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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

PUBLIC COPY

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: SEP 02 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).

John F. Grissom
Acting Chief, Administrative Appeals Office

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

The petitioner seeks classification of the beneficiary 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 the petitioner for classification as an alien of extraordinary ability. More specifically, the director found that the petitioner had failed to demonstrate the beneficiary's receipt of a major, internationally recognized award, or that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

On appeal, counsel for the petitioner argues that the beneficiary meets the statutory requirements and 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 to the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and the legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. *See* 56 Fed. Reg. 60897, 60898-9 (Nov. 29, 1991). As used in this section, the term "extraordinary ability" means a level of expertise indicating that the individual is one of that small percentage who has risen to the very top of the field of endeavor. 8 C.F.R. § 204.5(h)(2). The specific requirements for supporting documents to establish that an alien has sustained national or international acclaim and recognition in his or her field of expertise are set forth in the regulation

at 8 C.F.R. § 204.5(h)(3). The relevant criteria will be addressed below. It should be reiterated, however, that the petitioner must show that she has sustained national or international acclaim at the very top level.

This petition, filed on August 23, 2007 seeks to classify the beneficiary as an alien with extraordinary ability as a lighting designer. The record reflects that the beneficiary was the beneficiary of a previously approved petition as an alien with extraordinary ability under section 101(a)(15)(O)(i) of the Act, 8 U.S.C. § 1101(a)(15)(O)(i). While USCIS has approved an O-1 nonimmigrant visa petition filed on behalf of the beneficiary, that prior approval does not preclude 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 the beneficiary's qualifications).

Although the words "extraordinary ability" are used in the Act for both the nonimmigrant O-1 classification and the first preference employment-based immigrant classification, the applicable regulations define the terms differently for each classification. The O-1 regulation explicitly states that "[e]xtraordinary ability in the field of arts means distinction." 8 C.F.R. § 214.2(o)(3)(ii). "Distinction" is a lower standard than that required for the immigrant classification, which defines 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). The evidentiary criteria for these two classifications also differ in several respects, for example, nominations for awards or prizes are acceptable evidence of O-1 eligibility, 8 C.F.R. § 214.2(o)(3)(iv)(A), but the immigrant classification requires actual receipt of awards or prizes. 8 C.F.R. § 204.5(h)(3)(i). Given the clear regulatory distinction between these two classifications, the beneficiary's receipt of O-1 nonimmigrant classification is not evidence of his eligibility for immigrant classification as an alien with extraordinary ability.

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. 593, 597 (Comm. 1988). 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 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Furthermore, 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 has approved a nonimmigrant petition 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).

The regulation at 8 C.F.R. § 204.5(h)(3) indicates that an alien can establish sustained national or international acclaim through evidence of a one-time achievement (that is, a major, internationally recognized award). Barring the alien's receipt of such an award, the regulation outlines ten criteria, at least three of which must be satisfied for an alien to establish the sustained acclaim necessary to qualify as an alien of extraordinary ability. A petitioner, however, cannot establish eligibility for this classification merely by submitting evidence that simply relates to at least three of the criteria outlined in 8 C.F.R. § 204.5(h)(3).

Counsel argues throughout her brief that the director "ruled that [the beneficiary] did not achieve the evidentiary criteria . . . because he did not show that he is an alien of extraordinary ability." Citing *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), counsel asserts that "[t]his kind of improper, circular exercise has been reviewed by the Courts before and been struck down." However, in determining whether the petitioner meets a specific criterion, the evidence itself must be evaluated in terms of whether it is indicative of, or consistent with, sustained national or international acclaim. 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). We do not find it violates the reasoning in *Buletini*, 860 F. Supp. at 1231, to examine the evidence submitted as to whether it is indicative of, or consistent with, national or international acclaim. The court in *Buletini* was concerned that an alien would need to first demonstrate "extraordinary ability" in order to meet this criterion. Significantly, however, the court in *Buletini* acknowledged that "the examiner must evaluate the quality, including the credibility, of the evidence presented to determine if it, in fact, satisfies the criteria." *Buletini*, 860 F. Supp. at 1234. We are not following this "circular exercise" that troubled the court. Consistent with this reasoning, we will evaluate the quality of the evidence submitted below.

The petitioner has submitted evidence that, it claims, meets the following criteria under 8 C.F.R. § 204.5(h)(3).[1]

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

The petitioner claims that the beneficiary meets this criterion based on his receipt of two Felix Awards as Lighting Designer of the Year in 1996 and 2003.

The petitioner submitted copies of letters from ADISQ (Association du disque, de l'industrie de spectacle québécois et de la video) dated November 20, 1996 and November 3, 2003. The letters purport to congratulate the beneficiary for his receipt of the Lighting Designer of the Year. The

[1] The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

petitioner provided a copy of a 1997 Montreal journal *Spectacles* that appears to mention the beneficiary's receipt of the Felix award. The translations accompanying the documents, however, do not identify the translator and do not contain certifications that the translator was competent to translate from French to English or that the translations are complete and accurate. The documents therefore do not comply with the terms of 8 C.F.R. § 103.2(b)(3), which provides:

> *Translations.* Any 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.

Because the petitioner failed to submit certified translations of the documents, the AAO cannot determine whether the evidence supports the petitioner's claims. Accordingly, the evidence is not probative and will not be accorded any weight in this proceeding.

The petitioner also submitted a copy of a January 12, 2004 letter from [redacted], a partner with Phaneuf. [redacted] did not specify the nature of his company's business but stated that the beneficiary had operated and designed the lighting for several of its artists' tours as well as created some of its musical theatre productions. [redacted] further stated that the beneficiary "was recently awarded the FELIX Award in Montreal, Canada, for the lighting design of the year. This is the most prestigious industry award in this market for lighting designers." Mr. [redacted] did not indicate the basis of his knowledge of the beneficiary's award. Further, nothing in the record corroborates [redacted] statement regarding the prestige of the Felix awards.

In response to the director's request for evidence (RFE) dated February 28, 2008 requesting additional information regarding the Felix award, the petitioner submitted an article about ADISQ. The article indicated that ADISQ implemented the Felix awards in 1979 "to honour the best productions by Quebec musicians and music professionals, who were dissatisfied that they were only rarely nominated to compete in the annual Juno awards." The article also alleges that the television ratings for the event reached "approximately two million viewers" and that the gala "has become the principal showcase for celebrating and promoting the Quebec recording industry and its artists." Although the document identifies the authors, it does not indicate where or if the article was published. Further, the bibliography cited by the authors contain only references to information provided by ADISQ. The authors do not provide any specific reference to the television ratings that it cites for the ADISQ gala in which the awards are presented.

The petitioner submits information that it indicated was obtained from *Wikipedia*, the online user-edited encyclopedia. First, the petitioner did not submit the actual document from the *Wikipedia* website. Further, with regard to information from *Wikipedia*, there are no assurances about the reliability of the content from this open, user-edited internet site.[2] *See Lamilem*

[2] Online content from *Wikipedia* is subject to the following general disclaimer:

Badasa v. Michael Mukasey, 540 F.3d 909 (8th Cir. 2008). Accordingly, we will not assign weight to information for which *Wikipedia* is the only cited source.

The petitioner provided a copy of what purports to be the "rules and regulation" for the Felix award, which were adopted by the administrative committee of ADISQ on February 28, 2007. The document is not signed and it is not clear whether the document purports to be the entire "rules and regulation" regarding the Felix award. Nonetheless, the document indicates that a candidate for the Felix award must be a "Canadian citizen residing in the province of Quebec or have an enterprise [which employs] Quebec residents and that the head office is situated in Quebec."

In denying the petition, the director noted that competition for the Felix award was restricted to Quebec artists and excluded "all [other] notable and experienced music professionals from competing for the award." The director concluded that the award therefore "provides a local recognition for individuals who are not 'nominated to compete in the annual Juno awards.'" On appeal, counsel asserts that "the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(i) demonstrates that what is required is that the prize or award be recognized nationally, not that the prize be awarded to the winner of a competition which encompasses the entire nation i.e., a national competition."

We note first that the petitioner's evidence regarding the beneficiary's receipt of a Felix award has not been established. Further, there is no evidence showing that the Felix awards command a significant level of recognition beyond the context of the events in which they are presented. For example, there is no evidence showing that the winners of the awards are announced in major media or in some other manner consistent with national or international recognition or acclaim.

Counsel asserts that the record reflects that television coverage of the Felix awards reached two million viewers in Canada or approximately six percent of the Canadian population and that, by contrast, the Grammy Awards in February 2008 reached a total television audience of 17.5 million, approximately six percent of the population of the United States. While counsel provided documentation regarding viewership of the 2008 Grammy Awards, the record does not corroborate any of the other statistics alleged by counsel. For example, although the authors of

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See http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer, accessed on August 4, 2009, a copy of which is incorporated into the record of proceeding.

the article about ADISQ state that the television audience for the Felix award show reached two million, they provided no reference to support their statement. Additionally, no documentation in the record supports counsel's assertions about the percentage of individuals watching either the Felix or the Grammy Awards.

The petitioner has failed to establish that the beneficiary meets this criterion.

> *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 order to meet this criterion, published material must be primarily about the petitioner and be printed in professional or major trade publications or other major media. To qualify as major media, the publication should have significant national distribution and be published in a predominant language. Some newspapers, such as *The New York Times*, nominally serve a particular locality but would qualify as major media because of a significant national distribution.

The petitioner submitted articles from several media including *Spectacles*, *Le Journal de Quebec*, and *La Presse*. The translations accompanying these articles, however, do not comply with the provisions of 8 C.F.R. § 103.2(b)(3) in that they are only partial translations, the translator is not identified, and there is no certification that the translator was competent to translate from French to English or that the translations are complete and accurate. Further, many of the documents do not identify the media in which they were published as required by 8 C.F.R. § 204.5(h)(3)(iii). Accordingly, they are not probative and will not be accorded any weight in this proceeding.

The petitioner submitted a copy of an April 15, 1998 press release from Martin Professional about a tour of the Backstreet Boys featuring lighting from Martin Professional. The beneficiary is identified as the lighting director for the tour; however, the press release is about the Martin Professional equipment and not primarily about the beneficiary. A May 17, 2007 press release from Martin features the beneficiary's use of the company's equipment on tour with the musical *Wonderful Town*. A press release is a company's self-promotion of its products and services. It is not evidence that an independent journalist found the alien worthy of coverage. Additionally, the petitioner submitted no documentation that these press releases were actually printed in any media. The petitioner also submitted copies of documentation about performances of Sylvain Cossette. The documentation, which is almost illegible, appears to be retrieved from the website of Martin Professional, and mention the beneficiary but appears to be about the equipment utilized during [redacted] performances.

The petitioner provided other documentation that discusses a performance of the Backstreet Boys at the NEC Arena in Birmingham. The document discusses the beneficiary's role and work in the

lighting of the tour. However, the document does not include the title, date, and author of the material, as required by 8 C.F.R. § 204.5(h)(3)(iii).

Counsel alleged that Martin Professional "is a major industry magazine." In response to the RFE, the petitioner submitted documentation from the Martin website; however, nothing in the documentation submitted indicates that Martin Professional is a magazine or constitutes any type of media. The petitioner also submitted documentation about *Le Journal de Montreal*, *La Presse*, *Le Nouvelliste* and *Le Journal de Quebec* from *Wikipedia*. As previously discussed, information obtained from *Wikipedia* is not reliable and will not be accorded any weight in this proceeding.

In denying the petition, the director noted that none of the documentation submitted in support of this criterion was dated less than five years prior to the filing date of the petition and that the petitioner failed to establish that the media in which the articles appeared constitute a major trade or professional publication or other major media.

On appeal, counsel asserts that the director "misapplies the regulations," and that "[T]here is no requirement in the plain language of 8 C.F.R. § 204.5(h)(3)(iii) which even hints that publications about [the petitioner] and his work are not satisfactory unless they include the likes of USA Today, People Magazine, the Wall Street Journal or other publications of similarly large circulation." However, counsel does not explain how a publication can constitute major media without establishing that it has a significant circulation that extends beyond the local or regional level. Counsel further asserts that "[t]here is no requirement in the regulation that a newspaper has to be in English in order to constitute "major media." Nonetheless, the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that published material be accompanied by "any necessary translation," and the regulation at 8 C.F.R. § 103.2(b)(3) requires that documents submitted in a foreign language must be accompanied by a full English translation.

Counsel states that the petitioner's documentation included articles about the beneficiary or his work "in at least one major trade/professional publications[] and numerous other major media publications. According to counsel, *Le Journal de Montreal* is "the largest French-language newspaper in North America," and that *Le Journal de Quebec* is "the newspaper with the highest circulation [of] any city in Quebec." Nothing in the record supports counsel's assertions. 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 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner has failed to establish that the beneficiary meets this criterion.

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

To establish that the beneficiary meets this criterion, the petitioner submitted letters of recommendation from several individuals. However, a review of these letters do not reveal that

any of the authors stated that the beneficiary made an original contribution of major significance to the field. For example, [redacted] vice-president of Soltech, Inc., stated in a March 19, 2004 letter, that the petitioner "is an expert in the lighting industry" and "is a conscientious, efficient, organized and a highly skilled lighting designer with special skills of expertise in theatrical events." [redacted], president of Gestion Serge Brouillette Inc., stated that the beneficiary's "organization, artistic and creative skills have allowed him to design wonderful lighting for all of our productions." [redacted] stated that the beneficiary's "lighting designs are forever evolving with the technical advances within his field." In an unsigned January 26, 2004 letter, from Entertainment Design described the beneficiary as "a professional designer of the highest caliber who carefully researches, plans and prepares his productions."

In response to the RFE, counsel points out that those recommending the beneficiary write of his "creative skills," his "unique techniques," and his innovativeness. However, none of this rises to the level of making a contribution of major significance to the beneficiary's field of endeavor. Counsel renews this argument on appeal, taking issue with the director's statements that the beneficiary's contributions must "have demonstrable influence on the field or set a standard for which others aspire." Counsel asserts that nothing in the regulation requires the petitioner to meet these standards. Nonetheless, counsel points to, and the petitioner alleges, no specific achievements by the beneficiary that would constitute an original contribution of major significance to his field. A general analysis that the beneficiary is "creative" or "unique" is not the equivalent of establishing that the beneficiary has made a contribution of major significance to his field.

The petitioner has failed to establish that the beneficiary meets this criterion.

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

The petitioner claims the beneficiary meets this criterion based on his position as lighting director for several performers, including the Backstreet Boys, Sylvain Cossette, Lara Fabian, and for the opening acts for Aerosmith, Bryan Adams, Pearl Jam, and Madonna. The petitioner also stated that the beneficiary worked for Claude Debois and Stephane Rousseau, and allegedly won a Felix Award for his work for them. The petitioner stated that the beneficiary was the lighting director for Tap Dogs and worked with Cirque du Soleil, Franco Dragone, and *Wonderful Town.*

Counsel asserts that the director erred in "strongly suggesting that an artist cannot fulfill the [criterion] of 8 C.F.R. § 204.5(h)(3)(vii) if his art is not hung on a museum wall or if it is not the primary focus of a live performance or other concert event." Counsel further asserts that this interpretation "would constitute an absolute bar to any artist whose art is primarily used to enhance the public's enjoyment of another's performance."

The plain language of this criterion, however, reveals that it relates to the visual arts. It is inherent in the beneficiary's job that he provides lighting for performing artists. Therefore, not every production in which he provides lighting is a showcase or exhibition of his work. Duties or activities which

nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate national or international acclaim if they are inherent or routine in the occupation itself. Without evidence that the beneficiary's services were comparable to the exclusive artistic showcases that might serve to meet this criterion for a visual artist, we cannot conclude that the beneficiary meets this criterion. While we do not find that the services have no evidentiary value, they cannot serve to meet this criterion. For this reason, the regulations establish separate criteria. The petitioner's work is far more relevant to the "leading or critical role" criterion set forth at 8 C.F.R. § 204.5(h)(3)(viii) and will be discussed separately within the context of that criterion.

The petitioner has failed to establish that he meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.*

To meet this criterion, the petitioner must show that he performed a leading or critical role for an organization or establishment and that the organization or establishment has a distinguished reputation.

In her August 20, 2007 letter forwarding the petition, counsel stated that the beneficiary had worked as a lighting director and director for singers, shows and entertainment tours for 25 years, "many of which are internationally renowned." In his résumé, the beneficiary listed the entertainment personnel and shows on which he had worked as a lighting designer and director, including those listed above. We find that the beneficiary's role as a lighting director and designer for the various acts and shows was in a critical role. However, the record does not establish that any of the singers, shows or entertainment tours on which he worked enjoy a distinguished reputation.

Most of the supporting documentation submitted by the petitioner to establish the renown of the acts for which the beneficiary worked are retrieved from *Wikipedia*. This included information about *Wonderful Town*, Lara Fabian, the Backstreet Boys, Claude Dubois and Stephane Rousseau. As previously discussed, information contained on the *Wikipedia* website is unreliable and will not be afforded any weight in this proceeding. Other documentation regarding those with whom the beneficiary worked does not indicate the source. While some of the acts for which the petitioner worked, such as the Backstreet Boys and the Cirque de Soleil, are internationally known, this is not the equivalent of providing evidence that the acts enjoy a distinguished reputation. The evidence submitted by the petitioner is insufficient to establish that those for whom the beneficiary worked enjoy a distinguished reputation.

The petitioner has failed to establish that the beneficiary meets this criterion.

The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of his field of endeavor.

Review of the record, however, does not establish that the beneficiary has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim or to be within the small percentage at the very top of his field. 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.