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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

B4

[redacted]

FILE: [redacted] OFFICE: NEBRASKA SERVICE CENTER Date: FEB 16 2010
LIN 06 202 52215

IN RE: Petitioner:
Beneficiary: [redacted]

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.

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).

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a Texas corporation that seeks to employ the beneficiary as its executive manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity; and 2) the petitioner failed to establish that it would employ the beneficiary in a managerial or executive capacity. The director also noted that there were various anomalies in the submitted documentation, including inconsistencies with regard to the beneficiary's position title as well as the petitioner's claim that it did not file any prior petitions on the beneficiary's behalf, which is inconsistent with service records that show a previously filed immigrant petition on the beneficiary's behalf and subsequent denial of that petition by U.S. Citizenship and Immigration Services (USCIS). Lastly, the director dismissed the petitioner's statements regarding the beneficiary's position with a U.S. affiliate of the U.S. petitioner, finding that the separately incorporated entity is not the petitioner and that as a result, the beneficiary's responsibilities with that U.S. entity are irrelevant for the purpose of determining whether the instant Form I-140 warrants approval.

On appeal, counsel disputes the director's conclusions and attempts to dispel any perceived inconsistencies in a supporting appellate brief that has been submitted since the Form I-290B was filed.

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 and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who 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 two primary issues in this proceeding call for an analysis of the beneficiary's job duties. Specifically, the AAO will examine the record to determine whether the beneficiary was employed abroad and whether he would be employed in the United States in a qualifying managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily--
>
> (i) manages the organization, or a department, subdivision, function, or component of the organization;
>
> (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily--
>
> (i) directs the management of the organization or a major component or function of the organization;
>
> (ii) establishes the goals and policies of the organization, component, or function;
>
> (iii) exercises wide latitude in discretionary decision-making; and
>
> (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In support of the Form I-140, the petitioner submitted a letter dated June 21, 2006, which includes the following list of the beneficiary's duties and responsibilities during his employment abroad:

- Directed and coordinated activities of the company and formulated and administered organizational policies[.] (15%)
- In consultation with the management of [the foreign entity,] developed long-range goals and objectives of the firms [sic.] (20%)
- Responsible for corporate planning, general administration, marketing-sales and purchasing activities for the firm[.] (20%)
- Directed and coordinated activities of managers and employees in the operations, purchasing and marketing areas for which responsibility is delegated for further attainment of goals and objectives[.] (15%)
- Reviewed and analyzed activities, costs, operations, and forecasting data to determine progress toward stated goals and objectives[.] (15%)
- Reviewed with management and employees company's achievements and discussed required changes in goals or objectives of the company[.] (15%)

The petitioner also provided the following list of the beneficiary's duties and responsibilities during his proposed employment:

- Directs and coordinates activities of the organization and formulates and administers company policies. (15%)
- Responsible for creation, implementation, monitoring, and planning of all operations and any growth and expansion of businesses. (20%)
- In consultation with the management, develops long-range goals and objectives of the company. (20%)
- Directs and coordinates activities of employees in the sales, purchasing, advertising and marketing for which responsibility is delegated to further attainment of goals and objectives. (15%)
- Responsible for hiring and dismissing employees, negotiate contracts, and oversee any domestic distribution system. (15%)
- Reviews and analyzes activities, costs, operations, financial administration, and forecast data to determine progress toward stated goals and objectives. (10%)
- Discusses with management and employees to review achievements and discusses required changes in goals or objectives of the company. (5%)

On April 30, 2007, the director issued a request for additional evidence (RFE) instructing the petitioner to provide both entities' organizational charts illustrating their respective staffing levels and identifying the beneficiary's position with respect to other employees within each entity. The petitioner was also asked to provide detailed descriptions of the beneficiary's foreign and proposed employment, including the specific job duties he performed abroad and would perform during his proposed employment with the petitioning entity. Lastly, the petitioner was asked to provide all of the IRS Form W-2s the petitioner issued to its employees in 2006, noting that the submitted IRS Form W-2s for 2005 indicate that the beneficiary was the petitioner's only full-time employee. The director further pointed out that the petitioner's previously submitted organizational chart listed only two employees. The director expressly stated that any information submitted with regard to the petitioner's U.S. affiliate is irrelevant in the present proceeding.

In response, the petitioner provided a letter from counsel, dated July 18, 2007, in which counsel attempted to explain the inconsistencies with regard to the beneficiary's position title. Counsel explained that the petitioner is a small corporation that lacks sophistication and does not have a staff of accountants and attorneys "to comb through all its documents." Counsel further asserted that the beneficiary's position title is irrelevant and urged USCIS to focus on the beneficiary's job description in determining whether the beneficiary's foreign and proposed employment can be deemed as being within a managerial or executive capacity.

With regard to the statements regarding the beneficiary's foreign employment, the petitioner provided a letter dated July 18, 2007 on the foreign entity's letterhead signed by [redacted] of the foreign entity, who stated that during the beneficiary's tenure as managing director of the foreign entity, the beneficiary was in charge of finance, sales, marketing, purchasing, hiring, training and general operations. [redacted] further stated that the beneficiary had discretionary authority over the foreign entity's business and personnel and was responsible for long-term planning and setting as well as implementing corporate policy. The following description of the beneficiary's proposed employment with the petitioning entity was provided:

> His duties are to formulate and build a structure keeping in mind the company's goal[s] and objectives and thus creating new avenues for the companies in the area of business[;]
>
> He will be fully authorized to legally sign all the documents and engage, indulge and commit with any kind of transactions, monetary, administrative, or legal on behalf of the company in [the] company's interest[;]
>
> He will be responsible to implement the administrative machine as to successfully run day to day business[;]
>
> He will be allow[ed] to delegate his duties and rights to [any] person he finds liable for the job, [sic] by hiring, firing and training subordinate employees[;]
>
> He will prepare financial and cost analysis in order to determine the efficient use of funds[;]
>
> He will supervise, change, [and] modify the business tactics and policies [so] as to make it successful[;]

He will help the company in formulating new projects bys studying and creating policies and objectives so that the company can grow and turn to other profitable projects.

The petitioner also provided organizational charts illustrating its own and the foreign entity's hierarchies. The petitioner's chart shows that the petitioner is comprised of three employees—the beneficiary at the top of the hierarchy as the company's president, a store manager as the beneficiary's direct subordinate and an assistant manager, whose position is shown as being directly subordinate to the store manager. The petitioner provided copies of five IRS Form W-2s it issued in 2006.

The petitioner also provided the foreign entity's organizational chart, which similarly depicts the beneficiary's position at the top of the hierarchy, subordinate only to the company's managing partners. The chart shows that the beneficiary's subordinates included a finance manager, a human resource manager, a store general manager, and a sales manager. The finance manager is shown as supervising a collection manager; the human resource manager is shown as supervising a secretary, the store general manager is shown as supervising a store manager, who supervised a warehouse manager; and the sales manager is shown as supervising two assistant managers, each with a technician as his/her subordinate.

In a decision dated November 17, 2007, the director denied the petition noting that the description of the beneficiary's foreign employment was overly vague and insufficient to support the organizational chart that was submitted in response to the RFE. The director similarly found that the description of the beneficiary's U.S. employment lacked specific information about the proposed job duties and further noted that the petitioner's issuance of five IRS Form W-2s was inconsistent with the petitioner's organizational chart, which identified only three total employees working for the petitioning entity. In light of these adverse findings, the director determined that the petitioner failed to establish that the beneficiary's employment with the foreign entity and his employment with the U.S. petitioner was and would be within a qualifying managerial or executive capacity.

On appeal, counsel submits a brief in which he argues that a number of the inconsistencies pointed out in the director's decision were inadvertent and not material to the matter at hand. Counsel urges the AAO to focus on the beneficiary's job descriptions rather than his job titles in determining whether the proposed employment would be within a qualifying capacity.

While counsel makes a valid point, a review of the record indicates that the job descriptions of the beneficiary's foreign and proposed employment do not establish that the beneficiary either was employed abroad or that he would be employed by the U.S. petitioner in a qualifying managerial or executive capacity. The AAO further notes that despite the lack of any malicious intent, the petitioner must resolve inconsistencies in the record by independent objective evidence; any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). In other words, in light of what appears to be an inconsistency between the petitioner's organizational chart, which lists three employees, and the five IRS Form W-2s the petitioner apparently issued in 2006, the petitioner could have submitted employment records to establish each employee's period of employment with the petitioner in order to explain why the number of W-2s issued in 2006 exceeded the number of employees that were named in the petitioner's organizational chart. A statement from counsel, who asserts that inconsistencies result when an entity is small and lacks a sufficient administrative staff, is insufficient, particularly in light of case law that dismisses the mistaken notion that unsupported assertions of counsel can be deemed as valid probative 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).

Moreover, even if the AAO were to overlook the various inconsistencies that the director pointed out, the petition does not warrant approval. As properly pointed out in the director's decision, 8 C.F.R. § 204.5(j)(5) expressly requires a detailed description of the beneficiary's proposed job duties, which is among the key factors the AAO examines in determining a petitioner's eligibility to classify the beneficiary as a multinational manager or executive. The director also pointed out that the petitioner is required to establish that the beneficiary was employed abroad in a qualifying managerial or executive capacity. 8 C.F.R. § 204.5(j)(3)(i)(B). In order to establish that either the foreign or proposed employment fits the definition of managerial or executive capacity, a detailed job description is crucial, as the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). In the present matter, although the petitioner has provided more than one job description for the beneficiary's foreign and proposed employment, none of the descriptions conveys a meaningful understanding of the job duties the beneficiary performed abroad and those he would perform as part of his proposed position with the U.S. entity.

In the petitioner's initial support letter, both the foreign and proposed job descriptions were accompanied by an approximate percentage of time the beneficiary devoted and would devote to certain duties and responsibilities. With regard to the beneficiary's foreign employment, the petitioner stated that the beneficiary directed and coordinated activities and formulated policies for 15% of his time and developed goals and objectives for 20% of his time. However, the petitioner did not identify any policies, goals, or objectives, nor was any information provided to establish what specific process was used or the tasks that were involved in these broad responsibilities that, in reality, could be applied to a manager in any business, regardless of whether he primarily performs qualifying tasks in a managerial or executive capacity.

The petitioner also grouped together corporate planning, general administration, marketing-sales, and purchasing activities, which, combined, consumed 20% of the beneficiary's time abroad. However, the petitioner did not explain what specific activities were involved in corporate planning or how corporate planning can be distinguished from setting goals and objectives, which, without further explanation, is also indicative of a type of corporate planning. Moreover, it is not apparent that general administrative duties or activities associated with marketing, sales, and purchasing involve tasks that can be deemed as managerial or executive in nature. Additionally, the petitioner's response to the RFE includes a more recent letter from the foreign entity's president, who stated that the beneficiary was in charge of finance, sales, marketing, purchasing, hiring, training, long-term planning, and setting and implementing foreign corporate policy. However, this general statement does not expand on the vague job description that was previously submitted, as it provides no insight as to the specific tasks the beneficiary performed during his employment abroad.

With regard to the beneficiary's proposed employment with the U.S. entity, the petitioner provided a similar job description, broadly claiming that the beneficiary would direct and coordinate activities and formulate policies for 15% of his time; create, implement, monitor, and plan operations for 20% of his time; and consult with management in an effort to develop company goals and objectives for another 20% of his time. Again, the AAO notes that the petitioner did not specifically identify any policies, goals, or objectives, nor was any information provided to establish what specific process was used or the tasks that were involved in these broad policy-making responsibilities. The petitioner was equally vague about what constitutes the company's "operations," thereby making it virtually impossible to decipher what specific tasks are involved in creating,

implementing, monitoring, and planning "operations." Although the petitioner further claimed that 15% of the beneficiary's time would be spent coordinating the activities of sales, purchasing, advertising, and marketing employees, the organizational chart submitted in response to the RFE identified a store manager and an assistant manager as its only employees other than the beneficiary. Thus, based on the information provided in the organizational chart, the petitioner did not have any sales, purchasing, advertising, or marketing employees to coordinate. While the petitioner also failed to specifically identify what tasks are involved in coordinating employees, this deficiency is overshadowed by the petitioner's organizational hierarchy, which appears to lack a staff of sales, purchasing, advertising, and marketing employees for the beneficiary to coordinate. Similarly, the claim that the beneficiary would spend any significant amount of time hiring and firing employees does not seem credible, given the lack of any organizational complexity at the time of filing. The fact that the petitioner lumped the hiring and firing responsibility together with contract negotiation and overseeing the domestic distribution makes it difficult to determine how much of the beneficiary's time was specifically devoted to hiring and firing, which the AAO deems inconsistent with the petitioner's level of organizational complexity, the non-qualifying task of contract negotiation, and the unknown tasks associated with overseeing domestic distribution, which the petitioner did not define in a meaningful manner.

The record shows that the petitioner supplemented the above job description in its response to the RFE. However, the supplemental description of the beneficiary's proposed employment was provided in a letter from the foreign entity's president, not by a representative of the entity that is currently offering the U.S. employment. *See* 8 C.F.R. § 204.5(j)(3)(i). There is no evidence that the foreign entity's president is an authorized representative of the petitioning entity. Additionally, the supplemental job description offers no clarification of the deficiencies in the prior job description and, in fact, only gives rise to further questions. For instance, the new job description indicates that the beneficiary would formulate and build structure while considering the company's goals and objectives, including creating new avenues for business. The beneficiary would also formulate new projects in light of the policies and objectives he would create. These overly vague statements make it impossible to determine the extent of the beneficiary's involvement in obtaining and/or soliciting new business.

The letter from the foreign entity further stated that the beneficiary would be responsible for implementing "the administrative machine" in running the daily operations. While not clear, this statement seems to indicate that the beneficiary would assume administrative duties, which are daily operational tasks and therefore cannot be deemed as qualifying within a managerial or executive capacity. Given that the organization has no other employees available to perform the petitioner's daily administrative tasks, it is reasonable to assume that the beneficiary would actually perform these and possibly other non-qualifying tasks. That being said, the letter indicated that the beneficiary would prepare financial and cost analysis, which appears to be a bookkeeping duty that also falls within the parameters of what is deemed to be an administrative function and, thus, not within a qualifying managerial or executive capacity. It is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

In summary, the job descriptions that the petitioner has provided with regard to the beneficiary's foreign and proposed positions are inadequate in determining that the beneficiary was employed abroad or that he would be employed in the United States in a qualifying managerial or executive capacity. All of the submitted job

descriptions are severely lacking in the necessary degree of detail about the beneficiary's specific daily job duties and none appears to have taken into consideration the nature of the foreign entity's and U.S. petitioner's business or the organizational composition of either entity. Thus, while the job descriptions convey the beneficiary's degree of discretionary authority within each entity, they offer general statements that fail to convey a detailed illustration of the tasks that comprised the beneficiary's position abroad and those tasks that would comprise the beneficiary's daily activities within his proposed position.

Additionally, with regard to counsel's references to the petitioner's current approved L-1 employment of the beneficiary, while the AAO acknowledges that the statutory definitions for managerial and executive capacity are the same, the question of overall eligibility requires a comprehensive review of all of the provisions, not just the definitions of managerial and executive capacity. USCIS is not required to assume the burden of searching through previously provided evidence submitted in support of other petitions to determine the approvability of the petition at hand in the present matter. Moreover, prior nonimmigrant approvals do not preclude USCIS from denying an extension petition. *See e.g. Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Similarly, the approval of a nonimmigrant petition in no way guarantees that USCIS will approve an immigrant petition filed on behalf of the same beneficiary. USCIS denies many I-140 immigrant petitions after approving prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS,* 293 F. Supp. 2d at 25; *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).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the director. 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).

Thus, for the reasons stated above, the beneficiary's prior issuance of a nonimmigrant visa on the basis of an approved Form I-129 L-1 petition is not instructive in determining the petitioner's eligibility for the immigrant visa sought in the present matter.

Lastly, with regard to counsel's numerous references to the beneficiary's work for the petitioner as well as the petitioner's U.S. affiliate, the AAO notes that any time spent performing managerial work for any entity other than the petitioner cannot be considered as being a qualifying managerial or executive duty. Whether or not the specific tasks performed at the petitioner's U.S. affiliate would normally be deemed managerial or executive if performed in relation to the internal staff of the petitioner, they would be deemed in this instance to be tasks necessary to provide a service, albeit a management service, being provided by the petitioner as a general contracting company and thus, would be non-qualifying. Again, it is noted that an employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. *See* sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

In light of the significant deficiencies described above, the AAO cannot conclude that the petitioner provided sufficient evidence and information upon which to base the conclusion that the beneficiary was employed

abroad and that he would be employed in the United States in a qualifying managerial or executive capacity. Based on these two independent grounds of ineligibility, the instant petition cannot be approved.

Additionally, while not addressed in the director's decision, the record indicates that the petitioner has not submitted sufficient evidence to establish that it meets the requirements of 8 C.F.R. § 204.5(j)(3)(i)(D), which states that the petitioner must establish that it has been doing business for at least one year prior to filing the Form I-140. The regulation at 8 C.F.R. § 204.5(j)(2) states that doing business means "the regular, systematic, and continuous provision of goods and/or services by a firm, corporation, or other entity and does not include the mere presence of an agent or office." In the present matter, the petitioner filed a Form I-140 on June 29, 2006, indicating that it was in the business of retail sales of handbags and fashion accessories. Although the petitioner provided shipping documents dated April, August, and September of 2005, which establish periods of intermittent business activity, these documents do not establish that the petitioner was doing business on a regular, systematic, and continuous basis during the 12-month period from June 29, 2005 to June 29, 2006.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd,* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). Therefore, based on the additional ground of ineligibility discussed above, this petition cannot be approved.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.