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U.S. Citizenship and Immigration Services

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[redacted]

File: WAC 07 201 51971 Office: CALIFORNIA SERVICE CENTER Date: SEP 03 2008

IN RE: Petitioner: [redacted]
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.

FOR

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, California 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 petition seeking to employ the beneficiary in the position of "president" to open a new office in the United States 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, a corporation organized under the laws of the State of Illinois, describes its proposed business in the Form I-129 as "management, development, operations and consulting."

The director denied the petition concluding that the petitioner failed to establish that it has a qualifying relationship with the foreign employer.

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, the petitioner asserts that it has established that the foreign employer owns and controls the petitioner through its ownership of 51% of its issued shares.

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.

In addition, the regulation at 8 C.F.R. § 214.2(l)(3)(v) states that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or to be employed in a new office, the petitioner shall submit evidence that:

> (A) Sufficient physical premises to house the new office have been secured;
>
> (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involved executive or managerial authority over the new operation; and
>
> (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
>
> > *(1)* The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
> >
> > *(2)* The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
> >
> > *(3)* The organizational structure of the foreign entity.

The primary issue in the present matter is whether the petitioner has established that it and the foreign employer are qualifying organizations.

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." A "subsidiary" is defined in part as a corporation "of which a parent owns, directly or indirectly, more than half of the entity and controls the entity." 8 C.F.R. § 214.2(l)(1)(ii)(K).

In this matter, the petitioner claims that it is 51% owned by the foreign employer in Uganda and, thus, is a "subsidiary" as defined in the regulations. In support, the petitioner submitted a copy of a stock certificate indicating that 510 shares of stock were issued to the foreign employer on June 20, 2007; a stock certificate indicating that 490 shares of stock were issued to the beneficiary on June 20, 2007; a stock ledger recording these issuances; a bank statement indicating that the petitioner deposited $26,142.40 into its United States bank account on June 20, 2007; a copy of a check (number [redacted]) payable to the petitioner from the foreign

employer for 40 million Ugandan shillings dated June 19, 2007; a bank statement from the foreign employer showing a balance May 30, 2007 of 64,010,230.00 Ugandan shillings; and a copy of "minutes of special meeting" of the foreign employer which indicates its agreement to commit $25,000.00 to the establishment of the United States subsidiary. However, the record is devoid of evidence establishing that the check for 40 million Ugandan shillings was ever converted into United States dollars or that this check amount was debited from the foreign employer's Ugandan bank account.

On July 24, 2007, the director requested additional evidence. The director requested, *inter alia*, evidence that the foreign employer has paid for its interest in the United States operation. Specifically, the director requested copies of wire transfers, cancelled checks, deposit receipts, or other evidence detailing the monetary amounts for the stock purchase.

In response, the petitioner referred to the evidence submitted with the initial petition.

On December 14, 2007, the director denied the petition. The director determined that the petitioner failed to establish that it and the foreign employer are qualifying organizations. Specifically, the director concluded that the petitioner did not establish that the foreign employer actually acquired its interest in the United States operation by providing consideration.

On appeal, the petitioner claims that it established that the foreign employer paid for its interest in the United States organization. In support, the petitioner submits the Form I-290B and additional evidence, including organizational documents for the United States operation. However, the petitioner did not submit a cancelled check or any evidence establishing that the funds represented by the 40 million Ugandan shilling check were ever debited from the foreign employer's assets.

Upon review, the petitioner's assertions are not persuasive.

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 (BIA 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. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership.

In this matter, the petitioner failed to submit evidence establishing that the foreign employer actually transferred money to the United States operation in exchange for the issuance of its purported 51% interest. Although the petitioner submitted copies of a check from the foreign employer for 40 million Ugandan shillings, a bank statement for the foreign employer, and a United States bank statement for the petitioner showing a $26,142.40 deposit, the petitioner failed to submit a copy of a cancelled check or other evidence establishing that the foreign employer's check was ever negotiated, or that these funds were ever debited from the foreign employer's bank account, even though this evidence was specifically requested by the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). 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)). Therefore, as the petitioner failed to establish that the foreign employer ever paid for its purported majority interest in the United States operation, the petitioner has failed to establish that the foreign employer truly owns and controls the enterprise.

Accordingly, the petitioner has failed to establish that it is a qualifying organization, and the petition will not be approved for this reason.

Beyond the decision of the director, the petitioner failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

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 describes its proposed United States operation in a document titled "business plan." The petitioner claims that it will provide "management and operational services to real estate, restaurant, hospitality property development, retail operations and consulting businesses." The plan projects that the business will require $30,913.00 to start and will generate $400,000.00 in revenue during its first year, although these estimates are not corroborated by any evidence. As noted above, the petitioner submitted evidence that it currently has $26,142.40 in its bank account. The petitioner also claims that it has "already started negotiating with various Restaurant and Retail facility owner" and that it has "achieved its first management contract with Shiva Plus International, Inc[.]" However, the petitioner did not provide a copy of this purported contract. Finally, the plan vaguely indicates that the petitioner will provide management services, consulting services, and operational services, all pertaining to business operations. However, the petitioner did not provide any specific information regarding pricing, marketing, or exactly what useful services the petitioner will be providing to its clients.

The petitioner also described its hiring plan and proposed personnel structure for its first year in operation. The petitioner claims that, in the "coming months," it will establish a complex, multi-tiered organization consisting of approximately 14 workers including a vice president and nine "managers." The petitioner also claims that "the proposed positions directly under [the] beneficiary are all professional positions requiring at least a Bachelor's degree in [a] specialty occupation." Finally, the petitioner claims that the beneficiary will be at the top of this organization and will manage the organization through the described multi-tiered hierarchy of managers, supervisors, and professionals. However, the petitioner's financial projection for the first year only budgets $72,504.00 for salaries, $36,000.00 of which will apparently be paid to the beneficiary.

Upon review, the petitioner has failed to establish that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose the business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or

managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

As contemplated by the regulations, a comprehensive business plan should contain, at a minimum, a description of the business, its products and/or services, and its objectives. *See Matter of Ho*, 22 I&N Dec. 206, 213 (Assoc. Comm. 1998). Although the precedent relates to the regulatory requirements for the alien entrepreneur immigrant visa classification, *Matter of Ho* is instructive as to the contents of an acceptable business plan:

> The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

Id.

For several reasons, the petitioner in this matter has failed to establish that the United States operation will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties. The petitioner has failed to establish that the beneficiary will primarily perform qualifying duties after the petitioner's first year in operation; has failed to establish that the beneficiary will be relieved of the need to perform the non-qualifying tasks inherent to the operation of the business by a subordinate staff within the petitioner's first year in operation; has failed to establish that a sufficient investment has been made in the United States operation; and has failed to sufficiently and credibly describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C).

First, the job description for the beneficiary fails to credibly establish that the beneficiary will be performing primarily "managerial" or "executive" duties after the petitioner's first year in operation. When examining the proposed executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the proposed 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 that will be performed by the beneficiary and indicate whether such duties will be either in an executive or managerial capacity. *Id.*

In this matter, the petitioner has provided a vague and nonspecific description of the beneficiary's duties that fails to demonstrate what the beneficiary will do on a day-to-day basis after the petitioner's first year in operation. For example, the petitioner states that the beneficiary will "manage" the business through a subordinate tier of managers and supervisors, set "guidelines," and provide "directives." However, the petitioner fails to specifically define these duties. Overall, the petitioner has provided so few details regarding its proposed business that it cannot be discerned what the beneficiary will do on a day-to-day basis in performing any of the ascribed duties pertaining to the "management" of the business. The fact that the petitioner has given the beneficiary a managerial or executive title and has prepared a vague job description which includes inflated duties does not establish that the beneficiary will actually perform managerial duties after the first year in operation. Specifics are clearly an important indication of whether a beneficiary's duties will be primarily executive or managerial in nature; otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). 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 Treasure Craft of California*, 14 I&N Dec. 190.

Likewise, the record is not persuasive in establishing that the beneficiary will be, after the first year, relieved of the need to "primarily" perform the non-qualifying tasks inherent to his duties and to the operation of the business in general. While the petitioner claims that it will hire approximately 13 additional employees "in the coming months" and establish a complex, multi-tiered personnel structure, the petitioner has failed to establish that it will truly be able to hire these workers and, even if it could, that these workers will relieve the beneficiary of the need to primarily perform non-qualifying tasks. The petitioner's "business plan" vaguely describes the proposed United States operation as a management and consulting business. However, the plan and associated financial projections are entirely unsupported by evidence. The record does not specifically describe the operation's marketing strategy and fails to identify any business relationships or potential customers other than a single contract with Shiva Plus International, Inc. However, the petitioner did not submit a copy of this contract. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.* The petitioner also failed to establish the proposed cost of hiring the additional workers or to credibly explain in detail what, exactly, they will do on a day-to-day basis in the absence of an established customer base. This is especially important given that the petitioner has only budgeted $72,504.00 for salaries for the first year, which apparently includes the beneficiary's $36,000.00 salary. It is not credible that the petitioner will be able to achieve its stated hiring and business goals and stay within these projections. Finally, the record does not contain any purchase orders or contracts, and the only evidence addressing its assets is a bank statement indicating that the petitioner has $26,142.40 in its account.

Accordingly, the petitioner's claim that its newly formed operation, which has $26,142.00 in the bank, will hire 13 more workers, who will relieve the beneficiary of the need to primarily perform non-qualifying tasks, is not credible and is not supported by any evidence. Simply alleging that the petitioner will hire 13 employees who will perform all the non-qualifying tasks inherent to the business does not establish that the United States operation will truly grow and mature into an active business organization which will reasonably require the services of a beneficiary who will primarily perform managerial or executive duties. Rather, the petitioner must clearly define the scope and nature of a United States operation and establish that it has, and

will continue to have, the financial ability to support the establishment and growth of the business. However, as the record in this matter is devoid of any such evidence, the petitioner has failed to establish that the beneficiary will more likely than not perform "primarily" qualifying duties after the petitioner's first year in operation. 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; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Given the size and nature of the vaguely described business, it is more likely than not that the beneficiary and his proposed subordinate employees, if any are actually hired, will all primarily perform the tasks necessary to the operation of the business after the first year in operation. *See generally Family, Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313 (9th Cir. 2006). It is not credible that a business, such as the petitioner's proposed United States operation, will develop an organizational complexity within one year which will require the employment of a subordinate tier of managers or supervisors who will ultimately be supervised and controlled by a primarily executive or managerial employee. Therefore, it appears that the beneficiary will be, at most, a first-line supervisor of non-professional employees.[1] A managerial or executive employee must have authority over day-to-day operations beyond the level normally vested in a first-line supervisor. *See* 101(a)(44) of the Act; *see also Matter of Church Scientology International*, 19 I&N Dec. at 604.

Accordingly, the petitioner has failed to establish that the beneficiary will be primarily employed in a managerial or executive capacity within one year, and the petition may not be approved for that reason.

Second, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because it failed to establish that a sufficient investment was made in the enterprise. 8 C.F.R. § 214.2(l)(3)(v)(C)(*2*). In this matter, the petitioner claims to have received a $26,142.40

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[1]Furthermore, even though the petitioner claims that the proposed subordinate workers will be "professionals" who will possess bachelor's degrees, the petitioner offered no evidence to substantiate this claim. In 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). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee will be employed in a professional capacity as that term is defined above. In the instant case, the petitioner has not, in fact, established that a bachelor's degree will be necessary to perform the work of any of the proposed subordinate employees, assuming that it is even credible that any of these employees will ever actually be hired.

investment. In support of this assertion, the petitioner submits a bank statement. However, the record is not persuasive in establishing that the petitioner has received a sufficient investment to support the start-up of the new office. It is not credible that $26,142.40 will be sufficient to establish the enterprise vaguely described in the petition. As noted above, the petitioner claims in its "business plan" that it requires $30,913.00 to start the business. Therefore, according to its own "business plan," the petitioner has not received a sufficient investment. Furthermore, as noted above, the petitioner failed to corroborate with independent evidence any of its financial projections. Therefore, it cannot be concluded that the $26,142.40 "investment" would be sufficient under the circumstances. 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 Treasure Craft of California*, 14 I&N Dec. 190.

Accordingly, as the petitioner has failed to establish that it has received a sufficient investment, the petition may not be approved for this additional reason.

Third, the petitioner failed to establish that the United States operation will support an executive or managerial position within one year because the petitioner has failed to sufficiently describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(l)(3)(v)(C)(*1*). As explained above, the petitioner vaguely describes the United States operation as a management and consulting business. However, the plan and associated financial projections are entirely unsupported by evidence. The record does not specifically describe the operation's marketing strategy, and the petitioner fails to submit corroborating evidence of having established any business relationships or potential customers. It is unclear what services, exactly, the petitioner will provide. The record does not contain any independent analysis, contracts, or list of business contacts. Absent a detailed, credible description of the petitioner's proposed United States business operation specifically addressing the petitioner's proposed services, pricing, marketing plan, and customers, it is impossible to conclude that the proposed enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

Accordingly, the petitioner has failed to establish that the United States operation will support an executive or managerial position within one year as required by 8 C.F.R. § 214.2(l)(3)(v)(C), and the petition may not be approved for the above reasons.

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.