

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

SIZE APPEAL OF:

Perry Johnson & Associates, Inc.,

Appellant,

Appealed From
Size Determination No. 06-2018-060

SBA No. SIZ-5943

Decided: July 24, 2018

APPEARANCES

Dennis C. Garden, Esq., Daniel G. Cohen, Ogletree Deakins Nash Smoak & Stewart, P.C., Houston, Texas, for Appellant

Constance M. Kobayashi, Esq., U.S. Small Business Administration, San Francisco, CA, for the U.S. Small Business Administration

DECISION

I. Introduction and Jurisdiction

On May 9, 2018, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued Size Determination No. 06-2018-060 finding that Perry Johnson & Associates, Inc. (Appellant) is not a small business under the size standard associated with the subject procurement. Appellant maintains 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. 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. Solicitation and Protest

On January 24, 2018, the Department of Defense Education Activity (DoDEA) issued Request for Quotations (RFQ) No. HE1254-18-T-9000 for transcription support services. The Contracting Officer (CO) set the procurement aside entirely for small businesses and assigned

North American Industry Classification System (NAICS) code 561410, Document Preparation Services, with a corresponding \$15 million size standard. Quotations were due on February 7, 2018.

On April 3, 2018, the CO awarded the contract to Appellant and notified unsuccessful offerors of this award. On April 4, 2018, Diversified Reporting Services, Inc. (DRS), an unsuccessful offeror, filed a protest with the Government Accountability Office (GAO) and a size protest with the DoDEA against Appellant. DRS alleged Appellant was not a small business due to information on Appellant's website indicating that Appellant had become the largest privately held transcription company in the United States with \$43 million in revenues. On April 10, 2018, the CO forwarded the size protest to the Area Office for its consideration. GAO dismissed the size protest on April 20, 2018 due to lack of jurisdiction, which lies with OHA. *Diversified Reporting Services, Inc.*, B-416238.1 (April 20, 2018).

B. Area Office Proceedings

On April 20, 2018, the Area Office notified Appellant by United Parcel Service (UPS) mail and by email about its intention to conduct a size investigation of Appellant. The Area Office requested:

- 1) A response to DRS's allegations;
- 2) A completed SBA Form 355;
- 3) A copy of Appellant's articles of incorporation and bylaws;
- 4) Complete financial statements, including balance sheets and profit and loss statements for the last three fiscal years (2015, 2016, and 2017) for Appellant's business and any affiliates including companies identified on the firm's website such as Perry Johnson Registrars, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson, Inc.; and Perry Johnson Food Safety, Inc.;
- 5) Copies of the three most recent Federal business tax returns (2015, 2016, and 2017), for Appellant's business and any affiliates including companies identified on the firm's website such as Perry Johnson Registrars, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson, Inc.; and Perry Johnson Food Safety, Inc.; and
- 6) Financial documentation and tax returns that include revenues generated by Appellant's business location in Dublin, Ireland that Appellant refers to on its website.

The Area Office requested these documents no later than three working days from the receipt of the letter. (Letter from J. Nietes to J. Hubbard, April 20, 2018).

On Wednesday, April 25, 2018, Appellant emailed the Area Office in response to the April 20, 2018 letter requesting clarification on whether the date of receipt is the date of receipt of the letter in email form or hard copy form from the USPS. On the same day, the Area Office informed Appellant that receipt was determined based on the date of receipt of the email and provided Appellant with an extension for the following day if needed. Appellant informed the Area Office that the documents would be forwarded to the Area Office overnight and requested a non-disclosure agreement in order to receive confidential documents, namely, Appellant's financial statements. Appellant attached a proposed Mutual Non-Disclosure Agreement (NDA) to the email. The Area Office informed Appellant that legal counsel would review the NDA and noted that documentation submitted by companies is kept confidential. On April 26, 2018, Appellant informed the Area Office that the documents were forwarded to the Area Office and should arrive that morning.

In Appellant's narrative response to the Area Office's April 20, 2018 letter, Appellant states:

It should be noted that in the protest and size determination, there was mention of affiliated companies, Perry Johnson Registrars, Inc.; Perry Johnson Accreditation, Inc.; and Perry Johnson Food Safety. These companies, although in sharing similar nomenclature, do not in any way fall under the same corporate entity, umbrella, or family of businesses as Perry Johnson & Associates, Inc. Perry Johnson & Associates, Inc., operates a fully independent, and wholly separate corporate entity, with SAM, CAGE, and WWAF registration unaffiliated to any of the aforementioned companies.

(Letter from J. Hubbard to J. Nietes April 25, 2018). Appellant also stated that the Ireland business location has not been in operation since 2015 and is “used as a marketing tool to showcase the former business ventures internationally” and Appellant does not plan to reopen business ventures in the UK or abroad in the near or distant future. (*Id.*) Therefore, Appellant did not provide further information regarding its Ireland business location. (*Id.*)

On the SBA Form 355, Information for Small Business Size Determination, Appellant listed Perry L. Johnson as the sole owner of Appellant, and listed President and Chief Operating Officer of Appellant, Jeffrey R. Hubbard, as the sole officer. In response to a request that Appellant provide information about any owner(s) and officer(s) of Appellant who are the owner, partner, director, officer, member, employee, or principal stockholder in another business, Appellant listed Perry L. Johnson as the sole owner of Pathway Holdings, Inc. (Pathway Holdings) (Initial SBA Form 355.) Appellant provided Articles of Incorporation from 2005 that listed the name of the corporation as Perry Johnson, Inc. Appellant also provided an undated Certificate of Amendment to Articles of Incorporation that changes a name of a corporation from Johnson & Associates, Inc. to Perry Johnson & Associates, Inc. Appellant included bylaws for Perry Johnson, Inc. that were signed by Perry L. Johnson, who is listed as the Secretary of Perry Johnson, Inc. Appellant also included some 2015 and 2016 tax information for Pathway Holdings, which states that it is the 100% owner of Perry Johnson Electronic Technology, Inc. and Johnson & Associates, Inc.

On April 26, 2018, the Area Office responded to Appellant's submission requesting clarification and additional information regarding the information provided and clarified that "SBA may find affiliation based on common ownership, management, and or/identity of interest." (Email from J. Nietes to S. Doty, April 26, 2018 at 3:53pm EST). The Area Office requested that Appellant provide complete tax returns for Pathway Holdings and to clarify the relationship between Pathway Holdings and Perry Johnson & Associates, Inc. since Appellant only provided tax information for Pathway Holdings. The Area Office also requested tax returns for Perry Johnson Electronic Technology, Inc. and Johnson & Associates, Inc., as the entities are affiliated with the firm based on common ownership and/or management. The Area Office also requested a list of all companies in which Pathway Holdings has an ownership interest, identifying the shareholders/owners and percentage of ownership for each individual/entity and corporate management. The Area Office also pointed out inconsistencies with Appellant's SBA Form 355, which states that Mr. Hubbard does not own interest in and is not a principal of any other businesses, as "the Nevada Secretary of State website states Mr. Hubbard is an officer in Perry Johnson & Associates Coding, Inc. and Perry Johnson Medical Holdings, Inc." (*Id.*) The Area Office also requested that Appellant ensure the accuracy of Appellant's statement on the SBA Form 355 that Perry Johnson is not a principal and/or owner, director, or officer, in any outside businesses.

The Area Office also directed Appellant to provide ownership and corporate management information for Perry Johnson Registrars, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson, Inc.; and Perry Johnson Food Safety, which are all listed on Appellant's website under "Affiliates." Appellant was also asked to provide an explanation of why these entities have "similar nomenclature if they are not affiliates" and clarification of all business relationships each company has with Appellant. (*Id.*) It appeared that Perry Johnson & Associates Coding, Inc. and Perry Johnson Medical Coding, Inc. are also affiliated with Appellant based on common management and/or identity of interests. Therefore, the Area Office requested a list of owners and each individual's respective percentage of ownership as well as familial relationship information pertaining to Perry Johnson. The Area Office also requested corporate management information and three complete federal business tax returns for 2015, 2016, and 2017.

The Area Office identified Perry Johnson & Associates Radiology, Inc.; Perry Johnson Food Safety Consulting, Inc.; and Perry Johnson Registrars Food Safety, Inc. on the Nevada Secretary of State website, which all contain the "Perry Johnson" name. The Michigan Secretary of State website revealed "numerous companies using the 'Perry Johnson' name and have the same location as Pathway Holdings in Michigan." (*Id.*) The Area Office requested ownership and corporate management information, and an explanation of all business relationships with Appellant for each entity listed on a separate attachment. The attached list included the following entities that all share the same address as Pathway Holdings: Perry Johnson Aviation, Inc.; Perry Johnson Consulting, Inc. of Japan; Perry Johnson Environmental, Inc.; Perry Johnson II, Inc.; Perry Johnson, Inc.; Perry Johnson International Holding, Inc.; Perry Johnson Laboratories, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson Laboratory Accreditation NP, Inc.; Perry Johnson Laboratory's Inc.; Perry Johnson Registrars Environmental, Inc.; Perry Johnson Registrars Holding, Inc.; Perry Johnson Registrars-II, Inc.; Perry Johnson Registrars Inc.; Perry Johnson Registrar's, Inc. of Japan; and Perry Johnson Seminars, Inc. The Area Office provided Appellant with a deadline of submission by Tuesday, May 1, 2018 at 11am.

On April 30, 2018, Appellant emailed the Area Office stating that, “We are unclear on the rulings of affiliated companies and how they affect size determinations even if the affiliated companies operate in a different industry, and are registered under different NAICS codes in SAM than that listed in this solicitation.” (Email from S. Doty to J. Nietes, April 30, 2018 at 10:37am EST). In response, the Area Office advised Appellant to review the size regulations under 13 C.F.R. § 121.103 and 13 C.F.R. § 121.1009. The Area Office also explained, “[a]ny company that is deemed to be an affiliate, the revenues of that company will be aggregated with those of [Appellant] in determining size. If revenues exceed the size standard, the firm will be disqualified from this procurement.” (Email from J. Nietes to S. Doty, April 30, 2018 at 10:55am EST).

On May 2, 2018, Appellant responded to the Area Office stating it had “compiled the necessary and relevant information requested. . . .” (Email from S. Doty to J. Nietes, May 2, 2018 at 1:52pm EST). Appellant stated that Appellant does not conduct business with Perry Johnson Registrars, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson, Inc. and Perry Johnson Food Safety and therefore “cannot comment on how they are set up.” (Letter from J. Hubbard to J. Nietes, May 2, 2018). Appellant stated that it is a subsidiary of Pathway Holdings, which is owned by Perry L. Johnson and that none of the directors or officers of Appellant are family members of Appellant. Appellant explains that the similarity in nomenclature is for “branding purposes” and that “business relationships only hold true with respect to [Pathway Holdings], which has a second subsidiary, Perry Johnson & Associates Coding, Inc.” Appellant stated that Perry Johnson Medical Holding, Inc. is inactive. Appellant also stated that Perry Johnson is the sole owner of Pathway Holdings. Jeffrey R. Hubbard is the manager of Appellant and Perry Johnson & Associates Coding, Inc.; Perry Johnson & Associates Radiology, Inc.; Perry Johnson Food Safety Consulting, Inc.; and Perry Johnson Registrars Food Safety. However, these companies are separately owned by Perry L. Johnson, not Pathway Holdings. There is no common management among Perry Johnson & Associates Coding, Inc.; Perry Johnson & Associates Radiology, Inc.; Perry Johnson Food Safety Consulting, Inc.; and Perry Johnson Registrars Food Safety, “nor do individuals from these companies have management responsibilities at [Appellant] or Perry Johnson & Associates Coding, Inc.” (*Id.*)

Accompanying the May 2, 2018 letter, Appellant provided an updated SBA Form 355 that listed Perry Johnson & Associates Coding, Inc. as another business owned by Perry L. Johnson. (Supplemental SBA Form 355.) A letter dated April 27, 2018 from Appellant's tax preparer, Rehmann Robson, LLC (Rehmann) states that Appellant and Perry Johnson Electronic Technology, Inc. are “Qualified Subchapter S Subsidiaries wholly owned by [Pathway Holdings]” and are disregarded entities for U.S. income tax purposes and report on the tax return of their parent owner, Pathway Holdings. (Letter from A. August to J. Nietes, April 27, 2018). Rehmann also states that “virtually all of the activity reported on the tax return of [Pathway Holdings] is reflective of the business activity of [Appellant].” (*Id.*) In response to the Area Office's inquiry regarding Pathway Holdings' ownership interests, Rehmann states that Pathway Holdings wholly owns Appellant and Perry Johnson Electronic Technology Inc. and Perry Johnson is the 100% shareholder/owner and President of Pathway Holdings. Jeffrey Hubbard is the President of Perry Johnson & Associates, Inc. and Perry Johnson Electronic Technology, Inc. Lastly, Rehmann notes that Perry Johnson Electronic Technology Inc. and Perry Johnson &

Associates Coding, Inc. are the same company and that Perry Johnson Medical Holding Inc. is an inactive entity and has been since its inception in 2011. Attached to the letter, Rehmann included Pathway Holdings' tax returns for 2015 and 2016, and some tax information for 2017.

On May 2, 2018, the Area Office responded to Appellant's May 2, 2018 letter requesting additional information, documentation, and clarification. The Area Office requested that Appellant provide a completed copy of Pathway Holdings' complete tax information for 2017 and the federal tax returns filed for Perry Johnson Electronic Technology, Inc. and Johnson & Associates, Inc. "even if they are passive entities." (Letter from J. Nietes to J. Doty & J. Hubbard, May 2, 2018 at 4:28pm EST). The Area Office also requested a list of all companies owned by Pathway Holdings. The tax information for Perry Johnson Medical Holding, Inc. and Perry Johnson & Associates Coding for 2015, 2016, and 2017 was also requested. The Area Office also requested an explanation that contained the ownership and management information as well as the 2015, 2016, and 2017 tax returns for each of the business entities that contained the Perry Johnson name that were located on the Nevada Secretary of State and Michigan Secretary of State websites. Although Appellant denies doing business with Perry Johnson Registrars, Inc.; Perry Johnson Laboratory Accreditation, Inc.; Perry Johnson, Inc.; and Perry Johnson Food Safety, the Area Office requested an explanation of the entities' inclusion on Appellants' website, as its response that it does not have information pertaining to the companies was deemed inadequate by the Area Office. Any contract agreements regarding the use of the common branding of the "Perry Johnson" name for the various entities included on the website were also requested. Appellant's statements that "the noted companies are separately owned by Mr. Johnson" reveal that the information provided to the SBA by Appellant is inaccurate and/or incomplete. (*Id.*) The Area Office also cited to 13 C.F.R. § 121.1008(d), which allows SBA to presume that the concern is other than a small business when it fails to submit a completed SBA Form 355 or provide complete information in response to a size protest. The Area Office also cited to 13 C.F.R. § 121.1009(d) regarding the weight of evidence, which allows the SBA to assume that disclosure of information that a concern refuses to provide is indicative that the information is contrary to the concern's interests. Lastly, the Area Office provided Appellant with a deadline of Thursday, May 3, 2018 at 4:00pm PT, to provide the requested documentation and clarifications.

On Thursday, May 3, 2018, Appellant's counsel emailed the Area Office stating that he was "not quite sure" what the purpose of the inquiry is at this point given that a protest with the Government Accountability Office had been dismissed. (Email from D. Cohen to J. Nietes, May 3, 2018 at 2:30pm EST). The email also stated that Pathway Holdings only owns Appellant and Perry Johnson & Associates Coding, Inc. Appellant's counsel also stated:

The other businesses owned by Perry Johnson have nothing to do with Appellant, [Perry Johnson & Associates] Coding or [Pathway Holdings]. They are separately managed, have their own assets, employees, offices, etc. They are not contracting parties, do not have an identity of interest and do not conduct business for or on behalf of each other. Moreover, they do *not* share the same NAICS code as Perry Johnson & Associates Coding because they are completely different businesses in completely different industries with completely different customers.

(*Id.*)(emphasis in original.) Appellant's counsel stated that Appellant operates independent of other businesses outside of Pathway Holdings and should only be considered an affiliate of Pathway Holdings and Perry Johnson & Associates Coding, Inc. and not other businesses owned by Perry Johnson that operate in different industries with different management, customers, and interests. In response to Appellant's counsel's email, the Area Office stated that it would consider the information provided in its size determination. (Email from J. Nietes to D. Cohen, May 3, 2018 at 2:06pm EST).

C. Size Determination

On May 9, 2018, the Area Office issued Size Determination No. 06-2018-060 finding Appellant to be other than a small business concern. Specifically, the Area Office found that Appellant could not establish that its revenues, including those of its affiliates, are below the \$15 million size standard.

The Area Office reiterated in its Size Determination that it informed Appellant in its April 26, 2018 and May 2, 2018 correspondence that “a lack of or inadequate information provided could result in adverse inference by SBA.” (Size Determination, at 1.) The Area Office identified deficiencies with Appellant's responses to its requests for information and clarification regarding its size and affiliates. For example, the firm did not provide clarification regarding one of its company's revenues and tax returns. (*Id.* at 3.) The federal tax returns provided by Appellant listed Pathway Holdings as a holding company, having ownership of Perry Johnson Electronic Technology, Inc. and Johnson & Associates, Inc., which “raised concerns that all entities owned by this company must also be considered affiliates.” (*Id.*) Appellant failed to clarify Pathway Holdings' ownership in any other entities “[i]n spite of repeated requests” for the information. (*Id.*)

Appellant's submission of the SBA Form 355 did not appear to be credible due to Appellant's listing of only one affiliated firm despite multiple other firms being listed on Appellant's website. (*Id.* at 4.) In conducting its own research for clarification regarding the firms listed on Appellant's website, the Area Office identified several active entities listed on the Nevada Secretary of State website that could be affiliated with Appellant. (*Id.*) “Given that these entities use the Perry Johnson name, and two of them have the same principals as [Appellant], it is reasonable for SBA to assume that potential affiliation may exist. . . .” (*Id.*) Therefore, the Area Office requested clarification on the relationship between Appellant and the other potential affiliated entities. However, in response to the Area Office's inquiries, Appellant stated that the entities were not owned by Pathway and are separately owned by Perry Johnson. No additional information was provided by Appellant. (*Id.*) The Area Office identified multiple potential affiliated entities with the Perry Johnson name on the Michigan Secretary of State website where many of them operated from the same location in Troy, Michigan as Pathway Holdings, and Perry Johnson is listed as the registered agent. The Area Office found Appellant's explanation for the use of the common “Perry Johnson” nomenclature for the entities as being for “branding purposes” to be inadequate as it is reasonable to assume there is some contract agreement that allows the entities to use the Perry Johnson name that provides a “mutual benefit” for the parties involved. (*Id.*)

The Area Office highlights that its requests to obtain information regarding Appellant's potential affiliates were “very specific in the information that was requested and explained why the information was necessary” and directed Appellant to review the size regulations on numerous occasions. (*Id.* at 4-5.) The explanations provided by Appellant's President and its New Projects & Marketing Manager were “inaccurate or incomplete” due to the discrepancies in its initial response and “subsequent vague comments.” (*Id.* at 5.) Further, Appellant's “unwillingness to respond to SBA and/or submit requested information, SBA was unable to verify whether or not [Appellant] is affiliated with numerous entities, specifically ones identified on [Appellant's] website as well as companies identified on the Secretary of State websites for Nevada and Michigan.” (*Id.*)

The Area Office found Appellant's arguments to “lack merit and reflect a lack of understanding of the size regulations” since affiliation may be found based on ownership, management, and/or identity of interest. (*Id.*) Therefore, based on the information provided by Appellant, the Area Office found Appellant to be affiliated with Pathway Holdings, Perry Johnson & Associates Coding, Inc., and Perry Johnson Medical Holding, Inc. based on ownership and/or common management.

The Area Office found Appellant to be other than small based on adverse inference, which allows the SBA to assume that a protested concern is other than small when it fails to submit sufficient information to determine its size. (*Id.* at 6, *See* 13 C.F.R. § 121.1008(d).) The Area Office stated that it passed the three-part test for adverse inference in that (1) the requested information was relevant to an issue in the size determination, (2) there was a level of connection between the protested concern and the firm from which the information is requested, and (3) the request for information was specific. Because the Area Office could not establish that the revenues of Appellant and its affiliates were below the \$15 million size standard, it must conclude that Appellant does not qualify as a small business concern.

D. Appeal Petition

On May 23, 2018, Appellant filed this appeal. In its appeal, Appellant moved for OHA to review documentation that it believes should not be considered “new evidence” as the information was available to the Area Office because the documents consist of records available to the public. (Appeal, at 1.) Appellant concedes that the Area Offices' requests were specific. (*Id.*) Further, Appellant argues the information is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal. (*Id.* at 2.)

Appellant argues the application of the adverse inference rule was improper, as the information requested was not relevant to the size determination and there lacked a connection between Appellant and the firms from which information was requested. (Appeal, at 1.) Appellant provided the Area Office with information clearly documenting that there are only two firms affiliated with Appellant and the Area Office “failed to properly recognize and evaluate the information provided and, instead, based its determination on unwarranted premises and assumptions.” (*Id.*)

Appellant reads the affiliation regulation as requiring that firms have both common ownership and common management to be found affiliated. (*Id.*, at 3.) Appellant admits that Perry L. Johnson has ownership interests in a number of business entities in fields unrelated to the transcription services provided by Appellant. The management of those entities differs from that of Appellant and an identity of interest between Appellant and the other entities is absent. (*Id.*) Appellant argues, “while these firms share ownership interests by Perry Johnson, except for Perry Johnson, Inc., they have entirely different officers and management.” (*Id.*) Further, the firms are differentiated by the industries in which they focus.

Appellant argues the Area Office clearly erred in its application of the adverse inference because the ownership and management information requested by the Area Office were public corporate records to which the Area Office had access. Appellant maintains the requested information was not relevant, and there was not a high level of connection between Appellant and the firms whose information the Area Office requested. Therefore, the Area Office's request failed to satisfy two of the elements of the adverse inference test. Appellant provided information regarding the ownership interests of Pathway Holdings and “to extend the request to totally unrelated firms not under the control of Pathway Holdings or the management of its constituent business entities is unreasonable and overly broad.” (*Id.*, at 4.)

Appellant argues OHA has addressed the issue of affiliation of business entities with common ownership such as in *McNew Water Treatment Systems Mid-Atlantic, Inc.*, SBA No. SIZ-3903 (1994), where the appellant was unable to rebut the presumption of affiliation where the owner operated related companies in separate segments of the water treatment industry. (*Id.* at 4.) Appellant also highlights that OHA has reached a finding of affiliation when the companies operated under different NAICS codes, but within the same industry. (*Id.* at 4., *See Size Appeal of L & S Industrial & Marine, Inc.*, SBA No. SIZ-4978 (2008).) In *Size Appeal of L & S Industrial & Marine, Inc.*, significant contractual relations were also present between the firms. (*Id.* at 4.)

Appellant does not dispute that Perry Johnson has interests in a number of business entities, “many but not all of which include his name.” (*Id.* at 5.) However, the non-Pathway Holdings businesses referenced by the Area Office are unrelated to Appellant's affiliates and do not conduct business in any NAICS code remotely related to the Pathway companies. (*Id.*) Therefore, seeking information from Perry Johnson's unrelated business ventures is “unwarranted under both the relevance and related interests parts of the Adverse Inference Rule.” (*Id.*)

E. SBA's Response

On June 20, 2018, SBA filed a response to Appellant's appeal. SBA argues, “Appellant submitted information *it* decided was relevant to making the size determination and omitted any facts or information it deemed was irrelevant.” (SBA Response, at 3.) (emphasis in original.) SBA highlighted that the Area Office identified more than 20 firms that included “Perry Johnson” in their names. (*Id.*) Further, Appellant admits that Mr. Johnson has interests in numerous business entities. However, these businesses were not identified on SBA Form 355.

(*Id.*) Therefore, the burden of proof is on Appellant to establish its size. (*Id.* at 3.) By failing to provide the requested documentation, Appellant is failing to meet this burden. (*Id.* at 4.)

Affiliation is found here under 13 C.F.R. § 121.103(4) because Mr. Johnson is a third party who has power to control Appellant through Pathway Holdings, and any other concern he controls or has the power to control are also affiliates. (*Id.* at 5.) The SBA argues, “[t]hese regulations establish that control or power to control a business is the bedrock principle on which affiliation is found.” (*Id.*) “If what Appellant argues were true, then one could simply avoid a finding of affiliation by creating a holding company as the direct owner of a firm subject to a size protest, thereby removing the indirect owner's other businesses from the analysis. Under such a rule, it is doubtful that any business would ever be found to be affiliated with any other business.” (*Id.*)

Appellant argues that all of the factors under 13 C.F.R. § 121.103(a)(2) are not satisfied. (*Id.*) However, there is no requirement that all factors be present in order to find affiliation. Appellant argues that affiliation should not be found where its potential affiliates are not in the same line of business or do not operate under the same management, but does not identify any regulation or case law that supports its assertion. (*Id.* at 5-6.)

Appellant's reliance on *Size Appeal of L & S Marine & Industrial & Marine, Inc.*, SBA No. SIZ-4978 (2008) is misplaced because there affiliation was based on familial identity of interest. (*Id.* at 6.) Further, Appellant's cite to *McNew Water Treatment Systems Mid-Atlantic, Inc.*, SBA No. SIZ-3903 (1994) bolsters a finding of affiliation, as that appellant's argument against finding affiliation due to the subject concerns' operating in different segments of the water industry was rejected by OHA. (*Id.*)

Appellant's arguments that the Area Office did not establish all elements for a finding of affiliation due to adverse inference are unsupported because it is clear from the circumstances of this case that the rule should be applied. (*Id.*) Further, inquiries regarding concerns with the same name as the Appellant is a plain “evidence basis for delving further into the possibility of affiliation.” (*Id.* at 7.)

In response to Appellant's motion to admit new evidence, it is not the Area Office's responsibility to search for documentation relied upon by Appellant when the information was not submitted upon request. (*Id.*) Nevertheless, the documentation offered strengthens the finding of affiliation by adverse inference. (*Id.*) Therefore, the SBA has no objection to the admission of the documents. (*Id.*)

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 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. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. 13 C.F.R. § 134.308 (a). Therefore, evidence not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009). New evidence may be admitted on appeal at the discretion of the administrative judge if a motion is filed that establishes good cause for the admission of new evidence. 13 C.F.R. § 134.308(a). In its motion for admission of new evidence, the movant must demonstrate that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5803 (2017), quoting *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009). Further, OHA “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). The fact that evidence is publicly available does not eliminate the requirement to provide such information to the Area Office for its size determination. *See Size Appeal of Vazquez Commercial Contracting, LLC*, SBA No. SIZ-5041, at 10 (2017) (rejecting the appellant's argument that the information is not new evidence when it was available to Appellant, but not made a part of the record.)

Appellant seeks to introduce new evidence to the record and claims that the information should not be considered new evidence because the Area Office was able to locate the information as it was publically available. However, this is not the test for determining whether information may be introduced in this case. Appellant must show how the subject evidence is relevant to the issues in this case — the main issue being one of whether the application of adverse inference was appropriate. The proposed evidence by movant is irrelevant to the issue here. “If the adverse inference was proper, the size determination must be sustained. If the inference was improper, then the appropriate remedy would be to remand the case to the Area Office for a new size determination, not for OHA to attempt to conduct a size determination.” *Size Appeal of Oxyheal Medical Systems, Inc.*, SBA No. SIZ-5707, at 10 (2016.) Therefore, the motion for admission of new evidence is DENIED and the evidence will not be included in the record or considered in this decision.

C. Analysis

The issue in this case is whether the Area Office properly drew an adverse inference against Appellant when it deemed the responses by Appellant to be insufficient, inaccurate, and/or incomplete. First, it is clear from the regulations that Appellant has the burden of proof of establishing that the Area Office erred in its findings. At the protest level, Appellant's burden of proof was to establish that it is a small business for size determination purposes. 13 C.F.R. § 121.1009(c)(emphasis added).

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).

In order to determine if the Area Office appropriately applied an adverse inference against a subject concern, OHA employs a three-part test that requires an assessment of 1) whether the requested information was relevant to an issue in the size determination, 2) whether there is a level of connection between the protested concern and the concern(s) about which information is requested, and 3) whether the request for information is specific. If all three criteria are established, the challenged concern must produce the requested information or risk their size determination being based on adverse inference. *E.g., Size Appeal of Oxyheal Medical Systems, Inc.*, SBA No. SIZ-5707, at 9 (2016.)

Here, the first element is met because it is essential to a size determination that the aggregate revenues of Appellant and its affiliates be calculated in order to determine whether Appellant meets the applicable \$15 million size standard. The Area Office specifically requested the tax return information for Appellant and its potential affiliates. Appellant failed to provide this information except for the tax return information produced for Pathway Holdings.

Second, it is quite clear that there is a connection between Appellant and the potentially affiliated entities upon which information was requested by the Area Office. Appellant admits that Perry L. Johnson has ownership interests in these companies. Further, the entities share the same nomenclature as Appellant; some of which are listed on Appellant's website as "affiliates." The holding company that directly owns Appellant, Pathway Holdings, shares the same address with numerous entities that contain the "Perry Johnson" name. Perry L. Johnson, himself, is a 100% owner of Pathway Holdings and Appellant admitted, "these firms share ownership interests by Perry Johnson." *See* Section II. B. & D., *supra*. Lastly, Appellant conceded that the Area Office's requests were specific. Therefore, all elements of the three-part adverse inference test are present.

Appellant argues that the Area Office improperly applied the adverse inference rule because 1) the information requested was not relevant and 2) there was an inadequate level of connection between itself and the firms from which the information was requested. Appellant argues that the only firms that should be considered as affiliated are those also owned by Pathways Holdings. Appellant argues that the other firms that share the “Perry Johnson” name are separately owned by Mr. Perry Johnson and have different management, operate in unrelated industries, and therefore are not affiliated with Appellant for size determination purposes.

I agree with the Area Office in that it appears Appellant has a fundamental misunderstanding of the size regulations. Appellant construes 13 C.F.R. § 121.103(a)(2) as requiring that firms have both common ownership and common management to be found affiliated. This is a profound mistake. The regulation reads:

SBA considers factors such as ownership, management, previous relationships with or ties to another concern, and contractual relationships, in determining whether affiliation exists.

13 C.F.R. § 121.103(a)(2).

The regulation thus lists a number of factors, any one of which may support a finding of affiliation. *See Size Appeal of Bama Company*, SBA No. SIZ-4819, at 6 (2006) (holding that a sufficient factual finding under any one of the factors listed in 13 C.F.R. § 121.103 (a)(2) can result in a finding that a business concern whose size is at issue is other than small). Thus, affiliation may be based upon common ownership under 13 C.F.R. § 121.103(c), or common management under 13 C.F.R. § 121.103(e), or any of the other factors for a finding of affiliation listed under 13 C.F.R. § 121.103. The fundamental principle supporting a finding of affiliation is whether one concern or entity controls or has the power to control another, or a third party or parties has the power to control both. 13 C.F.R. § 121.103(a)(1), *See Size Appeal of Q Integrated Companies, LLC*, SBA No. SIZ-5778, at 12 (2016). If Perry L. Johnson owns a sufficient interest in other concerns besides Appellant to give him control of those concerns, then those concerns are affiliated with Appellant. This is true regardless of whether the concerns are in different lines of business or operate under different NAICS codes. *See Size Appeal of Concepts in Staffing, Inc.*, SBA No. SIZ-4547 (2003) (finding it irrelevant, for size determination purposes, that the appellant operates in a different line of business from its affiliates when they share common ownership); *see also Size Appeal of L & S Industrial & Marine, Inc.*, SBA No. SIZ-4978 (2008) (finding appellant affiliated with a firm that operated under a different NAICS code, but shared common ownership.)

On multiple occasions, the Area Office attempted to explain this concept to Appellant, to the point where one suspects Appellant's failure to understand is deliberate. The Area Office directed Appellant to review the size regulations with citations and even explicitly stated “SBA will consider these companies to be affiliated with the firm based on common ownership and/or management,” and failure to provide the requested information could lead to a finding that Appellant is not small. *See* Section II.B., *supra*. Yet Appellant continued to ignore the Area Office's many attempts at seeking clarification and explanations in light of Appellant's inconsistent and contradictory statements.

For example, Appellant argues that it is not affiliated with any other entity except those also directly owned by Pathway Holdings, but also states that Perry Johnson, the owner of Pathway Holdings, owns many other businesses that “have nothing to do” with Appellant. *See* Section II.B., *supra*. These statements are extremely contradictory and further suggest that Appellant is not familiar with the size regulations. Contrary to Appellant's belief, the fact that nearly all of the entities upon which information was requested appear to be owned, either directly or indirectly, by a sole individual, Mr. Perry L. Johnson, means that all these entities are affiliated with Appellant for size determination purposes. Further, as the SBA suggests, there is a clear indication that affiliation would likely be established due to Mr. Johnson's ability to control Appellant as a third party. 13 C.F.R. § 121.103(a)(4).

In its appeal, Appellant cites to previous OHA cases in its attempt to make a distinction regarding affiliates operating in unrelated industries that is not rooted in OHA precedent, nor in the size regulations. First, Appellant cites to *McNew Water Treatment Systems Mid-Atlantic, Inc.*, SBA No. SIZ-3903 (1994), where that appellant argued that another concern could not be considered a potential affiliate because it operated in a different segment of the same industry. OHA rejected this argument, as the central issue is not whether the entities are in the same industry, but whether one individual has the ability to control both entities. In citing to *McNew*, it appears that Appellant is attempting to make a distinction between companies in the same industry but different segments of that industry like in *McNew* and companies that operate in completely different industries as is present here. However, there is no distinction regarding the industries in which affiliates operate if one party has the ability to control them both; they remain affiliates for the purposes of determining size.

Second, Appellant cites to *L & S Industrial & Marine, Inc.*, SBA No. SIZ-4978 (2008) and *Size Appeal of Agrigold Juice Products*, SBA No. SIZ-4136 (1996), where two entities were deemed affiliates when they did not operate under the same NAICS code. As the SBA states in its response, this further bolsters a finding for affiliation here in light of the evidence provided.

Although Appellant makes these meritless arguments against affiliation in its appeal, the central issue in this matter remains whether the Area Office appropriately made an adverse inference to reach its size determination. Appellant was given numerous opportunities by the Area Office to provide sufficient information to properly establish its size. However, instead of providing the information the Area Office requested and allowing the Area Office the chance to determine its size, Appellant made a conscious decision not to provide the Area Office with the information it requested, having been warned that doing so could lead to a finding that Appellant is not small.

IV. Conclusion

Appellant has not established any error of law or fact in the Area Office's determination. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge