

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

In the Matter

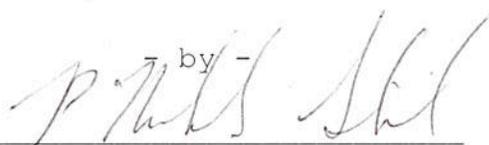
- of -

the Application of
World Wide Plumbing Supply, Inc.
For Certification as a
Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 59680

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

March 17, 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 World Wide Plumbing Supply, 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 World Wide Plumbing Supply, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

World Wide Plumbing Supply, Inc.'s application was submitted on May 6, 2015 (Exh. DED1).

The application was denied by letter dated February 17, 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 two separate eligibility criteria related to Surie Lefkowitz's ownership of the applicant (Exh. DED4).

By letter dated March 10, 2016, the applicant appealed from the denial (Exh. A1).

By letter dated May 26, 2016, the Division notified the applicant that its written appeal should be filed on or before July 6, 2016.

Applicant filed a seven page document entitled "Petition" and dated June 29, 2016, appealing from the Division's denial. Attached were seven exhibits, labelled in the attached exhibit chart as A1-A7.

In a four-page memorandum dated February 27, 2017, the Division responded to the appeal. Attached to the memorandum

were five exhibits, labelled in the attached exhibit chart as DED1-DED6.

On February 27, 2017, this matter was assigned to me.

In an email dated March 2, 2017, counsel for the applicant Horace Flowers, Esq., stipulated that exhibits A4 and A7 were not before the Division at the time it made its denial.

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 two criteria for certification.

First, the Division found that the applicant failed to demonstrate that the woman owner Surie Lefkowitz'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 the applicant failed to demonstrate that the woman owner, Surie Lefkowitz, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

Position of the Applicant

World Wide Plumbing Supply, 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. World Wide Plumbing Supply, Inc. is in the business of providing wholesale plumbing supplies (Exh. DED1 at 3). The company has a business address of 4002 15th Avenue, Brooklyn, New York (Exh. DED 1 at 1).

2. World Wide Plumbing Supply, Inc. was established on November 19, 1991 by Juda Lefkowitz (Exh. DED2 at 1). On January 2, 2013, Mr. Lefkowitz transferred 51% of the company to his wife Surie Lefkowitz (Exh. DED2 at 2-3). The application states that Ms. Lefkowitz contributed [REDACTED] to the firm in the form of cash and expertise (Exh. DED 1 at 3) but no proof of this was provided with the application. At the end of 2012, the firm reported capital stock of [REDACTED] and paid-in capital of [REDACTED] (Exh. DED5 at 3, lines 22-23).

3. In 2014, World Wide Plumbing Supply, Inc. paid Mr. Lefkowitz [REDACTED] in wages while Surie Lefkowitz received no wages (Exh. DED6 at 11). No shareholder distributions were made during 2014 (Exh. DED6 at 6).

DISCUSSION

This report considers the 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 sets forth two bases related to Surie Lefkowitz's ownership of World Wide Plumbing Supply, Inc. Each basis is discussed individually, below.

In its denial letter, the Division concluded that the applicant failed to demonstrate that the woman owner Surie Lefkowitz'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).

In its petition, the applicant makes two arguments regarding Ms. Lefkowitz's capital contribution. First, the petition claims that the Division failed to inquire about Ms. Lefkowitz's historic contributions of labor without adequate compensation which was part of her capital contribution prior to the transfer of ownership. Ms. Lefkowitz states that since the business was formed in 1991, she had an active and critical role in contributing her time and competence. She further states that during this time she received no compensation. In support of this claim, the applicant includes a copy of a January 2, 2013 document entitled "consent of action taken by the directors and shareholders" which states that because Ms. Lefkowitz "is familiar with all aspects of the operation and management of the Corporation, has spent considerable time in the past involving co-managing the Corporation and is willing to devote more time managing the Corporation, it was agreed by all shareholders that it was fair and reasonable that Surie should receive the majority of the profits and management responsibilities for the Corporation" (Exh. A2 at 1).

In its second argument, the applicant claims that the Division failed to consider the legitimate business interest of Juda Lefkowitz in transferring 51% of the business to his wife, specifically, that he is the owner of another business interest and wanted to devote his time to this other enterprise. Because Ms. Lefkowitz was familiar with the operation of the business

and had other business experience, she took a more active role in the applicant (Exh. A2 at 1).

In its reply, the Division argues that while the application indicates that Ms. Lefkowitz contributed [REDACTED] in the form of cash and expertise at the time she acquired her shares on January 2, 2013 (Exh. DED1 at 3), she failed to provide any evidence of having done so. The Division continues that even if she had shown a [REDACTED] contribution it would not be proportionate to her ownership interest, which the firm's balance sheet shows to be total capital stock and paid-in capital of [REDACTED] (Exh. DED5 at 4, lines 22-23). Regarding the applicant's claim that Ms. Lefkowitz made a substantial contribution of expertise and past work for the firm, the Division notes that the appeal does not identify any information in the documents submitted with the application that would have allowed it to conclude that her contribution outweighed that made by her husband.

Based on the evidence in the record, specifically the lack of any proof of a capital contribution or quantification of the amount of uncompensated time worked for the firm or expertise, the applicant failed to demonstrate that the woman owner Surie Lefkowitz'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 determination on this ground was based on substantial evidence.

In its denial letter, the Division also concluded that the applicant failed to demonstrate that the woman owner, Surie Lefkowitz, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

On the appeal, the applicant argues that the Division failed to properly review all the facts in the record when it denied the application on this ground. The appeal cites the corporation's 2013, 2014, and 2015 IRS form 1120S schedule K1

(Exhs. A4-A6).¹ In 2013, these forms show that Mr. Lefkowitz's share of that year's income was [REDACTED] and his wife's was [REDACTED] (Exh. A6). In 2014, these forms show that Mr. Lefkowitz's share of that year's income was [REDACTED] and his wife's was [REDACTED] (Exh. A5). Applicant argues that these documents reflect that Ms. Lefkowitz shares in the risks and profits. It further argues that while W2 forms constitute guaranteed earnings, they are generally not factored into whether an owner is sharing in the risks and profits of a business. In addition, the applicant attaches to its appeal copies of payroll checks that show that as of August 7, 2015, Ms. Lefkowitz received a weekly salary of [REDACTED] and her husband received [REDACTED] (Exh. A7). Applicant's counsel acknowledges that these documents were not before the Division at the time it made its denial.

In its reply, the Division points to federal tax forms for 2014 show that Mr. Lefkowitz earned a salary of [REDACTED] while his wife earned no salary (Exh. DED6 at 11) and that no shareholder distributions were made (Exh. DED6 at 6, line 7). These tax documents show that both Mr. and Mrs. Lefkowitz devoted 100% of their time to this business (Exh. DED6 at 11). The Division argues that it is not required, nor is it proper, to consider undistributed allocations of profit (shown on the form K1), but even if it had, it would have reached the same conclusion because the addition of Mr. Lefkowitz's salary to the undistributed profits showed he received a disproportionately larger benefit. The information attached to the appeal indicating that Ms. Lefkowitz now receives a greater salary than her husband was not before the Division at the time it made its denial determination, and therefore, cannot be considered in the appeal.

Based on the evidence in the record, specifically the fact that Surie Lefkowitz received no salary from the business while her husband received [REDACTED] in 2014, the applicant has failed to demonstrate that Surie Lefkowitz shares in the risks and profits in proportion to her ownership interest in the business

¹ Applicant's counsel acknowledges that the form from 2015 (Exh. A4) was not before the Division at the time of the denial, and therefore, not part of the record under review.

enterprise, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to demonstrate that the woman owner Surie Lefkowitz'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. The applicant failed to demonstrate that the woman owner, Surie Lefkowitz, shares in the risks and profits in proportion to her ownership interest in the business enterprise, as required by 5 NYCRR 144.2(c)(2).

RECOMMENDATION

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

**Matter of
World Wide Plumbing Supply, Inc.**

**DED File ID No. 59680
Exhibit List**

Exh. #	Description
DED1	Application
DED2	Stock certificates
DED3	Consent of Action
DED4	Denial letter
DED5	2012 tax returns
DED6	2014 tax returns
A1	March 10, 2016 letter requesting appeal
A2	Consent of Action (same as DED3)
A3	Minutes of special meeting of board
A4	2015 IRS form 1120S schedule K1
A5	2014 IRS form 1120S schedule K1
A6	2013 IRS form 1120S schedule K1
A7	Payroll checks for Surie and Juda Lefkowitz