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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

B6

[redacted]

SEP 29 2010

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:

IN RE: Petitioner: [redacted]
Beneficiary: [redacted]

PETITION: Immigrant petition for Alien Worker as an Other, Unskilled Worker pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. 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. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner[1] is a television and electronics repairs business. It seeks to employ the beneficiary permanently in the United States as an electronic repairs supervisor. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's denial, an issue in this case is whether the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

Beyond the director's decision, an issue is whether it has been established that a corporation, [redacted], is the successor-in-interest to the employer identified in the Form ETA 750. Also, beyond the decision of the director, an issue is whether this petition properly seeks classification of the beneficiary as an unskilled worker. 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 Soltane v. DOJ,* 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a de novo basis).

Finally, beyond the decision of the director, an additional issue is whether or not the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Section 203(b)(3)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(iii), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing unskilled labor, not of a temporary or seasonal nature for which qualified workers are unavailable.

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[1] According to the record, [redacted]. was incorporated on August 24, 2001. The labor certification was accepted on April 20, 2001, in the name of [redacted]. There is no correspondence in the record that the labor certification was amended prior to certification on August 4, 2003, to indicate that [redacted] is the successor-in-interest to [redacted] although there is correspondence concerning three other amendments.

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

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d).

Here, the Form ETA 750 was accepted on April 20, 2001. The proffered wage as stated on the Form ETA 750 is $1,142.80 per week ($59,425.60 per year).

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d at 145.

Accompanying the petition and the labor certification, counsel submitted page one of the petitioner's tax return (Form 1120S) for 2005.[2]

On January 16, 2008, the director issued a request for evidence to the petitioner, and requested, *inter alia,* according to the regulation at 8 C.F.R. § 204.5(g)(2), an annual return, or audited financial statement, or federal income returns for years 2001 through 2007, or the beneficiary's Wage and Tax Statements (W-2) for the years the beneficiary was employed by the petitioner. The director requested the beneficiary's most recent pay voucher. The director instructed that in the event the beneficiary was paid less than the proffered wage for any year, then, in that regard, the director requested additional documentary evidence to show the petitioner's ability to pay the wage.

As the petitioner's partial tax return submitted indicated that the petitioner was incorporated four months after the filing of the labor certification, the director stated that the petitioner needed to submit evidence (to meet its burden of proof) according to *Matter of* [redacted], 19 I&N Dec. 481 (Comm.1981) that a change of ownership took place, and that [redacted] is now the successor-in-interest to [redacted].

In response to the RFE, counsel submitted, *inter alia,* a letter from the petitioner dated February 26, 2008. The sole shareholder of [redacted] stated in the letter that the business does not employ the beneficiary, and that the sole proprietorship was reorganized as a corporation. There is

[2] The regulation at 8 C.F.R. § 204.5(g)(2) requires copies of petitioner's annual reports, federal tax returns, or audited financial statements. The petitioner failed to provide complete, signed and dated income tax returns. Clearly, unsigned, undated and incomplete tax returns were not submitted to the IRS. The probative value of the incomplete document as evidence is diminished substantially.

no evidence in the record according to the case of *Matter of* [redacted] to demonstrate that [redacted]. is the successor-in-interest to [redacted].

Additionally, counsel submitted a letter from the petitioner's accountant with unaudited financial statements for 2007;[3] and a page from the State of California website [redacted] ..., accessed on February 26, 2008.

On appeal, counsel submitted a legal brief and the petitioner's federal income tax returns (Form 1120S) for 2004, 2005, 2006, and 2007.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in 1996, to have a gross annual income of $625,918.00, and to currently employ five workers. According to the tax returns in the record, the petitioner's fiscal year is based upon a calendar year. On the Form ETA 750B, signed by the beneficiary on March 25, 2001, the beneficiary did not claim to have worked for the petitioner.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a Form ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the Form ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to

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[3] Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. As there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage. Assuming for the sake of argument that the unaudited financial records are probative evidence, as stated in the statements and in counsel's brief, the petitioner had a net loss of $421.99 for year 2007. Since the financial statements do not demonstrate the petitioner's ability to pay, and according to the director failed to state the petitioner's liabilities, it and the accountant's letter have slight evidentiary value in these proceedings.

or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, --- F. Supp. 2d. ---, 2010 WL 956001, at *6 (E.D. Mich. 2010). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that USCIS should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, --- F. Supp. 2d. at *6 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

> The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.
>
> We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

The record before the director closed on February 27, 2008, with the receipt by the director of the petitioner's submissions in response to the director's request for evidence. The petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated.

On appeal for the first time, the petitioner submitted its Forms 1120S tax returns for 2004, 2005, 2006, and 2007. As stated above, the petitioner was put on notice of required evidence and given a reasonable opportunity to provide it for the record before the visa petition was adjudicated. The petitioner failed to submit the requested evidence and now submits it on appeal. However, the AAO will not consider this evidence for any purpose. *See Matter of Soriano,* 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena,* 19 I&N Dec. 533 (BIA 1988). The appeal will be adjudicated based on the record of proceeding before the director.[4] The petitioner did not submit tax returns for 2001, 2002, or 2003. Assuming for the sake of argument that the tax returns are evidence in this matter, the petitioner's net income for years 2004-$39,513.00, 2005-$24,449.00, 2006-$24,834.00, and 2007-$20,954.00, are insufficient to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[5] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if

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[4] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 17e (2004-2005) and line 18 (2006-2007) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 30, 2010) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income credits, deductions, and other adjustments shown on certain of its Schedules K, the petitioner's net income is found on Schedule K of its tax returns.

[5] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Similarly, although requested by the director, the petitioner's Forms 1120S for 2001, 2002, and 2003, were not submitted. Furthermore, the petitioner's 2004, 2005, 2006, and 2007, tax returns were submitted for the first time on appeal, and therefore, the AAO will not consider such evidence for any purpose. Assuming for the sake of argument that the tax returns requested by the director, but not submitted, are evidence in this matter, the petitioner's net current assets for years 2004-<$5,902.00>, 2005-$47,726.00, 2006-$40,339.00, and for 2007-<$62,142.00> are insufficient to pay the proffered wage. The symbols *<a number>* indicate a negative number, or in the context of a tax return or other financial statement, a loss.

Therefore, for the years 2001 through 2007,[6] the petitioner did not have sufficient net current assets to pay the proffered wage.

Therefore, from the date the Form ETA 750 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of its net income or net current assets.

On appeal, counsel asserts the director determined that the petitioner demonstrated its ability to pay the proffered wage "for all other years since 2001." This statement has no basis in fact and it is not supported by the record or the director's decision. It is not true.

The petitioner failed to submit sufficient evidence to demonstrate that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000.00. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been

[6] Although requested by the director, the petitioner failed to submit its tax returns for years 2001 through 2003. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14); *see also* 8 C.F.R. § 204.5(g)(2).

included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, there was a paucity of evidence presented to the director to demonstrate the petitioner's financial circumstances. Although requested by the director to submit its tax returns, only one page of the petitioner's 2005 tax return was previously submitted, and instead of audited financial statements, the petitioner chose to submit unaudited financial statements for 2007. 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). The unaudited financial statements failed to show sufficient net income and insufficient evidence of net current assets to demonstrate the petitioner's ability to pay the proffered wage was submitted.

The AAO notes that the [redacted] was not a corporation at the time the labor certification was accepted on April 20, 2001, having been incorporated according to the record on August 24, 2001. No evidence was submitted, except for unsupported statements by [redacted], that it is the successor to [redacted]. A prima facie case had not been made to show successorship. *See Matter of* [redacted].,[7] 19 I&N Dec. 481 (Comm. 1986). Also, the petitioner's reputed predecessor-in-interest did submit its 2001 federal tax return.

There is insufficient evidence in the record to conclude that it is more likely than not that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date. There was insufficient evidence submitted to indicate that the petitioner's and its reputed predecessor-in-interest's negative net income and net current assets are a unique circumstance, or that the petitioner's business is on the rebound. Thus, assessing the totality of the circumstances in this

[7] Evidence of transfer of ownership must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled must remain substantially the same as it was before the ownership transfer. The successor must also establish its continuing ability to pay the proffered wage from the date of business transfer until the beneficiary adjusts status to lawful permanent resident.

individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

An additional issue is whether the petitioner demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The Form ETA 750 states that the position requires two years of experience.

The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The Form ETA 750, Part A, Line 13, describes the job duties of an electronic repairs supervisor as follows:

> Supervise and coordinate activities of workers engaged in the repairing and maintenance of televisions, sound systems, camcorde [sic] cameras, vcr's, installation of satellite system. Be willing to train and assist workers in reparation [sic] of all electronic equipment.

The regulation at 8 C.F.R. § 204.5(l)(3) provides:

> (A) General. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.
>
> * * *
>
> (D) Other workers. If the petition is for an unskilled (other) worker, it must be accompanied by evidence that the alien meets any educational, training and experience, and other requirements of the labor certification.

According to the Form ETA 750B, Item 15, the beneficiary stated under penalty of perjury on March 25, 2001, that he was employed fulltime by [redacted] of Lynwood, California, in T.V. repair from August 1996, to March 2000. Prior to that employment, the beneficiary stated that he was employed fulltime by [redacted] of Los Angeles, California, in television repair from September 1993, to June 1996.

On January 12, 2008, the director issued an RFE asking for the petitioner to submit information regarding the beneficiary's work experience before the priority date. The director requested in pertinent part:

> Submit evidence that the alien obtained the required two years of experience in the job offered before April 20, 2001. Evidence of experience must be in the form of letter(s) from current or former employer(s) giving the name, address, and title of the employer and a description of the experience of the alien, including specific dates of the employment and specific duties.

Although the petitioner submitted a letter dated February 25, 2008, from [redacted], owner of [redacted] of Lynwood, California, this letter does not describe the beneficiary's duties while employed from 1986 to 2000. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

There is insufficient evidence in the record to demonstrate that the beneficiary has the job experience to satisfy the offered job requirements as stated above under the regulation at 8 C.F.R. § 204.5(l)(3) to demonstrate that the beneficiary is qualified to perform the duties of the proffered position.

The preponderance of the evidence does not demonstrate that the beneficiary acquired the minimum qualifications for the offered position from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

Also, beyond the decision of the director, an issue is whether this petition properly seeks classification of the beneficiary as an unskilled worker.

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

> (4) Differentiating between skilled and other workers. The determination of whether a worker is a skilled or other worker will be based on the requirements of training and/or experience placed on the job by the prospective employer, as certified by the Department of Labor.

In this case, the labor certification indicates that the position requires two years of experience in the job offered. However, the petitioner requested the unskilled worker classification on the Form I-140. Accordingly, the petition cannot be approved for this additional reason because the petitioner has requested a classification which is incongruous with the requirements on the labor certification.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.