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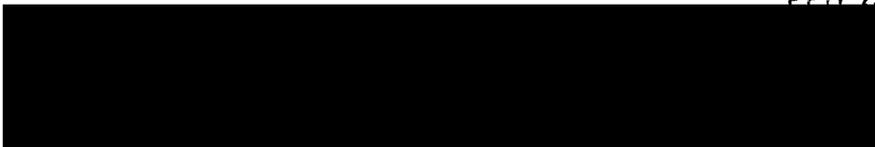
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FILE: WAC 04 125 54068 Office: CALIFORNIA SERVICE CENTER Date: FEB 21 2007

IN RE: Petitioner:
Beneficiary:

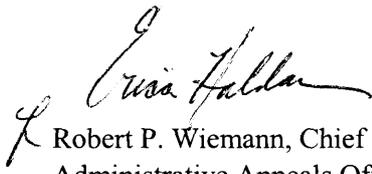


PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the
Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER: SELF-REPRESENTED



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, Chief
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the petition for a nonimmigrant visa, and the Administrative Appeals Office (AAO) rejected a subsequently filed appeal as untimely filed. The matter is now before the AAO on a motion to reconsider. The AAO will grant the petitioner's motion, withdraw its previous decision, and consider the previously filed appeal. The appeal will be dismissed.¹

The petitioner is a California company and claims to be a resort operator/owner. The petitioner states that it is the parent company of the beneficiary's foreign employer, Kungkungan Bay Resort/P.T. Tarsius International, located in Indonesia. Accordingly, the United States entity petitioned Citizenship and Immigration Services (CIS) to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A) pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The beneficiary was initially granted a two-year period of stay in L-1A status and the petitioner now seeks to extend the beneficiary's stay in order to continue to fill the position of reservations manager for a three-year period.

The director denied the petition on July 13, 2004, concluding that the record contains insufficient evidence to demonstrate that the beneficiary will be employed in a managerial or executive capacity. The director noted that the beneficiary will not supervise any subordinates in the United States, however, the petitioner claims the beneficiary supervises subordinate employees of the reservation department at the foreign entity. Thus, the director suggested that the beneficiary will be primarily involved in performing the day-to-day services essential to maintaining the business.

On appeal, counsel for the petitioner states that the beneficiary is employed in a managerial capacity and asserts the director erred by denying the petition. Counsel asserts that the beneficiary manages the managers employed by the foreign subsidiary. Counsel further states that the beneficiary manages an essential function, and she has a specialized knowledge of the foreign company. Counsel also explains that as a result of September 11, 2001 the foreign company underwent a financial decline and laid off several employees. Counsel explains that during this time, the beneficiary performed several non-managerial tasks. However, counsel asserts that the foreign company re-hired many employees and the beneficiary is now performing in a primarily managerial capacity for the U.S. company.

To establish eligibility under section 101(a)(15)(L) of the Act, the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, a firm, corporation, or other legal entity, or an affiliate or subsidiary thereof, must have employed the beneficiary for one continuous year. Furthermore, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

¹ On October 28, 2005, the AAO rejected the appeal as untimely filed. The AAO stated that since the director issued the decision via facsimile, the appeal was due 30 days after the decision was faxed to the petitioner, rather than the 33 days allocated for decisions sent to the petitioner via regular mail. The AAO withdraws that decision since the petitioner did not submit a preferred method of communication on Form I-907, Request for Premium Processing Service. The petitioner has established that its appeal was timely filed in accordance with the regulation at 8 C.F.R. § 103.5a(b).

The regulation at 8 C.F.R. § 214.2(l)(3) further states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily 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.

The nonimmigrant petition was filed on March 30, 2004. The Form I-129 indicates that the beneficiary will be employed in the position of reservation manager for the petitioner. In support of the petition, the petitioner submitted the following description of the job duties the beneficiary will perform for the United States company:

Reservation:

- Communication with resort’s clients (answering inquiries of availability, rate, customs of the area, and other information)
- Form a contract rate with agent, prepare the promotional materials
- Issuing reservations, quote rate of stays, settling payments of individual booking as well as group bookings.
- Communicating with [the foreign company’s] reservation staff on reservations status, accommodating clients’ special request, room assignment, etc.
- Maintain the reservation system and communication between US reservation office and reservation staff in Indonesia
- Make monthly occupancy report
- Approximate time spent for this job: 40%

Accounting Supervision:

- Overseeing the weekly cash flow of [the foreign company]
- Overseeing Monthly Financial Report (Cash flow Statement, Income Statement, Budget of [the foreign company])
- Maintain the accounting system for [the foreign company] in US
- Approximate time spent for this job: 25%

Supervision:

- Overseeing resort’s reservation staff (room assignment, booking status, etc)

- Overseeing resort's accounting staff (for weekly and monthly accounting report).
- Supervising one employee in the U.S. Office
- Approximate time spent for this job: 25%

Other:

- Assisting US management in the communication with Indonesian's [sic] government, Indonesian's [sic] Tax consultant and Indonesian employee
- Translating documents (Indonesian Labor Law, tax law, tourism law and other policy) into English for US management.
- Communicating with Resort's General Management and assisting GM on the information of Indonesian labor law, etc...
- [The beneficiary's] knowledge of the custom and the area (Domestic flight routes, local transportation, information of other local services in the area, etc) is very helpful in getting the information faster and more efficiently to our customer.
- [The beneficiary's] knowledge of the law and the procedures of the Labor Board, Tourism Board, and the local government procedure helps the US management.
- Approximate time spent for this job: 10%

In addition, the petitioner submitted a list of employees supervised by the beneficiary. The list indicates that the beneficiary supervises six individuals employed by the foreign company and one individual employed by the U.S. company. The petitioner stated that the beneficiary supervises the following six positions located at the foreign company: the assistant manager of administration department, the head of human resources, the accounts payable clerk, the account receivable clerk, the inventory clerk, and the reservation department clerk. In addition, the petitioner indicated that the beneficiary supervises the part-time accounts receivable/payable clerk located at the U.S. company. The petitioner also submitted an organizational chart for the U.S. company which indicates that the director of operations supervises the beneficiary as reservations manager, who in turn supervises the account payable employee. The organizational chart of the U.S. company does not indicate the six employees listed as subordinates of the beneficiary at the foreign company.

The petitioner also submitted the U.S. company's IRS Form 1120, U.S. Corporation Income Tax Return, for 2002. The document indicates that in 2002, the petitioner did not pay any wages or salaries. The tax return indicated costs in 2002 in the amount of \$340,990.00 for subcontractors.

The director determined that the petitioner submitted insufficient evidence to process the petition. On April 6, 2004, the director requested that the petitioner submit the following documentation: (1) a copy of the foreign company's organizational chart, including the name, job title, job duties, educational level and annual salary of all employees supervised by the beneficiary; (2) the United States company's organizational chart, including the name, job title, job duties, educational level and annual salary of all employees supervised by the beneficiary; (3) a more detailed description of the beneficiary's duties in the United States; (4) copies of the U.S. company's payroll summary, Form W-2 and W-3 evidencing wages paid to employees; and, (5) copies of the U.S. company's California Forms DE-6, Quarterly Wage and Withholding Reports, for the last four quarters.

The petitioner submitted a response to the director's request for additional evidence on June 29, 2004. The petitioner resubmitted the job description for the beneficiary's position in the U.S. company, however, the allocated time spent on each duty was slightly changed. In addition, the petitioner submitted the organizational chart for the foreign company. The chart indicates that the beneficiary is supervised by two directors, and the director of operations. The chart also indicates that the beneficiary will supervise the reservations department including the assistant manager of reservation department and the reservations clerk, and she will supervise the accounting department including the account receivable employee and the account payable employee. The petitioner also submitted a list of staff supervised by the beneficiary which differs from the list previously submitted as discussed above. The new list indicates that the beneficiary will supervise four employees rather than six, located at the foreign company: the assistant manager of reservation department, the accounts payable clerk, the account receivable clerk and the reservation department clerk. The new list also indicates that the beneficiary will not supervise any employees in the United States.

The petitioner also submitted the Form W-2 for 2003 issued to the beneficiary. In addition, the petitioner submitted the company's California Form DE-6, Quarterly Wage and Withholding Reports for the quarters ended in March 2003, September 2003 and December 2003. The number of employees hired by the U.S. company during these quarters ranged from 9 to 0, and was six at the end of 2003. The petitioner did not submit its Form DE-6 for the first quarter of 2004.

The director denied the petition on July 13, 2004 on the ground that the petitioner did not establish that the beneficiary will be employed in a primarily managerial or executive capacity. The director observed that since the beneficiary will only supervise employees located at the foreign company, the beneficiary does not qualify for L-1A classification. In addition, since the beneficiary will not supervise any employees at the United States company, the director concluded it is likely that the beneficiary will perform the duties required for the functions and day-to-day operations of the business, rather than oversee the functions and/or the personnel that perform those duties.

On appeal, counsel for the petitioner asserts that the beneficiary is employed in a primarily managerial capacity because she manages other managerial and professional employees, and because she manages an essential function of the U.S. company. Counsel explains that the effects of September 11, 2001 created a decrease in tourism in Indonesia which greatly affected the foreign company and consequently the U.S. company. In effect, the petitioner laid off several employees from the foreign company and employees of the reservation department and thus the beneficiary did not supervise employees for a period of time, and performed several administrative and non-qualifying tasks. Counsel also explains that the foreign company is doing much better and the petitioner has rehired several of the employees. Counsel for the petitioner asserts that the U.S. company and the foreign company employ a professional staff who relieves the beneficiary from performing non-qualifying duties. Counsel also states that the beneficiary has specialized knowledge of the foreign company and therefore qualifies for L-1 classification.

On appeal, the petitioner submits a list of employees in February 2004, March 2004, May 2004, and June 2004. The list clearly identifies the employees that were laid off during the foreign company's slow period, and the individuals that were later rehired on a part-time in June 2004. The list does not indicate if these employees are hired by the foreign company or the U.S. company. In addition, the list indicates that the beneficiary's position with the company changed from reservations manager to director of administration in May 2004. The petitioner also submitted a revised job description for the position

offered to the beneficiary, and revised organizational charts for both the U.S. company and the foreign company. Since the revised documents submitted on appeal indicate the staffing and job description of the U.S. company and the foreign company after the date the instant petition was filed, the new information will not be considered on appeal. On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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).

Counsel's assertions on appeal are not persuasive. Upon review of the petition and evidence, the petitioner has not established that the beneficiary would be employed in a managerial or executive capacity. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Here, while the beneficiary evidently exercises some discretion over the day-to-day operations of the reservations department, the petitioner's description of her proposed duties suggests that the beneficiary's actual duties as of the date of filing were and would continue to be providing the services of the business.

The beneficiary's proposed job description includes vague duties such as the beneficiary will "maintain the reservation system and communication between US reservation office and reservation staff in Indonesia"; "overseeing the weekly cash flow of [the foreign company]"; "assisting US management in the communication with Indonesian's government, Indonesian's Tax consultant and Indonesian employee"; and "communicating with Resort's General Management and assisting GM on the information of Indonesian labor law, etc..." Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. The actual duties themselves will 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 response to the director's request for evidence, the petitioner resubmitted the same job description for the beneficiary's position with a few changes in the time spent on each duty. According to the job description, the petitioner stated that the beneficiary will spend 65% of her time in reservation operations such as "communicating with resort's client (answering inquiries of availability, rate, customs of the area of the resort location, informing client of Indonesia visa policy and other information);" "form a contract rate with agent, prepare the promotional material and deliver them to travel agencies;" and "issuing reservations." Without additional clarification from the petitioner regarding the managerial or executive duties involved, the AAO cannot distinguish this vague responsibility from routine administrative tasks. If the beneficiary is in fact handling the day-to-day reservation operations, these duties have not been shown to be managerial or executive in nature. 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 Intn'l.*, 19 I&N Dec. 593, 604 (Comm. 1988).

The job description also includes several non-qualifying duties such as the beneficiary will be responsible for “communication with resort’s clients (answering inquiries of availability, rate, customs of the area, and other information); “form a contract rate with agent, prepare the promotional materials;” “issuing reservations, quote rate of stays, settling payments of individual booking as well as group bookings;” “communicating with [the foreign company’s] reservation staff on reservations status, accommodating clients’ special request, room assignment, etc.”; “make monthly occupancy report”; “maintain the accounting system for [the foreign company] in US”; and “translating documents (Indonesian Labor Law, tax law, tourism law and other policy) into English for US management.” Since the petitioner has not confirmed that the beneficiary will supervise a support staff in the reservations department who are in charge of accounting, negotiations, marketing, sales and or financial development, it appears that the beneficiary will be providing the services of accounting, sales and market operations, and preparing financial statements and budgets, rather than directing such activities through subordinate employees. Based on the current record, the AAO is unable to determine whether the claimed managerial duties constitute the majority of the beneficiary's duties, or whether the beneficiary primarily performs non-managerial administrative or operational duties. The petitioner's description of the beneficiary's job duties does not establish what proportion of the beneficiary's duties is managerial in nature, and what proportion is actually non-managerial. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

The record also contains several inconsistencies regarding the subordinate employees the beneficiary will supervise. For example, the initial petition indicated that the beneficiary will supervise six individuals employed by the foreign company and one individual employed by the U.S. company. However, in the response to the director’s request for evidence, the petitioner submitted a new list of employees the beneficiary will supervise which indicated that the beneficiary will not supervise any employees in the United States. It is incumbent upon the petitioner to resolve any 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).

Although petitioner states that the beneficiary will supervise a subordinate staff located at the foreign company, the petitioner has neither presented evidence to document the existence of these employees nor identified the services these individuals provide. Additionally, the petitioner has not explained how the services of the employees at the foreign company obviate the need for the beneficiary to primarily conduct the petitioner's business. Without documentary evidence to support its statements, the petitioner does not meet its burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998).

The petitioner’s description of the beneficiary’s duties cannot be read or considered in the abstract, rather the AAO must determine based on a totality of the record whether the description of the beneficiary’s duties represents a credible perspective of the beneficiary’s role within the organizational hierarchy. The record does not demonstrate that the beneficiary has a sufficient number of employees in the United States employed full-time who could perform the non-managerial tasks associated with operating the reservations department for an international business. The petitioner’s general description of the

beneficiary's duties and the lack of sufficient personnel to perform these tasks make it impossible to conclude that the beneficiary would plausibly perform primarily managerial or executive duties.

Furthermore, on appeal, counsel for the petitioner indicates that the beneficiary manages an essential function for the organization. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Boyang, Ltd. v. I.N.S.*, 67 F.3d 305 (Table), 1995 WL 576839 (9th Cir, 1995)(citing *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988)). In this matter, the petitioner has not provided evidence that the beneficiary manages an essential function.

In addition, on appeal, counsel for the petitioner asserts that the beneficiary qualifies as an L-1 employee because she has "specialized knowledge of the [foreign company] and its organization." On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). 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).

Counsel's request to amend the petition on appeal is not properly before the AAO. The regulations at 8 C.F.R. § 214.2(l)(7)(i)(C) state:

The petitioner shall file an amended petition, with fee, at the service center where the original petition was filed to reflect changes in approved relationships, additional qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the Act.

The request to reconsider the original petition on appeal as a petition for L-1B specialized knowledge classification is, therefore, rejected.

As discussed above, the totality of the record supports a conclusion that the beneficiary would be required to perform primarily non-qualifying duties associated with the petitioner's day-to-day functions, as the petitioner has not identified sufficient staff within the petitioner's organization, subordinate to the beneficiary, who would relieve the beneficiary from performing routine duties inherent to operating the reservations operations. The fact that the beneficiary has been given a managerial job title and general

oversight authority over the business is insufficient to elevate her position to that of a "function manager" as contemplated by the governing statute and regulations. Again, the actual duties reveal the true nature of employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1103.

Based upon the lack of a comprehensive job description, and the lack of evidence of the company's staffing levels, it cannot be concluded that the beneficiary will be employed by the U.S. company in a managerial or executive capacity. Based on the foregoing discussion, the appeal will be dismissed.

The prior approval of the nonimmigrant petition filed by the petitioner on behalf of this beneficiary does not preclude CIS from denying an extension of the original visa based on a reassessment of the petitioner's or beneficiary's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004).

Furthermore, if the previous nonimmigrant petitions were approved based on the same unsupported and contradictory 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 CIS 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).

In addition, the AAO's authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001). Based upon the lack of required evidence in the current record, and due to the petitioner's failure to submit requested evidence, the AAO finds that the director was justified in departing from the previous petition approvals and denying the instant request for an extension of the beneficiary's status.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for the decision. 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 appeal will be dismissed.

ORDER: The appeal is dismissed.