

Identifying data deleted to  
prevent clearly unwarranted  
invasion of personal privacy  
**PUBLIC COPY**

U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Office of Administrative Appeals, MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

B4

[Redacted]

FILE:

[Redacted]  
LIN 07 017 52254

Office: NEBRASKA SERVICE CENTER

Date: SEP 02 2009

IN RE:

Petitioner: [Redacted]  
Beneficiary: [Redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

[Redacted]

INSTRUCTIONS:

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

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

  
John F. Grissom  
Acting Chief, Administrative Appeals Office

**DISCUSSION:** The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of North Carolina that engages in the water purification treatment business. The petitioner seeks to employ the beneficiary as its general manager and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

On January 9, 2008, the director denied the petition determining that the petitioner failed to establish that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity.

On appeal, counsel disputes the director's conclusions and asserts that the beneficiary is employed by the U.S. company in an executive capacity as well as a managerial capacity.

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

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

\* \* \*

- (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or

executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States 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 petitioner filed the immigrant petition on October 20, 2006. In a letter dated September 26, 2007, the petitioner indicated that the beneficiary was employed as general manager of Superior Water Systems (HK) Limited (SWS), the petitioner's affiliate in Hong Kong, from March 14, 2005 until August 21, 2006, when he was transferred to the U.S. company. Since August 21, 2006, the beneficiary has been in the United States in L-1A status working in the capacity of general manager of the U.S. company, while still retaining his title and responsibilities at the foreign entity. The petitioner indicated that the beneficiary has assumed the general management of both companies since that time. The petitioner submitted a job description setting forth the duties of the beneficiary in the newly combined general manager position as follows:

1. Maximizing the profit of the business
2. Oversee the entire operation to ensure all departments work effectively and efficiently.
3. Oversee the business of [the foreign entity] in US including periodically visit [sic] to manage the business in Hong Kong.
4. Introduce and implement of short, medium and long term objectives to the company [sic].
5. Set up, update and implement of company policy and procedure from time to time to manage the whole operation [sic].
6. Perform accountancy duty including preparation of financial reports and audit reports.
7. Perform financial controller duty including approval of payments, management of payroll and taxes filing.
8. Perform human resources work including recruitment, staff appraisal, leave approval, etc.
9. Supervise Shop Manager, Office Executive and Office Assistant to perform general administration and clerical duties.

The petitioner also submitted a combined organizational chart for both companies. On the chart, the beneficiary is listed as general manager for both companies, reporting directly to the owners of the companies. The chart shows the beneficiary directing or managing twelve other employees in the U.S. company; the job descriptions for some of these subordinate employees were also submitted.

On July 31, 2007, the director issued a request for further evidence (RFE) to demonstrate that the beneficiary's position with the United States entity qualifies under all four statutory criteria for managerial capacity. The director requested a more detailed list of specific day-to-day duties performed by the beneficiary, including an estimate of the percentage of time spent at each individual task, in his role as general manager.

In a letter responding to the RFE, the petitioner noted that while the director requested evidence establishing the beneficiary as a manager, the beneficiary role would be more properly categorized under the definition of "executive capacity." The petitioner provided an expanded description of the

beneficiary's duties in the U.S. company, in which the beneficiary's responsibilities are divided into seven different categories with the percentage of time spent per category indicated as follows:

- Daily accounting work – 20%
- Human resources – 5%
- Administration – 10%
- Tax filing – 5%
- Management accounting – 30%
- Business development – 5%
- General Management – 25%

The petitioner also provided an organizational chart for the U.S. company, dated August 6, 2007, which shows the beneficiary as general manager and administration manager at the head of the organization with thirteen additional employees. The beneficiary's subordinates include an office executive directly under the supervision of the beneficiary in his role as administrative manager; a sales director supervising six sales representatives and one marketing manager in the sales & marketing department; and in the service department, a service manager supervising a senior service technician, a delivery route technician, and a service technician.

On November 3, 2007, the director denied the petition, finding that the record is insufficient to establish that the beneficiary would be employed in the United States in a qualifying managerial or executive capacity. Focusing on the description of the beneficiary's job duties in the U.S. company, the director observed that most of the claimed duties appear to be essential operational tasks that are typically performed by subordinate personnel. The director further concluded that based on the nature of the business, including its size, organizational structure and the service it provides, it does not appear that the reasonable needs of the organization warrant or support an executive/managerial position. The director further found that the petitioner has not established that there is a subordinate staff of professional, managerial, or supervisory personnel who will relieve the beneficiary from performing the non-qualifying tasks.

On appeal, counsel contends that the evidence submitted clearly establishes that the beneficiary is employed primarily in an executive capacity, and, alternatively, the evidence also establishes that the beneficiary is employed in a managerial capacity. Counsel asserts that the description of the beneficiary's job duties was not intended to be the sole evidence of the beneficiary's executive capacity. Counsel refers to a number of other documents in the record -- such as business plans, management reports, policy memoranda, contracts and offers of employment -- which counsel claims demonstrate that "the beneficiary functions at a senior level within the organization and maintains the requisite level of autonomy and authority over all decisions that affect corporate policies." Counsel asserts that the evidence shows that the beneficiary "establishes policies and procedures for the company, negotiates and executes contracts with vendors and distributors, engages professionals such as CPAs, develops and implements business plans, hires and fires employees and otherwise directs all of the company's business activities." Counsel asserts that the beneficiary has wide latitude in performing such actions and does so without any direct oversight, reporting only to the owners of the

company. As such, counsel contends, the beneficiary functions in an executive capacity within the U.S. company.

Counsel further emphasizes that the beneficiary heads a staff of twelve employees, including three managers, who in turn manage the work of front-line employees. Counsel claims that as the highest ranking employee, the beneficiary manages the organization and each department within the organization, directs and supervises the work of two subordinate managers who in turn manage other staff, has the authority to hire and fire and take personnel action with respect to the subordinate employees, and has the authority to exercise discretion over the day-to-day operations of the business, as demonstrated by the business documents submitted into evidence. As such, counsel contends, the beneficiary also functions in a managerial capacity within the U.S. company.

Upon review, the AAO concurs with the director's determination that the petitioner has not established that the beneficiary would be employed by the U.S. company in a primarily 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. § 204.5(j)(5). 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.* Beyond the required description of the job duties, the U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that the beneficiary's duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act.

In this instance, while the evidence indicates that the beneficiary is the highest ranking employee within the U.S. company and performs some of the high-level responsibilities that are specified in the definition, the record does not sufficiently establish that the beneficiary *primarily* performs these specified responsibilities, and does not spend a majority of his time on day-to-day functions. As previously noted, the job description provided in response to the RFE divides the beneficiary's responsibilities into different categories and assigns percentages of time spent on each general category. However, the AAO notes that, within each category, there are a number of tasks listed that are not managerial or executive in nature. Examples of these non-qualifying tasks include:

**Daily Accounting Work (20%)**

- daily bookkeeping and cash flow monitoring
- monitoring accounts receivables
- managing bank accounts by signing check and making bank deposits

**Human Resources ( 5%)**

- maintaining and updating employment records

**Administration (10%)**

- prepare and authorize payroll

**Tax filing (5%)**

- prepare and submit all tax related returns

**Management Accounting (30%)**

- prepare annual budget, monthly and annual financial statements,  
and monthly result analysis reports

**General Management (25%)**

- handle and monitor all customers' complaints

Although there are other responsibilities listed under each category that would qualify as executive or managerial duties, the above responsibilities appear to be administrative or operational tasks that do not fall within the statutory definition of managerial or executive capacity. Because the petitioner has provided a breakdown of time spent for each category of tasks rather than for the individual tasks, the AAO cannot determine based on the record what proportion of the beneficiary's duties would qualify as managerial or executive and what proportion would be non-qualifying. *See Republic of Transkei v. INS*, 923 F.2d 175, 177 (D.C. Cir. 1991).

Counsel contends on appeal that the evidence clearly indicates that the beneficiary is supported by a staff of twelve, at least two of whom are managerial employees, who would relieve the beneficiary from performing non-qualifying tasks. It is noted that the petitioner submitted job descriptions for some of the employees of the U.S. company. However, these job descriptions reflect the names and positions of employees of the company in October 2005, before the beneficiary's arrival in the United States. By the time the petition was filed, some of the individuals listed in the job descriptions no longer held the same position, and other positions appear to have been eliminated altogether (the shop manager and the office assistant positions, *e.g.*). Consequently, it cannot be determined whether and to what extent the distribution of duties among the company's employees has been altered to accommodate the addition of the beneficiary to the organization. Counsel contends that the beneficiary's subordinate employees -- specifically the sales manager, the marketing manager, and office executive and a service manager -- actually perform the day-to-day tasks of the company, rather than the beneficiary. Even assuming that the 2005 job descriptions for the other employees of the company are still up-to-date, the AAO finds them to be vague and insufficiently detailed and do not

indicate that the beneficiary's non-qualifying tasks listed above are in fact handled by his subordinates. Further, it is noted that in addition to being general manager, the beneficiary is also listed on the most current organizational chart as the administrative manager. As such, it would appear that he also handles much of the day-to-day administrative tasks of the company that area attributed to the administrative manager. Consequently, counsel's claim that the beneficiary's subordinate staff relieves him from performing non-qualifying duties does not find support in the record. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. **The unsupported assertions of counsel do not constitute evidence.** *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Counsel also claims that the director erred in relying solely on the beneficiary's job description in determining whether he functions in a primarily executive or managerial capacity. Counsel refers to a number of other documents in the record which counsel claims demonstrate essential aspects of the beneficiary's direction of the business or his establishment of goals and policies for the companies. The AAO acknowledges that the documents to which counsel refer illustrate to some extent the level of the beneficiary's involvement in the U.S. company. However, taken together, these documents are still insufficient to demonstrate that the beneficiary's involvement in the company is *primarily* at the executive or managerial level, as required by the statute. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Finally, it is noted that counsel refers to an unpublished decision in which the AAO determined that the beneficiary of an employment-based immigrant petition met the requirements of serving in an executive capacity. Counsel contends that the same factors relied upon by the AAO in the cited decision apply in the instant petition and establish that the beneficiary here is employed in an executive capacity. However, counsel has furnished no evidence to establish that the facts of the instant petition are analogous to those in the unpublished decision. Further, while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding.

Because the petitioner has failed to meet the essential requirement of establishing that the beneficiary would be employed by the U.S. entity in a *primarily* managerial or executive capacity, the petitioner has failed to demonstrate that the beneficiary is eligible for the benefit sought. For this reason, the petition will be denied.

Beyond the decision of the director, the AAO also finds that the petitioner has failed to establish that, in the three years preceding entry as a nonimmigrant, the beneficiary was employed by the entity abroad for at least one year in a managerial or executive capacity, as required under the regulation at 8 C.F.R. § 204.5(j)(3)(1)(B).

In its September 26, 2006 letter, the petitioner indicated that the beneficiary was instrumental in the establishment of the petitioner's affiliate in Hong Kong, and was employed officially by SWS as its

general manager as of March 2005. The petitioner provided the following description of the beneficiary's job duties in the foreign entity:

1. Set up and develop new business in Hong Kong for the marketing of PHSI Water Cooler in Hong Kong
2. Research and develop the marketing of PHSI Water Cooler in Southern China.
3. Oversee the entire operation to ensure all departments work effectively and efficiently.
4. Introduce and implement of short, medium and long term objectives to the company [sic].
5. Perform accountancy duty including preparation of financial reports and audit reports.
6. Perform financial controller duty including approval of payments, management of payroll and taxes filing.
7. Perform human resources work including recruitment, staff appraisal, leave approval, etc.

The petitioner indicated that the beneficiary hired his first subordinate employee in the foreign entity, the sales manager, in November 2005, and later hired a part-time service technician.

In the RFE, the director requested a more detailed list of the beneficiary's specific day-to-day duties, including an estimate of the percentage of time spent at each individual task. The director also requested an explanation of the job duties, level of authority, responsibilities and starting dates of the beneficiary's subordinates within the foreign entity, as well as further evidence of the staffing level in the foreign entity during the year preceding the filing of the petition, including the number of hours worked per week by all employees and contractors.

In response, the petitioner provided descriptions of the beneficiary's job responsibilities in the foreign entity in four different stages – the "development" stage (March–May 2005), the "kick-off" stage (June–August 2005), the "implementation stage" (September 2005–February 2006), and the "developed" stage (March–August 2006). Like the description of the beneficiary's U.S. position, the petitioner divided the beneficiary's job responsibilities into different categories and assigned a percentage of time spent to each category.

The petitioner also submitted an organizational chart for the foreign entity, dated August 1, 2005, showing the beneficiary as general manager, and under him, a sales manager, an administration officer and a service technician. Under the sales manager are four sales representative positions, all vacant. Job descriptions for the beneficiary's subordinates in the foreign company indicate that the sales manager has been in that position since March 2005 and works 176 hours per month, spending 85% of his time prospecting, making sales calls, and obtaining referrals.<sup>1</sup> According to the petitioner, the

---

<sup>1</sup> It is noted that in the September 2006 support letter, the petitioner indicated that the sales manager was not hired by the beneficiary until November 2005. The petitioner has not explained this discrepancy. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such

administration officer was hired in August 2006 and works part-time, at 40 hours per month. The service technician, hired in November 2005, works 10-20 hours per month on average and spends 70% of his time on on-site delivery and installation and service of water coolers, and 30% of his time on in-shop service, including inventory control, inspection, maintenance and repair.

Upon review, the AAO finds the record does not show that the beneficiary was employed in an executive or managerial capacity by the foreign entity for the requisite time period.

Based on the evidence, prior to his arrival in the United States in August 2006, the beneficiary was employed as general manager by the foreign entity since March 2005. The evidence also shows that from March through November 2005, the beneficiary was the sole employee of the foreign entity. The record further shows that throughout the 18 months of his employment with the foreign entity, the beneficiary spent the majority of his time engaged in tasks that were necessary to produce the company's product or to provide the company's services. 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 of Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). For example, from March through May 2005, the beneficiary spent 75% of his time applying for business registration for the company, preparing a feasibility study, developing the business plan, performing market research, and receiving sales and product training from the U.S. company. In June through August 2005, the beneficiary spent 70% of his time developing the business plan, performing market research, arranging for financing, and setting up the company's physical office. In September 2005 through February 2006, the beneficiary spent 50% of his time on sales and marketing activities, including receiving sales training from the U.S. office, preparing sales kits and materials, conducting direct mailings and making sales calls, and spent another 10% on technical and service-related tasks. In March through August 2006, the beneficiary continued to spend 50% of his time preparing sales kits and materials, prospecting (through cold calls and direct mailing), and making sales calls.

In addition, while the sales manager and the service technician were hired in November 2005, their job descriptions indicate that their responsibilities comprised primarily sales and technical service functions. The administration officer, whose job duties included general administrative tasks, bookkeeping, filing, managing bank accounts, monitoring accounts receivables, preparing monthly financial statements, and sales administration, was not hired until the beneficiary's departure in August 2006. Thus, it would appear that, in addition to his involvement in sales and technical service as noted above, the beneficiary was also solely responsible for conducting the day-to-day administrative and operational tasks of the foreign company throughout his tenure there.

---

inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In light of the foregoing, the AAO cannot conclude that the beneficiary was employed in a primarily executive or managerial capacity within the foreign entity for the requisite period. For this additional reason, the petition will be denied.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d at 1043.

The AAO acknowledges that USCIS has previously approved an L-1A petition filed by the petitioner on behalf of the instant beneficiary. It must be noted that many I-140 immigrant petitions are denied after USCIS approves prior nonimmigrant L-1A petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; *see also* § 316 of the Act, 8 U.S.C. § 1427. Because USCIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L-1A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i) (requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Despite any number of previously approved petitions, USCIS does not have any authority to confer an immigration benefit when the petitioner fails to meet its burden of proof in a subsequent petition. *See* section 291 of the Act. Based on the lack of required evidence of eligibility in the current record, the AAO finds that the director was justified in departing from the previous nonimmigrant petition approval by denying the instant petition.

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. Accordingly, the director's decision will be affirmed and the petition will be denied.

**ORDER:** The appeal is dismissed.