Cite as: *Size Appeal of Alterity Management & Technology Solutions, Inc.*, SBA No. SIZ-5514 (2013)

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Alterity Management & Technology Solutions, Inc., Appellant, Appealed From Size Determination No. 2-2013-30	SBA No. SIZ-5514 Decided: November 13, 2013

APPEARANCE

Warner H. Session, Esq., The Session Law Firm, P.C., Washington, D.C., for Appellant

DECISION

I. Introduction and Jurisdiction

On August 5, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area II (Area Office) issued Size Determination No. 2-2013-30 concluding that Alterity Management & Technology Solutions, Inc. (Appellant) is not a small business under the size standard associated with Appellant's primary industry.

Appellant contends that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand. For the reasons discussed *infra*, the appeal is denied, and the size determination is affirmed.

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. The record reflects that Appellant received the size determination on August 6, 2013, and filed the instant appeal within fifteen days thereafter, so the appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. 8(a) BD Application

On April 23, 2012, Appellant applied for admission into the 8(a) Business Development (BD) program. Appellant's application was declined on September 14, 2012, and Appellant sought reconsideration.

On November 20, 2012, SBA's Division of Program Certification and Eligibility (DPCE) requested a formal size review of Appellant in order to assess Appellant's eligibility for the 8(a) BD program. DPCE stated that Appellant appears to be dependent upon Innovative Management & Technology Approaches, Inc. (IMTAS), and other concerns associated with IMTAS, for a large percentage of Appellant's revenues. (DPCE Letter at 1.) According to DPCE, Appellant's primary industry is North American Industry Classification System (NAICS) code 541690, Other Scientific and Technical Consulting Services, with a corresponding size standard of $14 million average annual receipts. DPCE indicated that this NAICS code was "confirmed by contracts and invoices submitted by [Appellant] in support of work performed in its primary industry." (*Id.*)

B. Size Determination

On August 5, 2013, the Area Office issued its size determination concluding that Appellant is not a small business due to affiliation with IMTAS. In reaching its decision, the Area Office applied the size standard associated with NAICS code 541690, which DPCE identified as Appellant's primary industry.[1]

The Area Office explained that Appellant is 100% owned by Mr. Sumit Talwar, who is also the company's President and CEO. (Size Determination at 1.) Mr. Talwar founded Appellant in 2006, although the company remained dormant until 2010. (*Id.* at 1, 4.) Appellant represented that it does not receive administrative, technical, or financial assistance from IMTAS. (*Id.* at 2.) In addition, the firms share no common management. (*Id.*)

The Area Office began by considering possible affiliation between Appellant and IMTAS through economic dependence. The Area Office observed that concerns ordinarily are affiliated through economic dependence when one depends upon another for 70% or more of its revenue. *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007). In this case, Appellant derived 98.4% of its 2010 revenues from IMTAS, and 100% of its 2011 revenues from an IMTAS subsidiary. (Size Determination at 2.) The Area Office determined, however, that it would be "extremely punitive" to apply the 70% rule in this case because Appellant was dormant until 2010, and Appellant's revenues for 2011 amounted to only $880. (*Id.* at 4.) Further, during the initial months of 2012, Appellant entered into new agreements with concerns which have no connection to IMTAS. (*Id.*) The Area Office concluded that Appellant is essentially a start-up concern, and that it would "unduly penalize start-up operations" to find Appellant economically dependent upon IMTAS. (*Id.*)

The Area Office next examined affiliation under the newly organized concern rule, 13 C.F.R. § 121.103(g). The Area Office explained that, although Mr. Talwar founded Appellant in 2006, Appellant could still be considered newly organized because Appellant had been dormant for an extended period. (Size Determination at 5.) The Area Office found that Mr. Talwar is a

[1] The Area Office recognized that Appellant's Form 355 specified a different NAICS code (518210, Data Processing, Hosting and Related Services) as Appellant primary industry. The Area Office stated that it made several requests for Appellant to clarify the inconsistency, but did not receive a satisfactory response. (Size Determination at 1.)

former key employee of IMTAS. (*Id.*) Specifically, Mr. Talwar was IMTAS's Director of Operations between October 2007 and January 2012, and "provided overall technical and/or administrative direction of IMTAS' major programs." (*Id.*) Further, in a letter which accompanied Appellant's reconsideration request, IMTAS's Chief Operating Officer (COO), Mr. Tim Bashara, stated that Mr. Talwar "was instrumental in assisting me with the control of day to day operations" during his tenure at IMTAS, and that IMTAS decided to execute a contract with Appellant after Mr. Talwar's departure because Mr. Talwar "was critical to the on-going operations at IMTAS." (*Id.* at 3.) The Area Office found Mr. Bashara's remarks were evidence of Mr. Talwar's important role within IMTAS. (*Id.* at 5-6.)

The Area Office determined that Appellant and IMTAS both perform a variety of information technology consulting services and "are capable of providing similar services to their customers." (*Id.* at 6.) Therefore, the two firms operate in related industries. Further, although Mr. Talwar left IMTAS in January 2012, his ties with IMTAS were not fully severed, and Appellant continued to conduct business with IMTAS at the time of Appellant's application to the 8(a) BD program. (*Id.*) The Area Office concluded there is no clear line of fracture between Appellant and IMTAS, and the concerns are affiliated under the newly organized rule.

The Area Office proceeded to aggregate the average annual receipts of Appellant and IMTAS in order to determine Appellant's size. Because Appellant's 8(a) BD application was filed in April 2012, the applicable years under review were 2009, 2010 and 2011. (*Id.* at 7.) Appellant submitted information on IMTAS's revenues for 2010 and 2011, but provided only the value of contracts obligated to IMTAS for 2009. (*Id.*) As a result, the Area Office applied an adverse inference that the missing information would have shown that IMTAS is not a small business. (*Id.* at 7-8.) The Area Office concluded that Appellant is not a small business due to its affiliation with IMTAS.

C. Appeal

On August 21, 2013, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the Area Office erred in finding affiliation between Appellant and IMTAS under the newly organized concern rule. Appellant also argues that the Area Office used the wrong NAICS code and size standard to examine Appellant's size.

Appellant contends that, contrary to the size determination, Mr. Talwar was not a key employee of IMTAS. (Appeal at 2.) Appellant acknowledges that Mr. Talwar "played an important role with IMTAS," but contends that he did not have critical influence or substantive control over the operations or management of IMTAS. (*Id.*) Appellant adds that Mr. Talwar terminated his association with IMTAS in May 2013, and that Appellant "received minimal income from IMTAS from the time the size determination inquiry began in 2012 until the final size determination was issued in August 2013." (*Id.*) Appellant contends that the situation found here is comparable to that in *Size Appeal of J.W. Mills Management, Inc.*, SBA No. SIZ-4909 (2008). Appellant explains that in *J.W. Mills*, OHA found that a non-executive, non-officer of the alleged affiliate was not a former key employee of the alleged affiliate because he did not exercise critical influence or control over the alleged affiliate. Appellant contends that the same is true for the case at hand. Appellant emphasizes that Mr. Talwar was not a senior executive,

equity partner, or officer of IMTAS; that Mr. Talwar was hired to oversee only two programs; that Mr. Talwar was promoted to Director of Operations after two years with the company; that Mr. Talwar "had no contract execution approval authority or the ability to commit funds for any project"; and that Mr. Talwar "was not responsible for executing any policies and procedures." (*Id.* at 3.)

Next, Appellant argues that it is not in the same industry as IMTAS. Appellant states that Appellant "focuses on providing IT support and management consulting" to customers that desire "high-end support" and "solution-centric functions." (*Id.* at 4.) Conversely, according to Appellant, IMTAS "supports its clients on a volume basis" and "is focused on staff augmentation, equipment reselling, and operations and maintenance." (*Id.*)

Appellant further argues that the business ties between Appellant and IMTAS do not suffice to meet the fourth element of the newly organized concern rule. Appellant contends that the Area Office itself determined that these business ties did not rise to the level of economic dependence. (*Id.* at 5.) Further, Appellant argues, the Area Office should have considered Appellant's 2012 revenues in analyzing the business relationship with IMTAS. Had the Area Office done so, it would have discovered that Appellant's 2012 revenues came primarily from sources other than IMTAS. (*Id.*) Appellant cites *Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012) for the proposition that a challenged firm may sever its dependence on another concern. Appellant argues that it is "contradictory" for the Area Office to find no economic dependence, yet reference those same business ties in finding affiliation under the newly organized concern rule. (*Id.* at 6.)

Appellant further contends that a clear line of fracture exists between itself and IMTAS. Appellant asserts that Mr. Talwar's sole ownership and control of Appellant, the absence of any financial or technical support from IMTAS, and the Area Office's conclusion that there is no economic dependence, all are evidence of clear fracture. (*Id.*) Thus, in Appellant's view, the record demonstrates that Appellant and IMTAS are "separate and non-dependent companies." (*Id.*)

Lastly, Appellant states that the Area Office utilized the wrong NAICS code and size standard in its determination. Appellant maintains that the correct NAICS code is 518210, Data Processing, Hosting, and Related Services. (*Id.* at 7.) Appellant states that this is the code referenced in Appellant's SBA Form 355. Appellant insists that it "does not provide nor has [it] ever provided" services in the fields associated with NAICS code 541690. (*Id.*) Appellant complains that the Area Office "did not explain why it identified [Appellant's] primary NAICS code [as] 541690." (*Id.*) Appellant argues that even if OHA affirms the finding of affiliation with IMTAS, the size determination should be reversed because the firms' combined revenues do not exceed the $30 million size standard associated with NAICS code 518210.

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 that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an 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 Area Office determined that Appellant is affiliated with IMTAS under the newly organized concern rule, 13 C.F.R. § 121.103(g). As discussed below, Appellant has not shown any reversible error in the Area Office's determination. Consequently, the appeal must be denied.

The newly organized concern rule consists of four required elements:

> (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 Willow Environmental, Inc.*, SBA No. SIZ-5403, at 6 (2012). If these four elements are met, affiliation may be rebutted by demonstrating a clear line of fracture between the two concerns. The purpose of the newly organized concern rule is to prevent circumvention of the size standards by the creation of "spin-off" firms that appear to be small, independent businesses but are, in actuality, affiliates or extensions of large firms. *Size Appeal of Coastal Management Solutions, Inc.*, SBA No. SIZ-5281, at 4 (2011).

In the instant case, the Area Office found that each of the four elements of the test is met. The first element is met because Appellant's founder, Mr. Talwar, is a former key employee of IMTAS. The second element is satisfied because Appellant and IMTAS are both information technology consulting firms. The third element is met because Mr. Talwar is President, CEO, and sole owner of Appellant. The fourth element is met because Appellant derived nearly all of its revenues for the years under review from IMTAS or IMTAS subsidiaries. See Section II.B, *supra*.

In an effort to refute the size determination, Appellant contends that the Area Office's findings are insufficient to conclude that Mr. Talwar was ever a "key employee" of IMTAS. This argument is meritless. Pursuant to SBA regulation, a "key employee" is an individual with "critical influence in or substantive control over the operations or management" of the concern. 13 C.F.R. § 121.103(g). Here, it is undisputed that Mr. Talwar served for several years as IMTAS's Director of Operations, a position which would have given him some degree of influence or control over IMTAS's operations. Moreover, beyond Mr. Talwar's job title, the Area

Office also reviewed statements from Mr. Talwar himself and from IMTAS's COO, Mr. Bashara, describing the nature of Mr. Talwar's responsibilities during his tenure at IMTAS. Contrary to Appellant's arguments on appeal, Mr. Bashara states that Mr. Talwar was "instrumental in assisting me with the control of day to day operations", and that IMTAS contracted with Appellant after Mr. Talwar's departure because Mr. Talwar was "critical to the on-going operations at IMTAS." These remarks are strong evidence that Mr. Talwar was, in fact, a key employee of IMTAS. *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 8 (2010) (noting that a former key employee was "so indispensable to [his former employer] that even after he left its employ, [the former employer] retained him as a contractor."). On this record, then, the Area Office reasonably and properly concluded that Mr. Talwar is a former key employee of IMTAS.

Appellant also disputes whether the second element of the newly organized concern rule is met. Appellant maintains that Appellant and IMTAS have different areas of expertise, and pursue fundamentally different clients and business strategies. Thus, Appellant reasons, the two companies cannot be said to be operating in the same industries. These arguments fail for two reasons. First, Appellant offers no evidence to substantiate its contentions as to the purported differences between the companies, and OHA has held that "[m]ere unsupported assertions are not sufficient to refute, or establish error, in a size determination." *Size Appeal of Saint George Industries, LLC*, SBA No. SIZ-5474, at 7 (2013). Second, the applicable regulation requires only that the two concerns be in "related" industries. 13 C.F.R. § 121.103(g). Here, given that both Appellant and IMTAS are information technology consulting companies, there is little doubt that they operate, at a minimum, in "related" industries. *Size Appeal of eTouch Federal Systems, LLC*, SBA No. SIZ-5280, at 6 (2011) (rejecting a challenged firm's attempt to draw "fine distinction[s] between the areas of Information Technology the two concerns operate in", and holding that the second element of the newly organized concern rule is met because the two companies "are both involved in providing services in the field of Information Technology.").

Appellant also asserts that the fourth element of the newly organized concern rule is not met because, although Appellant did receive contracts from IMTAS and IMTAS subsidiaries during 2010 and 2011, the Area Office concluded that Appellant was not economically dependent upon IMTAS as a result of those contractual ties. This argument too is meritless. The newly organized concern rule is a separate grounds for affiliation from economic dependence, and the fourth element of the newly organized concern rule does not require a showing that the contracts or assistance provided also would give rise to economic dependence. *E.g., Size Appeal of Blue Cord Construction, Inc.*, SBA No. SIZ-5077, at 6-8 (2009) (bonding assistance to the new concern met the fourth element of the newly organized concern rule, in "the clearest and most compelling example of the newly organized concern affiliation OHA has ever decided," even though such bonding assistance would not have sufficed to show economic dependence). Moreover, the size determination indicates that Appellant likely would have been found economically dependent upon IMTAS, except that it would be "punitive" to apply the rule to a start-up business. Section II.B, *supra*. Contrary to the Appellant's contentions, then, the Area Office did not conclude that Appellant's ties with IMTAS were inadequate to show economic dependence, but rather that it would be unjust to apply the economic dependence rule under the circumstances presented here. I therefore find no inconsistency in the Area Office's determination that Appellant contravened the newly organized concern rule, but not the economic dependence rule.

Appellant also asserts that there is a clear line of fracture between itself and IMTAS because Mr. Talwar fully severed his association with IMTAS in May 2013. (Appeal at 2.) Further, "by November 2012 the relationship between [[Appellant] and IMTAS had significantly changed." (*Id.* at 5.) Under OHA precedent, though, a clear line of fracture does not exist if substantial ties remain between the two companies as of the date to determine size. *Sabre88*, SIZ-5161 at 8-9. Here, the Area Office determined Appellant's size as of April 23, 2012, the date Appellant applied for admission to the 8(a) BD program. 13 C.F.R. § 121.404(b). The Area Office found — and Appellant does not dispute — that Appellant still had significant ties with IMTAS as of that date. Events occurring after April 23, 2012 are not relevant to this analysis, and the Area Office properly gave little weight to such developments. *Size Appeal of Specialized Veterans, LLC*, SBA No. SIZ-5138, at 6 (2010) (recognizing that "the Area Office may not consider evidence or events that transpired after" the date to determine size). Accordingly, the Area Office correctly concluded that there was no "clear line of fracture" between Appellant and IMTAS as of April 23, 2012.

Lastly, Appellant contends that the Area Office utilized the wrong NAICS code and size standard in the size determination. There are two significant flaws in this argument. First, the Area Office utilized the NAICS code and size standard identified by DPCE in its protest. Sections II.A and II.B, *supra*. Insofar as Appellant believed DPCE to be mistaken, Appellant could, and should, have voiced such objections to the Area Office during the size review. Pursuant to 13 C.F.R. § 134.316(c), OHA will not consider substantive issues raised for the first time on appeal. Second, even if the Area Office had utilized the NAICS code and size standard Appellant now recommends, the outcome of the case would have been no different. This is true because Appellant failed to produce IMTAS's 2009 tax returns, and the Area Office consequently applied an adverse inference that the missing information would have shown that IMTAS was not a small business. 13 C.F.R. §§ 121.1008(d) and 1009(d); *Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9-11 (2013), *recons. denied*, SBA No. SIZ-5493 (2013) (PFR). On appeal, Appellant has not attempted to argue that the adverse inference was improper or unwarranted. Thus, because Appellant failed to produce all requisite information, Appellant would not have qualified as a small business, regardless of which NAICS code and size standard were selected. At most, then, the use of a potentially incorrect NAICS code and size standard constituted harmless error, and would provide no justification to overturn the size determination. *Size Appeal of A1 Procurement, LLC*, SBA No. SIZ-5121, at 8 n.3 (2010) (finding the Area Office's reliance upon one fact to be harmless error because the record demonstrated affiliation even absent that fact).

IV. Conclusion

For the above reasons, the appeal is DENIED, the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge