

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

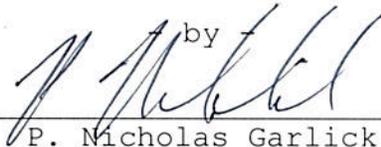
In the Matter

- of -

the Application of
Sunrise Credit Services, Inc.
For Certification as a Woman-owned Business Enterprise
Pursuant to Executive Law Article 15-A.

NYS DED File ID No. 52212

RECOMMENDED ORDER

by


P. Nicholas Garlick
Administrative Law Judge

June 22, 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 Sunrise Credit Services, 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 Sunrise Credit Services, Inc. challenging the determination of the Division that the applicant does not meet the eligibility requirements for certification as a woman-owned business enterprise.

Sunrise Credit Services, Inc.'s application was submitted on August 7, 2014 (Exh. DED2).

The application was denied by letter dated November 18, 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 two separate eligibility criteria related to Diane Doane's ownership and control of the applicant.

With a cover letter dated March 17, 2016, Diane Doane, on behalf of the applicant, filed an appeal from the Division's denial determination. Attached to the appeal were 8 exhibits identified as exhibits A1 to A8 in the attached exhibit chart.

By memorandum dated May 26, 2016, the Division responded to the applicant's appeal. Attached to the response were 5 exhibits identified as exhibits DED1 to DED5 in the attached exhibit chart.

On June 1, 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 two separate criteria for certification.

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

Position of the Applicant

Sunrise Credit Services, 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. Sunrise Credit Services, Inc. is in the business of providing debt collection services and has a business address of 260 Airport Plaza, Farmingdale, New York. (Exh. DED2.)

2. Diane Doane¹ owns 51% of the stock of Sunrise Credit Services, Inc. and serves as its chief executive officer (CEO). Her brother, Richard Doane, owns 45.2% of the corporation's stock and serves as its president. David Duryea owns 1.9% of the stock and serves as its executive vice president for collections. Joseph Vassar owns 1.9% of the stock and serves as its executive vice president for sales. (Exh. DED2 at 2.)

3. In 2014, Ms. Diane Doane Plowman received [REDACTED] in compensation from the corporation. Her brother Mr. Richard Doane received [REDACTED]. Two other officers, David Duryea and Joseph Vassar each received [REDACTED] (Exh. DED3 at 10).

4. Mr. Richard Doane is the president of Sunrise Credit Services, Inc. (Exh. DED2 at 2; DED5 at 2; A5 at 1). Under the terms of the corporation's by-laws, the president is the chief executive officer of the corporation; has general charge of the business, affairs and property; and has general supervision over the corporation's officers and agents (Exh. DED4 at 7). Ms. Diane Doane's title of chief executive officer does not exist under the by-laws of the corporation (Exh. DED4).

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

¹ Documents in this record refer to her as both Diane Doane and Diane Doane-Plowman.

Division's denial letter set forth two bases related to Ms. Doane's ownership and control of Sunrise Credit Services, Inc. Each basis is discussed individually, below.

As a preliminary matter, the appeal makes reference to all the documents provided as part of the application process and states, erroneously, that these documents are part of the record on appeal. Since these documents are not provided by the parties with their appeal papers, they are not in the administrative record of this appeal.

The appeal also notes that the applicant has already been certified as a WBE by the Women's Business Enterprise National Council, the State of New Jersey, and the California Public Utilities Commission (Exhs. A1 - A3). Nothing in the record indicates that the criteria for these certifications is the same as those used by the Division and found in New York State regulations (5 NYCRR 144). Therefore, these certifications are irrelevant to the issues on appeal.

Ownership

In its denial letter, the Division determined that the applicant failed to demonstrate that the woman owner, Diane Doane, 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).

In the appeal, Ms. Doane argues that she does enjoy all the customary incidents of ownership and claims that her total compensation is by far the highest in the company. Ms. Doane states that she decided against giving herself a base-pay raise after she took over in 2013 as CEO for business and personal philosophical reasons. She states that she believes a CEO should make her money from profits and that she is happy with her level of compensation. In the appeal, Ms. Doane provides a brief history of her role in the firm and the circumstances by which she became majority shareholder and then CEO in January 2013. She states that 2013 was a difficult time for the company and that she would have found it very hard to give herself a raise while eliminating jobs at the company. She states that in 2014 she gave herself a modest increase in her base pay (but does not include any proof of this with the appeal) and states

that her total compensation is by far the highest in the company (she references unidentified application documents for this claim, but again does not provide them with the appeal). She also states that she earns triple the amount the two minority members of the firm earn and more than her brother, the president of the firm (again she provides no reference to what documents she is citing, nor does she provide copies of these documents). Because the appeal does not identify which documents in the application support Ms. Doane's claims, identify the amounts of compensation she claims she receives, nor identify the type of compensation it is impossible to evaluate her claim. The affidavits provided with the appeal do not address this issue (Exh. A4 -A8).

In its response, the Division argues that Ms. Doane does not share in the risks and profits of the corporation in proportion to her ownership interest because the male owners of the corporation's stock receive greater compensation than she does. The Division cites the applicant's 2014 IRS form 1125E which shows the compensation paid to the corporation's officers (Exh. DED3 at 10).

Name of officer	% of common stock owned	Compensation
Richard Doane	45.2	
Diane Doane Plowman	51	
David Duryea	1.9	
Joseph Vassar	1.9	

The Division states that this evidence demonstrates that Ms. Doane receives substantially less wage compensation than each of the other male stock owners. The Division concludes that this gross disparity in wage compensation demonstrates that the male owners share disproportionately in the profits of the business enterprise.

Ms. Doane may, as she claims, enjoy the profits of the company in proportion with her ownership interest, however, the applicant has failed to produce any proof of this claim with its appeal. Based on the evidence in the record and the discussion above, the applicant has failed to demonstrate that the woman owner, Diane Doane, 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 Division has shown that its denial on this ground was based on substantial evidence.

Control

The second ground for denial cited by the Division was the applicant failed to demonstrate that the corporate documents and relevant business agreements permit the woman owner, Diane Doane, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2).

On the appeal, Ms. Doane argues that she does have the final say in any and all decisions and has unrestricted decision making power in all aspects of corporate affairs. She acknowledges that very old board minutes reference a limitation on the corporate president's spending authority, she claims this clause has never been enforced (she makes no specific reference to a document nor are any relevant documents provided). She concludes that no limitations on her authority to operate the corporation exist and includes several affidavits in the appeal. The affidavits provided with the appeal all state that Ms. Doane, as CEO of the company, makes business decisions for the company on a regular bases (Exhs. A4 -A8). None address the issue of the corporate documents or by-laws.

In its response the Division argues that the corporation's by-laws do not permit Ms. Doane to make decisions without restrictions. The Division states that this certification criteria focuses on who is formally empowered to control business decisions on behalf of the business, not on who makes the decisions on a day-to-day basis. The Division states that Mr. Richard Doane is identified as the president of the corporation in both the application (Exh. DED2 at 2) and in the minutes of the board of directors of the corporation dated March 18, 2015 (Exh. DED5 at 2). Under the terms of the corporation's

by-laws, the president is the chief executive officer of the corporation; has general charge of the business, affairs and property; and has general supervision over the corporation's officers and agents (Exh. DED4 at 7). In addressing the applicant's argument that Ms. Doane's title as CEO empowers her to make decisions without restrictions, the Division notes that the title of CEO does not exist under the by-laws of the corporation. The Division also notes that nothing in the record regarding the duties and powers of the CEO exists. The Division concludes that under the corporate documents, Mr. Doane is authorized to overrule any other officer of the corporation, and therefore, Ms. Doane is not permitted to make business decisions without restrictions.

Because the by-laws of the corporation authorize the president of the corporation to make the business decisions for the firm and Ms. Doane is not the president, the applicant does not meet this certification criteria. 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 the woman owner, Diane Doane, to make business decisions without restrictions, as required by 5 NYCRR 144.2(b)(2). The Division has shown that its denial on this ground was based on substantial evidence.

CONCLUSIONS

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

RECOMMENDATION

The Division's determination to deny Sunrise Credit Services, Inc.'s application for certification as a woman-owned

business enterprise should be affirmed, for the reasons stated in this recommended order.

**Matter of
Sunrise Credit Services, Inc.**

**DED File ID No. 52212
Exhibit List**

Exh. #	Description	# of pages
A1	New Jersey WBE certification	2
A2	California Public Utilities Commission WBE certification	1
A3	Women's Business Enterprise National Council WBE certification	1
A4	Affidavit of Diane Doane	3
A5	Affidavit of Richard Doane	4
A6	Affidavit of Douglas Cohen	3
A7	Affidavit of Lisa Bertsch	3
A8	Affidavit of David Duryea	3
DED1	Denial letter dated November 18, 2015	3
DED2	Application	15
DED3	2014 IRS forms	15
DED4	Corporate by-laws	15
DED5	Minutes of board of directors dated March 18, 2015	2