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U.S. Citizenship
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Services

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File: EAC 07 233 52133 Office: VERMONT SERVICE CENTER Date: **AUG 01 2008**

IN RE: Petitioner:
Beneficiary:



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

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the petition for a nonimmigrant visa. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant visa petition seeking to employ the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner is a corporation organized under the laws of the State of Florida and allegedly provides services, staffing, and supplies to cruise ships.

The director denied the petition concluding that the petitioner did not establish that it has a qualifying relationship with the beneficiary's foreign employer, Emerald Seas Management, Ltd. Specifically, the director determined that the two entities do not share common ownership and control.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel to the petitioner asserts that both entities are controlled by the same individual and that this individual owns shares in both the petitioner and the foreign employer.

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The primary issue in the present matter is whether the petitioner has established that it has a qualifying relationship with the foreign employer, Emerald Seas Management, Ltd.

The regulation at 8 C.F.R. § 214.2(l)(3)(i) states that a petition filed on Form I-129 shall be accompanied by "[e]vidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations." Title 8 C.F.R. § 214.2(l)(1)(ii)(G) defines a "qualifying organization" as a firm, corporation, or other legal entity which "meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section" and "is or will be doing business." "Affiliate" is defined in pertinent part as "[o]ne of two subsidiaries both of which are owned and controlled by the same parent or individual." 8 C.F.R. § 214.2(l)(1)(ii)(L)(I).

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm. 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. 593.

In this matter, the petitioner claims in a letter dated August 7, 2007 that an individual, [REDACTED] is "the owner and president of both [the petitioner and Emerald Seas Management, Ltd.]." Furthermore, the petitioner's 2005 Form 1120, U.S. Corporation Income Tax Return, indicates that Mr. [REDACTED] owns 100% of the petitioner's stock. The petitioner also submitted a stock certificate which indicates that [REDACTED] was issued 120 shares of stock in 2005. However, a letter dated November 1, 2005 from the petitioner's counsel, [REDACTED] indicates that "the sole shareholders of [the petitioner] as of this date are [REDACTED]"

Accordingly, on August 27, 2007, the director requested additional evidence. The director requested, *inter alia*, further evidence addressing the ownership and control of the petitioner, specifically the extent of [REDACTED] ownership and control in view of the representations made in the November 1, 2005 letter.

In response, counsel submitted a letter dated October 2, 2007 in which he clarifies that [REDACTED] owns 20% of the petitioner's stock while [REDACTED] owns 80% of the stock. However, counsel claims that [REDACTED] now owns and controls the company as follows:

It should also be noted that [REDACTED] passed away last year. Though her estate has not been settled yet, the stock she held is transferred back to the company and therefore, Mr. [REDACTED] has become the sole owner of the company.

Counsel submitted no evidence to support this claim. Counsel did not submit copies of [REDACTED] will or pertinent probate documents or copies of the petitioner's stockholder agreements, proxies, or other materials which may address the transfer of ownership of, or control over, shares upon the death of a stockholder.

On October 22, 2007, the director denied the petition. The director concluded that the petitioner failed to establish that it has a qualifying relationship with the foreign employer. Specifically, the director determined that, since [REDACTED] owns 80% of the foreign employer but only 20% of the petitioner, the two entities are not qualifying organizations because they are not owned and controlled by the same individual. The director also noted that the record is devoid of evidence establishing that [REDACTED] stock came under [REDACTED] ownership or control upon her death.

On appeal, counsel asserts that both entities are controlled by [REDACTED] and that this individual owns shares in both the petitioner and the foreign employer. In support, counsel submits letters from an accountant, an attorney, three company vendors, and a bank which collectively indicate that Mr. [REDACTED] generally directs the petitioner's business. The letters claim that [REDACTED] signs documents for the company and makes all business decisions related to the operation. However, counsel again fails to submit any documents addressing the disposition of [REDACTED] shares or the settlement of her estate. Counsel also fails to submit any documents pertaining to the transfer of stock upon the death of a shareholder or the voting of shares, e.g., stockholder agreements, proxies, or other relevant organizational documents.

Upon review, counsel's assertions are not persuasive.

In this matter, the record is not persuasive in establishing that [REDACTED] as an owner of 20% of the stock, "controls" the petitioner and, thus, the petitioner has failed to establish that it and the foreign employer are qualifying organizations as defined by the regulations. As noted above, "control" over an entity means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. 593. While it appears that Mr. [REDACTED] directs the day-to-day business operations of the petitioner, the record does not establish that he has any direct or indirect legal right and authority to do so. To the contrary, it appears that the legal right or authority to direct the petitioner's business operations is vested in the owner of the majority of the petitioner's shares, i.e., [REDACTED] or, assuming she has passed away and her Estate is subject to an active probate proceeding, the administrator or executor of her Estate. As noted above, the record is devoid of evidence establishing that [REDACTED] shares, and the voting powers inherent thereto, are now either owned or controlled by [REDACTED]. Counsel also failed to submit any evidence pertaining to the transfer, or assumption of control, of [REDACTED] stock upon her death such as a stockholders' agreement, a proxy agreement, or any other relevant organizational documents which address this issue. The unsupported statements of counsel on appeal are not evidence and thus are not entitled to any evidentiary weight. *See INS v. Phinpathya*, 464 U.S. 183, 188-89 n.6 (1984); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503 (BIA 1980). 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)).

Accordingly, the petitioner has failed to establish that it has a qualifying relationship with the foreign employer, and the petition may not be approved for that reason.

Beyond the decision of the director, the petitioner has failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner does not clarify in the initial petition whether the beneficiary will primarily perform managerial duties under section 101(a)(44)(A) of the Act, or primarily executive duties under section 101(a)(44)(B) of the Act. A petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. Given the lack of clarity, the AAO will assume that the petitioner is claiming that the beneficiary will be employed as either a manager *or* an executive and will consider both classifications.

The petitioner describes the beneficiary's proposed duties as "project and training manager" in a letter dated August 7, 2007 as follows:

1. Responsible for defining and implementing company policies between the shoreside office and onboard personnel.
2. Responsible for training and motivating all personnel, and to ensure that their performance is in accordance to company policy and expectations.
3. Conducts department meetings to share, create and implement new ideas that will generate and increase revenue while reducing cost. Maintains ongoing training to improve performance of all service personnel.
4. Responsible for training and maintaining the proper handling and cleaning procedures to ensure that all health and safety requirements are met as per the U.S. Public Health Department.
5. In charge of ordering and maintaining goods and supplies inventory. To supervise the good use of all stock by controlling pilferage, and theft. Focus thoroughly on maintaining suitable inventory of all stock in the storeroom.
6. In charge of the preparation of personnel payroll, maintenance of personal records, including job performance conduct and evaluation records. Recommend staff whose performance merits their promotion.
7. Responsible for the safekeeping of all cash and important documents. In charge of all accounts and monetary records reports.

The petitioner also submitted an organizational chart for the United States operation. However, the chart does not identify the beneficiary's proposed position as project and training manager.

Finally, the petitioner submitted copies of its Forms 941, Employer's Quarterly Federal Tax Return. According to the most recent return, the petitioner employs eight people in the United States.

On August 27, 2007, the director requested additional evidence. The director requested, *inter alia*, a more detailed description of the beneficiary's proposed duties, an organizational chart showing where the beneficiary's proposed position will fit into the petitioner's personnel hierarchy, and job descriptions for all of the beneficiary's proposed subordinate workers.

In response, the petitioner submitted a document titled "job description" in which the beneficiary's proposed duties are further described as follows:

1. Responsible for coordinating and implementation of company policies between shoreside office and onboard personnel. (4 hrs./week).
2. Research new tendencies in U.S. restaurant and bar scene culture in order to replicate onboard ships catering mainly to U.S. clients. This includes activities, menu items and popular mix drinks. (2 hrs./week).
3. Responsible for training and motivating all personnel that will board the vessels and ensure the Director of Hotel Services continues to motivate personnel while onboard. (10 hrs./week).
4. Maintains ongoing training to continually improve all service personnel performance. This includes ensuring cooks/chefs/bartenders receive proper training on new items to be offered. (2 hrs./week).

5. Ensure that onboard performance is in accordance to company policy and expectation. (3 hrs./week).
6. Conducts department meetings to share, create and implement new ideas that will generate and increase revenue while reducing cost. (2 hrs./week).
7. Responsible for training and maintaining the proper handling and cleaning procedures to ensure that all health and safety requirements are met as per the U.S. Public Health Department. Will review health inspection reports conducted by the Director of Hotel Services while onboard vessels. (2 hrs./week).
8. In charge of authorizing purchase orders for supplies and reviewing inventory reports of goods and supplies. To supervise and good use of all stock by controlling pilferage, and theft. Identify and maintaining [sic] suitable inventory of all stock in the storeroom. (2 hrs./week).
9. In charge of the preparation of reports needed by Human Resources to prepare onboard personnel payroll, maintenance of personal records, including job performance conduct and evaluation records. Recommend staff whose performance merits their promotion. (3hrs./week).
10. Responsible for the safekeeping of all cash and important documents. Receiving and reviewing accounting and monetary records and daily reports from the Director of Hotel Services for onboard operations. Discuss with President and CFO the profitability of each contract and review financial objectives. (2 hrs./week).
11. Review with President possible projects and determine their feasibility. (2 hrs./week).
12. Set up operations for new projects. (3 hrs./week).
13. Miscellaneous. (3 hrs./week).

The petitioner also submitted an organizational chart in which the beneficiary is portrayed as reporting to Mr. [REDACTED] and as supervising the "director of hotel services." While counsel claims in his letter dated October 2, 2007 that the "director of hotel services" supervises "several other supervisory positions," the petitioner fails to specifically describe these subordinate supervisors. Finally, the duties of the "director of hotel services" are described in a document dated September 13, 2007 as follows:

- Supervisor of Food & Beverage departments on board the vessel. – (8 hours/week)
- Responsible for purchasing food/beverage inventory. (8 hours/week)
- Manages [sic] of ship in Ft. Lauderdale (Regal Empress for 400 crew on board[])] (8 hours/week)
- Responsible for ordering for Food, Bar, Hotel and for Crew and Passengers on board- (8 hours/week)
- Miscellaneous- (8 hours/week)

Upon review, the petition is not persuasive in establishing that the beneficiary will be primarily employed in a managerial or executive capacity in the United States.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are

either in an executive or managerial capacity. *Id.* A petitioner cannot claim that some of the duties of the position entail executive responsibilities, while other duties are managerial. As explained above, a petitioner may not claim that a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

In this matter, the petitioner's description of the beneficiary's job duties fails to establish that the beneficiary will act primarily in a "managerial" or "executive" capacity. To the contrary, the petitioner has submitted a job description which describes the beneficiary as primarily performing administrative or operational tasks which do not rise to the level of being managerial or executive duties. For example, the petitioner asserts that the beneficiary will devote most of his time to researching restaurant and bar scene culture, training personnel, preparing reports, safekeeping cash and documents, setting up "operations for new projects," and performing miscellaneous tasks. However, these training and operational tasks are the tasks necessary to the provision of the petitioner's service, and the record is not persuasive in establishing that the beneficiary will be relieved by a subordinate staff of the need to perform these non-qualifying tasks. It must be emphasized that training personnel, either the petitioner's employees or the employees of a customer, is not a qualifying managerial or executive duty. Furthermore, the supervision or management of the employees of a customer, rather than of the petitioner, in the context of the provision of management services to that customer is also not a qualifying managerial or executive duty. Instead, these duties constitute the tasks necessary to the provision of service, i.e., the provision of management services. The fact that the petitioner has given the beneficiary a managerial or executive title does not establish that the beneficiary will actually perform managerial or executive duties. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. at 604.

The petitioner has also failed to establish that the beneficiary will supervise and control the work of other supervisory, managerial, or professional employees, or will manage an essential function of the organization. As asserted in the record, the beneficiary will directly supervise the "director of hotel services." However, this worker is not credibly described as having supervisory or managerial responsibilities over other employees. It does not appear that the "director of hotel services" has any direct subordinates. While the petitioner claims that this employee supervises other workers, it does not appear as if these workers are employed by the petitioner. The record also fails to disclose the identity or number of these workers or to establish the magnitude of control the "director of hotel services" has over their employment, if any. Once again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190). Accordingly, the record is not persuasive in establishing that the "director of hotel services" is a bona fide managerial or supervisory employee.

In view of the above, it appears that the beneficiary will be primarily a first-line supervisor of a non-professional worker, the provider of actual services, or a combination of both. A managerial employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. Section 101(a)(44)(A)(iv) of the Act; see also *Matter of Church Scientology International*, 19 I&N Dec. at 604. Moreover, as the petitioner failed to establish the skills and

education required to perform the duties of the director of hotel services, the petitioner has not established that the beneficiary will manage professional employees.¹ Therefore, the petitioner has not established that the beneficiary will be employed primarily in a managerial capacity.²

Similarly, the petitioner has failed to establish that the beneficiary will act in an "executive" capacity. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act. Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct, and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or

¹In evaluating whether the beneficiary will manage professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

²While the petitioner has not argued that the beneficiary will manage an essential function of the organization, the record nevertheless would not support this position even if taken. The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act. The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e., identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 214.2(l)(3)(ii). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. In this matter, the petitioner has not provided evidence that the beneficiary will manage an essential function. The petitioner's vague job description fails to document that the beneficiary's duties will be primarily managerial. Also, as explained above, it appears that the beneficiary will likely be a first-line supervisor of a non-professional employee and will primarily perform non-qualifying operational or administrative tasks. Absent a clear and credible breakdown of the time spent by the beneficiary performing his duties, the AAO cannot conclude his duties will be managerial, nor can it find that the beneficiary will primarily perform the duties of a function manager. See *IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

stockholders of the organization." *Id.* For the same reasons indicated above, the petitioner has failed to establish that the beneficiary will act primarily in an executive capacity. As explained above, it appears that the beneficiary will be primarily employed as a first-line supervisor and will perform the tasks necessary to produce a product or to provide a service. Therefore, the petitioner has not established that the beneficiary will be employed primarily in an executive capacity.

In reviewing the relevance of the number of employees a petitioner has, federal courts have generally agreed that Citizenship and Immigration Services (CIS) "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d 175, 178 (D.C. Cir. 1991)); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990) (per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003). Furthermore, it is appropriate for CIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Accordingly, the petitioner has failed to establish that the beneficiary will primarily perform managerial or executive duties, and the petition may not be approved for this additional reason.

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 Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. When the AAO denies a petition on multiple alternative grounds, a plaintiff can succeed on a challenge only if it is shown that the AAO abused its discretion with respect to all of the AAO's enumerated grounds. *See Spencer Enterprises, Inc.*, 229 F. Supp. 2d at 1043.

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. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.