

**United States Small Business Administration
Office of Hearings and Appeals**

SIZE APPEAL OF:

Siwa'vaats, LLC

Appellant

Appealed from

Size Determination No. 6-2007-092

SBA No. SIZ-4906

Decided: February 29, 2008

APPEARANCE

Robert K. Tompkins, Patton Boggs LLP, Washington, D.C., for Appellant.

DECISION AND REMAND ORDER

HOLLEMAN, Administrative Judge:

Jurisdiction

This appeal is decided under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134.

I. Background

Siwa'vaats, LLC (Appellant) applied for admission into the Small Business Administration's (SBA) 8(a) Business Development (BD) program in 2006. The SBA initially found Appellant ineligible for the program, and then Appellant requested a reconsideration, submitting additional materials. On July 13, 2007, SBA again found Appellant ineligible for the 8(a) BD program. The SBA's letter noted Appellant was ineligible because Appellant had not demonstrated two years in business or the potential for success, and Appellant might be other than a small business. The letter also stated, "a formal size determination must be rendered before [Appellant] may be admitted" into the program.

On September 11, 2007, submitted its request for a formal size determination to the SBA's Office of Government Contracting, Area VI Office in San Francisco, California (Area Office). On November 8, 2007, the Area Office dismissed Appellant's request for lack of standing because Appellant "is not currently eligible to apply for the 8(a) program." As authority for its dismissal, the Area Office cited 13 C.F.R. §§ 121.601-121.602.

Appellant received the size determination on November 13, 2007, and filed its appeal with the Office of Hearings and Appeals (OHA) on December 12, 2007.

In its appeal, Appellant asserts the SBA erred by basing its dismissal of Appellant's request for a size determination on an inapplicable regulation. Further, Appellant asserts another section of the regulations specifically authorizes requests for size determinations made concerning an 8(a) BD program eligibility application. Thus, SBA made errors of fact and law in its November 8, 2007, dismissal of Appellant's request. As relief, Appellant requests OHA to reverse and vacate the Area Office's November 8, 2007, dismissal and to remand the matter to the Area Office for a complete size determination.

II. Discussion

A. Timeliness

Appellant filed the instant appeal within 30 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(2).

B. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, it must prove the area office size determination is based on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). The Office of Hearings and Appeals (OHA) will disturb the area office's size determination only if the administrative judge, after reviewing the record and pleadings, has a definite and firm conviction the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

C. Standing to Request a Size Determination

As Appellant correctly points out, the regulations at 13 C.F.R. §§ 121.601-121.602, cited by the Area Office in its dismissal of Appellant's request for a size determination, are inapplicable to the issue of whether Appellant had standing to request a size determination. Those regulations pertain to the definition of "small" for 8(a) BD companies and to the time as of which those company must be small. The Area Office thus erred in citing those provisions.

The regulation applicable to standing to request a size determination is at 13 C.F.R. § 121.1001. As regards the SBA's 8(a) BD program, this regulation provides:

Concerning initial or continued 8(a) BD eligibility, the following entities may request a formal size determination:

(A) *The 8(a) BD applicant concern* or Participant; or . . .

13 C.F.R. § 121.1001(b)(2) (emphases added). Contrary to the Area Office's view, which is that an 8(a) BD applicant must be "currently eligible to apply for the 8(a) program" in order to have

standing to request a size determination (and that Appellant did not satisfy this requirement), the pertinent regulation makes clear that an 8(a) BD applicant's request for a size determination need only "concern" initial 8(a) BD eligibility. There is no requirement that the applicant be "currently eligible" for the program. The Area Office erred in imposing this requirement.

Next, I must apply the correct standard to the facts in this case to determine whether Appellant had standing to request a size determination. Appellant's request needed only to concern its initial 8(a) BD eligibility. Here, Appellant has applied for the 8(a) BD program. The Area Office file, transmitted to OHA for this appeal pursuant to 13 C.F.R. § 134.306(a), contains Appellant's entire 8(a) BD application. The SBA's July 13, 2007, letter stated Appellant was ineligible for the 8(a) BD program because of, among other reasons, Appellant's size and also instructed Appellant that a formal size determination must be rendered before it could be admitted into the program. These facts demonstrate that Appellant's request for a size determination did "concern" Appellant's initial 8(a) BD eligibility. There was simply no other reason for it to seek a size determination at that time. Therefore, I conclude that Appellant satisfied the requirement for standing to request a size determination set out in 13 C.F.R. § 121.1001(b)(2)(A). The Area Office erred in not finding Appellant had this standing.

Accordingly, I conclude the Area Office made errors of fact and law in dismissing the Appellant's request for a size determination and, for that reason, I must remand this matter to the Area Office for a complete size determination on Appellant. Appellant has satisfied its burden of proving the Area Office dismissal of Appellant's request for a size determination was based on clear error of fact or law.¹

III. Conclusion

For the above reasons, I GRANT Appellant's size appeal. The Area Office's November 8, 2007, dismissal of Appellant's request for a size determination is REVERSED and VACATED. This matter is REMANDED to the Area Office for a full size determination.

CHRISTOPHER HOLLEMAN
Administrative Judge

¹ Appellant also requests a protective order. A protective order is not needed, however, because there are no other non-government parties involved in this proceeding and this Decision, which will be published, contains none of Appellant's confidential information.