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U.S. Citizenship
and Immigration
Services

PUBLIC COPY

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[REDACTED]

File: [REDACTED]
LIN 07 095 52170

Office: NEBRASKA SERVICE CENTER

Date: **NOV 25 2008**

IN RE: Petitioner:
Beneficiary:

[REDACTED]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

[REDACTED]

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.


John F. Grissom, Acting Chief
Administrative Appeals Office

DISCUSSION: The employment based immigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner was organized as a limited partnership in the State of Texas in 2005, and claims to be engaged in the import, export and sale of all terrain vehicles and jet skis. It seeks to employ the beneficiary as its marketing and sales manager pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The petitioner claims that it is the subsidiary of Broderick Special Imports, C.C., a South African corporation.

The director denied the petition, finding that the petitioner had failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. On appeal, counsel contends that the director erred in denying the petition since the director did not fully comprehend the nature of the petitioner's business. In support of this contention, counsel submits a statement on Form I-290B along with additional documentary evidence.

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

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary. A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The issue in this matter is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term “managerial capacity” means an assignment within an organization in which the employee primarily

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

The term “executive capacity” means an assignment within an organization in which the employee primarily

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

On Form I-140, filed on February 8, 2007, the petitioner indicated that the beneficiary would be employed as its marketing and sales manager, and that he would “manage sales and marketing [and] implement business

operations for worldwide import and export.” In a letter of support dated January 25, 2007, the petitioner described the beneficiary’s duties as follows:

As Marketing manager, [the beneficiary] will be responsible for determining the demand for products and services offered by retail establishments and identify potential customers. He develops pricing strategies with the goal of maximizing [the petitioner’s] profits or share of the market while ensuring that their customers are satisfied. In addition, as the Marketing Manager, he oversees product development and monitor[s] trends that indicate the need for new products and services

As an executive manager, in connection with his duties as a Sales Manager, he will direct the actual distribution or movement of their products and services to the customer. Additionally, he will coordinate the sales distribution by establishing sales territories, quotas and goals and also establish training programs for sales representatives. As Sales Manager he will analyze sales statistics gathered by staff to determine sales potential and inventory requirements and monitor the preferences of customers.

As Marketing and Sales Manager he visits key markets to evaluate operations and provide additional supervision and leadership to regional sales managers as well as formulate and implement plans for development of accounts by region, and also provides recommendations of changes or amendments of existing policies and procedures for [all the] offices. He plans, directs and coordinates the activities of buyers and purchasing officers of their products as well as transportation, storage and distribution activities in accordance with governmental policies and regulations.

Finally he will oversee the national sales programs for [the petitioner’s] products and services. Furthermore, as Marketing and Sales Manager he is responsible for preparing factual and detailed reports for presentation at regular status and management meetings with the office in the United States as well as the office in South Africa.

The director found the initial evidence insufficient to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity. Consequently, a request for evidence was issued on August 21, 2007. In the request, the director required the petitioner to submit a job description for the beneficiary which highlighted with specificity his duties, in addition to documentation supporting the amount of time he devoted to each identified duty. Additionally, the petitioner was requested to submit an organizational chart showing the beneficiary’s position within the organizational hierarchy. Finally, the director requested a brief overview of the title and duties of all employees identified on the organizational chart, as well as payroll records evidencing their employment with the petitioner.

In a response dated September 27, 2007, the petitioner addressed the director’s requests. Regarding the beneficiary’s duties, the petitioner provided the following updated description:

- **Overall responsibility for the success of [the petitioner].** As the highest ranking [employee of the petitioner] who lives and works full-time in the United States, [the beneficiary] is ultimately responsible for the success of the U.S. subsidiary. He transferred his Sales & Marketing responsibilities from South Africa to the U.S. market, i.e. planning, organizing and implementing sales programs and achieving sales objectives. But also, importantly, with this position he also was given critical executive-level responsibility for the entire U.S. operation's financial side, i.e. budgets, financial forecasts, monitoring and taking advantage of pricing trends, and reporting on product developments and sales to the South African parent company;
- **Training, developing, motivating and controlling inside and/or outside sales representatives or distributors as well other staff members in the organization.** This includes training supervisory staff; providing motivation for sales staff through meetings, educational campaigns, incentives and evaluations; setting sales and performance goals; and ensuring that staff perform according to management expectations;
- **Increasing sales Company-wide.** This includes working with the General Managers' direct reports to formulate and implement sales plans in order to develop and maintain both national and regional business accounts. In so doing the General Manager makes recommendations to the Managing Member/Owner (whether he's in South Africa or visiting the U.S.) regarding opportunities to maximize sales. Additionally the General Manager represents [the petitioner] when he visits key markets to evaluate operations.
- **Professional liaison with contract Marketing and Advertising Agencies** to promote [the petitioner's] products. In this regard [the beneficiary] continues to work with the management of the same Marketing and Advertising companies that he worked with in his South African managerial positions. Duties include representing [the petitioner] to the management of such agencies; planning and preparing tasks related to marketing and advertising campaigns; and preparing related reports for Member/Owner.
- **Preparing managerial Sales and Marketing reports and proposals for the Managing Member (Owner)** of [the petitioner], including recommending new or amended company working policies and procedures in order to promote the goals of the company;
- **Directing and controlling the work of the National Sales & Marketing Manager's direct reports,** including the preparation and giving of performance appraisals related to Key Performance Areas as specified by [the petitioner] and its parent company.

Regarding the percentage of time the beneficiary devotes to each area of responsibility, the petitioner stated as follows:

- Overall responsibility for the organization: 40%
- Effectively train, develop, motivate and control inside and/or outside sales representatives or distributors as well other staff members in the organization: 35%

- Develop the company share of the business through supervisory staff under [the beneficiary's] responsibility: 10%
- Interact and communicate with [the petitioner's] marketing and advertising agencies: 5%
- Admin-support of managing member in the development of [the company's] sales nationally: 5%
- Manage the Key Performance Areas (KPA's) of direct subordinates: 5%

In addition, the petitioner submitted an organizational chart which indicated that the beneficiary holds the highest ranking position in the petitioning entity. It further claimed that in addition to the beneficiary, the petitioner also employed one other full-time person, [REDACTED], as its Administrative Manager. Ms. [REDACTED] is responsible for all administrative matters of the company such as bookkeeping, contract compliance and execution, inventory, recordkeeping, invoicing, scheduling, and dealing with suppliers. The petitioner also claimed that she acts as a general assistant and further oversees the petitioner's contract shipping agencies. Although a financial manager was listed on the chart, the petitioner indicated that he was employed abroad. The organizational chart depicted a total of six open positions, including an opening for a regional sales manager.

The petitioner further explained that the petitioner's staff also included shared positions, which it claimed was "typical of a foreign sales representation office." It claimed that the owner/managers and financial manager work out of the South African office. The petitioner concluded by stating that the remainder of its employees are hired on a contract basis, and include contract representatives/distributors in various states who are compensated on commission; and contract shipping agencies who are compensated on an as-needed basis.

On January 8, 2008, the director denied the petition. Specifically, the director concluded that the beneficiary would not be employed in a primarily managerial or executive capacity, since the organizational structure of the U.S. entity at the time of filing was insufficient to support the beneficiary in such a position. On appeal, counsel contends that the beneficiary in fact qualified as a managerial employee, and claims that the director erred by failing to comprehend the nature of the petitioner's business and the beneficiary's role therein.

Upon review, the AAO concurs with the director's findings. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). Although the petitioner provided a lengthy overview of the beneficiary's duties in both the initial letter of support and the response to the request for evidence, the descriptions provided are nondescript and merely paraphrase the regulatory definitions. Based upon the evidence submitted, it cannot be determined that the beneficiary would be primarily engaged in qualifying managerial or executive duties. The AAO, therefore, agrees with the director's conclusions.

The definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

As a preliminary point, the AAO notes that the petitioner amended the beneficiary's position title, duties and level of responsibility when responding to the request for evidence. The beneficiary was initially described as a sales and marketing manager whose duties were limited to these functions. However, in response to the request for evidence, the petitioner amended the beneficiary's title to that of "general manager" and indicated that he would devote 40 percent of his time to oversight of the entire company. In sum, the initial description appeared to have the beneficiary doing more of the actual work, while the second iteration of the job has the beneficiary managing more of the actual work done in the petitioner's operation.

The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established. 8 C.F.R. § 103.2(b)(8). When responding to a request for evidence, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or its associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). If significant changes are made to the initial request for approval, the petitioner must file a new petition rather than seek approval of a petition that is not supported by the facts in the record. The information provided by the petitioner in its response to the director's request for further evidence did not clarify or provide more specificity to the original duties of the position, but rather added new generic duties to the job description.

In both the initial letter of support and in response to the request for evidence, the description of duties provided simply adopts many of the key phrases used in the statutory definitions of managerial and executive capacity. See sections 101(a)(44)(A) and (B) of the Act. These general statements do little to clarify the exact nature of the beneficiary's duties. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. For example, in response to the request for evidence, the petitioner claimed that 40% of the beneficiary's time was devoted to "overall responsibility for the organization." However, without additional details, this description of such an important role gives no insight on the nature of the actual position. The petitioner has failed to answer a critical question in this case: What does the beneficiary primarily do on a daily basis? The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108.

The petitioner's description of the beneficiary's duties suggests that the beneficiary is engaged in the production of the petitioner's products and services; namely advertising and distribution of the all terrain vehicles. Specifically, the overview of the beneficiary's position in the United States suggests that the beneficiary is responsible for the sales and marketing functions of the company, since it is clear that the beneficiary enters into agreements with dealers and provides technical assistance when necessary. The AAO further notes that the beneficiary is allegedly responsible for overseeing and training inside and outside sales representatives well as other employees of the organization. While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the

beneficiary is “primarily” performing managerial or executive duties. Section 101(a)(44) of the Act. Whether the beneficiary is an “activity” or “function” manager turns in part on whether the petitioner has sustained its burden of proving that his duties are “primarily” managerial.

In this matter, the main aspects of the beneficiary’s position involve, as stated above, the promotion and distribution of the petitioner’s all terrain vehicles. Specifically, since the organizational structure of the petitioner indicates that the internal staff of the petitioner is rather small, it appears that the beneficiary is responsible for interacting and coordinating with outside vendors and distributors personally, thereby performing the sales and marketing functions of the petitioner. The petitioner’s organizational chart indicates that aside from his wife, [REDACTED], the petitioner has no other on-site, full-time employees. While a number of other sales positions are identified, they are not yet filled and appear to be projected for the future.

Upon review of the chart, it appears that the actual number of unfilled positions within the petitioner’s organization is as follows:

Regional Sales Manager	1
Freelance Sales Rep / Distributor Other States	1
Sales Rep – Houston	1
Spares / Warranty Clerk	1
Accessories Sales Person	1
Warehouse Driver	1
Shipping Accounts Clerk	1

The petitioner was established in October 2005, and the instant petition was filed in February 2007. While the AAO comprehends the need for certain employees to engage in non-traditional duties at the commencement of a business, this enterprise was in business for over a year prior to filing and therefore should not be considered a new office at the commencement stage. The fact that the proposed staffing levels more than triple the petitioner’s current on-site staff raises questions with regard to the validity of the petitioner’s claim that the beneficiary does not engage in non-qualifying duties, and suggest that such a number of persons is required to keep the business running. Simultaneously, it suggests that the beneficiary is engaged in the tasks necessary to keep the petitioner’s products and services expanding. An employee who “primarily” performs the tasks necessary to produce a product or to provide services is not considered to be “primarily” employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one “primarily” perform the enumerated managerial or executive duties); *see also Matter of Church Scientology Int’l.*, 19 I&N Dec. 593, 604 (Comm. 1988). It appears unlikely that the beneficiary, assisted only by an administrative manager, could operate the petitioner’s business yet refrain from engaging in non-qualifying duties.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) “may properly consider an organization’s small size as one factor in assessing whether its operations are substantial enough to support a manager.” *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of*

Transkei v. INS, 923 F.2d 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Moreover, the petitioner's payroll records raise additional questions regarding the staffing of the U.S. entity. The petitioner's Form 1065, U.S. Return of Partnership Income for 2006 indicates that no wages were paid to employees during that year, despite the company's creation in October 2005. More importantly, however, the director noted that the petitioner submitted payment vouchers for the petitioner and [REDACTED] back to April 2006, which assist in verifying their employment, yet contradict the claims of the petitioner on its Form 1065 that it paid no wages or salaries to employees in 2006. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Counsel on appeal contends that this discrepancy is due to the certain tax issues as a result of being funded by its foreign parent. Specifically, a letter from the petitioner's certified public accountant indicates that nature of withholdings foreign persons are subject to upon working in the United States. This explanation, however, does not explain the discrepancies noted above. Based on the lack of legitimate payroll documentation, the AAO cannot determine whether the petitioner actually employs the beneficiary and administrative manager as claimed. This lack of documentation also raises questions regarding the petitioner's ability to pay the proffered wage of the beneficiary. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

Beyond the decision of the director, the petitioner has failed to establish that the petitioner has the ability to pay the proffered wage. In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not establish that it had previously employed the beneficiary at the proffered wage of \$113,300 per year.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court

held 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 on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; *see also Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

As the petition's priority date falls on February 8, 2007, the AAO must examine the petitioner's tax return for 2006. The petitioner's IRS Form 1065 for calendar year 2006 presents a net taxable income of -\$152,192. The petitioner could not pay a proffered wage of \$113,300 per year out of this income.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage. The AAO is unable to determine the petitioner's net current assets from the documentation contained in the record.

Accordingly, the evidence of record does not establish the petitioner's ability to pay the proffered wage. For this additional reason, the petition cannot be approved.

Another issue not addressed by the director is whether the petitioner was doing business in the United States for at least one year prior to filing the instant petition. The regulation at 8 C.F.R. § 204.5(j)(3)(i)(D) requires the petitioner to submit evidence that the prospective United States employer has been doing business for at least one year. "Doing business" means the regular, systematic and continuous provision of goods and/or services by a firm, corporation or other entity and does not include the mere presence of an agent or office. 8 C.F.R. § 204.5(j)(2).

As noted above, the instant petition was filed on February 8, 2007, therefore, the petitioner must establish that it was doing business in the United States for an entire year as of this date. The record does not contain evidence of business activities dating back to February 2006. The earliest invoice in the record is dated in June 2006. Furthermore, the petitioner claims that the beneficiary holds the highest ranking full-time position in the company, but he did not arrive in the United States until April 2006. It is unclear who, if anyone, would have operated the company prior to that date. For this additional reason, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if she shows that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.