Cite as: *Size Appeal of Forterra Systems, Inc.*, SBA No. SIZ-5029 (2009)

REDACTED DECISION FOR PUBLIC RELEASE

United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF:	
Forterra Systems, Inc.	SBA No. SIZ-5029
Appellant	Decided: March 13, 2009
Appealed from Size Determination No. 6-2009-019	

APPEARANCES

Richard J. Vacura, Esq., Keric B. Chin, Esq., Morrison & Foerster LLP, McLean, Virginia, for Appellant Forterra Systems, Inc.

DECISION

PENDER, Administrative Judge:

I. Introduction and Jurisdiction

This appeal arises from a January 13, 2009 size determination (Case No. 6-2009-019) (Size Determination) issued by the U.S. Small Business Administration (SBA), Office of Government Contracting, Area VI (Area Office) finding Forterra Systems, Inc. (Appellant) to be other than small for the applicable size standard of $25 Million in annual receipts. For the reasons discussed below, 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.

II. Issues

Whether the Area Office was correct to draw a negative inference under 13 C.F.R. § 121.1008(c) when Appellant failed to provide requested information.

Whether the Area Office made a clear error of law or fact in finding Appellant to be affiliated with its 28.74% shareholder when the next largest shareholder owned 17.32% of Appellant's outstanding stock.

III. Background

A. Solicitation and Protest

On September 3, 2008, the U.S. Department of the Air Force, Air Education and Training Command, Randolph Air Force Base, Texas (Air Force), issued Request for Proposals No. FA3002-08-R-0043 (RFP) for the purchase of software. The RFP was a total small business set-aside. The Contracting Officer (CO) designated the procurement under North American Industry Classification System (NAICS) code 511210, Software Publishers, which has an annual receipts size standard of $25 Million.[1] Initial offers were due October 3, 2008. Appellant self-certified as a small business with its offer on October 3, 2008.

On December 16, 2008, the Air Force notified unsuccessful offerors that Forterra Systems, Inc. (Appellant) was the apparent successful offeror. On December 17, 2008, American Research Institute, Inc. (ARI) protested the size status of Appellant to the CO. ARI alleged Appellant is "dominant" in the 3D virtual world industry, and alleged it had a teaming agreement with IBM which gives it an unfair advantage. On December 18, 2008, the CO forwarded the protest to the SBA Area Office.

B. The Area Office's Size Investigation

On December 19, 2008, the Area Office notified Appellant of the size protest and requested it to submit a completed SBA Form 355, its response to the protest allegations, and certain other information and documents. On December 23, 2008, Appellant responded to the protest allegations by letter. Appellant's submission also included its completed SBA Form 355, copies of its tax returns, its Fifteenth Amended and Restated Articles of Incorporation (Articles of Incorporation), its Bylaws, and its financial statements through 2007.

This information shows that, by itself, Appellant is below the size standard. Appellant's capitalization includes four series of preferred stock as well as common stock. Appellant's three largest shareholders are [Investor-A], [Investor-B], and [Investor-C]. Each of these three shareholders is a venture capital investment group, and their reported shareholdings include those of their affiliated entities.

On December 30, 2008, the Area Office requested a break-out of Appellant's preferred shareholders and its option- and warrant-holders. The Area Office also quoted the regulation at 13 C.F.R. § 121.103(c)(2) (providing a rebuttable presumption that the largest minority shareholders control a concern when their aggregate holdings are approximately equal in size and large), and noted its finding that [Investor-B] and [Investor-A] own large and approximately equal holdings. The Area Office then requested Appellant to provide information about [Investor-B] and [Investor-A], including:

[1] Effective August 18, 2008, the size standard for NAICS code 511210 was increased from $23 Million to $25 Million. 73 Fed. Reg. 41237 (July 18, 2008).

- their owners and ownership percentages; charter documents; and tax returns and financial statements for their last three fiscal years as of October 3, 2008; and

- a list of companies in which they have ownership interests; and for each company its owners, ownership percentages, whether [Investor-B] and [Investor-A] have officers or directors and, if so, who they are.

The Area Office also stated that [Investor-B] and [Investor-A] may send the requested information directly to the Area Office, but that without it, the Area Office would have to find Appellant other than small.

Later that day, the Area Office informed Appellant of a discrepancy, among Appellant's submissions, in [Investor-B]'s percentage ownership in Appellant. Appellant corrected its Form 355 noting some of its shares had been redistributed by [Investor-B] to its individual partners. Appellant also explained that the shares listed are "fully diluted," including those owned by the option- and warrant-holders, as if the options and warrants had been executed.

On December 31, 2008, Appellant informed the Area Office that it would be difficult to compile the requested information about [Investor-B] and [Investor-A] investments in other companies, and discussed with the size specialist how it might rebut the presumption in 13 C.F.R. § 121.103(c)(2). Appellant also noted its previous involvement in the Small Business Innovation Research (SBIR) program had been without size issues.

On January 7, 2009, Appellant submitted its Fourth Amended and Restated Voting Agreement (Voting Agreement), the declaration of its President, and detailed arguments on the affiliation issues raised by the Area Office. Appellant provided a letter from [Investor-B] stating its income for its past two fiscal years; a list of [Investor-B]'s 12 partners (each represented by a number) and each partner's percent ownership in [Investor-B]; and a list of [Investor-B]'s approximately 90 portfolio companies (each represented by a number), including percent owned by [Investor-B] and other data. Appellant also provided a letter from [Investor-A] stating its average income for the past three years (an amount exceeding the size standard), a list of its 102 investors (each represented by a number), with each owner's percent ownership in [Investor-A], and a list of [Investor-A]'s 24 portfolio companies including, for each, its name, percent owned by [Investor-A], and percents owned by other large investors (who were represented by numbers). Both [Investor-B] and [Investor-A] stated their only common investments were in Appellant and in one other company that was spun off by Appellant.

On January 9, 2009, the Area Office noted Appellant's response to its previous request was incomplete. The Area Office again requested the names of the investors in both [Investor-B] and [Investor-A], the names of [Investor-B]'s portfolio companies, the participation of [Investor-B] and [Investor-A] partners as officers and directors of their portfolio companies, and copies of [Investor-B]'s and [Investor-A]'s charter documents, tax returns, and financial statements.

On January 12, 2009, Appellant provided a supplemental response, and stated that detailed information on [Investor-B]'s and [Investor-A]'s investors and their percent ownership

would be forwarded to the Area Office directly from [Investor-B] and [Investor-A]. Instead of providing [Investor-B]'s and [Investor-A]'s tax returns and financial statements, Appellant clearly stipulated that the average annual receipts for [Investor-B] and/or [Investor-A] for the three tax years prior to the October 3, 2008 self-certification date would exceed the $25 Million size standard. Thus, [Investor-B]'s and [Investor-A]'s tax returns and financial statements are not relevant to the inquiry. The separate responses from [Investor-B] and [Investor-A] included complete lists of their investors, percentage owned by each, and the portfolio companies in which they (and their affiliates) invested, along with the percents owned.

Appellant also clarified that [Investor-B]'s redistribution of Appellant's shares occurred before its October 3, 2008 self-certification date.

In its responses, Appellant argued it is not affiliated with [Investor-B] or [Investor-A] under the identity of interest (common investments) rule. Appellant also argued it is not affiliated with either [Investor-B] or [Investor-A] under the minority shareholder rule, regardless of whether the Area Office counts the 11% of Appellant's shares that [Investor-B] redistributed to its own partners as [Investor-B]'s or not. If the Area Office counts the 11% as [Investor-B]'s, making [Investor-B]'s and [Investor-A]'s shares almost equal, the presumption of affiliation under 13 C.F.R. § 121.103(c)(2) can be and is rebutted. If the Area Office does not count the 11% as [Investor-B]'s ([Investor-B] having 17.32% against [Investor-A]'s 28.74%), then 13 C.F.R. § 121.103(c)(3) applies because Appellant's shares are widely held.

Even if Appellant's shares are not widely held, Appellant argued there is no single block of voting stock that is large as compared with all other stockholdings. On this latter point, Appellant cited *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999), *Size Appeal of Lebanon Foundry & Machine Company*, SBA No. SIZ-2433 (1986), and *Size Appeal of The H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008). Appellant also argued that neither [Investor-B] nor [Investor-A] controls Appellant's Board of Directors.

C. Facts

1. As established in the Record, the relevant facts applicable to Appellant's corporate organization are:

a. Appellant's Certificate of Incorporation authorizes Common Stock and four series of convertible Preferred Stock. All stock votes, and the voting power of Preferred shareholders is based on the number of Common Stock shares into which their Preferred is convertible. A quorum is a majority of shareholders, and action requires a majority vote.

b. Appellant is managed by its Board of Directors. Appellant's Board of Directors has seven Directors. Under the Voting Agreement [Investor-B], [Investor-A], and [Investor-C] each selects one of the three Series 1 Directors; and the Series 4 and Common stockholders each selects one Director. Two "Independent Directors" are selected by a majority of all shareholders, approved by the Board, and mutually agreeable to the Common Stock and all Series 1 Directors. The quorum is four Directors and a majority is needed for Board action.

c. Matters requiring either a majority of the Preferred Stock (voting together as one class) or a supermajority (six) of Directors are: a change to the size of the Board; transfer of assets into a subsidiary; transfer of a material portion of Appellant's intellectual property; replacement of auditors or legal counsel; change of signatory rights on a banking or investment account; a transaction not in the ordinary course of business where an officer, director or family member has an interest; pledge or mortgage of assets over $200,000; and expenditures over $200,000 not related to the current line of business.

d. Matters requiring a majority of the Preferred Stock are: a change to the authorized amount of Common Stock; redemption or purchase of Appellant's own Stock[2]; a merger, consolidation, sale or disposition of substantially all assets, or disposition of more than 50% of voting power; liquidation, dissolution, or wind-up. Also, any change to the rights, preferences, privileges, or number of shares of a Series of Preferred Stock, issuance of securities with preferences over or on parity with a Series or other changes adversely affecting a Series requires a majority of that Series.

2. Other submissions contained in the Record establish that:

a. Appellant has some [xxx] shareholders. Appellant's three largest shareholders, on a fully-diluted basis (considering stock options and warrants as if exercised) are:

[Investor-A]	28.74 %
[Investor-B]	17.32 %
[Investor-C]	11.56 %

b. [Investor-A] and [Investor-B] funds have in common only one limited partner investor, and that investor owns less than a 10% interest in [Investor-A] and [Investor-B].

c. Appellant's outstanding Common Stock is majority-owned by [Investor-F], who has no interest in either [Investor-A] or [Investor-B] funds. [Investor-A] owns none of Appellant's Common Stock, and [Investor-B] owns only a minuscule amount of it.

d. Appellant's outstanding Series 4 Preferred Stock is owned as follows:

[Investor-D]	39.2 %
[Investor-E]	19.6 %
[Investor-A]	20.6 %
[Investor-B]	20.6 %

e. Appellant's outstanding Preferred Stock (all four series combined) is 37.42% owned by [Investor-B] funds, and 37.22% owned by [Investor-A] funds.

f. [Investor-A] and [Investor-B] have no common investments other than

[2] Exceptions include situations such as the exercise of an option to repurchase an employee's shares after termination.

Appellant and one other firm which was spun off from Appellant.

E. The Size Determination

On January 13, 2009, the Area Office issued Size Determination No. 6-2009-019 (Size Determination), concluding Appellant is not an eligible small business under the $25 Million size standard. The Area Office first examined the protest allegations concerning industry dominance and the teaming agreement with IBM, and concluded neither allegation had any merit.

Turning to Appellant's own capital structure, the Area Office noted Appellant's two largest shareholders owned approximately the same percentage of shares (fully diluted), but then [Investor-B] redistributed some 10% of Appellant's shares to [Investor-B] fund investors.

The Area Office also discussed how a key employee, such as a managing director, can have an identity of interest with his employer if they have investments in common. The Area Office noted that many of [Investor-B]'s managing directors and its chief financial officer are also Appellant's shareholders. They share an economic interest with [Investor-B] through their positions in [Investor-B]. These individuals, according to [Investor-B]'s website, represent the interest of [Investor-B] as members on various boards of the companies in which [Investor-B] has investments. Hence, the Area Office concluded these individuals and [Investor-B] have an identity of interest and should be considered as one party for the purpose of determining affiliation. Thus, [Investor-B]'s shareholdings in Appellant, when combined with those with whom it had an identity of interest, brought [Investor-B]'s holdings back to approximately that of [Investor-A]. The Area Office concluded that because [Investor-B] and [Investor-A] have power to control Appellant and thus are Appellant's affiliates, any other businesses either [Investor-B] or [Investor-A] control are also affiliated with Appellant.

The Area Office also found that even if it accepted Appellant's statement that [Investor-B] no longer had a shareholding the size of [Investor-A]'s, [Investor-A] would still be considered a shareholder with a minority holding that is large compared to all other shareholders (Size Determination at 4). The Area Office compared the stock ownership of Appellant to the percentages discussed in *Size Appeal of Novalar Pharmaceuticals, Inc*., SBA No. SIZ-4977 (2008) and concluded that Appellant was not controlled by its own officers and directors, but rather [Investor-A] since its holding is greater than 22.4%.

The Area Office noted Appellant had failed to provide [Investor-B]'s and [Investor-A]'s financial statements, partnership agreements, tax returns, and the names of the other investors in the companies in which [Investor-B] and [Investor-A] had ownership interests. Because Appellant failed to provide the requested information to the Area Office and the Area Office decided it needed the missing information to fully evaluate questions involving the identity of interest between various entities, it drew an adverse inference as to their size (combined with their own affiliates) and determined, therefore, that since Appellant is affiliated with [Investor-B] and [Investor-A], Appellant is other than small.

D. The Appeal

On January 28, 2009, Appellant filed the instant appeal. Appellant renews and amplifies the arguments it made before the Area Office. Appellant asserts the Area Office erred in finding it other than small because (1) it misapplied the multiple largest minority shareholder rule and missed that it is a rebuttable presumption and was rebutted by evidence in the Record; (2) it erroneously applied an adverse inference against Appellant.

The core of Appellant's rebuttable presumption argument is that 13 C.F.R. § 121.103(c)(2) establishes a rebuttable presumption. That is, although two concerns may control equivalent amounts of stock that are each less than 50% of the whole, there is only a presumption that either of the two concerns can control the concern and that can be rebutted. As rebuttal, Appellant asserts that neither [Investor-B] nor [Investor-A] individually or collectively has the ability to elect enough members of Appellant's Board of Directors to control Appellant's operations and that there were no super-majority voting requirements that gave either the power to exert negative control as envisioned by SBA's regulations and explained in *Size Appeal of EA Engineering, Science, and Technology, Inc.*, SBA No. SIZ-4973 (2008).

Appellant challenged the Area Office's drawing of an adverse inference by alleging the information it failed to provide was not essential and relevant to the size determination. In addition, Appellant stated the Area Office failed to specify what the adverse inference is or how it relates to the information not submitted, but instead just applied an adverse inference without sufficient justification. As support for its arguments, Appellant cites *Size Appeal of Guam Oil & Refining Company, Inc.*, SBA No. SIZ-2120 (1985) as the basis of its argument and asserts that the information the Area Office required and did not receive must be both essential and relevant before it can draw an adverse inference.

IV. Discussion

A. Timeliness

Appellant timely filed its appeal within 15 days of receiving the size determination. 13 C.F.R. § 134.304(a)(1).

B. Standard of Review

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 Consulting, 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.

In applying the applicable review standard in this case, I am mindful that cases based upon venture capital investments of small businesses are more complex than other cases. As with any affiliation protests, an area office has only a limited amount of time to identify the kind of information it needs and to analyze that information while applying complex affiliation principles. At the same time, it is equally certain that challenged concerns have to provide a great deal of information (that is not necessarily readily available), in a short period of time, while at the same time providing their analysis of that evidence.

The Area Office's extensive investigation into the portfolio companies of [Investor-A] and [Investor-B] would have been appropriate if [Investor-A] and [Investor-B] had not stipulated they were other than small. For example, in *Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919 (2008); *Size Appeal of Colt Defense LLC,* SBA No. SIZ-4943 (2008) the challenged firm's shareholders would not concede affiliation or size. Moreover, the Area Office treated the protest as if the size standard were employee based rather than receipts based. This distinction is important, for it is far more likely that a shareholder who is a venture capital investor will exceed a receipts-based size standard. For the protest underlying this appeal, the stipulations by [Investor-A] and [Investor-B] were of material assistance and reduced issues for the Area Office to decide. Nevertheless, the Size Determination did not recognize this distinction.

In this appeal, I find the Area Office made too many findings, including making two findings that were contradictory. Specifically, the Area Office should not have found affiliation under both 13 C.F.R. § 121.103(c)(1) and (2). Further, the Area Office should not have drawn an adverse inference. This is because the evidence in the Record supports a finding that Appellant and [Investor-A] are affiliated pursuant to 13 C.F.R. § 121.103(c)(1). Thus, the only evidence that mattered in this appeal under the line of cases analyzed in *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008), was that [Investor-A] controls 28.74% of Appellant's Outstanding Stock on a fully-diluted basis and the next largest shareholder controls 17.32%.

C. The Merits

1. Stock Ownership

Affiliation based on stock ownership is governed by 13 C.F.R. § 121.103(c). The text of the parts of 13 C.F.R. § 121.103(c) relevant to this appeal follow:

> (1) A person (including any individual, concern or other entity) that owns, or has the power to control, 50 percent or more of a concern's voting stock, *or a block of voting stock which is large compared to other outstanding blocks of voting stock,* controls or has the power to control the concern.
>
> (2) If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, *SBA presumes* that each such person controls or has

> the power to control the concern whose size is at issue. *This presumption may be rebutted by a showing that such control or power to control does not in fact exist*.
>
> (3) If a concern's voting stock is widely held and no single block of stock is large as compared with all other stock holdings, the concern's Board of Directors and CEO or President will be deemed to have the power to control the concern in the absence of evidence to the contrary.

(emphasis added).

The Record clearly establishes that [Investor-A] controls 28.74% of Appellant's Outstanding Stock on a fully-diluted basis and the next largest shareholder ([Investor-B]) controls 17.32%. Based upon these facts, it was clear error to find these holdings are equal or approximately equal in size and to conclude [Investor-A] and [Investor-B] controlled Appellant pursuant to 13 C.F.R. § 121.103(c)(2). Because the presumption in 13 C.F.R. § 121.103(c)(2) is rebuttable (*Size Appeal of Alon U.S.A., LP,* SBA No. SIZ-4453 (2001)), the error led to additional analysis to establish other grounds of affiliation through common investments. This additional analysis is no longer necessary.

In its January 7, 2009 submission, Appellant cites *Size Appeal of Procedyne Corp.*, SBA No. SIZ-4354 (1999), *Size Appeal of Lebanon Foundry & Machine Company,* SBA No. SIZ-2433 (1986), and *Size Appeal of The H.L. Turner Group, Inc.,* SBA No. SIZ-4896 (2008) for the proposition that there is no single block of voting stock that is large as compared with all other stockholdings. In those decisions, OHA concluded the challenged firms were affiliated with their single-largest minority shareholders. In *Procedyne,* the two largest minority shareholders held 42.1% and 18.9% respectively of the challenged firm. In *Lebanon Foundry,* the two largest minority shareholders held 45% and 30% respectively. In *Turner,* they held 49% and 36%. I find the Appellant's minority-stock ownership situation to be more similar to that of Private A-5 and Private A-8[3] in *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008), than it is to the challenged firms in *Procedyne, Lebanon Foundry*, and *Turner*. I provide the decisionally-necessary facts in the table below.

Case	Largest Shhr %	Next-Largest Shhr %	Ratio (Largest to Next-Largest)	Difference (percentage points)
Procedyne	42.1	18.9	2.23	23.2
Novalar A-8	27.1	15.3	1.77	11.8
Appellant	**28.7**	**17.3**	**1.66**	**11.4**
Novalar A-5	22.4	14.1	1.59	8.3
Lebanon	45.0	30.0	1.50	15.0
Turner - QCC	49.0	36.0	1.36	13.0

[3] Private A-5 and Private A-8 are privately-held companies whose names were redacted from the published version of the *Novalar* decision.

Unlike 13 C.F.R. § 121.103(c)(2), the presumption in 13 C.F.R. § 121.103(c)(1) is not rebuttable. Therefore, inquiry need go no further, for the facts of this appeal fit within the ratios, which, in *Novalar,* were found to justify a finding of affiliation under 13 C.F.R. § 121.103(c)(1) .

2. Adverse Inference

If a challenged concern declines or otherwise fails to comply with an area office's requests for information and these requests meet the standard described in *Size Appeal of Quantrad Sensor, Inc.*, SBA No. SIZ-4255, at 7 (1997) (*Quantrad*), then the Area Office may take an adverse inference pursuant to 13 C.F.R. § 121.1008(d) and determine any missing evidence would have demonstrated Appellant to be other than small. *See Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919, at 12-13 (2008) (*USA Jet*). As explained in *USA Jet*, 13 C.F.R. § 121.1008(d) codified *Quantrad* and *Size Appeal of Donovan Travel, Inc., d/b/a Carlson Wagonlit Travel,* SBA No. SIZ-4270 (1997), which differ in certain aspects from *Guam*. Thus, the Three-Part Test detailed in *Quantrad* is controlling.

> The three-part test requires, first, that the requested information be relevant. In other words, it must logically relate to an issue in the size determination. Second, there must be a level of connection between the challenged firm and the concern about which the information is requested. Finally, the request for information must be specific. If all of these criteria are met, the challenged firm or the alleged affiliate must produce the information requested by the Area Office.

Quantrad at 7.

In the Size Determination, the Area Office discusses what evidence it requested and the Appellant did not provide. The Area Office stated it informed Appellant this information was necessary for it to determine whether or not [Investor-A] or [Investor-B] and its respective partners share an identity of interest in any of the concerns (including Venture Capital entities) at issue in this appeal, including Appellant. The Area Office explained that if Appellant did not provide this information, it may presume Appellant is other than small.

The Area Office's decision to take an adverse inference does not apply to whether an affiliation with [Investor-A], [Investor-B], or their various stakeholders (Venture Capital entities) made Appellant other than small. Basically, Appellant stipulated that if it is affiliated with either [Investor-A] or [Investor-B], then its annual receipts exceed the applicable $25 Million size standard. This makes it unnecessary to pursue this line of inquiry concerning Appellant's annual receipts if [Investor-A], [Investor-B], or both is found to have the power to control Appellant. Accordingly, since 13 C.F.R. § 121.103(c)(1) applies, Appellant's refusal or failure to provide tax returns or other similar information is irrelevant to determining its size.

Ultimately, Appellant's refusal or failure to provide the documents the Area Office requested concerning relationships between the Venture Capital entities is irrelevant. This is because it was error for the Area Office to even consider affiliation beyond Appellant's affiliation with [Investor-A].

3. SBIR Eligibility

Appellant raised the issue of its SBIR eligibility in its argument to the Area Office. The Area Office noted that Appellant should not be eligible for SBIR grants. I agree. 13 C.F.R. § 121.702(a), in relevant part, provides:

> Ownership and control. (1) An SBIR awardee must (i) be a concern which is at least 51% owned and controlled by one or more individuals who are citizens of the United States, or permanent resident aliens in the United States; or
> (ii) Be a concern which is at least 51% owned and controlled by another business concern that is itself at least 51% owned and controlled by individuals who are citizens of, or permanent resident aliens in the United States.

Based upon Fact 2.a., three entities, together, own more than 51% of Appellant. Thus, neither 13 C.F.R. § 121.702(a)(1)(i) nor (ii) is satisfied by Fact 2.a. Accordingly, the Area Office was correct to opine Appellant is ineligible for SBIR grants.

4. Summary

The Area Office found that [Investor-A]'s holdings are large compared to all other shareholders pursuant to 13 C.F.R. § 121.103(c)(2). Based upon these findings all of the Area Office's findings concerning 13 C.F.R. § 121.103(c)(1) and 13 C.F.R. § 121.1008(d) are irrelevant, for its findings concerning shareholder percentages are conclusive.

V. Conclusion

Based upon the foregoing, Appellant's Appeal is DENIED and the Size Determination is AFFIRMED. Accordingly, Appellant is not an eligible small business concern under NAICS code 511210.

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

THOMAS B. PENDER
Administrative Judge