

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

SIZE APPEAL OF:

Mid-Continent Group, LLC,

Appellant,

Appealed From
Size Determination No. 05-2020-006

SBA No. SIZ-6038

Decided: December 12, 2019

ORDER DISMISSING APPEAL¹

I. Background

On October 17, 2019, the U.S. Small Business Administration (SBA) HUBZone Program Office requested a formal size determination of Mid-Continent Group, LLC (Appellant), in connection with Appellant's application for HUBZone certification. On November 5, 2019, the SBA Office of Government Contracting, Area Office V (Area Office) issued Size Determination No. 05-2020-006 concluding that Appellant is an other than small business and thus ineligible for HUBZone certification under its primary NAICS code. (Size Determination at 5.)

On November 21, 2019, Appellant filed an appeal challenging the Area Office's size determination with the SBA Office of Hearings and Appeals (OHA). On the same day, OHA issued an Order for Appellant to show cause why the appeal should not be dismissed as untimely.

On November 25, 2019, Appellant filed its Response to the Order to Show Cause (Response). Appellant argues that the transmittal of the filing of the appeal was timely, but a “combination of poor internet connection” and the occurrence of a tragic incident involving counsel's employee's family member “caused the failure to follow up with a call to insure the filing was received.” (Response at 1.)

Appellant urges that certain factors were present to allow for an excusable delay in filing its appeal. (Response at 2, citing *Bateman v. U.S. Postal Service*, 231 F.3d 1220, 1223-24, (9th Cir. 2000), citing to *Pioneer Investment Services Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed. 2d 74 (1993), stating, “the danger of prejudice to the opposing party”; “the length of the delay and its potential impact on the proceedings”; “the

¹ 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 and 134.

reason for the delay”; and “whether the movant acted in good faith” are factors for determining whether a delay in filing is excusable.)

Appellant contends it is unlikely that any prejudice would occur to the opposing party, the SBA HUBZONE Program office, should OHA consider proceeding with this matter. (*Id.*) Appellant points out that the delay in filing the instant appeal was one day, which was caused by a delay in transmission and Appellant's counsel's neglect in following up to confirm receipt of the appeal by OHA. (*Id.*) Appellant explains the delay was caused not only by the electronic failure in the transmission of the document, but also caused by “an event extremely devastating to the entire firm and one which may fall under an acceptable bases — death or serious illness.” (*Id.*) Appellant demonstrates that it attempted to timely file the appeal in good faith by explaining that counsel for Appellant would have transmitted the appeal on November 19, 2019, had the firm not been traveling. (*Id.*)

Appellant cites to an article released by the American Bar Association that describes “Best Practices for Missing a Filing Deadline in Federal Court” and the Federal Rules of Civil Procedure which provides guidance and information regarding the doctrines of “equitable relief” and “excusable neglect” to support its plea for acceptance of the instant appeal. (*Id.* at 3.)

Appellant asks OHA to accept the factors in the *Pioneer* case; consider the demonstration of “good cause” shown; make a determination that counsel for Appellant acted in good faith; acknowledge that extending the filing deadline by one day will not prejudice the HUBZone Program Office; acknowledge that the adverse ruling would be the equivalent of a default judgment based on a technicality, which Federal Courts disfavor; find that the circumstances that led to the failure to confirm receipt of the filing on November 20, 2019 were “excusable neglect” on the firm's behalf; and to extend the deadline for receipt of filing one day in order to preserve the appeal for Appellant, a small business. (*Id.* at 4.)

II. Discussion

I conclude that I must dismiss the instant appeal. An appellant must file a size appeal within 15 calendar days after receipt of the size determination. 13 C.F.R. § 134.304(a). Filing is the receipt of the appeal by OHA. 13 C.F.R. § 134.204(b). The regulation further provides that “[a]n untimely appeal will be dismissed.” 13 C.F.R. § 134.304(c)(emphasis supplied). Most importantly, the regulation explicitly denies the Judge the power to modify “[t]he time period governing commencement of a case (*i.e.*, when the appeal petition may be filed).” 13 C.F.R. § 134.202(d)(2)(i)(A). The regulation thus affords a Judge no discretion in the case of an untimely size appeal, and the Judge must dismiss it.

The Area Office issued the size determination at issue here on November 5, 2019 via email, and it was received that day by Appellant. The deadline for filing an appeal from that determination was November 20, 2019. The instant appeal was filed November 21, 2019. The appeal is therefore untimely, and I must dismiss it.

Although Appellant provides insight as to why the filing of the appeal petition was untimely, the regulation is clear. While I appreciate the unfortunate circumstances that led to the

delay in transmission of the instant appeal, Appellant is asking me to exercise a discretion that the regulation denies me. Appellant's authorities are inapposite, as they deal with deadlines set for proceedings after the commencement of a case, filing of responses to summary judgment motions, and proofs of claim, etc. What Appellant is asking me to do is to, in effect, waive a statute of limitations, and that I cannot do. The regulation mandates that I dismiss this appeal.

III. Conclusion

For the above reasons, I DISMISS the instant appeal as untimely. This is the final decision of the U.S. Small Business Administration. *See* 13 C.F.R. § 134.316(d).

CHRISTOPHER HOLLEMAN
Administrative Judge