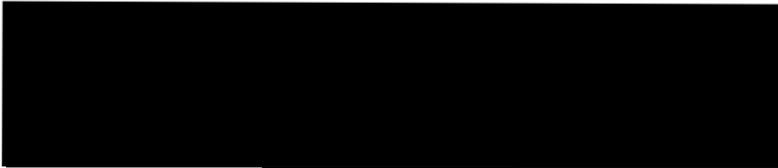




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File: WAC 05 062 52803 Office: CALIFORNIA SERVICE CENTER Date: NOV 13 2006

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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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, a Brazilian company, filed this nonimmigrant petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee with its U.S. subsidiary pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The United States entity is an Arizona limited liability company that claims to be engaged in the sale of marble and granite in the United States. The petitioner seeks authorization for its U.S. subsidiary to employ the beneficiary in the position of "International Imports & Exports USA Business Manager" for a three-year period.

The director denied the petition concluding that the petitioner did not establish that the beneficiary will be employed in a managerial or executive capacity for the United States entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the beneficiary will serve in a managerial capacity with the U.S. entity. Counsel suggests that the director misinterpreted the evidence submitted and made erroneous assumptions regarding the beneficiary's proposed employment capacity. Counsel submits a brief and evidence in support of the appeal.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, 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 within three years preceding the beneficiary's application for admission into the United States. 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 issue in the present matter is whether the petitioner established that the beneficiary will be employed by the United States entity in a primarily managerial capacity. The petitioner does not contend that the beneficiary will be employed in an executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as 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.

The Form I-129 petition was filed on December 28, 2004. In support of the petition, the petitioner submitted an affidavit from its president, who stated that the beneficiary would be transferred to the United States "to manage all of [the U.S. entity's] purchases, sales and exports." The petitioner indicated on Form I-129 that the U.S. entity has one employee.

The director issued a request for additional evidence on January 3, 2005 and instructed the petitioner to submit additional evidence to establish that the beneficiary will be performing the duties of a manager or executive with the U.S. company. Specifically, the director requested that the petitioner submit the following: (1) a more detailed description of the beneficiary's proposed duties in the United States including the percentage of time the beneficiary will spend on each duty; (2) an organizational chart for the U.S. company which clearly identifies the beneficiary's position and listing all employees under his supervision by name and job title; (3) a brief description of job duties, educational level and annual salaries/wages for all employees under the beneficiary's supervision; and (4) copies of the U.S. company's state quarterly wage reports for the last four quarters.

Counsel for the petitioner submitted a response to the director's request on March 25, 2005. The petitioner's response included an unsigned letter, dated March 15, 2005, from the U.S. entity, which included the following information regarding the beneficiary's proposed duties in the United States:

[The beneficiary] will become the USA Business Manager, responsible for the over-all operation of [the U.S. entity] and directly involved in the international import of granite slabs from the foreign suppliers, along with their volume sale to the wholesale customers. He will also direct the expansion of the customer base by using his expertise to help them chose [sic] and acquire the best granite for their project.

* * *

As USA Business Manager, [the beneficiary's] duties will include:

1. Direct and manage the over-all operation of [the U.S. entity] according to the vision and purpose of the company as established by [the petitioner].
2. Develop and execute a business plan to increase the customer base and product line.
3. Maintain contact with the stone quarries and suppliers in Brazil to locate the type of products needed to supply the local market and arrange for their purchase and shipment to the U.S. (30% of time)
4. Visit potential clients to offer them the services and products of [the U.S. entity] (25% of time)
5. Oversee the maintenance of clear financial records and the accounting of all financial activities. Manage the financial records with the help of a bookkeeper and accountant. (25% of the time)
6. Work with the Statutory Agent / Administrator, David Abel, to insure that all requirements in the area of warehousing, human resources, sales and delivery are being met (20%) of the time.

The petitioner indicated that the U.S. entity had not yet filed a state quarterly wage report as it had relied on contract labor up until January 2005. The petitioner submitted an employee list and summary of wages paid during the first quarter of 2005, and indicated that it currently employs two warehouse assistants, one of whom also serves as a delivery driver. The petitioner indicated that its other employee is the "USA Statutory Agent/Administrator" and provided the following information regarding his duties:

[R]esponsible for the overall operation of the [U.S. entity's] warehouse, receiving the containers sent by [the petitioner] and overseeing their unloading, delivery and payment. He also helps companies in the USA contact [the petitioner] and [the beneficiary] to discuss their specific granite needs with him.

* * *

His responsibilities include retail sales, human resources, warehouse operation and slab delivery.

The petitioner stated that Mr. Abel receives a part-time gross salary of \$2,750 per month.

The petitioner submitted a proposed organizational chart identifying the beneficiary as “USA Manager-Imports & Exports – Sales” supervising the “Statutory Agent – Administrator – Sales,” who in turn supervises the two warehouse employees, and various contractors which include an accounting firm, customs brokers, a transportation provider, and various warehouse equipment and supply providers. The chart indicates that the beneficiary will report to the foreign company’s granite and marble exports manager.

The director denied the petition on April 4, 2005, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity in the United States. The director observed that although the U.S. entity’s organizational chart depicts three employees and seven contractors, the company’s 2003 Form 1065, U.S. Return of Partnership Income shows no salaries and only \$27,300 in cost of labor. The director noted that the petitioner had “failed to submit evidence that there are any employees being paid by [the U.S. entity].” The director concluded based on the staffing levels that “it appears that the beneficiary ... will be performing many aspects of the day-to-day business.”

The director further found that the beneficiary’s claimed duties were “to[o] broad and nonspecific to convey any understanding of the beneficiary’s actual day-to-day activities” and appeared to include marketing duties, which would not be considered managerial or executive in nature. The director determined that the beneficiary would not be primarily supervising a subordinate staff of professional, managerial or supervisory personnel who would provide relief from the performance of non-qualifying duties, or that the beneficiary would primarily manage an essential function or operate at a senior level within an organizational hierarchy.

On appeal, counsel for the petitioner asserts that the beneficiary will be employed in a managerial capacity and meets each of the statutory criteria in that he: will manage the U.S. operations; will supervise and control the work of the U.S. company’s highest-level employee, who in turn supervises lower-level employees; will have the authority to hire and fire employees and make other personnel actions; and will exercise discretion over the day-to-day operations of the function over which he has authority. Counsel asserts that the beneficiary “oversees [redacted] day to day sales of granite and marble, and also oversees Abel’s supervision of Human Resources, warehouse operations and slab delivery.”

Counsel emphasizes that the U.S. company’s operating agreement identifies the responsibilities of the manager of the company and establishes that the beneficiary will perform the high-level responsibilities specified in the statutory definition of managerial capacity, including authority to enter into contracts and buy and sell assets of the company. Counsel further asserts that the beneficiary primarily performs these duties while the “day to day functions” are performed by the U.S. company’s statutory agent/administrator.

Counsel further asserts that the director erred in concluding that the U.S. company failed to provide evidence of wages paid to employees. Counsel notes that the petitioner clearly indicated that it only recently hired payroll employees and the director’s reliance on information contained in the U.S. company’s Form 2003 IRS Form 1065 was inappropriate for purposes of determining the company’s current staffing levels. Counsel contends that the record establishes that the beneficiary will supervise a subordinate staff of professional, managerial or supervisory personnel who will provide relief from the performance of non-qualifying duties. Counsel again emphasizes that the U.S. company’s administrator supervises low-level employees and is “in

charge of sales and supervising the delivery and receipt of stones” at the U.S. company’s warehouse. Counsel asserts that the beneficiary “would never have the time to perform any day to day tasks necessary to produce a product or a service as alleged by the Service.” Counsel notes that the U.S. company anticipates hiring three additional full-time employees in the near future to meet the increasing demands of its clientele.

In support of the appeal, the petitioner submits an affidavit from its president, who states that the beneficiary is “the sole decision maker of the U.S. entity” and further explains his duties as follows:

[The beneficiary] has sole discretion to decide the location of the business, enter into contracts on behalf of [the U.S. company], decide whether to increase or decrease the amount of investment to and of the business, whether to accept a certain supplier of stone, enter into contracts with major distributors when his presence is requested (usually when high-profile clients are involved), make financial decisions including but not limited to hiring and firing employees, signing operating statements, taxes and hiring of contractors (if necessary. Usually, Mr. ██████████ the Administrator handles payroll and contractors.)

The petitioner also submits an affidavit from ██████████ the U.S. company’s administrator who states that he reports “all decisions and matters” to the beneficiary. He states that his “primary activities” are: “to supervise personnel...; to supervise and close the sales of stones...; “to make sure delivery requirements were met, and supervise the arrival and unloading of containers.”

Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity.

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 petitioner’s description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

In this case, the petitioner has asserted that the beneficiary will be employed in a qualifying managerial capacity with responsibility for managing the entire U.S. operation. The definitions of executive and managerial capacity 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).

On appeal, counsel refers to the role of the “manager” as set forth in the petitioner’s operating agreement as evidence that the beneficiary performs the high-level responsibilities contemplated by the statutory definition of managerial capacity. *See* section 101(a)(44)(A) of the Act. However, the AAO notes that there is no indication that a manager has been named under the terms of the U.S. company’s August 28, 2002 operating agreement. Nevertheless, it appears that the beneficiary, as the sole representative of the foreign parent company in the United States, would have the authority to exercise discretion over the day-to-day operations of the U.S. company.

However, the petitioner's description of the beneficiary's duties indicates that the beneficiary would be primarily engaged in non-qualifying duties, rather than devoting the majority of his time to managing the U.S. company. In response to the director's request for evidence, the petitioner indicated that the beneficiary would be responsible for the "over-all operation" of the U.S. company, but also "directly involved" in the international import of granite from foreign suppliers and "volume sale to the wholesale customer." The petitioner also indicated that the beneficiary would help customers choose and acquire the best granite for their projects. Although counsel and the petitioner suggest on appeal that the beneficiary will merely oversee sales activities carried out by the U.S. company's administrator, these statements clearly indicated the beneficiary's direct involvement in the day-to-day operations of the U.S. company.

Furthermore, the petitioner's breakdown of the beneficiary's duties further undermines counsel's assertions that the beneficiary will perform primarily qualifying duties. For example, the petitioner indicated that the beneficiary will allocate 30 percent of his time to maintaining contact with Brazilian suppliers to locate the types of products needed by U.S. customers and "arrange for their purchase and shipment." The petitioner did not explain how sourcing products and making shipping arrangements qualifies as a managerial function. In addition, the petitioner indicated that the beneficiary would devote 25 percent of his time to "visit new potential clients to offer them the services and products" of the U.S. company. This duty reveals the beneficiary's direct involvement in sales to U.S. customers and also cannot be considered a qualifying duty. Accordingly, the petitioner's description of the beneficiary's duties indicates that he will spend more than half of his time sourcing, importing, marketing and selling the U.S. company's products. 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).

On appeal, counsel appears to recant its previous description, and asserts that the beneficiary merely "oversees [REDACTED] day to day sales of granite and marble." The affidavit from the foreign entity's president suggests that the beneficiary only participates in transactions involving "high-profile clients," and Mr. [REDACTED] indicates in his affidavit that one of his duties is "to supervise and close the sales of stones." However, in response to the director's request for evidence, the petitioner indicated that Mr. [REDACTED] is responsible for "retail sales" while the beneficiary would be responsible for "volume sale to the wholesale customer." Based on the evidence submitted, it is evident that wholesale activities would account for the majority of the U.S. company's business.

A petitioner cannot offer a new position to the beneficiary on appeal, or materially change a position's title, its level of authority within the organizational hierarchy, or the 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). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). The AAO will not accept counsel's assertion that the U.S. company's administrator will perform all of the U.S. company's non-qualifying sales functions, particularly in light of the petitioner's initial description of the beneficiary's duties.

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that 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)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(ii)(B)(2). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(ii)(B)(3).

Here, the record establishes that the beneficiary has the authority to hire and fire employees and that he will oversee one supervisory employee. As discussed above, the petitioner has not demonstrated that these would be the beneficiary's primary duties. Rather, it is evident that the beneficiary will spend a significantly greater portion of his time performing non-qualifying duties associated with the company's product sourcing, importing, sales and marketing functions, and thus he does not qualify as a "personnel manager."

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). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a detailed job description of the duties performed in managing the essential function, i.e. 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. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. 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. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). Counsel asserts on appeal that the beneficiary will manage a function or component of the foreign company, namely, the U.S. subsidiary, whose main function is sales to U.S. customers.

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. As discussed above, the petitioner has not established that the beneficiary's duties will be primarily managerial, and thus the petitioner has not established that the beneficiary will serve as a function manager within the meaning of section 101(a)(44)(A)(ii) of the Act.

Counsel asserts that the director based his decision, in part, on the petitioner's staffing levels, and erroneously relied upon the U.S. company's 2003 tax return, rather than considering its staffing levels as of the date of filing. The AAO concurs that the petitioner's 2003 staffing levels are irrelevant, as the instant petition was

filed on December 28, 2004. However, when considering the U.S. company's staffing levels as of the date of filing, the record does not support a finding that the company has the organizational structure to support the beneficiary in a primarily managerial capacity. 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. However, 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). The size of a company may be especially relevant when CIS notes discrepancies in the record and fails to believe that the facts asserted are true. *Id.*

The U.S. company has been operational since 2002 and is engaged in the import and sale of granite and marble products. At the time of filing, it was utilizing the part-time contracted services of an administrator and various warehouse staff on an as-needed basis, although the petitioner claims to have hired the administrator and two warehouse staff as direct employees shortly after the petition was filed. The petitioner has provided no documentary evidence of wages paid to these employees, such as canceled checks or paycheck stubs. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Further, even if these employees are considered, the petitioner has not identified anyone, other than the beneficiary, who would be responsible for sourcing the products sold by the petitioner or selling the products to wholesale customers. The petitioner has not explained how the reasonable needs of the petitioning enterprise would justify the beneficiary's performance of these non-managerial duties.

Furthermore, the reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See* sections 101(a)(44)(A) and (B) of the Act, 8 U.S.C. § 1101(a)(44). The reasonable needs of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of his or her time on non-qualifying duties.

The petitioner indicates that the U.S. company will hire additional employees in the future. However, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

Based on the foregoing discussion, it cannot be found that the beneficiary will be employed in a qualifying managerial or executive capacity. For this reason, the appeal will be dismissed.

Beyond the decision of the director, the petitioner has not established that the beneficiary has been employed by the foreign entity in a primarily managerial or executive capacity. The petitioner provided a description of the beneficiary's foreign duties in its response to the director's request for evidence, and stated that in his current role as export manager, the beneficiary is responsible for "contacting companies in the USA &

Canada to determine their granite slab needs and how [the petitioner] can help them meet those needs” and for “contacting various quarries in Brazil to secure the quality and pricing needed to serve this market.” The petitioner also indicated that the beneficiary is responsible for contacting the U.S. company on a weekly basis to determine if it has the necessary stock. Based on the petitioner’s representations the beneficiary is primarily responsible for performing purchasing, sales and marketing tasks, rather than performing managerial duties for the foreign entity. 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). The foreign entity’s organizational chart shows that the beneficiary reports to the administrative manager for granite and marble exports, and supervises no subordinate staff in Brazil, thus it cannot be found that the beneficiary operates at a senior level with respect to the export function within the foreign entity. For this additional reason, the appeal will be dismissed.

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).

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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.