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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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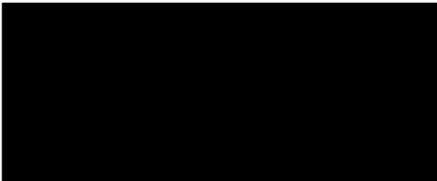
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Date: **JUL 25 2011** Office: VERMONT SERVICE CENTER FILE:

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:



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 service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a food research technology firm. To employ the beneficiary in what it designates as a food science technologist position, the petitioner endeavors to classify him as a nonimmigrant worker in a specialty occupation 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, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, counsel asserts that the director's basis for denial was erroneous, and counsel contends that the petitioner satisfied all evidentiary requirements. In support of these contentions, counsel submits a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and counsel's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation "which [(1)] 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 [(2)] 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;
- (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, 8 U.S.C. § 1184(i)(1), 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 a particular position 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 comments in the last two paragraphs above are critical for understanding the basis upon which the AAO is dismissing this petition. Review of the entire record of proceeding in this matter reveals that the evidence of record failed to establish that performance of the proffered position requires the theoretical and practical application of a body of highly specialized knowledge in a specific specialty and the attainment of a bachelor's degree in that specialty. The AAO notes that the petitioner, through its counsel, acknowledged this failure in stating, at page four of the brief on appeal, "Clearly, there is no prescribed major or specific bachelor's program for the [proffered] position."

In this regard, the AAO notes that it appears that the petitioner and its counsel failed to read the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) in context and conjunction with the overarching specialty occupation definitions at section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii).

Because the proffered position does not require a bachelor's degree, or the equivalent, in a specific specialty closely related to the proffered position, it is not a specialty occupation. Accordingly, the AAO will not disturb the director's decision, and the appeal will be dismissed.

The AAO will now address the specific criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A).

As will now be discussed, because the evidence in the record of proceeding does not substantiate that the proffered position is one for which there is normally a minimum requirement for a bachelor's degree, or the equivalent, in a specific specialty, the petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).

With the visa petition, counsel submitted a letter, dated April 1, 2009, from the petitioner's director. That letter describes the duties of the proffered position as follows:

Coordinate USA activities, promotion angles and programs with Swiss headquarters.
Review technical results, quality issues and commercial forms with [REDACTED] in Brazil.

Resolve, in coordination with both Management and [REDACTED] legal issues surrounding each product, specifically:

- * Labelling [sic] issues (FDA and EPA)
- * Application issues (FDA)
- * Import issued [sic] (customs authorities)

Resolve in coordination with both Management and [REDACTED] commercial issues surrounding each product, specifically:

- * Evaluation of market potential (per sector per application)
- * Competitor analysis (per sector per application)
- * Definition of commercial partners (Selection of Distributors)

The visa petition was accompanied by no evidence, nor even an assertion, that the proffered position requires a minimum of a bachelor's degree or the equivalent in a specific specialty and qualifies, therefore, as a position in a specialty occupation.

The director denied the visa petition on July 16, 2009. In that decision, the director noted that the beneficiary was previously employed by the petitioner pursuant to a student visa in an optional program of training (OPT) position. The director found that the proffered position is an extension of that same employment, which clearly did not require a minimum of a bachelor's degree or the equivalent in a specific specialty, as the beneficiary was placed in his OPT position prior to completing his degree. The director found, therefore, that the evidence did not demonstrate that the petitioner would employ the beneficiary in a specialty occupation.

In response to the decision of denial, counsel submitted an undated letter from the petitioner's managing director and job vacancy announcements printed from popular job search websites. In his undated letter, the petitioner's managing director asserted that the proffered position is unique, as he related the duties of that position as follows:

[The beneficiary's] position requires his participation and analysis of research methods and the resultant data as the [petitioner's] technology evolves. This includes not only information derived here, but that developed by the parent company in Switzerland for which [the beneficiary] is also responsible. He was and shall be involved among others in industrial trials of the use of [the petitioner's] EPT-technology on potato and tortilla chips. The position also requires the analysis of existing related scientific literature and its potential application. It involves analysis for the optimum ways to apply and market the proprietary technology to the scientific community, the USDA, potential customers, and the public. Clearly the job is not a mere continuation of [the beneficiary's] OPT.

The petitioner's managing director further stated, "As [the beneficiary's OPT] has come to an end, he has assumed increasingly more important tasks for the [petitioner]." He stated that the beneficiary's duties including planning all aspects of the petitioner's presence at an international conference for food technology, coordinating meetings, introductions, and explanations of the petitioner's products and fostering a relationship with a leading consultant on food technology and food processing and an executive at a snack food company, which was made possible by the beneficiary's understanding of the petitioner's technology. He further stated that the beneficiary has traveled internationally on the petitioner's behalf "to exchange views and discuss strategic approaches."

The managing director stated that the petitioner's future requires the promotion of its scientific applications, that such promotion will be among the beneficiary's job duties, and that it will require an intensive analysis of scientific literature, evaluation of industry reports, and studies on market potential, on competitive behavior, and on activities. He stated that, the beneficiary's psychology degree entailed considerable research, data analysis, and application as well as communication of findings, and that if the beneficiary had not possessed a bachelor's degree in psychology, he would not have been offered the proffered position. Thus, the managing director acknowledges that the beneficiary is sought for skills that may have been attained by a number of different and unrelated academic majors and course concentrations, but not so that he could apply the body of highly specialized knowledge in psychology which was conveyed in the course of the beneficiary's attaining his degree in psychology.

Finally, the petitioner's managing director stated, ". . . [I]t is [the beneficiary's] degree in psychology plus almost nine (9) years (four in Switzerland and almost five in the USA) of experience with [the petitioner's] science and confidential and proprietary processes which qualifies him for the [proffered] position." The assertion that the beneficiary is qualified for the proffered position based on his education and experience, rather than solely his education, is addressed further below.

On appeal, counsel for the petitioner states that the Agricultural and Food Sciences Technicians occupation "approximated some of the duties and requirements [the beneficiary] would be expected to assume." Counsel's brief on appeal also states that the petitioner's letter accompanying the petition "clearly demonstrates a position which embodies the duties of a "Technician" but goes well beyond what is expected of that position in scope and responsibility."

The AAO recognizes the DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.¹ The *Handbook's* chapter "Science Technicians" addresses the occupational classification of Agricultural and Food Sciences Technicians. It states the following about the duties of Agricultural and Food Sciences Technicians:

Agricultural and food science technicians work with related scientists to conduct research, development, and testing on food and other agricultural products. Agricultural technicians are involved in food, fiber, and animal research, production, and processing. Some conduct tests and experiments to improve the yield and quality of crops or to increase the resistance of plants and animals to disease, insects, or other hazards. Other agricultural technicians breed animals for the purpose of investigating nutrition. Food science technicians assist food scientists and technologists in research and development, production technology, and quality control. For example, food science technicians may conduct tests on food additives and preservatives to ensure

¹ The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO's references to the *Handbook* are to the 2010 – 2011 edition available online.

compliance with Food and Drug Administration regulations regarding color, texture, and nutrients. These technicians analyze, record, and compile test results; order supplies to maintain laboratory inventory; and clean and sterilize laboratory equipment.

As to the educational requirements of science Technician positions, including agricultural and food sciences technician positions, the *Handbook* states:

There are many ways to qualify for a job as a science technician. Most employers prefer applicants who have at least 2 years of specialized postsecondary training or an associate degree in applied science or science-related technology. Some science technicians have a bachelor's degree in the natural sciences, while others have no formal postsecondary education and learn their skills on the job.

That chapter of the *Handbook* does not support the proposition that science technician positions require a minimum of a bachelor's degree or the equivalent in a specific specialty.

The AAO also finds that, to the extent that they are described in the record, neither the proffered position, nor the duties comprising them, comport with any occupational classification for which the *Handbook* indicates an entry requirement of at least a bachelor's degree, or the equivalent, in a specific specialty.

Further, the AAO finds that the proffered position is described in generalized, generic terms that relate neither the substantive nature of the work that the beneficiary would perform nor any body of highly specialized knowledge in a specific specialty, at a bachelor's degree or higher level, that he would have to apply in order to perform the proffered position.

As the petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, it 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 above, the petitioner has not established that the proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. Also, the petitioner has not submitted attestations from other persons or firms in the industry or from a professional association that the position is one for which there is a routine practice of recruiting and hiring only persons with at least a bachelor's degree in a specific specialty.

As will now be discussed, the job-vacancy advertisements from other firms have no probative value.

The vacancy announcements submitted are for various job titles, including Quality Assurance Technician – Food, Quality Control Technician, Quality Assurance Technician, (Senior) Technician Fermentation, Manufacturing Quality Manager 1, Integrity Management/GIS Technician, Senior QA in Food Industry, Quality Services Technician, Non Exempt Site Quality Services Technician – Quality Systems, Site Quality Services Technician – Process Improvements, Food Science Technician, Laboratory Technician Screening – Target Discovery, and Analytical Food Lab Technician. Although most of those positions appear to be within the food and beverage production industry, two are in the biotechnology/pharmaceuticals industry, one position is with a producer of construction materials, and one is in another manufacturing industry.

Two of those announcements specifically require a bachelor's degree in food science. One of those vacancy announcements states that the position requires a bachelor's degree in meat science, food science, or a related field. One requires a bachelor's degree in biological sciences. One requires a bachelor's degree in chemistry. The AAO observes that those positions each require a minimum of a bachelor's degree or the equivalent in a specific specialty, but not in psychology.

One states that it requires a bachelor's degree in engineering or science. The AAO observes that it requires a bachelor's degree, but not in a specific specialty.

One of those vacancy announcements states that “the ideal candidate must have BS degree preferably in Food Science.” Four announcements state that a minimum of a bachelor's degree in a science/technical discipline is preferred, and list “science, engineering, food science, etc.” as options. One states that a degree in engineering, basic sciences, or a business-related discipline would be highly desirable. The AAO notes those announcements indicate a preference, rather than a minimum requirement.

One announcement states that the position requires, “[a] BS degree in horticulture, timber, forestry, or related field and/or relevant experience.” The AAO notes that the position does not, therefore, require a bachelor's degree, but merely lists it as an option.

Another announcement states that the position requires a bachelor's degree in food science or equivalent science with five years of experience, or an associate's degree and eight years of experience. That position does not, therefore, require a minimum of a bachelor's degree.

The remaining five announcements state that the position announced requires a bachelor's degree, but not that the degree should be in any specific specialty.

Further, none of those vacancy announcements demonstrate that the duties of the positions offered qualify them as positions parallel to the proffered position. Also, the petitioner's managing director's assertion that the proffered position is unique supports the proposition that they are not parallel positions.

Further still, even if all of those vacancy announcements had been placed by similar organizations within the petitioner's industry, for positions parallel to the proffered position, and required a minimum of a bachelor's degree or the equivalent in psychology, 19 vacancy announcements would still be insufficient to demonstrate an industry-wide recruiting and hiring requirement of a minimum of a bachelor's degree or the equivalent in a specific specialty.

For the reason's discussed above, the petitioner has not satisfied the first of the two alternative prongs of the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner also failed to satisfy 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 AAO finds that the descriptions of the position and its constituent duties, which, as observed earlier in this decision, are generic, generalized, and lacking in substantive content, do not show that whatever complexity or uniqueness is claimed for the proffered position is of such a degree that it necessitates the services of a person with at least a bachelor's degree, or the equivalent, in a specific specialty.

Next, the AAO also finds that the petitioner not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3). That is, it has not established a history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty. (Of course, if such a history had been shown, the petitioner would also have to establish that it was generated by the position's actual performance requirements, rather than as a preference for qualifications beyond those actually required for performance of the position.)²

² A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements, and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. See *generally Cf. Defensor v. Meissner*, 201 F. 3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act. To interpret the regulations any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position - and without consideration of how a beneficiary is to be specifically employed - then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. See *id.* at 388.

Finally, the petitioner has not satisfied the fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), which requires a petitioner to establish that the nature of the position's specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree.

As reflected in its earlier discussion regarding the proffered position and its duties, the AAO finds that they are related exclusively in general terms of generic functions. As such, the duties are not developed with sufficient specificity to convey the level of specialization and complexity required by this fourth criterion. To the extent that they are described in the record of proceeding, the duties of the proffered position lack substantive detail and specificity sufficient to indicate that they are so specialized and complex as to require the application of a body of highly specialized knowledge usually associated with any particular level of education, let alone with a baccalaureate or higher degree in a specific specialty.

The AAO finds that the director was correct in his determination that the record before him failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

The record suggests an additional issue that was not discussed in the decision of denial.

As discussed in this decision, the proffered position has not been shown to require a baccalaureate or higher degree, or its equivalent, in a specific specialty and has not, therefore, been shown to qualify as a position in a specialty occupation. The AAO observes that if the petitioner had demonstrated that the proffered position qualified as a specialty occupation position by virtue of requiring a minimum of a bachelor's degree or the equivalent in a specific specialty, the petitioner would be obliged, in order for the visa petition to be approvable, to demonstrate that the beneficiary has a minimum of a bachelor's degree or the equivalent *in that specific specialty*.

The beneficiary has a bachelor's degree in psychology. An examination of the descriptions of the duties of proffered position suggests that most of those duties do not involve application of the specialized knowledge required to obtain a of a psychology degree. This suggests that, if the proffered position were shown to be a position in a specialty occupation, the beneficiary might not be found to be qualified for the position.

Further, the AAO observes that the letter from the petitioner's managing director indicates that the petitioner is relying on the beneficiary's education and experience, rather than his education alone, to show that he is qualified for the proffered position. If the petitioner intends to rely on the beneficiary's experience, even in part, to show that the beneficiary is qualified for the proffered position, then, in accordance with 8 C.F.R. § 214.2(h)(4)(iii)(D)(1), the petitioner must provide 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. The petitioner submitted no

such evaluation, and the beneficiary's experience cannot be considered in determining whether he is qualified to work in the proffered position.

In the instant visa category, however, a beneficiary's credentials to perform a particular job are relevant only when the job is found to qualify as a specialty occupation. The finding that the petitioner failed to demonstrate that the proffered position qualifies as a specialty occupation, however, is dispositive, and the AAO need not reach the issue of the beneficiary's qualifications.

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

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. The appeal will be dismissed and the petition denied.

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