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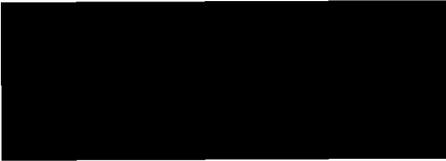
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U.S. Department of Homeland Security  
U. S. Citizenship and Immigration Services  
Office of Administrative Appeals MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

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File: EAC 09 073 50069      Office: VERMONT SERVICE CENTER      Date:      **JUL 15 2010**

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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew  
Chief, Administrative Appeals Office

**DISCUSSION:** The Director, 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 is a Florida corporation that seeks to employ the beneficiary for an initial one-year period from January 2, 2009 until January 1, 2010 in the position of general manager. Therefore, the petitioner filed this nonimmigrant petition seeking to open a new office in the United States and 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 director denied the petition based on two independent grounds of ineligibility: 1) the petitioner failed to establish that the United States operation will support an executive or managerial position within one year; and 2) the petitioner failed to establish the physical location of its business.

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 the director's conclusions are erroneous and resubmits exhibits that were previously submitted in response to the request for evidence (RFE), which was issued on January 14, 2009.

It is further noted that, after conducting a comprehensive review of the record, the AAO finds that the petitioner provided adequate evidence to establish that it has secured sufficient physical premises to house its new office. As such, the AAO hereby withdraws the second ground as a basis for denial. The AAO also finds the petitioner's eligibility in the present matter is in no way affected by a relationship between the petitioner and an entity that previously petitioned to employ the beneficiary in the H-1B nonimmigrant visa category. As such, the director's comments with regard to an irrelevant matter are also hereby withdrawn. Regardless, the AAO concludes that a denial was warranted in the present matter. A full discussion of the petitioner's submissions and the AAO's analysis is provided below.

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.

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 primary issue in this matter is whether the petitioner has established that the intended United States operation, within one year of the approval of the petition, will support an executive or managerial position.

In support of the Form I-129, the petitioner submitted a letter dated December 12, 2008 in which it described its proposed U.S. operation as a medical distribution company that will distribute expendable materials to clinics, home health care businesses, hospitals, health care centers, and to the general public. In a separate attachment, the petitioner described the beneficiary's proposed position as being within an executive capacity. In the company's initial stage of development, the beneficiary would be responsible for developing a start-up business plan, creating the necessary departments within the organization, and hiring and training the necessary personnel. The petitioner also provided the following percentage breakdown of the beneficiary's responsibilities during the company's first year of operation:

- To Define the General Policy of the Company and create the specific goals of the business.  
(5%)

- Will be Responsible for complete operation, administration and management of the business. (10%)
- To Plan and develop organizational Policies and Goals for each department of the business and makes [sic] pursuit of their implementation. (5%)
- To Directs [sic] the activities of all departments . . . . (Administrative/Office Dept; Corporate Account Sales Dept; Purchase Dept.) (10%)
- To Analyzes [sic] market trends and economic conditions to forecast potential purchases. (10%)
- To Decide the purchase of new items and products and participates [sic] in the supplier's selection. (5%)
- To develop new market Goals in order to achieve maximum profit. (5%)
- To Plan the visit to the potential customers and promotes the business before them with the purpose of increasing the portfolio of sales. (5%)
- To deals [sic] with Financial Institutions in obtaining lines of credit and meets [sic] all financial needs of the Company.
- To set up an operational Budget and coordinates [sic] the activities of all Departments under her control to properly allocate funds . . . . (5%)
- Will represent The Company before any Governmental Agency. (5%)
- To Confer with Administrative Personnel and reviews [sic] the activities and analyzes [sic] 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 or policy change. (5%)
- Will be Responsible for laying out the different [p]lans the USA [c]ompany will pursue and conferring with the Executive Board (Dominican Republic). (5%)
- To prepare and send monthly to the Board of Directors in [the] Dominican Republic, a Report with the results of his [sic] management. (10%)
- Recruitment and training the staff: determines such human resources as are necessary, when hiring new personnel, takes part in their selection, hiring and training. (5%)
- To ensure the maintenance of official records, by-laws, and standing rules according to Board actions. (5%)

The petitioner indicated that it projects the hiring of an office manager and "several top line employees" to work in the administrative, corporate account sales, and purchase departments. Although the petitioner made approximate hiring projections for its first two years of operation, it did not specify the exact number of expected hires in any of the departments after its first year of operation.

The petitioner also provided a business plan outlining its financial summary and business objectives. The plan outlines a financial summary of the funds needed to support the business operation, a timetable for hiring sales representatives, and the projected revenues that could be anticipated after the first and second year of operation. It is noted that the financial summary shows that the beneficiary would receive \$10,580 from its investors and that it would borrow an additional \$5,000 as a short-term loan. The same document contains a dollar breakdown of the anticipated start-up costs, including a projected \$10,000 in start-up expenses and \$12,275 in projected purchase of start-up assets for a total of \$22,275. The breakdown does not account for any costs to be incurred for the hiring of personnel.

On January 14, 2009, the director issued a request for evidence (RFE) instructing the petitioner to submit, *inter alia*, evidence that the beneficiary, within one year of operation, will be relieved from performing primarily non-qualifying tasks. The petitioner was asked to provide a business plan with a timetable that would include specific dates for specific actions commencing with the company's initial date of existence.

In response, the petitioner submitted an undated document entitled "Proposed Organizational Structured [sic]," whose contents (with regard to the U.S. entity) are identical to those found in a previously submitted document titled, "USA Company: Inmersa of Miami, Inc[.]" The petitioner also provided a business plan timetable projecting when various events would take place. The AAO notes, however, that the timetable contains two columns showing two different dates for each action. One column is titled "Timescale," while the other is titled "Date." The petitioner did not provide any information to clarify what these two dates represent. For instance, the petitioner identified the purchase of inventory as one of the actions that would be taken. The date in the timescale column is shown as December 2009-April 2010 while the date in the date column is shown as December/February 2008. The petitioner did not provide any information to explain what each date represents or when the actual purchase of inventory would take place. If the timescale date was intended to shown the period of time during which inventory would be purchased, the petitioner did not clarify the progression of its purchases during the five-month period or indicate whether the purchases would be made in phases and, if so, what would be purchased during which particular phase of the five-month period.

The petitioner's timetable further indicates that the petitioner would introduce its marketing campaign between April and November 2010; make initial staffing selections between July and November 2009; and be fully staffed as of December 2010.

In a decision dated March 5, 2009 the director denied the petition, concluding that the petitioner failed to submit sufficient evidence to establish that the petitioner would support a managerial or executive employee within its first year of operation.

On appeal, the petitioner provides a summary of the director's findings and previously submitted documents, asserting that the prior submissions were sufficient to establish that the petitioner meets the eligibility requirement in question. The petitioner also restates the relevant regulatory provisions and statutory definitions and concludes that the U.S. entity is viable and would support the beneficiary in a managerial or executive position. The AAO finds that the petitioner's assertions are not persuasive.

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(1)(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 specifically describe the beneficiary's proposed 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 describe the nature, scope, and financial goals of the new office. 8 C.F.R. § 214.2(I)(3)(v)(C).

As a threshold issue, the AAO notes that the dollar amount of the investment in the U.S. entity is inconsistent with the amount the petitioner has indicated it would need for its initial start-up costs, which do not include the larger costs that would be needed for inventory and personnel. Specifically, the petitioner's financial summary, which was submitted initially with the petition, indicates that the owners of the U.S. entity would invest a total amount of \$10,580 into the U.S. business. While the petitioner indicated that it was in the process of seeking an additional \$5,000 as a short-term loan, there is no evidence to corroborate this claim, as the record contains no documentation of any steps taken by the petitioner in order to secure the loan. 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)). Moreover, even if the petitioner had submitted evidence to show that the \$5,000 loan had been secured, the petitioner would only have \$15,580 to use towards start-up operational costs. This amount falls far short of the \$22,275 the petitioner indicated it would need to cover the required costs.

Also, as previously noted, the petitioner's summary of costs did not account for necessary expenses such as the cost of inventory and the cost of personnel salaries, particularly that of the beneficiary. More importantly, the foreign entity's investment of \$10,580 is insufficient to pay the beneficiary's salary, which the petitioner indicates would be \$1,000 per week, or to cover the cost of additional personnel, inventory, and advertising, which total to over \$400,000.<sup>1</sup>

Next, in light of the insufficiency of the funds available to pay for the petitioner's personnel, inventory, and advertising expenses, the AAO finds that the petitioner would be precluded from commencing business activity for an indefinite period. While the regulations for a new office petition do not require the petitioner to provide evidence of any business transactions, the regulations require that a petitioner seeking to extend the employment of a beneficiary who initially came to work in or open a new office must submit evidence to show that it has been doing business for the previous year. *See* 8 C.F.R. § 214.2(I)(14)(ii)(B). This requirement indicates that even a new office petitioner is expected to do business throughout its first year of operation. In the present matter, even if the size of the foreign entity's investment were sufficient to cover the additional operational costs, the timetable provided in response to the RFE indicates that the petitioner would not commence the hiring of employees until July 2009 and it would not purchase inventory until December 2009, nearly one year after the filing of the petition. In light of the petitioner's delay in purchasing inventory and hiring staff until months after filing the petition, the AAO concludes that the petitioner would have been unable to commence doing business at the time of filing.

Lastly, 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(I)(3)(ii). The petitioner's

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<sup>1</sup> *See* the business and operating plan timetable submitted in response to the RFE.

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.* While the petitioner provided a list of the beneficiary's job duties during the petitioner's first year of operation, no description of job duties was provided to establish what the beneficiary would be doing beyond that first year. As such, the AAO is unable to determine whether the beneficiary would primarily perform tasks within a qualifying managerial or executive capacity after the petitioner has been operational for one year.

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. As previously stated, while the petitioner claims that it will hire office personnel, two managers, and two subordinates to assist each manager during its first year in business, the petitioner has failed to establish that it will truly be in a position to hire these workers and, even if so, that these workers will relieve the beneficiary of the need to primarily perform non-qualifying tasks. Furthermore, the petitioner fails to describe its marketing strategy, market analysis, financing sources, competitors, business relationships, pricing, or licensing requirements. The petitioner has also failed to provide evidence of any proposed business activity. Crucially, the record is devoid of evidence establishing that the United States enterprise will more likely than not grow to the point that it will reasonably require the full-time services of an employee who would primarily perform qualifying managerial or executive duties. Once again, going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Id.*

Accordingly, the petitioner's claim that its newly formed operation will hire employees 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 three 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 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. 593, 604 (Comm. 1988).

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.

Beyond the decision of the director, the petitioner has failed to meet at least two additional eligibility requirements.

First, the petitioner has failed to establish 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." "Subsidiary" is defined in pertinent 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). "Doing business" is defined in part as "the regular, systematic, and continuous provision of goods and/or services." 8 C.F.R. § 214.2(l)(1)(ii)(H).

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; *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.

In this matter, the petitioner has provided three unnumbered stock certificates to establish its ownership. One stock certificate indicates that the foreign entity owns 51% of the U.S. entity's shares; another stock certificate indicates that the beneficiary owns 19% of the U.S. entity's shares; and the remaining stock certificate indicates that Eduardo Fernandez owns 40% of the U.S. entity's shares. Based on these percentages, the petitioner has indicated that it has sold 110% of its shares. This is a factual impossibility, as the petitioner cannot sell more shares than are authorized to be issued. As the petitioner did not indicate the specific number of shares it intended to issue to the purported subscribers, the AAO cannot determine how many shares were actually issued and who owns the majority of those authorized shares. 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.

Second, the petitioner has failed to establish that the beneficiary has been employed in a primarily managerial or executive capacity with the foreign entity for one year within the three years prior to the filing of the petition. 8 C.F.R. § 214.2(l)(3)(v)(B). As the petitioner filed the Form I-129 on January 12, 2009, the relevant three-year time period during which the beneficiary's one year of foreign employment must have taken place is from January 12, 2006 and January 12, 2009. It is noted that brief trips to the United States that took place during the beneficiary's employment abroad do not interrupt the one-year period of continuous employment abroad, but those brief trips will not be counted toward the fulfillment of the requirement. *See* 8 C.F.R. § 214.2(l)(1)(ii)(A). In the present matter, the petitioner stated in a letter that was annexed to Exhibit 1 of the RFE response that the beneficiary has been the foreign entity's general manager from August 2006 through the present. However, in the same annexed letter, the petitioner stated that the beneficiary came to the United States in August 2006 as an L-2 nonimmigrant dependent of an L-1. As indicated above, any time spent in the United States since her August 2006 entry into the United States cannot be counted towards the requisite one-year period of foreign employment. As the beneficiary could not have been employed abroad for longer than seven months during the qualifying three-year period, i.e. from January to August 2006, the

petitioner has failed to meet the one year of foreign employment requirement and the AAO need not address the issue of whether or not the beneficiary was employed abroad within a qualifying managerial or executive capacity.

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

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.