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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office
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**U.S. Citizenship
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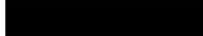
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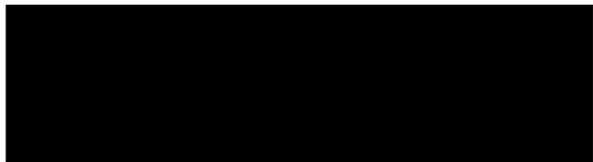
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IN RE: 

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(i)

ON BEHALF OF PETITIONER:



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 \$630. 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 Form I-601, Application for Waiver of Ground of Inadmissibility (Form I-601) was denied by the District Director, Philadelphia, Pennsylvania, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Jamaica. The applicant was found to be inadmissible to the United States under section 212(a)(6)(C)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(6)(C)(i), for seeking to procure a visa, other documentation, or admission into the United States or other benefit provided under this Act, by fraud or willfully misrepresenting a material fact. The applicant was also found to be inadmissible under section 212(a)(9)(B)(i)(II) of Act, 8 U.S.C. § 1182(a)(9)(B)(i)(II), for having been unlawfully present in the U.S. for more than a year. The applicant is married to a U.S. citizen, and he is the beneficiary of an approved Form I-130, Petition for Alien Relative. The applicant seeks a waiver of his inadmissibility pursuant to section 212(i) of the Act, 8 U.S.C. § 1182(i), so that he may live in the United States with his spouse.

The director determined the applicant was unlawfully present in the U.S. between 1994 and 1997, and that upon his reentry into the U.S. on March 5, 1998, he became inadmissible for unlawful presence pursuant to section 212(a)(9) of the Act. The director determined further that the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act because he obtained a B2 visitor visa following his December 1997 voluntary departure, by concealing prior use of a false identity and prior voluntary departure history. In addition, the director determined the applicant was inadmissible under section 212(a)(6)(C)(i) of the Act because he obtained the benefit of voluntary departure through fraud or material misrepresentation. The director found the applicant had failed to establish his spouse would experience extreme hardship if he were denied admission into the United States. The applicant's waiver application was denied accordingly.

Through counsel, the applicant asserts on appeal that the director erroneously found the applicant to be inadmissible under sections 212(a)(9)(B)(i)(II) and 212(a)(6)(C)(i) of the Act. Counsel asserts that, for inadmissibility purposes, the applicant's only unlawful presence in the U.S. occurred between April 1, 1997 and November 18, 1997, less than the 365 days or more required in section 212(a)(9)(B)(i)(II) of the Act. Counsel indicates further that the applicant did not misrepresent a material fact when he obtained his visitor visas because he used his true name and identity each time he obtained a U.S. visa and admission into the United States. Counsel additionally asserts that the applicant's consistent use of an alias for U.S. immigration removal hearing purposes did not constitute a material misrepresentation under section 212(a)(6)(C)(i) of the Act, because it was not done to procure voluntary departure. In the event the applicant is found to be inadmissible, counsel asserts that the applicant's wife will suffer extreme hardship if he is denied admission. Counsel indicates further that a favorable exercise of discretion is merited in the applicant's case. In support of these assertions the record contains affidavits written by the applicant's wife, as well as Jamaica country conditions information, criminal history information and affidavits from friends attesting to the validity of the applicant's marriage and to the applicant's good character. The entire record was reviewed and considered in rendering a decision on the appeal.

A review of the record reflects the applicant was admitted into the United States with a B1/B2 visitor visa on November 5, 1993. The visa was issued under the name, [REDACTED], and was contained in a Jamaican passport issued under the same name. [REDACTED] is the applicant's true name and identity. The applicant remained in the U.S., and he was brought to the attention of the legacy Immigration and Naturalization Service in April 1997, subsequent to an arrest in Pennsylvania. An alien file was created under the alias name used by the applicant at the time, [REDACTED]. The Record of Deportable Alien (Form I-213) contained in the record reflects that at that time, the applicant claimed his passport could not be located, and the Service found no immigration history for the applicant under his alias name. The applicant was placed into deportation proceedings under his alias name, and he was granted voluntary departure by an immigration judge on November 18, 1997, with an alternate order of deportation to Jamaica if he did not depart by December 18, 1997. The record contains evidence of the applicant's departure from the U.S. prior to December 18, 1997. On January 27, 1998, and again on March 5, 1998, the applicant used a valid B1/B2 visitor visa previously issued to him on February 1, 1995, under the name [REDACTED], to gain admission into the U.S. The applicant's last admission on March 5, 1998 was valid for 90 days. The applicant has not departed the U.S. since his last admission. He married a U.S. citizen on December 20, 1999, and he filed a Form I-485, Application to Register Permanent Residence or Adjust Status (Form I-485) under his true name on November 2, 2001. U.S. Citizenship and Immigration Services (the Service) denied the applicant's Form I-485 on September 19, 2006.

Section 212(a)(9)(B) of the Act provides in pertinent part:

(i) In general.- Any alien (other than an alien lawfully admitted for permanent residence) who-

(I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to section 244(e)) prior to the commencement of proceedings under section 235(b)(1) or section 240, and again seeks admission within 3 years of the date of such alien's departure or removal, or

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United States, is inadmissible.

(ii) Construction of unlawful presence.- For purposes of this paragraph, an alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the period of stay authorized by the Attorney General or is present in the United States without being admitted or paroled.

Based on a review of the record, the AAO finds the applicant is not inadmissible under either section 212(a)(9)(B)(i)(I) or (II) of the Act.

Sections 212(a)(9)(B)(i)(I) and (II) were added to the Act by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Div. C of PL 104-208, September 30, 1996) (IIRIRA). IIRIRA became effective on April 1, 1997, and only periods of unlawful presence spent in the U.S. after its April 1, 1997 effective date count towards unlawful presence for sections 212(a)(9)(B)(i)(I) and (II) of the Act purposes. The length of the alien's accrued unlawful presence is not calculated by combining periods of unlawful presence accrued during multiple unlawful stays in the United States. Furthermore, an alien is not subject to the three-year bar set forth in section 212(a)(9)(B)(i)(I) of the Act if, after commencement of removal proceedings, s/he is granted voluntary departure and/or leaves, so long as less than one year of unlawful presence was accrued prior to the alien's departure date. Accrual of unlawful presence stops on the date the alien is granted voluntary departure and resumes on the day after voluntary departure expires. *See* USCIS Adjudicator's Field Manual, Chapter 40.9.2 (May 6, 2009), <http://www.uscis.gov/ilink/docView/AFN/HTML/AFM/0-0-0-1.html> (referring to 8 C.F.R. §§ 239.3 and 1240.26)

In the present case, the applicant was admitted into the U.S. on November 5, 1993. Under IIRIRA, he began to accrue unlawful presence on April 1, 1997. However on November 18, 1997, the applicant was granted voluntary departure by an immigration judge, through December 18, 1997. Because the applicant departed the U.S. prior the expiration of his voluntary departure, he ceased to accrue unlawful presence on November 18, 1997. The applicant thus accrued 231 days (less than one year) of unlawful presence prior to his departure from the U.S. on December 17, 1997. Accordingly, he is not inadmissible under section 212(a)(9)(B)(i)(I) of the Act.

Unlike the three-year bar set forth in section 212(a)(9)(B)(i)(I) of the Act, the ten-year inadmissibility bar in section 212(a)(9)(B)(i)(II) of the Act applies even if the alien leaves after removal proceedings have commenced. Specifically, an alien who voluntarily departs the United States or who was removed from the United States after having been unlawfully present for more than one year, triggers the ten-year bar to admission under section 212(a)(9)(B)(i)(II) of the Act, for periods of unlawful presence that accrue after April 1, 1997.

In the present matter, the applicant has accrued over one year of unlawful presence since his last admission into the U.S. on March 5, 1998. However, the applicant has not departed the United States since his last admission. The inadmissibility provisions contained in section 212(a)(9)(B)(i)(II) of the Act therefore do not apply in this case.

Section 212(a)(6)(C) of the Act provides, in pertinent part that:

- (i) Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

A misrepresentation is generally material only if by it the alien received a benefit for which he would not otherwise have been eligible. *See Kungys v. United States*, 485 U.S. 759; 108 S. Ct. 1537 (1988). A misrepresentation or concealment must be shown by clear, unequivocal, and convincing evidence to be predictably capable of affecting the official decision in order to be considered material. *Id.* at 771-72. Additionally, fraud or willful misrepresentation of a material fact in the procurement or attempted procurement of a visa, other documentation, or admission must be made to an authorized official of the United States government in order for inadmissibility under section 212(a)(6)(C)(i) of the Act to be found. *See Matter of Y-G-*, 20 I&N Dec. 794 (BIA 1994); *see also Matter of D-L- & A-M-*, 20 I&N Dec. 409 (BIA 1991); *Matter of Shirdel*, 19 I&N Dec. 33 (BIA 1984); *Matter of L-L-*, 9 I & N Dec. 324 (BIA 1961). A misrepresentation made in connection with an application for visa or other documents, or for entry into the United States, is material if either:

1. the alien is excludable on the true facts, or
2. the misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in proper determination that he be excluded.

Matter of S- and B-C-, 9 I&N Dec. 436, 448-449 (BIA 1960; AG 1961).

Upon review of the record, the AAO finds the evidence does not establish that the applicant obtained his B1/B2 visitor visa following his December 1997 voluntary departure from the United States. Rather, the evidence in the record establishes that the applicant was issued a ten-year, multiple entry visitor visa on February 1, 1995, several years before he was placed into removal proceedings. The director's finding that the applicant concealed his prior false identity and voluntary departure history from consular officers in order to obtain a visitor visa is not supported by the evidence in the record.

The finding that the applicant obtained the benefit of voluntary departure by fraud or material misrepresentation is, however, supported by the record.

The Form I-294, Warning to Alien Ordered Removed or Deported, contained in the record reflects that per section 212(a)(9) of the Act, the applicant would have been prohibited from entering, attempting to enter, or being in the United States for five years from the date of his departure if he had been ordered deported or removed. In addition, an alien unlawfully present in the U.S. after being ordered removed is barred from applying for consent to reapply for admission for ten years from the date of his/her last departure from the U.S. *Matter of Torres-Garcia*, 23 I&N Dec. 866 (BIA 2006). An alien granted the privilege of voluntary departure, on the other hand, is not deemed to have departed the U.S. under an order of removal. *See* 8 C.F.R. § 1240.26(c)(4). Accordingly, voluntary departure does not carry a mandatory period prohibiting reentry into the United States. We find that voluntary departure is an immigration benefit.

An alien may be granted voluntary departure by an immigration judge at the conclusion of removal proceedings only if, among other things, "the alien is, and has been, a person of good

moral character for at least five years immediately preceding the application”. See 8 C.F.R. § 1240.26(c)(1)(ii).¹

Section 101(a)(f) of the Act provides in pertinent part that:

For the purposes of this Act – No person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was . . . (6) one who has given false testimony for the purpose of obtaining any benefits under this Act”.

The U.S. Supreme Court has defined the term “testimony” as, “oral statements made under oath.” *Kungys v. United States*, 485 U.S. 759, 780, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988). The Board of Immigration Appeals (Board or BIA) held in *Matter of G*, 6 I&N Dec. 208, 209 (BIA 1954) that, “[t]estimony is the evidence given by a competent witness under oath or affirmation, as distinguished from evidence derived from writings and other sources.”

The applicant was placed under oath by an immigration judge at the initiation of his removal proceedings. See 8 C.F.R. § 1240.10 (stating the immigration judge shall place the respondent under oath at the opening of the removal proceeding.) The applicant provided a false identity at that time, and maintained the false identity throughout his removal proceedings. The applicant subsequently applied to the immigration judge for voluntary departure in lieu of removal using a false identity. See 8 C.F.R. § 1240.11(b) (stating the alien applies to the immigration judge for voluntary departure.) The applicant’s use of a false identity throughout his deportation proceedings thus constituted false testimony.

Counsel has argued that in spite of the applicant’s use of a false identity, and indeed because of it, the immigration judge was aware of the applicant’s criminal record. Counsel appears to be arguing that the applicant would have been granted voluntary departure regardless. However, in addition to the fact that the applicant’s false testimony alone would have likely disqualified him from consideration for voluntary departure, the fact that the applicant had assumed a false identity to obtain employment in violation of his visa status, and had overstayed on his visa, certainly would have been relevant to a determination of the applicant’s character, and the applicant’s concealment of his true identity prevented the immigration court from weighing this factor. We find, therefore, that the applicant misrepresented a fact to obtain an immigration benefit, and that misrepresentation was material to the benefit sought.

Section 212(i) of the Act provides that:

- (1) The [Secretary] may, in the discretion of the [Secretary], waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son or daughter of a United States citizen or of an alien lawfully

¹ The Order of the Immigration Judge reflects that the applicant was granted voluntary departure at the conclusion of his removal proceedings.

admitted for permanent residence, if it is established to the satisfaction of the [Secretary] that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

The applicant is married to a U.S. citizen. The applicant's spouse is a qualifying relative for section 212(i) of the Act, waiver of inadmissibility purposes.

Section 212(i) of the Act provides that a waiver of the bar to admission is dependent first upon a showing that the bar imposes an extreme hardship on a qualifying family member. Once extreme hardship is established, it is but one favorable factor to be considered in the determination of whether the Secretary should exercise discretion. *See Matter of Mendez*, 21 I&N Dec. 296 (BIA 1996).

Extreme hardship is "not a definable term of fixed and inflexible content or meaning," but "necessarily depends upon the facts and circumstances peculiar to each case." *Matter of Hwang*, 10 I&N Dec. 448, 451 (BIA 1964). In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative's family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. *Id.* The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not exclusive. *Id.* at 566.

The BIA has also held that the common or typical results of removal and inadmissibility do not constitute extreme hardship, and has listed certain individual hardship factors considered common rather than extreme. These factors include: economic disadvantage, loss of current employment, inability to maintain one's present standard of living, inability to pursue a chosen profession, separation from family members, severing community ties, cultural readjustment after living in the United States for many years, cultural adjustment of qualifying relatives who have never lived outside the United States, inferior economic and educational opportunities in the foreign country, or inferior medical facilities in the foreign country. *See generally Matter of Cervantes-Gonzalez*, 22 I&N Dec. at 568; *Matter of Pilch*, 21 I&N Dec. 627, 632-33 (BIA 1996); *Matter of Ige*, 20 I&N Dec. 880, 883 (BIA 1994); *Matter of Ngai*, 19 I&N Dec. 245, 246-47 (Comm'r 1984); *Matter of Kim*, 15 I&N Dec. 88, 89-90 (BIA 1974); *Matter of Shaughnessy*, 12 I&N Dec. 810, 813 (BIA 1968).

However, though hardships may not be extreme when considered abstractly or individually, the BIA has made it clear that "[r]elevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists." *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996) (quoting *Matter of Ige*, 20 I&N Dec. at 882). The adjudicator

“must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation.” *Id.*

The actual hardship associated with an abstract hardship factor such as family separation, economic disadvantage, cultural readjustment, et cetera, differs in nature and severity depending on the unique circumstances of each case, as does the cumulative hardship a qualifying relative experiences as a result of aggregated individual hardships. See, e.g., *Matter of Bing Chih Kao and Mei Tsui Lin*, 23 I&N Dec. 45, 51 (BIA 2001) (distinguishing *Matter of Pilch* regarding hardship faced by qualifying relatives on the basis of variations in the length of residence in the United States and the ability to speak the language of the country to which they would relocate). For example, though family separation has been found to be a common result of inadmissibility or removal, separation from family living in the United States can also be the most important single hardship factor in considering hardship in the aggregate. See *Salcido-Salcido*, 138 F.3d at 1293 (quoting *Contreras-Buenfil v. INS*, 712 F.2d 401, 403 (9th Cir. 1983)); but see *Matter of Ngai*, 19 I&N Dec. at 247 (separation of spouse and children from applicant not extreme hardship due to conflicting evidence in the record and because applicant and spouse had been voluntarily separated from one another for 28 years). Therefore, we consider the totality of the circumstances in determining whether denial of admission would result in extreme hardship to a qualifying relative.

The record in this case contains references to hardship the applicant's U.S. citizen children would experience if the waiver application were denied. It is noted that Congress did not include hardship to an alien's children as a factor to be considered in assessing extreme hardship. In the present case, the applicant's spouse is the only qualifying relative for the waiver under section 212(i) of the Act, and hardship to the applicant's children will not be separately considered, except as it may affect the applicant's spouse.

In support of the applicant's extreme hardship claim, the record contains letters written by the applicant's wife indicating she had a difficult childhood, that she was a teen mother, and that she felt depressed as a single mother. She states that the applicant is a good emotional and financial provider for her family, and that she would be unable to live above the poverty line without his financial help. She indicates that she and the applicant are starting their own car repair and sales business and that they want to start a family together. She does not want to live separately from the applicant and she fears that she would be unable to find work in Jamaica, and that it would be hard for her kids to adjust to life in Jamaica. She states further that she would miss her life, friends and family in the U.S. if she moved with the applicant to Jamaica and that her children would have fewer opportunities there. The record contains general country conditions information on Jamaica, and four letters from friends attesting to the strength of the applicant's marriage and to his good character. The record additionally contains court disposition information reflecting dismissed or not guilty findings for unlawful possession of cocaine and unlawful possession of a controlled substance charges filed against the applicant.

Upon review, the AAO finds the evidence in the record fails to show that the hardships faced by the applicant's wife, considered in the aggregate, rise beyond the common results of removal or inadmissibility to the level of extreme hardship.

The affidavit evidence submitted in this case fails to demonstrate that the applicant's wife would experience extreme hardship if she remained in the U.S. or if she relocated to Jamaica. Although the assertions made by the applicant's wife are relevant and have been taken into consideration, little weight can be afforded them in the absence of supporting evidence. *See Matter of Kwan*, 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *See 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)).

The record contains no evidence to corroborate the statements that the applicant's wife would suffer extreme emotional and financial hardship if the applicant were denied admission into the United States. The record contains no medical or other documentary evidence to corroborate the claim that the applicant's wife has or would suffer from depression. There is also no evidence to indicate that the applicant and his wife operate a business together, or that his wife would experience financial hardship on this basis. The record lacks birth certificate or other evidence to establish that the applicant's wife has children, or to demonstrate the age of the children, where they live, or that she is financially responsible for children. The record also fails to demonstrate that the applicant's wife would be unable to support herself if the applicant did not remain with her in the U.S. Indeed, a review of employment and federal income tax return evidence contained in the record indicates the applicant's wife has been steadily employed since 1990, earning between \$25,000 and \$49,000 a year. This evidence contradicts the assertion that the applicant's wife would live at the poverty level without the applicant's financial assistance. The country conditions evidence contained in the record is general, and fails to demonstrate that the applicant's wife would be unable to find work in Jamaica, or that she would face any specific hardship if she moved with the applicant to Jamaica. It is also noted that no 2011 Department of State (DOS) Travel Warnings or Alerts exist for Jamaica, and 2011 DOS country specific information for Jamaica is general and fails to establish that the applicant's wife would experience extreme hardship in Jamaica. *See* U.S. Department of State, Jamaica Country Specific Information (February 24, 2011), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1147.html.

Although the depth of concern and anxiety over the applicant's immigration status is neither doubted nor minimized, the fact remains that Congress provided for a waiver of inadmissibility only under limited circumstances. In nearly every qualifying relationship, whether between husband and wife or parent and child, there is a deep level of affection and a certain amount of emotional and social interdependence. While, in common parlance, the prospect of separation or relocation nearly always results in considerable hardship to individuals and families, in specifically limiting the availability of a waiver of inadmissibility to cases of "extreme hardship" Congress did not intend that a waiver be granted in every case where a qualifying relationship, and

thus the familial and emotional bonds, exist. The point made in this and prior decisions on this matter is that the current state of the law, viewed from a legislative, administrative, or judicial point of view, requires that the hardship, which meets the standard in section 212(h) of the Act, be above and beyond the normal, expected hardship involved in such cases. In the present matter, the applicant has established only that his wife would experience the type of emotional and financial hardship commonly associated with removal or inadmissibility, if the applicant is denied admission into the United States.

Upon review of the totality of the evidence, the AAO finds that the applicant failed to establish extreme hardship to his U.S. citizen spouse as required under section 212(i) of the Act. As the applicant has not established extreme hardship to a qualifying family member no purpose would be served in determining whether the applicant merits a waiver as a matter of discretion.

In proceedings for application for waiver of grounds of inadmissibility under section 212(i) of the Act, the burden of proving eligibility remains entirely with the applicant. Section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.