

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

SIZE APPEAL OF:

VORAGO Technologies, Inc.

Appellant,

Appealed From  
Size Determination No. 05-2022-006

SBA No. SIZ-6242

Decided: August 29, 2023

APPEARANCES

John R. Prairie, Esq., George E. Petel, Esq., Morgan W. Huston, Esq., Wiley Rein, LLP,  
for Appellant

DECISION<sup>1</sup>

I. Introduction and Jurisdiction

On May 19, 2023, the U.S. Small Business Administration (SBA) Office of Government Contracting Area V (Area Office) issued Size Determination No. 05-2022-006, concluding that Silicon Space Technology Corporation d/b/a VORAGO Technologies, Inc. (Appellant) is other than small under the applicable 500 employee size standard for the Small Business Innovation Research (SBIR) program. Appellant appeals the size determination, which claims it is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse it. For the reasons discussed *infra*, the appeal is GRANTED, and the size determination is REVERSED, VACATED, and REMANDED to the Area Office for a new size determination.

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 15 days after 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.

---

<sup>1</sup> This decision was initially issued under confidential treatment. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

## II. Background

### A. Size Determination

Appellant is an SBIR firm that has previously obtained SBIR contracts with the National Aeronautics Space Administration (NASA) and the Department of Defense (DOD). On November 16, 2021, the Area Office initiated an Area Director-directed formal size determination of Appellant, because SBA had received information that after the venture capital firm New Science Ventures (NSV) obtained a controlling interest in Appellant it may no longer be small.

On May 19, 2023, the Area Office issued Size Determination No. 05-2022-006, finding that Appellant is other than small, because it failed to meet the ownership requirements to be eligible for the SBIR program at 13 C.F.R. § 121.702(a).

The Area Office first noted that Appellant had asserted it was not owned by NSV and instead that NSV and its affiliates are venture capital management companies, which provide venture capital management services to limited partnerships. Appellant had stated it was majority-owned by a combination of individuals with direct ownership and individuals who manage their ownership through limited partnerships. There are 18 individuals who own interests in Appellant directly and 96 individuals who own through limited partnerships, which are small businesses. These limited partnerships do not control Appellant. It further asserted it is majority owned by U.S. citizens and is well above the regulatory requirement of over 50% ownership and control by U.S. citizens or permanent resident aliens. Additionally, NSV Management manages the NSV limited partnerships investments as an exercise of the limited partners' control. (Size Determination, at 1-2.)

As explained, an SBIR awardee must be more than 50% directly owned by at least one individual or by other small business concerns if the concerns are each more than 50% owned and controlled by individuals who are U.S. citizens or permanent resident aliens. (*Id.*, at 3, citing 13 C.F.R. § 121.702(a)(1)(i).) No single venture capital operating company, hedge fund, or private equity firm may own more than 50% of an SBIR awardee unless the owner concern qualifies as a small business concern that is more than 50% directly owned and controlled by individuals who are U.S. citizens or permanent resident aliens. (*Id.*, citing 13 C.F.R. § 121.702(a)(2).) “Individual” in this context means a natural person. (*Id.*, citing *Size Appeal of CBR Laboratories, Inc.*, SBA No. SIZ-4423 (2001).)

The Area Office emphasized that OHA precedent permits only one layer of separation between the SBIR entity and individuals who own and control it, and that an SBIR recipient may not have more than one layer of corporate ownership. When control of the SBIR entity flows through another entity, the direct ownership and control requirement is not met. (*Id.*, citing *Size Appeal of Emerald Biostructures, Inc.*, SBA No. SIZ-5221 (2011); *Size Appeal of Glucan Biorenewables, LLC*, SBA No. SIZ-5608 (2014).)\*2 Based on the record, the Area Office found that since 2015, Appellant was owned [minority]% by individuals, and [majority]% by NSV. The NSV's website identified it as a venture capital firm which invests in companies. Further, NSV refers to the companies it is involved with as “our companies.” Appellant could be located

on its website under the “Our Companies” tab. The Area Office took note of the language used and concluded that it implied ownership, and not merely management, of the companies with which NSV was involved. Thus, the Area Office concluded that NSV added an additional level of ownership. (*Id.*, at 4, citing letter May 25, 2021 from Appellant to **[Party 1]**.)<sup>\*2</sup> In addition, the Area Office found NSV is owned by numerous other entities, identified as:

- J.P. Investment III, LLC
- New Science Ventures Fund — Crozet, L.P.
- New Science Ventures Fund — Euro, L.P.
- New Science Ventures Fund — Madison, L.P.
- New Science Ventures Fund I, L.P.
- New Science Ventures Fund III (Offshore) L.P.
- New Science Ventures Fund III, L.P.
- NSV 2016 Opportunities Fund (Offshore) L.P.
- NSV 2016 Opportunities Fund L.P.
- NSV Extension Fund II (Offshore) L.P.
- NSV Extension Fund II L.P.
- NSV Investments I, L.P.
- NSV Master Limited Partnership II, L.P.
- NSV New Opportunities Fund (Offshore) L.P.
- NSV New Opportunities Fund II (Offshore), L.P.
- NSV New Opportunities Fund II, L.P.
- NSV New Opportunities Fund, L.P.
- NSV Partners, Institutional, L.P.

(*Id.*, at 4-5.)

Appellant also stated that Somu Subramanian is Managing Member of New Science Ventures, LLC, NSV Partners, LLC, NSV Partners II, LLC, NSV Partners, III, L.P., and NSV Management, LLC. (*Id.*, at 5.) Here, the Area Office found that these entities made up Appellant's second ownership level. In turn, these entities are owned by other entities and individuals, making up the third level of ownership. This level consists of a combination of individuals, trusts, LLCs, LPs, and funds, but no further information was given on who owns the entities at the third level. (*Id.*, at 5.)

The Area Office concluded that Appellant's ownership structure did not comply with the requirements of 13 C.F.R. §§ 121.702(a)(1)(i) and 121.702(a)(2). When an entity owns an SBIR entity, that entity must be owned and controlled by individuals. Control which flows through an additional entity to reach the owner entity does not meet the ownership and control requirements. When an SBIR firm is owned by another entity, that entity itself must be in control of the SBIR firm, and it cannot act as a passthrough for the entity or individual who actually does have control. The Area Office found that NSV has had over 50% ownership of Appellant for all of the relevant years. (*Id.* at 5, citing letter from Appellant to **[Party 1]**, May 25, 2021.) Therefore, Appellant was not directly owned by individuals in a manner that complied with 13 C.F.R. § 121.702(a)(1)(i). Further, Appellant's ownership structure does not comply with 13 C.F.R. § 121.702(a)(2). NSV is a venture capital firm that owns over 50% of Appellant, and Appellant did

not establish that it is more than 50% directly owned and controlled by individuals who are citizens or permanent resident aliens of the U.S. Consequently, Appellant did not meet the regulatory requirements of the SBIR program and was ineligible for SBIR awards. (*Id.*, at 5-6.)

### B. The Appeal

On June 5, 2023, Appellant filed the instant appeal. Appellant asserts the size determination is based on an error of fact. Appellant asserts that it is more than 50% directly owned and controlled by a combination of (i) U.S. individuals and (ii) limited partnerships that are majority-owned directly by U.S. individuals. The Area Office erroneously found that the venture capital firm, NSV, directly owned and controlled more than 50% of Appellant and the limited partnerships own NSV. (Appeal, at 1-2.)

With its appeal, Appellant filed a motion to supplement the record and included a declaration from counsel describing the interactions with the Area Offices, and a letter dated October 18, 2021 from Appellant to the U.S. Attorney's Office for the Western District of Texas, providing clarification regarding Appellant's eligibility for the SBIR program, which the Area Office relied upon, while Appellant had not known was part of the evidence the Area Office considered in making the Size Determination. (Motion and Appellant's Exh. 3.)

In its appeal, Appellant argues it provided substantial information demonstrating its compliance with the SBIR requirements. That after working with Area Office V for months, a Size Specialist from Area Office II contacted Appellant and inquired as to whether Appellant met the relevant ownership requirements. Appellant maintains it submitted the necessary ownership documentation and argues the Size Determination is based almost entirely on information Appellant provided to another Government agency before the size review began, a submission to Area Office V prior to Area Office II taking over, and language from a NSV's website which Appellant does not control. (Appeal, at 2-3.)

Appellant recounts that on November 16, 2021, SBA Area Office V initiated a size determination, which it informed Appellant was based on information it had received suggesting that NSV had obtained a controlling interest in Appellant. On November 19, 2021, Appellant responded to the Area Office's request for information with a letter laying out its ownership and control. This included a chart showing specific ownership percentages held by each individual shareholder and partnership. The chart listed ownership percentage for each year from 2015 to 2020 for a number of individuals and several NSV limited partnerships, which in turn were owned by individuals. An Attachment C gave detailed percentage ownership of each limited partnership held by U.S. individuals. NSV was not listed as having any ownership interest in Appellant. This showed that the majority of each limited partnership was held by U.S. individuals. Appellant explained that, together with direct investors, U.S. individuals or limited partnerships majority owned by U.S. individuals hold and continue to hold well above 50% of Appellant's total equity, and thus, its ownership structure is compliant with SBA regulations. (*Id.*, at 6, citing Appellant's Response of November 19, 2021 at 3-4.)

Appellant also addressed the issue of control, explaining that control of the concern was held by individuals with direct ownership, its CEO, and an independent director. Under the

shareholders' agreement, the NSV Partnerships are entitled to nominate only two of the five directors. (*Id.*, at 7.)

In further communications with the Area Office, Appellant gave breakdowns of ownership, and submitted information on the citizenship status of the shareholders and owners of the limited partnerships. (*Id.*, at 7-9.) On March 23, 2023, Appellant was notified that the size determination would be handled by Area Office II. On April 20, 2022, Appellant again submitted a substantial number of documents in response to Area Office II's new requests and produced an extensive index of all documents presented to SBA as part of the process. (*Id.*, at 9-10.)

Appellant asserts the size determination starts from the “original incorrect and consistently refuted premise that NSV has been the majority owner of VORAGO since 2015.” (*Id.*, at 11.) The size determination relies upon language from NSV's website, rather than on Appellant's extensive submissions. Appellant argues the size determination ignores or incorrectly interprets the multiple instances in which Appellant expressly explained to SBA that NSV does not own a controlling interest in Appellant. (*Id.*, at 11-12.) The Area Office compounds the error by finding, contrary to the information Appellant submitted, that NSV is owned by numerous other entities, and lists the limited partnerships which Appellant had explained held direct ownership interest in Appellant. (*Id.*, at 12.)

Appellant bases its appeal on its allegation of two clear errors made by the Area Office. First, the finding that NSV held a controlling interest in Appellant. Second, that NSV is owned by limited partnerships. Both findings are wrong and inconsistent with the information Appellant submitted to SBA. (*Id.*, at 13.)

To support its statements, Appellant argues it has demonstrated its ownership structure meets the regulatory requirements at 13 C.F.R. § 121.702(a)(1)(i) because its ownership is a combination of direct ownership by U.S. individuals and direct ownership by limited partnerships that are directly owned by a combination of individuals, trusts and entities. Appellant's submissions established that more than 50% of its ownership is held either directly by U.S. individuals and nine limited partnerships which are majority owned directly by U.S. individuals. (*Id.*, at 14.)

Appellant notes the Area Office's finding that NSV was its majority owner was based in part on a May 25, 2021 submission it made to the [Party 1], which predated SBA's size review. The Area Office never raised the subject of this letter during the size review. Appellant maintains that had it known this letter was being considered, it would have explained this letter was an imprecise exchange expressly clarified by both Appellant and the Government in a subsequent exchange in October, 2021. (*Id.*, at 15, citing letter of October 18, 2021 from Appellant to [Party 1].) The size determination also cites Attachment C of Appellant's November 19, 2019 submission as evidence NSV has been a majority owner since 2015, but this document clearly shows ownership is not held by NSV, but by multiple limited partnerships. (*Id.*, at 16.) While the Area Office also erred by relying on language from the NSV website to conclude it implies ownership, which Appellant does not own or control the website, greater weight should have been given to actual submissions from parties rather than internet research. (*Id.*, at 17, citing *Size*

*Appeal of Costar Services, Inc.* SBA No. SIZ-5745 (2016); *Size Appeal of Aerospace Engineering Spectrum*, SBA No. SIZ-5497 (2013).

Further, Appellant assigns error to the Area Office's finding that NSV is owned by the limited partnerships which make up Appellant's second ownership level. There is no support in the record for this finding, and no citation for it in the size determination. (*Id.*) Moreover, the Area Office relied on case law that is inapposite, because the concerns in those cases had more than one layer of corporate entity ownership between them and the individual owners. (*Id.*, at 18.)

Appellant concludes by requesting that the size determination be vacated, and the matter remanded to the Area Office for a new size determination.

### III. Discussion

#### A. Standard of Review and New Evidence

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant must prove that the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb 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).

Appellant seeks to admit new evidence into the record. This consists of a declaration of counsel describing the interactions with the Area Office, and a clarification letter to another federal agency which the Area Office relied upon, but which Appellant had not been aware that was part of the record and considered. I find Appellant has established good cause to admit this evidence. The letter clarifies matters in the letter that the Area Office relied upon without alerting Appellant it was doing so, and the declaration supplements the record of the discussions with the Area Offices. I therefore GRANT Appellant's motion and ADMIT the proffered evidence. *Size Appeal of Northwind-CDM Smith Advantage, LLC*, SBA No. SIZ-6053 (2020).

#### B. Analysis

In order to be eligible for the SBIR program, a concern must be more than 50% owned and controlled by one or more individuals who are either U.S. citizens or permanent resident aliens of the U.S., other small business concerns (each of which is more than 50% directly owned and controlled by individuals who are U.S. citizens or permanent resident aliens of the U.S.), an Indian tribe, ANC or NHO, or a wholly owned business entity of such tribe, ANC, or NHO, or any combination of these. 13 C.F.R. § 121.702(a)(1)(i).

Further, no single venture capital operating company hedge fund or private equity firm may own more than 50% of the concern unless that concern qualifies as a small business concern that is more than 50% owned and controlled by individuals who are citizens or permanent

resident aliens of the U.S., 13 C.F.R. § 121.702(a)(2). OHA has held that “individuals” in this context means a natural person. *CBR Laboratories, supra*.

While the Area Office concluded that Appellant failed to meet the requirements of the regulation — that NSV owned a majority interest in Appellant — this conclusion was based upon a clear error. Appellant's submissions to the Area Office, beginning with its SBA Form 355, Attachment E, made clear that this was not the case, and that Appellant was owned either directly by individuals, or by limited partnerships. Nothing Appellant submitted identified NSV as a majority shareholder, or indeed as one of Appellant's shareholders at all.

The Area Office's reliance upon website evidence in preference to Appellant's written submissions was clear error. The regulations clearly state that SBA must give greater weight to specific, signed, factual evidence than to general unsupported allegations or opinions. 13 C.F.R. § 121.1009(d). There is also no indication that Appellant controls NSV's website, even if NSV refers to Appellant as one of “our companies.” The language on the NSV site the Area Office relied upon, “our companies” is ambiguous at best, and could as easily refer to firms to which NSV provides consulting services as opposed to firms in which it has an ownership interest. For the Area Office to rely upon what another concern's website “implied” about ownership, instead of the documentation submitted by the subject concern itself was again clear error.

Further, due process requires that concerns must have specific notice of the grounds of protests against them, so they have the opportunity to craft a meaningful response. *Size Appeal of Alutiiq Int'l Sols., LLC*, SBA No. SIZ-5069, at 3 (2009). The Area Office's reliance upon the May 25, 2021 letter, when Appellant was not informed that it was part of the record the Area Office was considering clearly lacked due process and failure to give Appellant the opportunity to comment upon it was also error.

I thus find that the size determination was based upon a clear error of fact, the finding that NSV was Appellant's majority owner, in contradiction to the evidence in the record, and I conclude I must grant the appeal and remand this matter to the Area Office.

#### IV. Conclusion

Appellant has shown clear error in the size determination. The appeal therefore is GRANTED, the size determination is VACATED, and the matter is REMANDED to the Area Office for a new size determination, consistent with this decision.

CHRISTOPHER HOLLEMAN  
Administrative Judge