

Small Business Administration (S.B.A.)
Office of Hearings and Appeals

[Size Appeal]
IN THE MATTER OF:
SP TECHNOLOGIES, LLC, APPELLANT

SBA No. SIZ-5319
Size Determination No. 2-2011-169

January 20, 2012

Appearances

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And

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For Appellant SP Technologies, LLC.

DECISION

I. Jurisdiction

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.

II. Issue

Whether the Area Office made a clear error of fact or law in concluding two concerns are affiliated under an identity of interest through a family relationship.

III. Background

A. The DPCE Referral

On December 10, 2010, SP Technologies, LLC (Appellant), applied for admission into the Small Business Administration (SBA) 8(a) BD program. On June 24, 2011, SBA's Associate Administrator for Business Development (AA/BD) denied Appellant's application. The AA/BD stated that Appellant was reliant for all of its 2008 and 2009 revenues upon Technology Ventures, LLC (TVL). The AA/BD further stated that Appellant was potentially affiliated with TVL based upon a family identity of interest.

On August 5, 2011, Appellant filed a request for reconsideration. On September 6, 2011, SBA's Director of the Division of Program Certification and Eligibility (DPCE) requested that the SBA Office of Government Contracting perform a size determination on Appellant in connection with Appellant's application for admission to SBA's 8(a) BD program. The DPCE identified the principal issue as whether Appellant was affiliated with TVL.

On October 11, 2011, SBA's Office of Government Contracting — Area II, in King of Prussia, Pennsylvania (Area Office), contacted Appellant and informed Appellant that its size had been questioned in connection with its application for participation in the 8(a) BD program, and requested Appellant complete an SBA Form 355, together with certain other information. The Area Office informed Appellant it would use North American Industry Classification

System (NAICS) code 541611, Administrative Management and General Management Consulting Services, with a corresponding \$7 million annual receipts size standard, to determine Appellant's size.

The record reflects that Ms. Pratima Damani is Appellant's Chief Executive Officer and sole shareholder. Appellant was formed in 2001 and Ms. Damani's husband, Sundeep Damani was at that time a 49% shareholder, and Ms. Damani was a 51% shareholder. On January 1, 2009, Mr. Damani transferred his entire interest to Ms. Damani, and Ms. Damani became Appellant's sole shareholder.

Ms. Damani has never worked for TVL. Ms. Damani was employed by the Federal National Mortgage Association (Fannie Mae) from 2004 to September, 2010, and ran Appellant on a part-time basis. In September, 2010, Appellant left Fannie Mae in order to concentrate her full-time efforts on Appellant.

Mr. Damani holds a 24.98% interest in TVL. TVL has two other members, Sharad Tak and Jitendra Vyas, who own 45.5% and 30.52% shares of the concern, respectively. Appellant asserts TVL is in a different line of business covered by NAICS code 541511, Custom Computer Programming Services. Under TVL's Operating Agreement, members shall vote in proportion to their respective membership interests, and actions requiring a majority of the members shall be authorized if more than 50% of the outstanding membership interests entitled to vote approve of the action. TVL is managed by a Board of Managers consisting of all three members.

In 2008, 2009, and in 2010 prior to July, 100% of Appellant's revenues came from TVL. Appellant's total revenue in each of these years was less than \$200,000. After June 30, 2010, Appellant has received no revenue from TVL. Appellant stated that since June 30, 2010, it has had no business dealings with TVL, and it anticipates there will be no further dealings.

On October 31, 2011, Appellant informed the Area Office that the ceiling value of its subcontracting agreement with Booz Allen Hamilton (BAH) has been increased to \$500,000, and the period of performance extended to June 30, 2013.

B. The Size Determination

On November 1, 2011, the Area Office issued the subject size determination, finding Appellant other than small. The Area Office examined Appellant's receipts for the years 2008, 2009, and 2010 and concluded that Appellant, taken by itself, is a small business.

The Area Office further noted the rule set forth in *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007), that if a concern derives 70% or more of its revenue from one concern, that concern is economically dependent upon the second concern, and thus affiliated with it under the identity of interest rule. The Area Office found that revenues from TVL represented 98% of Appellant's 2008-2010 receipts. Nevertheless, the Area Office further found that Appellant had ceased doing business with TVL, and did not anticipate conducting any further business with TVL. The Area Office also noted Appellant's increased BAH subcontract. The Area Office thus concluded Appellant had rebutted the presumption of an identity of interest with TVL due to economic dependency.

Nevertheless, the Area Office concluded there was an identity of interest between Appellant and TVL due to the familial relationship with Mr. Damani because: (1) The Damanis are married; (2) Over the 2008-2010 period, 98% of Appellant's revenue came from TVL; (3) Mr. Damani had previously held a key position with and owned a 49% interest in Appellant; (4) Mr. Damani owns a 24.98% interest in TVL, and is a key member of its management team; (5) Appellant and TVL are in related lines of business.

The Area Office relied upon *Size Appeal of Condor Reliability Services, Inc.*, SBA No. SIZ-5116 (2010), holding there is a rebuttable presumption that family members have identical interests and must be treated as one person, a presumption that arises from the family relationship itself. The concerns in question need not have common management and common ownership to be found affiliated.

The Area Office thus concluded that Appellant and TVL were affiliated, and after reviewing TVL's annual receipts, concluded Appellant was other than small.

C. The Appeal

On November 8, 2011, Appellant received the size determination. On November 18, 2011, Appellant filed the instant appeal.

Appellant asserts Mr. Damani does not control TVL, and further asserts that under SBA regulations, Mr. Tak, TVL's largest single shareholder, must be found to control the concern. Further, Mr. Damani is not TVL's highest officer, and thus does not have power to control the concern. Appellant further asserts that Mr. Damani and Ms. Damani have no role in each other's businesses. At the date for determining size, Mr. Damani had no ownership or role in Appellant.

Further, Appellant asserts it and TVL are not in related businesses. Appellant argues that simply falling within the two-digit NAICS sector does not mean the businesses are in related fields. TVL's NAICS code 541511 comprises establishments engaged in dealing with software, Appellant's NAICS code 541611 comprises establishments engaged in providing management advice.

Finally, Appellant asserts the Area Office misrepresented Appellant's annual receipts, and that even if it is affiliated with TVL, it is an eligible small business. The Area Office should have excluded from its calculation of receipts revenues Appellant received from TVL.

Appellant also moves for the admission of additional documents into the record. Appellant asserts it submitted these documents with its 8(a) application, and these documents should have been included in the record before the Area Office.

IV. Discussion

A. Timeliness, New Evidence and Standard of Review

Appellant filed its appeal within 15 days of receiving the size determination. Thus, the appeal is timely. 13 C.F.R. § 134.304(a).

Appellant seeks to enter into the record evidence not considered by the Area Office. Evidence not previously presented to the Area Office will not be considered unless the Administrative Judge orders its submission or a motion is filed and served establishing good cause for its submission. 13 C.F.R. § 134.308(a). After reviewing Appellant's proposed submissions, I conclude they do not add any evidence of significance to the record, and I DENY Appellant's motion to admit them into the record.

The standard of review for this appeal is whether the Area Office based its 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. See *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775 (2006), for a full discussion of the clear error standard of review. 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.

B. The Merits

SBA's regulations provide that concerns are affiliated when one controls or has the power to control the other. 13 C.F.R. § 121.103(a). The key concept of affiliation is whether one concern controls or has the power to control the other. *Size Appeal of GPA Technologies, Inc.*, SBA No. SIZ-5307, at 7 (2011). One of the grounds for finding control is whether the concerns' principals have an identity of interest. "Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests ... such as family members ... may be treated as one party with such interests aggregated." 13 C.F.R. § 121.103(f).

The Area Office found Appellant was not affiliated due to economic dependence upon TVL, despite TVL's being the source of nearly all of its receipts. The Area Office decided that the rule set forth in *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834 (2007), that a concern dependent upon another concern for over 70% of its re-

ceipts is economically dependent upon the second concern, is not applicable here. The Area Office reasoned that because Appellant had ended its business relationship with TVL, and had begun a new relationship with BAH, the rule was not applicable.

I find that the Area Office did not commit a clear error in its finding. OHA has recently held that, despite *Faison*, a concern may be found not to be affiliated with a concern which is responsible for all or nearly all of its revenue if the “mechanical application of the rule ... would be an injustice”...“places too large a significance on too small a contract” and “would unduly penalize start-up operations, which may have had a chance to obtain only one or two contracts at the time they face a size determination”. *Size Appeal of Argus and Black, Inc.*, SBA No. SIZ-5204, at 6 (2011). Here, Ms. Damani has operated Appellant as a part-time job until September, 2010, with only TVL as a customer. Ms. Damani has now taken on Appellant as her full-time occupation, terminated the business relationship with TVL, and acquired new customers. A mechanical application of the *Faison* rule in this case would be an injustice where there is no longer any business relationship between the concerns, the receipts involved were never a large amount, representing only one contract, and Appellant had only just begun to operate as a full-time concern. The Area Office, therefore, did not err in finding Appellant was not affiliated with TVL under the economic dependence rule.

The Area Office did however find Appellant affiliated with TVL as a result of the identity of interest because of family relationship between the concerns' principals.

OHA's long-standing case precedent interprets the identity of interest rule as creating a rebuttable presumption that family members have identical interests and must be treated as one person. *See, e.g., Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 6 (2011); *Size Appeal of Golden Bear Arborists, Inc.*, SBA No. SIZ-1899, at 7 (1984). The presumption arises, not from the degree of family members' involvement in each others' business affairs, but from the family relationship itself. *Size Appeal of Allied Safety and Envtl. Distributing, Inc.*, SBA No. SIZ-5209, at 4 (2011); *Size Appeal of Gallagher Transfer & Storage Co., Inc.*, SBA No. SIZ-4295, at 6 (1998). The concept is that the persons will, because of the commonality of their interests, act in concert or as one. *Size Appeal of DooleyMack Govt. Contracting, LLC*, SBA No. SIZ-5085, at 6 (2009); *Size Appeal of Bob Jones Realty Co.*, SBA No. SIZ-4059, at 5 (1995). The presumption of affiliation may be rebutted with evidence showing that the interests deemed to be one are in fact separate. 13 C.F.R. § 121.103(f); *Bob Jones*, SIZ-4059, at 5. In order to rebut the presumption, the family members may show that they do not have an identity of interests, that they are estranged or not otherwise involved with each other's business affairs, and that there has been a clear line of fracture between them. *Size Appeal of Hal Hays Constr., Inc.*, SBA No. SIZ-5217, at 6 (2011).

However, a minimal amount of economic or business activity between two concerns does not mandate a finding of clear fracture. A small amount of economic activity is not sufficient to create a commonality of interests to make two concerns act in concert or as one. *GPA Technologies*, at 7. The family members in question need not be estranged in order to support a finding of clear fracture. *Id.* This is in line with the principle laid down in *Golden Bear*, that the presumption of affiliation may be rebutted “[w]ith factors which would render the application of the regulation unjust or inequitable under the circumstances.” *Golden Bear*, at 7, cited in *GPA Technologies*, at 7. Factors that have supported a finding of clear fracture include the concerns having different facilities, having different locations, and being in different lines of business. *GPA Technologies*, at 7.

Here, the Area Office found affiliation between TVL and Appellant based upon the family relationship between the Damanis. However, the record reflects that the concerns are in different locations. Further, despite the Area Office's conclusory statement to the contrary and supported by no analysis or discussion, the concerns are in different line of business. Appellant's line of business is Administrative Management and General Management Consulting Services, which covers concerns engaged in providing operating advice and assistance to businesses and other organizations on administrative management issues, and also includes concerns which are general management consultants. *NAICS Manual*,^[FNal] at 743. TVL's line of business is Custom Computer Programming Services, which is writing, modifying, testing, and supporting computer software to meet the needs of a particular customer. *NAICS Manual*, at 740. Thus, Appellant's line of business is management consulting, while TVL's is in the field of Information Technology, producing software. The Area Office erred in finding Appellant and TVL, and thus the Damanis, in the same line of business.

Further, by Mr. Damani's divesting himself of his stock in Appellant, and Appellant's ending its business relationship with TVL, the Damanis created a clear fracture between their business interests. The Area Office clearly erred in considering Mr. Damani's past ownership in Appellant as a factor supporting a lack of clear fracture, because Mr. Damani no longer owned any interest in Appellant at the time of its application, the date for determining its size. 13

C.F.R. § 121.404(b). Accordingly, Mr. Damani's past interest in Appellant was no longer relevant, as Appellant's size must be determined as of the date set by the regulation. *Size Appeal of Innovative Construction & Management Services, LLC*, SBA No. SIZ-5202, at 7-8 (2011).

The Area Office also clearly erred in finding Appellant's past receipts from TVL as a ground for finding identity of interest based upon the family relationship, which receipts the Area Office had just determined were not grounds for finding identity of interest based upon economic dependence. The Area Office failed to explain why it then included these receipts as a basis for finding identity of interest based upon familial ties. Because Appellant had severed its business connection with TVL, I find that the Area Office should not have used these receipts as a ground for finding identity of interest based upon the family relationship.

I thus conclude that Appellant had achieved a clear fracture between the business interests of Mr. and Ms. Damani. The two concerns no longer did business with each other, Mr. Damani owned no interest and held no office in Appellant, Ms. Damani owned no interest and held no office in TVL, and TVL and Appellant were located in different facilities and engaged in different lines of business.

Further, even if the Damanis are to be counted as one person, the Area Office failed to establish that this conclusion requires a finding of affiliation between Appellant and TVL. Mr. Damani holds only a 24.98% interest in TVL. Affiliation is based upon control and power to control, and Mr. Damani's minority interest cannot be said to control TVL. Mr. Damani can be outvoted by the two other members at any time. He is not TVL's highest officer. A finding of affiliation based upon family identity of interest requires the family member to have the power to control the alleged affiliate. *Size Appeal of STA Technologies, Inc.*, SBA No. SIZ-4790, at 5 (2006). Here, even with the family relationship between the Damanis, there is no evidence that either Appellant or TVL can control the other or that a third party can control both. Without that finding, there can be no conclusion that the concerns are affiliated. *Size Appeal of Manroy USA, Inc.*, SBA No. SIZ-5244, at 5 (2011).

Moreover, Mr. Tak, as holder of the largest share of TVL as compared to all other holdings, must be presumed to control TVL. 13 C.F.R. § 121.103(c)(1); *Size Appeal of Cellegy Pharmaceuticals, Inc.*, SBA No. SIZ-4439, at 5 (2001). OHA has found that shareholders with minority interests similar to Mr. Tak's control their concerns. *Size Appeal of The H.L. Turner Group, Inc.*, SBA No. 4896, at 5 (2008) (a block of stock representing 49% share controls when the next largest block represents a 36% share); *Size Appeal of U.S. Grounds Maintenance, Inc.*, SBA No. SIZ-4601, at 3, 10 (2003) (a block of stock representing 46.67% share controls when the next largest block represents a 33.333% share). Therefore, because Mr. Tak controls TVL, Mr. Damani does not, and because Mr. Damani does not control TVL, it cannot be said to be affiliated with Appellant, even if there is no clear fracture between the Damanis.

Accordingly, I conclude that the Area Office clearly erred in finding Appellant other than small due to affiliation with TVL, based upon an identity of interest. Therefore, Appellant has met its burden of finding clear error in the size determination. I must therefore reverse the size determination, and grant the instant appeal.

V. Conclusion

Appellant met its burden of proving that the Area Office committed clear errors of law based upon the record before it. Accordingly, this appeal is GRANTED, and the Size Determination is REVERSED. Appellant is an eligible small business.

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

Christopher Holleman
Administrative Judge

FN1. Executive Office of the President, Office of Management and Budget, *North American Industry Classification System-United States (2007) (NAICS Manual)*, available at www.census.gov.