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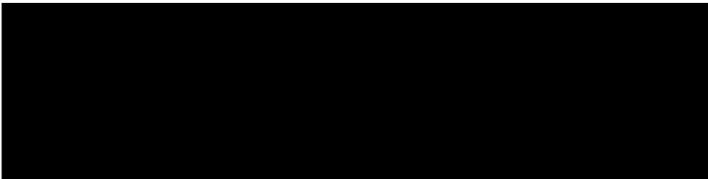
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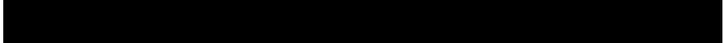
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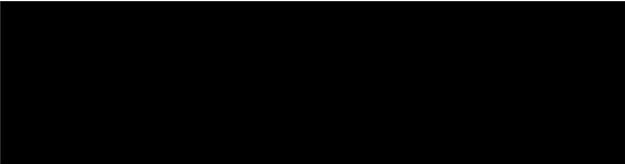
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FILE: WAC-03-217-53393 Office: CALIFORNIA SERVICE CENTER Date: **SEP 29 2006**

IN RE: Petitioner: 
Beneficiary: 

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:


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.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will remain denied.

The petitioner is a machine shop. It seeks to employ the beneficiary permanently in the United States as a polisher. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). The director determined that the petitioner had not established that it had the ability to pay the beneficiary the proffered wage as indicated on the Form ETA 750 and that the petitioner failed to provide evidence to prove the beneficiary's two years of qualifying experience. The director denied the petition accordingly.

On appeal, counsel submits a brief statement and resubmits evidence in the record.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 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 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 Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on March 28, 2000. The proffered wage as stated on the Form ETA 750 is \$10.97 per hour (\$22,817.60 per year). The Form ETA 750 states that the position requires 2 years of experience in the job offered.

On the petition, the petitioner claimed to have been established in 1967, and to currently employ 18 workers. The evidence in the record of proceeding shows that the petitioner is structured as a C corporation. According to the tax returns in the record, the petitioner's fiscal years last from March 1 to February 28. On the Form ETA 750B signed by the beneficiary on May 11, 2000, he did not claim to have worked for the petitioner.

The petitioner submitted the following documents as supporting documentation regarding its ability to pay with the initial filing: Form 1120 U.S. Corporation Income Tax Returns for 1999 through 2002.

On May 3, 2004, because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the director requested additional evidence (RFE) pertinent to that ability. The director specifically requested the petitioner's 2003 tax return and Form DE-6 Quarterly Wage Reports for the last four quarters.

In response, the petitioner submitted the petitioner's tax return for 2002 again, and Form 1065 U.S. Return of Partnership Income for 2003 filed by American Made, and Form DE-6 for the second through fourth quarters of 2003 and the first quarter of 2004 filed by American Made Motorcycle.

Because the petitioner submitted financial documents from another business entity to establish its ability to pay the proffered wage, the director issued a second RFE on August 30, 2004. The director's second RFE requested legal documentation showing American Made is a successor-in-interest to or DBA of the petitioner.

In response to the second RFE, counsel submitted a letter from the petitioner requesting change of the employer, business license for American Made, and uncertified Form ETA 750 for American Made and the beneficiary.

On January 13, 2005 the director determined that the petitioner did not establish that it had the ability to pay the proffered wage beginning on the priority date.

On appeal counsel argues that the documents submitted established the petitioner's ability to pay the proffered wage.

The record of proceeding shows that the petitioner, Cavallo & Cavallo, Inc., was incorporated as a C corporation on February 19, 1988 with federal employer identification number (FEIN): 33-0281170 and is doing business as Production Engineering & Machine at 8575 Red Oak Street, Rancho Cucamonga, California. The petitioner using the business name of Production Engineering & Machine applied and was approved for a labor certification in the position of polisher on behalf of the beneficiary. The petitioner filed the instant petition based on the approved labor certification. The petitioner submitted the beneficiary's compensation documents, and American Made's business and financial documentation to establish the continuing ability to pay the beneficiary the proffered wage in this case. The form 1065 tax return shows that American Made was established on January 1, 1997 as a domestic general partnership with [REDACTED] and is doing business at [REDACTED] California. The record contains no evidence that the petitioner is doing business as American Made, nor does American Made qualify as a successor-in-interest to the instant petitioner. This status requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the petitioning company. A letter from the petitioner "request[ing] a change in the applicant / petitioner for [the beneficiary]" and a new ETA 750 form, without certification from DOL, listing American Made as an employer are not sufficient to establish that American Made is a successor-in-interest to the petitioner. Nor does the fact that the same individual owns 100% shares of both business entities establish that American Made is a successor-in-interest to the petitioner. In the instant case, the petitioner failed to establish that American Made is a DBA of the petitioner or successor-in-interest to the petitioner. Consequently, the petitioner cannot establish its continuing ability to pay the proffered wage with income or assets of American Made. Therefore, the AAO will not consider any financial documentation of American Made in determining the petitioner's ability to pay the proffered wage from the beginning on the priority date.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage, and the successor-in-interest must establish the financial ability of the predecessor enterprise to have paid the certified wage at the priority date. See *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). Therefore, the petitioner in the instant case must demonstrate its ability to pay the proffered wage with its own net income or net current assets. Counsel's reliance on income and assets of American Made to establish the petitioner's continuing ability to pay the proffered wage is misplaced.

Thus, beyond the decision of the director, the AAO determines that American Made is not a successor-in-interest to the petitioning entity in this case. 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*, 299 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).

In determining the petitioner's ability to pay the proffered wage during a given period, Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted the beneficiary's pay stubs from American Made dated from February 13, 2004 to January 14, 2005 showing the beneficiary was paid at the rate of \$12.50 per hour during this period. However, as previously discussed, the petitioner did not establish that American Made is a DBA of or successor-in-interest to the petitioner, therefore, wages paid to the beneficiary by American Made cannot establish the petitioner's ability to pay the proffered wage through the method of wage paid. The petitioner did not submit W-2 forms or any other documentary evidence that it paid any compensation to the beneficiary in the year of the priority date through the present. Therefore, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage from the priority date.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. 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). Counsel's reliance on the petitioner's gross receipts and wage expense is misplaced. Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. The court in *Chi-Feng Chang* further noted:

Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng* at 537.

The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1999 through 2002 and American Made's Form 1065 U.S. Return of Partnership Income for 2003. As American Made is not a DBA of or successor-in-interest to the petitioner, American Made's 2003 tax return cannot be considered. The priority date here is March 28, 2000 and the petitioner's 1999 tax return only covers its fiscal year of 1999 from March 1, 1999 to February 28, 2000, therefore, the 1999 tax return is not necessarily dispositive. The tax returns for 2000 through 2002 demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$22,817.60 per year from the priority date to 2002.

In 2000, the Form 1120 stated net income¹ of \$22,029.

In 2001, the Form 1120 stated net income of \$4,168.

In 2002, the Form 1120 stated net income of \$(8,260).

Therefore, for the fiscal years 2000 through 2002, the petitioner did not have sufficient net income to pay the proffered wage.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.² 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 15 through 17. 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. The petitioner's net current assets were \$(44,558) in 2000, \$(60,437) in 2001, and \$(81,884) in 2002. Therefore, the petitioner did not have sufficient net current assets in 2000 through 2002 to pay the proffered wage of \$22,817.60.

¹ Taxable income before net operating loss deduction and special deductions as reported on Line 28.

² According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "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). *Id.* at 118.

The record before the director closed on July 23, 2004 with the receipt by the director of the petitioner's submissions in response to the RFE. As of that date the petitioner's federal tax return for 2003 should have been available. However, the petitioner did not submit its 2003 tax return. Therefore, the petitioner failed to establish its ability to pay the proffered wage in 2003. Furthermore, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in the RFE dated May 3, 2004, the petitioner declined to provide copies of its 2003 tax return. The tax returns would have demonstrated the amount of taxable income the petitioner reported to the IRS and further reveal its ability to pay the proffered wage. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

Therefore, from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets. Further, the portion of the director's decision regarding the petitioner's continuing ability to pay the proffered wage beginning on the priority date is affirmed.

The director also denied the petition because the petitioner failed to demonstrate that the beneficiary is qualified for the proffered position. A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). See *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971). The priority date is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 28, 2000.

The certified Form ETA 750 in the instant case states that the position of polisher requires two (2) years of experience in the job offered. On the Form ETA-750B signed by the beneficiary on May 11, 2000, he represented that he was unemployed from April 1998 to the present, worked for Pro 1 at 2700 Melbourne Avenue, Pomona, CA forty hours a week as a polisher for one year and nine months from June 1996 to March 1998, and worked for Brico Metal Finishes at 12416 Benedick Avenue, Downey, CA forty hours a week as a polisher for eight years and five months from January 1988 to June 1996. The beneficiary signed the form on May 11, 2000 under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The instant I-140 petition was submitted with the following items concerning the beneficiary's qualification as required by the above regulation: Amendment and Clarification of Form 750B from Angelica Cendejas, a legal assistant of counsel, an affidavit of the beneficiary with W-2 forms from [REDACTED], and an experience letter from [REDACTED] with beneficiary's W-2 form and paystubs from that employer.

The amendment and clarification of Form 750 is signed by [REDACTED], a legal assistant of counsel's office and addressed to Immigration Officer at California Service Center states in pertinent part:

Please note that due to a typographical mistake made by the office personnel, item #15b on form 750B should read as follow:

Work History:

The 750B #15b, [REDACTED] date started 06/1998 and left on 06/2000.

The 750B#15C, [REDACTED] date started 01/1997 date left was 06/1998.

The beneficiary clarifies in his affidavit executed on April 13, 2003 that:

I have worked at Pro-One Performance Manufacturing, Inc. at [REDACTED] [REDACTED] since 1998 to 2000, as a Polisher. Being a person that always showed responsibility and honesty, always with efficiency, punctuality, at all time. Full time (40 hours a week).

The experience letter from Brico Metal Finishing dated May 21, 2003, signed by [REDACTED] as the owner states in pertinent part:

[The beneficiary] was formerly employed by [REDACTED] from January 1997 until June 1998. He was a fulltime worker (40 hrs. or more) per week. His pay was approximately \$8.50/hr.

Because the evidence submitted did not establish the beneficiary's prior experience, the director issued a FRE on May 3, 2004. In his RFE, the director states in pertinent part:

Submit evidence to establish that the beneficiary possesses the experience listed on the Form ETA 750 (Application for Alien Employment Certification). Evidence of prior experience should be submitted in letterform on the previous employer's letterhead showing the name and title of the person verifying this information. This verification should states the beneficiary's **title, duties**, and dates of employment/experience and number of hours worked per week.

Note: The employment verification from [REDACTED] states the beneficiary was employed from January 1997 through June 1998. The original Application for Alien Employment Certification (Form ETA 750) indicates a different date. Please clarify the discrepancy and submit proof of the beneficiary's employment history with [REDACTED]. Provide letters, contracts and pay statements to verify the beneficiary worked for the listed employer. Please include a current point of contact, current address and current phone number at which [CIS] or other U.S. Government agency can contact the employer.

Evidence submitted by [REDACTED] does not state the beneficiary's title and duties.

(Emphasis in original).

In response to the director's RFE dated May 3, 2004, counsel submitted another correction letter and copies of affidavit of the beneficiary and experience letter from [REDACTED]

In his denial notice, the director determined that the letter from [REDACTED] and the affidavit from the beneficiary do not state the beneficiary's title and duties. Therefore, CIS was not able to determine whether the duties performed in his previous employment match those of the offered position. In addition, there is a discrepancy with the beneficiary's employment dates.

Counsel argues on appeal that the letter from previous employer stating that the beneficiary was employed at [REDACTED] from January 1997 through June 1998, full time employee (40) hours a week and the affidavit signed under oath by the beneficiary which states that he was employed with [REDACTED] from 1998 until 2000, supported by forms W-2's as well as pay stubs proved the two years of qualifying employment experience as a Polisher.

The first issue that needs to be discussed is whether the petitioner established the beneficiary's requisite experience with [REDACTED] under the requirement set forth at 8 C.F.R. § 204.5(g)(1). The regulation requires such evidence must be in the form of a letter from a current or former employer or trainer and must include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. The record of proceeding contains an experience letter dated May 21, 2003 from [REDACTED] the owner of [REDACTED] submitted with the initial filing. As the director correctly pointed out, this letter does not state the beneficiary's title and duties, and as such does not meet the requirements set forth at 8 C.F.R. § 204.5(g)(1), and cannot be considered as a primary evidence to establish the beneficiary's requisite experience. Counsel argues that the attached W-2 forms and pay stubs support the contents of the letter. However, neither W-2 form nor pay stubs indicate the beneficiary's title and duties. In addition, the letter says that the beneficiary worked for the employer from January 1997 until June 1998 and the pay stub shows the beneficiary's payment with this employer ended on May 30, 1998. Both the letter and the pay stubs would have only verified one year and five months of employment experience if the letter had met the requirements. That would not be sufficient for the two years of the requisite experience as required by the certified labor certification in the instant case. Moreover, the regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically and clearly requested by the director in his RFE dated May 3, 2004, the petitioner declined to provide new or additional evidence to substantiate the beneficiary's experience with [REDACTED] in response to the RFE. The regulatory-prescribed evidence of requisite experience would have demonstrated that the beneficiary possessed the required two years of experience in the job offered and further revealed the beneficiary's qualifications for the proffered position. The petitioner's failure to submit these documents cannot be excused. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

The regulation requires a letter from a current or former employer or trainer as primary evidence relating to qualifying experience or training, and only allows consideration of other documentation relating to the alien's experience or training as secondary evidence in the circumstance that such primary evidence is unavailable. In the instant case, the petitioner submitted an affidavit from the beneficiary relating to his experience with [REDACTED] with the initial filing without explanation why the primary evidence required by the regulation is unavailable. In response to the RFE, counsel claimed that: "due to lost documentation my client is unable to provide additional documents." However, the beneficiary losing documents does not demonstrate that the experience letter from the prior employer is unavailable. Therefore, without reasonable explanation why the primary evidence required by the regulation is not available any

secondary evidence relating to the beneficiary's requisite experience is not acceptable. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

As previously noted, the affidavit of the beneficiary does not include a job description as required by the regulation. The attached W-2 forms do not provide support in this aspect. Therefore, as the director stated in his decision, CIS is unable to determine whether the duties performed in his previous employment match those of the offered position. In addition, the affidavit states that the beneficiary worked for [REDACTED] [REDACTED] from 1998 to 2000. Without indicating the starting and ending months the affidavit could not have established that the beneficiary possessed the two years of requisite experience. The beneficiary did not submit his 1998 W-2 form to support his employment in 1998, but submitted the W-2 forms for 1999 and 2000. Because the affidavit does not indicate the beneficiary's compensation rate, the amount paid to the beneficiary by [REDACTED] cannot provide exact information on how many months or hours the beneficiary worked in that year. However, it is most unlikely that the total amount of \$807.25 shown on the W-2 form for 2000 established that the beneficiary worked for the employer the whole year of 2000. The only possible approved experience would be the year of 1999 even if the affidavit of the beneficiary could be considered as primary evidence for his prior experience. Because of these defects, the affidavit of the beneficiary will be given little weight in these proceedings.

Therefore, the AAO concurs with the director's determination that the petitioner did not establish with regulatory-prescribed evidence the beneficiary's prior two years of experience as a polisher.

Counsel's assertions on appeal cannot overcome the decision of the director. 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.