U.S. Department of Homeland Security
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Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: LIN 04 002 53887 Office: NEBRASKA SERVICE CENTER Date: OCT 17 2005

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

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.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Acting Director, Nebraska Service Center, denied the petition for the employment-based visa. The petitioner filed an untimely appeal, which the director treated as a motion to reopen. Upon review, the director affirmed the previous decision and denied the petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed the instant immigrant petition seeking to classify the beneficiary as a multinational manager or executive pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C). The petitioner is a corporation organized under the laws of the State of Illinois that is engaged in hotel management. The petitioner seeks to employ the beneficiary as its director of food and beverages.

The director denied the petition concluding that the petitioner had not established the existence of a qualifying relationship between the United States and foreign entities. As the petitioner subsequently filed an untimely appeal, the director treated the appeal as a motion to reopen and considered the additional documentary evidence submitted by counsel. Upon review, the director again denied the petition concluding that the purported affiliate relationship between the two organizations did not exist.

On appeal, counsel claims that the director erroneously concluded that the two individual shareholders of the United States and foreign entities do not own and control approximately the same proportion of each entity. Counsel states that the two shareholders, who are brothers, "[exercise] de facto control or negative control as described in *Matter of Siemens Medical Systems, Inc.*, 19 I&N [Dec.] ([BIA] 1986) and *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982)." Counsel submits an appellate brief and additional documentary evidence in support of these claims.

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

> (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):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. – An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives or managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this

classification. The prospective employer in the United States must furnish a job offer in the form of a statement, which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether a qualifying relationship exists between the foreign and United States entities as required in section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity;
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> * * *
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner filed the instant petition on October 2, 2003. In an appended letter, dated September 25, 2003, the petitioner identified the United States company as an affiliate of the beneficiary's foreign employer, [redacted] The petitioner indicated that both corporations are owned and controlled by the company Hostmark Investors Inc., which is doing business as [redacted]. The petitioner attached two charts reflecting the relationship between the foreign and United States corporations. Specifically, the chart identified the following ownership interests:

> **Petitioning Entity:** owned solely by the corporation '[redacted]'
>
> **HMG Inc.:** 75% of its stock owned equally by '[redacted]'[1] and [redacted]
>
> **Hostmark B.C. (beneficiary's foreign employer):** owned solely by the corporation "Hostmark Canada"
>
> **Hostmark Canada:** owned equally by '[redacted]' and [redacted]

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[1] Throughout the record [redacted] is also referred to as '[redacted]' For purposes of continuity, the AAO will refer to the shareholder as [redacted]

[2] The chart does not identify the owner of the remaining 25 percent of the stock. A subsequently submitted chart indicates that the organization '[redacted]' owns the remainder of the stock in [redacted]

The chart also identified [redacted] and [redacted], the owners of fifty percent of the organization "Hostmark Hospitality," which the petitioner had noted in its September 25, 2003 letter as the owner of both the United States and foreign entities.

The petitioner submitted the following documentary evidence related to the beneficiary's foreign employer, Hostmark B.C.: (1) a "Corporate Information" statement; (2) certificates of incorporation and registration; (3) memorandum and articles of association; (4) a stock certificate, dated December 17, 1997 identifying "Hostmark Canada Inc." as the owner of 1,000 shares; (5) a "Special Resolution" regarding the company's right to borrow money; (6) a "Shareholder's Resolution" and minutes from a directors' meeting on December 17, 1997, naming [redacted] as the owner of its 1,000 issued shares of stock; and (7) a corporate stock register confirming Hostmark Canada Inc. as the owner of 1,000 shares of stock.

The petitioner also provided the articles of incorporation for the company "HWP S. Raintree Enterprises, Inc." Counsel later acknowledged a mistake in the name of the petitioning entity on Form I-140, which identified the petitioner as "HWP S. Raintree Enterprises, Inc.," and indicated that the name of the petitioner should be [redacted] However, counsel did not subsequently submit the appropriate articles of incorporation.

In a request for evidence, dated June 22, 2004, the director addressed the evidence submitted with the immigrant petition and stated "it does not appear that [redacted] and [redacted] wn the [foreign and United States] entities in the same proportion, which calls into question whether a qualifying relationship as considered by regulations actually exists." The director stated that the petitioner had not provided evidence to support the organizational relationships identified on the chart, and further noted an inconsistency in a portion of the documents, which referenced the foreign company "Hostmark Management (B.C.) Inc." The director noted that it was unclear whether "Hostmark Management (B.C.) Inc." is the same company as "Hostmark B.C.," the beneficiary's foreign employer. The director requested that the petitioner provide documentary evidence such as annual reports, articles of incorporation, financial statements, and stock certificates that would establish common ownership and control between the United States entity and the beneficiary's foreign employer.

Counsel responded in a letter dated September 13, 2004.[3] As evidence of a qualifying relationship, counsel submitted the following: (1) the register of shareholders for "Hostmark Management (B.C.) Inc." and a stock certificate, both identifying "Hostmark Canada" as the shareholder of 1,000 shares of issued stock; (2) the register of shareholders and two stock certificates for "[redacted]," each naming [redacted] and Robert Cataldo as the owners of 500 shares of stock; (3) an "Affidavit of Capitalization" from the vice-president of HMG, Inc. stating that 1,000 shares of 1,333 shares of stock issued by HMG, Inc. are owned equally by Bud Cataldo and Robert Cataldo, with the remainder owned by "[redacted]"; (4) two stock certificates, dated September 20, 1994, naming [redacted] and [redacted] as the owners of 500 shares of issued stock; and (5) a register of shareholders and a stock certificate identifying HMG, Inc. as the

[3] Counsel addressed in his September 13, 2004 response the above-discussed mistake in the petitioner's corporate name on Form I-140. Counsel explained that the company "[redacted]" was incorrectly identified, and, in fact, had previously been dissolved. Counsel stated that the petitioner is actually "[redacted]" a company established in 1993, and noted that the petitioner's correct employer identification was indicated on the original Form I-140. Counsel submitted a revised Form I-140 properly identifying the petitioning entity.

owner of 1,000 shares of stock in the petitioning entity. Counsel submitted the petitioner's 2002 U.S. Corporation Income Tax Return, which also identified HMG, Inc. as the sole shareholder of the petitioning entity.

In a decision dated October 22, 2004, the director concluded that the petitioner had not demonstrated the existence of a qualifying relationship between the foreign and United States entities. The director stated that the petitioner did not submit evidence to support the corporate relationships identified on the organizational chart. Specifically, the director stated:

> The chart indicates that [redacted] and [redacted] each own 50% of Hostmark Canada Inc., which in turn owns 100% of Hostmark Management B.C. Co. This is supported by the share certificates. However, the petitioner does not address the relationship, if any, with the beneficiary's actual foreign employer, Hostmark BC, nor did the petitioner indicate or provide evidence to establish that Hostmark BC and Hostmark Management B.C. are the same entity. As the Service raised this issue in the request for evidence, it is unclear why the petitioner would fail to address this discrepancy.
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> * * *
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> Further, the petitioner indicates that [redacted] and [redacted] each individually own 37.5% of HMG, Inc., which in turn owns 100% of S. Raintree Enterprises, Inc. The share certificates and affidavit from [redacted] II, Vice President of HMG, Inc., corroborate this claim. Hostmark Investors LP owns the remaining 25% of HMG, Inc., and there is no evidence, nor does the petitioner claim, that [redacted] and [redacted] own any shares of Hostmark Investors LP. From this, it does not appear that a qualifying relationship exists between the United States and foreign entities.
>
> Specifically, presuming that Hostmark Management B.C. Co. is the same company as Hostmark BC, [redacted] and [redacted] each individually own 50% of the foreign entity and 37.5% of the United States entity. The two shareholders do not own and control approximately the same share or proportion of each entity. Further, neither individual owns a majority of with entity, nor is there evidence that one individual has control over both entities. Therefore the entities are not affiliates or subsidiaries as defined by regulations.

Consequently, the director denied the petition.

Counsel filed an untimely appeal on December 7, 2004. In accordance with the regulation at 8 C.F.R. § 103.3(a)(2)(v)(B), the director treated the appeal as a motion to reopen and considered the additional evidence submitted by counsel. In an attached brief, counsel claimed the existence of an affiliate relationship between the foreign and United States entities, as [redacted] and [redacted] both own and control Hostmark Management B.C. Co. and S. Raintree Enterprises, Inc. through their ownership of [redacted] and [redacted]. Counsel stated that in accordance with the regulatory definition of "affiliate," [redacted] and [redacted] constitute "the same group of individuals." As evidence that the two brothers "act as a single group," counsel submitted proxies, titled "Declaration of Voting Trust" and signed by each brother, pertaining to the shares held by each in [redacted] and [redacted] Specifically, both [redacted] and [redacted] noted their role as legal trustee over the "beneficial voting rights of the

[s]hares for and on behalf of my brother." Each further stated in the proxy that they "irrevocably grant" to the other "unlimited and unfettered authority to vote the Shares by proxy." In an attached affidavit dated November 17, 2004, the vice-president of HMG, Inc. stated:

> [redacted] and [redacted] jointly own and control both HMG, Inc. and [redacted]. Together they own 75% and 100% of the voting shares of these two entities, respectively. A[s] legal confirmation of their joint ownership and control [redacted] and [redacted] have exchanged proxies to vote each others shares.

Counsel referenced the previously submitted documentary evidence as confirmation of ownership and control of the four organizations by [redacted] and [redacted]. Counsel also cited *Matter of Hughes* and *Matter of Siemens Medical Systems, Inc.* as demonstrating control over an organization "by the same individual or group of individuals."

Counsel addressed the director's statement that the record lacks evidence that Hostmark Management (B.C.) Co. is actually the same company as Hostmark BC. Counsel stated that evidence submitted with the immigrant petition, including the corporate information sheet, share certificate, Canadian tax records for the beneficiary, and financial statements, "permit the adjudicator to safely infer" that the two organizations are one and the same.

In a decision dated January 31, 2005, the director concluded that the additional evidence failed to establish the purported affiliate relationship between the foreign and United States entities. The director stated:

> Regulations clearly indicate that if the companies are owned by a group of individuals, each individual must own and control approximately the same share or proportion of each entity. In this case, [redacted] and [redacted] each own 50% of the foreign entity and 37.5% of the United States entity. They do not own the shares in the same proportion, nor do either of them have a controlling interest in both entities. While there is a commonality of ownership, there is nothing to indicate that the two individuals would vote in concert on all issues, and therefore nothing to establish that their shares could be combined to establish majority control of both entities.
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> The petitioner references two precedent decisions regarding the L-1 nonimmigrant classification. Both decisions reference *de facto* control to establish a qualifying relationship. However, there is nothing to illustrate that either [redacted] or [redacted] exerts *de facto* control over both entities, and therefore nothing to illustrate that a qualifying relationship as considered by regulations exists between the two entities.

The director acknowledged the proxies executed by each brother, but noted that, as they are not dated, the proxies are insufficient to establish that at the time of filing the petition the two brothers possessed the authority to vote each person's shares. The director stated "[t]here is nothing to demonstrate that declarations which have not been dated or notarized would be legally binding." The director further stated that because both brothers executed the proxies on behalf of the other, "they have simply exchanged voting rights, not granted one of them *de facto* authority over all of the shares." The director noted that the proxies appear to give each brother the right to vote the other's shares in his absence, yet if present, each would retain voting authority over their shares. The director concluded that even if the proxies gave each brother the unlimited

authority to vote the other's shares, "they would still vote the same amount." The director stated "[t]here is nothing to indicate that the two always vote in concert on all issues, nothing to show that one has control of all of the shares, and therefore nothing to show *de facto* control." Consequently, the director again denied the petition.

Counsel filed an appeal on March 4, 2005 claiming that the director erred in his determination that [redacted] and [redacted] did "not own and control approximately the same proportion of each entity." In an appended appellate brief, counsel addresses the concept of "negative control" as discussed in *Matter of Siemens Medical Systems, Inc.*, and states:

> [redacted] and [redacted] have exchanged proxies granting each of them up to 75% control of HMG, Inc. Should they have a disagreement with respect to the distribution of profits, appointment of directors, management or direction of HMG, Inc. neither brother would be able to exert his will over the other. In fact, both brothers have *negative control* over HMG, Inc. – as the commissioner in the Siemens case describes that concept.

(emphasis in original).

Counsel explains that the intent of the proxies signed by each brother was to prevent either from voting his shares against the wishes of the other. Counsel states, however, that because of the "theoretical possibility" that the proxies may not result in the intended veto, [redacted] and [redacted] entered into a second proxy agreement that clarifies their original intent. Counsel explains that the new agreement revises the original voting rights granted to each brother by the other, and gives [redacted] 50 percent control of HMG, Inc. Counsel notes that this amount is in proportion with [redacted] 50 percent control of Hostmark B.C. Counsel submits a copy of the agreement, which, although dated March 3, 2005, states that it is effective as of August 16, 2001.

Counsel further contends that the brothers "act as a single majority shareholder," thus satisfying the regulation at 8 C.F.R. § 204.5(j)(2)(A), which defines an affiliate as "one of two subsidiaries both of which are owned and controlled by the *same parent or individual*." (emphasis added). Counsel references the November 17, 2004 affidavit submitted by HMG, Inc.'s vice-president as additional evidence that the brothers manage the organizations "in concert" as a single shareholder. Counsel states that even if this proposition is not accepted by Citizenship and Immigration Services (CIS), the proxy agreement entered into by the Cataldo brothers "establishes full technical compliance" with subsection (B) of the regulation at 8 C.F.R. § 204.5(j)(2). (defining "affiliate" as one of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity).

Upon review, the petitioner has not demonstrated the existence of a qualifying relationship between the foreign and United States entities.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or

indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. at 364-365. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

Notwithstanding the content of the March 3, 2005 proxy agreement between the Cataldo brothers, the agreement will not be afforded any evidentiary weight as it was entered into approximately a year and a half after the filing of the petition. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm. 1971). Moreover, a petitioner may not make material changes to a petition in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998). 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. *Id.* Here, the petitioner attempted to satisfy the requirements of an affiliate relationship by executing a proxy agreement after the filing of the petition. The AAO notes that it is irrelevant that the March 3, 2005 agreement identifies its effective date as August 16, 2001, approximately two years prior to the filing of the petition. The petitioner is clearly attempting to circumvent the well-founded case law, which requires that the petitioner demonstrate the existence of a qualifying relationship at the time of filing the petition. This same reasoning applies to the proxies executed by the [redacted] brothers pertaining to their shares in [redacted]

At the time of filing the petition, the alleged affiliate relationship did not exist between the foreign and Untied States entities. The petitioner bases its claim of a qualifying relationship on the purported indirect ownership of the beneficiary's foreign employer and the United States entity by the [redacted] In *Sun Moon Star Advanced Power, Inc. v. Chappel*, 773 F. Supp. 1373 (N.D. Cal 1990), the Immigration and Naturalization Service (now CIS) refused to recognize the indirect ownership of the petitioner by three brothers, who held shares of the company as individuals through a holding company. The decision further noted that the two claimed affiliates were not owned by the same group of individuals. The court found that the Immigration and Naturalization Service decision was inconsistent with previous interpretations of the term "affiliate" and contrary to congressional intent because the decision did not recognize the indirect ownership. After the enactment of the Immigration Act of 1990, the Immigration and Naturalization Service amended the regulations so that the current definition of "subsidiary" recognizes indirect ownership. *See* 56 Fed. Reg. 61111, 61128 (Dec. 2, 1991). Accordingly, the basis for the court's decision has been incorporated into the regulations. However, despite the amended regulation and the decision in *Sun Moon Star*, neither legacy Immigration and Naturalization Service nor CIS has ever accepted a random combination of individual shareholders as a single entity, so that the group may claim majority ownership, unless the group members have been shown to be legally bound together as a unit within the company by voting agreements or proxies.

To establish eligibility in this case, it must be shown that the foreign employer and the petitioning entity share common ownership and control. Control may be "de jure" by reason of ownership of 51 percent of outstanding stocks of the other entity or it may be "de facto" by reason of control of voting shares through partial ownership and possession of proxy votes. *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982).

In this case, the U.S. entity is owned by HMG Inc., and the beneficiary's foreign employer is owned by Hostmark Canada. While counsel contends that both HMG Inc. and Hostmark Canada are owned and controlled by the Cataldo brothers, thereby satisfying both subsections (A) and (B) of the regulation at 8 C.F.R. § 204.5(j)(2), the record does not support this assertion.

The beneficiary's foreign employer and the United States entity are not "subsidiaries . . . owned and controlled by the same parent or individual." 8 C.F.R. § 204.5(j)(2). Contrary to counsel's claim, Bud and Robert Cataldo do not qualify as a "single majority shareholder" for purposes of establishing an affiliate relationship. It is unrealistic to expect the AAO to accept the proposition that [redacted] would function as a single shareholder based on their relationship as brothers and their tendency during the past thirty years to "[work] in concert." The regulation at 8 C.F.R. § 204.5(j)(2)(B) allows for demonstrating the existence of an affiliate relationship when more than one shareholder exists. The AAO will not recognize the [redacted] brothers as a single shareholder for purposes of demonstrating the existence of an affiliate relationship.

The petitioner has failed to demonstrate that the beneficiary's foreign employer and the United States entity satisfy the regulatory definition of affiliate at 8 C.F.R. § 204.5(j)(2)(B). While the AAO recognizes the concept of indirect ownership, the petitioner has not established that [redacted] own and control HMG, Inc., and consequently, own and control the United States entity. Each brother owns 37.5% in HMG, Inc., or a minority interest. At the time of filing the petition, the petitioner did not offer any documentary evidence, such as voting proxies or agreements to vote in concert so as to establish a controlling interest. As discussed previously, the AAO will not consider the subsequent proxies or the March 3, 2005 proxy agreement. As a result, the AAO cannot accept counsel's proposition that together the Cataldo brothers own 75%, or a majority interest, in [redacted]

The petitioner has not established that the same legal entity or individuals control both entities. The AAO notes that although the petitioner presented stock certificates and the corporate stock register identifying Bud and [redacted] as equal shareholders in the company Hostmark Canada, the petitioner did not provide supplemental evidence in the form of agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. If the petitioner had properly established [redacted] control of HMG, Inc.[4], this documentation would have been significant in establishing whether he also maintains *de facto* control of Hostmark Canada. Consequently, despite counsel's claims, *Matter of Siemens Medical Systems, Inc.* and *Matter of Hughes* do not apply in the present matter as the record does not contain any agreements influencing either brother's control of the company.

The foreign and United States entities are not affiliates as both companies are not owned and controlled by the same individuals. Based on the evidence submitted, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign organizations. Accordingly, the appeal will be dismissed.

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[4] The petitioner attempted to demonstrate control of [redacted] through the proxy agreement executed a year and a half after the filing of the petition.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met. Accordingly, the director's decision will be affirmed and the petition will be denied.

ORDER: The appeal is dismissed.