United States Small Business Administration
Office of Hearings and Appeals

HUBZONE APPEAL OF: CS Government Solutions, LLC, Appellant, Appealed From: HUBZone Determination Solicitation No. 70RTAC21R00000003	SBA No. HUB-105 Decided: June 16, 2025

APPEARANCES

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Shane J. McCall, Esq., Nicole D. Pottroff, Esq., John L. Holtz, Esq., Gregory P. Weber, Esq., Stephanie L. Ellis, Esq., Annie E. Birney, Esq., Koprince, McCall, Pottroff, LLC, for BahFed Corporation

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DECISION[1]

I. Introduction and Jurisdiction

On February 12, 2025, the Director of the U.S. Small Business Administration (SBA) HUBZone Program (D/HUB) issued a HUBZone Determination (Determination), finding CS Government Solutions, LLC (Appellant) not to be an eligible HUBZone small business concern. On February 26, 2025, Appellant filed the instant appeal from that HUBZone determination. Appellant argues that the D/HUB's determination is clearly erroneous, and requests that OHA reverse it, and find Appellant is an eligible HUBZone small business concern. For the reasons discussed *infra*, I DENY the appeal and AFFIRM the D/HUB's determination.

[1] This decision was originally issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded the parties an opportunity to file a request for redactions if desired. No redactions were requested, and OHA therefore now issues the entire decision for public release.

OHA decides HUBZone appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 126 and 134 and Federal Acquisition Regulation (FAR) 19.1303. Appellant filed the appeal within ten business days of receiving the HUBZone determination, so the appeal is timely. 13 C.F.R. § 134.1303. Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation, Protest, and Determination

On April 20, 2021, the Department of Homeland Security (DHS) issued Solicitation No. 70RTAC21R00000003, to establish FirstSource III, DHS's department-wide vehicle for a wide variety of Information Technology commodities (hardware and software) and value-added reseller services. The Solicitation was set aside 100% for small business in several functional categories. The first was 8(a) concerns. The second was Historically Underutilized Business Zones (HUBZone) concerns. The third was Service-Disabled Veteran Owned Small Businesses, the fourth, Women-Owned Small Business and the fifth, all small business. The designated North American Industry Classification System (NAICS) code is 541519 — Information Technology Value Added Resellers, with a corresponding 150 employee size standard.

The Solicitation calls for a two-phased evaluation in accordance with FAR 12.603 utilizing streamlined acquisition procedures. (Solicitation, ¶ M.2.) Phase I proposals were due June 9, 2021. Phase I proposals would be Volume I. This would be technical proposals, with a cover letter certifying the Offeror has read and agrees to comply with all of the conditions and instructions in the Solicitation, a completed Attachment 6 Compliance Checklist, Representations and Certifications from FAR 52.212-3, 52.204-24, 52.209.2, and Offerors' response to Factor One — Ability to Perform the Work, and Factor Two — Supply Chain Risk Management Approach. After evaluation of the Phase I proposals, offerors will be provided with an Advisory Down-select Notice in accordance with Section M of this solicitation.

Phase II proposals were due January 25, 2025. This will include Volumes II and III and include a cover letter certifying the Offeror has read and agrees to comply with all of the conditions and instructions in the Solicitation. It will include the response to Factor Three — Demonstrated Prior Experience and Factor Four — Past Performance. Phase II proposals would also include pricing assumptions and the price proposal in Volume III. (Solicitation, ¶ L.4.2, ¶ 5.)

Thus, under the express submission requirements, offerors were required to provide all relevant certifications and representations, including status certifications, in their Phase I submissions, but not in Phase II submissions. Price was to be included in Phase II submissions, but not in Phase I submissions.

The Solicitation included references to the FAR provisions applicable to each of the socio-economic tracks of the procurement, including FAR part 19.13 for HUBZone concerns. (Solicitation, ¶ B.2.)

On June 8, 2021, Appellant submitted its Phase I proposal. Appellant is a joint venture between Sirius Federal, LLC (Sirius) and Cynergy Professional Systems LLC (Cynergy). Appellant registered in the System of Award Management (SAM) as a HUBZone joint venture and identified Cynergy as the HUBZone joint venture partner.

On March 28, 2022, SBA notified Cynergy via email that the HUBZone Program was initiating a program examination to determine whether Cynergy met the eligibility requirements for the HUBZone Program as of its certification anniversary date of December 20, 2021. On April 27, 2022, Cynergy submitted a response to the program examination notification letter which included copies of Cynergy's payroll records for the periods of November 11, 2021, through December 10, 2021. Included on those payroll records were Aaron Sams, Barbara Sanders, Beverly Smith, and Jose Rodriguez (hereinafter referred to as the "Individuals").

On July 19, 2022, SBA's Suspension and Debarment Official sent a "show cause" letter to Cynergy based on the information Cynergy provided in response to the program examination notification. The "show cause" letter stated that the Individuals claimed by Cynergy to be HUBZone employees appeared on the payroll for numerous other businesses seeking to obtain or maintain HUBZone certification, and it appeared that the Individuals were included on Cynergy's payroll only to maintain HUBZone certification and were not legitimate Cynergy employees. The "show cause" letter requested that Cynergy provide documentation and information demonstrating the firm did not, at any time, submit false information regarding the employment status and/or residency of its claimed HUBZone employees in order to obtain or maintain HUBZone certification. Cynergy did not respond to SBA's "show cause" letter.

On January 25, 2023, Appellant submitted its Phase II proposal.

On April 17, 2023, SBA issued a notice of proposed decertification to Cynergy via email. The cause for decertification was Cynergy's failure to respond to the "show cause" letter.

On May 17, 2023, Cynergy responded to SBA's notice of proposed decertification. Cynergy included with its response: a job description for the "Business Development Assistant" position claimed to be held by all of the Individuals; timesheets for the period from January 4, 2021 to December 24, 2021, for each of the Individuals; copies of W-2s for the year 2021 for each of the Individuals; a table representing the work product allegedly produced by the Individuals; copies of resumes for each of the Individuals; copies of offer letters for each of the Individuals; and a written statement from Cynergy's owner, Ms. Cynthia Mason.

On August 3, 2023, SBA decertified Cynergy from the HUBZone program. SBA found the information contained in the record failed to demonstrate the four Individuals performed work for at least 40 hours during the four-week period immediately prior to Cynergy's certification anniversary date of December 20, 2021, and thus did not meet the HUBZone definition of "employee" as of that date.

SBA therefore excluded the Individuals from SBA's calculation of the number of Cynergy's HUBZone employees. SBA then found Cynergy had 23 employees who worked at least 40 hours per month at the relevant time, including 6 employees who resided in HUBZones,

which was below the 35% HUBZone residency requirement. SBA therefore found Cynergy was not eligible for the HUBZone program and decertified Cynergy.

On September 10, 2024, DHS issued notices to unsuccessful offerors in the 8(a) and HUBZone categories. Appellant was one of the successful offerors.

On September 17, 2024, BahFed Corporation (BahFed) filed a HUBZone protest against Appellant's HUBZone status.

On February 12, 2025, the Deputy Director of SBA's HUBZone Program sustained the BahFed HUBZone protest. SBA informed Appellant that the four Individuals were not legitimate Cynergy employees. If they were not, then Cynergy may not have met the 35% HUBZone residency requirement at the time of its certification anniversary date on December 20, 2020. The HUBZone regulations provide that for a two-phase procurement such as the one here, a concern must be a certified HUBZone small business concern as of the date it submits its initial bid or proposal (which may or may not include price). 13 C.F.R. 126.601(e). Cynergy was required to be HUBZone-certified as of its June 8, 2021, Phase-one offer.

SBA's HUBZone regulations further provide "Once SBA certifies a concern as eligible to participate in the HUBZone program, the concern will be treated as a certified HUBZone small business concern eligible for all HUBZone contracts for which the concern qualifies as small, for a period of one year from the date of its initial certification or recertification." 13 C.F.R. § 126.501(a). "As long as [a] concern was eligible at the time of its offer (and eligibility relates back to the date of its certification or recertification), it could be awarded a HUBZone Contract. . . . " 13 C.F.R. § 126.504(c)(1). Thus, an offeror on a HUBZone contract must be HUBZone-certified at the time of its initial offer, and its eligibility relates back to its certification anniversary date preceding that date of offer. Accordingly, SBA determines the eligibility of a concern subject to a HUBZone status protest as of the firm's most recent certification anniversary date preceding the firm's date of offer for the procurement. 13 C.F.R. § 126.803(a). Cynergy's certification anniversary date preceding the date of its Phase one offer was on December 20, 2020. (Letter Sustaining Protest, at 3-4.)

The Deputy Director further noted that the HUBZone Act and the implementing regulations required that at least 35% of a HUBZone small business concern's employees reside in a HUBZone. (*Id.*, at 4, 15 U.S.C. § 657a(d)(1)(A); 13 C.F.R. § 126.200(d)(1).) She noted the regulations defined "Employee" as individuals hired on full-time, part-time or other basis so long as they worked for a minimum of 40 hours during the four-week period prior to the review. She further noted the preamble to an amendment of the regulation in 2019 which stated that some third-party businesses were providing HUBZone resident employees to prospective HUBZone concerns. The preamble concluded that SBA would allow these arrangements where they were legitimate, and the individuals hired were performing legitimate work. (*Id.*, at 6-7, 84 Fed. Reg. 65,222, 65,225 (Nov. 26, 2019).)

SBA's policy was that individuals hired through third party employment agencies must be performing work in order to be considered employees for the HUBZone Program. The Deputy Director concluded that it is thus clear that individuals hired directly by a HUBZone applicant or

participant must be performing work in order to be considered employees for HUBZone purposes. In 2024, SBA published a final rule that emphasized an individual must be performing work in order to be considered an employee for HUBZone purposes. (*Id.* (89 Fed. Reg. 102,448 (Dec. 17, 2024).)

The Deputy Director further noted Cynergy bore the burden of proof to demonstrate its eligibility, and failure to provide sufficient information or supporting documents may result in an adverse inference. (*Id.*, citing 13 C.F.R. §§ 126.306(b), 126.403(b).)

The Deputy Director noted SBA had previously found that the four Individuals did not meet the HUBZone definition of "employee" as of December 20, 2021, because SBA requested evidence demonstrating they were each performing at least 40 hours of work during the relevant time period. The only documentation Cynergy provided was a single table containing names and contact information for several dozen contracting officers. This table on its face did not constitute the collective effort of four individuals each working 40 hours, nor did Cynergy provide evidence as to who created the table, such as drafts or memos. The decertification letter noted that, despite SBA's request for evidence the Individuals were performing work, Cynergy failed to provide a single email, or evidence of onboarding, training, or any evidence of interaction with Cynergy employees. (*Id.*, at 8.)

Cynergy responded to the protest letter once again claiming the Individuals as employees. The Deputy Director found that the lack of work product indicates the Individuals did not perform 40 hours of work in the four-week period ending December 20, 2020. She therefore excluded them from the calculation of Cynergy's employees. Based on the documents provided covering Cynergy's certification anniversary date of December 20, 2020, SBA found Cynergy had 19 employees who worked at least 40 hours a month at that time. Thus at least seven employees would have to be HUBZone residents to meet the regulatory requirement, and Cynergy had at most five. Consequently, Cynergy was not an eligible HUBZone concern for this award. (*Id.*, at 8-9.)

SBA did find that Cynergy did meet the principal office requirement, and that Appellant's joint venture agreement complied with the regulation.

B. Appeal

On February 26, 2025, Appellant filed the instant appeal. Appellant raises one issue, did the four Individuals (Aaron Sams, Barbara Sanders, Beverly Smith, and Jose Rodriguez) qualify as Cynergy's employees on the date for determining Cynergy's HUBZone status. Appellant asserts that they were. (Appeal at 1.)

Appellant argues first that SBA's regulations designate payroll records as the sole means for determining who counts as a HUBZone concern's employee. Appellant argues SBA erred in relying exclusively on irrelevant non-payroll records (like work product) to conclude the Individuals were not Cynergy employees. Cynergy's payroll records settle the issue, all four Individuals qualified as Cynergy employees. (*Id.*, at 2.)

Appellant argues the SBA regulations do not impose quantity, quality or value-assessing requirements. SBA invented the concept of "legitimate work" outside of the regulation. Appellant argues SBA developed a standard outside of the regulation which states that to be considered an employee, an individual must perform work that complies with an undisclosed standard that in SBA's sole judgement benefits the HUBZone concern and consists of 40 hours of work. SBA erred in imposing this non-regulatory standard. (*Id.*)

Appellant argues SBA committed a clear error of law in using records other than payroll records to assess whether the four Individuals were Appellant's employees. The regulation has an expansive definition of who constitutes an employee:

> Employee means all individuals employed on a full-time, part-time or other basis, so long as the individual works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, which is either the date the concern submits its HUBZone application to SBA or the date of recertification.

13 C.F.R. § 126.103 (2021).

Appellant also argues the same regulation identifies the singular source for identifying a concern's employees:

> SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition. (Appellant's emphasis).

(Appeal at 4-5.)

Appellant argues the regulation sets out the key features of identifying the employees of a HUBZone concern. Part-time employees count as a concern's employees. Individuals must work only an average of 10 hours in each of the four weeks before a concern's recertification date to qualify as employees. The definition is expansive and is meant to capture all individuals employed. Finally, and most importantly here, SBA looks only at payroll records to determine is an individual falls within the definition. The payment of wages makes an individual an employee. Appellant argues the regulation's plain language appoints the concern's payroll records as the definitive source for employee identification. No other documents are mentioned, nor do they matter because compensation is the hallmark of a non-owner employee. (*Id.*, at 5.)

Individuals who receive direct compensation are employees, but non-compensated individuals and independent contractors are not. The compensation dichotomy reinforces the regulation's unambiguous directive to use only payroll records in determining who is an employee. (*Id.*, at 5-6.)

Here, the Individuals each logged and were paid for 40 hours by Cynergy in the four-week period preceding December 20, 2020, the date for determining Cynergy's status. Appellant argues there is no dispute that these employees were HUBZone residents. Appellant further

argues that only payroll records and no other documentation may be used to determine whether an individual is an employee of a concern seeking HUBZone status.

Appellant relies upon *Size Appeal of Colossal Consulting, LLC*, SBA No. SIZ-6285 (2024) where OHA held SBA may only calculate a concern's annual receipts using its tax returns. Where the regulation designates a single documentary source as the basis for a determination, SBA may not expand the breadth of its examination by requesting additional documents. (*Id.*, at 9.)

SBA's concept of "legitimate work" — or an eligibility-determining quantitative or qualitative work standard — is an invention; it appears nowhere in the HUBZone regulations. Neither the statute nor SBA's implementing regulations impose a requirement that an individual must perform work exceeding a quantitative or qualitative threshold to be considered a HUBZone employee. The intent of Congress was to promote economic development in economically distressed areas through awards to HUBZone concerns. (*Id.*, at 11, citing 15 U.S.C. § 657a(a).) Nowhere does the statute discuss the sufficiency of work as a predicate for qualifying an employee.

The idea that individuals must perform work to some standard to be considered employees has no basis in the regulations. SBA's basis for imposing the legitimate work requirement cannot supplant the regulation's plain language. An employee is an individual who is employed on a full time, part time or other basis. There is no mention as to the quality or quantity of work performed. Appellant argues SBA's definition of employee decouples the concept of employee from the substance of the work. (*Id.*, at 10-11.)

Appellant notes that SBA appears to rely upon a passing comment in the Federal Register to support its argument that individuals must perform "legitimate work" to be considered HUBZone employees. Appellant argues this interpretation is not entitled to *Auer* deference because the regulation is not ambiguous. (*Id.*, at 13, 84 Fed. Reg. 65,222, 65,225 (Nov. 16, 2019).)

Appellant also points to SBA's recent revision of the regulation, which burdened the definition with an explicit work requirement and eliminated review of payroll records as the sole means of determining who is an employee. (*Id.*, at 14 citing (89 Fed. Reg. 102,448, 102,467 (Dec. 17, 2024).) Appellant asks why does the new rule allow SBA to review documents beyond payroll records and covering an individual's performance of work and require an individual to perform work to be considered an employee, if that requirement already existed? (*Id.*, at 14.)

Appellant also comments on SBA's Size Policy Statement No. 1 (51 Fed. Reg. 6099, Feb. 20, 1986).) Appellant argues it is inapplicable here, because that dealt with firms trying to exclude individuals from being considered employees, and the issue here is the opposite. (*Id.* at 15.)

Appellant further argues that even if the regulation were ambiguous, SBA's interpretation would not be entitled to *Auer* deference. SBA's interpretation of the "legitimate work" statement in the 2019 preamble is limited to individuals employed through agreements with third-party

businesses and is thus not SBA's authoritative position on the issue. SBA is using interpretation to create a new regulation. Further, SBA's substantive expertise is not implicated on the question of "legitimate work." That judgment is up to the employing concern. Further, SBA's interpretation is not an intelligible exercise of that expertise. The question of what is "legitimate," or "work" is undefined so the term may not be objectively applied. *Auer* deference is not appropriate unless an independent inquiry into the character and context of the agency interpretation shows (1) it constitutes the agency's authoritative or official position, (2) implicates the agency's substantive expertise and (3) reflects the agency's fair and considered judgment. (*Id.* at 16, citing *Laturner v. United States*, 933 F. 3d 1354, 1362 (Fed. Cir. 2019).) The commentary is not SBA's official position, it is more narrowly focused on individuals employed through a third-party agreement with a concern which provides HUBZone employees to businesses. Further, SBA's expertise is not implicated in the concept of "legitimate work," and the term cannot be objectively applied. (*Id.*, at 17-18.)

C. BahFed's Response

On March 20, 2025, BahFed Responded to the Appeal. BahFed argues SBA's insistence on asking for more information on the Individuals' employment than merely payroll records was justified under the plain language of the regulation and deference to a Federal agency interpreting the language of its own regulation. (BahFed Response, at 3.) BahFed argues the current HUBZone regulations currently define employee as an individual who works at least 10 hours a week in the four-week period immediately prior to the date of review and the concern demonstrates a legitimate business reason for that schedule. SBA reviews the totality of the circumstances to determine if an individual is an employee. (*Id.*, at 3-4 citing 13 C.F.R. § 126.103 (2025).) The regulation in effect at the time of Cynergy's certification also called for SBA to review the totality of the circumstances when reviewing whether an individual was an employee. (13 C.F.R. § 126.103 (2020). While the regulations differ, both grant SBA the ability to look at the "totality of the circumstances," to look at the IRS criteria and SBA Size Policy Statement No. 1 to determine if someone is an employee and provide that an individual must perform "work" to be an employee.

BahFed points out that SBA's Size Policy Statement No. 1, which the regulation incorporates, lists a number of factors to consider when determining whether someone is an employee, and makes clear the list is not exhaustive. SBA must look at the list of questions from the Size Policy Statement, and the totality of all circumstances, in determining whether individuals were employees. (*Id.*, at 6.)

Further, SBA's regulations provide the Agency may request additional information or documents and will itself determine the scope of its examination. (*Id.*, at 7, citing 13 C.F.R. §§ 126.300(b), 126.304(b)(1), 126.403 (a) & (b).) The regulation specifically states SBA will also consider a sole owner of a concern who has not worked 40 hours during the relevant period but who has not hired another individual to direct the concern's employees as an employee. SBA could not do this if its sole criteria was the concern's payroll. (*Id.*)

BahFed maintains Appellant is advocating a narrow and incorrect reading of the regulation, ignoring its full text. SBA's regulations consistently give the Agency authority to

consider all information it considers necessary, and to ask for more than the specific information listed in the regulations, when the Agency deems it necessary in making the certifications for its programs. (*Id.*, at 8, citing 13 C.F.R. §§ 128.302(c), 124.203, 127.303(b).) BahFed further takes issue with Appellant's reliance on *Size Appeal of Colossal Contracting, LLC*, SBA No. SIZ-6285 (2024). The holding there was limited to size determinations. (*Id.*)

BahFed further argues SBA, like any Federal agency, has the right to interpret its own regulations if they are ambiguous. (*Id.*, at 10, citing *Auer v. Robbins*, 519 U.S. 452 (1997).)

BahFed characterizes Appellant's argument as: neither the statute nor SBA's implementing regulations impose a requirement that an individual must perform work exceeding some quantitative or qualitative threshold to be considered a HUBZone employee. BahFed noted that Appellant does not appear to dispute that the Individuals did not perform substantive work. Appellant skips over parts of the regulation referring to "work," Size Policy Statement No. 1, and the totality of the circumstances standard. The HUBZone regulations have long included a requirement for work. Appellant seeks to set a lackadaisical standard for work where all that is required is that the employee be paid for a certain number of hours. The HUBZone regulations have long included a requirement for work, creating a regulatory nexus for SBA's enforcement and interpretation of the regulation. Appellant's interpretation of the regulation could lead to abuse and waste of taxpayer funds. (*Id.*, at 10-13.)

BahFed argues first, that the regulation is not ambiguous, it requires that the employees work, and SBA has long interpreted it as requiring work. SBA's citation to the Federal Register (84 Fed. Reg. 65,222, 65,225 (Nov. 26, 2019); 89 Fed. Reg. 102,448, 102,467 (Dec. 17, 2024)) shows its long-time interpretation of the regulations. (*Id.*, at 13-15.)

If the regulation is to be considered ambiguous, BahFed argues that *Auer* deference is applicable here. The Agency's interpretation should control, where this interpretation has been published in the Federal Register. SBA's practice and *published* interpretation of its own regulations have shown since 2019 that the employees in a HUBZone must be doing some form of legitimate "work." (*Id.*, at 16-17.)

D. SBA OGC Comments

SBA asserts that in September 2023, all four of the Individuals were indicted by a federal grand jury for wire fraud and conspiracy to defraud the United States through a scheme in which false employees were placed on the payroll of multiple HUBZone companies for those companies to falsely obtain HUBZone certification. (SBA OGC Comment at 3, citing "San Antonio Business Owner and Associates Arrested for Defrauding SBA Program" (Sept. 17, 2023).)

SBA first looks to the purpose of the HUBZone program. This is to provide federal contracting assistance for small business concerns located in historically underutilized business zones in an effort to increase employment opportunities, investment, and economic development in such areas. (*Id.*, at 5 citing 13 C.F.R. § 126.100 (2025).)

SBA rejects Appellant's argument that payroll records are the sole source for identifying a concern's employees. SBA asserts it has never been its intent or practice to limit its review to payroll records when determining who qualifies as an employee for HUBZone purposes. SBA points to the regulation in effect at the time of Appellant's certification preceding its offer (December 20, 2020) which provided that in determining whether an individual is an employee, SBA reviews the totality of the circumstances. (*Id.*, at 5-6, citing 13 C.F.R. § 126.103 (2020).)

SBA OGC argues the regulation, by using the phrase "totality of the circumstances" provides that SBA considers a number of factors when determining who qualifies as an employee. These include — but are not limited to — the concern's payroll records; Internal Revenue Service criteria; SBA's Size Policy Statement No. 1 (51 Fed. Reg. 6099 (Feb. 20, 1986)); and other information related to whether, how, and when an individual is compensated. If the scope of the review was limited to payroll records alone, then SBA could not consider the totality of the circumstances, and the regulations would be internally inconsistent. (*Id.*, at 7.)

Further, if SBA relied upon payroll records alone, all of the regulatory language following "totality of the circumstances" would be inconsistent or superfluous. These provisions address unique categories of workers and specify whether such workers generally do or do not qualify as employees under the HUBZone program. The regulation provides that individuals supplied by a temporary employee agency are treated as employees. These individuals would not appear on the subject concern's payroll. SBA must thus review documentation outside the firm's payroll records, such as agreements between a HUBZone firm and a temporary employee agency, to determine whether they are employees. SBA could not do this if it was limited to reviewing payroll records. (*Id.*)

The regulations also provide that an unpaid owner of a concern who works for the concern for at least 40 hours during the relevant time period is an employee. This person would not appear on the concern's payroll records. SBA OGC argues that to make the determination that an unpaid owner is an employee, SBA must review documentation outside of the concern's payroll records. These provisions on temporary workers and unpaid owners would not make sense if SBA was only permitted to review payroll records to determine who is an employee. (*Id.*, at 7-8.)

The regulation further provides that independent contractors who receive payment reported through IRS Form 1099 are not employees. These individuals do not appear on a concern's payroll, and thus this provision would be superfluous if SBA's review were limited to payroll records. It would be nonsensical to read the HUBZone definition of employee as requiring SBA to rely solely on payroll records to determine whether a particular individual is an employee. (*Id.*, at 8.)

Nothing in the regulations limits the documentation SBA may review to determine if a particular individual qualifies as an employee. Rather, the regulations affirmatively state that SBA may request additional documentation to determine whether a firm meets the program's requirements. (*Id.*) The regulation in effect at the time of Appellant's certification preceding its date of offer provided SBA may review any information related to a HUBZone concern's eligibility, including but not limited to documentation related to location and ownership, the 35%

residency requirement and the concern's attempt to maintain its percentage. SBA could request further information. (*Id.*, citing 13 C.F.R. § 126.403 (2020).) The current regulations give the Agency the same discretion with nearly identical language. (*Id.*, citing 13 C.F.R. § 126.403 (2025); § 126.300(b).)

SBA further asserts the Court of Federal Claims has affirmed SBA is not limited in the documentation that it can request to determine who qualifies as an employee under the HUBZone program. (*Id.*, at 9, citing *Mark Dunning Indus. v. United States*, 64 Fed. Cl. 374, 379 (2005).)

SBA argues Appellant's reliance upon *Size Appeal of Colossal Consulting, LLC*, SBA No. SIZ-6285 (2024) is misplaced. That case is a size case dealing with the size regulations which are not applicable here. (*Id.*)

SBA OGC also rejects Appellant's argument that an individual does not have to work to be counted as an employee for HUBZone purposes. SBA's regulations unambiguously require an individual to work to qualify as a HUBZone employee. At the time of Appellant's initial offer the regulation defined an employee as an individual who works a minimum of 40 hours during the four-week period immediately prior to the relevant date of review. (*Id.*, at 10, citing 13 C.F.R. § 126.100 (2020).) Similar language specifying an individual must work a certain number of hours to qualify as an employee has appeared in the definition of "employee" since the beginning of the program. (*Id.*, citing initial rule at 63 Fed. Reg. 31896, 31909 (Jun. 11, 1998).)

The most common-sense definition of an employee is someone who works. SBA recently published a final rule emphasizing that an individual must be performing work to be considered an employee of a HUBZone concern. The preamble noted SBA analysts had identified a pattern where firms put HUBZone residents on their payroll but did not give them work. This has never been permitted because allowing this would undermine the purpose of the program. SBA stated it would continue to require individuals to perform some work to be considered employees for HUBZone purposes. (*Id.*, at 10-11, citing 89 Fed. Reg. 102,448, 102,466-67 (Dec. 17, 2024).)

SBA OGC relies upon the legislative history of the HUBZone program, noting that it was conceived as a jobs program meant to create employment opportunities for HUBZone residents. Congress intended for the HUBZone program to create employment opportunities for HUBZone residents. It is in order to fulfil this intent that the HUBZone statute expressly requires that at least 35 percent of the employees of a HUBZone firm must reside in a HUBZone — the statute does not simply require a HUBZone firm to pay a sum of money to HUBZone residents. (*Id.*, at 10-14.)

SBA OGC asserts Appellant is arguing a HUBZone employee is an individual who is paid for residing in a HUBZone. It notes Appellant does not assert the Individuals performed work at any time. Rather, Appellant avoids the issue by stating the Individuals "each logged and were paid for 40 hours." (emphasis supplied.) At no time have the HUBZone regulations ever defined an employee as someone who is simply paid money. The purpose of the program is job creation. (*Id.*, at 15.)

E. Appellant's Consolidated Reply

On April 10, 2025, Appellant filed a Motion for Leave to File a Consolidated Reply to both BahFed's Response and SBA OGC's Comments. Appellant argued that this was justified on the grounds that HUBZone appeals are relatively new regulatory creatures, and therefore OHA has not had many instances to apply the HUBZone regulations. Furthermore, Appellant contended that both SBA and BahFed raised new arguments in their responses to which a considered reply is useful. On April 24, 2025, OHA granted the motion and admitted the Reply, in the interest of a more complete record.

First, Appellant argued that the word "works" is not the entirety of the operative regulation, and it does not permit SBA to undertake a counterintuitive and impossible investigation into work product to determine employee status. (Cons. Reply at 1). Appellant further contended that both SBA and BahFed obfuscated the issues in this appeal by claiming that Appellant did not contend that the Four Individuals, in fact, performed work during the relevant period, and by claiming that Appellant argued that the HUBZone regulations do not require employees to work. (*Id.*, at 1-2).

Appellant asserts it did not address whether the Individuals worked because it is not an issue on appeal. Indeed, not only did SBA never find that the Individuals performed no work, but it explicitly acknowledged that Cynergy submitted work product from the four Individuals. Rather, SBA questioned the hours worked by the Individuals based solely on work product, finding a "lack of work product beyond a single table with contracting officer names and information" absent any other evidence that the Individuals were indeed performing work for Cynergy, to indicate that the four Individuals did not perform 40 hours of work during the four-week period preceding December 20, 2020." (Status Determination at 8.)

Appellant argues the question framed by the Status Determination itself is not whether or not the Individuals worked, but whether they worked 40 hours in the relevant period. Moreover, this would mean that the principal issue on appeal is whether the regulations permit SBA to investigate to make that quantitative determination — bearing in mind that 13 C.F.R. § 126.103 establishes a purely numerical requirement (40 hours) and says nothing about qualifying an employee through labor output. (Cons. Reply at 2).

Regarding the second point, Appellant contends that SBA's error resides in its hyperfocus on this one word — "works" — to the exclusion of a holistic interpretation of the regulatory scheme. More specifically, SBA wrested that single term to demand qualitative measures (e.g., work product, etc.) as proof for a quantitative 40-hour requirement, despite there being no regulatory basis for that position. (Cons. Reply at 3). (emphasis supplied in Reply).

Moreover, to require HUBZone firms prove the 40-hour work requirement through documents aside from payroll records is impractical (and in many cases, infeasible). In fact, many employees do not produce any work product or other tangible evidence of work aside from payroll records. Common examples include retail employees, chauffeurs, receptionists, and security guards. Despite the only evidence of their working hours consisting of payroll records, they nevertheless undoubtably qualify as employees despite otherwise lacking a paper trail of

work product. (*Id.* at 3). Any attempt to distinguish the Individuals from the above-listed professions is hollow, as the HUBZone regulations apply uniformly across industries and employment positions. *See* 13 C.F.R. § 126.100 *et seq*. (2021). Accordingly, the concept of demanding specific work product to ascertain employee status is contrary to any reasonable reading of the regulations in question. (*Id.*)

Furthermore, using a qualitative factor (such as work product) as an assessment to arrive at a quantitative conclusion (compliance with the 40-hour requirement) is a highly subjective exercise. Bolstering this point, nowhere in the HUBZone regulations do they articulate any guiding principle that would enable SBA to assign hours to documentary proof of work — aside from payroll records — or warn HUBZone participants that SBA might scrutinize non-payroll documentation to assign an employee a work-hours value. (*Id.* at 4).

Appellant also argues that SBA's fixation on the word "works" — and its extrapolation thereof — also reveals another of its flawed assumption about the HUBZone program. Appellant contends that, although the HUBZone program is designed to provide general "increased employment opportunities" in HUBZones (13 C.F.R. § 126.100 (2021)), it is not specifically a workforce development program, but rather a broader economic development financing program. In other words, the point of the program is to infuse HUBZones with more money. Accordingly, the regulations do not dictate or even expect the augmentation or refinement of professional or job-related skills. *See* 13 C.F.R. § 126.100 *et seq*. (2021). Nor do the regulations equip SBA with a device to discover the precise work performed by each employee of a HUBZone firm, let alone a qualitative or value-based metric to recognize the concern's 40-hour employees. But they do, however, supply a uniform and easily applied methodology for employee recognition: an individual who "works" 40 hours over the relevant four-week period — as reflected on payroll documentation — is an employee. (Cons. Reply at 4-5).

Appellant's other main broad argument in its Reply is that, with respect to the Individuals, the regulation's totality of the circumstances language and SBA's general right to collect information does not and cannot strip their employee status, which is established by the regulation's principal mechanism for identifying employees. (Cons. Reply at 5). Appellant notes payroll records are the only specific records explicitly mentioned by the HUBZone regulations to determine whether an individual is an employee of a HUBZone firm. Yet both SBA and BahFed ignored this controlling language in their responses. Both SBA and BahFed relied upon the totality of the circumstances standard and SBA's right to demand necessary documentation to assess HUBZone eligibility. Appellant contends that both these lines of argumentation fail.

The regulation says:

> SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition.

13 C.F.R. § 126.103 (2021) (emphasis added in Reply).

Appellant contends that any subsequent totality of the circumstances language is not designed to overturn the clear payroll records test outlined above. Rather, totality of the circumstances language functions — both in this instance and throughout SBA's regulations more broadly — as a failsafe to ensure that SBA captures entities or individuals which might otherwise evade a primary test of characterization (e.g., affiliate, employee, etc.). It is not, as SBA and BahFed argue, a mechanism to disqualify entities or individuals who, under another rule, attain a regulatory characterization. (Cons. Reply at 6).

Appellant argues that the totality of the circumstances language comes only after SBA lays down the principal way of capturing employees: ("reviewing] a concern's payroll records." 13 C.F.R. § 126.103 (2021)). This placement implies the totality language describes an addition to, not a modification of, the explicitly mentioned main avenue for counting employees. (Cons. Reply at 7). In other words, this means the totality of the circumstances language is not a *carte blanche* for SBA to remove employees meeting the 40-hour requirement on the payroll records from employee status, but rather mechanism to affirmatively identify individuals who should be considered employees. (Cons. Reply at 8).

Appellant makes one final point responding to both BahFed and SBA's discussions of the *Colossal Consulting* case. SBA No. SIZ-6285 (2024). Appellant contends that they missed the point entirely. In that case, SBA tried to question the information in the designated document for determining size — tax returns — which OHA held was impermissible. In this case, there is a designated document — payroll records — to determine the employment status of the Individuals. The same principle applies across both these cases, that SBA cannot question the information in that designated document and use non-payroll information to reach another conclusion — in this case, to strip the Individuals of their employee status. (Cons. Reply at 8).

In sum, the specific provision of reviewing payroll records trumps the general provision about reviewing other information. *See Nat'l Air Cargo Grp., Inc. v. United States*, 117 Fed. Cl. 10, 17 (2014) ("specific statutory provisions govern general statutory provisions, such that when a specific and general provision exist side by side, the specific provision must be given effect, and the general provision is used only when then specific provision is inapplicable"). And the payroll records for the Individuals definitively establish them as Cynergy's employees. (Cons. Reply at 9).

Accordingly, OHA should reverse SBA's status determination and affirm the challenged concern's HUBZone eligibility for the procurement.

F. BahFed's Response to Appellant's Reply

On May 5, 2025, BahFed responded to Appellant's Reply. BahFed made a point to reiterate its opposition to Appellant's Motion, as it did not believe the Reply sufficiently presented new or novel arguments that had not been discussed already or that could not have been raised by Appellant prior to the original close of record. (Response at 1).

BahFed's first argument is that Appellant's Reply twists regulatory phrasing to craft its own definition of "work" and yet provided little to no relevant legal argumentation. (Response at

2). Despite arguing that against BahFed and SBA's interpretation of the word "work" and SBA's right to request more than just payroll records, Appellant cites only one regulation: 13 C.F.R. § 126.100.

BahFed argues, as it has in its previous filings, that 13 C.F.R. § 126.103's history, current version, SBA policy documents, IRS guidance, case law, and other SBA regulations show that "work" is not simply defined as presence on payroll records, but that there must be actual work product to show some performance of work was accomplished. Pursuant to all those different sources of authority — SBA is allowed to ask for more information.

Rather than address these substantive points directly, Appellant instead dismisses any "qualitative" element to the word "work," seeing only a "quantitative" element, those being hours from payroll records. Furthermore, since Appellant does concede that an entity's employees have to work in order to be qualified HUBZone employees, it makes sense for the SBA as the agency administering the program to review what is considered work, as HUBZone is not a self-certified program. (Response at 3).

Appellant argues that many employees don't produce a definite "work product," citing security guards and chauffeurs as examples. There are multiple problems with this line of argumentation. To start, the solicitation at issue — No. 70RTAC21R00000003 — is related to information technology (IT), not car rides or guard services, so the comparison is tenuous at best. But even if one accepts this argument on a broader philosophical level, this still ignores that both chauffeurs and security guards have a number of different ways in which to measure "qualitative" work product, which BahFed enumerated for both professions. BahFed further argues OHA should reject Appellant's argument because claims about which random unrelated jobs do merely creates a distraction from the real issue at hand, SBA's ability to interpret its own regulations and the content of the regulation itself. (*Id.*, at 4).

Appellants' arguments continuously mistake its role in the procurement process. Appellant is not the customer, but the provider of services. Appellant is the participant in the HUBZone program, not the administrator of the HUBZone program. By contrast, SBA is the customer and — as administrator of the HUBZone program — gets to write the rules to participate. Appellant is trying to bend the regulations and SBA's interpretations to its own interpretation, thereby inverting this fundamental dynamic. (*Id.*)

A federal agency's right to interpret its own regulations, and the deference due its interpretation continues to be a tenet of administrative law. *See Auer v. Robbins*, 519 U.S. 452 (1997); *see also Dolan v. Fed. Emergency Mgmt. Agency*, No. CV 23-00869 JB/JFR, 2024 WL 5145808, at *13 (D.N.M. Dec. 17, 2024) (stating that "*Auer* deference" is "the law of the land.") As already discussed in BahFed's initial Response, the regulations unambiguously allow SBA to look beyond payroll records to determine who are "employees" for HUBZone eligibility, and the word "work" is just part of SBA regulatory right to do so. (*Id.*, at 5).

BahFed states Appellant's interpretation that "work" (and therefore the determination of an employee) is defined as merely a time keeping requirement is incorrect. While the regulation mentions hours and payroll records, that is not the limit of the word "work" or SBA's

interpretation of its own regulations. Appellant's argument the HUBZone regulations do not articulate a guiding principle for proof of work beyond payroll records or give HUBZone. The regulations provide ample guidance. BahFed argues 13 C.F.R. § 126.103, its history, SBA policy documents, IRS guidance, case law and other SBA regulations show that "work" and what may be examined is not simply limited to payroll records, but that there must be actual work product that suffices to show some form of performance was done. (*Id.*)

BahFed further argues Appellant ignores the clear meaning and application of "totality of the circumstances" which allows for SBA to request more than payroll records from a HUBZone applicant. Appellant, once again, fundamentally misses the forest for the trees with this line of argumentation. (*Id.*, at 6-7).

Appellant's framing of the "totality of the circumstances" language as a "failsafe" is erroneous based on how the term is used in non-relevant regulations such as size affiliation. Appellant's argument basically amounts to: 1) the HUBZone "totality of the circumstances" language comes after the language about payroll records; and 2) because it is "paired with" Internal Revenue Service ("IRS") criteria and SBA's Size Policy Statement No. 1 it is somehow not utilized except as a failsafe. While there are many different canons of construction and interpretation, stating something by virtue of appearing later in a regulation makes it subordinate to preceding language is not compelling. (*Id.*, at 7).

To further underscore this point BahFed relies upon the regulation, 13 C.F.R. § 126.103. The "totality of circumstances" language is not off in another subsection, separate definition, additional page, or other section of the C.F.R., but rather lies one sentence after discussion of payroll records. (emphasis supplied in Response). Furthermore, it states in no uncertain terms that "[t]o determine if an individual is an employee, SBA reviews the totality of circumstances, including criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes and the factors set forth in SBA's Size Policy Statement No. 1." 13 C.F.R. § 126.103.

The language here is very straightforward. It states that in order to determine if someone is an employee, SBA reviews the totality of circumstances. If, as Appellant argues, SBA viewed the "totality of the circumstances" language as some sort of "failsafe," it would have language about if other methods fail, in the absence of other methods, etc. contained within the regulation. But it does not. Rather, it says that SBA "will" look at the totality of the circumstances, which includes — but is not limited to — payroll records, and therefore may entail factors as work product and any other indicators of employment, which may include "qualitative" criterion. (Response at 8).

Finally, BahFed contends it has already refuted Appellant's flawed arguments surrounding *Colossal Consulting, LLC*, SBA No. SIZ-6285. (*Id.*, at 9). Appellant argues, with respect to this case, that SBA cannot non-payroll information to reach another conclusion—i.e., strip the Individuals of their employee status. (Consolidated Reply at 8.) Appellant argues that SBA cannot "scrap" payroll record review. BahFed responds that payroll records are not "scrapped," but rather they are part and parcel of what is reviewed along with substantive work. Put simply, they are simply a part of the process. (Response at 9).

Finally, BahFed concludes by circling back to the broader point that Appellant's Consolidated Reply adds no significant additional arguments but merely recycles the same arguments from its initial Appeal. BahFed contends that no amount of alternate phrasing or purported new complexities in argumentation can change that the proposed reply is simply Appellant arguing once again that it doesn't agree with the SBA's own interpretation of its regulations. (Response at 10).

For these reasons, the instant appeal should be denied.

III. Discussion

A. Standard of Review

"The standard of review for an appeal of a HUBZone status protest determination is whether the D/HUB's determination was based on clear error of fact or law. The appellant has the burden of proof, by a preponderance of the evidence." 13 C.F.R. § 134.1308. Under this standard, OHA will disturb the D/HUB's determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the D/HUB erred in making their key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006). The administrative judge's decision must be based upon "a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto." 13 C.F.R. § 134.1312.

B. Analysis

The issue here is whether the D/HUB's determination that the Individuals could not count as employees of Cynergy was based upon a clear error of fact or law. If not, then Cynergy did not have the requisite 35% of its employees necessary to be a qualified HUBZone concern, and thus Appellant would not be eligible for an award under this procurement. 13 C.F.R. § 126.200(d) (2020).

Appellant's eligibility is determined as of its certification anniversary date of December 21, 2021. 13 C.F.R. § 126.501(a) (2020). At that time, the regulation defining "Employee" for the HUBZone program read:

> *Employee* means all individuals employed on a full-time, part-time, or other basis, so long as that individual **works** a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, which is either the date the concern submits its HUBZone application to SBA or the date of recertification. SBA will review a concern's payroll records for the most recently completed pay periods that account for the four-week period immediately prior to the date of application or date of recertification in order to determine which individuals meet this definition. **To determine if an individual is an employee, SBA reviews the totality of circumstances**, including criteria used by the Internal Revenue Service (IRS) for Federal income tax purposes and factors set forth in SBA's Size Policy Statement No. 1 (51 FR 6099, February 20, 1986).

(1) In general, the following are considered employees:

(i) Individuals obtained from a temporary employee agency, leasing concern, or through a union agreement, or co-employed pursuant to a professional employer organization agreement;

(ii) An individual who has an ownership interest in the concern and who **works** for the concern for a minimum of 40 hours during the four-week period immediately prior to the relevant date of review, whether or not the individual receives compensation;

(iii) The sole owner of a concern who **works** less than 40 hours during the four-week period immediately prior to the relevant date of review, but who has not hired another individual to direct the actions of the concern's employees;

(iv) Individuals who receive in-kind compensation commensurate with **work** performed. Such compensation must provide a demonstrable financial value to the individual and must be compliant with all federal and state laws.

(2) In general, the following are not considered employees:

(i) Individuals who are not owners and receive no compensation (including no in-kind compensation) for work performed;

(ii) Individuals who receive deferred compensation for work performed;

(iii) Independent contractors who receive payment via IRS Form 1099 and are not considered employees under SBA's Size Policy Statement No.1; and

(iv) Subcontractors.

(3) Employees of an affiliate may be considered employees, if the totality of the circumstances shows that there is no clear line of fracture between the HUBZone applicant (or certified HUBZone small business concern) and its affiliates (see § 126.204).

13 C.F.R. § 126.103 (2020) (emphasis supplied).

In its appeal, Appellant quoted only the first two sentences of the regulation. Appellant argues that an individual's status as an employee is determined by the concern's payroll records, period. Appellant argues that the payroll records are themselves determinative of an individual's status as an employee, and no other inquiry need be made. Indeed, Appellant argues that to do so is to "strip" any individual of their status as an employee, established by the examination of the payroll records. Appellant is misreading the regulation. Immediately following the sentence

referring to payroll records the regulation states “To determine if an individual is an employee, SBA reviews the totality of circumstances.”

Thus, the regulation provides not that SBA will merely review payroll records and leave it at that, but that the Agency will review the totality of the circumstances, that is, all aspects of the relationship between the concern and the individuals identified as its employees and determine whether the identified individuals are employees under the HUBZone regulations. The regulation goes on to enumerate a number of the factors to be considered in determining whether an individual is an employee, beyond merely payroll records, such as IRS criteria and SBA's Size Policy Statement No. 1, and other information related to whether, how and when an individual is compensated. It then gives examples of individuals who are to be considered employees: individuals obtained from an employment agency, an individual who has an ownership interest and works for the concern for at least 40 hours during the four week period, a sole owner who works less than 40 hours during the four weeks period but has not hired another individual to direct their employees, and individuals who receive in kind compensation commensurate with the work performed. The regulation also identifies individuals who are not employees, individuals who are not owners and receive no compensation for work performed, individuals who receive deferred compensation for work performed, independent contractors and subcontractors. Employees of an affiliate may be considered employees if there is no clear line of fracture between the concerns. The regulation clearly does not contemplate SBA will merely review an applicant concern's payroll records and draw its conclusion on that basis alone. The regulation calls for a review of the totality of the circumstances. Further, the regulation emphasizes in several places the importance of work in determining whether an individual is an employee. Work is clearly important in determining an individual's employee status. Payroll records are mentioned only once in determining who is an employee and would not be applicable in the cases of those individuals who receive no financial compensation, but who are to be counted as employees.

If SBA relied upon payroll records alone, all the provisions which follow in the regulation would be inconsistent or superfluous. Employees obtained from temporary agencies and individuals with an ownership interest who are not receiving compensation would not ordinarily be included in a concern's payroll records. Yet, the regulation categorizes them as employees. Conversely, the categories of personnel the regulation identifies as not being employees, uncompensated individuals, individuals receiving deferred compensation, contractors and subcontractors, employees of an affiliate, would not ordinarily be included in a concern's payroll records, and so if those records were the only factor considered, subsections (2) and (3) of the regulation would be wholly superfluous.

Further, nothing in the regulation limits the relevant documentation SBA may review in reaching its conclusion as to the eligibility of a HUBZone concern or the status of an individual claimed as an employee by a concern seeking HUBZone status. The regulation on certification provided, both in 2020 and now that:

> SBA, at its discretion, may rely solely upon the information submitted, may request additional information, may conduct independent research, or may verify the information before making an eligibility determination.

13 C.F.R. § 126.300(b).

Further, the regulation on program examinations in effect at the time of Appellant's certification provides SBA may review "any information" related to a concern's HUBZone eligibility and may require that a concern "submit additional information" as part of the program examination. 13 C.F.R. § 126.403(a) & (b) (2020). The regulations still provide that SBA will "determine the scope of any program examination and may review any information." 13 C.F.R. § 126.403 (2025). It is thus clear that the regulations provide that, in determining a concern's HUBZone eligibility, including whether the individuals it claims are employees are entitled to that status, SBA is not limited to payroll records or any one source of documentation, but may rely upon any information submitted, may request additional information or may conduct independent research. The Court of Federal Claims has affirmed that SBA is not limited to payroll records in determining who is an employee under the HUBZone program. *Mark Dunning Indus. v. United States*, 64 Fed. Cl. 374, 379 (2005). A concern's payroll records alone are not the sole evidence of whether any particular individual is classified as an employee under SBA's HUBZone regulations.

Appellant's reliance upon *Colossal Consulting, LLC*, SBA No. SIZ-6285 (2024) is misplaced. *Colossal* rested on 13 C.F.R. § 121.104(a)(1) which mandates that "The Federal Income tax returns and any amendments filed with the IRS on or before the date of self-certification must be used to determine the size status of a concern." (emphasis supplied). This regulation explicitly requires that the Federal Income tax returns be used to calculate a concern's size. The word "must" makes it clear the use of the Federal income tax returns is mandatory. "OHA has repeatedly interpreted § 121.104(a) to mean that, if tax returns are available for the years under review, such returns must be used to calculate a concern's receipts, to the exclusion of any extrinsic financial information." *Colossal*, at 7. *Colossal* was interpreting a regulation which required a concern's tax returns and only those documents be used to determine a concern's size. The regulation here, in contrast, explicitly calls for a totality of the circumstances analysis in which a concern's payroll records are only one factor in determining who a concern's employees are. *Colossal* is inapposite here and does not support Appellant's argument.

It is therefore clear that, in reviewing whether an individual is an employee of a HUBZone concern SBA is not limited to a review of the concern's payroll records. SBA must consider the totality of the circumstances and may review any all information available to make that determination.

Appellant's later pleadings retreat from the position it appeared to initially take, that no work is required from the individuals a HUBZone concern designates as its employees. This is fortunate, as it is very clear that HUBZone employees are required to work. The regulation at § 126.403 defines Employee as an individual who works for the HUBZone concern, using the word "work" four times. This definition has described a HUBZone employee as someone who works form the HUBZone concern since the initial final rule implementing the program. 63 Fed. Reg. 31896, 31909 (June 11, 1998).

This is because the HUBZone program is — as it was intended to be — a jobs program. The HUBZone program was created by Pub. L. No. 105-135 (Dec. 2, 1997), as Title VI of the Small Business Reauthorization Act of 1997 (Reauthorization Act). The language originated as S. 208 (105th Cong.) but was added to the larger bill (see 143 Cong. Rec. S8971). When S. 208 was introduced, the bill's sponsor (the late Senator Kit Bond) described the program as one that would create jobs. 143 Cong. Rec. S730 (Jan. 28, 1997). The Small Business Committee's report described the legislation frankly as a "jobs bill." S. Rpt. 105-62 (1997). In a proposed revision of the regulations in 2007, the preamble describes the program as a jobs program. 72 Fed. Reg. 3750, 3750-3753 (Jan. 26, 2007). There is no question that the HUBZone program is a jobs program, and that, to be considered an employee of a HUBZone concern, an individual must perform work.

Appellant now argues that SBA may not make any judgment as to the work performed by the Individuals. Appellant waxes philosophical about the nature of work and the impossibility of making judgement about it. Appellant argues that some types of work, such as chauffeurs and security guards, do not produce a work product. BahFed sensibly responds with examples of the work product and documentation that may be produced even in these occupations. Appellant refers SBA's concept of "legitimate work" as based upon a "passing comment" in the Federal Register, which comment it argues has only limited authority. This is baseless. SBA discussed the concept in the preamble to a final rule making amendments to the HUBZone regulations. 84 Fed. Reg. 65,222, 65,225 (Nov. 16, 2019). This was a commentary on the final rule and thus has the authority of the Agency's official interpretation of the rule. The preamble discussed employees obtained by HUBZone firms from third-party businesses which provide HUBZone residents as employees, and these residents work for more than one HUBZone firm. SBA concluded that it would allow these arrangements where the individuals being hired were performing "legitimate work." SBA thus set forth the concept of legitimate work in the context of the definition "employee" under the HUBZone regulations, precisely the regulation at issue here. Under the circumstances, the Agency's interpretation of the regulation is entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). The question is, whether the Individuals were performing legitimate work.

The Individuals here were allegedly working on Information Technology and thus should have produced a significant work product for review. Instead, beyond the payroll records, there is merely one sheet of contacts with Contracting Officers. The D/HUB, using all the information at hand, and considering the totality of the circumstances, reached the conclusion that the Individuals had not worked for forty hours in the four weeks preceding the date of review. This is a reasonable conclusion, given the record before the D/HUB, that four people each working for forty hours over four weeks should have produced a far more substantial product. They therefore failed to meet the definition of "Employee" in the HUBZone regulation. Therefore, they were not counted as Cynergy employees and thus Cynergy did not meet the standard of 35% of its employees being HUBZone residents, and was not a HUBZone concern, and Appellant is not an eligible HUBZone joint venture. The D/HUB's judgment here cannot be said to be clear error.

IV. Conclusion

Appellant has failed to establish that the HUBZone determination is based upon a clear error of fact and law. Accordingly, I DENY the Instant appeal, and I AFFIRM the D/HUB's determination. Appellant is not an eligible HUBZone small business for the instant procurement. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.1315.

CHRISTOPHER HOLLEMAN
Administrative Judge