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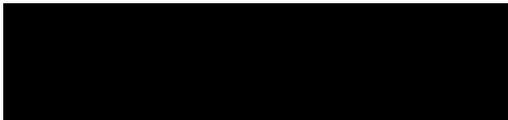
U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
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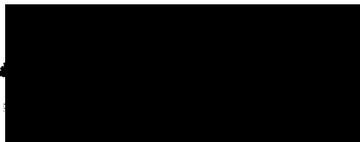


FILE: SRC 03 232 51237 Office: TEXAS SERVICE CENTER Date: FEB 18 2005

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

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

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.

A handwritten signature in cursive script, appearing to read "Robert P. Wiemann".

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to employ its general manager as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized in the State of Texas that is engaged in the sale and lease of medical equipment and supplies. The petitioner claims that it is the subsidiary of the beneficiary's foreign employer, located in Maracaibo, Venezuela. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's employment for two years.

The director denied the petition concluding that the petitioner failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. The director specifically noted that the beneficiary would not be employed as a manager, as he did not supervise or manage any subordinate professional or managerial employees.

On appeal, counsel claims that the director's finding that the beneficiary would qualify for L-1A classification only if he manages professional or managerial employees is a misinterpretation of the applicable statute. Counsel contends that Citizenship and Immigration Services (CIS) ignored the concept of functional manager, as provided for in the regulations, and further claims that the beneficiary qualifies as a manager as he is managing an essential function of the business. Counsel also states that CIS incorrectly relied on the size of the petitioning organization when denying the petition rather than considering the reasonable needs of the "newly expanding business." Counsel submits a brief in support of the appeal.

To establish L-1 eligibility, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act, 8 U.S.C. § 1101(a)(15)(L). Specifically, within three years preceding the beneficiary's application for admission into the United States, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education,

training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a management or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The issue is whether the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity.

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) Has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization) if another employee or other employees are directly supervised; 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.

The petitioner filed the nonimmigrant petition on August 22, 2003 indicating that the beneficiary would be employed as its general manager. In an attached document from the petitioner titled "Support Documentation" the petitioner stated that the position of general manager involves the management of the company's business operations including:

- Control of physical inventory intended for sale in the United States;
- Develop and implement policies and procedures for company operations;
- Ascertain and plan the development of the products intended for sale and lease;
- Supervision and control of bank accounts;
- Supervision of sales to the distributors;
- Development of new distributors in the potential market;
- Training and handling of personnel[.]

The petitioner further stated that the beneficiary would possess the highest level of managerial authority in the organization and would supervise, train, hire and fire employees.

In an attached payroll record dated June 30, 2003, the beneficiary as well as two additional individuals were identified as employees of the petitioning organization. No evidence explaining the positions of the other two workers was submitted.

The director issued an Intent to Deny dated October 23, 2003, requesting that the petitioner identify any additional workers employed by its organization and explain their duties and educational backgrounds. The director also asked that the petitioner explain how the beneficiary would be relieved from performing the daily operations of the business. Additionally, the director requested that the petitioner submit its state

quarterly tax returns for the past two quarters and its Form 940 EZ Employer's Annual Federal Unemployment Tax Return.

Counsel responded in a letter dated November 18, 2003 and provided the following explanation as to how the beneficiary's job duties would not include the performance of day-to-day operations of the company:

Currently, the beneficiary is establishing new clientele relationships and lobbying [sic] activities to start business relations with petroleum companies in order to continue to expand the new division of the petitioner in the oil and gas industry. In addition, the beneficiary is negotiating future contracts of service and petroleum equipment supply, in addition to the contract already signed with [REDACTED] de Mexico, S.A. de C.V.

Counsel also explained in his letter that the beneficiary is involved in the diversification of the petitioner's business due to problems incurred by the petitioner in obtaining a medical equipment supplier number. Counsel submitted a letter from the beneficiary as the director of the petitioning organization, in which the beneficiary explained that the Centers for Medicare and Medicaid were processing applications more slowly and with more scrutiny as a result of wheelchair fraud. The beneficiary stated that the petitioner's shareholders voted to create a new division of the company, Petroleum Engineering Integrated Services (PEIS), which would involve the planning, design and problem diagnosis of well construction.

With regard to the additional workers employed by the petitioner, counsel submitted a resume for each of the two employees, identifying one worker as an administrative assistant and the second as a sales representative. In an attached document, the petitioner noted that the administrative assistant's duties included: (1) collaborating with all administrative activities; (2) bookkeeping; (3) controlling company inventory; and (4) monitoring the company's sales and purchases. The job duties of the sales representative were outlined as: (1) taking purchase orders; (2) promoting products to clients; (3) delivering and picking up payments; and (4) maintaining in-services.

In a decision dated December 2, 2003, the director determined that the petitioner failed to demonstrate that the beneficiary would be performing in a primarily managerial or executive capacity under the extended petition. The director acknowledged that the petitioner is presently seeking new avenues for investment, but stated that "at the time of filing [the petition] the beneficiary is not primarily performing in a managerial or executive capacity since the beneficiary is not managing other professionals or managers." The director also concluded that the beneficiary would be engaged in the daily activities of the business "given the current structure of the company." Consequently, the director denied the petition.

In an appeal filed on January 2, 2004, counsel asserts that CIS abused its discretion in determining that the petitioner would not support the beneficiary in a primarily managerial or executive capacity as a result of the size of the petitioning organization. Counsel cites *Mars Jewelers v. INS*, 702 F. Supp. 1570 (N.D. Ga. 1988) and *Johnson-Laird, Inc. v. INS*, 537 F. Supp. 52 (D.C. Ore. 1981), as precedent case law establishing that the number of personnel in an organization is not determinative of whether a person is employed as a manager or an executive. Counsel also refers to an unpublished AAO decision involving an employee of the Irish Dairy Board as evidence that the sole employee of a company may qualify for L-1A classification. Counsel states:

The [Texas Service Center (TSC)] obviously was very preoccupied by the size of the petitioner and the number of persons on staff that it actually used the size as a basis for its

decision. Its conclusion that the beneficiary was not functioning as a manager was based on the ground that because of the size and limited number of staff members, the beneficiary had to perform day-to-day activities, which, according to TSC, are not supposed to be performed by a manager. This conclusion drastically contrasts with the finding of Matter of Irish Dairy Board.

* * *

In this case, the TSC has ignored the *reasonable* needs of a newly expanding business, and especially the fact that the petitioning entity has just been through the maze of getting proper permits, licenses, and certificates from various state government agencies. The TSC only cited one main reason when denying this case, i.e., that the beneficiary is not managing other professionals or managers. However, this is not the only and one element when assessing the capacity of being manager/executive. According to federal regulations and case precedents, an individual can be a manager or an executive even without any subordinate staff members. The TSC clearly has used the size as its *sole* base in denying the petition. This is clearly no consistent with the federal regulations and the legal precedence.

(Emphasis in original).

Counsel further claims on appeal that the beneficiary would perform primarily managerial and executive duties while employed in the United States. Counsel states that the beneficiary's job duties "are essential and controlling functions and are of a type contemplated by the statute for manager and executive." Counsel contends that the beneficiary meets each of the elements of managerial capacity because: (1) he has been exercising power over business decisions, plans, strategies and policies, including pricing policies, budget plans, profit goals, and operational procedures for purchasing and distribution, and has implemented a strategy for expansion of the petitioning organization; (2) he will be overseeing and managing the company's marketing strategy, ensuring supplies, and maintaining channels for the sale of products, which is an essential function; (3) he has the authority to hire and fire employees; and (4) he has power over the company's daily business operations and "manages the essential function of ensuring the overall success of the business." Counsel states that in determining managerial capacity, the director ignored the second part of the regulation at 214.2(l)(1)(ii)(B)(2), which allows a manager to "[manage] an essential function within the organization, or a department or subdivision of the organization," rather than supervising the work of other supervisory, managerial or professional employees.

Counsel also contends that the beneficiary satisfies the requirements of an executive, stating that he: (1) directs the management of the organization; (2) establishes the organization's goals and policies; (3) exercises wide latitude in discretionary decision-making; and (4) receives general supervision from higher-level executives.

Upon review, the petitioner has not established that the beneficiary would be employed under the extended petition in a primarily managerial or executive capacity.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of

managerial responsibility cannot be performed. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to support an executive or managerial position. In order to qualify for an extension of L-1 nonimmigrant classification under a petition involving a new office, the petitioner must demonstrate through evidence, such as a description of both the beneficiary's job duties and the staffing of the organization, that the beneficiary will be employed in a primarily managerial or executive capacity. There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension.

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. § 214.2(l)(3)(ii). The job description provided by the petitioner indicates that one year after the approval of the nonimmigrant petition the beneficiary would be responsible for performing such non-managerial and non-executive job duties as controlling the company's inventory, selecting products for sale by the petitioner, maintaining the company's bank accounts, supervising sales, and obtaining new distributors in the United States market. While the petitioner claims that the beneficiary would possess the title of general manager, the beneficiary would clearly be performing non-qualifying functions of the business, which would allow for the sale of the petitioner's products, rather than "manag[ing] the organization, or a department . . . of the organization" as required in the statutory definition of managerial capacity. Section 101(a)(44)(A)(i) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i). The AAO is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Moreover, the record does not identify any subordinate employees who would relieve the beneficiary from performing these specific functions of the business. Based on the job descriptions for the petitioner's remaining two employees, the only function the beneficiary may be relieved from performing is the monitoring of the company's inventory. As the descriptions of the employees' remaining job duties are brief, it is unclear whether the beneficiary would still be responsible for selecting products for sales and supervising the company's sales. If the beneficiary himself continues to be responsible for the non-managerial and non-executive operations of the business, he may not be deemed to be employed in a primarily managerial or executive capacity. *Id.* at 604.

Furthermore, the actual positions and job duties of these two subordinate employees are questionable. Although counsel refers to one of the petitioner's employees as an administrative assistant, claiming that she would perform administrative functions of the business, a business card in the record identifies the same employee as a sales representative. This, therefore, raises doubt as to the true employment capacity and job responsibilities of the petitioner's lower-level employees. More importantly, it raises the additional question of whether the beneficiary would actually be relieved from performing any of the above-mentioned non-qualifying job duties, including monitoring inventory. The AAO cannot conclude that the beneficiary would be performing primarily managerial or executive job duties. 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. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988).

Counsel correctly observes that the director based his decision partially on the size of the enterprise and the number of staff and did not take into consideration the reasonable needs of the enterprise. As required by

section 101(a)(44)(C) of the Act, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, CIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization.

At the time of filing, the petitioner was a one-year-old company. The petitioner failed to supply requested information regarding the petitioner's annual gross income. The firm employed the beneficiary as general manager, and claimed to employ an administrative assistant and a sales representative. As noted previously, the record raises doubt as to whether the petitioner employs a sufficient subordinate staff that would perform the actual day-to-day, non-managerial operations of the company. The inconsistencies in the record prevent a finding that the administrative needs of the business, and particularly the monitoring of the company's inventory and sales, would be performed by someone other than the beneficiary. Based on the petitioner's representations, it does not appear that the reasonable needs of the petitioning company might plausibly be met by the services of the beneficiary as general manager, an administrative assistant and a sales representative. Regardless, the reasonable needs of the petitioner serve only as a factor in evaluating the lack of staff in the context of reviewing the claimed managerial or executive duties. The petitioner must still establish that the beneficiary is to be employed in the United States in a primarily managerial or executive capacity, pursuant to sections 101(a)(44)(A) and (B) of the Act. As discussed above, the petitioner has not established this essential element of eligibility.

The AAO recognizes counsel's claim that it should consider the petitioner's difficulties in receiving appropriate licenses as a reasonable need of the petitioning organization. While the petitioner may have incurred a "maze" in obtaining permits, licenses and certificates, the crux of the reasonable needs analysis is the job duties performed by the beneficiary in relation to the company's purpose and stage of development. Counsel did not specifically define how the beneficiary's employment in a managerial or executive capacity is affected by the petitioner's inability to obtain proper licensing. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). As addressed above, it appears that regardless of whether the petitioner received its permits and licenses, the reasonable needs of the organization would not be met by the petitioner's three employees. Moreover, despite potential obstacles in obtaining proper licensing, the regulations clearly provide the petitioner with one year to become sufficiently operational otherwise the beneficiary is ineligible for an extension of his L-1A classification. See 8 C.F.R. § 214.2(l)(3)(v)(C).

Counsel also contends that the beneficiary qualifies as a functional manager as he is not supervising professional or managerial employees, but is instead managing the essential function the company's marketing. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function.

In this matter, counsel's statement on appeal that the beneficiary would be overseeing and managing "[t]he essential function . . . [of] the company's marketing strategy, ensuring [sic] of supplying sources and maintaining and exploring sales channels," does not support the claim that the beneficiary would be a functional manager. Counsel has not identified the specific job duties included in managing the marketing strategies for the company. More importantly, counsel has not shown that the beneficiary would not personally perform duties related to the petitioner's marketing, such as determining the petitioner's products and suppliers for the products, as initially noted by the petitioner in its documentation submitted with the petition. Again, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. at 604. The AAO also notes that the concept of functional manager is not a guaranteed substitute to establishing managerial capacity merely because the employees supervised by the beneficiary are not supervisory, professional, or managerial. Here, the petitioner failed to satisfy the requirement of describing with specificity the duties performed by the beneficiary related to the essential function. Consequently, the beneficiary cannot be deemed to be employed as a functional manager.

Based on the above discussion, the petitioner has failed to demonstrate that the beneficiary would be employed by the United States entity in a primarily managerial or executive capacity. Accordingly, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not demonstrated the existence of a qualifying relationship between the beneficiary's foreign employer and the petitioning organization. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

In the instant matter, the petitioner claimed that it is a subsidiary of the beneficiary's foreign employer, as the foreign entity is the holder of 51% of the stock issued by the petitioning organization. The record, however, is devoid of the essential documentation establishing the foreign entity's stock ownership, such as a stock certificate, corporate stock certificate ledger, stock certificate registry, and the minutes of relevant annual shareholder meetings in order to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). As a result, the AAO cannot determine whether the required qualifying relationship exists between the two entities. For this additional reason, the appeal will be dismissed.

An additional issue not addressed by the director is the fact that the U.S. entity did not secure a commercial lease until April 8, 2003, nearly eight months after the approval of the original new office petition. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(A) requires a petitioner that seeks to open a new office to submit evidence that it has acquired sufficient physical premises to commence doing business. In the present matter, either the petitioner did not comply with this requirement, misrepresented that they had complied, or the

director committed gross error in approving the petition without evidence of the petitioner's physical premises. Regardless, the approval of the initial petition may be subject to revocation based on the evidence submitted with this petition. See 8 C.F.R. § 214.2(l)(9)(iii). The petition may not be approved for this additional reason.

Another issue not addressed by the director is whether the petitioning organization has been doing business in the United States for the previous year. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the intended United States operation one year within the date of approval of the petition to establish the new office. Furthermore, at the time the petitioner seeks an extension of the new office petition, the regulations at 8 C.F.R. § 214.2(l)(14)(ii)(B) requires the petitioner to demonstrate that it has been doing business for the previous year. The term "doing business" is defined in the regulations as "the regular, systematic, and continuous provision of goods and/or services by a qualifying organization and does not include the mere presence of an agent or office of the qualifying organization in the United States and abroad." 8 C.F.R. § 214.2(l)(1)(ii). There is no provision in CIS regulations that allows for an extension of this one-year period. If the business is not sufficiently operational after one year, the petitioner is ineligible by regulation for an extension. The record demonstrates that the petitioner did not receive its license, permit and insurance coverage to operate in the United States until May 2003, only three months prior to the filing of the instant petition. Additionally, the record does not contain documentary evidence of the petitioner's financial status. The petitioner has therefore failed to satisfy the regulation at 8 C.F.R. § 214.2(l)(14)(ii)(B). The appeal will be dismissed for this additional reason.

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).

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.