

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

SIZE APPEAL OF:

Trailboss Enterprises, Inc.,

Appellant,

Petition for Reconsideration of SBA No.
SIZ-5564

SBA No. SIZ-5578

Decided: August 5, 2014

APPEARANCES

Kate Kennedy, Esq., Jonathan A. DeMella, Esq., Dorsey & Whitney LLP, Seattle, WA,
for Petitioner

ORDER DENYING PETITION FOR RECONSIDERATION

I. Background

A. Prior Proceedings

On April 23, 2014, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination 6-2013-87, finding Trailboss Enterprises, Inc. (Petitioner) ineligible for Solicitation No. HSCEDM-12-R-00007 due to affiliation with four other concerns. On May 8, 2014, Petitioner appealed the size determination to the Office of Hearings and Appeals (OHA).

On June 10, 2014, OHA issued its decision in *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5564 (2014), denying the appeal and affirming the size determination. OHA determined Petitioner was affiliated with four other concerns based on a familial identity of interest. In doing so, OHA rejected Petitioner's argument that a lack of common management, shared commercial space and business contacts between the affiliated concerns satisfies the required clear fracture among the family members.

B. Petition for Reconsideration

On June 30, 2014, Petitioner filed the instant PFR. Petitioner requests OHA reconsider its denial of the appeal. Petitioner argues OHA's decision resulted in the application of an incorrect standard regarding familial identity of interest and that a clear line of fractures exists between the

family members. PFR at 2.

Petitioner contends OHA utilized an incorrect standard in finding affiliation between the concerns. According to Petitioner, OHA failed to account for the minimal business relationship between the family members, and the standard for evaluating familial identity of interests allows for minimal business activities between the concerns. Petitioner argues the relationship between the family members is similar to that found in *Size Appeal of Carwell Products, Inc.*, SBA No. SIZ-5507 (2013). In *Carwell*, OHA found a husband and wife had established the sufficient clear fracture despite the concerns subcontracting to each other. Petitioner argues that in the situation at hand, the concerns do not subcontract to each and their lack of common management, shared commercial space and business contacts show that there is a clear line of fracture.

Next, Petitioner argues OHA failed to acknowledge the lack of control between the concerns. Specifically, Petitioner states “the lack of shared resources and lack of any subcontracting or similar business relationship precludes any ability” for the affiliated concerns to exercise control over each other. *Id.* at 7. Further, Petitioner asserts it has been prejudiced by OHA's decision. Petitioner contends that OHA was required to evaluate the family and business history of the family members, according to OHA's own precedent established in *Size Appeal of Jenn-Kans, Inc.*, SBA No. SIZ-5128 (2010). Explicitly, Petitioner maintains that OHA should have considered the fact that the familial relationship began after the creation of the affiliated concerns. Petitioner concludes that the decision should be reconsidered and reversed.

II. Discussion

Petitioner filed its PFR within twenty days of service of *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5564 (2014) so the PFR is timely. 13 C.F.R. § 134.227(c).

A PFR may be granted by OHA upon a “clear showing of an error of fact or law material to the discussion.” 13 C.F.R. § 134.227(c). A PFR does not allow an unsuccessful party an additional opportunity to argue its position, and the PFR must rise from a manifest error of law or mistake of fact. *Size Appeal of Env'tl. Prot. Certification Co., Inc.*, SBA No. SIZ-4935, at 2 (2008) (PFR). “A PFR is appropriate only in limited circumstances, such as situations where OHA has misunderstood a party or has made a decision outside the adversarial issues presented by the parties.” *Id.* (citing *Quaker Alloy Casting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988) (quoting *Above The Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983))). Thus, “[t]he moving party's argument must leave the Administrative Judge with the definite and firm conviction that key findings of fact or conclusions of law of the earlier decision were mistaken.” *Size Appeal of TKTM Corp.*, SBA No. SIZ-4905 (2008) (citing *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11-12 (2006)); *Size Appeal of KVA Elec., Inc.*, SBA No. SIZ-5057 (2009).

Here, Petitioner can point to no misunderstanding by OHA of its arguments or any portion of the decision based on any fact or law outside the issues presented. Petitioner attempts to argue OHA's decision contained a misstatement of the appropriate legal standard for cases involving familial identity of interest. However, the decision clearly stated that some minimal contact would not preclude a finding of clear fracture. *Trailboss Enterprises, Inc.*, SBA No. SIZ-

5564, at 6 (2014) (“OHA has stated in the past ‘that a minimal amount of business or economic activity between two concerns does not prevent a finding of clear fracture.’”)

Petitioner's second argument on control is misplaced. OHA precedent establishes the identity of interest regulation creates the presumption of an identity of interest, and thus control, between family members which arises “not from the degree of family members' involvement in each other's business affairs, but from the family relationship itself.” *Size Appeal of SP Tech., LLC*, SBA No. SIZ-5319, at 5 (2012). The burden fell to Petitioner to rebut that presumption, which it failed to do.

Appellant errs when it argues OHA failed to follow precedent. The formation of the businesses prior to the marriage of Mr. Tolliver and Ms. Dossman-Tolliver might have lead to a finding of clear fracture had there been no additional dealings between the principals. Here, it is clear that the business contacts between Mr. Tolliver and Ms. Dossman-Tolliver have grown since then. Together, they control the Foundation, which owns the building from which the businesses they control operate. *Trailboss Enterprises, Inc.*, SBA No. SIZ-5564, at 6 (2014) (“Ms. Dossman-Tolliver and Mr. Tolliver control The Foundation because together they serve on its Board of Directors, with Mr. Tolliver as its President and Ms. Dossman-Tolliver as the Vice-President. Furthermore, Appellant owns the largest share of TSL, with DTG, a concern owned and controlled by Ms. Dossman-Tolliver, owning a 20% minority interest. Lastly, all the above listed concerns operate out of the same building owned by The Foundation.”) The facts showed there are substantial business undertakings between the Mr. Tolliver and Ms. Dossman-Tolliver. While the businesses were separate before their marriage, business contacts have formed between the concerns since then. Given that these are more than minimal contacts, no clear fracture existed.

IV. Conclusion

For the above reasons, I DENY the PFR and AFFIRM the decision in *Size Appeal of Trailboss Enterprises, Inc.*, SBA No. SIZ-5564 (2014).

CHRISTOPHER HOLLEMAN
Administrative Judge