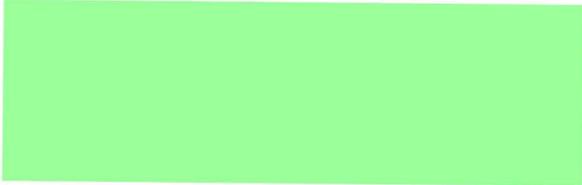
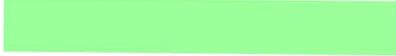


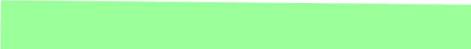


U.S. Citizenship
and Immigration
Services

(b)(6)



DATE: **MAR 19 2014** OFFICE: VERMONT SERVICE CENTER 

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)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation, claims to be a branch office of [REDACTED]. The beneficiary was previously granted L-1A classification for a period of one year in order to open a new office in the United States. The petitioner now seeks to extend his status so that he may continue his employment in the position of Operations Manager.

The director denied the petition concluding that the petitioner failed to establish that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel for the petitioner contends that the director erred by failing to analyze whether the beneficiary will be employed in an executive capacity. Counsel asserts that the beneficiary will be employed in an executive capacity. Counsel submits a brief in support of the appeal.

I. The Law

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, Petition for a Nonimmigrant Worker (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.

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.

II. U.S. Employment in a Managerial or Executive Capacity

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in a qualifying managerial or executive capacity.

A. Facts

The petitioner indicated on its Form I-129 that it is engaged in "sales, import and export" and it has three employees.

In a letter submitted in support of the petition, the petitioner indicated that it operates "on two fronts: local retail and exporting/importing goods." The petitioner explained that it purchased 50 percent shares of a retail company, [REDACTED], and purchased 50 percent of the shares of [REDACTED] a warehouse operation. The petitioner also explained that the beneficiary "manages two managers, one for the retail store and the other for the warehouse." The petitioner also stated that the beneficiary has "established goals and policies for the corporation and has expanded the operations of [the petitioner]."

The petitioner also submitted a document entitled, "Minutes of the Meeting of the Shareholders of [REDACTED]" that indicated 100 out of the 200 shares of [REDACTED] was transferred to the petitioner. The petitioner also provided a stock certificate, number 3, that indicated that the petitioner owned 100 shares of [REDACTED]

The petitioner also submitted a document entitled, [REDACTED] that indicated that the petitioner purchased 50 percent of shares of [REDACTED]. The petitioner also submitted a stock certificate, Number 1, which indicated the petitioner is the owner of 100 shares of [REDACTED]

The petitioner submitted several tax returns and bank statements for [REDACTED]. Four of the bank statements for [REDACTED] indicated an address in [REDACTED] rather than the address in Brooklyn as indicated by the petitioner. The petitioner also submitted one bill of lading that listed the petitioner as the consignee.

The director issued a request for evidence (RFE) instructing the petitioner to provide, in part: (1) a comprehensive description of the beneficiary's duties; (2) a list of employees identifying each employee by name and position title, and educational credentials for each employee; (3) complete position descriptions for all employees; and, (4) IRS Form 941 for 2012.

In response, the petitioner submitted a letter, describing the petitioner's operations and the beneficiary's areas of responsibility. The petitioner explained the business operations as follows:

[The petitioner] has opened its offices in the United States for the sale of goods including, spices, textiles, frozen goods such as vegetables, fish, and breads. [The petitioner] also imports and distributes household products used daily.

[The petitioner] purchased fifty percent (50%) of a retail company called [REDACTED] which sells goods akin to those sold by [REDACTED] in Pakistan. This retailer provides [the petitioner] with a venue to import and export goods for sale in the U.S.

[The petitioner] also purchased a portion of a warehouse for the storage of goods. All materials imported and exported are stored at this location. The warehouse is shared with [REDACTED], of which [the petitioner] owns fifty (50%) percent.

The petitioner also stated that the beneficiary is employed in an executive capacity as he will "direct [the petitioner] to reach its objectives by directing, planning and coordinating regarding employees and policies." The petitioner provided the following specific job duties to be performed by the beneficiary:

- Set fiscal goals for the company by establishing and overseeing the budgetary needs of the corporation. 10%
- Acquire new business for the company through the negotiation of agreements with vendors and wholesalers. 10%
- Establishing marketing and sales plans to facilitate the expansion of [the petitioner]. 5%
- Purchase other property and business to facilitate the expansion of [the petitioner]. 5%
- Hire and contract employees, attorneys, accountants, etc. 5%
- Ensure that the company adheres to all regulatory requirements including the attainment of appropriate licenses. 10%
- Oversee the activities of the import and export division. This comprises supervising the shipment and receipt of goods, pricing, and budget for the department. 15%
- Establish fiscal goals for the corporation as well as policies. Policies must relate to employment and employee conduct, the receipt and return of goods to vendors, pricing of merchandise, and customer relation policies. 10%
- Review and approve agreements from vendors and wholesalers. 10%
- Ensure team follows standard operating procedures for all operational functions and conduct regular meetings with team to discuss about issues, concerns, updates etc. 10%
- Support operational risk and audit process for the purpose of preventive maintenance. 5%

As stated above, the Beneficiary has control over the financial and regulatory functions of [the petitioner]. In performing this function, the Beneficiary oversees and controls the budgetary needs of the corporation, as well as maintains and disburses as necessary the finances of the corporation.

In addition, the Beneficiary handles all matters concerning leases, acquisition of new offices, and matters relating to vendor and customer relationships. He will also oversee the activities of the import and export division. This comprises supervising the shipment and receipt of goods, pricing, and budget of the department.

The petitioner also stated that the beneficiary will be responsible for “establishing goals and policies related to the operations of the corporation.” The beneficiary will also exercise wide latitude in discretionary decision-making as the shareholders of the petitioner “intend to have the beneficiary improve management of the corporation, increase clientele, expand and increase revenue,” and the beneficiary will only consult with the Board for “larger policy goals and budgetary discussions.” In addition, the beneficiary will “receive only general supervision from the remainder of the board.”

The petitioner also explained that the beneficiary will supervise a manager and a sales manager, and provided a job description for each employee. The petitioner did not submit the educational credentials or salaries of the employees as requested by the director in the RFE.

The petitioner submitted several bank statements for a [REDACTED] [REDACTED] which is not the address provided by the petitioner for the [REDACTED] [REDACTED] New York. The petitioner also submitted a "Deposit Account Balance Summary" from [REDACTED] for an account under the name of the petitioner that stated the open date of the account is September 7, 2012.

The petitioner also provided a letter, dated April 10, 2013, from [REDACTED], the tenant of the property located at [REDACTED] (the address listed as the petitioner's address on the Form I-129 and supporting documentation). [REDACTED] explained that on "November 7, 2011, I consented to the agreement that my property located at [REDACTED] which is operated by [REDACTED]. The petitioner also provided a document entitled, "Assignment and Assumption of Lease" where the assignor, [REDACTED] assigns the lease to [REDACTED]. However, the landlord is listed as [REDACTED] and the tenant is listed as [REDACTED]. Without the original lease agreement between [REDACTED] and the landlord, it is impossible to determine if [REDACTED] can assign his lease to [REDACTED]. In addition, in response to the RFE, the petitioner submitted five invoices in September [REDACTED]

The petitioner also submitted a sublease agreement between the tenant, [REDACTED] to the beneficiary for the rental of a warehouse located on [REDACTED]. Again, without the original lease agreement, it is not clear if the tenant can lease the space to a subtenant. Further, it is also not clear why the tenant prepared the sublease rather than the landlord.

The petitioner also submitted Form 941, Employer's Quarterly Federal Tax Returns, for the petitioner for the first quarter of 2013 that indicated two employees. The petitioner also submitted Forms 941 for [REDACTED] for all four quarters of 2012.

The director denied the petition, finding that the petitioner failed to establish that it will employ the beneficiary in a managerial or executive capacity under the extended petition. In denying the petition, the director noted several discrepancies in the evidence submitted by the petitioner. On appeal, counsel for the petitioner submits an appeal brief that is almost identical to the letter submitted in response to the request for evidence. On appeal, the petitioner does not discuss any of the discrepancies noted by the director in the decision and reiterates that the beneficiary will be employed in an executive capacity.

B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

As a preliminary matter, the AAO notes that [REDACTED] are not the petitioning entities in this proceeding. The petitioner completed Part 1 of the I-140 petition to clearly indicate that the intended employer is "[REDACTED]." Regardless of any ownership interest in [REDACTED], USCIS must examine whether the prospective United States employer, i.e., the U.S. branch office of the beneficiary's foreign employer, has offered the beneficiary a proffered position in an executive capacity as claimed by the petitioner. Accordingly, any supporting documentation that addresses the U.S. subsidiary's ownership or business transactions will not be addressed in this proceeding. Only those documents that pertain specifically to the petitioner listed on the Form I-129 will be addressed. As the petitioner's original supporting documentation pertained primarily to matters concerning [REDACTED] rather than those concerning the petitioner as listed on the petition, the petitioner did not submit sufficient evidence to warrant approval of the petition.

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(1)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are either in an executive or managerial capacity. *Id.*

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. Although the petitioner has provided a position description, it failed to provide specifics as to how the beneficiary will carry out the general tasks and goals listed above as a part of his daily duties. For instance, the petitioner did not provide specific examples, or supporting documentation regarding goals, strategies, policies or visions that have been or will be implemented, methodologies created for financial viability, or specific financial plans or decisions made. It is reasonable to expect a detailed discussion of his specific duties and responsibilities along with examples of his executive authority. The petitioner has provided no evidence to differentiate the beneficiary's listed duties from those of any executive in any industry, and the duties are not clear of the actual services provided by the petitioner regarding the import and export business. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. *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); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

The job description also includes several non-qualifying duties such as the beneficiary would, "acquire new business for the company through the negotiation of agreements with vendors and

wholesalers;” “establishing marketing and sales plans to facilitate the expansion of [the petitioner];” “ensure that the company adheres to all regulatory requirements including the attainment of appropriate licenses;” and, “handles all matters concerning leases, acquisition of new offices, and matters relating to vendor and customer relationships.” The petitioner did not indicate who will be in charge of preparing the financial reports and financial statements, or the development of the marketing program, or the development of the expansion strategies. It appears that the beneficiary will be marketing the business and handling the finance and accounting operations, rather than directing such activities through subordinate employees. In addition, the petitioner will be negotiating contracts and creating new partnerships without the assistance of any subordinate employee. 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 Intn’l.*, 19 I&N Dec. at 604.

Moreover, a critical analysis of the nature of the petitioner's business undermines the petitioner's assertion that the beneficiary is employed in an executive capacity. The Form 941, Employer's Quarterly Wage Report, for the first quarter of 2013 indicated that the petitioner employs the beneficiary and one other employee, [REDACTED] is a manager who “maintains receiving, warehousing, and distribution operations by initiating, coordinating, and enforcing program, operational, and personnel policies and procedures issued by Operations Manager.” The petitioner did not submit evidence that it employed any subordinate staff members who would perform the actual day-to-day, non-managerial operations of the company such as developing the sales and marketing programs, preparing the financial budget reports, bookkeeping, customer service, and business development.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly executive position.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. *See* section 101(a)(44)(B) of the

Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

As discussed, the petitioner's overly broad description of the beneficiary's duties indicates that the beneficiary is employed at the highest-level in the petitioning company and possesses the required level of authority. However, due to the lack of subordinate supervisory-level staff and the scope and nature of the petitioner's operations, the evidence does not establish that the beneficiary is relieved from involvement in supervising the day-to-day operations such that he can devote his time primarily to qualifying executive responsibilities.

Section 101(a)(44)(C) of the Act requires the AAO to "take into account the reasonable needs of the organization, component, or function in light of the overall purpose and stage of development of the organization, component, or function." However, the statute also requires the petitioner to establish that the beneficiary's position consists of "primarily" managerial and executive duties and that the petitioner has sufficient personnel to relieve the beneficiary from performing non-qualifying operational, administrative and first-line supervisory tasks.

Reading section 101(a)(44) of the Act in its entirety, the "reasonable needs" of the petitioner may justify a beneficiary who allocates 51 percent of his duties to managerial or executive tasks as opposed to 90 percent, but those needs will not excuse a beneficiary who spends the majority of her time on non-qualifying duties. The reasonable needs of the petitioner will not supersede the requirement that the beneficiary be "primarily" employed in a managerial or executive capacity as required by the statute. *See Brazil Quality Stones v. Chertoff*, 531 F.3d 1063, 1070 n.10 (9th Cir., 2008).

For the reasons discussed herein the petitioner has not established that it will employ the beneficiary in a managerial or executive capacity. Accordingly the appeal will be dismissed.

III. Qualifying Relationship

Although not addressed in the service center director's decision, a remaining issue in the present matter is whether the petitioner has established that it maintains a qualifying relationship with the beneficiary's foreign employer. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. one entity with "branch" offices), or related as a "parent and subsidiary" or as "affiliates." *See generally* section 101(a)(15)(L) of the Act; 8 C.F.R. § 214.2(l).

The petitioner claims that it is a branch office of [REDACTED]. However, according to the documentation, the petitioner is incorporated in the State of New York. It is fundamental to this nonimmigrant classification that there be a United States entity to employ the beneficiary. In order to meet the definition of "qualifying organization," there must be a United States employer. See 8 C.F.R. § 214.2(l)(1)(ii)(G)(2). Although the statute refers to an alien that seeks to enter the United States temporarily in order to render his or her services to "the same employer or a subsidiary or affiliate thereof," the phrase "same employer" refers to a "branch office" of a foreign entity that is authorized to do business in United States. The regulations define the term "branch" as "an operating division or office of the same organization housed in a different location." 8 C.F.R. § 214.2(l)(1)(ii)(J). If the petitioner submits evidence to show that it is incorporated in the United States, then that entity will not qualify as "an . . . office of the same organization housed in a different location," since that corporation is a distinct legal entity separate and apart from the foreign organization. See *Matter of M*, 8 I&N Dec. 24, 50 (BIA 1958, AG 1958); *Matter of Aphrodite Investments Limited*, 17 I&N Dec. 530 (Comm'r 1980); and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980). As in the present matter, if the petitioner is a foreign entity with no branch office in the United States and no qualifying ownership interest in a U.S. entity, there is no U.S. entity to employ the beneficiary and no qualifying organization. For this additional reason, the appeal will be dismissed.

III. EMPLOYMENT ABROAD IN A MANAGERIAL OR EXECUTIVE CAPACITY

Although not addressed by the director, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity, as required by 8 C.F.R. § 214.2(l)(3)(v)(B).

In the support letter, the petitioner stated that the beneficiary was employed by the foreign entity in the position of General Manager. The petitioner did not provide a description of the beneficiary's job duties abroad. Absent a detailed description of the beneficiary's actual duties and a consistent account of how the beneficiary allocated his time to specific duties, the AAO cannot conclude that the beneficiary has been employed by the foreign entity in a qualifying managerial or executive capacity.

In addition, the petitioner did not submit any documentation to evidence that the beneficiary was employed abroad such as paystubs, tax receipts, payroll journal or bank statements. The petitioner also did not provide any evidence that the employees listed by the petitioner for the foreign company are in fact employed by the foreign entity. 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)). For this additional reason, the petition cannot be approved.

IV. Conclusion

The AAO maintains discretionary authority to review each appeal on a *de novo* basis. The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). 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 v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd* 345 F. 3d 683 (9th Cir. 2003).

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.