

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

In the Matter

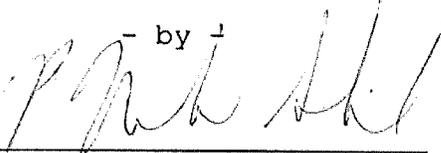
- of -

the Application of
Chaim Electric Corporation
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 62347

RECOMMENDED ORDER

- by -



P. Nicholas Garlick
Administrative Law Judge

June 5, 2019

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 Chaim Electric Corporation ("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 Chaim Electric Corporation challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Chaim Electric Corporation's application was submitted on June 21, 2017 (Exh. DED1).

The application was denied by letter dated October 27, 2017, from Raymond Emanuel, Director of Certification Operations (Exh. DED5). As explained in an attachment to Mr. Emanuel's letter, the application was denied for failing to meet seven eligibility criteria related to Yehudit Gelb's ownership, operation, and control of the applicant.

In a two-page letter dated February 16, 2018, Yehudit Gelb and her husband Yitzchak Gelb, submitted an appeal. Attached to the appeal were three newspaper articles, described in the exhibit chart as Exhibit A1.

In a sixteen-page filing dated May 16, 2019, the Division responded to the applicant's appeal. Included with the Division's papers were the affidavit of Raymond Emanuel, the Division's Director of Certification Operations, and twelve exhibits described in the attached exhibit chart as DED1-DED12.

On May 17, 2019, 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 seven separate criteria for certification. First, the Division found that the applicant failed to show that the contribution of the woman owner, Yehudit Gelb, was 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 woman owner, Yehudit Gelb, does not share in the risks and profits in proportion to her equity interest, as required by 5 NYCRR 144.2(c)(2).

Third, the Division found that the applicant failed to demonstrate that the woman owner, Yehudit Gelb, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

Fourth, the Division found that the woman owner, Yehudit Gelb, has not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

Fifth, the Division found that the woman owner, Yehudit Gelb, has not demonstrated the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(ii).

Sixth, the Division found that the woman owner, Yehudit Gelb, does not devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

Seventh, the Division found that the corporate bylaws and other documents governing the business enterprise do not permit the woman owner, Yehudit Gelb, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

Position of the Applicant

Chaim Electric Corporation 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. Chaim Electric Corporation is in the business of providing electrical construction services and fire alarm services (Exh. DED1 at 3). The firm has a business address of 2920 Avenue J, Brooklyn, New York (Exh. DED1 at 1).

2. Chaim Electric Corporation was established on July 7, 2000 (Exh. DED1 at 2). On January 2, 2010 Yehudit Gelb was issued 51% of the firm's stock and her husband, Yitzchak Gelb, was issued 49% (Exh. DED1 at 3).

3. The application states that the only contribution made to the firm was by Mr. Gelb on June 16, 2016, in the amount of [REDACTED] (Exh. DED1 at 3).

4. In 2013, the Chaim Electric Corporation's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received nothing (Exh. DED8 at 7). In 2014, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received nothing (Exh. DED9 at 7). In 2015, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received [REDACTED] (Exh. DED10 at 7). In 2016, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received [REDACTED] (Exh. DED11 at 7).

5. The application states that Mr. Gelb oversees the management of all aspects of the business's operations. Ms. Gelb shares with her husband the management of financial decisions, negotiating insurance, marketing, the purchase of equipment/sales, and payroll, and serves as a signatory on the firm's bank accounts (DED4 at 3-4).

6. Mr. Gelb's resume states that he obtained a NYC Master Electrician License in 1992 (Exh. DED2). Ms. Gelb lists her profession as a teacher on the Gelbs' 2014 personal tax returns (Exh. DED7 at 3).

7. Chaim Electric Corporation's 2013, 2014, and 2015 tax returns state that Ms. Gelb devotes 0% of her time to the business (Exh. DED8 at 7; Exh. DED9 at 7; Exh. DED10 at 7). The Gelb's personal tax returns report her employment as a teacher in 2014 (Exh. DED7 at 3) and 2015 (Exh. DED7 at 19).

8. Mr. Gelb is the president of the Chaim Electric Corporation and Ms. Gelb is vice president (Exh. DED1 at 2). The corporate bylaws state that the president shall in general supervise and control all of the business and affairs of the corporation (Exh. DED12 at 5).

DISCUSSION

This recommended order 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 set

forth seven bases related to Yehudit Gelb's ownership of Chaim Electric Corporation. Each is discussed separately, below.

OWNERSHIP

The first denial ground is that the applicant failed to show that the contribution of the woman owner, Yehudit Gelb, was 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 relevant facts cited in the denial letter are: (1) Ms. Yehudit Gelb owns 51% of the stock of the applicant and her husband Yitzchak Gelb owns 49%; (2) the application states that Mr. Gelb contributed money to the firm but does not state that Ms. Gelb did; and (3) the application materials do not include any documents showing Ms. Gelb made any individual contributions to the firm (Exh. DED6).

On their appeal, the Gelbs acknowledge that the applicant is a small, family-owned business and that as husband and wife, all their bank accounts are held jointly. Because of this, their contribution to the business was a joint contribution.

In its response, the Division states that no proof of any contribution by Ms. Gelb was submitted with the application. In his affidavit, Mr. Emanuel notes that the application states that the only contribution made to the firm was made by Mr. Gelb in 2016 in the amount of [REDACTED] (Exh. DED 1 at 3). The Division argues that claims made on the appeal that the Gelbs jointly made this contribution, does not show she contributed to the firm in proportion to her 51% ownership interest.

Based on the evidence in the record, specifically the fact that no proof of any contribution by Ms. Gelb was submitted with the application, the applicant has failed to show that the contribution of the woman owner, Yehudit Gelb, was 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 on this ground was based on substantial evidence.

The second ground for denial cited in the denial letter was that the woman owner, Yehudit Gelb, does not share in the risks and profits in proportion to her equity interest, as required by 5 NYCRR 144.2(c)(2). The relevant facts cited in the denial letter is that Mr. Gelb's salary from the firm in 2016 significantly exceeded Ms. Gelb's.

On their appeal, the Gelbs stated that because they both own the business, they both share the risks and profits. Further, it is unimportant to them who receives more in salary from the firm because the salaries are combined in their household.

In its response, the Division points to the firm's tax returns which show that Mr. Gelb is paid more than his wife. In 2013, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received nothing (Exh. DED8 at 7). In 2014, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received nothing (Exh. DED9 at 7). In 2015, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received [REDACTED] (Exh. DED10 at 7). In 2016, the firm's federal tax forms show that Mr. Gelb was paid [REDACTED] and Ms. Gelb received [REDACTED] (Exh. DED11 at 7).

Based on the evidence in the record, specifically the fact that Mr. Gelb receives more in salary from the firm than his wife, the applicant has failed to show that the woman owner, Yehudit Gelb, shares in the risks and profits in proportion to her equity interest, as required by 5 NYCRR 144.2(c)(2). The Division's denial on this ground was based on substantial evidence.

OPERATION

The third ground for denial was that the applicant failed to demonstrate that the woman owner, Yehudit Gelb, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The relevant facts cited in the denial letter are: (1) the firm is primarily engaged in providing electrical contracting services, specializing in fire alarms; (2) Mr. Gelb and several male employees are responsible for managing significant operations of the business related to estimating and supervising field operations; and (3) Ms. Gelb's

role in the operation is limited to office administration and marketing.

On their appeal, the Gelbs state that they discuss everything related to the operation of the business and that Ms. Gelb is involved in all aspects of the firm.

In its reply, the Division states that the application shows that Mr. Gelb, and other male employees, are responsible for the core business functions of the corporation, including estimating and supervising field operations. These core functions are how the business obtains work and provides services to its clients. The application also shows that Ms. Gelb is responsible for back office, or administrative functions of the firm, all of which she shares with her husband (Exh. DED 1 at 3-4).

Based on the evidence in the record, specifically the fact that Mr. Gelb and other male employees manage estimating and field operations, the applicant has failed to demonstrate that the woman owner, Yehudit Gelb, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1). The Division's denial on this ground was based on substantial evidence.

The fourth ground for denial that Yehudit Gelb has not demonstrated adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i) and the fifth ground, that Yehudit Gelb, has not demonstrated the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(ii), are combined by the Division in its denial letter. The relevant facts cited are: (1) Ms. Gelb's educational and professional background is in childhood education and she had no demonstrated professional experience or formal training in electrical contracting; and (2) Mr. Gelb has completed numerous courses and trainings in electrical work and has been employed in the electrical contracting industry for over 25 years in positions requiring him to supervise estimating and field operations.

On their appeal, the Gelbs state their belief that people from one industry are capable of leading a business in a

different industry. To back their assertion, they provide three newspaper articles arguing this point (Exh. A1).

In its response, the Division states that Mr. Gelb's resume shows that he was granted a NYC Master Electrician License in 1992 (Exh. DED2). Ms. Gelb lists her profession as a teacher on the Gelb's 2014 personal tax returns (Exh. DED7 at 3).

Based on the evidence in the record, specifically the fact that there is nothing in the record showing Ms. Gelb has managerial experience, technical competence, or working knowledge and ability to operate the firm, the applicant has failed to show that Ms. Gelb has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR144.2(b)(1)(i). In addition, the applicant has failed to demonstrate that the woman owner, Yehudit Gelb, has the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(ii). The Division's denial on these grounds was based on substantial evidence.

The sixth ground for denial was that the woman owner, Yehudit Gelb, does not devote time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The relevant fact cited in the denial letter is that the firm's 2016 federal tax return indicates that Ms. Gelb devotes minimal time to the operation of the firm.

The Gelbs do not address this denial ground on their appeal.

In its response, the Division argues that the application materials show Ms. Gelb's participation in the company's activities is sporadic. The Division notes that the firm's 2013 tax return states that Ms. Gelb devotes 0% of her time to the business (Exh. DED8 at 7), as does the firm's 2014 return (Exh. DED9 at 7), and the 2015 return (Exh. DED10 at 7). This fact combined with her employment as a teacher in 2014 (Exh. DED7 at 3) and 2015 (Exh. DED7 at 19) show that Ms. Gelb does not devote time on an ongoing basis to the firm, the Division concludes.

Based on the evidence in the record, specifically the fact that during 2013, 2014, and 2015 the company's tax returns

reported Ms. Gelb spent no time working for the firm, the applicant has failed to demonstrate that the woman owner, Yehudit Gelb, devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii). The Division's denial on this ground was based on substantial evidence.

CONTROL

The seventh ground for denial was that the corporate bylaws and other documents governing the business enterprise do not permit the woman owner, Yehudit Gelb, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The relevant facts cited in the denial letter are: (1) the firm's bylaws, specifically article 6, set forth the officers of the firm; (2) the bylaws state that the president of the corporation shall control the business operations of the firm; and (3) Mr. Gelb is the president of the corporation.

On their appeal, the Gelbs state that Ms. Gelb is not limited by her title or the language of the corporation's bylaws and that she participates in all the firm's decision-making.

In its response, the Division points to the application that states that Mr. Gelb is the president of the corporation and Ms. Gelb is vice president (Exh. DED1 at 2). The corporate bylaws state that the president shall in general supervise and control all of the business and affairs of the corporation (Exh. DED12 at 5). Because Ms. Gelb does not possess the power to control the firm, the Division concludes that the applicant does not meet this criterion for WBE certification.

Based on the evidence in the record, specifically the fact that Mr. Gelb is the corporation's president and is empowered to supervise and control the firm's affairs, the applicant has failed to demonstrate that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Yehudit Gelb, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division's denial on this ground was based on substantial evidence.

CONCLUSIONS

1. The applicant failed to show that the contribution of the woman owner, Yehudit Gelb, was 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 show that the woman owner, Yehudit Gelb, shares in the risks and profits in proportion to her equity interest, as required by 5 NYCRR 144.2(c)(2).

3. The applicant failed to demonstrate that the woman owner, Yehudit Gelb, makes decisions pertaining to the operations of the enterprise, as required by 5 NYCRR 144.2(b)(1).

4. The applicant failed to demonstrate that the woman owner, Yehudit Gelb, has adequate managerial experience or technical competence to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(i).

5. The applicant failed to demonstrate that the woman owner, Yehudit Gelb, has the working knowledge and ability needed to operate the business enterprise, as required by 5 NYCRR 144.2(b)(1)(ii).

6. The applicant failed to demonstrate that the woman owner, Yehudit Gelb, devotes time on an ongoing basis to the daily operation of the business enterprise, as required by 5 NYCRR 144.2(b)(1)(iii).

7. The applicant failed to show that the corporate bylaws and other documents governing the business enterprise permit the woman owner, Yehudit Gelb, to make decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

RECOMMENDATION

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

Matter of
Chaim Electric Corporation

DED File ID No. 62347
Exhibit List

Exh. #	Description
DED1	Application
DED2	Resume of Yitzchak Gelb
DED3	NYS DOS Division of Corporation's printout
DED4	Stock certificates
DED5	Denial letter
DED6	Master electrician's license of Isaac Gelb
DED7	2014, 2015, 2016 federal tax forms (personal)
DED8	2013 federal tax forms (corporate)
DED9	2014 federal tax forms (corporate)
DED10	2015 federal tax forms (corporate)
DED11	2016 federal tax forms (corporate)
DED12	Corporate bylaws
A1	Articles on value of industry experience for CEOs