SIZE APPEAL OF:

Altendorf Transport, Inc.

Appellant,

Appealed From
Disaster Loan Application No. 0005359379

SBA No. SIZ-5596
Decided: September 15, 2014

APPEARANCE

Christopher R. Shiplett, Esq., Watson & Associates, LLC, Denver, Colorado, for Appellant

DECISION

I. Introduction

This appeal arises from a size determination issued by the U.S. Small Business Administration (SBA) Office of Disaster Assistance, Loan Processing and Disbursement Center (Disaster Office) concluding that Altendorf Transport, Inc. (Appellant or ATI) is not a small business for purposes of receiving an Economic Injury Disaster Loan (EIDL). Appellant appealed the size determination to SBA's Office of Hearings and Appeals (OHA) on July 1, 2014, contending that the size determination is clearly erroneous. 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.

1 This decision was originally issued under the confidential treatment provision of 13 C.F.R. § 134.205. OHA received one or more requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.
II. Background

A. Prior Proceedings

On November 17, 2012, Appellant applied for an EIDL following a drought disaster that commenced on July 10, 2012. On November 30, 2012, the Disaster Office issued an informal decision declining Appellant's EIDL application because Appellant was not a small business under the size standard corresponding to Appellant's primary industry, North American Industry Classification System (NAICS) code 115113, Crop Harvesting, Primarily by Machine. NAICS code 115113 has a size standard of $7 million average annual receipts.

On December 6, 2012, Appellant requested a formal size determination from the Disaster Office, and presented evidence and argument that its primary industry is NAICS code 484230, Specialized Freight (except Used Goods) Trucking, Long-Distance. NAICS code 484230 has a corresponding average annual receipts size standard of $25.5 million. On May 29, 2013, the Disaster Office issued its formal size determination, again finding that Appellant's primary industry is NAICS code 115113 after analyzing Appellant's annual receipts for the years 2009, 2010, and 2011. The Disaster Office again concluded that Appellant is not a small business.

On June 28, 2013, Appellant appealed the May 29, 2013 formal size determination to OHA. On July 22, 2013, OHA issued its decision in Size Appeal of Altendorf Transport, Inc., SBA No. SIZ-5487 (2013) (Altendorf I). OHA vacated the size determination and remanded the matter to the Disaster Office for a new size determination with instructions to determine whether Appellant's primary industry is NAICS code 115113, NAICS code 484230, or NAICS code 484220 (Specialized Freight (except Used Goods) Trucking, Local2), based upon Appellant's receipts only for the year 2011, the most recently completed fiscal year as of the date the disaster commenced.

In reaching this decision, OHA found that Appellant is a firm which performs both harvesting and trucking activities. OHA determined that “trucking the harvesting firm's equipment to and from the fields to do [harvesting] work is part of the harvesting process.” Altendorf I, SBA No. SIZ-5487, at 6. As a result, the Disaster Office correctly considered the transportation of harvesting equipment under NAICS code 115113. Id. The “transportation of [harvested] grain to onsite, local or regional storage facilities,” though, is a trucking rather than harvesting function, and “such trucking falls within NAICS code 484220 or 484230, depending on whether the trucking is local or long distance.” Id. at 6-7. OHA continued:

It is simply not clear from the record how much of Appellant's trucking receipts represent local trucking of agricultural products, that is, trucking within a metropolitan area, which must be classified under NAICS code 484220; long distance trucking of agricultural products, that is, trucking beyond a metropolitan area, which must be classified under NAICS code 484230; or trucking of

2 Like NAICS code 484230, NAICS code 484220 has a corresponding size standard of $25.5 million average annual receipts.
Appellant's own harvesting equipment, which must be classified under NAICS code 115113.

On remand, I instruct the Disaster Office to conduct a thorough investigation as to whether the trucking associated with combining contracts is local, long-distance, or some combination of the two. It must give Appellant the opportunity to comment and submit evidence on this issue. The Disaster Office must then determine which NAICS code represents the largest portion of Appellant's revenues, employees, and costs of doing business for 2011, its most recent completed fiscal year. Once the Disaster Office has determined which NAICS code represents the greatest portion of Appellant's business for the most recently completed fiscal year, it can [then] make its determination as to which code represents Appellant's primary industry.

*Id. at 7.*

B. Appellant's Submissions and Arguments After Remand

Appellant made additional submissions to the Disaster Office on October 22, 2013. These included a 16-page letter presenting Appellant's argument that its primary industry is NAICS code 484230, Specialized Freight Trucking, Long Distance. Among the 12 exhibits Appellant presented are Exhibit D (109 pages), which lists miles traveled by each truck; Exhibit E (32 pages), summary by vehicle; and Exhibit L (58 pages), trip length tables.

Much of Appellant's argument concerned the accounting system that Appellant had used in 2011 and the difficulty in separating revenues and expenses among Appellant's various lines of business for that year. In particular, Appellant often sold to its customers two services -- combine harvesting and trucking the harvested crop — for a single price, so its invoices do not cleanly identify prices for each operation. This same accounting methodology is carried through to Appellant's financial statements and reflected in its 2011 Profit and Loss Statement.

Thus, Appellant's Income Account 400000 - Combine Revenue, includes receipts not only from combine harvesting, but also from trucking the just-harvested crop in the many instances where both services were sold as one package to the farmer. (Oct. 22, 2013, Letter at 7.) There are analogous issues in the Expense accounts.

Appellant's 2011 Profit and Loss Statement is as follows:

<table>
<thead>
<tr>
<th>Income</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>400000 Combine Revenue</td>
<td>XXX</td>
</tr>
<tr>
<td>410000 Trucking Revenue</td>
<td>XXX</td>
</tr>
<tr>
<td>420000 Equipment Lease Revenue</td>
<td>XXX</td>
</tr>
<tr>
<td>430000 Custom &amp; Precision Ag Revenue</td>
<td>XXX</td>
</tr>
<tr>
<td>440000 Interest &amp; Finance Chg Revenue</td>
<td>XXX</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>XXX</strong></td>
</tr>
</tbody>
</table>
Expense

<table>
<thead>
<tr>
<th>Line of business</th>
<th>NAICS</th>
<th>Receipts</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>501000 Combine &amp; Tractor Operations</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>503000 Trucking Operations</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>506000 Vehicle Operations</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>600000 Field Employment Costs</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>620000 Travel &amp; Recruiting Operations</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>700000 Field Expenses</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>710000 Ardoch Operation Expense</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>800100 General &amp; Administrative</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>800200 Finance Costs</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>800300 Insurance</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>899999 Misc. Expense</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
<tr>
<td>Total</td>
<td>XXX</td>
<td>XXX</td>
<td>XXX</td>
</tr>
</tbody>
</table>

(Id. at 2-3.)

In addition to needing to separate combine harvesting from trucking, Appellant had to separate local trucking from long-distance trucking because local and long-distance trucking are two separate industries with separate NAICS codes. In this regard, Appellant contended that according to the NAICS Manual local trucking establishments provide trucking “within a metropolitan area” whereas long-distance establishments provide trucking “between metropolitan areas” and that, because nearly all of Appellant's trucking activity takes place in rural areas, outside of any metropolitan area, Appellant's primary industry should be considered long-distance trucking. (Id. at 9-10.) Appellant asserted that the majority of Appellant's 2011 business was in long-distance trucking, NAICS code 484230, because 99% of its trucking work, whether or not associated with harvesting, occurred outside a metropolitan area. Appellant calculated that its 2011 receipts and costs break out as follows:

<table>
<thead>
<tr>
<th>Line of business</th>
<th>NAICS</th>
<th>Receipts</th>
<th>Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crop Harvesting, Primarily by Machine</td>
<td>115113</td>
<td>XX%</td>
<td>XX%</td>
</tr>
<tr>
<td>Specialized Freight Trucking, Local</td>
<td>484220</td>
<td>XX%</td>
<td>XX%</td>
</tr>
<tr>
<td>Specialized Freight Trucking, Long Distance</td>
<td>484230</td>
<td>XX%</td>
<td>XX%</td>
</tr>
<tr>
<td>Equipment Lease</td>
<td>532490</td>
<td>XX%</td>
<td>XX%</td>
</tr>
</tbody>
</table>

(Id. at 13-14.) Thus, Appellant reasoned, because long-distance trucking accounts for the largest share of Appellant's receipts and costs, Appellant's primary industry is NAICS code 484230.

Appellant arrived at these figures by analyzing its 2011 truck logs. These logs are kept for each truck giving date, driver, loads, customer, and starting/ending odometer readings. Appellant sorted each of the [XXX] miles driven into four categories of trucking:
### C. Size Determination After Remand

On June 12, 2014, the Disaster Office issued the instant size determination. After recapping the prior proceedings, the Disaster Office summarized Appellant's October 22, 2013, submission and Appellant's contention that 99% of all of its trucking in 2011 was long-distance. (Size Determination at 4.) The Disaster Office determined the distinction between local and long-distance trucking in the NAICS Manual was not helpful, because it referred to “metropolitan areas” while Appellant's trucking operations occurred almost entirely in rural areas. (Id. at 4-5.)

The Disaster Office rejected Appellant's reasoning that the overwhelming majority of its trucking miles were long-distance because in rural areas, instead basing its analysis on various U.S. Department of Transportation (DOT) regulations defining long-haul vs. short-haul trucking. (Id. at 5-6.) According to the Disaster Office's analysis, 535 of Appellant's 654 invoices, or 81.8%, involved trip distances of 100 miles or less. “This statistic is a clear indication of the overall short-haul nature of [Appellant's] trucking operation.” (Id. at 7.)

Next, the Disaster Office classified Appellant's receipts for 2011 as follows:

<table>
<thead>
<tr>
<th>Line of business</th>
<th>NAICS</th>
<th>2011 Receipts</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crop Harvesting, Primarily by Machine</td>
<td>115113</td>
<td>$XXX</td>
</tr>
<tr>
<td>Specialized Freight Trucking, Local</td>
<td>484220</td>
<td>$XXX</td>
</tr>
<tr>
<td>Specialized Freight Trucking, Long Distance</td>
<td>484230</td>
<td>$XXX</td>
</tr>
<tr>
<td>Equipment Lease</td>
<td>532490</td>
<td>$XXX</td>
</tr>
</tbody>
</table>

(Id.)
Based on this data, the Disaster Office concluded that Appellant's primary activity remains NAICS code 115113, Crop Harvesting, Primarily by Machine, with an average annual receipts size standard of $7 million. Appellant's average annual receipts for its last three completed fiscal years exceed the size standard, so Appellant is not a small business and is ineligible for an EIDL. (Id. at 8.)

D. Appeal

On July 1, 2014, Appellant filed its appeal of the size determination with OHA. Appellant maintains that the Disaster Office improperly concluded that Appellant is other than small, committing three clear errors of fact and law in the process. Specifically, Appellant asserts the Disaster Office: (1) failed to follow OHA's instructions in Altendorf I to distinguish between local and long-distance trucking on the basis of “within” as opposed to “beyond” a metropolitan area; (2) erred in concluding that a trip under 100 miles is “local” and a trip over 100 miles is “long distance”; and (3) erred in determining trip length based on estimates of trip length rather than the drivers' log books. (Appeal at 1-2.)

First, Appellant argues, the Disaster Office made an error of law by not following OHA's instructions on remand to distinguish between local and long-distance trucking on the basis of whether it occurred “within” as opposed to “beyond” a metropolitan area. The Disaster Office clearly erred in basing its analysis, and doing so without explanation, on the unrelated outside source of DOT regulations, rather than on the NAICS code definitions. (Id. at 7-8.)

Second, Appellant contends that the Disaster Office erred in determining that a trip under 100 miles is local and a trip over 100 miles is long distance, thereby drawing an arbitrary distinction between the two types of trucking. Appellant argues that, according to the NAICS definitions, all long-distance trucking establishments provide trucking “between metropolitan areas” and the Disaster Office erred in selecting a different definition. Further, the Disaster Office's approach is “at odds with” the NAICS definitions in situations where a haul covering over 100 miles occurs entirely within a metropolitan area, or where a haul occurs between cities that are less than 100 miles apart. (Id. at 8-11.)

Third, the Disaster Office made factual errors in declining to use Appellant's driver log books to determine the length of each trip made, relying instead on estimates of trip length by invoice. (Id. at 11-12.)

Based on these alleged errors, Appellant asserts the Disaster Office improperly found that Appellant's primary industry is NAICS code is 115113, Crop Harvesting, Primarily by Machine. Likewise, the Disaster Office's conclusion that Appellant is not an eligible small business for the EIDL is erroneous. Appellant requests that OHA overturn the size determination or vacate it and remand the matter for another size determination based on OHA's previous instructions and the driver logs. (Id. at 12-13.)
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 that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb a size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that SBA erred in making its key findings of fact or law. Size Appeal of Taylor Consultants, Inc., SBA No. SIZ-4775, at 11 (2006).

B. NAICS Manual Definitions

The NAICS Manual describes NAICS code 115113, Crop Harvesting, Primarily by Machine, as comprising:

establishments primarily engaged in mechanical harvesting, picking, and combining of crops, and related activities. The machinery used is provided by the servicing establishment.

NAICS Manual at 156.

The NAICS Manual describes NAICS code 484220, Specialized Freight (except Used Goods) Trucking, Local, as comprising:

establishments primarily engaged in providing local, specialized trucking. Local trucking establishments provide trucking within a metropolitan area that may cross state lines. Generally the trips are same day return.

Id. at 627. The NAICS Manual includes “[l]ocal agricultural products trucking” as one of the industries under this code. Id. In discussing Truck Transportation subsector generally, the NAICS Manual states that “[l]ocal trucking establishments primarily carry goods within a single metropolitan area and its adjacent nonurban areas.” Id. at 623.

The NAICS Manual describes NAICS code 484230, Specialized Freight (except Used Goods) Trucking, Long Distance, as comprising:

establishments primarily engaged in providing long-distance specialized trucking. These establishments provide trucking between metropolitan areas that may cross North American country borders.

Id. at 628.

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C. Analysis

SBA regulations stipulate that, to be eligible for an EIDL, an applicant may not exceed the size standard designated for the industry in which the applicant is primarily engaged. 13 C.F.R. § 121.301(a). In this case, there is no dispute that Appellant's average annual receipts for its three last completed fiscal years (2011, 2010, and 2009) prior to July 10, 2012, the disaster commencement date, were $[XXX]. Accordingly, Appellant would not be an eligible small business if its primary industry is NAICS code 115113, which has a $7 million annual receipts size standard, but would be eligible under either NAICS code 484220 or 484230, both of which have a $25.5 million size standard. The central issue in this case, therefore, is whether Appellant's primary industry is in NAICS code 115113, 484230, or 484220.

With respect to a concern's primary industry, SBA size regulations provide:

In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets.

13 C.F.R. § 121.107. A business concern has only one primary industry, as NAICS codes may not be combined or split. See Size Appeal of Richard E. Muck, SBA No. SIZ-2522 (1986). Applying these principles, the Disaster Office concluded that Appellant's primary industry is NAICS code 115113, Crop Harvesting, Primarily by Machine, such that Appellant is ineligible for an EIDL.

In seeking to overturn the size determination, Appellant argues at length that Appellant should be found to be primarily engaged in NAICS code 484230, Specialized Freight (except Used Goods) Trucking, Long Distance, because Appellant performed more trucking than harvesting during 2011, and nearly all of this trucking occurred in rural areas. Appellant emphasizes that, according to the NAICS Manual definitions, short-distance trucking occurs “within a metropolitan area” whereas long-distance trucking occurs “between metropolitan areas.” See Section II.D, supra. Therefore, Appellant reasons, the correct approach here is to consider all truck trips that are entirely outside any metropolitan area to be long-distance trucking. In Appellant's view, approximately 99% of Appellant's trucking occurred in rural areas, so the Disaster Office should have determined that approximately 99% of Appellant's trucking is long-distance under NAICS code 484230.

I find Appellant's contentions unpersuasive for several reasons. First, contrary to the premise of Appellant's arguments, it does not appear from the NAICS Manual that all trucking which occurs outside of any metropolitan area is automatically deemed long-distance trucking. The NAICS Manual description of long-distance trucking, NAICS code 484230, characterizes such trucking as “between metropolitan areas.” While this phrase can be interpreted to mean “outside of a metropolitan area,” as Appellant urges, the phrase also could be understood to
mean “from one metropolitan area to another.” The latter interpretation is more plausible because the *NAICS Manual* recognizes that local trucking may occur in “adjacent nonurban areas,” and may include “[l]ocal agricultural products trucking.” See Section III.B, supra. Thus, a close reading of the *NAICS Manual* does not support the conclusion that all trucking in rural areas is long-distance. Further, the approach Appellant advocates fails to consider any measure of time or distance in assessing whether trucking is local or long-distance. It is notable in this regard that the *NAICS Manual* description for NAICS code 484220, local trucking, specifies that “[g]enerally the trips are same day return.” Id. Under Appellant's approach, though, if Appellant were to haul harvested crops from a farm to a storage facility 30 miles away and the entire trip is within a rural area, this trip would be considered long-distance trucking under NAICS code 484230, even though common sense dictates that a 30-mile trip, completed in less than a day, is not a long haul. In addition, if Appellant's truck completed more than one trip in a day, such trips also would run afoul the “same day return” language of local trucking. I therefore reject Appellant's contention that all trucking in rural areas is long-distance trucking.

Appellant argues that OHA determined in *Altendorf I* that trucking outside of a metropolitan area is long-distance trucking, and that the Disaster Office improperly disregarded OHA's ruling. I find no merit to this argument. OHA's decision in *Altendorf I* squarely addressed the question of whether the transportation of harvesting equipment should be considered harvesting or trucking, but did not provide interpretive guidance as to the distinction between local and long-distance trucking. See Section II.A, supra. Further, although OHA directed the Disaster Office to examine how much of Appellant's work fell within NAICS codes 115113, 484220, and 484230, OHA did not provide specific instructions as to how the Disaster Office should conduct the analysis. I therefore find no inconsistency between the instant size determination and *Altendorf I*.

Appellant also objects to the Disaster Office's use of DOT regulations to determine a quantifiable cut-off point in miles between local and long-distance trucking. In Appellant's view, the Disaster Office arbitrarily decided that a trip under 100 miles is “local” and a trip over 100 miles is “long distance”. As discussed above, though, the *NAICS Manual* descriptions are not amenable to the fine distinctions needed to determine Appellant's primary industry, because those descriptions refer to metropolitan areas and Appellant's trucking occurred almost entirely in rural areas. The approach Appellant advocates — that every truck trip occurring wholly in a rural area, regardless of its time or distance, be considered long-distance — is too simplistic to make sense, and the Disaster Office had to find some methodology with a reasonable basis. As DOT regulates the trucking industry, consulting DOT's regulations for guidance was not irrational. Moreover, while Appellant maintains that a 100-mile limit may conflict with the *NAICS Manual* descriptions in certain situations, Appellant does not identify specific instances in the record where the Disaster Office's use of this threshold created an absurd or improper result.

Appellant also contends that the Disaster Office should have used Appellant's driver log

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4 This example is not merely hypothetical. According to an attachment to the size determination, Appellant had numerous invoices, collectively valued at least $[XXX], which involved estimated hauls of 30 miles or less, one-way. The specific invoices are [XXX].
books to ascertain the length of each trip made, instead of relying on estimates of trip length by invoice. I see no merit to this argument. Appellant's driver log books are concerned with information such as the total number of miles driven each day, vehicle fuel efficiency, and taxes paid per gallon of fuel, but do not record how many miles a particular load covers. Further, the driver log books are not labeled by invoice, and cannot be readily correlated with Appellant's financial records.

Ultimately, the problem for Appellant is that, based on the financial data Appellant submitted to the Disaster Office, combine harvesting accounted for approximately [XX]% of Appellant's receipts during 2011, and local and long-distance trucking together comprised approximately [XX]%.[24] Specifically, the Disaster Office found $[XXX] of receipts in combine harvesting; $[XXX] in local trucking; and $[XXX] in long-distance trucking. Id. In order to prevail in its appeal, then, Appellant would need to establish that more than $[XXX] of local trucking should instead be classified as long-distance trucking, such that the receipts for NAICS code 484230 would outweigh those of NAICS code 115113. Appellant has made no such showing here. As a result, this appeal must be denied.

IV. Conclusion

For these reasons, 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).

KENNETH M. HYDE
Administrative Judge