

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

VSBC Appeal of:

Acorn Science & Innovation, Inc.,

Appellant

SBA No. VSBC-364-A

Decided: June 13, 2024

APPEARANCE

Robert E. Willitts, President, Acorn Science & Innovation, Inc., Dillwyn, Virginia

DECISION

I. Introduction and Jurisdiction

On May 6, 2024, Acorn Science & Innovation, Inc. (Appellant) appealed a decision of the Director of the Veteran Small Business Certification Program (D/VSBCP) of the U.S. Small Business Administration (SBA), denying Appellant's application for certification as a Service-Disabled Veteran Owned Small Business (SDVOSB). SBA found that Appellant could not be certified because it could not reasonably conclude that Robert E. Willitts, a Service-Disabled Veteran (SDV) controls Appellant. On appeal, Appellant maintains the denial decision was erroneous, and requests that SBA's Office of Hearings and Appeals (OHA) reverse the denial. For the reasons discussed *infra*, the appeal is granted.

OHA adjudicates SDVOSB status appeals pursuant to the Small Business Act of 1958, 15 U.S.C. §§ 631 *et seq.*, and 13 C.F.R. parts 128 and 134 subpart K. Appellant timely filed the appeal within 10 business days after receiving the denial notice on May 3, 2024. 13 C.F.R. § 134.1104(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. The Case File

On September 25, 2013, Appellant incorporated in the Commonwealth of Virginia. (Case File (CF), Exhs. 30, 33.) Under Appellant's Unanimous Shareholders' Agreement, Appellant issued a total of 1,000 shares of common stock. A Shareholder is defined as “the beneficial owner of the Stock.” (CF, Exh. 32.) According to Appellant's Stock Ledger and Stock Certificates, Mr. Willitts, a service-disabled veteran, holds 510 voting shares of Appellant, and Hyrum W. Laney owns 490 voting shares of Appellant. (CF, Exh. 28.) Mr. Willitts holds a 51% ownership interest in Appellant, while Mr. Laney holds a 49% ownership interest. (CF, Exh. 70.)

Upon request by the D/VSBCP, Appellant submitted Amended Bylaws, executed on April 1, 2024, and signed by Mr. Willitts, who is listed as the Appellant's sole Director. (CF, Exhs. 25, 26.) The Amended Bylaws include the following pertinent provisions:

## ARTICLE II - MEETINGS OF SHAREHOLDERS

[ . . . ]

6. Quorum. Any number of shareholders together holding at least a majority of the outstanding shares of capital stock entitled to vote with respect to the business to be transacted, who shall be present in person or represented by proxy at any meeting duly called, shall constitute a quorum for the transaction of business. If less than a quorum shall be in attendance at the time for which a meeting shall have been called, the meeting may be adjourned from time to time by a majority of the shareholders present or represented by proxy without notice other than by announcement at the meeting.

7. Voting. At any meeting of the shareholders each shareholder of a class entitled to vote on any matter coming before the meeting shall, as to such matter, have one vote, in person or by proxy, for each share of capital stock of such class standing in his name on the books of the Corporation on the date, not more than 70 days before such meeting, fixed by the Board of Directors as the record date for the purpose of determining shareholders entitled to vote. Every proxy shall be in writing, dated and signed by the shareholder entitled to vote or his or her duly authorized attorney-in-fact.

(*Id.* at 1-2.)

### B. Denial

On May 3, 2024, D/VSBCP denied Appellant's application for certification as an SDVOSB. (CF, Exh. 23.) D/VSBCP found that Appellant did not demonstrate that a SDV holds “ultimate authority to establish and lead both the long-term decision-making and day-to-day operations of the business,” as required under 13 C.F.R. § 128.203(e). (*Id.* at 1.)

More specifically, D/VSBCP asserts the Amended Bylaws “does not indicate what passes as an act of the Shareholders.” (*Id.* at 2.) D/VSBCP acknowledges there is one Director and an act of the majority of the directors passes as an act of the directors. (*Id.*) However, the D/VSBCP concluded that shareholder voting was not addressed in the Amended Bylaws. (*Id.*) Thus, based on the definition of shareholder voting, the D/VSBCP could not determine the SDV has unilateral control over all shareholder voting. (*Id.*) Therefore, the D/VSBCP denied certification, finding he could not reasonably conclude Appellant met the control requirements of 13 CFR § 128.203(a). (*Id.*)

### C. Appeal

On May 6, 2024, Appellant appealed the D/VSBCP's decision to OHA. Appellant asserts SBA made a factual and legally incorrect determination when it concluded “it cannot be reasonably concluded that Robert Willitts (SDV) has unilateral control over all shareholder voting.” (Appeal at 1, *citing* Denial Letter.) Appellant asserts it is not in dispute that Appellant has two shareholders, Robert E. Willitts, the SDV who owns 510 voting shares of Appellant, and Hyrum W. Laney, who owns 490 voting shares of Appellant. (*Id.*)

Further, Appellant asserts that according to Appellant's Amended Bylaws, a shareholder's vote is based on the number of shares owned. Therefore, Mr. Willitts, the SDV, holds 510 voting shares, while Mr. Laney holds 490 voting shares. (*Id.*) Appellant asserts that “Mr. Willitts possesses full control over [Appellant] as its majority shareholder; his 510 voting shares always prevail over Mr. Laney's 490 voting shares.” (*Id.* at 2.)

Lastly, Appellant concludes that it meets the control requirements under 13 C.F.R. § 128.203(e)(1)(ii) because Mr. Willitts owns 51% of Appellant's voting stock, he is the sole Director on Appellant's Board of Directors, and there are no supermajority voting requirements for shareholders to approve corporate actions. (*Id.*)

### III. Discussion

#### A. Standard of Review

Under SBA regulations, an applicant seeking verification as a Veteran Owned Small Business (VOSB) or SDVOSB “bears the burden of proof to demonstrate its eligibility.” 13 C.F.R. § 128.302(d). Eligibility is based on “the totality of circumstances, including facts set forth in the application, supporting documentation, any information received in response to any SBA request for clarification, any independent research conducted by SBA, and any changed circumstances.” *Id.* Furthermore, “[i]f a concern submits inconsistent information that results in SBA's inability to determine the concern's compliance with any of the VOSB or SDVOSB eligibility requirements, SBA will decline the concern's application.” 13 C.F.R. § 128.302(d)(1). In the event of a subsequent appeal to OHA, Appellant has the burden of proving, by a preponderance of the evidence, that the denial decision was based upon clear error of fact or law. 13 C.F.R. § 134.1111.

#### B. Analysis

Appellant has established that the D/VSBCP's decision was based on an error of fact or law. I find that Appellant has addressed all concerns in its Appeal and Amended Bylaws. As a result, I must grant this appeal.

The issue here is whether Appellant met the control requirements under 13 C.F.R. § 128.203. To meet the eligibility requirements for a SDVOSB, a concern must be at least 51% owned, and controlled, by one or more service-disabled veterans. 13 C.F.R. §§ 128.200(b), 128.202 and 128.203. The “control” requirement means that “both the long-term decision-

making and the day-to-day operations” must be controlled by service-disabled veterans. 13 C.F.R. § 128.203(a). Further the SDV must hold the highest officer position and must have the managerial experience needed to control the concern. 13 C.F.R. § 128.203(b).

Under 13 C.F.R. § 128.203(e)(1)(ii), control over a corporation means the SDV controls the Board of Directors. SBA will deem SDV control over the Board of Directors when:

[o]ne qualifying veteran owns at least 51% of all voting stock, the qualifying veteran is on the Board of Directors, and no supermajority voting requirements exist for shareholders to approve corporation actions. Where supermajority voting requirements are provided for in the concern's articles of incorporation, its by-laws, or by state law, the qualifying veteran must own at least the percent of the voting stock needed to overcome any such supermajority voting requirements.

13 C.F.R. § 128.203(e)(1)(ii).

Here, it is not in dispute that Mr. Willitts directly and unconditionally owns 51% of Appellant's voting stock. A review of the record reflects that the Stock Ledger and Shareholder Agreement executed October 1, 2013, record that Appellant issued 510 out of 1,000 original shares of Common Stock Voting shares to Mr. Willitts on October 1, 2013. Section II.A, *supra*. Further, on the same day, Appellant issued Mr. Laney 490 original shares of Common Stock Voting shares out of 1,000 shares. *Id.* Under the Amended Bylaws, one share equals one vote. *Id.* Thus, the record reflects that Mr. Willitts owns 51% of the aggregate of all outstanding voting stock.

D/VSBCP acknowledges that the Amended Bylaws state that Mr. Willitts is the sole Director of Appellant and that an act of the majority of the Directors passes as an act of the Directors. Section II.B, *supra*. However, the D/VSBCP denied the appeal because Appellant did not demonstrate “what acts as an act of the Shareholders.” *Id.* I find the D/VSBCP's determination overlooks SBA's regulations for control of a corporation. A discussion on the responsibilities of shareholders is not required to be included in the corporate documents under the regulations. Control over a corporation means: (1) SDV owns at least 51% of all voting stock; (2) the SDV is on the Board of Directors, and (3) no Supermajority requirements exist for shareholders. 13 C.F.R. § 128.203(e)(1)(ii); *see e.g., VSBC Appeal of NOVA Technologies, Inc.* SBA No. VSBC-354 (2024) (finding that the SDV owns more than 51% of all voting stock and is on the Board; therefore, the SDV controls the Board under the regulation unless there are supermajority voting requirements he cannot meet).

Here, Mr. Willitts owns 510 of the 1,000 outstanding shares, he is the sole Director on the Board of Directors as of the Amended Bylaws, and the majority of outstanding stock must be present for a quorum. Section II.A, *supra*. Further, I find no provisions in the Amended Bylaws that impede Mr. Willitts' control of the Board, nor do I find any which require a super majority vote.

I therefore conclude that Appellant has met its burden of establishing that the D/VSBCP's decision to decline Appellant's application for admission to SBA's certification database is based on error of fact or law. Accordingly, I must GRANT the instant appeal.

IV. Conclusion

Appellant has met its burden of establishing that the D/VSBCP's determination that it was not an eligible SDVOSB was based on an error of fact or law in denying Appellant's application for certification. I therefore GRANT this appeal and direct the D/VSBCP to immediately include Appellant in the SBA certification database. 13 C.F.R. § 134.1112(f). This is the final agency action of the U.S. Small Business Administration. 15 U.S.C. § 657f(f)(6)(A); 13 C.F.R. § 134.1112(d).

CHRISTOPHER HOLLEMAN  
Administrative Judge