

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
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



B6

Date: **JUL 20 2012**

Office: NEBRASKA SERVICE CENTER

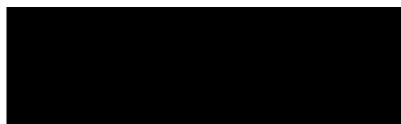
FILE: 

IN RE: 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. § 203 (b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you.

Perry Rhew
Chief, Administrative Appeals Office

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

The petitioner is a fiberglass services firm. On April 23, 2007, the petitioner filed a petition seeking to permanently employ the beneficiary as a fiberglass repairer. The petitioner requests classification of the beneficiary as a skilled worker pursuant to section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i).¹ As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), approved by the Department of Labor (DOL) on March 6, 2007.

The AAO conducts appellate review on a *de novo* basis. The AAO's *de novo* authority is well recognized by the federal courts. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

On November 26, 2008, the director issued a request for evidence (RFE), instructing the petitioner to submit additional evidence of its ability to pay the proffered wage starting from the April 27, 2001 priority date and evidence of the beneficiary's qualifying work experience. Additionally, the director notified the petitioner that the record indicated that the petitioner's sole shareholder, Celso M. Reyes and the beneficiary are brothers, which raised a question of the *bona fides* of the job opportunity. The director requested additional documentation from the petitioner establishing that a *bona fide* job opportunity existed and that no blood relationship existed.

In response, the petitioner submitted financial information related to its ability to pay the proffered wage² and documentation related to the beneficiary's qualifying experience. The petitioner submitted no evidence or information establishing that the job opportunity is *bona fide* or that no blood relationship exists between the beneficiary and the petitioner's sole shareholder.

The director denied the petition on April 14, 2009. The director noted that the petitioner's response to the RFE failed to address the question of the familial relationship and *bona fide* job offer or submit any evidence in reference to this question. The director found that the petition was not eligible for approval on this basis.

The petitioner filed the instant appeal on May 5, 2009. On Part 3 of Form I-290B, Notice of Appeal or Motion, without admitting or denying the familial relationship between the beneficiary and the

¹Section 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.

²It is noted that the beneficiary's birth certificate and the petitioner's sole shareholder's tax returns show that they share the same parents.

petitioner's sole shareholder, or any actual facts related to the instant case, the petitioner cites cases dealing with family relationships and whether a *bona fide* job opportunity existed.

It is noted that the purpose of the RFE is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(8) and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). As in the present matter, where a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *Matter of Obaighena*, 19 I&N Dec. 533 (BIA 1988). In this case, in fact, no actual evidence has been offered on appeal relevant to whether an *actual bona fide* job opportunity existed in this case. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). If the petitioner had wanted relevant facts applicable to the instant matter to be considered, it should have submitted such documents in response to the director's request for evidence. *Id.*

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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

It is noted that the petitioner has submitted no evidence that the DOL was cognizant of that relationship, if any, when it certified the instant labor certification for the instant beneficiary so that factors cited by the petitioner on appeal as expressed in *Matter of Modular Container Systems, Inc.*, 89 INA 228 (July 16, 1991) could be applied. With respect to the *bona fides* of the job offer, it is noted that a relationship invalidating a *bona fide* job offer may arise where the beneficiary is related to the petitioner by "blood" or it may be "financial, by marriage, or through friendship." *See Matter of Sunmart* 374, 00-INA-93 (BALCA May 15, 2000).

Under 20 C.F.R. 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists, that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). Where the petitioner is owned by the person applying for position, it is not a *bona fide* offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied). The court noted:

The regulatory scheme challenged by Bulk Farms is reasonably related to the achievement of the purpose outlined in section 212(a). As the district court correctly noted, "the DOL certification process is built around a central administrative

mechanism: A private good faith search by the certification applicant for U.S. workers qualified to take the job at issue.” See 20 C.F.R. § 656.21. This “good faith search” process operates successfully because all employers are subject to uniform certification requirements. The two independent safeguards challenged by Bulk Farms—the ban on alien self-employment and the bona fide job requirements—make the good faith search process self-enforcing. The prophylactic rules permit the Department of Labor to process more than 50,000 permanent labor certification requests each year. . .

The challenged regulations also represent a reasonable construction of section 212(a) insofar as they ensure the integrity of the information gathered by DOL. As a practical matter, where an employer is indistinguishable from the alien seeking the job in question, there is reason for the employer to abuse the process. . .

Bulk Farms, Inc., v. Martin, 963 F.2d 1286-1289 (1992).

In *Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986), the beneficiary was a principal of the petitioning corporation and the labor certification was signed on behalf of the petitioner by an individual identified as Julio Malqui. After certification and in the course of examining the petitioner’s tax returns, the former Immigration and Naturalization Service (now USCIS) observed that the 1981 tax return showed the beneficiary as the sole officer and a 50% shareholder in the company. The 1982 return reflected that the beneficiary and Mr. Malqui were each 50 percent shareholders with officer compensation going to the beneficiary. In light of these facts, the Board of Immigration Appeals (BIA) observed that the beneficiary is not supervised by Mr. Malqui, who signed the petition as president. Second, the job was not actually open to qualified U.S. Citizen or resident workers. The BIA found that where the beneficiary’s association with the petitioning corporation is concealed in labor certification proceedings, it prevents DOL from discharging its function of examining whether the job opportunity was clearly open to U.S. workers. It was concluded that the misrepresentation was both willful and material. The DOL advisory opinion submitted in that case noted that while it is not an absolute ground for denial of an application for certification, the alien’s ownership of the corporate employer should cause the certifying officer to examine more closely whether the job opportunity was clearly open to qualified U.S. workers. The alien’s ownership of his employer would be one ground for denial since it would not constitute work for an employer other than oneself as required by regulation. *Id.* at 403.

As noted above, the petitioner cites *Matter of Modular Container Systems, Inc.* on appeal. That case represented a decision by the Board of Alien Labor Certification Appeals (BALCA),³ which is

³The same standard has been incorporated into the PERM (Program Electronic Review Management) regulations. See 69 Fed. Reg. 77325, 77326 (Dec. 27, 2004). The regulation at 20 C.F.R. § 656.17(l) (2010) describes the documentation that a petitioner must provide if it is a closely held corporation or partnership in which the alien has an ownership interest, or where there is a familial relationship between the alien and the shareholders, officers, incorporators or partners, or

not binding on the USCIS.⁴ While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a). Moreover, *Matter of Modular Container Systems, Inc.* was predicated on the fact that the investor status of the alien beneficiary was disclosed to the certifying officer in the labor certification proceeding. In this case, the petitioner has not submitted any evidence that the DOL certifying officer was aware of the beneficiary's familial relationship with the petitioner's sole shareholder. The petitioner has not established that a *bona fide* job offer existed in this case.

It is incumbent on 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

The AAO concurs with the director's determination that the petitioner failed to establish that a *bona fide* job opportunity existed in this case.

Beyond the decision of the director, the evidence does not establish that the beneficiary possessed the qualifying experience required by the terms of the labor certification. 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

the alien is one of a small number of employees. The petitioner must demonstrate that a *bona fide* job opportunity existed and that it was available to all U.S. workers. The regulation then lists the supporting documentation that the petitioner must provide in order to demonstrate the *bona fides* of the job opportunity.

⁴ In that case, it was determined that DOL should examine whether a *bona fide* job opportunity was dependent on whether U.S. workers could legitimately compete for the job opening and whether a genuine need for alien labor existed. If the certified job opportunity is tantamount to self-employment, then there is a per se bar to labor certification. Whether the job is clearly open to U.S. workers if measured by such factors as 1) whether the alien was in a position to influence or control hiring decisions regarding the job for which certification is sought; 2) whether the alien was related to the corporate directors, officers, or employees; 3) whether the alien was the incorporator or founder of the employer; 4) whether the alien had an ownership interest in the company; 5) whether the alien was involved in the management of the company; 6) whether he was one of a small number of employees; 7) whether the alien has qualifications for the job that are identical to specialized or unusual job duties and requirements as stated in the application; and 8) whether the alien is so inseparable from the petitioning employer because of a pervasive presence and personal attributes that the employer would be unlikely to continue in operation without him.

(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).

Relevant to a beneficiary's qualifying work experience, the regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation*—

(A) *General*. Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers*. If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The petitioner must demonstrate that a beneficiary has the necessary experience specified on the labor certification as of the priority date. The filing date or priority date of the Form 750 is the initial receipt in the DOL's employment service system. *See* 8 C.F.R. § 204.5(d); *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977). Here, the ETA 750 was accepted for processing on April 27, 2001, which established the priority date.⁵

Item 14 of the Form ETA 750 requires that the beneficiary have two years of work experience in the job offered of fiberglass repairer. On Part B of the Form ETA 750, signed by the beneficiary on April 17, 2006, he lists one previous job. The beneficiary claims to have worked as a fiberglass repairer for Amicay, Inc. of Anaheim, California from 1985 to 1990.

The record contains an employment verification letter from Amicay Fiberglass Services, Inc., signed by Lynne Amicay, President. She states that the beneficiary worked for the firm from approximately 1985 through 1990. This letter does not state with enough specificity the beneficiary's dates of employment and fails to state whether he worked full-time or part-time. It fails to corroborate two full-time years of employment as a fiberglass repairer. Moreover, the Form I-140 information

⁵ If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date, including a prospective U.S. employer's ability to pay the proffered wage is clear.

claimed as the beneficiary's date of arrival in the United States directly contradicts the dates of employment claimed by Amicay Fiberglass Services, as it states that the beneficiary arrived in November 1989. It is incumbent on 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. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). Absent clarification and evidence to support the claimed qualifying employment, the evidence is insufficient to establish that the beneficiary has the required experience for the position offered.

Further, the AAO does not find that the petitioner established the ability to pay the proffered wage in 2001, the year covering the priority date of April 27, 2001. Pursuant to 8 C.F.R. 204.5(g)(2) the petitioner must establish its ability to pay the proffered wage at the time of the priority date and continuing until the beneficiary obtains lawful permanent residence.⁶ The proffered wage in this case is \$11.00 per hour, which amounts to \$22,880 per year.

The Form I-140 (Immigrant Petition for Alien Worker) was filed on April 23, 2007. On Part 5 of the Form I-140, it is claimed that the business was established in January 2001, currently has five employees, and declares \$230,032 in annual gross income.⁷

⁶The 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.

⁷The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of a labor certification application establishes a priority date for any immigrant petition later based on the Form 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 one of the essential elements 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, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the overall circumstances affecting the petitioner will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS 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 given period, if amounts less than the proffered wage have been paid, and the petitioner's net income or net current assets can cover the difference between actual wages paid and the full proffered wage, the ability to pay will be deemed to have been established for that period of time. In this matter, the record contains a 2001 W-2 issued to the beneficiary reflecting that \$11,216.50 in wages paid. This is \$11,663.50 less than the proffered wage of \$22,880. It is further noted that on this W-2, as well as a 2007 W-2 in the record, the petitioner issued them to a beneficiary with a Social Security number of xxx-xx-xxxx. On the Form I-140, however, Part 3 indicates that the beneficiary possesses no Social Security number, raising a question as to the veracity of the W-2s submitted.⁸ 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). The wages reflected on these W-2s will not be accepted as the record currently stands without explanation of these discrepancies.

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, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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); *Ubedu v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In this case, in 2001, the petitioner was an individual and the business was structured as a sole proprietorship.⁹ A sole proprietorship is a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm. 1984). Therefore the individual's adjusted gross

⁸Payroll records from December 2008, reflect a second Social Security number of xxx-xx-xxxx claimed for the beneficiary.

⁹In subsequent years, the petitioner was structured as a Subchapter S corporation and filed federal Form 1120S.

income, assets and liabilities are also considered as part of the petitioner's ability to pay. Individuals report income and expenses on their IRS Form 1040 federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). For this reason, sole proprietors provide evidence of the individual monthly household expenses to be considered as part of their ability to pay the proffered wage.

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioning entity structured as a sole proprietorship could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

In this case, in 2001, it is noted that on the Form 1040, the sole proprietor claimed his spouse and six dependents and reported an adjusted gross income of \$36,885. No summary of monthly household expenses has been provided. Even without considering any household expenses, it is noted that the proffered wage of \$22,880 represents approximately 62% of the petitioner's adjusted gross income. Even without the provision of a summary of household expenses, the AAO does not find that the petitioner has established the ability to pay the \$11,663.50 difference between the actual wages of \$11,216.50 paid to the beneficiary in 2001 and the proffered wage of \$36,885. Based on the evidence submitted, the petitioner did not demonstrate its ability to pay the proffered wage in 2001, the year covering the priority date. Thus, pursuant to 8 C.F.R. § 204.5(g)(2), it has not established its financial ability to pay the proffered wage from the priority date onward.

In some cases, USCIS may consider the overall circumstances applicable to the petitioner's financial ability in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).¹⁰ USCIS may consider such factors as

¹⁰ The petitioning entity in *Sonogawa* 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 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 *Sonogawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

longevity of the business, historical growth, reputation, or any uncharacteristic expenditures or losses incurred by the petitioner.

In the instant case, it is noted that the petitioner filed the labor certification application to sponsor his brother as a fiberglass repairer within five months of the establishment of the business. While gross income has generally increased, net income has declined from 2003 forward. No officer compensation has been reported and no reputational or other factors analogous to *Sonegawa* have been submitted. Thus, assessing the overall circumstances of this individual case, it is concluded that the petitioner has not established its continuing ability to pay the proffered wage based on *Matter of Sonegawa*.

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.