

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

In the Matter

- of -

the Application of

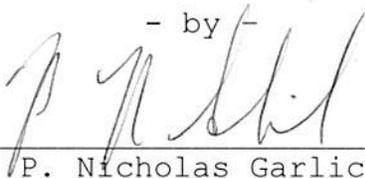
**SoHo Imaging Inc.**

For Certification as a Woman-owned Business Enterprise  
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 60134

**RECOMMENDED ORDER**

- by -



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P. Nicholas Garlick  
Administrative Law Judge

May 12, 2016

## **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 SoHo Imaging 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 SoHo Imaging Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

SoHo Imaging Inc.'s application was submitted on July 1, 2015 (Exh. DED2).

The application was denied by letter dated December 16, 2015, from Bette Yee, Director of Certification Operations (Exh. DED1). As explained in an attachment to Ms. Yee's letter, the application was denied for failing to meet four separate eligibility criteria related to Joanne Gosert's ownership, operation and control of the applicant.

By letter dated December 29, 2015, Joanne Gosert, on behalf of the applicant, filed a notice of appeal from the Division's denial determination.

By letter dated February 19, 2016, the Division notified the applicant that the applicant's written appeal should be submitted on or before March 23, 2016.

By letter dated January 28, 2016, the applicant filed its written appeal, an attachment and three exhibits (listed in the attached chart as exhibits A1-A3).

The Division submitted its response, which included a three page memorandum dated April 11, 2016. Attached to the response

were eight exhibits (listed in the attached exhibit chart as exhibits DED1 - DED8).

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

#### **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 four separate criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner, Joanne Gosert, enjoys the customary incidents of ownership and shares in the risks and

profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

Second, the Division found that the applicant failed to demonstrate that the woman owner's, Joanne Gosert'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).

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

Fourth, the Division found that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit woman owner, Joanne Gosert, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

#### Position of the Applicant

SoHo Imaging 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. SoHo Imaging Inc. provides high quality digital color printing as well as toner supplies for desktop laser printers, copiers and multi-functional printers (Exh. DED2 at 3).

2. SoHo Imaging Inc. was established on January 2, 2003. Prior to the establishment of the corporation, the company existed as a DBA which was formed on January 8, 2002. The only capital contribution to the firm was made by Scott Gosert on January 8, 2002 for \$5,000. (Exh. DED2 at 2).

3. Ms. Gosert is the president of the corporation and Mr. Gosert is CEO. The corporation has one employee (Exh. DED2 at 2).

4. In 2014, SoHo Imaging Inc. paid Mr. Gosert a salary of [REDACTED] while Ms. Gosert [REDACTED] (Exhs. DED3 at 14 & DED4).

5. Ms. Gosert's resume does not indicate that she works for SoHo Imaging Inc. but shows her working full-time for Eastman Kodak Company (Exh. DED5).

6. Ms. Gosert has joint control, with her husband, over the firm's financial decisions, hiring and firing, managing and signing payroll, and signing for business accounts. Mr. Gosert has sole control over the firm's estimating, preparing bids, negotiating bonding, negotiating insurance, supervising field operations, purchasing equipment/supplies, and negotiating contracts (Exh. DED2 at 3-4).

#### **DISCUSSION**

This report considers the written appeal of the 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 set forth four bases related to Ms. Gosert's ownership, operation and control of SoHo Imaging Inc. Each basis is discussed individually, below.

In the one page appeal letter, Ms. Gosert does not address the individual grounds for denial which are summarized here. First, she states that she has been the majority owner of the applicant since its inception. Then she states that in early 2015, she retired from Eastman Kodak Company after 34 years and it was decided by the officers of the applicant that she should take a more active role in the company, starting with attending the New York State Purchasing Forum Trade Show last May in Albany. Based on conversations there and her increased role with the applicant, she decided to apply for WBE status. She states that she is now very involved in all aspects of the company on a day to day basis and has always shared in the risks, rewards, capital contributions, decisions and investments. She concludes that she believes the applicant meets the criteria for WBE certification. Attached to the appeal are three documents: a one page statement from the New York State Office of General Services (OGS) about green purchasing, a copy of the applicant's application for

registration as a sales tax vendor, and a copy of a certificate of individual doing business under assumed name (Exhs. A1-A3). None of these documents is relevant to the grounds stated in the Division's December 16, 2015 denial letter.

### Ownership

In its denial letter, the Division cited two grounds based on the applicant's failure to meet ownership criteria set forth in the applicable regulations. The first ground cited by the Division was that the applicant failed to demonstrate that the woman owner, Joanne Gosert, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

As discussed above, the appeal letter does not specifically address this issue and none of the exhibits attached to it are relevant to this ground for denial.

In its response, the Division states that Ms. Gosert received [REDACTED] from the applicant in 2014. Citing tax documents for that year which show Mr. Gosert was paid [REDACTED] and Ms. Gosert received [REDACTED] (Exhs. DED3 at 14 & DED4), the Division concludes that Ms. Gosert did not receive a benefit from the applicant in proportion to her reported 51% ownership interest in the company.

Nothing in the administrative record shows that Ms. Gosert received any benefit from her majority ownership of the applicant. Based on the evidence in the record and the discussion above, the applicant has not demonstrated that the woman owner, Joanne Gosert, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

The second ground related to the ownership criteria was that the applicant failed to demonstrate that the woman owner's, Joanne Gosert'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).

As discussed above, the appeal letter does not specifically address this issue and none of the exhibits attached to it are relevant to this ground for denial.

In its response, the Division states that Ms. Gosert has failed to demonstrate that she made any capital contribution to the applicant. The Division points to the application that shows that the only capital contribution to the firm was made by Scott Gosert, Ms. Gosert's husband (Exh. DED2 at 2). Because the record lacks proof that Ms. Gosert ever contributed to the company, the Division concludes that the applicant does not meet the criteria to be certified as a WBE.

The Division is correct that nothing in this record suggests that Ms. Gosert ever made a capital contribution to the firm. Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman owner, Joanne Gosert'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).

### **Operation**

The Division also determined that the applicant failed to demonstrate that the woman owner, Joanne Gosert, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1) & (b)(1)(iii).

As discussed above, the appeal letter does not specifically address this issue and none of the exhibits attached to it are relevant to this ground for denial. The appeal letter does state that Ms. Gosert retired from Kodak in early 2015 and states that she now spends time working for the company, but no details or proof of this claim is presented.

In its response, the Division notes that Ms. Gosert's resume submitted with the application does not mention working for the applicant (Exh. DED5), but only shows her full-time employment at Kodak. In addition, the application shows the

applicant has only one employee, presumably Mr. Gosert since he is receiving a salary from the company (Exh. DED2 at 2).

The Division also points to information in the application describing the managerial responsibilities of Mr. and Ms. Gosert. This information states that Ms. Gosert has joint control, with her husband, over the firm's financial decisions, hiring and firing, managing and signing payroll, and signing for business accounts. Mr. Gosert has sole control over estimating, preparing bids, negotiating bonding, negotiating insurance, supervising field operations, purchasing equipment/supplies, and negotiating contracts (Exh. DED2 at 3-4). Based on this information, the Division contends that Ms. Gosert does not manage the core functions, the functions of the company that result in revenue generation. Because of this, the Division concludes that Ms. Gosert does not operate the applicant for certification purposes.

Because the core functions of the company are performed by Mr. Gosert, the applicant has failed to demonstrate that the woman owner, Joanne Gosert, makes decisions pertaining to the operations of the enterprise or devotes time on an ongoing basis to the daily operation of the business, as required by 5 NYCRR 144.2(b)(1)(i)-(iii). The core functions of the business, the source of its revenue, estimating and supervising field operations, are not undertaken by the woman owner. The Division's denial on this ground was based upon substantial evidence.

### **Control**

The Division also determined that the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Joanne Gosert, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

As discussed above, the appeal letter does not specifically address this issue and none of the exhibits attached to it are relevant to this ground for denial.

In its response, the Division states that while the application states that Ms. Gosert owns 51% of the applicant, no

proof of this claim was supplied. Included with the application materials was a notarized letter stating that no stock certificates had been issued by the applicant and that it did not have a stock ledger (Exh. DED6). Also included was a second letter stating that there were no by-laws for the corporation (Exh. DED7). Finally, the Division provides the certification of incorporation of the applicant (Exh. DED8) which shows Mr. Gosert as the incorporator of the firm. The Division concluded that the power to control the applicant rests with Mr. Gosert, who as incorporator is generally empowered to act on behalf of the corporation in the absence of shareholders (see, e.g. Business Corporation Law § 615[e]).

Nothing in the record shows that Ms. Gosert owns 51% of the applicant or has the authority to act on its behalf. Based on the evidence in the record and the discussion above, the applicant failed to demonstrate that the corporate documents and relevant business agreements permit woman owner, Joanne Gosert, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

#### **CONCLUSIONS**

1. The applicant has not demonstrated that the woman owner, Joanne Gosert, enjoys the customary incidents of ownership and shares in the risks and profits in proportion with her ownership interest in the enterprise, as required by 5 NYCRR 144.2(c)(2).

2. The applicant failed to demonstrate that the woman owner's, Joanne Gosert'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).

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

4. The applicant failed to demonstrate that the corporate documents and relevant business agreements permit woman owner, Joanne Gosert, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

**RECOMMENDATION**

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

**Matter of  
SoHo Imaging Inc.**

**DED File ID No. 60134  
Exhibit List**

<b>Exh. #</b>	<b>Description</b>	<b># of pages</b>
A1	OGS Green Purchasing State Profile	1
A2	Application for Registration as a Sales Tax Vendor	1
A3	Certificate of Individual Doing Business Under Assumed Name	1
DED1	Denial letter dated December 16, 2015	3
DED2	Application	8
DED3	2014 Form 1120 return	28
DED4	2014 W2 forms	1
DED5	Resume of Joanne Gosert	2
DED6	Stock certificate letter	1
DED7	By-laws letter	1
DED8	Certificate of incorporation	2