United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Manroy USA, LLC, Appellant, Appealed From Size Determination No. 3-2011-42	SBA No. SIZ-5244 Decided: June 7, 2011

APPEARANCES

Michael P. Johnson, Esq., and J. Dale Gipson, Esq., Lanier Ford Shaver & Payne P.C., Huntsville, Alabama, for Appellant

DECISION

I. Introduction & Jurisdiction

On April 11, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2011-42 finding Manroy USA, LLC (Appellant) other than small. On April 25, 2011, Appellant filed an appeal of the size determination. For the reasons discussed below, the appeal is granted, and the size determination is reversed.

SBA's Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. HUBZone Application and Size Determination

On November 12, 2010, Appellant submitted its application for admission to the SBA Historically Underutilized Business Zone (HUBZone) program. On January 21, 2011, the Director of the Office of HUBZone Program denied Appellant's application, finding that Appellant does not qualify as a small business under the firm's primary North American Industry Classification System (NAICS) code, 332994, Small Arms Manufacturing, with an associated

size standard of 1000 employees. On February 7, 2011, Appellant requested that the Area Office perform a formal size determination, claiming the HUBZone Director's determination was mistaken.

On April 11, 2011, the Area Office issued its size determination. The Area Office first explained that Appellant is owned by Mr. John P. Buckner, who holds a 51% ownership interest, and Caledonian Heritable, Ltd. (CHL), which owns the remaining 49% interest. The Area Office found that Mr. Buckner has the power to control Appellant due to his majority ownership. The Area Office also determined that Appellant is affiliated with the following entities which are owned entirely, or predominantly, by Mr. Buckner and his family: (1) Ballistic Applications and Materials International, LLC, (2) Ibis Tek, LLC, (3) BuckAir, LLC, (4) Verbuck, LLC (Verbuck) (5) Ibis Tek Holdings Co., Inc., (6) Ibis Tek Apparel, LLC, (7) Ibis Tek Properties, LLC, (8) RailLinc, LLC, (9) eFrost, LLC, and (10) Fleet Fitters, LLC.

Lastly, the Area Office determined that Appellant is affiliated with CHL, the minority owner of Appellant. The Area Office reasoned that Mr. Buckner and CHL have an identity of interest based in part upon their joint ownership of Appellant. In addition, the Area Office observed that CHL and Verbuck, one of the companies controlled by Mr. Buckner, jointly own a parcel of real property, which currently serves as Appellant's physical location. The Area Office therefore found an identity of interest between Mr. Buckner and CHL, and thus affiliation between Appellant and CHL. The Area Office concluded that, as of the date of Appellant's HUBZone application, the combined average employees of Appellant and its affiliates exceeds the 1000 employee size standard for NAICS code 332994. The record reflects that if CHL's employees were excluded, the combined average employees of Appellant and its other affiliates would be within the size standard.

B. Appeal Petition

On April 25, 2011, Appellant filed the instant appeal, claiming that the Area Office erred in finding affiliation between Appellant and CHL. Appellant does not challenge the Area Office's other findings of affiliation. Rather, Appellant disputes only the Area Office's determination that CHL and Mr. Buckner share an identity of interest.

Appellant first argues that the business ties between CHL and Mr. Buckner are insufficient to create "substantially identical business or economic interests," as 13 C.F.R. § 121.103(f) requires. Appellant asserts it is clear that Mr. Buckner's and CHL's joint ownership of Appellant is not, by itself, sufficient to create an identity of interest. Instead, Appellant claims multiple common investments would be necessary to find an identity of interest. *See, e.g., Size Appeal of Ben Fitzgerald Real Estate Servs., LLC d/b/a Rosemark*, SB A No. SIZ-4542 (2003).

Appellant explains that the only common business tie between Mr. Buckner and CHL, aside from their ownership of Appellant, is their ownership of the real property where Appellant is located.[1] Appellant argues that ownership of this property is not a separate business activity, but is ancillary to the investment in Appellant itself because Appellant is the sole user of the

[1] Mr. Buckner owns the property indirectly through control of Verbuck.

property, and neither Mr. Buckner nor CHL derives any additional revenue from ownership of the property. Appellant contends that the fact that it occupies the property rent-free undercuts the finding of an identity of interest between Mr. Buckner and CHL, because it demonstrates that ownership of the property is incidental to their investment in Appellant itself. Appellant thus asserts the relationship between Mr. Buckner and CHL is insufficient to establish an identity of interest.

Appellant further argues that CHL and Mr. Buckner do not share an identity of interest based upon common investments because such an identity of interest must be predicated upon common investments in business concerns, not real property. According to Appellant, while SBA's regulations indicate that "common investments" may give rise to an identity of interest, the term "common investments" refers only to investments in business entities and not investments in real property. Appellant contends that a prior version of the regulation made clear that an identity of interest could arise based upon "common investment in more than one concern." Further, when the current version of the regulation was promulgated, the language in the preamble explained that an identity of interest may arise due to "common investments in more than one concern." 67 Fed. Reg. 70,339, 70,340 (Nov. 22, 2002). In addition, Appellant contends the OHA cases dealing with an identity of interest based upon common investments all deal with investments in business concerns, not investments in real property. Appellant concludes there is no identity of interest between Mr. Buckner and CHL because Appellant is the only concern in which both are invested.

Finally, Appellant argues that even if OHA accepts the Area Office's finding of an identity of interest between CHL and Mr. Buckner, the regulation merely creates a rebuttable presumption of affiliation. Appellant emphasizes that affiliation is always based upon whether one firm has the ability to control the other. Appellant explains that the vast majority of Mr. Buckner's revenues are derived from other independent business interests and that Appellant itself generates only a small percentage of Mr. Buckner's revenues. Likewise, Appellant asserts that CHL's interest in Appellant is not singularly important to that firm's economic interests. Thus, Appellant concludes CHL has no power to control Mr. Buckner or the companies he owns. According to Appellant, because Mr. Buckner and CHL do not share substantially identical business interests, and because CHL does not control Appellant, there is no identity of interest between Mr. Buckner and CHL, and Appellant is not affiliated with CHL. Appellant requests that OHA reverse the size determination.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its appeal. Specifically, Appellant must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb the Area Office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that 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).

B. Analysis

The applicable SBA regulation provides that "[i]ndividuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated." 13 C.F.R. § 121.103(f). Based upon the facts presented in the record, I conclude the Area Office clearly erred when it determined that Appellant is affiliated with CHL based upon an identity of interest between Mr. Buckner and CHL.

Appellant is correct that the common investment by Mr. Buckner and CHL in Appellant itself is insufficient to create an identity of interest. *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132, at 6 (2010) ("[C]ommon investment only in the challenged firm is not enough to support a finding of affiliation based upon common investments." (citing *Size Appeal of Ameriko/Omserv*, SBA No. SIZ-3883 (1994))); *Size Appeal of Eagle Pharms., Inc.*, SBA No. SIZ-5023, at 9 (2009) ("Identity of interest on the basis of "common investments' plainly requires, at minimum, more than one common investment between two [concerns]."). In order to find an identity of interest between Mr. Buckner and CHL, then, there must be other common investments besides their joint ownership of Appellant. *Size Appeal of The H.L. Turner Group., Inc.*, SBA No. SIZ-4896, at 6 (2008) (finding "numerous common investments establish "a relationship that bespeaks a concert of purpose and effort"') (quoting *Size Appeal of Bend Research, Inc.*, SBA No. SIZ-4369, at 7 (1999))); *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822, at 5 (2006) ("This Office has held that an identity of interest may be found among those who have common investments in more than one concern, whose common business interests cause the parties to act in union for their common benefit." (citing *Size Appeal of Ridge Instrument Co., Inc.*, SBA No. SIZ-4207 (1996))).

The only other common investment identified by the Area Office is the real property owned by CHL and Verbuck. The property currently serves as Appellant's physical location. It is plain, however, that the property is being used for the sole purpose of supporting the concern in which both Mr. Buckner and CHL are invested. Thus, it appears Mr. Buckner and CHL worked together only to form Appellant and to buy one property for Appellant's use. The property generates no other revenue, and there are no other business ties between Mr. Buckner and CHL evidenced in the record. Contrary to the Area Office's conclusion, the fact that Appellant occupies the property owned by Verbuck and CHL rent free does not support a finding of an identity of interest between Mr. Buckner and CHL. Rather, it highlights that Appellant's business pursuits are the only endeavors that Mr. Buckner and CHL are jointly undertaking. Mr. Buckner and CHL are each involved in many other business endeavors, none of which are related or cooperative. I agree with Appellant that the joint ownership of Appellant and a piece of real estate used by Appellant are insufficient to create "substantially identical business or economic interests," as the identity of interest rule requires. 13 C.F.R. § 121.103(f).

More importantly, there is simply no evidence that Appellant and CHL can control one another or that a third party can control both entities. 13 C.F.R. § 121.103(a)(1) ("Concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both."); *see also Size Appeal of LGS*

Mgmt., Inc., SBA No. SIZ-5160, at 3 (2010) ("[C]ontrol is always the principal question when addressing affiliation."); *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128, at 5 (2010) ("The ultimate inquiry in any type of affiliation case ... is the power to control."). There is no indication in the record that CHL, as minority shareholder, could control Appellant. Nor is there any indication that Mr. Buckner (who does control Appellant) could control CHL. Thus, the firms cannot be affiliated.

I find the business ties between Mr. Buckner and CHL are insufficient to create an identity of interest. Mr. Buckner and CHL share investments only in Appellant and one parcel of real property. The facts and circumstances of this case thus indicate that Mr. Buckner and CHL have only ever cooperated to further Appellant's business. I therefore conclude there is no identity of interest between Mr. Buckner and CHL. Consequently, CHL's employees must be removed from Appellant's employee count, and Appellant is a small business under the applicable 1000 employee size standard.

IV. Conclusion

The Area Office clearly erred in determining that Appellant is affiliated with CHL. I therefore GRANT this appeal and REVERSE the Area Office's size determination.

This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge