

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

DECISION FOR PUBLIC RELEASE

SIZE APPEAL OF:

BryMak & Associates, Inc.,

Appellant,

Appealed From
Size Determination No. 3-2016-049

SBA No. SIZ-5777

Decided: September 22, 2016

APPEARANCES

John C. Dulske, Esq., Joan Kelley Fowler Gluys, Esq., Bryan L. Kost, Esq., The Law Offices of Dulske & Gluys, P.C., San Antonio, Texas, for BryMak & Associates, Inc.

Jonathan T. Williams, Esq., Megan C. Connor, Esq., Patrick T. Rothwell, Esq., PilieroMazza PLLC, Washington, D.C., for W&T Travel Services, LLC.

DECISION¹

I. Introduction and Jurisdiction

On June 17, 2016, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area III (Area Office) issued Size Determination No. 3-2016-049, finding that BryMak & Associates, Inc. (Appellant) is not a small business under the size standard associated with the instant procurement. Appellant contends that the size determination is clearly erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse or remand for further consideration. For the reasons discussed *infra*, the appeal is granted and the size determination is reversed.

¹ This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA offered the parties the opportunity to propose redactions to the decision. No party requested redactions. OHA now issues the decision for public release.

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 timely filed the instant appeal on July 5, 2016.² Accordingly, this matter is properly before OHA for decision.

II. Background

A. Prior Proceedings

On April 16, 2015, the U.S. Department of the Air Force (Air Force) issued Request for Proposals (RFP) No. FA3089-15-R-0002 for bus transportation services at bases near San Antonio, Texas. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 485113, Bus and Other Motor Vehicle Transit Systems, with a corresponding size standard of \$15 million average annual receipts. Appellant submitted its initial offer on June 18, 2015.

On November 16, 2015, the CO announced that Appellant was the apparent awardee. On November 23, 2015, W&T Travel Services, LLC (W&T), an unsuccessful offeror, protested Appellant's size. W&T alleged that Appellant is affiliated with BryMak Universal, LLC, a Maryland LLC (BU-MD); BryMak Universal, LLC, a Kentucky LLC (BU-KY); Universal BryMak, a Maryland LLC (UB); and Universal Services Provider, LLC (USP). The CO forwarded the protest to the Area Office for a size determination.

On January 12, 2016, the Area Office issued Size Determination No. 3-2016-025 concluding that Appellant is not affiliated with any of the four concerns identified in the protest: BU-MD and BU-KY (which merged in 2014 to form BryMak Universal, LLC (BU)), UB, and USP. Instead, the Area Office found, Appellant is affiliated with two other concerns. These are B-F Texas Transportation, LLC (BFTT), which Appellant wholly owns, and Hamby Enterprises Partnership, Ltd. (HEP), which is owned by Appellant's sole owner, Mr. Chris Hamby, and members of his family. The Area Office also looked at two other concerns, Hamby Farms, LLC (HF), and Evolution Insurance Company, Ltd. (EIC), but found neither affiliated with Appellant.

The combined receipts of Appellant, BFTT, HEP, and the proportionate joint venture receipts from BU and UB for the years 2012, 2013, and 2014 did not exceed the applicable size standard. Thus, the Area Office determined, Appellant is a small business for the RFP.

On January 28, 2016, W&T appealed Size Determination No. 3-2016-025 to OHA, and on March 21, 2016, OHA issued *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721 (2016). OHA reversed the Area Office's finding that Appellant and HF are not affiliated, vacated Size Determination No. 3-2016-025, and remanded the matter to the Area Office for further

² Ordinarily, a size appeal must be filed within 15 calendar days of receipt of the size determination. 13 C.F.R. § 134.304(a). Here, Appellant received the size determination on June 17, 2016. Fifteen calendar days after June 17, 2016, was July 2, 2016. Because July 2, 2016, was a Saturday and the following Monday was a federal holiday, the appeal petition was due on the next business day: Tuesday, July 5, 2016. 13 C.F.R. § 134.202(d).

investigation and a new size determination. OHA directed the Area Office to review three specific issues:

- (1) Whether Appellant is generally affiliated with USP;
- (2) Whether Carolyn Hamby and Chris Hamby, who are stepparent and stepchild, share an identity of interest and, if so, whether there is clear fracture; and
- (3) Whether the conclusion that EIC is widely-held has legal support and, if so, whether Appellant has power to control EIC.

W&T, SBA No. SIZ-5721, at 15-16.

On March 30, 2016, following OHA's issuance of *W&T*, *W&T* provided the Area Office with a letter containing additional material to consider on remand. *W&T* presented two separate arguments for affiliation between Appellant and Facility Services Management, Inc. (FSM): (1) Carolyn Hamby's control through ownership of both FSM and Appellant's affiliate HF means that Appellant and FSM are affiliated; and (2) Carolyn Hamby's identity of interest with her husband Terry Hamby, and Terry Hamby's identity of interest with his son Chris Hamby means that Chris Hamby and his stepmother Carolyn Hamby also share an identity of interest that causes affiliation between Appellant and FSM. (Letter from J. Williams to S. Nirk (Mar. 30, 2016), at 2-3.) *W&T* also urged the Area Office to consider the "multiple shared business connections between Chris and Carolyn Hamby that, together with their family connection, establish an identity of interest." (*Id.* at 3.)

On April 14, 2016, Appellant submitted to the Area Office the Declaration of Chris Hamby, documents, and argument. Chris Hamby stated that he and his sister, Angela Mitchell, were both married and independent when their parents, Terry and Judy Hamby, divorced in 2006. (Chris Hamby Decl. ¶¶ 3-4.) To his knowledge, his parents have never spoken with one another since then and are estranged. (*Id.* ¶ 4.) Terry Hamby married Carolyn Hamby in 2007, when Chris Hamby was 38 years old. (*Id.*) Chris Hamby explained that neither he nor his sister has ever lived with their stepmother, that he and his children both refer to her by her first name, and that there is no closeness in their relationship with her. (*Id.* ¶ 5.) "I see Carolyn Hamby as my father's spouse only." (*Id.*) He also stated that he does not act in concert or consultation with Carolyn Hamby, either directly or through Terry Hamby or anyone else. They are not closely involved with each other's lives or businesses. (*Id.* ¶ 6.) Chris Hamby noted that any personal relationship he had developed with Carolyn Hamby ended in May 2012 after a family argument. (*Id.* ¶ 7.) Since then he has ended business ties between Appellant and FSM by purchasing FSM's interest in BFTT and by letting two subcontracts with FSM expire. (*Id.*)

Regarding EIC, Chris Hamby stated he learned of that company from Appellant's insurance broker and did not become aware that FSM was also in EIC's program until Appellant had joined. (Chris Hamby Decl. ¶ 19.) As for HEP, neither Carolyn Hamby nor FSM have any connection with that concern. (*Id.* ¶ 20.) HEP is the only common investment and sole business relationship between Chris Hamby and his father Terry. (*Id.* ¶ 28.) However, since the divorce Terry has not been involved with the operations or control of HEP; Judy Hamby maintains its

day-to-day operations and finances. (*Id.* ¶ 29.) As of the self-certification date, HEP had only one asset, a warehouse where Appellant's offices are located. (*Id.* ¶ 30.)

In its legal argument accompanying the Chris Hamby declaration, Appellant maintained that Chris Hamby and Carolyn Hamby do not share an identity of interest and that Appellant and FSM are not otherwise affiliated. (Argument on Remand Issue #3, at 1.) After detailing the familial estrangement, Appellant pointed out that not only is there no close relationship between Chris Hamby and Carolyn Hamby, there also was a “significantly damaging event” in May 2012 “which constituted a clear break or fracture of any such relationship” and which led to Chris Hamby's decision to discontinue all business relationships with FSM. (*Id.* at 6.)

Appellant emphasized that neither Carolyn Hamby nor FSM has ever had ownership, an office, or a position in Appellant, and that neither Chris Hamby nor Appellant has ever had ownership, an office, or a position in FSM. (*Id.* at 2.) Further, Appellant and FSM have different lines of business, different customers, no planned subcontracting on the instant procurement, no common officers, employees, facilities, or equipment. (*Id.* at 2-3.) Neither Chris Hamby nor Carolyn Hamby provides the other, or the other's business, with any financial assistance, loans, bonding, security, or business transactions other than two subcontracts that expired on September 30, 2015. (*Id.* at 3.) In both subcontracts, Appellant was the prime contractor and FSM was the subcontractor. These subcontracts filled positions of heating, ventilation and air conditioning (HVAC) technician and maintenance worker, and the two subcontracts combined represented only 10.01%, 13.43%, and 11.83% of Appellant's revenues for the years 2012, 2013, and 2014. (*Id.*)

Citing *Size Appeal of SP Technologies, LLC*, SBA No. SIZ-5319 (2012) and *Size Appeal of Innovative Construction & Management Services, LLC*, SBA No. SIZ-5202 (2011), Appellant contended that past ownership in a concern and divestiture of past interest argue in favor of a finding of clear fracture, a situation that occurred here with Appellant's purchase of FSM's interest in BFTT in 2013. (*Id.* at 5-6.) Finally, Appellant argued that the single shares that it and FSM each have in the EIC program cannot be considered a substantial investment. (*Id.* at 7.)

B. The Instant Size Determination

On June 17, 2016, the Area Office issued Size Determination No. 3-2016-049, concluding that Appellant is not a small business. After additional fact-finding and analysis, the Area Office concluded, again, that Appellant is affiliated with BFTT and HEP based on ownership; found that Appellant is affiliated with HF based on familial identity of interest; and determined that Appellant is affiliated with FSM based on un rebutted familial identity of interest. The Area Office once again determined that Appellant is not affiliated with BU, UB, USP, or EIC.

The Area Office found that Appellant and USP are not generally affiliated. The Area Office first explained that Mr. Chris Hamby, Appellant's sole owner and director, controls Appellant, and that his wife, Ms. Sherri Hamby, who holds no interest in any entity, are Appellant's only officers. (Size Determination No. 3-2016-049, at 5.) Ms. Diane Voudouris, USP's sole owner, president, and director, controls USP and is not related to any of the Hambys

and has never owned any of Appellant. (*Id.*) Likewise, neither Chris Hamby nor any member of his family owns or has owned any of USP or had any position there. (*Id.* at 6.) Except for BU and UB, Appellant and USP have no continuing business or commercial relationship. (*Id.*) Thus, the Area Office concluded, Appellant and USP are not generally affiliated. (*Id.* at 6-7.) As before, the Area Office determined that neither UB nor BU is in violation of SBA's "3-in-2" rule, so there is no joint venture affiliation with Appellant. (*Id.* at 6.)

Regarding the Hamby family relationships, the Area Office noted that Chris Hamby and his sister, Ms. Angela Mitchell, each owns 49% of HEP as limited partners, and that their father, Terry Hamby, and mother, Judy Hamby, each owns 1% of HEP and are the General Managing Partners, who under the Partnership Agreement have the exclusive right and authority to manage and control the business. (*Id.* at 7.) The Area Office concluded Chris Hamby, Terry Hamby, Judy Hamby, and Angela Mitchell have a familial identity of interest and no clear line of fracture. (*Id.*) Thus, HEP is affiliated with Appellant. Likewise, HF, whose two 50% owners are Terry Hamby and his wife Carolyn Hamby, also is affiliated with Appellant. (*Id.* at 8.)

Turning to FSM, the Area Office found that Carolyn Hamby, who is Chris Hamby's stepmother, owns 80% of FSM, a concern that is other than small. Her daughters own the rest of FSM. Neither Carolyn Hamby nor FSM has ever had an ownership or managerial interest in Appellant, and neither Chris Hamby nor Appellant has ever had ownership or a position in FSM. (*Id.* at 8.) In 2008, Appellant and FSM formed the joint venture BFTT with each owning 50% of BFTT, but Appellant acquired FSM's interest in 2013. (*Id.*) In its earlier size determination, the Area Office found that Appellant is affiliated with BFTT, but made no determination with respect to FSM. On remand, Appellant asserted to the Area Office that the presumption of family identity of interest between Chris Hamby and his stepmother Carolyn Hamby is rebutted by a clear line of fracture because "she did not raise him, he never lived with her, and neither one is involved in each other's lives or business transactions." (*Id.*) Chris Hamby merely considers Carolyn Hamby his father's spouse, and she and Chris Hamby are estranged. (*Id.* at 8-9.) The Area Office found this rebuttal "not credible", and gave as the reason the fact that they had done business together as joint venture partners in BFTT from 2008 to 2013, and also that Appellant had two subcontracts with FSM from 2010 until September 30, 2015. (*Id.* at 9.) Thus, the Area Office reasoned, Chris and Carolyn Hamby "had been doing business together for at least seven years as of the date size is being determined." (*Id.*) In addition, both Appellant and FSM are shareholders in EIC. (*Id.*) Thus, the Area Office concluded, as of June 18, 2015, the date on which size is determined, there was no estrangement between Chris Hamby and Carolyn Hamby, so Appellant and FSM are affiliated. (*Id.*)

As for EIC, this concern is a captive insurance company owned equally by its shareholders/subscribers. In its earlier size determination, the Area Office determined that EIC's stock was widely-held as a result of its diffuse ownership. On remand, the Area Office determined that EIC's stock is not widely-held because it is not freely traded. (*Id.* at 9, citing 13 C.F.R. § 121.103(c)(3).) The issue is immaterial, though, because EIC is controlled by its President. Therefore, Appellant and EIC are not affiliated. (*Id.* at 10-11.)

To determine Appellant's size, the Area Office combined Appellant's own receipts, Appellant's proportionate share of receipts for the joint ventures BU and UB, and the receipts for

affiliates BFTT, HEP, HF, and FSM for the years 2012, 2013, and 2014. (*Id.* at 11.) These combined receipts exceed the \$15 million size standard, so Appellant is other than small and thus ineligible for the instant procurement. (*Id.*)

C. Appeal

On July 5, 2016, Appellant filed its appeal asserting that Size Determination No. 3-2016-049 is clearly erroneous and requesting OHA to reverse it. Specifically, Appellant argues that the Area Office erred (1) in finding affiliation amongst Appellant, Chris Hamby, Terry Hamby, HEP, and HF; and (2) in finding affiliation between Appellant and FSM. Appellant does not contest the Area Office's conclusions that Appellant is not affiliated with USP and EIC.³

Appellant contends that the Area Office did not afford Appellant the opportunity to rebut the presumption of familial identity of interest in the initial size investigation, as the original protest alleged only that Appellant is affiliated with USP through their joint ventures, and the Area Office presented Appellant with preliminary findings and an opportunity to rebut only on the issue of alleged affiliate EIC. (Appeal at 7 & n.2.) Then, Appellant contends, following the issuance of OHA's decision in *W&T*, Appellant provided the Area Office with facts and argument that, in its view, rebutted the presumption of family identity of interest among Appellant, Chris Hamby, and Terry Hamby by showing clear fracture, yet the Area Office “focused solely upon the singular fact that Chris Hamby owns a limited partnership in HEP (a real estate management company) in finding affiliation” among Appellant, Chris and Terry Hamby, HEP, and HF. (*Id.* at 7-10.) Appellant highlights that a minimal amount of business activity does not prevent a finding of clear fracture under OHA's case law, but the Area Office failed to apply this precedent in the size determination on remand. (*Id.* at 9-10.)

Moreover, Appellant contends, the Area Office erred in finding an identity of interest between Chris Hamby and Carolyn Hamby, and thus finding affiliation between Appellant and FSM. (*Id.* at 11-12.) Appellant points first to SBA's recently-revised identity of interest regulation, where the stepchild/stepparent relationship is not included among the “explicitly identified relationships” giving rise to presumptive affiliation. (*Id.* at 12-13.) Appellant next points to OHA's past decisions on both the presumption of affiliation and clear fracture, case precedent that the Area Office, in Appellant's view, misapplied.

Regarding presumptive affiliation, Appellant notes that OHA directed the Area Office, prior to reaching the issue of clear fracture, to examine and consider “whether Chris and Carolyn Hamby *have* an identity of interest such that the firms they control are affiliated.” (*Id.* at 13, citing *W&T*, SBA No. SIZ-5721, at 15 (emphasis Appellant's).) Appellant asserts that, despite OHA's extensive instruction on this issue and the detailed declarations Appellant submitted addressing it, the Area Office ignored the instructions, found the declarations not credible, invoked an unwarranted identity of interest presumption, and then found the presumption not

³ Because Appellant does not challenge these findings on appeal, further discussion of them is unnecessary. *Size Appeal of Env't'l Restoration, LLC*, SBA No. SIZ-5395, at 6-7 (2012) (when issue is not appealed, the area office's determination “remains the final decision of the SBA.”).

rebutted, all of which constitute clear errors. (*Id.* at 13-20.) A proper evaluation, in Appellant's view, would have resulted in a finding of no identity of interest between Chris Hamby and Carolyn Hamby. Absent a finding of identity of interest, the Area Office could only conclude that Appellant is not affiliated with FSM and, thus, is an eligible small business for the instant procurement. (*Id.* at 20-21.)

Having incorrectly presumed that Chris Hamby and Carolyn Hamby share an identity of interest, the Area Office further erred by failing to properly consider whether the two were estranged as of the self-certification date, an estrangement that would establish clear fracture. (*Id.* at 21.) As to this issue, Appellant points to the evidence it presented to the Area Office concerning the estrangement between Chris Hamby and Carolyn Hamby that dates to a May 2012 argument, which directly led to Appellant's 2013 purchase of FSM's interest in BFTT, and which resulted in no further business relationships between them except for two subcontracts originally awarded in 2010 which were allowed to expire on their own terms on September 30, 2015. (*Id.* at 22-23.) Appellant insists that the Area Office erred in relying upon Appellant's five-year relationship with FSM as joint venture partners in BFTT as a basis for finding no estrangement, because that business relationship ended in 2013, well before the June 18, 2015 self-certification date. (*Id.* at 23-24.) As for the two subcontracts, letting them run to term despite the estrangement was merely a practical business decision. (*Id.*) Appellant notes that OHA's case precedent does not require “a complete absence of any business ties between the family members or their firms to establish a clear line of fracture”. (*Id.* at 26.) Yet, Appellant contends, the Area Office failed to consider this point; instead it improperly focused on Chris Hamby and Carolyn Hamby “doing business together for at least seven years”, which is not the correct analysis. (*Id.* at 25.)

Finally, Appellant argues the Area Office failed to consider Appellant's assertion that application of the presumption of affiliation under the circumstances here would be unjust or inequitable. (*Id.* at 28-30.) As relief, Appellant requests that OHA grant the appeal, reverse the size determination, and find that Appellant and Chris Hamby are not affiliated with Terry Hamby, Carolyn Hamby, or FSM. (*Id.* at 31.)

D. W&T's Response

On August 5, 2016, W&T responded to the appeal. W&T does not contest the Area Office's determination that Appellant is not affiliated with EIC and USP. (Response at 2 & n.1.) Citing *Size Appeal of Chu & Gassman, Inc.*, SBA No. SIZ-5344 (2012), *modified on recons.*, SBA No. SIZ-5394 (2012) (PFR), W&T argues that OHA did not remand the issue of whether Appellant is affiliated with HEP and HF; rather, OHA ruled that they are affiliated, and these affiliations are now settled and the “law of the case”. (*Id.* at 4-6.) Further, because Carolyn Hamby wholly owns FSM and owns 50% of Appellant's affiliate, HF, FSM is affiliated with Appellant through HF, causing Appellant to be other than small. (*Id.* at 7-8.) In W&T's view, “[t]his conclusion is unavoidable because of the settled affiliations and common, controlling ownership, regardless of whether an identity of interest exists between Chris and Carolyn Hamby.” (*Id.* at 8.)

On the issue of whether Appellant is affiliated with FSM under 13 C.F.R. § 121.103(f), W&T asserts that SBA's revised identity of interest regulation became effective after the date of self-certification, and therefore does not apply to this appeal. (*Id.* at 11.) Even if the revised rule were applicable, though, the result would be the same. W&T cites *Size Appeal of Priority One Services, Inc.*, SBA No. SIZ-4479 (2002) and *Size Appeal of SolarCity Corp.*, SBA No. SIZ-5257 (2011) for the proposition that a stepparent/stepchild relationship suffices to establish presumptive affiliation based on familial identity of interest. (*Id.* at 10-11.)

Further, the Area Office reasonably found that Appellant's statements regarding estrangement between Chris and Carolyn Hamby lacked credibility, that there is no estrangement between them, and that the presumption of family identity of interest was not rebutted. (*Id.* at 10-11.) The Area Office identified several business connections between Chris and Carolyn Hamby and their companies, including their five-year association in BFTT, which ended when FSM gave its interest in BFTT to Appellant in 2013; the fact that both are shareholders and directors in EIC; and the two subcontracts each of which represents a significant percentage of the value of the respective prime contracts (17% of one and 23% of the other). (*Id.* at 8-10.) Further, both subcontracts were in effect on the self-certification date despite the fact that they could have been discontinued sooner. (*Id.*) Thus, Appellant has not carried its burden of establishing that the Area Office made clear error of fact or law in determining that Appellant is affiliated with FSM. W&T also disagrees with Appellant's contention that applying familial identity of interest here would be unjust or inequitable. (*Id.* at 10.)

III. Analysis

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. Threshold Matters

The parties agree that SBA's recent revisions to its identity of interest regulation, 13 C.F.R. § 121.103(f), are not applicable in this case. In those revisions, SBA introduced more specific language defining the types of family relationships that may give rise to an identity of interest, and stated that “[o]ther types of familial relationships are not grounds for affiliation on family relationships.” 81 Fed. Reg. 34,243, 34,258 (May 31, 2016). The revised regulation, though, became effective June 30, 2016, whereas Appellant's size is assessed as of June 18, 2015, when Appellant self-certified for the instant procurement. Thus, the prior version of 13 C.F.R. § 121.103(f) governs this case. The prior version of the regulation stated that:

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, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination by showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f) (2015).

OHA has extensive case precedent interpreting the regulation as creating a rebuttable presumption that close family members have identical interests and must be treated as one person. *See, e.g., Size Appeal of Knight Networking & Web Design, Inc.*, SBA No. SIZ-5561 (2014). A challenged firm may rebut the presumption of identity of interest if it is able to show “a clear line of fracture among the family members.” *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 8 (2013). “Factors that may be pertinent in examining clear line of fracture include whether the firms share officers, employees, facilities, or equipment; whether the firms have different customers and lines of business; whether there is financial assistance, loans, or significant subcontracting between the firms; and whether the family members participate in multiple businesses together.” *Size Appeal of Trailboss Enters., Inc.* SBA No. SIZ-5442, at 5 (2013), *recons. denied*, SBA No. SIZ-5450 (2013) (PFR). “OHA has recognized that a minimal amount of business or economic activity between two concerns does [not] prevent a finding of clear fracture.” *Carwell Prods.*, SBA No. SIZ-5507, at 8; *accord Size Appeal of RGB Group, Inc.*, SBA No. SIZ-5351, at 7 (2012); *Size Appeal of GPA Techs., Inc.*, SBA No. SIZ-5307, at 6 (2011).

C. Analysis

I agree with Appellant that the Area Office clearly erred in concluding that Chris Hamby shares an identity of interest with his stepmother, Carolyn Hamby, and that Appellant consequently is affiliated with FSM. There is no dispute that, absent affiliation with FSM, Appellant and its remaining affiliates do not exceed the applicable size standard. Accordingly, the appeal is granted and the size determination is reversed.

In its decision in *Size Appeal of W&T Travel Services, LLC*, SBA No. SIZ-5721 (2016), OHA noted that Carolyn Hamby and Chris Hamby are stepparent and stepchild, but took no position as to whether the relationship between them was sufficiently close as to create a rebuttable presumption of identity of interest under 13 C.F.R. § 121.103(f). OHA did, however, reject the argument that a stepparent-stepchild relationship is necessarily “too tenuous” to give rise to an identity of interest, observing that “in some instances the closeness of a stepparent-stepchild relationship can approach that of the parent-child relationship.” *W&T*, SBA No. SIZ-5721, at 15. OHA remanded the matter to the Area Office to determine “whether Chris and Carolyn Hamby have an identity of interest”, and if so “whether there is clear fracture”. *Id.*

On remand, Appellant submitted detailed information describing the lack of closeness in the relationship between Chris Hamby and Carolyn Hamby. Appellant explained that Chris Hamby was 38 years old when Carolyn Hamby became his stepmother. Section II.A, *supra*. In

his sworn declaration, Chris Hamby further averred that neither Chris Hamby nor his sister has ever lived with Carolyn Hamby; that he and his children both refer to Carolyn Hamby by her first name; and that there is no closeness in their relationship with her. *Id.* In addition, Chris Hamby stated that his relationship with Carolyn Hamby was further undermined as a result of a family argument in 2012, after which time the business dealings between them essentially ceased. *Id.* I agree with Appellant that, based on these facts, Appellant established that the relationship between Chris Hamby and Carolyn Hamby is not in the nature of a parent-child relationship. As a result, the Area Office clearly erred in presuming an identity of interest based on family relationships.

Even if it had been appropriate to invoke the presumption of identity of interest in the first instance, the Area Office further erred in concluding that Appellant did not rebut that presumption. Based on the information Appellant submitted to the Area Office, there were virtually no remaining ties between Chris Hamby and Carolyn Hamby and their respective companies as of June 18, 2015, the date to determine size. The Area Office itself recognized that Chris Hamby and Carolyn Hamby hold no ownership or managerial interests in each other's companies, and that the companies do not share employees, facilities, or other resources. Section II.B, *supra*. Further, although Appellant and FSM previously were participants in the BFTT joint venture, this association ended in 2013 when Appellant acquired FSM's stake in BFTT. *Id.* As of the date to determine size, then, the joint participation in BFTT was merely an historical connection, and OHA has explained that an area office may not rely on purely historical ties as evidence of a lack of clear fracture. *Size Appeal of SP Techs., LLC*, SBA No. SIZ-5319, at 6 (2012) (area office erred in considering past ownership as a factor supporting a lack of clear fracture, because that interest had been divested prior to the date for determining size). Accordingly, the only connections between Chris Hamby and Carolyn Hamby and their respective companies that were still in existence as of the date to determine size were two minor subcontracts that Appellant had awarded to FSM several years earlier and that had nearly expired, and the fact that Appellant and FSM are two of approximately 200 entities that obtain insurance through EIC. The Area Office determined, though, that EIC is controlled by its President, not by Appellant or by FSM, and the modest subcontracts between Appellant and FSM are by themselves insufficient to conclude that Appellant had failed to establish clear fracture. *Size Appeal of Avantara Corp.*, SBA No. SIZ-4225, at 5 (1996) (clear fracture existed between stepmother and stepdaughter when their only significant connection, as of the date to determine size, was “the proposed subcontract at issue here”). Thus, the Area Office clearly erred in finding that Appellant did not rebut the presumption of identity of interest.

In its response to the appeal, W&T also argues that Appellant should be deemed affiliated with FSM on alternate grounds. W&T highlights that, in the initial *W&T* decision, OHA concluded that Appellant is affiliated with HF because Chris Hamby shares an identity of interest with his father, Terry Hamby. Section II.A, *supra*. HF in turn is controlled by both Terry Hamby and Carolyn Hamby, and Carolyn Hamby also controls FSM. Section II.B, *supra*. Thus, W&T urges, because HF is affiliated both with Appellant and with FSM, Appellant is affiliated with FSM through HF.

W&T's argument fails for several reasons. First, W&T's underlying protest did not allege that Appellant is affiliated with FSM, and in its remand order, OHA specifically directed the

Area Office to consider whether Appellant is affiliated with FSM through an identity of interest between Chris Hamby and Carolyn Hamby. Section II.A, *supra*. The notion that Appellant may be affiliated with FSM on alternate grounds is therefore beyond the scope of the remand ordered by OHA, and is not properly before OHA at this time. Second, W&T's reasoning appears inconsistent with the decision in *W&T*. Notably, although OHA did state in *W&T* that Appellant is affiliated with HF, OHA did not conclude that, as a result, Appellant also must be affiliated with FSM. On the contrary, OHA remanded the matter to the Area Office to determine whether Appellant is affiliated with FSM through an identity of interest. Logically, if Appellant's affiliation with HF were sufficient to demonstrate that Appellant is affiliated with FSM, there would have been no need to further investigate the question of identity of interest. Thus, the decision in *W&T* at least implicitly undermines the argument that Appellant and FSM are affiliated by virtue of their joint connection to HF. Third, W&T offers no legal authority for the proposition that Appellant and FSM are affiliated simply because each company individually is affiliated with HF. Nor does W&T attempt to reconcile its argument with 13 C.F.R. § 121.103(a), which provides that “[c]oncerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties has the power to control both.” Here, there is no basis in the record to conclude that Appellant has the power to control FSM or *vice versa*, or that a third party has the power to control both Appellant and FSM. Thus, W&T's argument that Appellant is affiliated with FSM through HF is unpersuasive.

IV. Conclusion

Appellant has demonstrated that the size determination on remand is clearly erroneous. Accordingly, the appeal is GRANTED. It is undisputed that, excluding FSM, the combined average annual receipts of Appellant and its remaining affiliates do not exceed the applicable \$15 million size standard. The size determination therefore is REVERSED. Appellant is an eligible small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge