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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090

U.S. Citizenship
and Immigration
Services

B2

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: JUN 01 2009

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

JDeadrick
John F. Grissom,
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability in the arts. The director determined the petitioner had not established the sustained national or international acclaim necessary to qualify for classification as an alien of extraordinary ability.

On appeal, the petitioner argues that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

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

> (1) Priority workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> > (A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --
> >
> > > (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
> > >
> > > (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
> > >
> > > (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

Specific supporting evidence must accompany the petition to document the "sustained national or international acclaim" that the statute requires. 8 C.F.R. § 204.5(h)(3). An alien can establish sustained national or international acclaim through evidence of a "one-time achievement (that is, a major, international recognized award)." *Id.* Absent such an award, an alien can establish the necessary sustained acclaim by meeting at least three of ten other regulatory criteria. *Id.* However, the weight given to evidence submitted to fulfill the criteria at 8 C.F.R. § 204.5(h)(3), or under 8 C.F.R. § 204.5(h)(4), must depend on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

This petition, filed on January 3, 2007, seeks to classify the petitioner as an alien with extraordinary ability as a ballerina. The petitioner initially submitted information about the Kirov ballet company, letters of recommendation, program bills, news articles and performance reviews, and information about the Baltika prize. In response to a Request for Evidence ("RFE") dated February 13, 2008, the petitioner submitted

information about publications, additional news articles, additional letters of recommendation, additional program bills, and evidence of her current salary.

We note that although the record contains evidence of the petitioner's prior approval as an O-1 nonimmigrant, the prior approval does not preclude U.S. Citizenship and Immigration Services (USCIS) from denying an immigrant visa petition based on a different, if similarly phrased, standard. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004) (finding that prior approvals do not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications).

The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I. & N. Dec. at 597. It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d at 1090. The AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Furthermore, the regulation at 8 C.F.R. § 214.2 (o)(3)(iv), relating to nonimmigrant aliens of extraordinary ability in the arts, provides different eligibility criteria than those for the immigrant classification discussed below. Section 101(a)(46) of the Act proscribes: "The term 'extraordinary ability' means, for purposes of subsection (a)(15)(O)(i) of this section, in the case of the arts, distinction." 8 C.F.R. § 214.2(o)(3)(ii) defines "distinction" as follows:

> Distinction means a high level of achievement in the field of arts evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of arts.

The regulation relating to the immigrant classification, 8 C.F.R. § 204.5(h)(2), however, defines extraordinary ability in any field as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." While the ten immigrant criteria set forth at 8 C.F.R. § 204.5(h)(3) appear in the nonimmigrant regulation at 8 C.F.R. § 214.2(o)(3)(iii), those criteria apply only to aliens who seek extraordinary ability in the fields of science, education, business or athletics. Separate criteria for nonimmigrant aliens of extraordinary ability in the arts are set forth in the regulation at 8 C.F.R. § 214.2(o)(3)(iv). The distinction between these fields and the arts, which appears in 8 C.F.R. § 214.2(o) does not appear in 8 C.F.R. § 204.5(h). As such, the petitioner's approval for a non-immigrant visa classification under the lesser standard of "distinction" is not evidence of her eligibility for the similarly titled immigrant classification. Each petition must be adjudicated on its own merits under the statutory provisions and regulations which apply to the classification

sought. Thus, the petitioner's eligibility will be evaluated under the ten regulatory criteria relating to the immigrant classification.

On appeal, counsel argues that the director failed to review "similar precedents" of ballet dancers and other previously approved cases. Counsel refers to a prior unpublished case involving an American Ballet Theatre dancer and a television broadcaster. Each case is reviewed based on the evidence submitted; the evidence submitted in previous cases such as the ballet dancer referenced by counsel demonstrated eligibility of that petitioner. The evidence submitted here does not show that the petitioner made the same achievements or otherwise received the same level of national or international acclaim. Regardless, while the regulation at 8 C.F.R. § 103.4(c) indicates that designated and published decisions of the AAO are binding precedent on all Service employees in the administration of the Act, unpublished decisions have no such precedential value. We address the evidence submitted and the petitioner's contentions in the following discussion of the regulatory criteria relevant to his case. The petitioner does not claim eligibility under any criteria listed at 8 C.F.R. § 204.5(h)(3) that is not addressed below.

(i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

The petitioner submitted evidence of her receipt of the "Our Hope" prize awarded by Baltika Brewery. The information submitted about the Baltika prize indicates that the prize is given to "world music stars and young performers." The article submitted about the prize indicates that the petitioner won a prize given to "young performers." On appeal, counsel states that the prize "is not given to young ballet artists, it is given by major Russian company to accomplished ballet dancers . . . that are currently dancing in the world renown ballet companies." No evidence appears in the record about the prize except for the information referenced earlier. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I. & N. Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano*, 19 I. & N. Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I. & N. Dec. 503, 506 (BIA 1980). Without evidence to show for instance, who was eligible for the competition or, if the competition was restricted to dancers of a particular age or experience, how the award constitutes an award for excellence in the field if it did not encompass all performers working in the field regardless of age or experience, the petitioner has failed to demonstrate the recognition associated with this award.

In her original submission, counsel states that the petitioner received the 2001 "The Soul of Dance" award presented by *Ballet Magazine*. The record contains no evidence of the petitioner's receipt of such a prize. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I. & N. Dec. at 534 n.2; *Matter of Laureano*, 19 I. & N. Dec. at 3 n.2; *Matter of Ramirez-Sanchez*, 17 I. & N. Dec.at 506. In addition, the petitioner provided no information regarding the recognition due to the recipient of any such award nor did she provide any information about the contest itself such as the number of participants, the qualification of the judges, the eligibility requirements for entry in the contest, or how the participants would be judged to establish that the award is nationally or internationally recognized.

Even if the recognition of either award had been demonstrated, these awards were given in 2000 and 2001, more than six years prior to the filing of this petition so are not illustrative of the sustained acclaim required by section 203(b)(1)(A)(i) of the Act, 8 U.S.C. § 1153(b)(1)(A)(i) and 8 C.F.R. § 204.5(h)(3).

In light of the above, the petitioner has not established that she meets this criterion.

> *(iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.*

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulation, be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national or international distribution. An alien would not earn acclaim at the national level from a local publication. Some newspapers, such as the *New York Times*, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers.[1]

As stated by the director, the petitioner submitted articles primarily about her that appeared in major media. These articles include "Bright Russian" which appeared in the May 2004 *Vanity Fair,* a June 2005 article in *The New York Times*, and "Part dancer, Part actress, Part Genius" published in the June 20, 2000 *Evening Standard.* The petitioner also submitted numerous reviews of performances in which she appeared that featured her specially. While the reviews would not be sufficient on their own, in combination with the aforementioned articles, we find the petitioner's evidence sufficient to establish that she had material published about her in major media.

In light of the above, the petitioner established that she meets this criterion.

> *(iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought*

The regulation at 8 C.F.R. § 204.5(h)(3) provides that "a petition for an alien of extraordinary ability must be accompanied by evidence that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." Evidence of the petitioner's participation as a judge must be evaluated in terms of these requirements. The weight given to evidence submitted to fulfill the criterion at 8 C.F.R. § 204.5(h)(3)(iv), therefore, depends on the extent to which such evidence demonstrates, reflects, or is consistent with sustained national or international acclaim at the very top of the alien's field of endeavor. A lower evidentiary standard would not be consistent with the regulatory definition of "extraordinary ability" as "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). For example, judging a

[1] Even with nationally-circulated newspapers, consideration must be given to the placement of the article. For example, an article that appears in the *Washington Post*, but in a section that is distributed only in Fairfax County, Virginia, for instance, cannot serve to spread an individual's reputation outside of that county.

national competition or a competition for top artists is of far greater probative value than judging a regional, youth, or student competition.

In response to the RFE, counsel stated that the petitioner established eligibility by virtue of her participation with Youth America Grand Prix ("YAGP"). The petitioner submitted a letter from [redacted] founder and artistic director of YAGP, which stated that the petitioner teaches classes and otherwise assists with YAGP, but does not indicate that the petitioner actually judged any YAGP competition. Even if the letter did state that the petitioner served as a judge, the YAGP competition is restricted to students between the ages of 9 and 19 years old. We do not find that evaluating amateur student ballet dancers is indicative of sustained national or international acclaim or is otherwise indicative of this highly restrictive classification.

Without evidence that the petitioner actually participated as a judge and that such participation was in a capacity indicative of national or international acclaim, the petitioner has failed to establish that she meets this criterion.

(v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.

In response to the RFE, counsel stated that the petitioner is eligible under this criterion because of the "profound artistic effect she causes on audience who came [sic] to see the performance and by comparison to the other ballet dancers written by ballet critics." The September 15, 2006 letter from [redacted], ballet mistress with the American Ballet Theatre, states that the petitioner "continually receives critical acclaim . . . [and] brought a new level of professionalism and artistry to the American Ballet Theatre productions." The letter from [redacted], artistic director with the American Ballet Theater, states that the petitioner has a "brilliant stage presence and remarkable lyrical quality" and that she possesses "exceptionally strong technique." The letter from [redacted], choreographer with the American Ballet Theatre, states that the petitioner "excelled in the classical repertoire . . . [and has] outstanding talent." The letter from [redacted] representative of the Artists of American Ballet Theatre, states that the petitioner has "exceptional abilities and unique performance qualities." The letter from [redacted], contributing editor at *Vanity Fair*, states that the petitioner "is the foremost example of Russian technical refinement and threatrical [sic] depth." The letter from [redacted] a New York based dance critic, states that the petitioner "is a performer of rare beauty and intelligence" and is "a 'large-scale' daring dancer, of the kind the ballet world doesn't see much anymore."

While letters such as these provide relevant information about an alien's experience and accomplishments, they cannot by themselves establish the alien's eligibility under this criterion because they do not demonstrate that the alien's work is of major significance in her field beyond the limited number of individuals with whom she has worked directly. Even when written by independent experts such as [redacted], letters solicited by an alien in support of an immigration petition carry less weight than preexisting, independent evidence of major contributions that one would expect of an alien who has achieved sustained national or international acclaim. These letters indicate that the authors admire the petitioner's ability as a dancer but do not establish that the petitioner made a contribution of major significance to the field. In fact, the letter from [redacted] points out how classical the petitioner's dancing is, not that it was original or somehow changed the field.

The blog article from states that "[n]o dancer alive uses her wrists and hands with more calligraphy than [the petitioner]" and that the petitioner reenergized the New York ballet community. The letter from [redacted]t states that the petitioner "belongs in that halcyon league" of great dancers. The article a "Sylvan historian" that appeared in the September 2006 *The New Criterion* states that the petitioner's performance "lifted the ballet to a higher altitude." The article appearing in the February 3, 2005 *Washington Post* states that the petitioner "stood out from the other[s] . . . for the completeness of her dancing – the full, firm carriage of the arms, the suppleness of her upper body and her dramatic presence even when standing still." As complimentary as these articles are, they do not state that the petitioner danced in a new manner or otherwise made a contribution of major significance so much as they stated that she danced better than others. The description of the petitioner's dancing that appeared in the October 2004 *The New Criterion* states that she "dances, as she was trained to, with her shoulders, bust, back, head, and hands, as well as legs and feet." A number of other dance reviews or news articles notes the petitioner's classic style and attention to detail, which, again, compliment the petitioner on her abilities, but do not state that the petitioner made a contribution of major significance to the field.

In the original submission, counsel cites the petitioner's contribution to philanthropic organizations as another example of how the petitioner contributed to the ballet field. The petitioner submitted a newsletter noting her participation in a gala, which counsel states was the "Russian Children's Welfare Society['s] . . . Petruoushka benefit gala . . . [where o]ver $110,000.00 was raised for programs benefiting disadvantaged children across the globe." The record, however, contains no evidence to demonstrate how the petitioner's participation in philanthropic events amounts to an original contribution of major significance to the overall field.

Accordingly, the petitioner has not established that she meets this criterion.

(vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases.

The petitioner claimed eligibility under this criterion by virtue of her numerous performances with the Kirov Ballet and ABT. This criterion, however, relates to visual artists, such as sculptors and painters not ballet dancers like the petitioner. Regardless, frequent performances before an audience are intrinsic to the acrobatic and dance professions. Duties or activities which nominally fall within a given criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent to the occupation itself. In the performing arts, national or international acclaim is generally not established by the mere act of appearing in public, but rather by, for instance, attracting a substantial national or international audience. The record includes no evidence showing that the petitioner has attracted such a following. The regulations establish separate criteria, especially for those whose work is in the performing arts, under criterion (x). The petitioner's role with these organizations is also considered under criterion (viii). The petitioner failed to show that she was either the main attraction at any of the exhibitions or showcases or that her performances were otherwise indicative of sustained national or international acclaim.

In light of the above, the petitioner has not established that she meets this criterion.

(viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.

In order to establish that she performed a leading or critical role for an organization or establishment with a distinguished reputation, the petitioner must establish the nature of her role within the entire organization or establishment and the reputation of the organization or establishment. In response to the RFE, the petitioner relies heavily upon performance reviews to prove her role within the ABT and states that she has performed in leading roles with the ABT. The petitioner submitted no information about the ABT except for that which appears on the ABT's own website. Although the ABT's material states that it is one of the foremost companies in the world, no objective evidence appears to support this claim. 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)). Without such evidence, we are unable to conclude that the ABT enjoys a distinguished reputation.

Even if the ABT's reputation had been established, the petitioner submits no evidence showing that she performs in a leading or critical role for that organization. Although the evidence reflects that the petitioner has performed in leading roles in ABT productions, nothing in the record distinguishes her from other soloists or principals in the company let alone its artistic management. In addition, the petitioner submitted no evidence showing that she is responsible for ABT's success or standing to a degree consistent with the meaning of "leading or critical role" and indicative of sustained national or international acclaim at the very top of her field. As a comparison, the letter from [redacted] chief dance critic for the *New York Sun* and assistant editor of *Ballet Review*, stated that [redacted] and "helped raise ABT's standards in the classical repertory" by bringing training and dance methods from the closed society of the USSR. The "Company History" submitted about the ABT also notes [redacted] contribution, stating that "[u]nder his leadership, numerous classical ballets were staged, restaged and refurbished, and the Company experienced a strengthening and refining of the classical tradition." No similar statements were made about the contribution of the petitioner to indicate that she performs in a critical or leading role for ABT. We also note that the evidence submitted shows that the petitioner is performing as a soloist for ABT. In the response to the RFE, counsel admits that soloists are "a step down from the leading ballet dancer" known as principal. Counsel then explains that the terminology should not be determinative in this case due to the petitioner's actual role dancing in lead roles as a principal would do. Even if the petitioner is performing in the same roles given to principals, the ABT's classification of her as soloist indicates that she is not performing in the same leading role as those named as principals. Counsel states that her promotion to principal is imminent as shown by her listing as a principal in a 2007 playbill. First, that playbill is for a show occurring after the date that this petition was filed. A petitioner, however, must establish eligibility at the time of filing. 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Comm. 1971). Second, that playbill appears in a foreign language and no translation was provided. The regulation at 8 C.F.R. § 103.2(b)(3) requires that "[a]ny document containing foreign language submitted to USCIS shall be accompanied by a full English language translation which the translator has certified as complete and accurate, and by the translator's certification that he or she is competent to translate from the foreign language into English." Third, a suggestion of an eminent promotion does not provide proof that the promotion will actually occur.

On appeal, counsel lists a number of roles that the petitioner performed while with the Kirov Ballet, however, for reasons iterated above, nothing in the record establishes either that the Kirov Ballet enjoys a distinguished reputation or that the petitioner performed in a leading or critical role for the Kirov Ballet as opposed to performing in a role similar to other soloists.

In light of the above, the petitioner has not established that she meets this criterion.

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.

The petitioner submitted W-2 tax forms showing that she earned $77,321.54 in 2006 and $73,318.05 in 2007. The letter from [redacted] contract coordinator for ABT, states that the petitioner is employed at a salaried rate of $72,000 per year plus per diem expenses. The report submitted from O*Net states that the average wage for a dancer in the United States is $9.55 per hour and in New York that the median wage is $18.79 per hour. As counsel notes, this average salary is considerably lower than the remuneration that the petitioner receives with the ABT. The classification used on O*Net is too broad in scope, however, in that it includes a variety of different types of dancer including "company dancer, . . . belly dancer, [and] dance artist." The petitioner submitted no evidence regarding what kind of salary could be commanded by a solo ballet dancer, including other ABT dancers, and therefore no meaningful comparison can be made to determine that the petitioner's salary is significantly high in relation to others in her field.

As a result, the petitioner has failed to demonstrate eligibility under this criterion.

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

Although the petitioner did not specifically claim eligibility under this criterion, her arguments presented pursuant to the discussion of 8 C.F.R. § 204.5(h)(3)(vii) apply more aptly to this criterion. As discussed above, the petitioner participated in numerous shows as a part of various ballet troupes. The petitioner did not submit any evidence of commercial success of the performances such as the submission of box office receipts or other records of the success enjoyed by these ballet troupes. As she was a part of the troupe, the petitioner also would have needed to present evidence that she was the reason for all or part of the commercial success enjoyed by the troupes. However, she submitted no such evidence. Accordingly, the petitioner has not established that she meets this criterion.

In this case, the petitioner has failed to demonstrate receipt of a major, internationally recognized award, or that she meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3). Review of the record does not establish that the petitioner has distinguished herself to such an extent that she may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of her field. The evidence is not persuasive that the petitioner's achievements set her significantly above almost all others in her field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act and the petition may not be approved.

The burden of proof in visa petition proceedings remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, the petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.