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U.S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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**U.S. Citizenship
and Immigration
Services**

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FILE:

LIN 09 048 51123

Office: NEBRASKA SERVICE CENTER

Date: **APR 15 2010**

IN RE:

Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as an Alien of Extraordinary Ability Pursuant to Section 203(b)(1)(A) of the Immigration and Nationality Act; 8 U.S.C. § 1153(b)(1)(A)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, on June 30, 2009, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner seeks classification as an employment-based immigrant pursuant to section 203(b)(1)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(A), as an alien of extraordinary ability as a biomedical researcher. The director determined that the petitioner had not established the requisite extraordinary ability and failed to submit extensive documentation of his sustained national or international acclaim.

Congress set a very high benchmark for aliens of extraordinary ability by requiring through the statute that the petitioner demonstrate “sustained national or international acclaim” and present “extensive documentation” of his or her achievements. *See* section 203(b)(1)(A)(i) of the Act, 8 U.S.C. §§ 1153(b)(1)(A)(i), and 8 C.F.R. § 204.5(h)(3). The implementing regulation at 8 C.F.R. § 204.5(h)(3) states that an alien can establish sustained national or international acclaim through evidence of a one-time achievement of a major, internationally recognized award. Absent the receipt of such an award, the regulation outlines ten criteria that call for the submission of specific objective evidence. 8 C.F.R. §§ 204.5(h)(3)(i) through (x). Through the submission of required initial evidence, at least three of the ten regulatory criteria must be satisfied for an alien to establish the basic eligibility requirements.

On appeal, counsel claims that he meets at least three of the regulatory criteria at 8 C.F.R. § 204.5(h)(3).

I. Law

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

(1) Priority workers. -- Visas shall first be made available ... to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

(A) Aliens with extraordinary ability. -- An alien is described in this subparagraph if --

(i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,

(ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and

(iii) the alien's entry into the United States will substantially benefit prospectively the United States.

U.S. Citizenship and Immigration Services (USCIS) and legacy Immigration and Naturalization Service (INS) have consistently recognized that Congress intended to set a very high standard for individuals seeking immigrant visas as aliens of extraordinary ability. See H.R. 723 101st Cong., 2d Sess. 59 (1990); 56 Fed. Reg. 60897, 60898-99 (Nov. 29, 1991). The term "extraordinary ability" refers only to those individuals in that small percentage who have risen to the very top of the field of endeavor. *Id.* and 8 C.F.R. § 204.5(h)(2).

The regulation at 8 C.F.R. § 204.5(h)(3) requires that an alien demonstrate his or her sustained acclaim and the recognition of his or her achievements in the field. Such acclaim and achievements must be established either through evidence of a one-time achievement (that is, a major, international recognized award) or through meeting at least three of the following ten criteria.

- (i) Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor;
- (ii) Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields;
- (iii) Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation;
- (iv) Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought;
- (v) Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field;
- (vi) Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media;
- (vii) Evidence of the display of the alien's work in the field at artistic exhibitions or showcases;
- (viii) Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation;

(ix) Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field; or

(x) Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk, or video sales.

In 2010, the U.S. Court of Appeals for the Ninth Circuit (Ninth Circuit) reviewed the denial of a petition filed under this classification. *Kazarian v. USCIS*, 2010 WL 725317 (9th Cir. March 4, 2010). Although the court upheld the AAO's decision to deny the petition, the court took issue with the AAO's evaluation of evidence submitted to meet a given evidentiary criterion.¹ With respect to the criteria at 8 C.F.R. §§ 204.5(h)(3)(iv) and (vi), the court concluded that while USCIS may have raised legitimate concerns about the significance of the evidence submitted to meet those two criteria, those concerns should have been raised in a subsequent "final merits determination." *Id.*

The court stated that the AAO's evaluation rested on an improper understanding of the regulations. Instead of parsing the significance of evidence as part of the initial inquiry, the court stated that "the proper procedure is to count the types of evidence provided (which the AAO did)," and if the petitioner failed to submit sufficient evidence, "the proper conclusion is that the applicant has failed to satisfy the regulatory requirement of three types of evidence (as the AAO concluded)." *Id.* at *6 (citing to 8 C.F.R. § 204.5(h)(3)). The court also explained the "final merits determination" as the corollary to this procedure:

If a petitioner has submitted the requisite evidence, USCIS determines whether the evidence demonstrates both a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2), and "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). Only aliens whose achievements have garnered "sustained national or international acclaim" are eligible for an "extraordinary ability" visa. 8 U.S.C. § 1153(b)(1)(A)(i).

Id. at *3.

Thus, *Kazarian* sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. In reviewing Service Center decisions, the AAO will apply the test set forth in *Kazarian*. As the AAO maintains *de novo* review, the AAO will conduct a new analysis if the director reached his or her conclusion by using a one-step analysis rather than the two-step analysis dictated by the *Kazarian* court. See *Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

¹ Specifically, the court stated that the AAO had unilaterally imposed novel, substantive, or evidentiary requirements beyond those set forth in the regulations at 8 C.F.R. § 204.5(h)(3)(iv) and 8 C.F.R. § 204.5(h)(3)(vi).

II. Analysis

A. Evidentiary Criteria

The petitioner has submitted evidence pertaining to the following criteria under 8 C.F.R. § 204.5(h)(3).²

Documentation of the alien's receipt of lesser nationally or internationally recognized prizes or awards for excellence in the field of endeavor.

A review of the director's decision reflects that he found the petitioner's submission of fellowships insufficient to establish eligibility under the regulation at 8 C.F.R. § 204.5(h)(3)(i). On appeal, the petitioner did not address this criterion or contest the decision of the director.

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion based on the following submitted documentation:

1. The Damon Runyon Cancer Research Foundation Postdoctoral Fellowship Award for "the role of IKKbeta in tobacco smoking-induced lung carcinogenesis" on June 2, 2006;
2. The World Health Organization Fellowship Award "to study health promotion and treatment" on June 10, 1999;
3. The American Association for Cancer Research (AACR) Scholar-in-Training for "financial support for predoctoral students, medical students and residents, postdoctoral and clinical fellows, or the equivalent" in 2005;
4. Second Place at the Gulf-Coast Society of Toxicology (GCSOT) for the Graduate Student Platform Presentations for *Thiazolidinediones, a Class of Insulin Sensitizers, Suppress IGF-1 Tumor Promoting Activity* in 2005;
5. First Place at the Second Annual Graduate Student Retreat, the University of Texas M.D. Anderson Cancer Center for "an outstanding presentation" on September 17, 2004;
6. Sixth Place for the Science and Technique Achievement Award by the Education Committee, Henan Province, China in September 2001;
7. An offer as a postdoctoral scholar-employee at the University of California on November 28, 2005;
8. An offer for a position as a postdoctoral fellowship research associate at the Duke University Medical Center on April 8, 2005; and
9. An offer for a postdoctoral position at the University of Texas M.D. Anderson Cancer Center on July 15, 2005.

The petitioner failed to submit any documentation regarding any of his fellowship and student awards to demonstrate recognition beyond the presenting organizations to establish that they are

² The petitioner does not claim to meet or submit evidence relating to the criteria not discussed in this decision.

nationally or internationally recognized awards or prizes. Similarly, being offered employment at a university is not considered a prize or award, much less one that is nationally or internationally recognized.

Accordingly, the petitioner failed to establish that he meets this criterion.

Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.

In the director's decision, he found that the petitioner failed to establish that his membership with AACR required outstanding achievements by its members as judged by national or international experts pursuant to the regulation at 8 C.F.R. § 204.5(h)(3)(ii). On appeal, the petitioner did not address this criterion or contest the decision of the director.

At the time of the original filing of the petition, the petitioner claimed eligibility for this criterion based on the following submitted documentation:

1. A letter from [REDACTED] AACR, indicating that the petitioner paid his membership dues for 2008;
2. A copy of the petitioner's AACR membership card indicating that the petitioner is an active member in good standing; and
3. An ACCR membership application.

According to ACCR's membership application, the requirements for active membership are as follows:

Active membership is open to investigators worldwide who have conducted two years of research resulting in articles in peer-reviewed publications relevant to cancer and cancer-related biomedical science, or who have made substantial contributions to cancer research in an administrative or educational capacity. Evidence of patents relevant to cancer research may be provided as qualifications for membership in lieu of peer-reviewed publications. A complete application for Active membership consists of the Official AACR Membership Application Form with all requested information provided including appropriate signatures of two nominators who are existing Active, Emeritus, or Honorary members in good standing; a copy of the candidate's curriculum vitae and bibliography; and payment for the first year's dues in the amount of \$265.

While AACR's membership requirements for an active member provide standards and narrow membership to those who achieve two years of research resulting in peer-reviewed articles or who have made substantial contributions to cancer research, those standards fail to reflect that outstanding achievement is an essential condition for membership. A substantial contribution is not necessarily an outstanding achievement. We are not persuaded that completing two years of

research resulting in articles in peer-reviewed publications or making substantial contributions for a single organization meets the plain language of the regulation. Further, the documentation submitted by the petitioner failed to establish that membership with AACR requires outstanding achievement as judged by recognized national or international experts as required by this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.

The petitioner claims eligibility for this criterion based on the following submitted documentation:

1. A brief blurb entitled, *Avoid a Sticky Situation*, in *Science*, edited by Constance Holden, on June 29, 2007;
2. A review of the website titled *BioRating.com*, from Genetic Engineering & Biotechnology News (GEN)'s website, by [REDACTED], on November 15, 2008; and
3. A review of the website titled *BioRating.com-Your Bio Research Experience*, from GEN's website, by [REDACTED] on December 1, 2008.

In general, in order for published material to meet this criterion, it must be primarily about the petitioner and, as stated in the regulations, be printed in professional or major trade publications or other major media.

In addition, the plain language of the regulation at 8 C.F.R. § 204.5(h)(3)(iii) requires that the published material be *about* the petitioner relating to his work. Compare 8 C.F.R. § 204.5(i)(3)(i)(C) relating to outstanding researchers or professors pursuant to section 203(b)(1)(B) of the Act, which only requires published material about the alien's work.

Regarding item 1, while the brief snippet credits the petitioner with creating a new website, the article is primarily about biorating.com and not primarily *about* the petitioner relating to his work. In fact, besides referring to the petitioner as the website's creator, the short paragraph is entirely a description of the function and use of the website. In this case, we are not persuaded that a single article whose only mention of the petitioner is in crediting him with the creation of a website meets the plain language of this regulatory criterion.

Regarding items 2 and 3, similar to item 1, these reviews are not published material about the petitioner relating to his work. Rather, the reviews relate entirely to critiques of biorating.com. In fact, the petitioner is not even mentioned in any of these reviews. Nevertheless, while the petitioner claims on appeal that GEN is "the most widely read biotechnology publication around

the globe, and has been linked by numerous other scientific websites,” the petitioner bases his claims on information from GEN’s own website. We simply cannot rely solely on information from a website whose purpose is to promote and market itself in order to increase distribution and readership. The petitioner failed to submit any other documentation demonstrating that GEN is a professional or major trade publication or other major media.

Accordingly, the petitioner failed to establish that he meets this criterion.

Evidence of the alien’s original scientific, scholarly, artistic, or business-related contributions of a major significance in the field.

In the director’s decision, he concluded that the petitioner established eligibility for this criterion without specifically addressing the evidence upon which this conclusion was based. Upon review, we find the director’s decision must be withdrawn.

The petitioner bases his eligibility for this criterion upon his published articles, citations to his published works by others, the creation of the website, Biorating.com, and reference letters.

As it relates to the petitioner’s reference to his published articles as evidence to meet this criterion, we note that the regulations contain a separate criterion regarding the authorship of published articles. 8 C.F.R. § 204.5(h)(3)(vi). We will not presume that evidence relating to or even meeting the publication of scholarly articles criterion is presumptive evidence that the petitioner also meets this criterion. To hold otherwise would render meaningless the regulatory requirement that a petitioner meet at least three separate criteria. Therefore, while the petitioner’s articles will not be considered under this criterion they will be addressed under the next criterion.

We are also not persuaded by the petitioner’s claim that his website is a contribution of major significance in his field. According to the brief paragraph attributed to the website in *Science*, the website opened in the fall of 2006, approximately two years prior to the filing of the petition on December 1, 2008. Notably, as of the date of the article on June 29, 2007, while the purpose of the site is to collect experts’ rating of nearly 250 antibodies, “[the petitioner] and his colleagues have provided most of the evaluations.” Therefore, although we do not dispute that this website is an original contribution to his field, the fact that few others besides the petitioner and his colleagues appear to be using and sharing information on the website does not demonstrate that biorating.com has been of major significance to the field as required by the regulation.

Finally, as it relates to the petitioner’s submission of reference letters, we do not find the letters contain sufficient specific information to support a finding that the petitioner has made original contributions of major significance in his field. In this case, the majority of the reference letters are from individuals who have taught, worked with, or otherwise interacted with the petitioner. While such letters can provide important details about the petitioner’s role in various projects, they cannot form the cornerstone of a successful extraordinary ability claim. Further, USCIS may, in its discretion, use as advisory opinion statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, USCIS is

ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters of support from the petitioner's personal contacts is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. Thus, the content of the writers' statements and how they became aware of the petitioner's reputation are important considerations. Even when written by independent experts, letters solicited by an alien in support of an immigration petition are of less weight than preexisting, independent evidence of original contributions of major significance that one would expect of an individual who has sustained national or international acclaim at the very top of the field.

Many of the reference letters refer to the petitioner's articles and awards. However, as indicated above, the regulatory criteria are separate and distinct from one another. As the petitioner's claimed awards and scholarly articles are addressed under separate criteria, we will not further consider this evidence under this criterion.

The remaining information contained in the reference letters, while describing the petitioner's research and generally referring to the importance of his research, fail to provide specific details to explain how his research has currently impacted his field so as to be considered contributions of major significance. We note that although the petitioner has documented citations to his published work which is reflective of the fact that the field has taken some notice of the petitioner's findings (as also indicated in his reference letters), the petitioner has failed to establish how those findings have significantly contributed to his field. For instance, [REDACTED] states that the petitioner's findings are "monumental because *he will be able to control the production of [reactive oxygen species] ROS if these two genes are indeed responsible for the generation of ROS in the liver.*" [REDACTED] goes on to state that the petitioner's research project "is imperative and successful completion . . . *would identify novel molecules for pharmaceutical targeting. . . [emphasis added].*" With regard to the petitioner's second project, [REDACTED] indicates that he expects improvements to be made as a result of the petitioner's research. Given [REDACTED] descriptions in terms of future applicability and determinations that may occur at a later date, it appears that the petitioner's research, while original, is still ongoing and that the findings he has made are not currently being implemented in his field. Similarly, [REDACTED] states that the petitioner "showed for the first time that a class of anti-diabetic drugs . . . has the capability of dramatically inhibiting skin tumor development in a mouse model." Again, while we acknowledge the originality of the petitioner's findings, [REDACTED] does not indicate that anyone is currently applying the petitioner's research findings so as to establish that these findings have already impacted the field in a significant manner. Moreover, [REDACTED] concludes that the finding "may have a huge economic impact." Again, the petitioner's impact and contribution to his field are referred to in terms of future possibilities. Other references such as [REDACTED] and [REDACTED] also point to the significance of the petitioner's findings, noting that the petitioner has helped to provide for "a whole new strategy for skin cancer prevention." Again, however, the references fail to provide specific examples of how his findings are currently being used in the field. Accordingly, while we do not dispute the originality of the petitioner's research and findings, as well as the fact that the field has taken some notice of his work, the

actual present impact of the petitioner's work has not been established. Rather, the petitioner's references appear to speculate about how the petitioner's findings may affect the field at some point in the future.

Without documentation showing how the petitioner's work has impacted his field, that it has been unusually influential, or has otherwise risen to the level of original contributions of major significance, we cannot conclude that he meets this criterion.

Accordingly, the petitioner failed to establish that he meets this criterion.

Evidence of the alien's authorship of scholarly articles in the field, in professional or major trade publications or other major media.

In the director's decision, he concluded that the petitioner established eligibility for this criterion. A review of the record reflects that the petitioner submitted sufficient documentation demonstrating his authorship of scholarly articles in the field, in professional or major trade publications or other major media. Therefore, we agree with the findings of the director.

Accordingly, the petitioner established that he meets the plain language of this criterion.

B. Final Merits Determination

Kazarian sets forth a two-part approach where the evidence is first counted and then, if qualifying under three criteria, considered in the context of a final merits determination. However, as discussed above, the petitioner established eligibility for only two of the criteria, of which three are required under the regulation at 8 C.F.R. § 204.5(h)(3). The petitioner falls far short of meeting any third criterion.

Notwithstanding the above, a final merits determination considers all of the evidence in the context of whether or not the petitioner has demonstrated: (1) a "level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the[ir] field of endeavor," 8 C.F.R. § 204.5(h)(2); and (2) "that the alien has sustained national or international acclaim and that his or her achievements have been recognized in the field of expertise." 8 C.F.R. § 204.5(h)(3). See *Kazarian*, 2010 WL 725317 at *3.

Regarding the regulation at 8 C.F.R. § 204.5(h)(3)(i), academic study is not a field of endeavor, but training for a future field of endeavor. As such, academic scholarships and student awards cannot be considered prizes or awards in the petitioner's field of endeavor. Moreover, competition for scholarships is limited to other students. Experienced experts in the field are not seeking scholarships, and experienced experts do not compete for fellowships and competitive postdoctoral appointments. Therefore, awards that are limited to students, like those claimed by the petitioner are not indicative of someone who is at the top of his or her field.

Regarding original scientific contributions of major significance under 8 C.F.R. § 204.5(h)(3)(v) the petitioner has not demonstrated a “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990). Based on an evaluation of the submitted evidence, the petitioner failed to establish that he “is one of that small percentage who have risen to the very top of the field.” While we have acknowledged the petitioner’s original contribution in the creation of the website, biorating.com, the petitioner has failed to establish the requisite sustained acclaim. As previously noted, at the time the petition was filed, it was “[the petitioner] and his colleagues [who had] provided most of the evaluations” for the site. Such evidence is not indicative of the sustained acclaim needed to establish eligibility for this classification.

Finally, when compared to the accomplishments of individuals who submitted recommendation letters on the petitioner’s behalf, it appears that the highest level of the petitioner’s field is far above the level he has attained. While the petitioner’s accomplishments may distinguish him from other postdoctoral fellows and research associates, we will not narrow his field to others with his level of training and experience. For example, ██████████ claims to be a member of the National Academy of Sciences and has authored at least 32 peer-reviewed publications. ██████████ Hursting claims to have been awarded the National Institute of Health (NIH) Merit Award for Leadership/Excellence in Obesity and Cancer Research as well as the NIH Merit Award for Leadership/Excellence in Cancer Training and Research, authored at least 87 peer-reviewed publications, and made at least 35 presentations regarding his research. ██████████ claims to have published at least 150 peer-reviewed publications, 41 abstracts, and 28 published book chapters, serves on the editorial board of Cancer Research and Clinical Oncology, as associate editor for Molecular Carcinogenesis and International Journal of Cancer Prevention, and has served as a journal reviewer for at least 17 publications.

The conclusion we reach by considering the evidence to meet each criterion separately is consistent with a review of the evidence in the aggregate. Even in the aggregate, the evidence does not distinguish the petitioner as one of the small percentage who has risen to the very top of the field of endeavor. The documentation submitted in support of a claim of extraordinary ability must clearly demonstrate that the alien has achieved sustained national or international acclaim and is one of the small percentage who has risen to the very top of the field of endeavor.

III. Conclusion

Review of the record does not establish that the petitioner has distinguished himself to such an extent that he may be said to have achieved sustained national or international acclaim and to be within the small percentage at the very top of his field. The evidence is not persuasive that the petitioner’s achievements set him significantly above almost all others in his field at a national or international level. Therefore, the petitioner has not established eligibility pursuant to section 203(b)(1)(A) of the Act, and the petition may not be approved.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.”); *see*

also Janka v. U.S. Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

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.