

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

SIZE APPEAL OF:

Elite Construction Management
Corporation,

Appellant,

Appealed From
Size Determination No. 01-SD-2014-24

SBA No. SIZ-5565

Decided: June 10, 2014

APPEARANCE

Mitesh M. Patel, Esq., Mavinkurve & Patel, LLC, Iselin, New Jersey, for Appellant

DECISION

I. Introduction and Jurisdiction

This appeal arises from a Small Business Administration (SBA) size determination issued to Elite Construction Management Corporation (Appellant) in conjunction with Appellant's application for 8(a) Business Development certification. In the size determination, SBA's Office of Government Contracting, Area I (Area Office) found that Appellant was not a small business.

Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the determination and find Appellant to be an eligible small business. 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. Size Determination

On February 19, 2013, Appellant submitted its 8(a) application. On February 10, 2014, SBA's Division of Program Certificate and Eligibility (DPCE) questioned Appellant's eligibility

as a small business in connection with its 8(a) application, and requested that the Area Office perform a formal size determination of Appellant. Appellant's primary North American Industry Classification System (NAICS) code is 238390, Other Building Finishing Contractors. The size standard associated with this NAICS code is \$14 million in average annual receipts.

On April 24, 2014, the Area Office determined Appellant was not an eligible small business under the \$14 million size standard because it was affiliated with 27 other companies based on familial identity of interest, 13 C.F.R. § 121.103(f). The Area Office explained that Appellant is wholly owned by Mr. Sumeet Desai, who is also the president and sole member of Appellant's board of directors. Mr. Desai has minority ownership interests in four other companies, two of which are also minority owned by his father, Suresh Desai, and brother, Sapan Desai. In all, Messrs. Sumeet, Suresh, and Sapan Desai have ownership interests in 27 companies other than Appellant.¹

The Area Office then explained that, although the presumption that family members share an identity of interest is rebuttable, the Area Office did not offer Appellant the opportunity to rebut the presumption because the Area Office had “not completed the identity of interest finding.” The Area Office then explained that it had requested the complete ownership information for the 27 companies in question, but the information Appellant provided was incomplete and inconsistent. The Area Office also requested tax returns or other financial statements for 25 companies, but Appellant supplied this information for only four companies. As a result, the Area Office applied the adverse inference rule, 13 C.F.R. § 121.1008(d), and determined Appellant was affiliated with the 27 companies in which the Desais also have ownership interests.

Further, the Area Office noted, there are certain ties between Appellant and one of the affiliates, Shrinath, Inc. (Shrinath), which preclude a finding of clear fracture. First, Shrinath, which is wholly owned by Sumeet Desai's parents, offered Appellant office space rent-free from Appellant's inception in 2010 until January 2014, when Appellant began paying \$300 per month in rent. Shrinath also hired Elite to repair flood damage at Shrinath's offices.

B. Appeal Petition

On May 20, 2014, Appellant filed the instant appeal of the size determination with OHA. Appellant maintains that the size determination is clearly erroneous and should be overturned.

¹ These companies are Blend Concept Group, LLC; Cookstown Hospitality Group, LLC; Dhan Laxmi Investments, LLC; Dynamite Real Estate, Inc.; Govind Hospitality Group, LLC; Jaykishan Hospitality Group, LLC; Jessup Star LLC; JSK Distribution; JSK Holdings of Orlando, Inc.; London Beverage, LLC; Midtown Hospitality, LLC; NJMD Management, Inc.; Palak, LLC; Pikesville Hospitality Group, Inc.; Pikesville Hospitality Investors, LLC; Rainbow Heaven Distribution, LLC; Rainbow Hospitality, Inc.; Shreeji Real Estate, L.P.; Shrinath, Inc.; Stadium Hospitality Group, LLC; Sunshine Investments, Inc.; Terrapin Hospitality, Inc.; Towson Hospitality, LLC; Trent Motel Associates, L.P.; Waukegan Hospitality Group, LLC; and York Hospitality Group, LLC.

Appellant argues it is not affiliated with 24 of the 27 entities the Area Office listed. First, Appellant contends, the Desais have no ownership interest at all in JSK Distribution. Of the 26 companies in which the Desais actually have ownership interests, Appellant argues it is not affiliated with 24 of them because the Desais' ownership interests are so insignificant that they cannot exercise control over these firms. *Size Appeal of U.S. Grounds Maintenance, Inc.*, SBA No. SIZ-4601 (2003). Only two firms, Dynamite Real Estate, Inc. and Shrinath, Inc., are sufficiently owned by a Desai family member, such that the ability to control exists.

Next, Appellant argues, there is a clear line of fracture among the Desai family members. Although Appellant's owner and his family members have common investments in four other firms, these are minority ownership interests. The bulk of the affiliates are located in states far away from New Jersey, where Appellant is located. Appellant does not share officers, employees, or equipment with any of the alleged affiliates, and Appellant is in an entirely different line of business than these firms and has different customers.

Appellant argues the Area Office should not have focused on Appellant's previous dealings with Shrinath, Inc. These historic ties, Appellant contends, do not establish current affiliation because they concluded in 2012 and therefore did not exist as of the date for determining size. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 12 (2013).

Appellant then addresses the Area Office's statement that its information was incomplete and contained inconsistencies. Appellant explains that “[a]ny inconsistencies in the submitted data was the result of [Appellant's] lack of information at the time.” Appeal at 10. Appellant claims that the “substantial submissions over the years and the evidentiary record before the tribunal confirms that [Appellant] has been forthcoming in revealing all information within its possession.” *Id.*

Appellant contends that even assuming Appellant is affiliated with all firms in which the Desai family has ownership interests, Appellant is still small under the \$14 million size standard.

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. Analysis

Concerns are affiliated when one concern controls or has the power to control the other, or a third party controls or has the power to control both. 13 C.F.R. § 121.103(a)(1). SBA considers factors such as ownership, management, and previous relationships or ties to another

concern, and contractual relationships, in determining whether control exists. 13 C.F.R. § 121.103(a)(2). A challenged concern's size is calculated by adding its annual receipts to the annual receipts of each affiliate. 13 C.F.R. § 121.104(d)(1).

Under the identity of interest rule, affiliation may arise among two or more individuals or firms if they have identical or substantially identical business interests. 13 C.F.R. § 121.103(f). Individuals or firms affiliated through an identity of interest will be treated as one party with their interests aggregated. *Id.* Here, the Area Office did not complete the identity of interest finding because it did not receive the complete ownership information for the 27 firms it was investigating. Instead, the Area Office applied the adverse inference rule to find that the Desai family members control the firms in which they have ownership interests and that Messrs. Sumeet, Suresh, and Sapan Desai have substantially identical business interests.

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).

OHA has established a three-part test for assessing whether an adverse inference is appropriate. First, the requested information must be relevant; that is, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the protested concern and the concern about which the information is requested. Third and finally, the request for information must be specific. If all three criteria are met, the challenged concern must produce the requested information or suffer the consequences of an adverse inference. *E.g., Size Appeal of AudioEye, Inc.*, SBA No. SIZ-5477, at 9-10 (2013).

Appellant does not address this three-part test. Nevertheless, I find, based on SBA regulations and the record before me, that the Area Office properly applied the adverse inference rule. Because the Area Office was investigating whether the Desai family had an identity of interest, it was necessary to consider their investments and whether they were able to control the companies in which they invested. 13 C.F.R. § 121.103(f); *Size Appeal of Seacon Phoenix, LLC*,

SBA No. SIZ-5523, at 3 (2013). For the Area Office to determine whether there was the ability to control based on ownership, the Area Office needed to consider the Desai family members' ownership interests with respect to the other ownership interests in these firms. 13 C.F.R. § 121.103(c)(2). Finally, tax returns or financial statements were necessary to determine whether these firms were small businesses. *Id.* § 121.104(d)(1). Accordingly, these firms' complete ownership information and tax returns or financial statements were relevant to the size investigation. There was also a sufficient level of connection between Appellant and these firms because the Desai family admittedly had ownership interests in at least 26 of them.² Finally, the record confirms that the Area Office specifically requested these documents. Accordingly, I conclude that the Area Office's requests for information met the three-part test to determine whether the Area Office properly drew an adverse inference from Appellant's failure to submit the information requested. It was therefore not clear error for the Area Office to draw the adverse inference.

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

² Because the Area Office properly inferred that Appellant is affiliated with many other companies and that these other companies are not small businesses, it does not change the outcome of the size determination if no Desai family member has ownership interests in JSK Holdings. Therefore, assuming the Area Office erred on this point, such error is harmless.