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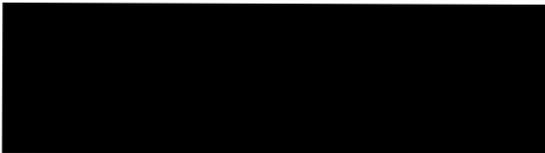
File: WAC 08 007 52428 Office: CALIFORNIA SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner:
Beneficiary:



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)

IN 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 filed this nonimmigrant visa petition seeking to employ the beneficiary as its "art frame department 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 limited liability company organized under the laws of the State of California and is allegedly an importer of tiles, frames, and other building materials.

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

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 to the petitioner asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager.

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 primary issue in the present matter is whether the beneficiary will be employed by the United States

entity in a primarily managerial or 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.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as 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 does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. Although the director restricted her consideration of the petition to whether the petitioner has established that the beneficiary will be employed in a primarily managerial capacity, the petitioner on appeal asserts that the beneficiary will be employed in either a managerial or an executive capacity. Accordingly, the AAO will consider both classifications on appeal. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis); *see also* 5 U.S.C. 557(b).

The petitioner claims in the Form I-129 to employ eight workers and that the beneficiary will be employed as its "art frame department manager." In a letter dated September 24, 2007 signed by the petitioner's president, the beneficiary's proposed employment and duties are described as follows:

In this capacity, [the beneficiary] will be responsible for managing a team of specialists in the area of building art materials including frame selection, testing, and quality assurance at our San Francisco, California, facility; using her deep product knowledge and significant experience in the field, and professional judgment to exercise wide latitude in discretionary decision-making to accomplish goals. [The beneficiary] possesses the necessary cultural expertise in the designs of Yun sculpture and her experience provides her with both the aesthetic as well as the managerial skills needed by our American subsidiary. As President, not only of the US subsidiary but our overseas subsidiaries as well, I spend much of my time outside of the United States overseeing our overseas operations. [The beneficiary] directs the activities of all workers including other managers and also coordinate[s] distributors in Los Angeles and New York. She often acts on behalf of the Board of Directors of the company, a role that she is able to perform because, as a former Director, she is familiar with each of them and speaks the 5 languages (Japanese, Thai, Chinese, English and Taiwanese) to receive our diverse shareholders and international clients.

Essential Duties and Responsibilities

- Represents the company during negotiations of contracts and with agreements with business partners.
- Management/supervision of designers of unique art frames, whose highly specialized designs are finely crafted reproductions of historic Yun designs, and tiles.
- Strategic planning, organization, execution, and control of frame marketing, development[,] and production by her deep knowledge of Yun Frame;
- Supervision of test case design prototypes and execution;
- Exercises wide discretion over Marketing including strategically formulating the annual plan including overseeing quality control for frame catalog, supervising arrangements for yearly trade show (choice of venues, etc.), managing show preparation and activities, reviewing show booth designs, booth size, choosing which employees to send as company representatives; signing all trade show contracts on behalf of the company;
- Exercises wide discretion on company Advertising Promotion strategy including final decision over where and when to advertise in print and other media.
- Supply and distribution scheduling including work coordinating with tile and frame distributors in New York and Los Angeles;
- Oversight of sales production reports and forecasts and managing weekly inventory reports;
- Ensuring conformance of featured building materials to the appropriate trends in contemporary interior design;
- Ability of speaking 5 languages to work on behalf of Board of Directors to receive diverse shareholders and international clients;

- Liaison with Board of Directors, overseas company designers and production managers to ensure standardization and implementation of corporate goals[.]

The petitioner also submitted a letter dated September 25, 2007 in which it claims that the beneficiary's proposed title, art frame department manager, "under-represents her actual managerial duties." The petitioner claims that the beneficiary was given this title out of deference to older employees and that the title "vice president" would be a more appropriate title given her duties.

However, the petitioner also submitted an organizational chart for the United States operation. Contrary to the petitioner's claims, this chart shows the beneficiary, the art frame department manager, reporting to the president and directly supervising only two workers, a "sales" employee and an "assistant." The chart shows all the other employees reporting to a general manager who, in turn, also reports to the president.

On October 16, 2007, the director issued a Notice of Intent to Deny. The director noted that the record is not persuasive in establishing that the beneficiary will be employed in a primarily managerial or executive capacity. The director afforded the petitioner thirty days to submit additional information, evidence, or arguments to support the petition.

In response, counsel submitted a letter dated November 13, 2007 in which he reiterates that the beneficiary's job title, art frame department manager, has created "confusion" about the beneficiary's actual job duties and that she will be the "highest executive in the US subsidiary organization" in the absence of the president. The petitioner also submitted a variety of business documents, which purportedly show that the beneficiary has performed organizational and financial duties beyond those duties listed in her job description.

Finally, the petitioner submitted organizational charts for the petitioning organization which differ substantially from the chart submitted with the initial petition. The new organizational charts portray the beneficiary as being employed in a significantly more senior position than what was claimed initially. The new charts show the beneficiary at the very top of the organization supervising all subordinate workers, with the exception of the president, in various locations. Importantly, in addition to the "sales" worker and the "assistant," the beneficiary is now portrayed as directly supervising the "engineering consultant" and the "general manager" and, indirectly, the general manager's four subordinate workers. The petitioner did not acknowledge the substantial difference between the two sets of organizational charts.

On November 28, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that the beneficiary will be employed primarily in a managerial capacity. The director specifically noted the petitioner's inappropriate submission of an organizational chart, which materially alters the personnel structure of the United States organization and attempts to expand the beneficiary's authority beyond that which was described in the initial petition.

On appeal, counsel asserts that the director erred and that the beneficiary's duties are primarily those of an executive or manager.

Upon review, counsel's assertions are not persuasive.

As a threshold matter, it is noted that the petitioner's attempt in its response to the Notice of Intent to Deny to substantially expand the beneficiary's authority over the United States operation beyond that which was described in the initial petition was inappropriate and will not be considered by the AAO. As correctly noted by the director, the petitioner initially submitted an organizational chart that shows the beneficiary, the art frame department manager, directly supervising only two workers, a "sales" employee and an "assistant." This chart is generally consistent with the submitted job description. However, in response to the Notice of Intent to Deny, the petitioner attempted to expand the beneficiary's authority by submitting materially altered organizational charts for the United States operation. As explained above, the new charts show the beneficiary at the very top of the organization supervising all subordinate workers, with the exception of the president, in various locations. Furthermore, the beneficiary is portrayed as directly supervising the "engineering consultant" and the "general manager" and, indirectly, his four subordinate workers. These six workers, arranged in two tiers, were not listed as subordinates of the beneficiary in the original organizational chart. In response to a Notice of Intent to Deny, 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 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 Citizenship and Immigration Services (CIS) requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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. Accordingly, the AAO will only consider the job descriptions and organizational structure claimed by the petitioner in the initial petition.

In view of the above, 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.* The fact that the beneficiary has been ascribed an inflated job title, or not, is of little evidentiary value.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act in a "managerial" or "executive" capacity. In support of the petition, the petitioner described the beneficiary, with the assistance of two subordinate workers, as designing, distributing, marketing, and advertising the petitioning organization's frame products. However, it appears that these design, distribution, and marketing responsibilities are primarily administrative or operational tasks necessary to the production of a product or the provision of a service and are not qualifying managerial or executive tasks. Furthermore, as it has not been established that either of the beneficiary's two proposed subordinate workers will be a managerial, supervisory, or professional employee (*see infra*), it has not been established that her "supervision" of the performance of any of these tasks will rise beyond that of a first-line supervisor. Accordingly, it has not been established that the beneficiary will primarily perform managerial or executive duties. 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 International*, 19 I&N Dec. 593, 604 (Comm. 1988). A managerial employee must have authority over day-to-day operations beyond the level normally vested in a

first-line supervisor, unless the supervised employees are professionals. 101(a)(44)(A)(iv) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Furthermore, while the petitioner claims that the beneficiary will be, in the president's absence, the "highest executive in the US subsidiary organization," the petitioner has failed to specifically describe the beneficiary as performing qualifying managerial or executive duties. Instead, the petitioner has vaguely described the beneficiary as directing "the activities of all workers including other managers" and as performing "critical managerial functions." However, such vague, managerial-sounding duties are not probative of the beneficiary actually performing qualifying duties, especially in light of the beneficiary's job description as "art frame department manager" and her placement on the original organizational chart as the supervisor of only two workers. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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). Moreover, the fact that the beneficiary may have performed tasks necessary to the establishment of the United States operation or signed documents on behalf of the petitioning organization is not probative of the beneficiary performing qualifying duties.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise a "sales" worker and an "assistant." However, these employees are not described as having supervisory or managerial responsibilities. To the contrary, it appears that these workers will perform the tasks necessary to the provision of a service or the production of a product. Furthermore, although the petitioner claims that the beneficiary will have supervisory authority over other workers in various locations, the record is devoid of evidence specifically describing this authority or establishing that the beneficiary will truly "supervise" anyone other than the two subordinate workers identified in the organizational chart. An employee will not be considered to be a supervisor or manager simply because of a job title, because he or she is arbitrarily placed on an organizational chart in a position superior to another employee, or even because he or she supervises daily work activities and assignments. Rather, the employee must be shown to possess some significant degree of control or authority over the employment of subordinates. Given the size and nature of the petitioner's business, it is more likely than not that the beneficiary and her proposed subordinate employees will all primarily perform the tasks necessary to the operation of the business. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees. As noted above, a managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604. Finally, as the petitioner failed to establish the skills required to perform the duties of the subordinate positions, the petitioner has not established that the beneficiary will manage

professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. 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. 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 written job offer that clearly describes the duties to be 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 tasks related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, the record indicates that the beneficiary will primarily be a first-line supervisor of non-professional employees and/or will perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing her duties, the AAO cannot determine what proportion of her duties will be managerial, nor can it deduce whether the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. It appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Furthermore, as the beneficiary will report directly to the petitioner's president, it appears that any authority to truly direct the enterprise would be vested in this individual and not in the beneficiary. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that 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 at 1316 (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). 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.*

In this matter, the petition contains serious inconsistencies regarding its staffing and organization. For example, and as noted above, the petitioner has submitted two conflicting organizational charts for the United States operation. The first chart shows the beneficiary supervising two workers. The remaining workers are not portrayed as being under the beneficiary's supervision. However, after receiving the director's Notice of Intent to Deny, the petitioner submitted a materially altered organizational chart portraying the beneficiary as supervising all the other workers with the exception of the president. The petitioner offered no explanation for this inconsistency. 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). 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.

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner failed to establish that the beneficiary was employed abroad for at least one continuous year in a position that was managerial or executive in nature. 8 C.F.R. §§ 214.2(l)(3)(iii)-(iv).

The foreign employer described the beneficiary's duties abroad as "overseas marketing and sales manager" in an attachment to the Form I-129 as "overseeing the work of other employees and managing essential design supervisory and sales functions within our company." The petitioner also submitted an organizational chart for the foreign employer portraying the beneficiary as supervising two "assistants." The petitioner did not

describe the duties of these "assistants."

Upon review, the record is not persuasive in establishing that the beneficiary was employed abroad in a managerial or executive capacity. The petitioner has failed to specifically describe the beneficiary's job duties abroad. Specifics are clearly an important indication of whether a beneficiary's duties were primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, *aff'd*, 905 F.2d 41. Furthermore, the petitioner failed to describe the duties of the beneficiary's purported subordinates abroad. Absent detailed descriptions of the duties of both the beneficiary and her purported subordinates, it is impossible for CIS to discern whether the beneficiary was "primarily" engaged in performing managerial or executive duties abroad. *See* sections 101(a)(44)(A) and (B) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has not established that the beneficiary was employed in a primarily managerial or executive capacity for one continuous year in the three years preceding the filing of the petition, and the petition may not be approved for this 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 at 1002 n. 9 (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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 appeal will be dismissed.

ORDER: The appeal is dismissed.