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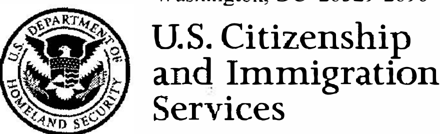
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



DATE: FEB 1 0 2015 OFFICE: NEBRASKA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, approved the petition on February 15, 2008. On April 11, 2012, the director issued the petitioner a notice of intent to revoke the approval of the instant petition. The petitioner responded to this notice of intent to revoke (NOIR), and on June 12, 2012, the director reopened the petition after noting that the petitioner was unable to obtain the documents requested. The director then issued a request for evidence to which the petitioner responded on August 31, 2012. On December 3, 2013, the director denied the petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The appeal will be dismissed.

The petitioner describes itself as a "Software Development/Consulting" business. It seeks to employ the beneficiary permanently in the United States a "Software Engineer" pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1] As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the United States Department of Labor (DOL).

The director's decision denying the petition concluded that the petitioner had not provided the Certified Quarterly Wage Reports and State Unemployment Compensation Report Forms for all quarters from 2006 through 2011 to establish its ability to pay the beneficiary's proffered wage.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

Ability to Pay the Proffered Wage

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

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

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089 was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). According to United States Citizenship and Immigration Services (USCIS) records, the petitioner has filed I-140 petitions on behalf of multiple other beneficiaries. Accordingly, the petitioner must establish that it has had the continuing ability to

[1] In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.

pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

Here, the ETA Form 9089 was accepted on October 5, 2006. The proffered wage as stated on the ETA Form 9089 is per hour (per year based on 40 hours per week).

In determining the petitioner's ability to pay the proffered wage, USCIS first examines whether the petitioner has paid the beneficiary the full proffered wage each year from the priority date. If the petitioner has not paid the beneficiary the full proffered wage each year, USCIS will next examine whether the petitioner had sufficient net income or net current assets to pay the difference between the wage paid, if any, and the proffered wage.[2] If the petitioner's net income or net current assets is not sufficient to demonstrate the petitioner's ability to pay the proffered wage, USCIS may also consider the overall magnitude of the petitioner's business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612 (Reg'l Comm'r 1967).

On April 11, 2012, the director issued the petitioner a notice of intent to revoke the approval of the Form I-140 (NOIR) and indicated that USCIS subpoenaed the California Employer Quarterly Wage Reports for the petitioner for 2008 and 2009 and found discrepancies between these subpoenaed reports issued by the California Employment Development Department and the Employer Quarterly Wage Reports submitted by the petitioner.

On May 1, 2014, we issued the petitioner a notice of intent to dismiss (NOID) and request for evidence for the petitioner to have an opportunity to demonstrate whether it had any follow-up communications with the California Employment Development Department (EDD) to obtain the Certified Quarterly Wage Reports for 2006 through 2011. In response to our NOID, counsel submitted a letter, dated November 14, 2013, signed by the petitioner's accountant, requesting the Quarterly Wage Reports. We note that this letter references a conversation that took place that day, but the name of the person contacted is not stated. We also note that this letter states it is a second request whereas a review of the record demonstrates that this was the fourth request. The letter also states that it is sent by Fax and U.S. mail, but there is not any evidence of a fax delivery confirmation or evidence of delivery by U.S. mail.

At the outset, we note that the record reflects that the petitioner initially submitted Quarterly Wage Reports stating specific wages paid to the instant beneficiary for the second, third and fourth quarters of 2008, as well as the first three quarters of 2009. On appeal the petitioner submitted copies of the Quarterly Wage Reports it claims to have submitted to the California EDD for the second, third and fourth quarters of 2008. These copies do not state any wages paid to the instant beneficiary. These forms are consistent with the Quarterly Wage Reports USCIS received from the subpoena to the California EDD, which do not state any wages paid to the beneficiary for these quarters. No

[2] *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986); *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983); and *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), aff'd, No. 10-1517 (6th Cir. filed Nov. 10, 2011).

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explanation for the different Quarterly Wage Reports for 2008 submitted by the petitioner is made. Although the record contains Forms W-2 which state wages that the petitioner asserts it paid to the beneficiary for 2006 through 2011, the discrepancies in these Quarterly Wage Reports call into question all of the Forms W-2 in the record. This raises doubts as to whether the beneficiary was employed with the petitioner and whether the petitioner paid the beneficiary in 2008 and 2009, or the other years at issue. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* Therefore, we cannot accept the Forms W-2 in the record as demonstrating wages that were actually paid to the instant beneficiary.

The director also stated in the April 11, 2012 NOIR that the wages stated on the petitioner's 2006 tax return did not support the assertion on the Form I-140 that it employed workers. The director noted that since 1999, the petitioner filed over petitions since 1999, which includes those filed under its "doing business as" (DBA) names. As noted above, the petitioner must demonstrate its ability to pay the proffered wage of the instant beneficiary and its other sponsored workers.

We note that the director's April 11, 2012 NOIR requested that the petitioner submit its certified federal tax returns for 2006 through 2011. The petitioner did not submit this documentation which, in light of the discrepancies in the Quarterly Wage Reports the petitioner submitted in the instant case, calls into question the authenticity of the petitioner's federal tax returns. Therefore, we cannot view the petitioner's tax returns as establishing the ability to pay the proffered wages of the instant beneficiary or the other sponsored workers. Even if the petitioner had resolved this issue by submitting its certified tax returns, and if such tax returns were consistent with those within the record, the petitioner's tax returns state its net income for 2006 through 2011, as shown in the table below.

- In 2006, the Form 1120S stated net income[3] o
- In 2007, the Form 1120S stated net income of
- In 2008, the Form 1120S stated net income of
- In 2009, the Form 1120S stated net income of
- In 2010, the Form 1120S stated net income of
- In 2011, the Form 1120S stated net income of

[3] Where an S corporation's income is exclusively from a trade or business, USCIS considers net income to be the figure for ordinary income, shown on line 21 of page one of the petitioner's IRS Form 1120S. However, where an S corporation has income, credits, deductions or other adjustments from sources other than a trade or business, they are reported on Schedule K. If the Schedule K has relevant entries for additional income, credits, deductions or other adjustments, net income is found on line 18 (2006-2012) of Schedule K. *See* Instructions for Form 1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed February 9, 2015) (indicating that Schedule K is a summary schedule of all shareholders' shares of the corporation's income, deductions, credits, etc.). Because the petitioner had additional income deductions shown on its Schedule K for 2006, the petitioner's net income is found on Schedule K of its 2006 tax return.

Therefore, if the petitioner were to resolve the discrepancies in the record by submitting certified tax returns, the petitioner's net income was greater than the beneficiary's proffered wage for the years 2007, 2008, 2009 and 2011. However, the petitioner did not have sufficient net income to pay the beneficiary's proffered wage for 2006 and 2010. The petitioner also has not established that it had sufficient net income to pay the proffered wages of its other sponsored workers in any of the years at issue. As noted above, the petitioner has not provided certified copies of its tax returns or quarterly wage reports to demonstrate the wages paid to the beneficiary or its other sponsored workers.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[4] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. As indicated above, if the petitioner were to resolve the discrepancies regarding the tax returns which are called into question, the petitioner's tax returns state its end-of-year net current assets for 2006 through 2011, as shown in the table below.

- In 2006, the Form 1120S stated net current assets of
- In 2007, the Form 1120S stated net current assets of
- In 2008, the Form 1120S stated net current assets of
- In 2009, the Form 1120S stated net current assets of
- In 2010, the Form 1120S stated net current assets of
- In 2011, the Form 1120S stated net current assets of

This demonstrates that for these years, if the discrepancies with the tax returns are resolved, the petitioner's net current assets were greater than the beneficiary's proffered wage. However, as stated above, the petitioner has not demonstrated that these amounts of net current assets were sufficient to pay the proffered wages of its other sponsored workers. The petitioner has also not resolved the discrepancies with the quarterly wage reports the petitioner submitted. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wages of its other sponsored workers.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Sonegawa,* 12 I&N Dec. at 614-15. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to

[4] Current assets consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. Current liabilities are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). Joel G. Siegel & Jae K. Shim, *Dictionary of Accounting Terms* 118 (3d ed., Barron's Educ. Series 2000).

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do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the Form I-140 states that the petitioner has been in business since and employs workers. We note that the Form I-140, which was signed by the petitioner's owner on October 16, 2006, states that the petitioner had employees, whereas the 2007 Quarterly Wage Report submitted by the petitioner states that it had employees during the first quarter of 2007. According to USCIS records, the petitioner has filed over Form I-140 petitions on behalf of other beneficiaries from 1999 onward.[5] The petitioner has not provided any evidence of the number of petitions it has filed despite the director's request for this documentation in the April 11, 2012 NOIR. The record does not contain evidence of the priority dates of the other sponsored workers, the proffered wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. As stated above, the petitioner has not demonstrated that it had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The petitioner has not provided any evidence of its reputation in the industry. The tax returns in the record reflect declining gross receipts from 2008 through 2011. The record does not contain evidence demonstrating that the petitioner paid its other sponsored workers the proffered wages or that it had the ability to do so. Although the petitioner's tax returns state net income amounts greater than the proffered wage for 2007, 2008, 2009 and 2011, and net current assets greater than the proffered wage for 2006 and 2010, the petitioner has not verified the authenticity of these tax returns or demonstrated that these amounts, if accurate, are sufficient to pay its other sponsored workers. Most importantly, the two copies of the Quarterly Wage Reports submitted by the petitioner are in direct conflict with each other and with the Forms W-2 in the record regarding the amount of wages paid to the beneficiary in 2008. Thus, assessing the totality of the circumstances in this individual case, it is

[5] As indicated above, the director noted in the April 11, 2012 NOIR that the petitioner had filed over petitions under its name and "doing business as" names since 1999. We note that this number of petitions includes immigrant and nonimmigrant visa petitions by the petitioner and filed under other names used by the petitioner.

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concluded that the petitioner has not established that it had the continuing ability to pay the proffered wages of the instant beneficiary and its other sponsored workers.

Beneficiary's Qualifications

Beyond the decision of the director,[6] the petitioner has not demonstrated that the beneficiary is qualified for the position offered. Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree. An "advanced degree" is a U.S. academic or professional

[6] An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

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degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty.

In the instant case, the petitioner claims that the beneficiary may be classified as an advanced degree professional based on a foreign equivalent degree to a U.S. bachelor's followed by at least five years of progressive experience in the specialty.

Part H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in "any field."
H.5. Training: None required.
H.6. Experience in the job offered: 60 months.
H.7. Alternate field of study: None accepted.
H.8. Alternate combination of education and experience: Master's degree and one year of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: [Left blank].

Part J of the labor certification states that the highest level of education that the beneficiary has achieved relative to the requested occupation is a Bachelor's degree in Business Administration in Accounting from completed in The record contains the following documents relating to the beneficiary's education:

- A copy of the beneficiary's Bachelor of Commerce diploma and transcripts from indicating that the beneficiary completed this program in
- A copy of the beneficiary's Certificate of Post Graduate Diploma in Computer Applications from dated This certificate states that the beneficiary was enrolled in this program from to
- A copy of the beneficiary's Master of Commerce diploma and transcripts from completed in
- A copy of the beneficiary's Certificate of Post Graduate Diploma in Business Management with Finance and Systems and transcripts from completed in The transcripts state that the beneficiary was admitted into this program in

The time period of the beneficiary's Master of Commerce program of study overlaps with the beneficiary's postgraduate program from The beneficiary's claimed education also overlaps with his claimed work experience. These inconsistencies must be addressed in any further filings.

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Even assuming that the beneficiary possesses the foreign equivalent of a U.S. bachelor's degree, which has not been established here due to the inconsistencies regarding the beneficiary's education, it has not been established that the beneficiary has five years of post-baccalaureate experience to qualify as an advanced degree professional.

Evidence relating to qualifying experience must be in the form of a letter from a current or former employer and must include the name, address, and title of the writer, and a specific description of the duties performed by the beneficiary. 8 C.F.R. § 204.5(g)(1). If such evidence is unavailable, USCIS may consider other documentation relating to the beneficiary's experience. *Id.*

The record contains an undated experience letter from stating that the beneficiary was employed there as a "System Analyst" from to However, this experience overlaps the period of time of the beneficiary's postgraduate program from , which calls into question this experience. In addition, this experience was not listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the labor certification, lessens the credibility of the evidence and facts asserted.

The record also contains an undated experience letter from the stating that the beneficiary was employed there as a Software Engineer from to However, this experience overlaps the period of time of the beneficiary's postgraduate program from which calls into question this employment experience.

Due to the discrepancies with the beneficiary's experience noted above, we cannot view these experience letters as credible toward establishing that the beneficiary possesses five years of experience as a "Software Engineer" as required by the terms of the labor certification.

The record also contains the following experience letters:

- A letter, dated August 14, 2003 from stating that the beneficiary was employed there as a "Software Engineer" from to (27 months).
- An undated letter from stating that the beneficiary was employed there as a "Software Engineer" from until (seven months).

These experience letters demonstrate that the beneficiary had 34 months of experience in the job offered which is 26 months short of the 60 months of required experience. Therefore, the petitioner has not established that the beneficiary possessed five years of post-baccalaureate experience in the specialty. Therefore, the beneficiary does not qualify for classification as an advanced degree professional under section 203(b)(2) of the Act.

Bona Fide Job Offer

Although not a basis for this decision, in any further filings, the petitioner must establish that a *bona fide* job offer exists. In our May 1, 2014 NOID, we provided the petitioner an opportunity to provide evidence demonstrating the existence of a *bona fide* job offer in the instant case. The labor certification and the petition list the work location for the proffered position as [redacted] No other work location is noted. In our NOID, we noted that public records do not indicate that the beneficiary ever resided in or near [redacted] We requested that the petitioner provide evidence of its work location to demonstrate that the petitioner intends to employ the beneficiary there. In response to our NOID, the petitioner submitted the Forms W-2 issued to the beneficiary for 2007 through 2011 and an offer of employment from the petitioner for the beneficiary to work at the corporate address in [redacted] The petitioner stated that the beneficiary had previously been assigned to work at an end-client's site located in [redacted] The petitioner also stated that the labor certification contains a section for "Employer" information, which we note is in Part C of the ETA Form 9089, which pertains to where the petitioner is located and not necessarily to where the beneficiary will work. Accordingly, the petitioner states that it would have been incorrect to state the end-client location as this would indicate that the petitioner is located at that site. However, Part H of the ETA Form 9089 asks for the primary worksite where the work is to be performed and lists the address of the worksite as [redacted] In any further filings, the petitioner must provide evidence of the physical location where the beneficiary will work and evidence demonstrating the existence of a *bona fide* job offer.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed. The petition remains denied.