

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

SIZE APPEAL OF:

AudioEye, Inc.,

Appellant,

Appealed From

Size Determination No. 6-2013-059

SBA No. SIZ-5477

Decided: June 20, 2013

APPEARANCES

Robert K. Tompkins, Esq., Trevor J. Tullius, Esq., Patton Boggs, LLP, Washington D.C.,
for Appellant

DECISION

I. Introduction and Jurisdiction

On April 15, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 6-2013-059 finding that AudioEye, Inc. (Appellant) is not a small business under the size standard associated with Solicitation No. FCIS-JB-980001-B, Refresh #30. Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse and conclude that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted in part and is otherwise denied.

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. Certificate of Competency

On March 12, 2013, the U.S. General Services Administration (GSA), Center for Information Technology Schedule Programs, requested a Certificate of Competency (COC) for Appellant in conjunction with Solicitation No. FCIS-JB-980001-B, Refresh #30. After reviewing

information submitted by Appellant, the Area Office questioned Appellant's small business status, noting that Appellant may still be affiliated with its former parent company, CMG Holdings Group, Inc. (CMG). Accordingly, on March 22, 2013, the Area Office initiated a formal size review of Appellant, pursuant to 13 C.F.R. § 121.408.

B. Size Determination

On April 15, 2013, the Area Office issued its size determination concluding that Appellant is not a small business under the \$25.5 million size standard associated with the solicitation. The Area Office found that, in addition to various acknowledged affiliates,¹ Appellant is affiliated with CMG and with Marathon Patent Group, Inc. (Marathon). The Area Office determined that Appellant and CMG are affiliated under the newly organized concern rule, 13 C.F.R. § 121.103(g), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). Appellant and Marathon were found to be affiliated through common management, 13 C.F.R. § 121.103(e).

The Area Office explained that Audio Eye Acquisition Corp (AEAC), a holding company, owns 55% of Appellant. The next largest shareholder, CMG, owns 10.3%. AEAC's largest shareholder is Bradley Brothers LLC (Bradley Brothers), which owns 47.1% of AEAC. The Area Office determined that Bradley Brothers has the power to control Appellant through AEAC. Messrs. Nathan and Sean Bradley, who are brothers, each own 50% of Bradley Brothers. (Size Determination at 2.)

The Area Office then explained that Mr. Nathan Bradley is President and CEO of Appellant, Mr. Sean Bradley is Appellant's Chief Technical Officer (CTO), and Mr. James Crawford is Appellant's Chief Operating Officer (COO). The Bradleys and Mr. Crawford also serve on Appellant's board of directors, along with three other individuals. (*Id.*)

Next, the Area Office described Appellant's relationship with CMG. In March 2010, Appellant and CMG entered into a share exchange agreement, whereby CMG acquired 100% of Appellant's common stock. (*Id.*) Appellant at that time became a wholly-owned subsidiary of CMG.

CMG later decided to “spin-off” Appellant as a separate company. In June 2011, CMG entered into an agreement with AEAC regarding this transaction. Pursuant to the agreement, AEAC's stockholders would acquire 80% of Appellant's capital stock from CMG. CMG retained 15% ownership of Appellant and would distribute as dividends 5% of Appellant's capital stock. (*Id.*) Appellant was obligated to obtain the release of the obligations of CMG's 13% senior secured convertible extendible notes with an aggregate principal balance of \$1,075,000. (*Id.* at 2-

¹ Appellant acknowledged affiliation with Empire Technologies LLC, Bradley Locrone Investment Group, Bradley Locrone Management Services LLC, Locrone Bradley Asset Holdings LP, LB Asset Holding Services LLC, Bradley Family Revocable Lifetime Trust, Bradley Straub Management Services LLC, and Bradley Straub Investment Group LP. (Size Determination at 2.) The Area Office found that the combined average annual receipts of Appellant and its acknowledged affiliates do not exceed the \$25.5 million size standard. (*Id.*)

3.)

CMG and AEAC further agreed that Appellant and CMG would enter into a royalty agreement and a service agreement. Under the royalty agreement, Appellant would pay CMG 10% of cash received from income earned, settlements, or judgments directly resulting from Appellant's patent enforcement and licensing strategy, whether received by Appellant or any of its affiliates. Under the service agreement, CMG would receive: (1) a commission of at least 7.5% of all revenues received by Appellant after the closing date from all business, clients, or other sources of revenue procured by CMG or its employees, officers, or subsidiaries and directed to Appellant; and (2) 10% of net revenues obtained from a third party. (*Id.* at 3.) The Area Office stated that Appellant has made no payments to CMG under either agreement. (*Id.*) CMG completed its spin-off of Appellant on February 22, 2013. (*Id.*)

The Area Office next determined Appellant and CMG are affiliated under the newly organized concern rule. The Area Office recited the four elements of the rule, and noted that the purpose of the rule “is to prevent circumvention of the size standards by the creation of ‘spin-off’ firms that appear to be small, independent firms but are, in fact, affiliates or extensions of large firms.” (*Id.* at 4, quoting *Size Appeal of DMI Educ. Training, LLC*, SBA No. SIZ-5275, at 7 (2011)).

Here, the Area Office reasoned the first and third elements of the newly organized concern rule were met because Appellant's officers (Messrs. Nathan Bradley, Sean Bradley, and Crawford) were also Appellant's officers prior to the spin-off from CMG. (*Id.*) The second element was met because, after the spin-off, Appellant has continued to perform the same types of services as it did before the spin-off. The fourth element is met due to the services agreement between Appellant and CMG. The Area Office recognized that Appellant had “not paid anything to CMG as a result of this agreement and [that Appellant] does not at this time anticipate that CMG will provide any business to [Appellant] as a result of this agreement.” Nevertheless, the Area Office found the fourth element to be met, reasoning that CMG and Appellant are contractually obligated by the terms of the service agreement, and CMG retains an ownership interest in Appellant. (*Id.*)

The Area Office also determined that Appellant did not demonstrate clear fracture from CMG. Although Appellant is no longer a wholly-owned subsidiary of CMG, the continuing agreements between the two firms render Appellant “an extension of CMG.” (*Id.*)

In addition, the Area Office determined that Appellant and CMG are affiliated under the totality of the circumstances. The Area Office identified the following four factors as being “strongly suggestive of reliance”: (1) Appellant and CMG “share common ownership”; (2) under the royalty agreement, Appellant will pay CMG 10% of cash received from income earned, settlements or judgments from Appellant's patent enforcement and licensing strategy; (3) under the services agreement, CMG will receive a commission of at least 7.5% of all revenues received by Appellant from all business, clients, or other sources of revenue procured by CMG and 10% of net revenues obtained from a third party; and (4) CMG's CEO is quoted in an article as describing the spin-off as “our strategic expansion.” The Area Office considered that this remark “strongly suggests that [Appellant] is clearly an extension of CMG.” (*Id.* at 6-7.)

The Area Office also determined that Appellant is affiliated with Marathon through common management. The Area Office explained that affiliation arises where one or more officers, directors, managing members, or partners who control the board or directors and/or management of one concern also control the board of directors or management of another concern. However, common management does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations. (*Id.* at 5, citing *DMI*, SBA No. SIZ-5275, at 6.). In this case, the Area Office observed, Messrs. Nathan Bradley and Crawford are officers and directors of Appellant. Mr. Bradley is also Marathon's CTO & President of IP Services, and Mr. Crawford is Marathon's COO. Further, Mr. Bradley will head Marathon's new IP Research and Services Center, according to media reports. Therefore, the Area Office determined, Messrs. Nathan Bradley and Crawford “have a large degree of critical influence and the ability to exercise substantive control over Marathon's operations.” Because the same individuals have similar influence with Appellant, Marathon and Appellant are affiliated through common management. (*Id.*)

The Area Office noted that Appellant did not furnish tax returns for CMG or Marathon. Appellant denied any affiliation with CMG or Marathon, and maintained that Appellant does not have access to those companies' tax returns. (*Id.* at 7.)

The Area Office rejected these explanations, noting that by regulation “[i]n the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.” 13 C.F.R. § 121.1009(d). The Area Office explained that OHA has interpreted this regulation, known as the adverse inference rule, as having three requirements: (1) the requested information must be relevant to an issue in the size determination; (2) there must be a level of connection between the protested concern and the concern about which the information is requested; and (3) the request must be specific. In this case, the Area Office determined, the tax returns were “clearly relevant, the requests are specific, and all the information requested concerns [Appellant's] alleged affiliates, CMG and Marathon.” (Size Determination at 8.) Accordingly, the Area Office invoked the adverse inference rule and determined that Appellant is not a small business. (*Id.*)

C. Appeal

On April 12, 2013, Appellant filed its appeal of the instant size determination with OHA. Appellant maintains that the size determination is marred by mistakes of fact and law. Accordingly, OHA should reverse the size determination and find Appellant to be an eligible small business.

Appellant argues the size determination contains material factual errors, and offers the following corrections. First, Appellant asserts, although Mr. Crawford and the Bradleys served as Appellant's officers while it was a subsidiary of CMG, they have never served as officers or key employees of CMG itself. Next, Appellant and CMG do not “share common ownership”, as the Area Office stated, because CMG holds only a small minority interest in Appellant, Appellant has no ownership interest in CMG. Further, the royalty and service agreements do not indicate

that CMG can control Appellant, because the agreements have no control or reversionary provisions. The services agreement is non-exclusive—CMG may send its referrals elsewhere, and Appellant may secure customers on its own or sign additional service agreements with other parties. (Appeal at 9-10.)

With regard to affiliation with CMG, Appellant contends it is not a “newly organized” business; thus, the Area Office erroneously applied the newly organized concern rule. OHA has recognized that “[o]nce a concern has been active for an extended period, it is not appropriate to apply the newly organized concern rule without considering whether the challenged firm can still reasonably be considered a new business.” *Size Appeal of Coastal Mgmt. Solutions, Inc.*, SBA No. SIZ-5281, at 4 (2011). Appellant emphasizes it was established in 2005, and has undergone two recent changes in ownership: once when acquired by CMG, and a second when Appellant was spun off from CMG. Since 2005, Appellant has been in the same line of business with nearly the same management team. (Appeal at 12.) Appellant insists that it is not a new business but rather “the continuation of a company incorporated in 2005 which has undergone a simple change in *ownership*.” (*Id.* at 14, emphasis in original.)

Further, the Area Office's conclusion that Appellant and CMG are affiliated under the newly organized concern rule is erroneous because none of the rule's four elements are met. Appellant argues the first and third elements are not met because Messrs. Nathan Bradley, Sean Bradley, and Crawford were never officers, directors, principal stockholders, managing members, or key employees of CMG. Therefore, Appellant was not organized by former officers, directors, principal stockholders, managing members, or key employees of CMG. (*Id.* at 13.)

Appellant contends the second element of the newly organized concern rule is not met because Appellant and CMG do not operate in the same or similar lines of business. CMG is a holding company that focuses on marketing, communications, and strategic consulting services. Appellant, on the other hand, is a software developer and provider. In Appellant's view, the Area Office incorrectly based its analysis on whether Appellant continued to operate in the same line of business after being spun-off from CMG. Appellant argues this line of reasoning is faulty because, rather than considering whether Appellant is in the same line of business as CMG, the alleged affiliate, the Area Office merely compared Appellant to itself. (*Id.*)

Appellant argues the fourth element is not met because CMG does not provide contracts, financial or technical assistance, or any other support to Appellant. Although the Area Office referenced the services agreement between Appellant and CMG, this agreement provides for payments from Appellant to CMG, ““not the other way around.” (*Id.* at 14.) Appellant further contends that the provisions of the services agreement do not constitute the necessary financial support because the agreement is a “non-exclusive, optional business development agreement.” (*Id.*)

Appellant goes on to argue that the Area Office erred in finding there was no clear fracture. Appellant reiterates that Appellant and CMG are in separate lines of business, and Appellant does not rely on CMG for business, contracts, or revenues. The firms do not share officers or directors. (*Id.*)

Appellant contends the Area Office misapplied the test for finding affiliation under the totality of the circumstances, because the Area Office did not review all information pertinent to Appellant's business relationship with CMG. 13 C.F.R. § 121.103. Rather, Appellant asserts, the Area Office “selectively chose which factors it would [use to] analyze each entity.” (*Id.* at 17.) Further, none of the four factors cited by the Area Office demonstrate that CMG has any power to control Appellant, or vice versa. (*Id.*)

Next, Appellant argues the Area Office erred in finding Appellant affiliated with Marathon through common management. Appellant contends that the Area Office conducted a superficial analysis based solely on job titles, and “cannot point to a fact outside Nathan Bradley and James Crawford's job titles to show that they have critical influence and the ability to exercise substantive control over Marathon's operations.” (*Id.* at 15-16.) Moreover, Appellant contends, Marathon had no revenues for the years in question, so whether Appellant and Marathon are affiliated is of no consequence. (*Id.* at 11, 14-15.)

Appellant reiterates that it did not provide CMG and Marathon's tax returns to the Area Office because Appellant does not have access to such information. Appellant goes on to explain that Appellant instead directed the Area Office to other official, reliable sources of information, such as filings with the U.S. Securities and Exchange Commission (SEC). Accordingly, Appellant argues, it was a clear error of law, arbitrary, and capricious for the Area Office to draw an inference based on failure to provide tax returns. (*Id.* at 18.)

Appellant argues that, even assuming the affiliation findings were correct, the affiliates' aggregated receipts are still well below the \$25.5 million size standard. Appellant includes a table listing the receipts of Appellant, its acknowledged affiliates, Marathon, and CMG. According to this table, these firms' combined average annual receipts are less than \$7 million. (*Id.* at 11.) Appellant states that it obtained information regarding CMG's receipts from SEC filings and information regarding Marathon's receipts from media reports. (*Id.*, n.2-3, citing Size Determination at 5.)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the 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

As discussed *infra*, Appellant has persuasively established that it is not affiliated with CMG under either of the grounds advanced by the Area Office. Therefore, the size determination

is clearly erroneous in that regard. Nevertheless, Appellant has not shown error in the Area Office's finding that Appellant is affiliated with Marathon through common management. As a result, that portion of the appeal must be denied.

1. Affiliation with CMG

The Area Office determined that Appellant and CMG are affiliated on two grounds: the newly organized concern rule, 13 C.F.R. § 121.103(g), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). Both of these findings, however, are flawed.

The newly organized concern rule consists of four elements, all of which must be met for the rule to apply:

(1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise.

Size Appeal of Rio Vista Mgmt., LLC, SBA No. SIZ-5316, at 11 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 7 (2010). In this case, though, the first element of the test fails because Appellant was not founded by former officers, shareholders, or key employees of CMG. In particular, the record establishes that Appellant was founded in 2005, approximately five years before Appellant became associated with CMG. Further, there is no indication that Appellant's founders have ever been officers, directors, shareholders, or employees of CMG. Because the first element of the test fails, there can be no violation of the newly organized concern rule, irrespective of whether the remaining elements of the test are met. *Size Appeal of Willow Environmental, Inc.*, SBA No. SIZ-5403, at 6 (2012) (reversing size determination when the first element of the newly organized concern rule was not met); *see also Size Appeal of CJW Constr., Inc.*, SBA No. SIZ-5254, at 8 (2011); *Size Appeal of J.W. Mills Mgmt.*, SBA No. SIZ-4909, at 5 (2008) (“If the challenged firm was not formed by shareholders, officers, or key employees of the large firm, it is unnecessary to examine the other requirements of 13 C.F.R. § 121.103(g).”).

The Area Office also erred in determining Appellant and CMG are affiliated under the totality of the circumstances. The totality of the circumstances may be the basis for a finding of affiliation if an area office “is unable [to] establish affiliation under any of the other specific affiliation rules, yet the relationship between the parties taken as a whole is indicative of affiliation.” *Size Appeal of LOGMET, LLC*, SBA No. SIZ-5155, at 10 (2010). Nevertheless, as with any case, affiliation exists only when “one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both.” 13 C.F.R. § 121.103(a); *see also Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462 (2013) (reversing size determination which had found affiliation under the totality of the

circumstances because the area office identified ten interactions between the companies, but those interactions did not demonstrate any power to control). In order to find affiliation through the totality of the circumstances, “an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.” *Size Appeal of Faison Office Prods., LLC*, SBA No. SIZ-4834, at 11 (2007).

Here, the Area Office identified four factors as “strongly suggestive of reliance”: (1) Appellant and CMG “share common ownership”; (2) under the royalty agreement, Appellant will pay CMG 10% of cash received from income earned, settlements or judgments from Appellant's patent enforcement and licensing strategy; (3) under the services agreement, CMG will receive a commission of at least 7.5% of all revenues received by Appellant from all business, clients, or other sources of revenue procured by CMG and 10% of net revenues obtained from a third party; and (4) CMG's CEO is quoted in an article as describing the spin-off of Appellant as “our strategic expansion.” Section II.B, *supra*. As Appellant correctly observes, however, it is not accurate to state that Appellant and CMG “share common ownership.” Rather, CMG currently holds only a small minority interest in Appellant. This small ownership stake is not sufficient to give CMG any power to control Appellant; indeed, the Area Office expressly determined that Bradley Brothers—not CMG—has the power to control Appellant. *Id.* Similarly, the royalty and service agreements between Appellant and CMG, and the remarks by CMG's CEO, indicate that the firms have some business dealings with one another. There is, however, no evidence that either firm “strongly relies” on these arrangements for a significant portion of its business. Further, the Area Office seemingly overlooked the absence of other meaningful ties between the two firms. For example, CMG provides no financial or technical assistance to Appellant, the companies operate in different lines of business, and the firms do not share employees, management, equipment, or facilities. Accordingly, the record simply does not support the conclusion that Appellant and CMG are affiliated under the totality of the circumstances, because there is no indication that either firm has the power to control the other. *E.g.*, *Size Appeal of Diverse Constr. Group, LLC*, SBA No. SIZ-5112, at 7 (2010) (“I conclude upon reviewing these ties, or rather, the absence of ties between the firms, that there is simply not enough here to give either [the challenged firm] or [its alleged affiliate] control or power to control the other.”).

2. Affiliation with Marathon

The Area Office also found Appellant affiliated with Marathon through common management, 13 C.F.R. § 121.103(e). The applicable regulation states that “[a]ffiliation arises where one or more officers, directors, managing members, or partners who control the board or directors and/or management of one concern also control the board of directors or management of another concern.” In interpreting this rule, “OHA has recognized that ‘[c]ommon management affiliation does not require total control of a concern, just critical influence or the ability to exercise substantive control over a concern's operations.’” *Size Appeal of Env'tl. Quality Mgmt., Inc.*, SBA No. SIZ-5429, at 4 (2012) (quoting *DMI*, SBA No. SIZ-5275, at 9).

In the instant case, the Area Office found that Messrs. Nathan Bradley and Crawford have the ability to exercise substantive control over both Appellant and Marathon based on their positions in each company. Specifically, Mr. Nathan Bradley is Marathon's CTO and will head

Marathon's Intellectual Property Research and Services Center; he also serves as Appellant's CEO. Mr. Crawford is COO at both Appellant and Marathon. The Area Office concluded that Appellant and Marathon share common management because Messrs. Nathan Bradley and Crawford have the ability to exercise critical influence or substantive control at both companies.

Appellant argues that the Area Office conducted no substantive analysis and instead improperly assumed that Messrs. Nathan Bradley and Crawford hold substantive authority based upon their job titles. This argument is entirely unpersuasive. The positions of CEO, COO, and CTO are commonly understood to be senior leadership positions within a company, and there is no dispute that Messrs. Nathan Bradley and Crawford hold such positions at Appellant and at Marathon. Accordingly, the Area Office could reasonably infer that Messrs. Nathan Bradley and Crawford exercise substantive control or critical influence over both companies. Moreover, as the challenged firm, Appellant was responsible for persuading the Area Office that it is a small business. 13 C.F.R. § 121.1009(c). Similarly, on appeal, it is Appellant's burden to prove that the size determination is clearly erroneous. 13 C.F.R. § 134.314. Thus, if Appellant wished to show that, despite their job titles, Messrs. Nathan Bradley and Crawford actually have no substantive authority within the companies, it would have behooved Appellant to come forward with evidence to that effect. *Cf., Willow*, SBA No. SIZ-5403, at 5 (challenged firm introduced three sworn declarations attesting to the limited scope of employee's job responsibilities). In this case, though, Appellant has not attempted to demonstrate that Messrs. Nathan Bradley and Crawford cannot exercise critical influence or substantive control over the companies' operations. I therefore conclude Appellant has not established that the Area Office erred in finding Appellant to be affiliated with Marathon.

Appellant also argues that, even if Appellant is affiliated with Marathon, the issue is immaterial because Marathon had no revenues for the years in question. The problem for Appellant is that Appellant failed to produce Marathon's tax returns to the Area Office. As a result, the Area Office applied an adverse inference that the missing information would have shown that Appellant is not a small business. Section II.B, *supra*. The central issue, therefore, is whether the Area Office properly applied an adverse inference against Appellant in this case.

SBA regulations provide that:

If a concern whose size status is at issue fails to submit a completed SBA Form 355, responses to the allegations of the protest, or other requested information within the time allowed by SBA, or if it submits incomplete information, SBA may presume that disclosure of the information required by the form or other missing information would demonstrate that the concern is other than a small business. A concern whose size status is at issue must furnish information about its alleged affiliates to SBA, despite any third party claims of privacy or confidentiality, because SBA will not disclose information obtained in the course of a size determination except as permitted by Federal law.

13 C.F.R. § 121.1008(d). Further:

In the case of refusal or failure to furnish requested information within a required time period, SBA may assume that disclosure would be contrary to the interests of the party failing to make disclosure.

Id. § 121.1009(d).

OHA has established a three-part test for assessing whether an adverse inference is appropriate. First, the requested information must be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Third and finally, the request for information must be specific. If all three criteria are met, the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *E.g.*, *Size Appeal of Signal Ship Repair, LLC*, SBA No. SIZ-5335, at 7-8 (2012).

Here, Appellant does not dispute that Marathon's tax returns are relevant to the size determination. Nor does Appellant contend that the Area Office's request was overly broad or lacked specificity. Rather, Appellant argues that the second element of the test is not met, because Appellant lacks a sufficient level of connection to Marathon. Appellant asserts that it does not have access to Marathon's tax returns and is not in a position to produce those documents. Appellant further argues that, if the tax returns had been provided, they would have shown that Marathon and Appellant are small businesses.

While I sympathize with Appellant's plight, I find that Appellant's arguments are not meritorious. In its prior decisions, OHA has repeatedly held that an adverse inference test may properly be applied when an area office requests information about affiliates of the challenged firm. *See, e.g.*, *Size Appeal of [Drug Applicant]*, SBA No. SIZ-5362, at 10 (2012) (applying adverse inference when applicant firm failed to produce information about two investor firms with which the applicant was affiliated); *Signal Ship Repair*, SBA No. SIZ-5335, at 7-8 (applying adverse inference and noting that “[the challenged firm] cannot argue that the information was not in its control. The information was in the control of [the challenged firm's] affiliate, and the regulation required that affiliate to provide it.”); *Size Appeal of M. Braun, Inc.*, SBA No. SIZ-5087, at 4 (2009) (adverse inference applied when area office requested employee counts of concerns affiliated with the challenged firm through common ownership). There is, in other words, a sufficient “level of connection” between a challenged firm and its affiliates so as to justify application of an adverse inference. Further, it is not significant that the missing documents might have shown Appellant to be a small business. OHA has explained that “[t]he purpose of an adverse inference is to provide a negative consequence to those who fail to timely respond to a request for information by SBA during the size determination process.” *Size Appeal of Log In Sys., Inc.*, SBA No. SIZ-5130, at 2 (2010). It would undermine the purpose of the rule if a firm could escape such negative consequences simply by claiming that the missing information is not unfavorable.

Here, as detailed above, the Area Office correctly determined that Appellant and Marathon are affiliated through common management. Appellant denies such affiliation, but has not established that the Area Office's finding is clearly erroneous. As a result, the second element of the adverse inference test is met. There is no dispute that Marathon's tax returns are relevant or

that the Area Office request for those documents was specific. Therefore, the Area Office could reasonably apply an adverse inference due to Appellant's failure to produce Marathon's tax returns.

IV. Conclusion

Appellant is not affiliated with CMG, and the appeal is GRANTED to that extent. In all other respects, the appeal is DENIED. The Area Office correctly determined Appellant is affiliated with Marathon, and properly applied an adverse inference in calculating Appellant's size due to Appellant's failure to produce Marathon's tax returns. Accordingly, I AFFIRM the size determination as to Appellant's affiliation with Marathon, as well as the ultimate conclusion that Appellant is not a small business. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge