

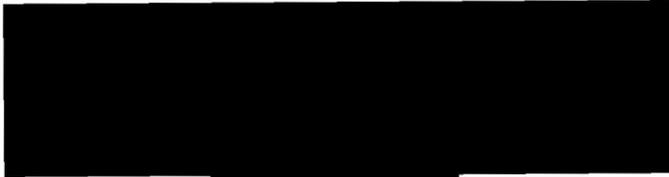


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Date: MAY 20 2008

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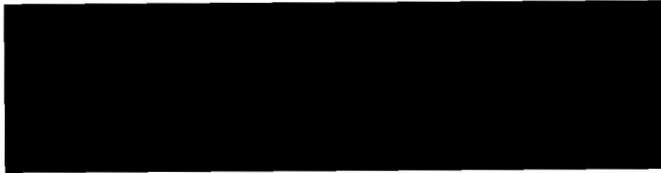
Petitioner:

Beneficiary:



PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 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 for*

Robert P. Wiemann, Chief  
Administrative Appeals Office

**DISCUSSION:** The director, Texas Service Center, denied the preference visa petition. The matter is presently before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a truck and trailer repair and manufacturing company. It seeks to employ the beneficiary<sup>1</sup> permanently in the United States as an auto body repairman. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the 2001 priority date of the visa petition. The director denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's September 6, 2006 denial, the single issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. In his decision, the director also determined that the audited combined financial statements of Freehold Carthage, Inc. and Affiliates may not be used to determine the petitioner's ability to pay the proffered wage. The AAO will also examine this issue in these proceedings.

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).

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<sup>1</sup> The instant beneficiary is a substituted beneficiary on the ETA Form 750. The initial beneficiary was [REDACTED] who signed the ETA Form 750, Part B on April 17, 2001.

Here, the Form ETA 750 was accepted on April 23, 2001. The proffered wage as stated on the Form ETA 750 is \$26.44 per hour (\$54,995.20 per year). The Form ETA 750 states that the position requires a grade school education and two years of experience in the proffered position.

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 AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal<sup>2</sup>. Counsel on appeal submits a brief. He also submits a letter dated September 22, 2006 written by [REDACTED], Officer of President, Freehold Cartage, Inc. In her letter Ms. [REDACTED] states that her family is the owner of Freehold Cartage, Inc. and its affiliated companies, including 33 East Maintenance Co., Inc. (the petitioner). Ms. [REDACTED] further states that the companies have always been managed and operated in a combined fashion since 2000, and that the financial statements for Freehold and its affiliates have always been combined statements since 2000. Ms. [REDACTED] asserts that the financial resources of Freehold Cartage, Inc. and its affiliates, including the petitioner, have always been shared among each other, and that Freehold Cartage, Inc. has always been responsible for providing financial resources to its affiliates, including the petitioner's financial operations, cash flow, and its ability to pay its employee's wages. Ms. [REDACTED] concludes by stating that Freehold Cartage, Inc. has been and will continue to be willing to be responsible for the petitioner's ability to pay the prevailing wage for the proffered position.

The record also reflects that in response to the director's request for further evidence dated June 9, 2006, the petitioner submitted copies of the petitioner's IRS Forms 1120S for tax years 2001 to 2005, as well as the audited combined statements for Freehold Cartage, Inc. and Affiliates for the years 2000 through 2005. In addition, counsel also submitted four pay stubs for the beneficiary from March 17, 2006 to April 14, 2006 that indicated the beneficiary earned \$14 an hour for a 40 hour week, and that as of April 14, 2006, the petitioner had paid the beneficiary \$7,789.60. The petitioner also submitted the beneficiary's W-2 Form for tax year 2005 that indicated the petitioner paid the beneficiary \$28,416.79. The record also contains an earlier letter from Ms. [REDACTED] dated April 11, 2006 that stated the beneficiary was currently employed by the petitioner, and that although the beneficiary's employment was at will, his position was a full time and permanent position. Ms. [REDACTED] also stated that the beneficiary's salary for tax year 2005 was \$32,400. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

The evidence in the record of proceeding shows that the petitioner is structured as an S corporation. On the petition, the petitioner claimed to have been established in November 1987, and to currently employ 24 workers. According to the tax returns in the record, the petitioner's fiscal year is based on a calendar year. On the Form ETA 750B, signed by the beneficiary on April 18, 2006, the beneficiary claimed to have worked for the petitioner, but provided no specific dates of employment.

On appeal, counsel asserts that Citizenship and Immigration Services (CIS) erred in not considering the audited combined financial statements of Freehold Cartage Inc. and Affiliates submitted to the record in

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<sup>2</sup> The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

response to the director's request for further evidence. Counsel states that the petitioner is an affiliate of Freehold Cartage, Inc., and as such, the director should have considered the combined financial statements of the affiliated companies of the petitioner, including the financial resources shared with a larger entity financially linked to the petitioner, in determining the petitioner's ability to pay the proffered wage. Counsel cites *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp.441 (D.C.C. 1988), in support of his assertion that CIS should consider pledges of financial support from a larger organization if the petitioner is financially linked. Counsel notes that the court in *Full Gospel* held that new divisions in businesses or new parishes of larger churches may not themselves be financially profitable, but if documents show that they may rely on the larger body for support, it is arbitrary and capricious for [CIS] not to consider the resources of the larger organization in making its evaluation of the [petitioner's] ability to pay. Counsel states that the court in *Full Gospel* takes a very reasonable and practical approach in determining an employer's ability to pay a proffered wage, and reflects normal business practices of corporations in the real business world in which corporations often use third party resources to enhance their own financial ability. Counsel states that such third party financial resources can include third party guarantees, surety, and long-term loans, or financial support of pledges from financially linked companies such as affiliated companies or parent companies. Counsel finally states that CIS, by refusing to consider qualifying third party resources in determining a petitioner's ability to pay a proffered wage, is not only inconsistent with the *Full Gospel* court ruling, but also contradicts normal business practices and sound financial sense.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

The director in her denial of the instant petition combined the petitioner's net income and net current assets in examining the petitioner's ability to pay the proffered wage. This approach is unacceptable because net income and net current assets are not, in the view of the AAO, cumulative. The AAO views net income and net current assets as two different ways of methods of demonstrating the petitioner's ability to pay the wage--one retrospective and one prospective. Net income is retrospective in nature because it represents the sum of income remaining after all expenses were paid over the course of the previous tax year. Conversely, the net current assets figure is a prospective "snapshot" of the net total of petitioner's assets that will become cash within a relatively short period of time minus those expenses that will come due within that same period of time. Thus, the petitioner is expected to receive roughly one-twelfth of its net current assets during each month of the coming year. Given that net income is retrospective and net current assets are prospective in nature, the AAO does not agree with counsel that the two figures can be combined in a meaningful way to illustrate the petitioner's ability to pay the proffered wage during a single tax year. Moreover, combining the net income and net current assets could double-count certain figures, such as cash on hand and, in the case of a taxpayer who reports taxes pursuant to accrual convention, accounts receivable. The AAO will further explain this analysis when it examines the petitioner's net income and net current assets.

On appeal and in its response to the director's request for further evidence, counsel states that the director and the AAO should consider the financial resources demonstrated in the audited combined financial statements of Freehold Cartage, Inc., rather than the petitioner's federal income tax return. However, the petitioner identified itself on the I-140 petition and on the ETA Form 750 as 33 Maintenance Co., Inc., and not as Freehold Cartage, Inc. As correctly noted by the director, because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [CIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Further, the decision in *Full Gospel Portland Church v. Thornburgh*, 730 F. Supp. 441, 449 (D.C.C. 1988) is not binding here. Although the AAO may consider the reasoning of the decision, the AAO is not bound to follow the published decision of a United States district court in cases arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). In addition, the decision in *Full Gospel* is distinguishable from the instant case. The court in *Full Gospel* ruled that CIS should consider the pledges of parishioners in determining a church's ability to pay the wages of an employee. Here, counsel asserts that CIS should treat the combined financial resources of a larger group of affiliated companies, reported together for purposes of commercial lending institutions, as evidence of the petitioner's ability to pay. However, the petitioner files its own federal tax return, and based on the combined audited statements, the petitioner's income represents a small portion of the entire combined financial resources of Freehold Cartage, Inc. and its affiliates. Further, based on the wage statements found in the record, the beneficiary does not work for Freehold Cartage, Inc., but rather for 33 East Maintenance Inc., a company with a distinct EIN number and federal income tax returns.

Thus while audited financial statements are one of the statutorily described methods of establishing a petitioner's ability to pay the proffered wage, in these proceedings, the AAO will examine the petitioner's individual federal corporate tax returns, rather than the combined audited financial statements of Freehold Cartage, Inc. and its affiliates. .

In determining the petitioner's ability to pay the proffered wage during a given period, 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 has provided the beneficiary's W-2 Form for tax year 2005 that established the petitioner paid the beneficiary \$28,416.29. The petitioner also submitted pay records that established that in 2006, the petitioner paid the beneficiary \$7,789.60 as of April 14, 2006, utilizing a pay rate of \$14 an hour, which is lower than the proffered hourly wage of \$26.44 noted on the Form ETA 750. Thus the petitioner has not established that it employed and paid the beneficiary the full proffered wage during any relevant timeframe including the period from the priority date in 2001 or subsequently. The petitioner has to establish its ability to pay the entire proffered wage to the beneficiary in tax years 2001, 2002, 2003, and 2004, as well as its ability to pay the difference between any wages paid to the beneficiary and the proffered wage in tax year 2005 and 2006.<sup>3</sup>

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<sup>3</sup> The record closed as of the petitioner's response to the director's request for further evidence dated August

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). 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 Chang* at 537.

The tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage of \$54,995.20 per year from the priority date:

- In 2001, the Form 1120S stated net income<sup>4</sup> of \$38,753.

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21, 2006. At that time, the petitioner's tax return for 2006 would not have been available. Thus, the AAO will not examine the petitioner's ability to pay the difference between the beneficiary's actual wages and the proffered wage in tax year 2006 based on the petitioner's net income or net current assets.

<sup>4</sup> Where an S corporation's income is exclusively from a trade or business, CIS 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 23 (1997-2003) line 17e (2004-2005) line 18 (2006) of Schedule K. See Instructions for Form 1120S, 2006, at <http://www.irs.gov/pub/irs-pdf/i1120s.pdf> (accessed March 22, 2007) (indicating that Schedule K is a summary schedule of all shareholder's shares of the corporation's income, deductions, credits, etc.). Because the petitioner had no additional income, credits, deductions, or other adjustments shown on its Schedule K for tax years 2001 to 2005, the petitioner's net income is found on line 21, ordinary income (loss) from trade or business activities, on its Form 1120S.

- In 2002, the Form 1120S stated net income of -\$106,101.
- In 2003, the Form 1120S stated net income of \$5,651.
- In 2004, the Form 1120S stated net income of -\$12,872.
- In 2005, the Form 1120S stated net income of -\$37,155.

Therefore, for the years 2001 to 2004, the petitioner did not have sufficient net income to pay the entire proffered wage, or the difference between the beneficiary's actual wages and the proffered wage of \$54,995.20 in 2005.

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, including real property that counsel asserts should be considered. 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.<sup>5</sup> 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.

- The petitioner's net current assets during 2001 were \$184,452.<sup>6</sup>
- The petitioner's net current assets during 2002 were \$39,422.
- The petitioner's net current assets during 2003 were \$54,767.
- The petitioner's net current assets during 2004 were \$44,291.
- The petitioner's net current assets during 2005 were \$8,754.

Therefore, for the year 2001, the petitioner did have sufficient net current assets to pay the proffered wage of \$54,995.20. However, in tax years 2002 through 2005, the petitioner did not have sufficient net current assets to pay either the entire proffered wage or the difference between the beneficiary's reported wages of \$28,416.79 in 2005, and the proffered wage of \$54,995.20, namely, \$26,578.41.

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

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<sup>5</sup>According to *Barron's Dictionary of Accounting Terms* 117 (3<sup>rd</sup> 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.

<sup>6</sup> The director erroneously stated the petitioner's net current assets in tax years 2001 to 2003 were as follows: \$157,709; \$49,422; and \$54,676.

of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in his brief accompanying the appeal that there is another way to determine the petitioner's continuing ability to pay the proffered wage from the priority date. Counsel states that CIS should consider the audited combined financial statements of Freehold Cartage, Inc., rather than the petitioner's federal income tax returns, in its examination of the petitioner's ability to pay the proffered wage. As previously stated, the AAO does not find counsel's assertion with regard to the audited combined financial statements submitted to the record to be persuasive. Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by the Department of Labor. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record does not contain the original ETA Form 750. 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). 8 C.F.R. §§ 204.5(a)(2), (l)(3)(i) require submission of a labor certification. 8 C.F.R. § 103.2(b) provides:

Submitting copies of documents. Application and petition forms must be submitted in the original. Forms and documents issued to support an application or petition, *such as labor certifications, Form IAP-66, medical examinations, affidavits, formal consultations, and other statements, must be submitted in the original unless previously filed with the Service.*

(Emphasis added.) 8 C.F.R. § 204.5(g) provides:

In general, ordinary legible photocopies of such documents (*except for labor certifications from the Department of Labor*) will be acceptable for initial filing and approval.

(Emphasis added.) Counsel has not provided any authority permitting CIS to accept a photocopy of this document. We note that petitioning employers are permitted to substitute alien beneficiaries but that a labor certification for an immigrant worker is not valid for multiple beneficiaries. *See generally Matter of Harry Bailen Builders*, 19 I&N Dec. 412 (Comm. 1986). 20 C.F.R. § 656.30(e) provides for the issuance of duplicate labor certifications by the Department of Labor, if the original labor certification is lost. The record contains no clarification as to why the original ETA Form 750 was not submitted to the record, or evidence that the petitioner has obtained an official duplicate labor certification.

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.