

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

SIZE APPEAL OF:

A & H Contractors, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2013-025

SBA No. SIZ-5459

Decided: April 2, 2013

APPEARANCES

Brian A. Bannon, Esq., Brian S. Gocial, Esq., Blank Rome LLP, Washington, DC,
for A & H Contractors, Inc.

DECISION

I. Introduction and Jurisdiction

On January 7, 2013, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2013-025 concluding that A & H Contractors, Inc. (Appellant) is not a small business under the \$33.5 million size standard associated with Appellant's primary industry. The Area Office determined that Appellant is affiliated with Lakeshore Engineering, Inc. d/b/a Lakeshore Group (Lakeshore), and other Lakeshore affiliates, under the totality of the circumstances. 13 C.F.R. § 121.103(a)(5).

Appellant maintains that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse, and conclude that Appellant is a small business. For the reasons discussed *infra*, the appeal is granted, and the size determination is reversed.

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. Procedural History

On May 23, 2012, the U.S. Army Corps of Engineers (Corps) issued Invitation for Bids (IFB) No. W9127S-12-B-0009 for dredging. The Contracting Officer (CO) set aside the

procurement entirely for small businesses, and assigned NAICS code 237990, Other Heavy and Civil Engineering Construction, with a corresponding size standard of \$33.5 million average annual receipts. On July 6, 2012, the CO announced that Appellant was the apparent awardee.

On July 12, 2012, an unsuccessful bidder, 4H Construction Corporation (4H), protested Appellant's size. On August 9, 2012, the Area Office issued Size Determination 3-2012-101, finding that Appellant exceeded the \$33.5 million size standard. The Area Office determined that Appellant was affiliated with businesses owned or controlled by Mr. Avinash Rachmale, including Lakeshore and Sky Group Grand, LLC (SGG), on the basis of common management, 13 C.F.R. § 121.103(e), the joint venture rule, 13 C.F.R. § 121.103(h), and the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). Appellant did not produce tax records for Lakeshore and other affiliates, so the Area Office invoked an adverse inference that the missing information would have shown that Appellant exceeded the size standard.

On August 24, 2012, Appellant timely appealed Size Determination 3-2012-101 to OHA, claiming that 4H lacked standing to protest Appellant's size because 4H was statutorily ineligible for award. On November 7, 2012, OHA granted the appeal and vacated Size Determination 3-2012-101 without reaching the merits of the determination. *Size Appeal of A & H Contractors, Inc.*, SBA SIZ-5417 (2012).

The Corps cancelled the IFB and resolicited on an unrestricted basis. Appellant, however, did not compete for the reissued procurement. On November 9, 2012, the Area Office initiated its own size protest against Appellant under 13 C.F.R. § 121.1001(b)(9), based on the Area Office's "belief that [Appellant] and its affiliates' average annual revenues exceed the Size Standard of \$33.5 Million." (Protest at 1.) On November 30, 2012, Appellant responded to the protest, submitting a completed Form 355 and other information.

B. The Instant Size Determination

On January 7, 2013, the Area Office issued Size Determination No. 3-2013-025 finding that Appellant is affiliated with three companies associated with Mr. Rachmale -- Lakeshore, SGG, and Lakeshore HealthCare Investment Group, Inc.(LHIG) -- under the totality of the circumstances. The Area Office also found Appellant affiliated with two other concerns, Hardiman Holdings LLC (Hardiman Holdings) and Andorjohn Consulting and Management (Andorjohn), through common ownership and familial identity of interest. Appellant acknowledged affiliation with Hardiman Holdings and Andorjohn, but disputed affiliation with Lakeshore, SGG, and LHIG.

The Area Office first explained that Mr. Thomas E. Hardiman Sr. is president and 100% owner of Appellant. (Size Determination No. 3-2013-025, at 4.) His wife, Mrs. Gloria A. Hardiman, is Vice President and Secretary of Appellant but holds no ownership interest. (Id.) The Area Office found that Mr. Hardiman Sr. has the power to control Appellant based on his ownership of the company. (Id.)

Next, the Area Office found that Andorjohn is 100% owned by Mrs. LaTonya Wallace-Hardiman, daughter-in-law of Mr. Hardiman Sr. Mrs. Wallace-Hardiman has the power to

control Andorjohn, and Appellant is affiliated with Andorjohn through familial identity of interest. (*Id.* at 5.) Hardiman Holdings is a real estate investment firm which is 50% owned by Mr. Hardiman Sr. and 50% owned by his wife, Mrs. Gloria Hardiman. Appellant and Hardiman Holdings are affiliates by virtue of their common ownership. (*Id.* at 6.)

The Area Office next described certain connections between Appellant and SGG. The Area Office found that Mr. Rachmale owns 85% of SGG, and has the power to control SGG. (*Id.*) Mr. Rachmale is not related by blood, marriage, civil union, or adoption to Mr. Hardiman Sr. or to any other member of the Hardiman family. Mr. Hardiman Sr. holds a 5% ownership interest in SGG. (*Id.*) In addition, Appellant leases office space in Detroit, Michigan from SGG under a lease arrangement which will expire December 31, 2016. (*Id.*) The Area Office noted that Lakeshore and its affiliates also have office space in the same building, and that this particular office space is the most expensive of any leased by Appellant, although Appellant's corporate headquarters are located in Tennessee.

The Area Office stated that Appellant did not provide detailed information about the ownership structure or business interests of Lakeshore. Appellant did, however, acknowledge that Mr. Rachmale is an owner and the CEO of Lakeshore. The Area Office determined that Lakeshore "has certified [itself] as a large business for multiple NAICS codes including 236220." (*Id.*) Mr. Rachmale is also the majority owner of LHIG through an intervening concern, and Mr. Hardiman Sr. holds a 5% ownership interest in LHIG. (*Id.* at 7.) Based on his ownership interests and his role as Lakeshore's CEO, the Area Office found that Mr. Rachmale has the power to control Lakeshore and LHIG. (*Id.*)

The Area Office next determined that Appellant is affiliated with the concerns owned and controlled by Mr. Rachmale under the totality of the circumstances. The Area Office described Appellant as having an "ongoing close business relationship" with Mr. Rachmale's companies. (*Id.*)

The Area Office found that Mr. Hardiman Sr. purchased Appellant in 2003 from Mr. Rachmale and his wife, who founded the company in 1998. (*Id.* at 8.) Mr. Hardiman Sr. worked at Lakeshore for several years prior to purchasing Appellant, and fully transitioned to Appellant only in 2006. The Area Office highlighted that Mr. Hardiman Sr. departed Lakeshore in 2006, the same year that Appellant was admitted into the 8(a) Business Development (BD) program and the same year Lakeshore graduated from the 8(a) BD program. (*Id.*) The Area Office also noted that Mr. Hardiman Sr. continued to serve as a consultant to Lakeshore until 2009, as reflected in his personal tax returns. (*Id.* at 9.) The Area Office found that Mr. Rachmale was previously a member of Appellant's Board of Directors until September 3, 2012, when Mr. Hardiman Sr. unilaterally removed him from that position. (*Id.* at 7.) Mr. Rachmale "does not currently have any position with [Appellant]." (*Id.*)

The Area Office reviewed Appellant's lease arrangement with SGG in Detroit, Michigan. The lease agreement indicates that Appellant occupies 1,713 sq. ft. of space at a specified rate of \$12 per sq. ft., and pays \$1,713 per month. (*Id.* at 9.) The Area Office discovered, however, that other space is currently available for rent in the same building at rates of \$14 - \$16 per sq. ft. Further, the Area Office noted that Appellant's previous lease agreement indicated that Appellant

leased a space of 3,265 sq. ft. at a rate of only \$10 per sq. ft., and paid \$2,720.83 per month. (*Id.*) The Area Office concluded that Appellant "is clearly receiving a reduced rental rate from [SGG] for the office space in this building." (*Id.*)

The Area Office next found that Appellant and Lakeshore formed a joint venture in 2009. The joint venture, known as A&H/Lakeshore JV, was awarded two contracts, with Appellant receiving 51% of the net profits and Lakeshore the remaining 49%. (*Id.*) The Area Office found no violation of the "3-in-2" rule, 13 C.F.R. § 121.103(h), and noted no other current business dealings between Appellant and Lakeshore, but stated that the relationship between Appellant and Lakeshore "has continued to be close in order to settle the requirements of the two contracts they have been awarded." (*Id.*) Appellant derives significant revenues from the joint venture.

The Area Office next reviewed Appellant's accounts for the years 2009 through 2012, and found that Appellant had made payments to, and received payments from, Lakeshore and SGG. (*Id.* at 10.) According to the Area Office, some of the payments to SGG deviated from what would be expected in the lease agreements. (*Id.*) From August 2009 to March 2011, payments from Appellant to SGG exceeded the stated lease amount, eventually rising to as much as \$5,777.22 per month. Then, between March 2011 and August 2011, the payments decreased, and SGG began to receive less than the specified lease amount. (*Id.*) The Area Office found that, in 2010, Appellant made a one-time \$3,786.05 payment to Lakeshore labeled as "Xmas", which, Appellant asserted, was a contribution by Appellant for a Christmas party. (*Id.*) The Area Office concluded that the fact that the companies were conducting "shared Christmas Parties" further cemented the close relationship between Appellant and Lakeshore. (*Id.*)

The Area Office observed that during 2010, Lakeshore loaned Appellant \$354,128 at 3% interest, which Appellant subsequently repaid in 2012. (*Id.*) Additionally, the Area Office reiterated that Appellant and Lakeshore formed a joint venture together and are still performing three task orders. These ties, combined with Mr. Hardiman Sr.'s minority ownership interests in two entities controlled by Mr. Rachmale, and the fact that Appellant "is co-located with Lakeshore in a building owned by [SGG]", another of Mr. Rachmale's companies, led the Area Office to conclude that Appellant is affiliated with the entities owned by Mr. Rachmale based on the totality of the circumstances. (*Id.* at 11.)

The Area Office stated that complete average annual receipts Mr. Rachmale's companies were not provided, so it was not possible to ascertain the combined average annual receipts of Appellant and all of its affiliates. Appellant stipulated, however, that it would not qualify as a small business if it is affiliated with Lakeshore. (*Id.*) As a result, the Area Office found that Appellant is not a small business under the \$33.5 million size standard.

C. The Appeal

On January 22, 2013, Appellant filed the instant appeal of Size Determination No. 3-2013-025 with OHA. Appellant acknowledges affiliation with Andorjohn and Hardiman Holdings, but maintains that the Area Office clearly erred in finding Appellant affiliated with Lakeshore and other concerns owned or controlled by Mr. Rachmale. Appellant is a small

business because the combined average annual receipts of Appellant, Andorjohn, and Hardiman Holdings do not exceed \$33.5 million.¹

Appellant contends that the size determination is flawed because it "failed to find that Mr. Rachmale or Lakeshore have actual or potential control of [Appellant], or vice versa." (Appeal at 4.) Appellant asserts that power to control is "the foremost principle behind affiliation", and that the record here demonstrates that neither Mr. Rachmale nor Lakeshore has the power to control Appellant. Merely having a "close business relationship" is not sufficient to establish affiliation. (*Id.*) Appellant likens the instant case to Size Appeal of Cygnus Corp., SBA No. SIZ-4243 (1997), where OHA found that no affiliation existed even though the challenged firm had significant ties with its alleged affiliate, including renting office space, receiving financial assistance, and sharing certain resources.

Next, Appellant contends that the Area Office's analysis of the totality of the circumstances is flawed and legally insufficient. (*Id.* at 5.) Appellant maintains that the Area Office "fail[ed] to conduct the analysis required by any of the individual factors enumerated in 13 C.F.R. [§] 121.103(c)-(h)." (*Id.*) Further, OHA has held that any totality of the circumstances affiliation must be rooted in at least two independent grounds of affiliation, and the Area Office did not identify two or more such grounds here. (*Id.*, citing *Size Appeal of The Woods Hole Group, Inc.*, SBA No. SIZ-5009 (2008).)

Appellant explains that Mr. Rachmale was previously a member of Appellant's Board of Directors, but that he lacked any power to control Appellant because Appellant's owner, Mr. Hardiman Sr., could unilaterally remove Mr. Rachmale without cause. (*Id.* at 6, citing *Size Appeal of Environmental Quality Management, Inc.*, SBA No. SIZ-5429 (2012).) Appellant goes on to explain that Mr. Hardiman Sr. did, in fact, remove Mr. Rachmale from this position on September 3, 2012, more than two months before the date of the Area Office's size protest. (*Id.*) "Thus, as of the applicable date for the current size determination, there is no basis for finding affiliation between [Appellant] and Mr. Rachmale based on common management." (*Id.*)

Appellant next argues that the Area Office erroneously relied on the "long-standing personal history" between Messrs. Hardiman Sr. and Rachmale. (*Id.*) Appellant contends that the facts clearly show that Appellant is an independently viable concern that does not depend upon assistance from Mr. Rachmale or any of his businesses. (*Id.*) In addition, Appellant argues that Mr. Hardiman Sr.'s previous employment with Lakeshore, and Mr. Rachmale's previous ownership of Appellant, do not demonstrate that any current affiliation exists. (*Id.* at 7.) "The fact that Mr. Rachmale had an ownership interest in [Appellant] ten years ago is irrelevant to whether he has control over [Appellant] today." (*Id.*)

¹ Appellant explains that its own average annual receipts for the last three years, including its proportionate share of joint venture revenues, are approximately \$21 million. The receipts of Andorjohn and Hardiman Holdings do not materially affect this total. Thus, absent affiliation with any additional concerns, Appellant clearly qualifies as a small business under the \$33.5 million standard. (Appeal at 3.)

Appellant highlights that SBA knew of Mr. Hardiman Sr.'s prior employment with Lakeshore, as well as his minority investments in SGG and LHIG, when Appellant was admitted into the 8(a) BD program. "[I]t would be patently unreasonable to use these same facts as indicia of affiliation in 2013, when the SBA previously found it to be irrelevant to its acceptance of [Appellant] into the 8(a) [BD] program in 2006." (*Id.*) Appellant further asserts that the instant size determination undercuts Appellant's eligibility for the 8(a) BD program, and that the Area Office has no authority to intrude into 8(a) BD programmatic matters.

Appellant contends that the Area Office erred in basing its decision, in significant part, on Appellant's lease agreement with SGG in Detroit, Michigan. Appellant states that its main offices are in Memphis, Tennessee, and that Appellant is not dependent on its Detroit office to remain viable. (*Id.* at 8.) Appellant asserts that its lease with SGG is an arm's length transaction, and disputes the notion that Appellant enjoys favorable rates from SGG. Appellant emphasizes that the Area Office failed to consider the duration of the lease, and other market conditions, when the Area Office concluded that Appellant was receiving reduced rental rates. (*Id.*) Appellant also offers a detailed accounting of the changes in rental payments described by the Area Office. Appellant contends that it temporarily expanded its Detroit operations to another office suite in 2009 which resulted in higher rental payments. In 2011, due to changed economic conditions, Appellant substantially reduced the extra space it had occupied, which in turn resulted in lower rental payments. Appellant also made other payments to SGG for various renovations and upgrades. Appellant complains that the Area Office "never asked for an explanation of the foregoing charges, but merely assumed the supposed discrepancies were out-of-the-ordinary transactions reflecting preferential treatment or control." (*Id.* at 9.)

Appellant explains that the \$354,128 loan from Lakeshore to Appellant resulted from a dispute between the concerns. Lakeshore made an arm's length loan to Appellant in order to assist Appellant with a cash flow shortage which might have jeopardized an ongoing project. (*Id.*) Appellant maintains that the loan, which included reasonable 3% interest, was fully repaid in 2012, and that it did not provide Lakeshore or Mr. Rachmale with any means of controlling Appellant. (*Id.*) With regard to the 2010 Christmas party, Appellant asserts that it was more convenient and economical for Appellant to join Lakeshore's party, instead of incurring the expense and effort of hosting Appellant's own separate party. "Rather than demonstrating affiliation, the fact that [Appellant] paid its fair share of the costs is further evidence that the concerns operate independently." (*Id.* at 9-10.)

Lastly, Appellant argues the Area Office erred in finding the joint venture between Appellant and Lakeshore to be indicative of affiliation. Appellant argues that the joint venture is compliant with applicable regulations, including the "3-in-2" rule. (*Id.* at 10.) Appellant further maintains that it does not depend on the revenues from the joint venture, nor did the Area Office find any economic dependence. While Appellant does generate substantial revenues from the joint venture, a large majority of its revenues are derived independently from Lakeshore. (*Id.*)

Appellant concludes that the size determination should be reversed, as it failed to establish that Mr. Rachmale or Lakeshore controls, or has the power to control, Appellant.

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

The key issue in any affiliation case is the power to control. 13 C.F.R. § 121.103(a) (affiliation exists when "one [concern] controls or has the power to control the other, or a third party or parties controls or has the power to control both."); *Size Appeal of LGS Management, Inc.*, SBA No. SIZ-5160, at 3 (2010) ("control is always the principal question when addressing affiliation"). Accordingly, OHA has held that, although an area office may find affiliation based solely on the totality of circumstances, "an area office must [first] find facts and explain why those facts caused it to determine one concern had the power to control the other." *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 11 (2007); *see also Size Appeal of Diverse Constr. Group, LLC*, SBA SIZ-5112, at 7 (2010) (under a totality of the circumstances analysis, "a review of all the factors may lead to the conclusion one business has the power to control the other and, thus, both are affiliated."). In the instant case, I agree with Appellant that the record does not support the conclusion that Appellant could control Lakeshore, or vice versa. As a result, the Area Office clearly erred in finding Appellant to be affiliated with Lakeshore, SGG, and LHIG under the totality of the circumstances.

The Area Office devoted much of the instant size determination to reviewing the historic ties between Appellant and Lakeshore, and between their respective principals. The Area Office highlighted in particular that Mr. Hardiman Sr. purchased Appellant from Mr. Rachmale in 2003; that Mr. Hardiman Sr. was formerly an employee of Lakeshore until 2006, and was then a consultant for Lakeshore until 2009; that Mr. Rachmale previously served as a director on Appellant's board, before he was removed from that position by Mr. Hardiman Sr. in September 2012; and that Appellant borrowed \$354,128 from Lakeshore in 2010, and fully repaid the loan in 2012. As Appellant correctly observes, however, these historic ties have little, if any, relevance in assessing whether the firms are currently affiliated. This is true because, under applicable regulation, size must be determined as of November 9, 2012, the date that the Area Office initiated its protest against Appellant. *See* 13 C.F.R. § 121.1001(b)(9). The size determination itself recognized that none of these historic ties were still extant as of November 9, 2012. Accordingly, while the historic ties may be indicative of past affiliation, they do not establish that Appellant and Lakeshore are affiliated as of November 9, 2012. *Size Appeal of OBXtek, Inc.*, SBA No. SIZ-5451, at 12 (2013) (reversing size determination because the challenged firm had severed its longstanding economic dependence upon an alleged affiliate one month before the date to determine size, and "[s]o long as affiliation ceases before the date for determining size, the firms are former affiliates and their receipts will not be aggregated."); *Size*

Appeal of Chu & Gassman, Inc., SBA No. SIZ-5291 (2011)(historic ties do not give rise to current affiliation); *Size Appeal of CJW Construction, Inc.*, SBA No. SIZ-5254, at 9 (2011) (prior employment of challenged firm's owner with the alleged affiliate was "too far in the past to be relevant to the question of affiliation today.").

In the size determination, the Area Office did identify three links between Appellant and Lakeshore which were still in existence as of November 9, 2012. First, Appellant's owner, Mr. Hardiman Sr., holds 5% interests in SGG and LHIG, concerns which are predominantly owned by Mr. Rachmale, who also controls Lakeshore. Second, Appellant leases office space in Detroit, Michigan from SGG, a Lakeshore affiliate, in the same building which houses Lakeshore's corporate headquarters. Third, Appellant and Lakeshore previously established a joint venture, and continue to work together to complete two contracts awarded to that joint venture. Even if viewed collectively, however, these links are not substantial enough to demonstrate any power to control, such that Appellant could reasonably be deemed affiliated with Lakeshore under the totality of the circumstances.

With regard to Mr. Hardiman Sr.'s 5% ownership stakes in SGG and LHIG, there is no reason to believe that such small interests could enable Mr. Hardiman to control SGG or LHIG, let alone Lakeshore. On the contrary, the Area Office specifically determined that Mr. Rachmale holds majority ownership of both SGG and LHIG, and that Mr. Rachmale alone has the power to control those companies. See Section II.B, *supra*. Meanwhile, Appellant is wholly owned by Mr. Harriman Sr., and, according to the size determination, Mr. Rachmale has no significant involvement with Appellant's business. The Area Office found that Mr. Rachmale currently holds no position at all with Appellant, as an officer, director, or employee. (*Id.*) Further, the Area Office did not find any identity of interest between Messrs. Harriman Sr. and Rachmale, such that their interests might be imputed to one another. In short, then, the record offers no basis to conclude that Mr. Hardiman Sr.'s small ownership stakes in SGG and LHIG are indicative of any power to control.

Similarly, a lease of office space does not demonstrate any power to control; otherwise a concern would always be affiliated with its landlord. Nor is it problematic that Appellant and Lakeshore are tenants in the same office building. *Size Appeal of Roundhouse PBN, LLC*, SBA No. SIZ-5383, at 17-18 (2012) ("The mere fact that companies operate in similar lines of work, or in close proximity to one another, does not give rise to affiliation under 13 C.F.R. Part 121."). The size determination suggests that Appellant may be in a position to exact favorable terms from SGG, as evidenced by the fact that Appellant pays a lower rent per square foot than is available to new tenants in that building. The Area Office did not identify any questionable provisions in Appellant's lease, however, and the fact that Appellant's rental rate differs from that which would be charged to new tenants can easily be attributed to market conditions (such as the inventory of available space, the quantity of space being leased, the duration of lease, or the desirability of the space) and thus is not evidence of any preferential treatment. The Area Office also noted variations in the payments made by Appellant to SGG over the course of several years. Appellant, however, comprehensively explains the reasons for these fluctuations, all of

which are not unusual in the context of a long-term lease, such as the one found here.² Again, then, the record does not establish that Appellant's lease of office space from SGG gives rise to any power to control.

The only remaining factor for finding affiliation cited by the Area Office was the joint venture between Appellant and Lakeshore, from which Appellant derives a substantial portion of its revenues. The Area Office specifically determined, however, that the joint venture was a legally permissible arrangement compliant with SBA's "3-in-2" rule. See Section II.B, supra. Further, the Area Office made no finding that either Appellant or Lakeshore was economically dependent upon the joint venture, or that the joint venture constituted a critical aspect of either company's business. Apart from the joint venture, the Area Office did not identify any other contractual ties or collaboration between the firms, and cited no evidence of any technical or financial assistance or shared resources, such as common employees or common facilities. The fact that two companies formed a single joint venture, compliant with SBA's regulations, and without other significant business ties, is not sufficient to demonstrate that either company could control the other.

In making its findings, the Area Office appears to have been influenced by the long association between Messrs. Rachmale and Hardiman Sr. Appellant acknowledges that the two gentlemen are personal friends. As discussed above, however, the fundamental issue in any affiliation case is whether one concern controls, or has the power to control, another concern. In the case at hand, the facts discussed by the Area Office do not support a finding that Mr. Rachmale or any of his concerns could control Appellant, or that Appellant or Mr. Hardiman Sr. could control Lakeshore. Thus, the firms are not affiliated. Indeed, OHA has repeatedly held that a close association between a former employee and a prior employer is not sufficient to establish affiliation under the totality of the circumstances, even when the previous employer assists the former employee in starting a new concern. *Size Appeal of Summit Technologies & Solutions, Inc.*, SBA No. SIZ-5132, at 7-8 (2010) (connections between challenged firm and alleged affiliate -- including prior employment with alleged affiliate, a teaming agreement between the companies, and a loan which had been repaid -- did not establish affiliation under the totality of the circumstances); *Size Appeal of Fischer Business Solutions, LLC*, SBA No. SIZ-5075, at 7 (2009) (reversing size determination which had found affiliation under the totality of the circumstances because the size determination did not demonstrate any power to control).

IV. Conclusion

Appellant has demonstrated that the Area Office clearly erred in finding Appellant affiliated with Lakeshore, SGG, and LHIG. Appellant is affiliated with Hardiman Holdings and Andorjohn, but the combined average annual receipts of Appellant, Hardiman Holdings, and

² . It is worth noting that the Detroit location is not Appellant's primary facility, and that Appellant's rental payments for the Detroit location are modest as compared with Appellant's average annual receipts in excess of \$21 million annually. Thus, even if it were reasonable to find that Appellant's payments to SGG were suspicious, these payments apparently are not of sufficient magnitude to conclude that any power to control exists.

Andorjohn are well below the \$33.5 million size standard. Accordingly, the appeal is GRANTED, and the size determination is REVERSED. Appellant is a small business under the \$33.5 million size standard. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge