

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

SIZE APPEAL OF:

Sabre88, LLC

Appellant

Appealed from  
Size Determination No. 1-SD-2010-032

SBA No. SIZ-5161

Decided: October 19, 2010

APPEARANCE

Robert T. Cottingham, Managing Member, for Appellant.

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

Sabre88, LLC (Appellant) appeals Size Determination 1-SD-2010-032 (Size Determination) issued by SBA's Office of Government Contracting, Area Office I (Area Office). The Area Office determined Appellant to be other than small because it is affiliated with Phacil, Inc. I affirm the Area Office's Size Determination and deny the Appeal.

OHA decides size appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Accordingly, this matter is properly before OHA for decision.

II. Issues

Did the Area Office make a clear error of fact or law when it found Appellant's Managing Member to have been a key employee of Phacil (13 C.F.R. § 121.103(g))?

Did the Area Office make a clear error of fact or law when it found Appellant affiliated with a large concern based on the newly organized concern rule (13 C.F.R. § 121.103(g))?

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<sup>1</sup> The Assistant Administrator for Hearings and Appeals (AA/OHA) originally assigned this appeal to Judge Thomas B. Pender. Judge Pender left the SBA on September 24, 2010. The AA/OHA then reassigned this appeal to me.

### III. Background

#### A. Facts

On March 3, 2010, Sabre88, LLC (Appellant) applied to SBA's Division of Program Certification & Eligibility (DPCE) for admission into the 8(a) Business Development (BD) program. On April 5, 2010, the SBA's Assistant Administrator for DPCE (AA/DPCE) requested the Area Office to perform a size determination on Appellant. Appellant's primary industry is North American Industry Classification System (NAICS) code 541990, All Other Professional, Scientific and Technical Services, which has a small business size standard of \$7 million in annual receipts.

Appellant was established in January 2008. Appellant's original owners were Robert T. Cottingham (54%), Rafael Collado (23%), and Sascha Mornell (23%). Since May 22, 2009, when Messrs. Collado and Mornell left, Appellant's sole member and managing member has been Mr. Cottingham. By itself, Appellant is below the \$7 million annual receipts size standard applicable to Appellant's primary NAICS code 541990.

Phacil, Inc. (Phacil) was established in 2001 and is owned by Mr. Mornell and Mr. Collado. Phacil was admitted into the 8(a) BD program in 2003. During Phacil's 8(a) BD Annual Review, the AA/DPCE questioned Phacil's size eligibility and requested that the Area Office perform a formal size determination on Phacil.

On January 11, 2010, the Area Office issued Size Determination No. 01-SD-2010-011 (Phacil's Size Determination). There the Area Office concluded that Phacil was affiliated with Appellant but that Phacil was still a small business under Phacil's primary NAICS code 541512, Computer Systems Design Services, with a \$25 million annual receipts size standard. By itself, however, Phacil exceeds the \$7 million annual receipts size standard applicable to Appellant's primary NAICS code 541990.

Both Phacil and Appellant appealed Phacil's Size Determination, arguing that the finding of affiliation between Phacil and Appellant will adversely affect Appellant's small business status under Appellant's smaller size standard and thus make Appellant ineligible for the 8(a) BD program. OHA consolidated these appeals and dismissed them as premature and for lack of standing. *Size Appeals of Sabre88, LLC, et al.*, SBA No. SIZ-5113 (2010). OHA's decision stated that the appropriate channel for Appellant to refute any alleged affiliation with Phacil is through a size determination on Appellant itself.

#### B. Size Investigation on Appellant

On March 3, 2010, Appellant applied for admission to the 8(a) BD program. On April 5, 2010, following the AA/DPCE's request for a size determination, the Area Office commenced its size investigation by requesting various documents and information from Appellant, including a complete list of contracts Appellant received in the past three fiscal years and information on Mr. Cottingham's position at Phacil.

On April 9, 2010, Appellant submitted its initial response to the Area Office. In it, Appellant asserted that it is not affiliated with Phacil under the newly organized concern rule. Alternatively, Appellant asserted that there was clear fracture between the concerns and, therefore, no affiliation. Appellant organized its submission around the elements of the newly organized concern rule, 13 C.F.R. § 121.103(g).

First element – Former owners or key personnel of one concern organize a new concern. Appellant stated that Mr. Cottingham, prior to his December 2008 resignation, had been Phacil's Vice President of Government Affairs and Senior Program Manager but that, despite the title of vice president, he was never an officer of Phacil because he was not elected by Phacil's board and had no fiduciary responsibilities. Further, Mr. Cottingham was never an owner or director of Phacil. Appellant also argued Mr. Cottingham was not a key employee of Phacil because he had no authority to sign checks, bid proposals, or contract awards, and no authority to hire or fire employees. In support, Appellant submitted sample contracts and hire documents signed by Mr. Mornell.

Appellant further stated Phacil had three vice presidents, each assigned to a region. Mr. Cottingham's region was the Northeast; the other two had Washington, D.C., and California. Also, no vice president provided critical influence or substantial control over Phacil; they were not executive management who directed the company and made final decisions on all matters. Mr. Cottingham's position description states that, among his duties, he was responsible for maintaining Phacil's operations and presence in the Northeast, establishing SOPs for each contract, developing responsibilities and goals for team leads, maintaining relationships with customers, expanding Phacil's customer base, and growing its revenues. As Phacil's sole Government Affairs person, he was to maintain good relations with members of Congress and their staffs, and maximize lobbying and "earmark."

Second element – The new concern is the same or related field of business. Appellant and Phacil are in different fields because Appellant's primary industry is in is 541990, All Other Professional, Scientific and Technical Services, while Phacil's is in NAICS code 541512, Computer Systems Design Services.

Third element – The individuals who organized the new concern serve as its officers, directors, principal shareholders, managing members or key employees. Appellant asserted that no former officers, directors, principal stockholders or key employees of Phacil organized Appellant, because Messrs. Collado and Mornell do not serve as Appellant's officers, directors, principal stockholders or key employees, and they gave up their ownership interests in Appellant on May 22, 2009.

Fourth element – The original concern furnishes the new concern with contracts, financial or technical assistance, indemnification on bonds and/or other facilities, whether for a fee or otherwise. Because Appellant receives less than half its revenues from contracts with Phacil, Appellant is not solely dependent on Phacil for revenues such that affiliation should be imputed. In support, Appellant cited an August 8, 2008, subcontract with Apptis, Inc. (Apptis) for telecommunications services at GSA Region III. On May 6, 2010, in response to a question,

Appellant stated Phacil did not assist Appellant in obtaining any contract with Apptis. Appellant provided the Area Office with a list of all of its contracts, and these include the areas of telecommunications management, data entry, public relations, and human resource services. Appellant has been Phacil's subcontractor on contracts from the Nuclear Regulatory Commission (ongoing) and the Department of the Treasury (completed). The Apptis subcontract for work at GSA Region III (Apptis Task Directive) includes, in its Statement of Work, references to "Phacil - Saber88, LLC" as the party providing the services, although Mr. Cottingham, not Phacil signed it. Mr. Cottingham also provides public relations and government relations services to Phacil under contract.

Clear fracture. Finally, even if the Area Office found Appellant satisfied the four elements of the newly organized concern rule, Appellant is not affiliated with Phacil because there is clear fracture between the two concerns. In support, Appellant stated there are no common owners or officers, no shared employees, and no shared facilities among the concerns, and they operate in different cities.

On June 3, 2010, Appellant submitted Mr. Cottingham's resume and answers to additional questions about his work at Phacil. This information shows that, in his four years there, he helped increase its revenue from \$600,000 to \$25 million, and its employee count from 12 to about 250, with 33 employees, including one project manager and one team lead, under his supervision. (Only large projects have team leaders or project managers.) As program manager, Mr. Cottingham made customer visits to check on work progress, to learn of any trouble areas, and to determine whether the customer needed any additional work. He also visited employees to give and get feedback. Appellant stated Phacil did not consider him or the four other "vice presidents" to be senior management. Only Messrs. Collado and Mornell were senior management. Mr. Cottingham was one of four program managers who, along with four department managers, reported to senior management.

As Vice President of Government Affairs, Mr. Cottingham was responsible for maintaining good relations with Congressional and regulatory staff, trade associations, and others active in Federal and State policymaking. He maintained day-to-day contact, including face-to-face meetings, with staffers, informed them of the impact on Phacil of proposed legislation and policy, and also prepared the CEO for his appearances before Congress and agencies.

After leaving Phacil at the end of 2008, Mr. Cottingham continued his Government Affairs work for Phacil under a personal services contract starting on January 1, 2009. On June 4, 2010, Appellant informed the Area Office that Phacil had terminated that contract as of May 31, 2010.

C. Size Determination No. 01-SD-2010-032

On July 20, 2010, the Area Office issued Size Determination No. 01-SD-2010-032 (Size Determination). The Area Office determined that, as of March 3, 2010, Appellant was affiliated with Phacil under the newly organized concern rule. The Size Determination focused on the issue of whether Mr. Cottingham was a key employee of Phacil prior to founding Appellant, but

also discussed the roles of Messrs. Cottingham, Collado, and Mornell in both concerns, each concern's lines of business, and contracts provided to Appellant by Phacil.

The Area Office concluded, regarding the first element of the newly organized concern rule, that even if Mr. Cottingham was not an "elected" officer of Phacil, he was clearly a key employee there because of his position, responsibilities, and achievements.

In connection with the second element, the Area Office noted that Appellant was in the businesses of telecommunications management, data entry, public relations, and human resource services, based on its contract history and its website. Phacil was in telecommunications, database services and records, administrative/clerical service, external relations and public outreach, and human resources services, among others, according to its website. The Area Office concluded both concerns are capable of providing similar services to their customers and that they are in related industries, satisfying the second element.

Because Mr. Cottingham is Appellant's owner, the third element is also satisfied.

As for the fourth element, the Area Office concluded, despite Appellant's denial that Phacil assisted Appellant with obtaining work from Apptis, that Phacil did help Appellant, pointing to the Apptis Task Directive, in which Appellant and Phacil appear to be a team. Thus, Phacil was (and is) either directly or indirectly involved with 100% of Appellant's receipts. The Area Office observed that, even if some work is not counted, enough of Appellant's receipts came from Phacil as to satisfy this element of the newly organized concern rule, if not also the economic dependence affiliation ground.

The Area Office also noted, with little analysis, that Appellant and Phacil were also affiliated under the totality of the circumstances rule, particularly in light of the level of economic dependence.

### C. The Appeal

On August 7, 2010, Appellant received the Size Determination. On September 7, 2010, Appellant filed its size appeal with SBA's Office of Hearings and Appeals (OHA).

Appellant contends the Area Office's determination that it is affiliated with Phacil under the newly organized concern rule is based upon clear error of fact or law.

First, Appellant asserts Mr. Cottingham was not a key employee of Phacil. Although he managed 33 employees including three team leads/project managers, those responsibilities did not rise to the level of having "critical influence in or substantive control over the operations or management" of Phacil. Also, Mr. Cottingham has no expertise in Phacil's core capability, which is technology; instead, his expertise is in Congressional affairs. Appellant also asserts that the definition of key employee does not include an individual's achievements, so they should not be considered. Appellant also notes he has never been listed on the Central Contractor Registration (CCR) as Phacil's point of contact or on Phacil's website as a key employee.

Appellant asserts the OHA decisions cited in the Size Determination are inapplicable because they present much stronger cases of affiliation than does Appellant.

Second, Appellant asserts it is not in the same or related industry as Phacil, as shown by their different NAICS codes and the fact that Mr. Cottingham's expertise is not in technology but Congressional relations and lobbying.

Third, Appellant asserts that Messrs. Collado and Mornell are not officers, directors, principal stockholders, or key employees of Appellant, that they had made no substantial investment in Appellant, and that they resigned their memberships in 2009.

Fourth, Appellant asserts Phacil is not furnishing it with contracts, financial or technical assistance, facilities, or anything else. Appellant currently receives only 33% of its revenue from Phacil, and the public relations contract with Phacil is concluded. Regarding the Apptis Task Directive's references to "Phacil - Saber88, LLC", Appellant asserts that these resulted from "confusion" while Mr. Cottingham was working for both Phacil and Appellant, but that the other contract document submitted (which mentions only Appellant) is accurate. Also, the checks received from Apptis were payable only to Appellant. Appellant receives no surety indemnity or other financial assistance from Phacil.

Finally, Appellant also contends that, even if newly organized concern affiliation is found, Appellant can demonstrate clear fracture between itself and Phacil. In this connection, Appellant asserts that Messrs. Collado and Mornell disposed of their interest in Appellant on May 22, 2009, and that Phacil terminated the public relations contract as of May 31, 2010.

Appellant also asserts it is not affiliated with Phacil under either the identity of interest (economic dependence) or totality of the circumstances grounds. In support, Appellant asserts it does not rely on Phacil as an exclusive customer, and that over the past two-and-one-half years, its percentage of receipts from Phacil has declined from 88% to 33%. Appellant also notes the Size Determination lacks analysis on these issues and that the cited OHA decisions have nothing to do with Appellant's situation.

As relief, Appellant requests that OHA reverse the Size Determination and conclude Appellant is an eligible small business.

## V. Discussion

### A. Timeliness

Appellant filed the instant appeal within 30 days of receiving the Size Determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a)(2).

### B. Standard of Review

The standard of review for this appeal is whether the Area Office based the Size Determination upon clear error of fact or law. 13 C.F.R. § 134.314. In evaluating whether there

is a clear error of fact or law, OHA does not consider Appellant's size *de novo*. Rather, OHA reviews the record to determine whether the Area Office based its Size Determination upon a clear error of fact or law. Consequently, I will disturb the Area Office's Size Determination only if I have a definite and firm conviction the Area Office made key findings of law or fact that are mistaken. *Size Appeal of Taylor Consulting, Inc.*, SBA No. SIZ-4775, at 10-11 (2006).

### C. Merits of the Appeal

#### 1. Appellant is Affiliated with Phacil under the Newly Organized Concern Rule.

The Area Office found Appellant affiliated with Phacil under the newly organized concern rule. The rule has four elements, and provides that concerns may be found affiliated if:

- (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 individuals who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees.
- (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.

13 C.F.R. § 121.103(g). Affiliation may be rebutted by demonstrating a clear line of fracture between the two concerns. *Id.*

The purpose of the rule is to prevent circumvention of the size standards by the creation of "spin-off" firms that appear to be small, independent firms but are, in fact, affiliates or extensions of large firms. *Size Appeal of J.W. Mills Management*, SBA No. SIZ-4909, at 5 (2008).

The Area Office concluded that Mr. Cottingham was a key employee of Phacil, and that satisfied the first element.<sup>2</sup> I agree with the Area Office.

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<sup>2</sup> The record also shows that Messrs. Collado and Mornell, Phacil's two owners, were also involved in Appellant. Because these two individuals never left Phacil they cannot, strictly speaking, be considered "former" officers, directors, or principal stockholders of Phacil. It is only in that respect, however, that they do not precisely fit the first element of the newly organized concern analysis. Further, this difference (current as opposed to just former involvement in Phacil while Appellant was being organized) cuts in the direction of closer ties between Appellant and Phacil, not against closer ties. It was for this reason that in *Size Appeal of Blue Cord Construction, Inc.*, SBA No. SIZ-5077 (2009), OHA concluded that the first element of the newly organized concern analysis is satisfied by an individual who had current, as opposed to former involvement, in an alleged affiliate MCAI. *Blue Cord*, at 7 ("Mr. Waldrop is not

A “key employee” has a “critical influence in *or* substantive control over the operations *or* management” of the concern. 13 C.F.R. § 121.103(g) (emphases added). The record shows Mr. Cottingham had two roles at Phacil; the first as program manager for one of Phacil’s three regional operations (and manager of 33 of Phacil’s 250 employees), and the second as its Vice President for Government Affairs, with a unique set of responsibilities. In this latter role Mr. Cottingham was so indispensable to Phacil that even after he left its employ, Phacil retained him as a contractor. Mr. Cottingham was one of about eight department heads reporting directly to Phacil’s two owners. I conclude that the Area Office correctly found that Mr. Cottingham satisfies the definition of “key employee” of Phacil.

As to the second element, the Area Office found Appellant’s industries were telecommunications management, data entry, public relations, and human resource services, and that Phacil’s were telecommunications, database services and records, administrative/clerical service, external relations and public outreach, and human resources services, among others. The Area Office concluded both concerns are capable of providing similar services to their customers and that they are in related industries. Appellant asserts it is not in the same or related industry as Phacil, as shown by their different NAICS codes and the fact that Mr. Cottingham’s expertise is not in technology but Congressional relations and lobbying.

I find that the record supports the Area Office’s finding. Phacil and Appellant have some common fields, and neither concern is narrowly confined to any one specific industry. Appellant does not dispute these facts. As the Area Office found, Phacil operates in many industries beyond the Computer Systems Design Services of its primary NAICS code 541512. Appellant’s primary NAICS code 541990, All Other Professional, Scientific and Technical Services, includes many types of services. Mr. Cottingham was Phacil’s external relations, public outreach, and government relations operation, and after he left Phacil he continued to provide Phacil with those services from Appellant, providing one commonality. Accordingly, the second element is satisfied.

The fact that Mr. Cottingham is Appellant’s sole member and managing member satisfies the third element.

The Area Office found the fourth element is satisfied because Phacil has provided contracts to Appellant since its inception. The record supports the Area Office’s finding. Phacil provided Appellant with two subcontracts, one for Nuclear Regulatory Commission work, and one for Department of the Treasury work. Phacil also provided Appellant with a contract for work in government affairs. Thus, even without considering whether Phacil had involvement in the Apptis subcontract, I conclude that the fourth element of the newly organized concern analysis is satisfied.

The regulation permits rebuttal of the Area Office’s newly organized concern affiliation finding on demonstration of a clear line of fracture between the two concerns. There are a

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merely a former officer and key member of MCAI’s staff. He is much more. . . . he is currently an officer of MCAI; and he is a key staff member of MCAI . . .”).



number of ties between Appellant and Phacil, only some of which had been severed by March 3, 2010, the date as of which the Area Office determined Appellant's size. Although Mr. Cottingham resigned from Phacil in December 2008, he maintained a tie to Phacil through his contract for government affairs and public relations work. The ties between Appellant and Messrs. Collado and Mornell as its 23% owners were severed on May 22, 2009. The subcontract for work at Treasury ended in 2009. Mr. Cottingham's contract with Phacil ended on May 31, 2010, two months after March 3, 2010. The subcontract for work at the Nuclear Regulatory Commission is still ongoing. Thus, two ties to Phacil remained in place on March 3, 2010, the date as of which Appellant's size was determined. Because these two ties remained, Appellant has not demonstrated a clear line of fracture between itself and Phacil and, therefore, has not rebutted affiliation under the newly organized concern rule.

Accordingly, I conclude the Area Office correctly found that Appellant is affiliated with Phacil under the newly organized concern rule.<sup>3</sup>

2. Appellant is other than small.

The size regulations provide that, in calculating a concern's size, its own average annual receipts are added to those of each affiliate. 13 C.F.R. § 121.104(d)(1). Here, although Appellant by itself is small under the \$7 million size standard for NAICS code 541990, it has one affiliate, Phacil, whose receipts undisputedly exceed that size standard. Thus, Appellant's average annual receipts, when added to those of Phacil, also exceed the \$7 million size standard.

Accordingly, Appellant is other than small under the applicable \$7 million size standard.

V. Conclusion

For the reasons stated above, I conclude that the Area Office did not base its determination that Appellant is other than small under the \$7 million size standard upon clear error of fact or law.

Accordingly, the Size Determination is AFFIRMED. Appellant's appeal is DENIED.

This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(b).

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CHRISTOPHER HOLLEMAN  
Administrative Judge

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<sup>3</sup> In light of this conclusion, I need not discuss the identity of interest (economic dependence) and totality of the circumstances grounds cited by the Area Office.