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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



U.S. Citizenship
and Immigration
Services

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Date: JUL 01 2011

Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:



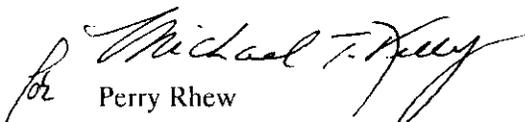
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INSTRUCTIONS:

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 law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must 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 director of the California Service Center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner claims to be a rehabilitation services company with 17 employees. It seeks to employ the beneficiary as a market research analyst pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The director denied the petition concluding that the proffered position is not a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the director's RFE; (3) the director's denial letter; and (4) Form I-290B.¹ The AAO reviewed the record in its entirety before reaching its decision.

The primary issue for consideration is whether the petitioner's proffered position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements:

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1) defines the term "specialty occupation" as one that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

¹ Although counsel checked Box B in Part 2 of the Form I-290B, indicating that he would submit a brief and/or additional evidence to the AAO within 30 days, counsel has submitted neither.

- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position;
or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

Consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

The petitioner states that it is seeking the beneficiary's services as a market research analyst. On the Form I-129, the petitioner provides its alleged business address in Part 1. This same address, which appears to be the address for a private home, is also listed as the beneficiary's home address and the location where the beneficiary will work.

The petitioner stated in its support letter, which was written on plain paper that does not bear any

company letterhead or logo, that the beneficiary will:

- Conduct research on customer opinions of rehabilitation programs;
- Conduct research on marketing strategies and collaborate with marketing professionals;
- Collect and analyze data on customer demographics and preferences;
- Forecast and track marketing and sales trends of rehabilitation services;
- Measure the effectiveness of marketing, advertising, and communications programs;
- Seek and provide information to the petitioner;
- Gather data on competitors; and
- Attend staff conferences.

The petitioner stated that it requires a bachelor's degree in business administration, economics, commerce, or the equivalent. Further, the petitioner provided a credential evaluation, written by [REDACTED] finding that a combination of the beneficiary's education is equivalent to a bachelor of arts degree in tourism management and that she has a bachelor of business administration degree based on a combination of her education and experience.

On June 19, 2009, the director issued an RFE requesting additional evidence that the proffered position is a specialty occupation and that the beneficiary is qualified to perform the duties of a specialty occupation. The director also asked the petitioner to provide more information regarding its business.

The petitioner responded that 75% of the beneficiary's time would be spent researching markets of the assisted care living and home health care industries and that 25% of her time would be spent conducting research and preparing presentations to be given by the president to skilled nursing assisted living facilities and home health care organizations.

Although the petitioner stated in the Form I-129 that it has 17 employees, in response to the RFE the petitioner states that it has 45 licensed physical therapists. The petitioner's president further states that he has been performing all of the marketing up until this point, but the petitioner now wants to hire the beneficiary to take over these duties so that the president can concentrate on operating the company and quality control. The petitioner does not state what degree, if any, the president currently holds.

The petitioner submitted copies of two advertisements placed by other companies. One advertisement is [REDACTED] at a large health care plan and so neither the position nor the company placing the ad are parallel to the position and petitioner in this petition. The second advertisement is for a marketing representative at a hospital, which is not a similar business to the petitioner. Further, this ad requires a bachelor's degree without stating that the degree must be in a *specific specialty*.

The petitioner also submitted a copy of an advertisement it placed for the proffered position. The advertisement states that the position requires a bachelor's degree in marketing, advertising, tourism or the equivalent plus five years of progressively responsible experience or a master's degree in business administration with a concentration in marketing. As stated previously, the petitioner stated in the support letter that it requires a bachelor's degree in business

administration, economics, commerce, or the equivalent. Therefore, this advertisement entails different requirements than what the petitioner originally stated in the petition. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In response to the RFE, the petitioner also submitted two additional credential evaluations, one written by [REDACTED] and the other written by [REDACTED], both finding that the beneficiary's degree is equivalent to a U.S. bachelor of science degree in tourism management and that a combination of the beneficiary's education and experience is equivalent to a U.S. bachelor's degree in business administration with a concentration in marketing.

The director denied the petition on August 17, 2009.

On appeal, counsel for the petitioner argues that the petitioner's business is sufficiently complex to justify the hiring of a market research analyst and that, moreover, the U.S. Department of Labor's *Occupational Outlook Handbook (Handbook)* states that a market research analyst position requires at least a bachelor's degree.

The petitioner has not provided any evidence on appeal to support counsel's arguments. However, even if the petitioner could demonstrate that its business is sufficiently complex to employ the beneficiary as a market research analyst, the AAO disagrees with counsel that the *Handbook*, 2010-2011 edition, indicates that entry into positions in that occupation normally requires at least a bachelor's degree, or the equivalent, in a specific specialty.

While the *Handbook* reports that a baccalaureate degree is the minimum educational requirement for many market and survey research jobs, it does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research, as would be required for the occupational category to be recognized as a specialty occupation. This is evident in the range of qualifying degrees indicated in the Significant Points section that introduces the *Handbook's* chapter "Market and Survey Researchers," which states: "Market and survey researchers can enter the occupation with a bachelor's degree, but those with a master's or Ph.D. in marketing or a social science should enjoy the best opportunities."

That the *Handbook* does not indicate that market research analyst positions normally require at least a bachelor's degree in a specific specialty is also evident in the following discussion in the "Training, Other Qualifications, and Advancement" section of its chapter "Market and Survey Researchers," which does not specify a particular major or academic concentration:

A bachelor's degree is the minimum educational requirement for many market and survey research jobs. However, a master's degree is usually required for more technical positions.

In addition to completing courses in business, marketing, and consumer behavior, prospective market and survey researchers should take social science courses,

including economics, psychology, and sociology. Because of the importance of quantitative skills to market and survey researchers, courses in mathematics, statistics, sampling theory and survey design, and computer science are extremely helpful. Market and survey researchers often earn advanced degrees in business administration, marketing, statistics, communications, or other closely related disciplines.

Because the *Handbook* indicates that entry into the market research analyst occupation does not normally require a degree in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation.

As the evidence of record does not establish that the particular position here proffered is one for which the normal minimum entry requirement is a baccalaureate or higher degree, or the equivalent, in a specific specialty closely related to the position's duties, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)). As discussed previously, the two advertisements submitted by the petitioner in response to the RFE do not demonstrate that similar firms require at least a degree in a specific specialty for parallel positions.

The petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Even if established by the evidence of record, which it is not, the requirement of a bachelor's degree in business administration is inadequate to establish that a position qualifies as a specialty occupation. A petitioner must demonstrate that the proffered position requires a precise and specific course of study that relates directly and closely to the position in question. Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation. See *Matter of Michael Hertz Associates*, 19 I&N Dec. 558.

To prove that a job requires the theoretical and practical application of a body of specialized knowledge as required by Section 214(i)(1) of the Act, a petitioner must establish that the position requires the attainment of a bachelor's or higher degree in a specialized field of study.

USCIS interprets the degree requirement at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) to require a degree in a specific specialty that is directly related to the proposed position. USCIS has consistently stated that, although a general-purpose bachelor's degree, such as a degree in business administration, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify a finding that a particular position qualifies for classification as a specialty occupation. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 189, 2007 WL 1228792 (C.A. 1 (Puerto Rico) 2007).

The petitioner has also not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree." The petitioner did not submit any documentation to evidence that the proffered position requires at least a bachelor's degree or the equivalent in a specific specialty. Indeed, the petitioner stated in its advertisement for the position that the degree could be in a wide range of fields, including business, marketing, and tourism.

Although the petitioner claimed that the president has been performing the proffered duties, the petitioner did not submit documentation regarding the president's degree. Further, the president did not state what percentage of his time is spent performing the proffered duties. As the record has not established a prior history of hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

Finally, the petitioner has not satisfied the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is reserved for positions with specific duties so specialized and complex that their performance requires knowledge that is usually associated with the attainment of a baccalaureate or higher degree in a specific specialty. The proposed duties have not been described with sufficient specificity to show that they are more specialized and complex than market-research-analyst positions that are not usually associated with a degree in a specific specialty.

Therefore, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under any of the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A). Accordingly, the AAO will not disturb the director's decision to deny the petition. The appeal will be dismissed, and the petition will be denied.

Beyond the decision of the director, the AAO finds that the petition must also be denied because the evidence in the record of proceeding does not establish that the evaluations of education and experience upon which the petitioner relies to establish the beneficiary's qualifications were rendered by persons that the pertinent regulations recognize as competent to evaluate the educational equivalency of experience. The AAO conducts appellate review on a *de novo* basis (*See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004)), and it was in the exercise of this function that the AAO identified this additional ground for denying the petition.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C), to qualify to perform services in a specialty occupation, the alien must meet one of the following criteria:

- (1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (3) Hold an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or
- (4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D), for purposes of paragraph (h)(4)(iii)(C)(4) of this section, equivalence to completion of a United States baccalaureate or higher degree shall mean achievement of a level of knowledge, competence, and practice in the specialty occupation that has been determined to be equal to that of an individual who has a baccalaureate or higher degree in the specialty and shall be determined by one or more of the following:

- (1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;
- (2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Noncollegiate Sponsored Instruction (PONSI);
- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

In accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(5):

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks. . . . It must be clearly demonstrated that the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation; that the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the alien has recognition of expertise in the specialty evidenced by at least one type of documentation such as:

- (i) Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;
- (ii) Membership in a recognized foreign or United States association or society in the specialty occupation;
- (iii) Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- (iv) Licensure or registration to practice the specialty occupation in a foreign country; or
- (v) Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

The beneficiary does not hold a U.S. degree and her four-year foreign degree has not been determined to be the equivalent of a U.S. degree in a bachelor's degree in business administration, economics, commerce, or the equivalent, as was stated as a requirement by the petitioner. Instead, it has been found to be equivalent to a bachelor's degree in tourism management. Further, the transcripts indicate that the beneficiary took only a few business-related courses towards her degree. Therefore, pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(C)(4), in order for the beneficiary to qualify for a specialty occupation, the record must demonstrate that she has education, specialized training, and/or progressively responsible experience equivalent to a U.S. baccalaureate or higher degree in a field required by a specialty occupation.

As stated above, the petitioner initially submitted a credential evaluation written by [REDACTED] at the [REDACTED] and [REDACTED] Management, writing on behalf of [REDACTED] which states that the beneficiary's education is equivalent to a bachelor of arts in tourism management and that a combination of her education and experience amount to the equivalent of a U.S. bachelor's degree in business administration.

Although a resume for [REDACTED] was submitted, no documentation was provided from the [REDACTED] establishing that, at the time he produced his evaluation for the petitioner, [REDACTED] that had a program for granting college-level credit in the pertinent academic specialty for work experience in that specialty, and (2) that this evaluator had authority for granting such credit based upon a person's work experience. Accordingly, this evaluation does not meet the standard of 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) for competency to render to USCIS an opinion on the educational equivalency of work experience.

Further, the evaluation from [REDACTED] submitted in response to the RFE, together with the letter from the [REDACTED] does not meet the standard described in 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). The letter from [REDACTED] does not establish that, at the time the associate professor produced his evaluation for the petitioner, (1) [REDACTED] had a program for granting college-level credit in the pertinent academic specialty for work experience in that specialty, and (2) that this evaluator had authority for granting such credit based upon a person's work experience.

Regarding the evaluation from [REDACTED] although the petitioner has submitted documentation from [REDACTED] website establishing that the university may issue credit to students for experience-based learning, this documentation also does not meet the above-described standard at 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), as the evidence in the record of proceeding does not establish that, at the time she produced her evaluation for the petitioner, [REDACTED] had the authority to grant college credit in the specialty specified by [REDACTED], pursuant to a [REDACTED] for granting such credit based upon a person's work experience in that specialty.

Aside from the decisive fact that the evidence of record does not establish [REDACTED] as competent under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1) to evaluate experience, the AAO finds that the content of their evaluations of the beneficiary's experience would merit no weight even if [REDACTED] were qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1). All three evaluation authors basically summarize the letter of the beneficiary's former employer, which describes the beneficiary's experience only in generalized and generic terms. [REDACTED] concludes, without analysis, that the "responsibilities handled by [the beneficiary] throughout her career are indicative of Bachelor's-level coursework in Business Administration and related subjects." [REDACTED] both conclude that the beneficiary "served in positions of increasing professional responsibility and sophistication, together with peers, under the supervision of managers, at a level of employment commensurate with Bachelor's level training," even though nowhere does the beneficiary's prior employer state with whom the beneficiary worked or their titles. The beneficiary's experience letter does not indicate whether the experience was gained while working with peers, supervisors, and subordinates who have a degree or its equivalent in a business-related field. As these three evaluations do not establish a substantive basis for their conclusions, they would have no probative value even if they were rendered by officials qualified under 8 C.F.R. § 214.2(h)(4)(iii)(D)(1).

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(D)(5), USCIS may determine that the beneficiary has the equivalent of a degree in computer information systems if he has a combination of education, specialized training, and/or work experience in areas related to this claimed specialty. However, the instant record of proceeding does not support such a determination.

As stated above, the evaluations on record are not probative of the beneficiary's attainment, through education and experience, of the degree-equivalency to which those evaluations attested. The AAO further finds that the letter from the beneficiary's former employer does not contain sufficient detail to establish that the beneficiary's experience was gained while working with peers, supervisors, and subordinates who have at least a bachelor's degree, or its equivalent, in a business-related field. Finally, the record lacks the required showing of the beneficiary's expertise in a business-related field. The evidence does not establish that the beneficiary is qualified to perform a specialty occupation.

The petition will be denied and the appeal dismissed. 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. The petition is denied.