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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

H2

[redacted]

FILE: [redacted] Office: MIAMI (WEST PALM BEACH) Date: NOV 17 2010

IN RE: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

[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. The fee for a Form I-290B is currently $585, but will increase to $630 on November 23, 2010. Any appeal or motion filed on or after November 23, 2010 must be filed with the $630 fee. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Michael Shumway

for Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the District Director, Miami Florida, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Mexico who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having committed a crime involving moral turpitude. The applicant seeks a waiver of inadmissibility pursuant to section 212(h) of the Act, 8 U.S.C. § 1182(h). The director concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on a qualifying relative, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, counsel indicates that the applicant was convicted of battery, breach of the peace, and driving under the influence and that only his grand theft conviction requires a waiver application. Counsel asserts that too much weight was placed on the fact that the applicant's lawful permanent resident wife and U.S. citizen stepdaughter were the victims in the battery conviction. Counsel maintains that Florida does not have a separate domestic battery statute, and that conviction records are often notated as "domestic" even though the crime actually pled to is simple battery. Counsel further contends that simple battery is not a crime involving moral turpitude. Counsel avers that the applicant's wife and stepdaughter have reconciled with the applicant and that they will experience extreme hardship if the wavier application were denied. According to counsel, the applicant's wife and U.S. citizen children will lose their only source of income, which is their trucking business, if the waiver is denied. Counsel declares that without the applicant, the applicant's spouse will lose her home and will not be able to pay for their vehicles.

Counsel states that if the applicant's wife returned to Mexico, she would have to petition the family court in order to take her youngest child from her first marriage with her. Counsel indicates that the applicant's three children and three stepchildren are entrenched in the American way of life and have spent their entire lives in the United States. He avers that their education and opportunities will be affected if they live in Mexico, and that they will be confronted with poverty. Counsel states that if the applicant returns to Mexico he will not earn enough money to send to his wife, and if the family moved to Mexico their welfare and comfort will be destroyed. Counsel avers that the applicant and his wife have been married since April 25, 1995 and denial of the waiver application will destroy their long-time family relationship.

We will first address the finding of inadmissibility. Section 212(a)(2)(A) of the Act states, in pertinent parts:

> (i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of –
>
> (I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

The Board of Immigration Appeals (Board) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

> [M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....
>
> In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General articulated a new methodology for determining whether a conviction is a crime involving moral turpitude where the language of the criminal statute in question encompasses conduct involving moral turpitude and conduct that does not. First, in evaluating whether an offense is one that categorically involves moral turpitude, an adjudicator reviews the criminal statute at issue to determine if there is a "realistic probability, not a theoretical possibility," that the statute would be applied to reach conduct that does not involve moral turpitude. *Id.* at 698 (citing *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). A realistic probability exists where, at the time of the proceeding, an "actual (as opposed to hypothetical) case exists in which the relevant criminal statute was applied to conduct that did not involve moral turpitude. If the statute has not been so applied in any case (including the alien's own case), the adjudicator can reasonably conclude that all convictions under the statute may categorically be treated as ones involving moral turpitude." *Id.* at 697, 708 (citing *Duenas-Alvarez*, 549 U.S. at 193).

However, if a case exists in which the criminal statute in question was applied to conduct that does not involve moral turpitude, "the adjudicator cannot categorically treat all convictions under that statute as convictions for crimes that involve moral turpitude." 24 I&N Dec. at 697 (citing *Duenas-Alvarez*, 549 U.S. at 185-88, 193). An adjudicator then engages in a second-stage inquiry in which the adjudicator reviews the "record of conviction" to determine if the conviction was based on conduct involving moral turpitude. *Id.* at 698-699, 703-704, 708. The record of conviction consists of documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. *Id.* at 698, 704, 708.

If review of the record of conviction is inconclusive, an adjudicator then considers any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. 24 I&N Dec. at 699-704, 708-709. However, this "does not mean that the parties would be free to

present any and all evidence bearing on an alien's conduct leading to the conviction. (citation omitted). The sole purpose of the inquiry is to ascertain the nature of the prior conviction; it is not an invitation to relitigate the conviction itself." *Id.* at 703.

The record reflects the following convictions in Florida.

Arrest date	Crime/Sentence
• 06/25/1999	Misdemeanor battery (domestic), Florida Statutes § 784.03 Guilty, suspended imposition of sentence, one year probation, no contact with victim without her written consent, attend and complete Batterer's Intervention Program
• 09/19/1998	Grand theft, Florida Statutes § 812.014 Convicted, adjudication of guilt withheld, two years probation
• 05/03/1998	Breach of peace, Florida Statutes § 877.03 Pled nolo contendere, adjudication withheld Probation

The applicant was convicted of battery (domestic) in violation of Fl. Stat. § 784.03. That statute provides, in pertinent parts:

> (1)(a) The offense of battery occurs when a person:
>
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
>
> 2. Intentionally causes bodily harm to another person.
>
> (b) Except as provided in subsection (2), a person who commits battery commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> . . .

Simple assault and battery offenses generally do not involve moral turpitude; however, that determination can be altered if there is an aggravating factor such as the infliction of bodily harm upon persons whom society views as deserving of special protection, such as children or domestic partners or intentional serious bodily injury to the victim. *In re Sanudo*, 23 I. & N. Dec. 968, 972 (BIA 2006). Fl. Stat. § 784.03 is violated by "an actual and intentional touching or striking of another person against the will of the other person; or intentionally causing bodily harm to an individual." Thus, based solely on its terms, Fl. Stat. § 784.03 encompasses (hypothetically) conduct that involves moral turpitude and conduct that does not.

In accordance with *Silva-Trevino*, the AAO must determine if an actual case exists in which Fl. Stat. § 784.03 was applied to conduct that did not involve moral turpitude. We are aware of a prior case in which Fl. Stat. § 784.03 has been applied to conduct not involving moral turpitude. In *Clark v. State*, the court noted, "under the battery statute the degree of injury caused by an intentional touching is not relevant and '*any* intentional touching of another person against such person's will is technically a criminal battery.'" 746 So.2d 1237, 1239 (Fla. 1st Dist. App. 1999)(citation omitted). The court further noted, "under section 784.03(1)(a) 'there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body.'" 746 So.2d 1237, 1239-40.

Therefore, we cannot find that all of the offenses described in Fl. Stat. § 784.03 are categorically crimes involving moral turpitude. The AAO must therefore review the entire record, including the record of conviction and, if necessary, other relevant evidence, to determine if the applicant's conviction under Fl. Stat. § 784.03 was for morally turpitudinous conduct. The record contains a police report related to the applicant's arrest for this offense. The narrative of the police report dated June 25, 1999 indicates the following:

> [redacted] told me her husband . . . came home from work while she was in the shower. When she came out of the shower, [redacted] told her to get out of the house he did not want her anymore. [redacted] told [redacted] she did not know it was just his house, and [redacted] said he did not care just get out, and he pushed her towards the door.
>
> [redacted] told me her daughter [redacted] [sic] [redacted] came in the room and asked [redacted] why her pushed her mother. [redacted] told her to shut up and he slapped her in the face. At that time the Sheriff's Office was called.
>
> [redacted] told me that on 06/22/99 the Hendry County Sheriff's Office was called to the house because [redacted] was hitting her. [redacted] told me she told the Deputies that [redacted] did not hit her because she was scared [redacted] would hit her again.
>
> [redacted] told me [redacted] had hit her several times with a long cord on 06/22/99 and it left several bruises on her. [redacted] was arrested for Battery (Domestic). On 06/25/99 [redacted] had [redacted] served with an injunction for protection against domestic violence.

As previously discussed, the Board in *In re Sanudo* determined that bodily harm upon individuals deserving of special protection such as a child, domestic partner, or a peace officer, constitutes morally turpitudinous conduct. 23 I&N Dec. 968, 971-72 (BIA 2006). The police report reflects that the applicant was arrested for a battery related to domestic violence. While the applicant did not submit his entire criminal record regarding the battery (domestic) conviction, we find it reasonable

to conclude that the circumstances described in the narrative of the events on June 22 (applicant's hitting his wife with a long cord, which left several bruises), and on June 25 (applicant's pushing his wife and slapping the face of his step-daughter), reflect the conduct of which the applicant was convicted. Consequently, in consideration of *In re Sanudo*, we find the applicant's conviction renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

The applicant was convicted of grand theft conviction under Fl. Stat. § 812.014. That statute provides, in pertinent parts that:

> (1) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:
>
> (a) Deprive the other person of a right to the property or a benefit from the property.
>
> (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.
>
> . . .

In the instant case, the statute under which the applicant was convicted, Fl. Stat. § 812.014, involves both temporary and permanent takings. By its terms Fl. Stat. § 812.014 can be violated by knowingly obtaining or using the property of another with intent to, either temporarily or permanently, deprive an individual of his or her property or appropriate the property to his or her own use. The Board has determined that to constitute a crime involving moral turpitude, a theft offense must require the intent to permanently take another person's property. *See Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973) ("Ordinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended."). Therefore, the AAO cannot find that a violation of Fl. Stat. § 812.014 is categorically a crime involving moral turpitude.

In the second-stage inquiry, which involves review of the "record of conviction" to determine if the conviction was based on morally turpitudinous conduct, the postsentence investigation shows that the applicant filled his truck with building material of "2/4's, roofing paper, nails in boxes and also tar paper," which he had taken from the site of a house under construction. The applicant stated that "he did take the building material so he could build an addition on to his home." The applicant further stated that "he did no [sic] know whose house it was that he had taken the supplies from." Based on the direct evidence as to what the applicant's intent was at the time he took the building materials, we find it reasonable to conclude that the circumstances surrounding the offense indicate that his intent was for a permanent taking, which renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act.

Since the applicant's battery (domestic violence) and grand theft convictions involve moral turpitude, which render him inadmissible under section 212(a)(2)(A)(i)(I) of the Act, we need not

determine whether his breach of the peace and disorderly conduct conviction contrary to Fl. Stat. § 877.03 involves moral turpitude.

The waiver for inadmissibility under section 212(a)(2)(B) of the Act is found under section 212(h) of the Act. That section provides, in pertinent part:

> (h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I) . . . of subsection (a)(2) . . . if -
>
> . . .
>
> (B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien . . .

A section 212(h) waiver of the bar to admission resulting from violation of section 212(a)(2)(A)(i)(I) of the Act is dependent first upon a showing that the bar imposes an extreme hardship to the citizen or lawfully resident spouse, parent, son, or daughter of the applicant. Hardship to the applicant is not a consideration under the statute and will be considered only to the extent that it results in hardship to a qualifying relative. The qualifying relatives here are the applicant's U.S. citizen spouse and his children and step-children, who are all U.S. citizens. If extreme hardship to the qualifying relative is established, the Secretary then assesses whether an exercise of discretion is warranted. *See Matter of Mendez-Moralez,* 21 I&N Dec. 296 (BIA 1996).

As a qualifying relative is not required to depart the United States as a consequence of an applicant's inadmissibility, two distinct factual scenarios are possible should a waiver application be denied: either the qualifying relative will join the applicant to reside abroad or the qualifying relative will remain in the United States. Ascertaining the actual course of action to be taken is difficult, and it is complicated by the fact that an applicant may easily assert a plan for the qualifying relative to relocate abroad or to remain in the United States depending on which scenario presents the greatest prospective hardship, even though no intention exists to carry out the alleged plan in reality. *Cf. Matter of Ige,* 20 I&N Dec. 880, 885 (BIA 1994) (addressing separation of minor child from both parents applying for suspension of deportation). Thus, we interpret the statutory language of the various waiver provisions in section 212 of the Act to require an applicant to establish extreme hardship to his or her qualifying relative(s) under both possible scenarios. To endure the hardship of separation when extreme hardship could be avoided by joining the applicant abroad, or to endure the hardship of relocation when extreme hardship could be avoided by remaining in the United States, is a matter of choice and not the result of removal or inadmissibility. As the Board stated in *Matter of Ige*:

> [W]e consider the critical issue . . . to be whether a child would suffer extreme hardship if he accompanied his parent abroad. If, as in this case, no hardship would ensue, then the fact that the child might face hardship if left in the United States would be the result of parental choice, not the parent's deportation.

Id. See also Matter of Pilch, 21 I&N Dec. 627, 632-33 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez,* 22 I&N Dec. 560, 565-66 (BIA 1999), the Board provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The Board added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The Board has also held that the common or typical results of deportation, removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. at 631-32; *Matter of Ige*, 20 I&N Dec. at 883; *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the Board has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator "must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation." *Id.*

We observe that the actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying

relative experiences as a result of aggregated individual hardships. *See, e.g., In re Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate).

Further, family separation has been found to be a common result of inadmissibility or removal in some cases. *See Matter of Shaughnessy*, 12 I&N Dec. at 813. Nevertheless, family ties are to be considered in analyzing hardship. *See Matter of Cervantes-Gonzalez,* 22 I&N Dec. at 565-66. The question of whether family separation is the ordinary result of inadmissibility or removal may depend on the type of familial relationship considered. For example, in *Matter of Shaughnessy*, the Board considered the scenario of parents being separated from their soon-to-be adult son, finding that this separation would not result in extreme hardship to the parents. *Id.* at 811-12; *see also U.S. v. Arrieta*, 224 F.3d 1076, 1082 (9th Cir. 2000) ("Mr. Arrieta was not a spouse, but a son and brother. It was evident from the record that the effect of the deportation order would be separation rather than relocation."). In *Matter of Cervantes-Gonzalez*, the Board considered the scenario of the respondent's spouse accompanying him to Mexico, finding that she would not experience extreme hardship from losing "physical proximity to her family" in the United States. 22 I&N Dec. at 566-67.

The decision in *Cervantes-Gonzalez* reflects the norm that spouses reside with one another and otherwise establish a life together, such that separating from one another is likely to result in substantial hardship. It is common for both spouses to relocate abroad if one of them is not allowed to stay in the United States, which typically results in separation from other family members living in the United States. Other decisions reflect the expectation that minor children will remain with their parents, upon whom they usually depend for financial and emotional support. *See, e.g., Matter of Ige*, 20 I&N Dec. at 886 ("[I]t is generally preferable for children to be brought up by their parents."). Therefore, the most important single hardship factor may be separation, particularly where spouses and minor children are concerned. *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS,* 712 F.2d 401, 403 (9th Cir. 1983)); *Cerrillo-Perez*, 809 F.2d at 1422.

Regardless of the type of familial relationship involved, the hardship resulting from family separation is based on the actual impact of separation on an applicant, and all hardships must be considered in determining whether the combination of hardships takes the case beyond the consequences ordinarily associated with removal or inadmissibility. *Matter of O-J-O-*, 21 I&N Dec. at 383. Indeed, the specific facts of a case may dictate that even the separation of a spouse and children from an applicant does not constitute extreme hardship. In *Matter of Ngai*, for instance, the Board did not find extreme hardship because the claims of hardship conflicted with evidence in the record and because the applicant and his spouse had been voluntarily separated from one another for 28 years. 19 I&N Dec. at 247. Nevertheless, though we require an applicant to show that a qualifying relative would experience extreme hardship both in the event of relocation and in the event of separation, in analyzing the latter scenario, we give considerable, if not predominant, weight to the hardship of separation itself, particularly in cases involving the separation of spouses from one another and/or minor children from a parent. *Salcido-Salcido*, 138 F.3d at 1293.

In rendering this decision, the AAO will consider all of the evidence in the record such as letters, birth certificates, a divorce decree, income tax records, business records, loan records, a vehicle purchase agreement, banking account information, letters, and other documentation.

As to hardship to a qualifying relative as a consequence of remaining in the United States without the applicant, the birth certificates in the record reflect that the applicant's children were born on March 15, 2005, December 11, 1994, November 14, 1996; and his stepchildren were born on February 27, 1988, May 26, 1989, and February 16, 1986. The letter from the applicant dated May 15, 2006 states that he is the president and owner of [redacted] Inc., and that his wife earns $500 with the company. Counsel indicates on appeal that the applicant's wife earns $500 every week helping her husband run the family business. Counsel asserts that the applicant has reconciled his relationship with his wife and stepdaughter and that they will experience extreme hardship if he were removed from the United States.

As to the hardship factors asserted in the instant case, that of the financial and emotional impact to the applicant's wife, children and stepchildren as a result of separation from the applicant, even though counsel contends on appeal that the applicant's business provides the sole source of income for his family, there is no documentation in the record in support of this contention. The income tax records are for 2003 and 2004 and they do not show any income of the applicant. Even though counsel maintains that the applicant and his wife and daughter have reconciled, and that the applicant's conviction occurred in 1999, we note that the record reflects that an injunction was issued on June 26, 1999 that prohibited the applicant from any having contact with his wife. The record does not reflect the period of time in which the injunction remained in force. Further, the police report conveys that on more than one occasion the applicant struck a member of his family, and that the applicant's wife feared that he would hit her if she complained of domestic abuse to the police. Consequently, we cannot find that based on the evidence in the record this is a familial relationship in which the applicant's wife, children, and stepchildren will endure extreme hardship as a result of separation from the applicant. In view of the injunction for domestic violence, and the lack of evidence demonstrating financial hardship to the applicant's family members, we cannot find that when all of the hardship factors are combined they establish extreme hardship to the applicant's qualifying relatives.

Counsel asserts that the applicant's children and stepchildren have spent their entire lives in the United States, that their education and opportunities will be impacted if they live in Mexico, and that they will be confronted with poverty. In view of the applicant's history of domestic violence, we find that the applicant's wife, children, and stepchildren would experience extreme hardship if they were to join the applicant to live in Mexico.

The applicant has not demonstrated extreme hardship should his wife, children, and stepchildren remain in the United States without him. Based upon the record before the AAO, the applicant in this case fails to establish extreme hardship to a qualifying family member for purposes of relief under section 212(h) of the Act.

Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing

whether he merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of proving eligibility remains entirely with the applicant. *See* Section 291 of the Act, 8 U.S.C. § 1361. The applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.