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U.S. Department of Justice
Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



File: [Redacted] Office: Nebraska Service Center Date: 11 SEP 2002

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(2)

IN BEHALF OF PETITIONER:
[Redacted]

Public Copy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition on November 9, 1998, the petitioner was a doctoral student and graduate research assistant at Wayne State University ("WSU"). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

(2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --

(A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

(B) Waiver of Job Offer. -- The Attorney General may, when he deems it to be in the national interest, waive the requirement of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor Service regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to Service regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

The Service believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, I.D. 3363 (Acting Assoc. Comm. for Programs, August 7, 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. Id. at note 6.

We concur with the director that the petitioner works in an area of intrinsic merit, and that the proposed benefits of his research would be national in scope. It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications.

The petitioner describes his research at WSU regarding the molecular mechanism of the human estrogen receptor and its involvement in breast cancer:

I have identified the genes which are responsible for the stability of the human estrogen receptor, and also the genes responsible for the resistance against the anti-breast cancer drug, tamoxifen. These findings are potentially important towards a breakthrough in breast cancer therapies.

Along with documentation of his published research and academic credentials (including his student membership in the American Physiological Society), the petitioner submits several witness letters. Dr. [REDACTED] Associate Professor of Physiology, WSU School of Medicine, states:

[The petitioner] has been a student in my laboratory at the WSU School of Medicine for four years; his research has been supported by the National Science Foundation, the WSU School of Medicine, and the Karmanos Cancer Institute. His results have provided preliminary data for two more grant applications...

Our work funded by the Karmanos Cancer Institute is focused on understanding how breast tumors become resistant to treatment with tamoxifen, and how some tumors adapt to actually use tamoxifen to promote their growth. Our long-range goal is that by understanding these processes, ways to circumvent them may be devised. We are approaching this by changing the amino acid sequence of a protein essential to the action of estrogen, the estrogen receptor. We are investigating a particular part of the protein that has been relatively little studied. By comparing the properties of the original and the altered proteins, we can learn how a hormonal signal is converted into a biological response, and by inference, how this response can be modified.

[The petitioner] has been essential to this project. Without his participation, there simply would not have been any data on which to base the NSF and KCI proposals. He has constructed all our altered receptor proteins and has begun to study their hormone-binding properties. Furthermore, many of the altered receptors will also be studied by Dr. [REDACTED] to learn how they respond to estradiol and tamoxifen. Thus, not only his own progress, but the progress of the project as a whole, depends on his work.

[The petitioner] presented some of his recent results on the altered receptors at the 1998 Annual Meeting of the American Society for Biochemistry and Molecular Biology, as a "Late-breaking Abstract" we both authored. Under my direction, he carried out the experiments, analyzed the results, wrote the abstract, prepared the poster display and presented his work. Based on that poster display, I have been invited to submit the results to the journal *Cell Biochemistry and Biophysics*, as well as to write a scholarly review on the subject (letter attached). [The petitioner] will be co-author on both articles. This invitation is a tremendous compliment to [the petitioner's] work. Indeed, in my 20 years as a scientist, this is the first time a poster has directly led to an invitation to publish the results and a review article.

Dr. S.C. Brooks, Professor, Department of Chemistry and Molecular Biology, WSU School of Medicine, states:

It is during my research activities that I have recently come to know [the petitioner], a graduate student in the Physiology Department.

[The petitioner's] mentor, Dr. [REDACTED] and my research group have become interested in a specific region (the "F" domain) of the estrogen receptor and the role of [sic] the F domain plays in the capacity of the leading breast cancer therapeutic agent, tamoxifen, to inhibit the growth of breast tumors. Dr. [REDACTED] and I have combined our expertise in the estrogen/breast cancer field to carry out this study with support from the Karmanos Cancer Institute, one of the top 10 cancer philanthropic organizations in the USA. Crucial to these investigations is the work of [the petitioner].

I have become familiar with [the petitioner's] talents and dedication during the course of these studies. He is an outstanding investigator in the field of molecular biology as applied in cancer research. In our project [the petitioner] has been responsible for the construction of numerous plasmids essential for the study of the intricacies of the receptor's role in the acquired resistance of certain breast tumors to therapy. It would not be possible for us to accomplish the aims of this project without genetic engineering contributions of [the petitioner].

* * *

In sum, the contribution of [the petitioner's] research may lead to a breakthrough in the understanding of breast cancer therapy and ultimately to a cure for this dread disease.

Dr. [REDACTED] Director of the Clinical Cytogenetics Laboratory at the Ellis Fischel Cancer Center, states:

I have known [the petitioner] through Dr. [REDACTED] who has been studying the estrogen receptor in relation to breast cancer for many years and is a leader in this area... Under Dr. Skafar's guidance, [the petitioner] studied the relationship of the structure and function of the estrogen receptor by altering a particular part of the amino acid sequence of the protein. He found this structural engineered protein had profound effects on the stabilization and dimerization of hormone-binding activity in the cell. This important discovery may provide important information on how the abnormal estrogen action converts into a cellular signal in promoting breast tumor growth and invasion. Understanding this process will lead to a better development of therapeutic agents in fighting against breast cancer.

The petitioner's initial seven witnesses include his laboratory supervisor at WSU [REDACTED] three WSU colleagues, a researcher who met the petitioner while on sabbatical at WSU, a research acquaintance of Dr. [REDACTED] and a local physician who met the petitioner at a medical conference. The above witness letters demonstrate that the petitioner is valued at WSU for his contributions in Dr. [REDACTED] laboratory. The witnesses praise the petitioner's dedication, competence in collecting data, mastery of laboratory techniques, and presentation skills. The witnesses, however, fail to demonstrate the petitioner's impact on the field beyond Dr. [REDACTED] laboratory. The petitioner has not shown that his work has attracted significant attention from independent researchers in the biomedical research field.

The director requested further evidence that the petitioner has met the guidelines published in Matter of New York State Department of Transportation. In response, the petitioner has submitted further letters, publications and background materials.

On December 16, 1999, thirteen months after filing the petition, the petitioner was awarded his doctorate from WSU. Also subsequent to filing, the petitioner obtained a position as a postdoctoral research associate in the laboratory of Dr. [REDACTED], Professor in Oncology, Karmanos Cancer Institute, WSU. Dr. [REDACTED] states:

Having graduated with a Ph.D. in Physiology from Wayne State University, [the petitioner] already had six years first-handed cancer research experiences. His research was focused on the breast cancer, the second leading cause of death in women in the U.S. He was the first one to identify a critical amino acid locating at the human estrogen receptor, which regulates the stability of the estrogen receptor. This finding has led a breakthrough in breast cancer treatment, whereas the estrogen receptors have been considered as a major factor causing breast cancer development. This result, combined with results from University of Rochester School of Medicine and Hebrew University School of Medicine in Israel, led to an internationally collaborated publication in *Biochemistry*, one of the field's leading journals. Meanwhile, [the petitioner] and his Ph.D. mentor Dr. [REDACTED] were invited to write a primary research paper and a scholarly review in a peer reviewed journal.

During his 6-year Ph.D. training, [the petitioner] also joined collaboration with Drs. S. C. Brooks and Jan Schwartz to investigate the molecular mechanism of tamoxifen, anti-breast cancer drug, in the treatment of breast patients. As an essential investigator, [the petitioner] has successfully generated numerous site-directed mutations in the human estrogen receptor, which have shown the altered affinity to tamoxifen. The preliminary data indicated that patients who respond to tamoxifen treatment ineffectively might contain abnormal form of estrogen receptors. This research project will valuably contribute to the field of breast cancer research, and may lead to a new avenue for breast cancer treatment.

Currently, in my laboratory, [the petitioner] is conducting a groundbreaking research to reveal the mechanism of a cancer development-regulating factor AP-2. AP-2, a transcription factor, plays an important role in tumorigenicity of pancreas, colon, lung, and breast cancers. It has been found that changing the level of AP-2 can directly affect development of breast cancer. Our research goal is to discover the key factors which control the level of AP-2 in human and to develop a therapeutic strategy to manipulate the level of AP-2 so that we can suppress the development of cancers. Because this research is pioneering in the cancer research field and has the great potential leading to a new therapy against cancers, it has been funded by the National Institute of Health as an over million-dollar research project. Presently, [the petitioner] is the only investigator who directly carries out the proposed experiments. Within a short period of time, [the petitioner] has

made significant progress.

In addition, [the petitioner] is also actively participating in another breast cancer research project that was funded by U.S. Postal Service Breast Cancer Foundation. As a major investigator, currently, he is supervising and instructing Dr. Kathy Carolin, Assistant Professor and U.S. trained breast surgeon in Detroit Medical Center, in conducting the experiments. In this project we are exploiting the center role of AP-2 transcriptional activity in human breast cancer to arrest carcinogenesis, eventually to develop a new way for gene therapy in breast cancer.

The majority of the new witnesses discuss the petitioner's current work in Dr. Tainsky's laboratory. While the witnesses' statements show that the petitioner has continued to work in the same field, we cannot consider the petitioner's work in Dr. Tainsky's laboratory as this petition was filed before the petitioner had commenced employment there. See Matter of Katigbak, 14 I & N Dec. 45 (Reg. Comm. 1971), in which the Service held that beneficiaries seeking employment-based immigrant classification must possess the necessary qualifications as of the filing date of the visa petition. A petitioner cannot file a petition under this classification based on the expectation of future eligibility.

The petitioner submits additional letters from Dr. [REDACTED] and Dr. [REDACTED] that repeat many of the assertions contained in their initial letters. Dr. [REDACTED] second letter adds: "I have directed five students through their Ph.D. [program], and in many ways [the petitioner] ranks at the top." University study, however, is not a field of endeavor, but, rather, training for future employment in a field of endeavor. The petitioner's academic achievement may place him among the top Ph.D. students at WSU, but it offers no meaningful comparison between the petitioner and experienced biomedical researchers who have already completed their doctorate.

All eleven of the new letters are from individuals connected with the petitioner's work at WSU, or professional associates of Dr. [REDACTED]. The petitioner's new witnesses include two of his research supervisors from WSU, a former adjunct faculty member at WSU, three WSU colleagues, Dr. [REDACTED] former supervisor from the National Institutes of Health, a colleague of Dr. [REDACTED] who served with him on the faculty at the University of Texas (Dr. [REDACTED] former employer), a graduate of WSU's Ph.D. program, a researcher from the Mount Sinai School of Medicine who collaborated with the petitioner, and a staff scientist from MetroHealth Medical Center who interacts with the petitioner by "shar[ing] knowledge and reagents that are developed in [their] laboratories."

Dr. [REDACTED] now an Assistant Professor in the Department of Physiology and Pharmacology at the University of New England, was previously an adjunct faculty member at WSU. Dr. [REDACTED] notes that the petitioner is "presently working with [his] former colleagues in Detroit." Her letter discusses the undoubted importance of estrogen receptor research. Pursuant to published precedent, the overall importance of a given project or area of research is insufficient to demonstrate eligibility for the national interest waiver. By law, advanced degree professionals and aliens of exceptional ability are generally required to have a job offer and a

labor certification. A statute should be construed under the assumption that Congress intended it to have purpose and meaningful effect. Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985); Sutton v. United States, 819 F.2d 1289, 1295 (5th Cir. 1987). By asserting that the petitioner's employment as a cancer researcher inherently serves the national interest, Dr. Davidoff essentially contends that the job offer requirement should never be enforced for this occupation, and thus this section of the statute would have no meaningful effect.

Several of the petitioner's witnesses refer to the petitioner's recent published articles and presentations at scientific conferences. These events occurred subsequent to the petition's filing. See Matter of Katigbak, *supra*. Furthermore, the record contains no evidence that the presentation or publication of one's work is a rarity in petitioner's field, nor does the record sufficiently demonstrate that independent researchers have heavily cited or relied upon the petitioner's work in their research.

The Association of American Universities' Committee on Postdoctoral Education, on page 5 of its Report and Recommendations, March 31, 1998, set forth its recommended definition of a postdoctoral appointment. Among the factors included in this definition were the acknowledgement that "the appointment is viewed as preparatory for a full-time academic and/or research career," and that "the appointee has the freedom, and is expected, to publish the results of his or her research or scholarship during the period of the appointment." Thus, this national organization considers publication of one's work to be "expected," even among researchers who have not yet begun "a full-time academic and/or research career."

When judging the influence and impact that the petitioner's work has had, the very act of publication is not as reliable a gauge as is the citation history of the published works. Publication alone may serve as evidence of originality, but it is difficult to conclude that a published article is important or influential if there is little evidence that other researchers have relied upon the petitioner's findings. Frequent citation by independent researchers, on the other hand, demonstrates more widespread interest in, and reliance on, the petitioner's work. The petitioner provides no evidence that his articles have been heavily cited.

In order to qualify for the classification sought, the petitioner must demonstrate that he has had some measure of influence on the biomedical research field as a whole. The opinions of experts in the field, while not without weight, cannot form the cornerstone of a successful national interest waiver claim. Evidence in existence prior to the preparation of the petition carries greater weight than new materials prepared especially for submission with the petition. We note that the record reflects little formal recognition or awards for the petitioner's research, arising from various groups taking the initiative to recognize the petitioner's contributions, as opposed to private letters solicited from selected witnesses expressly for the purpose of supporting the visa petition. Independent evidence that would have existed whether or not this petition was filed, such as heavy citation of one's published articles, is more persuasive than the subjective statements from individuals selected by the petitioner.

The director denied the petition, stating that the petitioner failed to establish that a waiver of the requirement of an approved labor certification would be in the national interest of the United States. The director acknowledged the petitioner's co-authorship of scholarly articles and attendance at scientific conferences, but indicated that the "publication and presentation of research work are inherent to the position of a researcher." The director also noted: "The evidence does not indicate that [the petitioner's] contributions have influenced the field to a substantially greater degree than those of other qualified researchers, also making contributions to [biomedical research]."

On appeal, the petitioner submits a second letter from Dr. [REDACTED] letter from U.S. Senator [REDACTED] and informational material about the WSU School of Medicine and the Karmanos Cancer Institute. We do not dispute the distinguished reputations of the WSU School of Medicine or the Karmanos Cancer Institute. The issue in this case is not the reputation of each of these organizations, but, rather, the petitioner's reputation as an individual researcher. To establish eligibility under this visa classification, the petitioner must clearly demonstrate a past history of significant accomplishment that has influenced the cancer research field.

Dr. [REDACTED] repeats previous assertions that the petitioner was "the first to identify a critical amino acid in the human estrogen receptor that controls the stability of the receptor." He adds that this finding "has injected a new hope for breast cancer patients for whom estrogen receptors play an essential role for causing cancers." Dr. [REDACTED] then describes the selection process used in hiring the petitioner at his laboratory. Dr. [REDACTED] states: "The petitioner has a much stronger background and experience than other candidates including many U.S. research scientists." This assertion reinforces the conclusion that any objective qualifications necessary for the performance of a research position can be articulated in an application for alien labor certification.

Dr. [REDACTED] also emphasizes the importance of having the petitioner continue working on the AP-2 project within his laboratory. We note that the petitioner was still a student at the time he filed this petition, and that postdoctoral researchers are covered under H-1B nonimmigrant visas. The regulation at 8 C.F.R. 214.2(h)(16)(i) permits an alien to work under an H-1B visa while an immigrant visa petition or labor certification application is pending. Therefore, the petitioner's continued participation in Dr. Tainsky's AP-2 project is obviously not contingent on the petitioner obtaining permanent resident status through the national interest waiver.

Dr. [REDACTED] letter refers to publications and presentations that occurred subsequent to the filing of the petition. See Matter of Katigbak, *supra*. Counsel indicates that the "importance of the petitioner's findings" has led to publication and presentation "in the field's leading forums." We note, however, that the publication record of many of the petitioner's witnesses far exceeds that of the petitioner. More importantly, the petitioner has not provided a citation history of his published works. Without evidence reflecting independent citation of his articles, we find that the petitioner has not significantly distinguished his results from those of other researchers in the field. It can be expected that if the petitioner's published research was truly

significant, it would be widely cited. The petitioner's participation in the authorship of one published article and four abstracts prior to the filing of the petition may demonstrate that his efforts yielded some useful and valid results; however, the impact and implications of the petitioner's findings must be weighed. The record fails to demonstrate that the petitioner's published works have garnered significant attention from other researchers throughout the scientific community.

The letter from U.S. Senator Carl Leven repeats the assertions in Dr. [REDACTED] letter, citing Dr. [REDACTED] as the source of the information. The congressional letter, typically issued in response to a constituent's concerns, requests that the Service "carefully consider [the petitioner's] appeal of the decision made on his I-140 Immigrant Visa Petition."

Counsel cites the numerous testimonial letters as evidence of the petitioner's impact on his field. We note that the petitioner's witnesses consist entirely of individuals with direct ties to WSU, the petitioner, or his supervisor. The witness letters indicate that the petitioner's contributions have arisen from work on ongoing research projects lead by Drs. [REDACTED] and [REDACTED]. The petitioner has not been shown to have initiated research projects which yielded significant findings. As a researcher in Dr. [REDACTED]'s laboratory, the petitioner's duties involve conducting research on AP-2 that was already underway well before the petitioner had arrived. The petitioner has not shown that his individual work or collaborative findings have had significant repercussions throughout the field. Thus, the petitioner's contributions to cancer research, such as the identification of an amino acid in the human estrogen receptor, appear to be incremental rather than fundamental. While the record amply documents that the petitioner has been an active researcher at WSU, it does not establish that the petitioner's research has had a greater or more lasting impact than that of other researchers in the biomedical field.

Several of the witnesses, such as Drs. Brooks and Kasetta, assert their confidence in the future significance of the petitioner's work. The witnesses' use of phrases such as "may lead to a breakthrough" and "may solve the puzzle and lead to a new solution" in describing the petitioner's accomplishments seem to suggest future results rather than a past record of demonstrable achievement. Without evidence that the petitioner has been responsible for significant achievements in the field of cancer research, we must find that the petitioner's assertion of prospective national benefit is speculative at best. While the high expectations of the petitioner's research supervisors, colleagues, and collaborators may yet come to fruition, at this time the waiver application appears premature.

Clearly, the petitioner's colleagues and collaborators have a high opinion of the petitioner and his work. The petitioner's findings, however, do not appear to have yet had a measurable influence in the larger field. While some of the witnesses discuss the potential applications of these findings, there is no indication that these applications have yet been realized. The petitioner's work has added to the overall body of knowledge in his field, but this is the goal of all such research; the assertion that the petitioner's findings may eventually have practical applications does not persuasively distinguish the petitioner from other competent researchers. In sum, the available evidence does not persuasively establish that the petitioner's past record of achievement

is at a level that would justify a waiver of the job offer requirement which, by law, normally attaches itself to the visa classification sought by the petitioner.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.