

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

SIZE APPEAL OF:

Altendorf Transport, Inc.,

Appellant,

RE: Economic Injury Disaster Loan

SBA No. SIZ-5487

Decided: July 22, 2013

APPEARANCES

Christopher R. Shiplett, Esq., Watson and Associates, LLC, Denver, Colorado, for Appellant

DECISION

I. 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, 123, and 134.

II. Background

A. The Loan Application and Informal Size Determination

On November 17, 2012, the Small Business Administration's (SBA) Office of Disaster Assistance, Processing and Disbursement Center in Fort Worth, Texas (Disaster Office) received an application from Altendorf Transport, Inc. (Appellant) for an Economic Injury Disaster Loan (EIDL). Appellant sought the loan in connection with Disaster Declaration ND-00029. This disaster was for drought, and the Commencement Date of the disaster was July 10, 2012.

On November 30, 2012, the Disaster Office issued its informal decision declining Appellant's EIDL application. The Disaster Office determined Appellant's primary industry is NAICS code 115113, Crop Harvesting, Primarily by Machine. Because Appellant's average annual receipts exceed the corresponding \$7 million average annual receipts size standard, Appellant is not an eligible small business for purposes of the EIDL.

B. The Reconsideration and Formal Size Determination

On December 6, 2012, the Disaster Office received Appellant's request for reconsideration of the Disaster Office's informal decision. Appellant argued that, although its business activities include those described under NAICS code 115113, Appellant's primary

business activity is agricultural truck transportation. Thus, the Disaster Office should have determined Appellant's size under NAICS code 484230, Specialized Freight Trucking (Excluding Used Goods), Long Distance, with a \$25.5 million average annual receipts size standard. Reconsideration Petition at 1.

Appellant explained it is an agribusiness truck transportation company that operates over-the-road semi-tractor trailers nationwide, and local tractors from Texas to Montana and North Dakota. As of the date of request for reconsideration, Appellant operated over 50 semi tractors and 75 hopper bottoms. Appellant explained that, although its operations include combining and equipment leases, Appellant's specialty is hauling agricultural related products from local elevators and farmers' grain bins to processors and end-users throughout the United States. Appellant provides the transportation and combine services as one base-price service, and argues that its trucking division is essential to its leasing and combine services. *Id.* at 1-2.

Appellant explained that, as a result of changing industry patterns, its trucking division surpassed its combine division “many, many years ago” as its primary industry. For this reason, Appellant changed its name in 1990 from Altendorf Harvesting, to Altendorf Transport, Inc. Nevertheless, explained Appellant, its tax return from 2010 “erroneously shows ‘IRS Business Activity Code No.’ code 115110 ‘Agricultural Service, Custom Combining.’” Appellant asserts this business activity code should have been changed many years ago. However, “[Appellant] has used the same CPA firm for decades, and has never updated, nor paid attention to the ‘IRS Business Activity Code No.’ on Schedule K of the Form 1120.” *Id.* at 6-7.

Appellant argued its primary industry is Specialized Freight Trucking (Excluding Used Goods), Long Distance, because that industry constitutes the bulk of Appellant's receipts, employees, and costs of doing business. 13 C.F.R. § 121.107. To support this assertion, Appellant included tables delineating by operational division Appellant's payroll, employee headcount, revenue, and expenses. In 2011, its trucking division accounted for 51% of revenue, 56% of employees, and 55% of expenses. By contrast, its combine division accounted for 46% of revenue, 44% of employees, and 44% of expenses. The remainder, which includes equipment lease, accounted for 3% of revenue and 1% of expenses. *Id.* at 2-7.

In speaking with the Disaster Office, Appellant argued that the trucking and combining services are separable. To support this argument, Appellant indicated that up to 40% of its trucking revenue comes from transporting crops that Appellant did not harvest itself. Size Determination at 3.

On May 29, 2013, the Disaster Office issued its formal size determination, again concluding that Appellant is not a small business. The Disaster Office determined the primary industry classification of NAICS 115113 “was supported by history and past self-classification.” The Disaster Office noted that Appellant was known as a custom harvesting service for many years after it was established in 1990. In addition, Appellant identified its business as “Business Code: 115110, Agricultural Service, Custom Combining” in its 2009 and 2010 tax returns. Not until 2011 did Appellant change the business identification to Business Code: 484200,

Specialized Freight, Trucking.¹ Further, noted the Disaster Office, although Appellant's Form 355 shows its primary industry as NAICS code 484230, Specialized Freight Trucking (Excluding Used Goods), Long Distance, an April 24, 2013, Dun & Bradstreet (D&B) report described Appellant as operating under NAICS code 115113. The Disaster Office concluded from the tax returns and the D&B report that “no one in the Applicant company bothered to make any distinction between revenue sources prior to a new CFO's arrival.” Size Determination at 1-2.

The Disaster Office explained that Tom Rerick became CFO of Appellant in 2011. Since that time, he has reorganized Appellant's books so that revenue between Appellant's two primary lines of business, custom harvesting and over-the-road trucking, could be tracked and better understood. On Appellant's 2011 tax return, Mr. Rerick consolidated the combining and over-the-road trucking revenues—which had been listed separately on Appellant's 2009 and 2010 tax returns—and split the \$6,517.00 of income from combining into \$4,344.70 for harvesting and \$2,172.30 for trucking. Mr. Rerick split the combine income because he thought the trucking activity related to the combining contracts should be included in the revenue from the over-the-road trucking contracts. Through this reorganization, the Disaster Office remarked, Mr. Rerick “has tried to demonstrate that the trucking operations generated revenues in 2011 that were greater than the revenues produced by the Custom Harvesting operation.” *Id.* at 2.

The Disaster Office criticized this financial reorganization for three reasons. First, the Disaster Office reasoned, the reorganization assumes hauling can be separated from custom harvesting, which is problematic, given that farmers pay one price for getting their crops from field to market. Second, the Disaster Office found the formula for determining the proportion of revenue associated with the trucking component of custom harvesting “somewhat arbitrary.”

Most significantly, however, the Disaster Office found the reorganization improperly assumes that the entire trucking component represents long-distance trucking. The Disaster Office challenged this assumption, noting that “it is only reasonable to assume that the farms of most customers are a relatively short distance from the market.” Accordingly, whether Appellant hauls crops it harvested or those it did not harvest, trucking activity related to Appellant's combining contracts is local. Therefore, the Disaster Office concluded, even if trucking and combining could be separated, NAICS code 484220, Specialized Freight Trucking (excluding Used Goods), Local,² describes the trucking service associated with combining. *Id.* at 3.

The Disaster Office then determined that Custom Harvesting includes “all activities embodied in combining contracts ... including necessary transportation of the grain to onsite, local or regional storage facilities as may be necessary.” *Id.* at 3. However, the Disaster Office reasoned, even if it were to separate the local trucking component from the combining service, custom harvesting would still constitute the bulk of Appellant's 2011 revenue.³ Accordingly,

¹ The Disaster Office observed that 484200 is an industry group, not an activity code.

² Like NAICS code 484230, Specialized Freight Trucking, Long Distance, NAICS code 484220 also has a \$25.5 million average annual receipts size standard.

³ The Disaster Office determined Appellant's 2011 revenue would be categorized as follows: NAICS code 115113, Crop Harvesting (\$4,392,234); NAICS code 484220, Specialized

custom harvesting makes up the bulk of Appellant's revenue under either analysis. *Id.* at 3-4.

The Disaster Office determined Appellant was not in a labor surplus area, and considered Appellant's size under NAICS code 115113. The Disaster Office found that Appellant's average annual receipts for the years 2009, 2010, and 2011 exceed the \$7 million size standard. *Id.* at 4-5.

C. The Appeal

Appellant filed the instant appeal on June 28, 2013. Appellant argues the Disaster Office made several mistakes of law and fact.

Appellant argues the Disaster Office erred in considering Appellant's tax returns from 2009 and 2010 when determining Appellant's primary industry. Under 13 C.F.R. § 121.107, the Disaster Office should have considered only 2011, the most recently completed fiscal year. Appeal at 5-6.

Appellant also argues the Disaster Office based its determination only on Appellant's revenues, rather than on the “distribution of receipts, employees, and costs of doing business among the different industries” as 12 C.F.R. § 121.107 requires. Appellant contends the Disaster Office ignored the tables illustrating these distributions. *Id.* at 6-7.

Appellant then maintains the Disaster Office placed too much weight on Appellant's historical self-classification. Appellant reiterates that its changed name reflected a change in the nature of its business. *Id.* at 8.

Appellant takes issue with the Disaster Office's statement that “farmers are paying for their crops to be harvested and pay one price for getting the crops from the field to the market.” Appellant argues the Disaster Office cited no evidence to support this conclusion, and emphasizes the demand for third-party agricultural transport. *Id.* at 9-10.

Appellant challenges the Disaster Office's statement that “it is only reasonable to assume that the farms of most customers are a relatively short distance from the market.” Appellant argues the Disaster Office reached this conclusion without reason or evidence. Appellant argues this faulty premise led the Disaster Office to erroneously conclude that, when Appellant hauls crops it did not harvest, such hauls must be local. *Id.* at 10-12.

Appellant contests the Disaster Office's determination that Appellant's formula for determining the proportion of revenue associated with the trucking component of custom harvesting is “somewhat arbitrary.” Appellant argues this is a “conclusory statement with no explanation of the record from which it derived.” Appellant also argues that it proved in the request for reconsideration that its combining customers pay for long-haul transportation of harvesting equipment. To support this conclusion, Appellant cites its accounting records, which have a separate revenue line item for “Equipment Trucking Pick Up/Delivery.” Appellant argues

Freight Trucking, Local (\$2,172,336); NAICS code 484230, Specialized Freight Trucking, Long Distance (\$2,648,349); and NAICS code 532490, Equipment Lease (\$290,010).

it “makes the reasonable inference in its operations and in its application that moving harvest equipment from one farm customer to the next, and from the equipment dealer to a customer's field necessarily involves over-the-road trucking.” *Id.* at 12-14.

Finally, Appellant complains the Disaster Office represented to Appellant's prime lender that Appellant would be approved for the loan. As a result of this representation, Appellant's lender extended continued credit, which Appellant accepted. Appellant argues it detrimentally relied on the Disaster Office's representation, and the denial is arbitrary and capricious. To support this argument, Appellant offers new evidence in the form of an unexecuted declaration from Hadley Freng, the manager of Appellant's prime lender. *Id.* at 14-15.

III. Discussion

A. Timeliness and Standard of Review

Appellant filed the instant appeal within 30 days of receiving the Size Determination, so the appeal is timely.⁴

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 on a clear error of fact or law. 13 C.F.R. § 134.314; *Size Appeal of Proceadyne Corp.*, SBA No. SIZ-4354, at 4-5 (1999). OHA will disturb the size determination only if the Judge, after reviewing the record and pleadings, has a definite and firm conviction the office that issued the size determination erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. The Merits of the Appeal

The SBA's regulations for disaster loans (other than physical disaster loans) require that an applicant business concern (1) must not exceed the size standard designated for the industry in which the applicant is primarily engaged; and (2) combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher. 13 C.F.R. § 121.301(a). The size standards are set forth in § 121.201. *Id.* As is clear from the regulation, the “primary industry” determines the size standard against which the applicant business concern is measured.

SBA determines a firm's primary industry by considering the distribution of receipts, employees, and the costs of doing business among the different industries in which business

⁴ OHA regulations provide that appeals from size determinations must be received at OHA within 15 days of the size determination's receipt. 13 C.F.R. § 134.304(a). However, where the determination being appealed to OHA provides for a different timeline than the regulation, the longer of the two governs. *Id.* § 134.202(a)(2). Here, the size determination instructed, “The Notice of Appeal must be filed and served within thirty (30) calendar days after receipt of this letter.” Size Determination Cover Letter at 1. Accordingly, thirty days is the operative deadline for this appeal.

operations occurred during the most recent fiscal year. 13 C.F.R. § 121.107. SBA may also consider other factors. *Id.* Among those factors are the industries identified on official filings made by the firm. *Size Appeal of Summit Techs. & Solutions, Inc.*, SBA No. SIZ-5132, at 6 (2010).

In this case, the Disaster Office decided Appellant's primary industry is NAICS code 115113, Crop Harvesting, Primarily by Machine. The NAICS Manual describes NAICS code 115113, as comprising “establishments primarily engaged in mechanical harvesting, picking, and combining of crops, *and related activities*. The machinery used is provided by the servicing establishment.” *NAICS Manual*, at 156 (emphasis added). In reaching this determination, the Disaster Office determined that the portion of Appellant's trucking operation associated with its combining operation could not be separated from and therefore was included in its combining operation. The record does not support this conclusion.

The scope of “related activities” under NAICS code 115113 has inherent limits. The bounds of what this term includes are determined by the interpretive canon of *eiusdem generis*. “Under the rule of *eiusdem generis* which means ‘of the same kind,’ where an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.” *Nielson v. Shinseki*, 607 F.3d 802, 807 (Fed. Cir. 2010) (quoting *Micron Tech., Inc. v. United States*, 243 F.3d 1301, 1308 (Fed. Cir. 2001)). Here, the NAICS Manual enumerates “mechanical harvesting, picking, and combining of crops” as included in NAICS code 115113. It then employs a general term, “related activities.” According to the above principle of interpretation, what counts as a related activity must be construed in light of the specific enumeration “mechanical harvesting, picking, and combining of crops.” A related activity, therefore, must have similar characteristics to those activities specifically enumerated. Mechanical harvesting, picking, and combining of crops are similar in that they are all part of the harvesting process that occurs at the conclusion of a growing season, and removing the crops from the soil. Firms engaged in these processes are retained by farmers at the end of the growing process to gather the farmers' crops from the fields so that those crops can be sold.

The process of trucking the harvesting firm's equipment to and from the fields to do this work is part of that harvesting process. It is part of the work the harvesting concern must perform to accomplish its tasks. The concern is not transporting goods for another firm, but is rather transporting its own equipment so that it may accomplish its work. This is part of providing the machinery used by the harvesting concern, as described in the *NAICS Manual*. Therefore, to the extent the Disaster Office considered the transportation of equipment to and from the farm as part of Appellant's combining operation, I find such determination does not constitute clear error.

Conversely, it is clear that trucking agricultural goods from the farm to a storage facility or local market lacks the unifying characteristic that it is part of the harvesting process. Rather, it is transportation of the crops once harvested, and trucking agricultural goods is not a necessary component of removing crops from the soil. Accordingly, I find the Disaster Office erred in determining that the “transportation of the grain to onsite, local or regional storage facilities” is

considered part of harvesting under NAICS code 115113. Rather, such trucking falls within NAICS code 484220⁵ or 484230,⁶ depending on whether it is local or long distance.

The Disaster Office went on to give an alternative analysis and determined that, assuming trucking could be separated from combining, combining/custom harvesting is still Appellant's primary industry. In reaching this conclusion, the Disaster Office rejected Appellant's argument that all of its trucking functions are long distance. Instead, the Disaster Office replaced Appellants assumption with its own assumption, stating that it is more reasonable to assume that farms are in close proximity to the markets they serve. Accordingly, the Disaster Office concluded that NAICS code 484220, Specialized Freight Trucking, Local, is the more appropriate category for the trucking Appellant performs in connection with its combining contracts.

As Appellant points out, however, the Disaster Office provided no support for this assertion. Appellant concedes that Appellant also makes an inference when it asserts that this trucking is long distance. In short, both the Disaster Office and Appellant make largely unsupported statements on this issue. It is simply not clear from the record how much of Appellant's trucking receipts represent local trucking of agricultural products, that is, trucking within a metropolitan area, which must be classified under NAICS code 484220; long distance trucking of agricultural products, that is, trucking beyond a metropolitan area, which must be classified under NAICS code 484230; or trucking of Appellant's own harvesting equipment, which must be classified under NAICS code 115113.

On remand, I instruct the Disaster Office to conduct a thorough investigation as to whether the trucking associated with combining contracts is local, long-distance, or some combination of the two. It must give Appellant the opportunity to comment and submit evidence on this issue. The Disaster Office must then determine which NAICS code represents the largest portion of Appellant's revenues, employees, and costs of doing business for 2011, the most recently completed fiscal year as of the date the disaster commenced. 13 C.F.R. §§ 121.107 and 121.302. Once the Disaster Office has determined which NAICS code represents the greatest portion of Appellant's business for the most recently completed fiscal year, it can then make its determination as to which code represents Appellant's primary industry.

While it is clear that Appellant has in the past used agricultural codes, the regulation directs the use of the most recent fiscal year for determining primary industry. The record reflects that Appellant, has, in recent years, made a concerted effort to redirect its efforts towards trucking. The review on remand of the distribution of Appellant's revenues should determine

⁵ The NAICS Manual describes code 484220 as “establishments primarily engaged in providing local, specialized, trucking. Local trucking establishments provide trucking within a metropolitan area that may cross state lines. Generally the trips are same day return.” *NAICS Manual*, at 627. The NAICS Manual specifically identifies Local Agricultural Products Trucking as one of the industries under this code. *Id.*

⁶ The NAICS Manual describes 484230 as “establishments primarily engaged in providing long-distance specialized trucking. These establishments provide trucking between metropolitan areas that may cross North American country borders.” *NAICS Manual*, at 627-28.

whether these efforts warrant the redirection of its primary industry to NAICS code 484230.

Finally, I find OHA is not the appropriate forum for Appellant's complaint that the Disaster Office misrepresented the status of Appellant's disaster loan to its prime lender because this representation was not a formal determination that OHA has jurisdiction to review. *See* 13 C.F.R. § 134.102. Because we will not reach this issue, the evidence Appellant offers to support its argument is inadmissible. *Size Appeal of Eagle Consulting Corp., Inc.*, SBA No. SIZ-5267, at 4 (2011), *recons. denied*, SBA No. SIZ-5288 (2011) (PFR) (finding evidence to be inadmissible when it was probative only of issues that OHA did not reach).

IV. Conclusion

For the above reasons, the size determination is VACATED and the instant appeal is REMANDED to the Disaster Office for further investigation and a new determination consistent with the instructions in this decision.

CHRISTOPHER HOLLEMAN
Administrative Judge