsible for generating revenues of this consulting firm. While there is no doubt that Ms. Coniglio works very hard, manages the

administrative aspects of firm, and oversees its finances, applicant's counsel points to nothing that shows her doing any consulting work, which is the firm's core business (Exh. DED1 at 3). Ms. Coniglio's CV does state that she directs training and that she is a qualified First Aid/CPR Instructor Trainer and a Certified Food Safety Trainer and Inspector (Exh. DED4 at 1 & 3), but John Coniglio's CV lists over a dozen training qualifications (Exh. DED5 at 5-7). Under these circumstances, it was reasonable for the Division to conclude that most if not all of the training done by the firm is done by John Coniglio, who, among other qualifications holds a Ph.D. in Safety Engineering, has qualified as an expert witness in several states, is a certified safety professional, and is a master trainer for both pipelines and construction site safety (Exh. DED5).

Based on the evidence in the record, discussed above, the applicant failed to demonstrate that the woman owner, Gina Coniglio, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial was based on substantial evidence.

Control

In its denial letter, the Division found that applicant failed to demonstrate that the women owners are permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

On the appeal, Ms. Coniglio responds to this denial ground by stating that she is mystified by it and questioning if the certification process has changed since the last recertification.

In its response, the Division argues that applicant failed to demonstrate that the women owners are empowered to control the management of the business. While the application indicated that Ms. Coniglio was the president of the firm at the time the application was submitted in August 2013 (Exh. DED1 at 2), documents supplied with the application indicate that Joseph Coniglio became president in February 2014 (Exh. DED9). The corporate by-laws identify the president as the chief executive

officer of the corporation (Exh. DED2 at 12) and, therefore, its highest ranking officer.

In the reply, applicant's counsel argues that because the president reports to the chairman of the board of directors, a post held by Ms. Coniglio, that she holds the highest ranking position of the company. Counsel notes that when Joseph Caniglio was made president in February 2014, he was given no voting rights on the board of directors (Exh. DED9). Counsel claims that the stockholders limited Joseph's power as president in Exhibit DED9, but no such restriction is set forth there. Counsel concludes that Joseph Coniglio is a figurehead president and that the authority to manage the corporation rests with Ms. Coniglio as chairman of the board of directors.

In this case, the corporate documents, specifically the corporation's by-laws state that the President of the corporation shall be its CEO. As such, the president is the corporation's highest officer and is empowered to manage the business. If Joseph Coniglio was, in fact, merely a figurehead, as applicant's counsel contends, there is no indication of this in the by-laws. The regulations require that the corporate documents allow the women owners to make decisions without restrictions and in this case the by-laws authorize the president to run the business.

Based on the evidence in the record, the Division found that applicant failed to demonstrate that the women owners are permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2). The Division's denial was based on substantial evidence.

CONCLUSIONS

1. Applicant failed to demonstrate that the women owners' capital contributions are proportionate to their 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, Gina Coniglio, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

3. Applicant failed to demonstrate that the women owners are permitted by the corporate documents and relevant business agreements to make business decisions without restriction, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

The Division's determination to deny Occupational Safety & Environmental Associates, Inc.'s application for certification as a woman-owned business enterprise should be affirmed for the reasons stated in this recommended order.

**Matter of
Occupational Safety & Environmental Associates, Inc.**

**DED File ID No. 9830
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Amended certificate of incorporation and bylaws
DED3	Stock transfer ledger and certificates
DED4	CV of Gina L. Coniglio
DED5	CV of John P. Coniglio
DED6	CV of Joseph J. Coniglio
DED7	Denial letter
DED8	Contribution documents
DED9	Minutes of stockholders meeting 1/20/14
A1	Signed client contracts
A2	Vendor contracts
A3	Stock ownership information
A4	Employee contracts
A5	CV of Gina L. Coniglio (same as DED4) and Contribution information (same as DED8)
A6	Letter certifying applicant as a bona-fide women enterprise by the County of Erie