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U.S. Citizenship
and Immigration
Services

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D-7

File: EAC 08 001 53170 Office: VERMONT SERVICE CENTER

Date: DEC 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: SELF-REPRESENTED

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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. 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 \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink, appearing to read "John F. Grissom".

John F. Grissom, Acting 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 extend the employment of its general manager 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 Florida corporation claiming to be a high technology advisor and distributor of electronic parts and accessories. The beneficiary was initially granted a one-year period of stay to open a new office in the United States. The petitioner now seeks to extend the beneficiary's stay for an additional three years.

The director denied the Form I-129 concluding that the petitioner failed to establish that the beneficiary would be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal, which the director declined to treat as a motion and forwarded to the AAO for review. On appeal, the petitioner asserts that the beneficiary would be employed in an executive capacity and claims that the U.S. operation would be able to support the beneficiary's position.

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 regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

The primary issue in the present matter is whether the beneficiary will be employed by the United States entity 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.

In support of the Form I-129, the petitioner provides two separate undated letters, the first of which is on company letterhead and indicates that the beneficiary will be "acting primarily as a manager in an executive capacity." The second letter is preceded by a yellow page titled "USA Company Madecorp Inc" [sic] and contains the subheading "managerial capacity," thereby indicating that the beneficiary would be employed in a managerial rather than an executive capacity. A petitioner may not claim to be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions. If the petitioner is indeed representing the beneficiary as both an executive *and* a manager, it must establish that the beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager. Here, the petitioner has not identified the beneficiary's prospective position as being clearly within one capacity or the other. While providing a job description that specifically enumerates individual duties may clarify which job capacity would best apply to the beneficiary's position, the record shows that the petitioner's failure to provide a sufficient job description was the primary basis for the denial. This issue will be explored in full in the discussion below.

In the second undated support letter (which was described above) the petitioner stated that the beneficiary's position title would be that of general manager and that he would be responsible for the company's operation, including all personnel decisions, contractual negotiations to buy existing businesses, legal matters, and all matters dealing with the company's finances. The letter then proceeds with a section entitled, "Specific Duties," which is subdivided as follows:

Organizational Management

Governance Administration

1. Administer the affairs of the corporation in accordance with organizational policies.
2. Ensure the maintenance of official records, by-laws, and standing rules according to [b]oard action.
3. Attend [b]oard and [c]oordinating [c]ommittee meetings, disseminating information between governance bodies and staff, and reporting on workplace operations, finances, planning, and other matters as necessary.

4. Proactively provide information, history, continuity, support and guidance to all governance bodies and members, in conjunction with the staff team.

Planning Administration

1. Provide leadership and vision to the organization by assisting the [b]oard and staff with the development of long[-]range and annual plans, and with the evaluation and reporting of progress on plans.
2. Research and write discussion papers, analysis documents and proposals as needed to assist the organization in determining and meeting its long[-] and short[-]term goals.
3. Oversee preparation of an [a]nnual [r]eport summarizing progress on short[-] and long[-] range plans.

Financial Management

1. Provide vision regarding overall financial health of the [c]ompany[.]
2. Provide vision and leadership in long-range fiscal planning
3. Provide recommendations regarding effective utilization of long[-] and short[-]term debt, including refinancing and purchasing/sales.
4. Provide recommendations regarding investments and cash strategies.
5. Oversee preparation of [the] annual budget, regular variance statements and annual audit.
6. Oversee fundraising efforts.

[W]orkplace Management

Staff Administration

1. Develop annual plan for staffing the [petitioner].
2. Hire, supervise, evaluate and, if necessary dismiss staff members.
3. Oversee workplace operations, including holding staff meetings and retreats, and [w]orking with staff to maintain and improve effectiveness and efficiency.
4. Ensure that all staff members receive appropriate training to perform their jobs effectively.

5. Revise staff job descriptions when necessary to increase efficiency and achievement of the organization's goals, with input from staff and other appropriate resources.
6. Oversee administration of staff benefits.
7. Oversee the maintenance of personnel and other administrative records.

Workplace Administration

1. Administer the affairs of the workplace in accordance with [the petitioner's] policies and contracts, and all applicable laws.
2. Promote effective communication on all levels of the organization.
3. Act as arbitrator/mediator in work and personnel/personal disputes.

The petitioner also provided a supplemental list of functions accompanied with the following percentage breakdown of time allotted to each function:

- Marketing Dep. [s]trategies on new daily promotions[.] 5%
- Supervise the [m]anagement operations and mak[e] sure that the goals were achieved[.] 10%
- Oversee the venture's financial status[.] 5%
- Accounts [p]ayable and [a]ccounts [r]eivable transactions[.]
- To authorize [the] office's expenses as well as purchas[es.] 1%
- To handle bank accounts as well as everything related to banking operations. 3%
- To sign and negotiate the [c]orporation['s] contracts[.] 2%
- To make contracts with [n]ational and [i]nternational suppliers[.] 4%
- To coordinate hiring new services[.] 15%
- To do bank reconciliation's [sic] on sales[.] 5%
- To generate the [c]orporation's expansion plans and make sure they are carried [out] and [that they are] feasibl[e.] 30%

- To create[,] generate[,] and plan productivity strategies[.] 15%
- To meet with [d]epartment [m]anagers[.] 2%
- Other functions described in the [j]ob [d]escription[.] 3%

The director reviewed the information provided and determined that additional information was needed. Accordingly, the director issued a request for additional evidence (RFE) dated December 7, 2007, instructing the petitioner to submit, *inter alia*, a comprehensive description of the beneficiary's proposed job duties, discussing their managerial or executive nature and explaining how the beneficiary's subordinates will relieve him from having to primarily perform non-qualifying tasks.

In response, the petitioner provided the following percentage breakdown of duties and responsibilities as part of Appendix No. 5:

- Directs the activities of the [d]ept. Managers, [sic] to ensure that all departments' managers are fulfilling the expectations and responsibilities of their work. S[upervision] 10%
- Analyzes market trends and economic conditions to forecast potential purchases. [Operative] 10%
- Deal[s] with [f]inancial [i]nstitutions in obtaining lines of credit and meet all financial needs of the [c]ompany. M[anagement] 10%
- Sets up an operational [b]udget and coordinates the activities of the [d]ept. Managers to properly allocate the funds necessary for all operations to fully develop. M[anagement] 5%
- Will represent [the petitioner] before any [g]overnmental [a]gency. O[perative] 5%
- Responsible for complete operation, administration and management of the business. M[anagement] 10%
- Plans and develops organizational [p]olicies and [g]oals and implements its [sic]. M[anagement] 10%
- Develop[s] new market [g]oals in order to achieve maximum profit. M[anagement] 10%
- Confers with [a]dministrative [p]ersonnel and reviews the activities and analyzes reports to determine any changes that need to take place in the program and operations in order to [ensure] cost reduction, improvement [sic] the process of policy change. M[anagement] 5%
- Responsible for laying out the different [p]lans the [petitioner] will pursue and conferring with the [e]xecutive [b]oard [of the foreign entity] in order to gain full approval of all [c]ompany [m]anagers. M[anagement] 5%

- Prepare[s] and send[s] monthly to the [b]oard of [d]irectors [of the foreign entity] a [r]eport with the results of his/her management. O[perative] 10%
- Recruit[s] and train[s] the staff. O[perative] 5%
- Ensure[s] the maintenance of official records, by-laws, and standing rules according to [b]oard action. M[anagement] 5%

The petitioner also supplemented the record with another organizational chart, illustrating a three-tiered hierarchy wherein the beneficiary occupies the senior-most position, subordinate only to the board of directors. The second tier of the hierarchy includes an administrative manager and a purchase manager, both depicted as the beneficiary's direct subordinates. The bottom tier of the hierarchy consists of an administrative assistant and a purchasing agent, subordinate to the administrative manager and purchasing manager, respectively.

After reviewing the petitioner's submissions, the director determined that approval was not warranted and therefore issued a decision dated March 18, 2008 denying the petition. The director determined that the petitioner's quarterly wage report for the relevant quarter during which the Form I-129 was filed lacked probative value, as it contained no signatures to validate the document. The director also addressed the beneficiary's deficient job description, which revealed only general managerial functions and failed to establish how the beneficiary's daily tasks fit the definition of managerial or executive capacity. Additionally, the director commented on the compensation structure for the purchasing agent, expressing doubt as to the petitioner's employment of a full-time sales person.

The AAO has considered the director's findings in light of the documentation submitted by the petitioner and concludes that the denial of the Form I-129 was properly issued. That being said, the AAO finds that the director placed undue emphasis on employee salaries, as they do not determine the nature of the duties performed. As such, the director's findings regarding the salaries of the beneficiary and his subordinates will have no bearing on the AAO's ultimate conclusion in this proceeding. However, as discussed in the above paragraph, the director has enumerated other findings that served as a sufficient basis for denial.

On appeal, the petitioner reviews the documentation previously submitted, restates the director's findings, and repeats the statutory definitions for managerial and executive capacity. In addition, notwithstanding the petitioner's claim that it appreciates the distinction between managerial and executive capacity, the petitioner repeatedly states that the beneficiary will be employed in a "managerial and/or executive capacity" without expressly stating which definition should be applied to the beneficiary's proposed position.

The petitioner also provides examples to illustrate ways in which the beneficiary exercises his discretionary authority. However, discretionary authority alone does not establish that the beneficiary would be employed in a qualifying capacity. Rather, 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 AAO will then consider this information in light of the petitioner's organizational hierarchy, the beneficiary's position therein, and the petitioner's overall ability to relieve the beneficiary from having to primarily perform

the daily operational tasks. In the present matter, while the petitioner has provided lengthy discussions of the beneficiary's broad oversight responsibilities, it has failed to respond to the director's request for specific job duties accompanied by an explanation of how various duties fall within a managerial or executive capacity.

While the AAO acknowledges the petitioner's submission of a percentage breakdown of what is claimed to be a list of the beneficiary's job duties, this list is also overly generalized and fails to reveal specific duties within the overall scheme of the petitioner's specific type of retail operation. For example, in the petitioner's most recent job description (which was submitted in response to the RFE), the petitioner claimed that the beneficiary would direct the activities of its department managers; maintain responsibility over the operation, administration, and management of the business; and plan, develop, and implement policies, and goals, which cumulatively were allotted 30% of the beneficiary's time. However, the petitioner provided no explanation as to the specific nature of the duties underlying these broad job responsibilities, which could be applied to any number of positions, including those that may not fall within the definition of managerial or executive capacity. The petitioner attributed another 10% of the beneficiary's time to developing new market goals. However, as the petitioner failed to explain what specific tasks the beneficiary would carry out in his pursuit of the various responsibilities attributed to his job, the AAO is unable to differentiate how this responsibility is different from planning, developing, and implementing goals and policies, which was previously mentioned. Case law has firmly established that the actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). The vague nature of petitioner's statements precludes the AAO from determining which duties would occupy 40% of the beneficiary's time and whether such duties fall within the definition of managerial or executive capacity.

Additionally, the petitioner allotted 10% of the beneficiary's time to analyzing market trends and economic conditions, 10% to dealing with financial institutions, and 5% to representing the petitioner before government agencies. However, without further explanation, these responsibilities are not indicative of qualifying job duties. Rather, they are suggestive of underlying daily operational tasks. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Id.* In the present matter, in addition to paraphrasing portions of the four-prong definitions for managerial and executive capacity, the petitioner supplements its statements with generic job responsibilities that can be applied to any type of business. The petitioner fails to convey a meaningful understanding of the beneficiary's role in the grand scheme of a business that is purportedly engaged in technology consulting and distributing electronic parts and accessories. In other words, what specific job duties does the beneficiary perform in order to ensure that the petitioner generates income from the goods and services it claims to provide?

Furthermore, despite the fact that the petitioner claims to be a goods and services provider, there is no indication as to who actually provides the consulting services and who sells the electronic parts and accessories the petitioner purportedly offers. In the present matter, of the five employees that were part of the petitioner's organizational hierarchy, three are depicted as managers and carry managerial titles. Although the organizational chart that was initially provided in support of the Form I-129 identified a sales agent, that position was not included in the more recent chart submitted in response to the RFE. In fact, the individual who was earlier named as the sales agent, is now named in the position of a purchase agent. The job description attributed to the purchase agent does not include selling the petitioner's products and services.

The petitioner also fails to identify anyone within its organization who provides technology consulting services. Without information and evidence as to who carries out these income generating services, the AAO cannot rule out the possibility that these services are provided by the beneficiary himself. 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. 593, 604 (Comm. 1988).

Lastly, the petitioner's prior approval of a Form I-129 in no way suggests that either a subsequent non-immigrant or immigrant petition would be approved. In fact, the regulations that apply to a new office petition specifically provide for a start-up business, allowing that business one year to progress to a stage of development wherein it can support the beneficiary in a primarily managerial or executive position. *See* 8 C.F.R. § 214.2(l)(3)(v). Citizenship and Immigration Services has no way of predicting whether a petitioner will reach that stage of development by the end of its first year of operation. As such, an approval of a new office petitioner in no way indicates that a subsequent petition to extend the beneficiary's period of employment would be granted.

In summary, the record contains a deficient description of the beneficiary's proposed employment and fails to establish that the petitioner has attained a level of operation that would enable the beneficiary to primarily devote his time to tasks within a qualifying managerial or executive capacity. For this initial reason, this petition cannot be approved.

Additionally, the record indicates that approval is not warranted on the basis of additional grounds that were not addressed in the director's decision.

First, 8 C.F.R. § 214.2(l)(3)(iii) requires that a petitioner filing a Form I-129 establish that he or she was employed abroad by a qualifying organization for at least one year during a specified three-year time period. In the present matter, the petitioner has provided broad statements of the beneficiary's job responsibilities that are as equally devoid of specific information as the statements that were provided with regard to the beneficiary's prospective employment. The petitioner failed to list specific job duties discussing what tasks the beneficiary undertook to meet his daily business objectives. As discussed above at length, the petitioner must provide specific information about the beneficiary's job duties and establish who actually performed the non-qualifying operational tasks. Without these essential components, the AAO cannot conclude that the primary portion of the beneficiary's time abroad was spent performing duties within a qualifying capacity.

Second, 8 C.F.R. § 214.2(l)(14)(ii)(A) requires the petitioner to provide evidence that it and the foreign entity that previously employed the beneficiary are still qualifying organizations. *See also* 8 C.F.R. § 214.2(l)(3)(i).

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." A "subsidiary" is defined in pertinent part as a corporation of which a parent "owns, directly or indirectly, half of the entity and controls the entity."

In this matter, the petitioner has provided its articles of incorporation stating the name of the corporation and the number of shares the corporation is authorized to issue. However, the petitioner did not provide a certificate of incorporation issued by the state nor does the articles of incorporation itself contain a date of filing or an official state seal showing that it was, in fact filed. Title XXXVI, section 607.0203(2) of the Florida corporations statute states the following:

The Department of State's filing of the articles of incorporation is conclusive proof that the incorporators satisfied all conditions precedent to incorporation except in a proceeding by the state to cancel or revoke the incorporation or involuntarily dissolve the corporation.

As the petitioner has provided no evidence that the Florida Department of State filed the articles of incorporation whose photocopy has been provided for review, the AAO cannot determine with any degree of certainty that the document was actually filed and that the petitioner was incorporated as claimed.

Additionally, Title XXXVI, section 607.0625(2) of the Florida corporations statute states the following regarding the content of stock certificates that issue shares of the petitioner's stock:

At a minimum, each share certificate must state on its face:

- (a) The name of the issuing corporation and that the corporation is organized under the laws of this state;
- (b) The name of the person to whom issued; and
- (c) The number and class of shares and the designation of the series, if any, the certificate represents.

In the present matter, the photocopied stock certificates the petitioner has submitted do not contain the **specific number of shares that were purportedly issued**. Rather, each certificate, Nos. 1-3, shows the percentage of shares that were issued. Thus, not only are these stock certificates unclear as to the number of the 7,500 authorized shares actually issued, but the petitioner also failed to comply with Florida's statutory provisions as described above.

Based on the above deficiencies, the petitioner's corporate existence and the number of shares issued come into question, thereby precluding the AAO from finding that a qualifying relationship exists between the petitioner and the beneficiary's foreign employer.

Lastly, 8 C.F.R. § 214.2(l)(14)(ii)(B) requires that the petitioner provide evidence establishing that it has been doing business for the previous year. "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." Despite the director's finding that the petitioner is actively doing business, further review of the record suggests that the director's finding was premature.

In this matter, the initial "new office" petition was approved from September 26, 2006 until September 26, 2007 (EAC 06 164 52299). Although the petitioner has provided a number of its utility bills and tax

documents, neither is evidence of business transactions and therefore cannot be relied upon to determine whether an entity is engaged in the "the regular, systematic, and continuous provision of goods and/or services." While the petitioner claims that it sells goods, i.e., electronic parts and accessories, and provides consulting services, as indicated in Part 5 Item 10 of the Form I-129, the petitioner has provided no sales invoices or proof that customers have paid for these goods and/or services consistent with the manner that is required by the regulatory provisions discussed above. 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)). As such, the AAO cannot conclude that the petitioner has satisfied the regulatory requirement found at 8 C.F.R. § 214.2(l)(14)(ii)(B).

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. Here, that burden has not been met. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.