

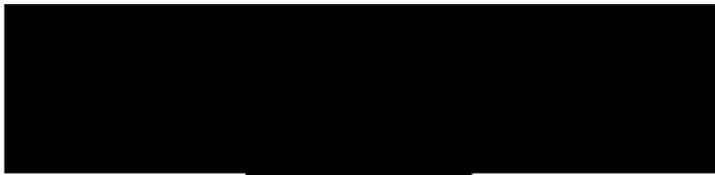


U.S. Citizenship  
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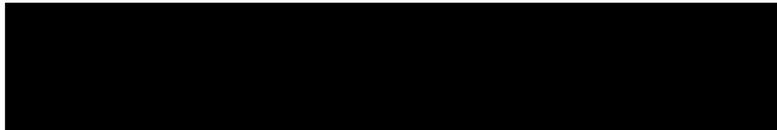
Office: CALIFORNIA SERVICE CENTER

Date: JAN 22 2008

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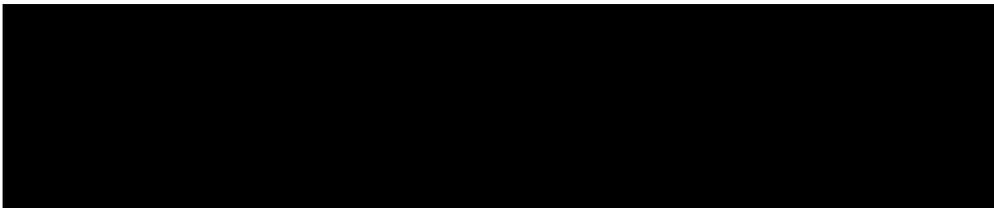
Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The employment based visa petition was denied by the Director (director), California Service Center following an interview at the district office. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a termite exterminator. It seeks to employ the beneficiary permanently in the United States as an accountant. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Following an interview at the district office, the Service Center director concluded that petitioner had misrepresented the nature of the beneficiary's employment with it. He also concluded that the petitioner had not established its ability or willingness to employ and pay the proffered wage to the beneficiary according to the terms of the ETA 750.

Current counsel<sup>1</sup> entered a notice of entry of appearance with the appeal, which was filed on August 26, 2005. He maintains that the petitioner and beneficiary offered consistent testimony at the district office interview and that there was no misrepresentation of the beneficiary's claimed work for the petitioner. He also contends that the petitioner has had the ability to pay the proffered wage.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also, Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Section 212(a)(5)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(5)(i), provides that any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-

- (I) there are not sufficient workers who are able, willing qualified (or equally qualified in the case of an alien described in clause (ii) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
- (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this

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<sup>1</sup> Former counsel was [REDACTED] of Sherman Oaks, California, including named associates on the notice of entry of appearance (Form G-28). On October 4, 2007, [REDACTED] entered a guilty plea to one count of conspiracy and two counts of visa fraud in the U.S. District Court of the Central District of California. [REDACTED] entered a guilty plea to conspiracy to commit visa fraud and two counts of making false statements on August 14, 2006.

paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

*Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The approved Form ETA 750, (Parts A and B) was accepted for processing by the DOL on January 13, 1998, thus establishing the priority date by which the beneficiary's qualifications for the certified position must be obtained, as well as the employer's continuing financial ability to pay the proffered wage. See 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1971). As set forth on the ETA 750, the proffered salary for the certified position of an accountant is \$21.83 per hour or \$45,406 per year. On Part B of the ETA 750, signed by the beneficiary on January 9, 1998, it is claimed that the beneficiary has worked for the petitioner since June 1997 as an "accountant (Independent Contractor)."

On Part 1 of the Immigrant Petition for Alien Worker (I-140), the Internal Revenue Service (IRS) tax number is listed as [REDACTED]. The petitioner's name on both the I-140 and the ETA 750 is Mastercare Termite Control, which was registered as a fictitious business name by [REDACTED], as indicated by a copy of the 1988 county fictitious business name statement contained in the record. The California tax identification number of 356-53xx-x as shown on the ETA 750 is also shown on copies of 1998-2001 Transmittal of Wage and Tax Statements (W-3s) as belonging to [REDACTED]. On Part 5 of the I-140, which was filed August 23, 2003, the corporate petitioner, [REDACTED] Inc. d/b/a Mastercare Termite Control, claims to have been established in July 1988, have a gross annual income of \$1,899,296 and employs fifteen workers.

In support of the petitioner's ability to pay the proposed wage offer to the beneficiary a copy of the 2000 U.S. Corporation Income Tax Return of [REDACTED] was submitted with the petition.

On December 4, 2002, the director issued a request for additional evidence instructing the petitioner to provide "original computer printouts from the IRS, dated stamped by the IRS, of tax returns filed with the IRS by the petitioner for the years 1998, 1999, 2000, 2001, and 2002." The director also requested that the petitioner submit copies of the beneficiary's Wage and Tax Statements (W-2s) for the years 1998 to the present, as well as the petitioner's payroll summary, W-3's evidencing wages paid to all workers from 1998 to the present. The director

further instructed the petitioner to provide employment verification letters to support the claimed two years of experience in the job offered as required by the ETA 750 and evidence of the qualifying relationship between Joel [REDACTED] and Mastercare Termite Control including copies of an annual report listing all affiliates and percentage of ownership, copies of the articles of incorporation, and a copy of the current state business license.

By letter, dated February 25, 2003, former counsel informed the director that IRS filed computer printouts of the 1998-2001 tax returns could not be provided but had been requested and would be forwarded to the Service upon receipt. The letter did not explain why the IRS stamped 2002 tax return had not been requested or provided. In reference to the beneficiary's W-2s, the letter states that a Form 1099 is enclosed. It is observed that no 1099s or W-2s were submitted in response to the director's request for evidence.

A copy of the petitioner's IRS Form 4506 request for copies of the 1998-2001 tax returns was submitted with this letter. Also submitted were the corporate petitioner's own copies of its 1998-2001 tax returns, the 1998-2001 W-3s, copies of various documents indicating that the [REDACTED] was doing business as Mastercare Termite Control, and a copy of an undated employment verification letter from Paz Memorial Services Inc. in Quezon City, Philippines indicating that the beneficiary had been employed there as an accountant from March 1988 to February 1991. An earlier October 18, 2001, letter from this company had been submitted with the petition.

On May 11, 2005, an interview was held with [REDACTED], as the president of the corporate petitioner, and the beneficiary at the immigration district office in California in connection with the I-140 and the beneficiary's Application to Register Permanent Residence or Adjust Status (I-485). Both [REDACTED] and the beneficiary were requested to bring various documents supporting the petitions. In particular, the petitioner was instructed to bring the original IRS tax return records for all tax years from the priority date to the present time, as well as copies of the petitioner's state EDD Form De-6 (quarterly state wage reports) for the last four quarters. The beneficiary was also instructed to provide IRS date stamped computer tax records including W-2s and Form 1099s for all years that the beneficiary has worked in the United States. None of the documents were brought to the interview, although the petitioner, through former counsel, later submitted copies of some state quarterly wage reports of "Servicemasters Marketing, Inc.," which do not appear to belong to the corporate petitioner, [REDACTED] d/b/a Mastercare Termite Control.

On May 27, 2005, the director issued a notice of intent to deny the petition, advising the petitioner that pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), information which is adverse to the consideration of the instant petition was being furnished to the petitioner to allow it an opportunity for rebuttal before the decision is rendered. The director proceeded to advise that [REDACTED] testimony and the beneficiary's statements were inconsistent in that [REDACTED] described the beneficiary as a full-time employee since 1997 while the beneficiary stated that he started in 1997 and was paid as a non-employee at the beginning and currently works approximately twelve hours per week as the petitioner's director employee and also is paid as an independent contractor for consulting services through his own accounting firm of "Federated Investment and Management Services." The director also noted that the beneficiary had been approved as a non-immigrant employee (H1B) to work as an accountant for the petitioner since June 1998 at a compensation of \$39,624. The petitioner was allowed thirty days to provide evidence or argument in opposition to the intent to deny.<sup>2</sup> The director also requested that the

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<sup>2</sup> The director erroneously characterized it as a proposed revocation.

petitioner provide W-2s for the beneficiary for 2002, 2003, and 2004, as well as copies of the petitioner's state quarterly wage reports for 2002, 2003, 2004 and the first quarter of 2005.

In response, former counsel submits a letter explaining that [REDACTED] operates businesses at several locations in Los Angeles through separate corporate entities. She states that the beneficiary was hired for the Carson, California location but was later transferred to another location. She further contends that [REDACTED]'s business organization was explained at the interview and that the nature of the beneficiary's employment as both a direct employee and as a consultant was irrelevant in that the total amounts paid were roughly equivalent to the proffered wage. Submitted with this letter are copies of written statements taken at the interview from [REDACTED] and the beneficiary as well as the following:

- 1) copies of the beneficiary's individual 2003 and 2004 income tax returns which include copies of W-2s issued to himself and his spouse from Mastercare Investment & Marketing Corp.
- 2) copies of the 2003 and 2004 Form 1120 U.S. Corporation Income Tax Return for Federated Investment and Management showing the beneficiary to be the sole shareholder and accompanied by copies of corresponding Form 1099s issued to the beneficiary and two other individuals with the same last names in each year.
- 3) copies of 2002-2005 state quarterly wage reports for Mastercare of Long Beach and Mastercare Investment & Marketing Corp.; copies of W-3s for 2002-2004 for Mastercare Investment & Marketing Corp.
- 4) copies of Master Care Investment & Marketing Corp.'s 2002 and 2003 corporate tax returns.

It is noted that Master Care Investment & Marketing Corp., Federated Investment and Management and Mastercare of Long Beach appear to be the same entities with the same federal and state identification tax numbers. It is further noted that the tax returns of this company show that [REDACTED] holds a two-thirds ownership interest and the beneficiary holds a one-third interest. The federal and state identification tax numbers appearing on the tax documents of above-mentioned three entities are not the same as the corporate petitioner's numbers and will not be considered as the same entity as the petitioner. Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

The transcript of the statement from [REDACTED] indicates that when he was asked to list the employees at the Carson (California) location and the salary paid to each person, he referred the questioner only to the DE 6's, W-2s and tax returns and answered affirmatively to the question as to whether he had 1099 employees at the Carson and Long Beach location.

The director denied the petition on July 28, 2005. The director reiterated that the testimony of [REDACTED] and the beneficiary contradicted each other in that [REDACTED] claim that the beneficiary was working as a full-time employee misrepresented the nature of the beneficiary's employment in that he has really been compensated through his own company and not as the petitioner's direct employee. The director further notes that the requested documents such as certified tax returns, W-2s or 1099s were not provided at the interview as requested and no explanation was offered for the omission, and questioned the authenticity of quarterly wage reports and tax returns provided after the interview. He also determined that the petitioner had been authorized to hire the beneficiary as a direct non-immigrant (H1B) employee and had not explained why the beneficiary had not been compensated at the certified rate of \$39,624 per year, rather than as a non-employee consultant and part-time direct employee. The director concluded that since the petitioner had not compensated the beneficiary in accordance with the non-immigrant provisions, then it cannot be determined with any certainty that the petitioner will employ and pay the beneficiary in accordance with the ETA 750.

On appeal, current counsel states that the testimony of [REDACTED] and the beneficiary were not contradictory in that [REDACTED] various companies employ more than 90 workers and that [REDACTED] stated that all employees were given W-2s or 1099s for work performed and that his lack of specificity as to how the beneficiary was compensated was understandable. Counsel contends that to both [REDACTED] and the beneficiary, the petitioner was the employer because beneficiary was paid for his services, regardless of whether a 1099 was issued or not. Counsel also takes issue with the director's questioning of the authenticity of the DE-6 quarterly wage reports which were not provided until after the expiration of the thirty days following the director's May 27, 2005 notice of intent to deny.<sup>3</sup> Counsel states that the petitioner sent a letter to the relevant state agency on June 10, 2005 and did not receive a response until after the 30-day time period. It is noted that the petitioner's own quarterly reports were not provided until current counsel provided them on appeal and which represent the wage reports of [REDACTED] for 2002, the first quarter of 2003 and the first quarter of 2005. None include the beneficiary's name.

Also provided for the first time on appeal are three copies of Form 1099s issued by Servicemasters Marketing, Inc. to the beneficiary showing that he was paid non-employee compensation of \$60,839.69 in 1998; \$98,082.68 in 1999; and \$82,894.22 in 2000.

As to the petitioner's ability to pay the proffered wage, counsel states that the petitioner has compensated the beneficiary as evidenced by the 1099's and W-2s that have been submitted to the underlying record and that the total compensation as either a W-2 or 1099 worker has exceeded the prevailing wage of \$39,624 in each year. Counsel emphasizes that there is no requirement that an immigrant beneficiary be classified as a W-2 employee for tax purposes. He states that the petitioner's offer of full-time permanent employment to the beneficiary as an accountant at the wage of \$21.83 per hour upon issuance of his lawful permanent residence was submitted to the underlying record.

It is noted that the phrase " 'for the purpose of performing,' " in section 212(a)(14) of the Act, clearly indicates that an immigrant alien within the contemplation of section 212(a)(14) must establish a *bona fide* intent to engage

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<sup>3</sup> As noted above, these reports were not those of the corporate petitioner, but of Servicemasters Marketing, Inc.

in the certified position at the certified salary as set forth on the ETA 750 A. *See Matter of Semerjian*, 11 I&N Dec. 751 (Reg. Comm. 1966). In this case, it is noted that the certified proffered salary is \$21.83 per hour or \$45,406. The definition of employment for these purposes requires “permanent full-time work by an employee for an employer other than oneself.” 20 C.F.R. § 656.3. Thus, if the position for which certification has been sought constitutes nothing more than self-employment, or as a possible invitation to continue as a part-time employee and as an entrepreneur billing the employer as an independent contractor, it does not constitute “employment” under the regulations and the *bona fides* of the job opportunity are doubted. For the purposes of a position certified by the DOL, this would not include the continuation of compensating a beneficiary as a non-employee as shown through the issuance of a Form 1099. In this case, it appears from the miscellaneous documents provided to the record by the petitioner as well as the officer’s notes and written statements from Mr. [REDACTED] and the beneficiary at the interviews that the beneficiary and [REDACTED] may have regarded the employing entity as all of the separate corporations rather than the specific corporate entity of [REDACTED] d/b/a Mastercare Termite Control as set forth in the I-140 and the ETA 750. It is unclear how many questions were asked of [REDACTED] at the interview as to how and why the petitioner failed to compensate the beneficiary in the manner required by his non-immigrant status and whether his intent to employ the beneficiary in compliance with the terms of the ETA 750 may be considered to be existent. While the failure to compensate a non-immigrant in accordance with applicable non-immigrant provisions may be a factor in the determination of whether a petitioner intends to continue to offer a *bona fide* job opportunity under the immigrant regulations, it may not be considered determinative in all cases. It is also unclear if the director questioned the beneficiary as to the extent of his own company’s income from the petitioner and whether, given the existence and record of income of his own firm of Federated Investment and Management, that it would be reasonable to believe that he would take the certified position of accountant as described on the labor certification. Until these questions are answered, the AAO must conclude that the certified position remains open to the beneficiary and that at the time of the interview, mutual intentions of the petitioner and the beneficiary were that the beneficiary would accept this position. *See Yui Sing Tse v. INS*, 596 F.2d 831 (9<sup>th</sup> Cir. 1979).

In examining the petitioner’s ability to pay the proffered salary of \$45,406, CIS will first examine whether the petitioner may have employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage during a given period, the evidence will be considered prima facie proof of the petitioner’s ability to pay the proffered wage. To the extent that the petitioner paid wages less than the proffered salary, those amounts will be considered in calculating the petitioner’s ability to pay the proffered wage. In this case, although instructed by the director on December 4, 2002, the petitioner submitted neither the W-2s requested nor the 1099 that was indicated within former counsel’s letter. These documents were also not submitted at the time of the interview, although requested by the district office. The petitioner ultimately submitted only copies of the beneficiary’s W-2s issued by the separate corporate entity of Mastercare Investment & Marketing Corp. in 2003 and 2004, and copies of the beneficiary’s 1099’s from his own company of Federated Investment and Management to the underlying record. Current counsel provided copies of the beneficiary’s 1099s for 1998, 1999 and 2000 for the first time on appeal. As none of these documents were issued by the corporate petitioner of [REDACTED] d/b/a Mastercare Termite Control, they will not be further addressed.

If the petitioner’s net income does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner’s

federal income tax return or audited financial statements without consideration of depreciation or other expenses. If it equals or exceeds the proffered wage, the petitioner is deemed to have established its ability to pay the certified salary during the period covered by the tax return. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage has been well established by judicial precedent. "The [CIS] may reasonably rely on net taxable income as reported on the employer's return." *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1053 (S.D.N.Y. 1986) ((citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, *supra*, and *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985). In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

In this case, the petitioner was requested on December 4, 2002 to submit the original date-stamped IRS tax return records for 1998 through 2002. The petitioner was further instructed to bring the original IRS filed tax return records for all tax years from the priority date to the present time to the interview at the district office held on May 11, 2005. These tax return records have never been submitted as requested. In pursuing the approval of an I-140, the petitioner must provide the information sought by the director if such information has a direct relevance on the resolution of the issue and it may be obtained by reasonable effort. In this case, as noted by the director, the petitioner has been given ample opportunity to provide these records. They have never been provided. We find that the petitioner's failure to produce the requested documents constitutes an appropriate ground for denial of the petition. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14). In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997); *Matter of Patel*, 19 I&N Dec. 774 (BIA 1988); *Matter of Soo Hoo*, 11 I&N Dec. 151 (BIA 1965).

It is noted that the record contains copies of the petitioner's bank statements covering the period from October 1, 2004 to January 31, 2005 and the March 31, 2005 bank statement. These statements cannot show a sustainable ability to pay the proffered wage as they do not represent a complete portrait of the petitioner's assets and liabilities. Moreover, the regulation at 8 C.F.R. § 204.5(g)(2) requires evidence in the form of audited financial statements, federal tax returns or annual reports. While additional material may be considered, such documentation generally may not be considered as a substitution for the basic evidentiary requirements.

Beyond the decision of the director and for future reference if further proceedings involving this petitioner and beneficiary may be filed, it is noted that an additional basis for investigation and possible inclusion in a notice of adverse information pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), is the fact that on an earlier biographic form (G-325A) signed by the beneficiary on July 28, 1992 and filed in connection with his asylum application, he lists his employment as being a supervisor from 8/80 to 1991 for the Lon Tondena Phils Samar Wood Lumber and working for Fil-Am Specialty in part-time sales from August 1991 to the present. As these

dates of employment raise an issue as to the authenticity of the qualifying employment verification letter in this proceeding which asserted his full-time employment as an accountant from March 1988 to February 1991 for Paz Memorial Services, Inc., it would merit additional scrutiny.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The appeal is dismissed.