



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 16493399

Date: APR. 12, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Worker (Extraordinary Ability)

The Petitioner, a mountaineering and rock-climbing guide and instructor, seeks classification as an individual of extraordinary ability. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the Petitioner meets at least three of the ten initial evidentiary criteria for this classification. The Petitioner subsequently filed a combined motion to reopen and motion to reconsider. The Director granted the motion, in part, but affirmed the denial of the petition on the same grounds. The matter is now before us on appeal.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 203(b)(1) of the Act makes visas available to immigrants with extraordinary ability if:

- (i) the alien has extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation,
- (ii) the alien seeks to enter the United States to continue work in the area of extraordinary ability, and
- (iii) the alien's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation

at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

The Petitioner is a mountaineering and trekking expedition guide and the sole proprietor of [redacted] [redacted] in Nepal. The Petitioner maintains that he has “extraordinary ability in the field of Athletics – Rock Climbing” and “has made an enormous national acclaim in the field of Rock Climbing in Nepal.” The Petitioner indicates his intention to work as a rock-climbing coach in the United States.

A. Evidentiary Criteria

Because the Petitioner has not indicated or established that he has received a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). The Petitioner claims to meet five of the ten criteria, summarized below:

- (i), Lesser nationally or internationally recognized awards or prizes;
- (ii), Memberships in associations that require outstanding achievements;
- (iii), Published materials in professional, major trade or major media publications;
- (iv), Judging the work of others in the field; and
- (v), Original contributions of major significance.

The Director determined that the Petitioner met two of the evidentiary criteria, relating to awards and judging, at 8 C.F.R. § 204.5(h)(3)(i) and (iv). On appeal, the Petitioner asserts that he satisfies the three additional criteria listed above. After reviewing all the evidence in the record, we will not disturb the Director’s determination that the Petitioner satisfied the awards criterion at 8 C.F.R. § 204.5(h)(3)(i). However, for the reasons discussed below, we conclude that he has not satisfied the requirements of any additional criteria and does not meet the initial evidence requirements for this classification.

Documentation of the individual's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.
8 C.F.R. § 204.5(h)(3)(ii)

The Petitioner maintains that he meets this criterion based on his membership in the U.S. Nepal Climbers Association Inc. (USNCA), the [REDACTED] and the Nepal Mountaineering Instructor's Association (NMIA), and as the "founding member" and proprietor of [REDACTED]. To satisfy this criterion, the Petitioner must show that membership in the association is based on being judged by recognized national or international experts as having outstanding achievements in the field for which classification is sought.¹

With respect to USNCA, the Petitioner provided: a copy of his membership card identifying him as a "Life Member" of the association as of [REDACTED] 2020; a certificate recognizing that "Life Membership" was bestowed upon him in "in grateful appreciation for his unwavering support and contribution" to the association; and screenshots from the USNCA website listing the Petitioner among the association's "Life Members." The Petitioner provided a letter from USNCA [REDACTED], [REDACTED] [REDACTED] who explains that there are two categories of membership (general and life) and that "[a]ny individual who have successfully summited at least a 5000m tall mountain is eligible to apply for the life-time membership and the general membership." [REDACTED] refers USCIS to the association's website (usnepalclimbers.org) for membership requirements and explains that its board of directors will "scrutinize an individual's profile before providing membership." He also discusses some of the Petitioner's achievements. The Director acknowledged that the Petitioner's achievements are noteworthy but determined that neither [REDACTED]'s letter nor the information provided on the association's website provided information indicating that "outstanding achievements" are an essential condition for life membership in the USNCA.

On appeal, the Petitioner again refers to the membership program requirements found at the USNCA website, emphasizes the "stringent membership criteria for Life Membership," and provides a screenshot of the relevant page from the website. According to this information, Life Membership "is awarded to those members who have contributed to the tourism sector throughout their professional career as a trekking guide," while General Membership is available to "any individual who has successfully summited at least a 5000m tall mountain." To be eligible for Life Membership, applicants "must have guided for a minimum of 7 years, must have certification on a mountaineering climbing course, and must have climbed a peak above 6000m at least 4 times."

The Petitioner has not shown that life membership in the USNCA requires outstanding achievements, as judged by recognized national or international experts. The record reflects that the USNCA requires a certain level of professional experience as a trekking guide, an industry certification, and four

¹ See USCIS Policy Memorandum PM 602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14 6* (Dec. 22, 2010), <https://www.uscis.gov/policymanual/HTML/PolicyManual.html> (providing an example of a admission to membership in the National Academy of Sciences as a Foreign Associate that requires individuals to be nominated by an academy member, and membership is ultimately granted based upon recognition of the individual's distinguished achievements in original research).

qualifying climbs. Here, the Petitioner does not demonstrate that possessing the stated experience is indicative of outstanding achievements consistent with this regulatory criterion. While USNCA's board of directors may consider other factors when evaluating membership applications, we can only evaluate the association's stated membership requirements as documented in the record. The Petitioner has not provided, for example, the organization's bylaws or constitution or information from the organization regarding its application review process or standards. The USNCA may have determined that the Petitioner has outstanding achievements in the field, above and beyond the stated professional experience and certification membership requirements, when granting his life membership. However, it is the Petitioner's burden to establish USNCA requires outstanding achievements as an essential condition of membership for every life member admitted and he has not met that burden.

The Petitioner also claims eligibility under this criterion based on his "Honorary Lifelong Membership" in [redacted]. He initially submitted a certificate from [redacted] indicating that "[t]his honor recognizes his commitment demonstrated towards the programs, activities and ideas" of the association, but he did not provide supporting evidence demonstrating that [redacted] requires outstanding achievement as a condition for membership. The Director advised the Petitioner of this deficiency in a request for evidence (RFE) and allowed him the opportunity to submit additional evidence, such as the sections of the association's bylaws or constitution discussing the criteria for membership and the qualifications required for those who serve on its membership reviewing panel.

In response, the Petitioner submitted a letter from [redacted] who states that "the constitution of [redacted] provides three categories of membership – General, Honorary and Lifelong membership." He indicates that the categories have different requirements but does not specify what those requirements are. [redacted] goes on to discuss the Petitioner's "Honorary Membership" and his contributions to rock-climbing and mountaineering in Nepal. He concludes that "[t]herefore, as per the regulation of agency and subject to the provision of our constitution, the executive committee of the organization recognized [the Petitioner's] national contribution and decided to honor him with lifelong membership of this association in 2019." The Director determined that the Petitioner's membership in [redacted] did not satisfy the criterion because the Petitioner did not provide evidence related to the membership requirements for each membership category mentioned in [redacted]'s letter. The Director also observed that the [redacted] website did not contain information about the general, honorary, and lifelong membership categories mentioned by [redacted]

On motion, the Petitioner submitted another letter from [redacted], who states that "[redacted] had updated its website with the classification of its members and other information." He also provided a screenshot from the website [redacted] that lists the Petitioner as a "Lifelong Member (Honorary)" This evidence states that "the committee has taken this decision based on lifelong membership criteria stated in the organization's constitution," noting that "honorary lifelong membership" is those "who have shown leadership in the tourism industry of Nepal for at least 15 years" and "contributed significantly to sectors including rock climbing, mountaineering, trekking, coaching, hospitality and safari." The Director acknowledged this evidence but emphasized that the Petitioner did not provide evidence that [redacted] requires outstanding achievements as an essential condition for membership, or evidence that the individuals who review prospective members are recognized as national or international experts. The Director also observed that the Petitioner had not submitted the relevant portions of the referenced [redacted] constitution which would shed light on its requirements for different

levels of membership, the membership review process, and the credentials of the “executive committee” that considers admission of members.

On appeal, the Petitioner re-submits the above-referenced screenshot from the [redacted] website as evidence that he has been recognized as an honorary lifelong member. However, he does not address the evidentiary deficiencies mentioned in the Director’s decision on motion, such as the lack of evidence outlining the requirements for different levels of membership mentioned in [redacted]’s letter and the lack of evidence that those who participate in the membership review process are recognized national or international experts in the field. Further, based on the limited information provided regarding the “honorary lifelong membership” category, we cannot determine that 15 years of experience and undefined “contributions” in the field amounts to a requirement that all members at this level must demonstrate outstanding achievements.

For the first time on appeal, the Petitioner asserts that he qualifies under this criterion based on his membership with the NMIA. He submits a letter from NMIA [redacted], who describes the Petitioner as a “key resource person” for the association and states that it has approached him to become one of its advisors. However, he does not state that the Petitioner was granted membership in NMIA or that membership in the association requires outstanding achievements of its members as judged by recognized national or international experts. The record includes a certificate issued to the Petitioner by NMIA for completion of a “Basic Mountain Navigation and Hill Walking Course” in 2006 and evidence that he completed a “High Mountain Rescue Training” course conducted by NMIA in 2011, but does not document his membership in this association.

As noted, the Petitioner also claims eligibility under this criterion based on his status as the “founding member” and proprietor of [redacted]. We agree with the Director’s determination that the Petitioner’s ownership of this private business does not qualify as or equate to a “membership in an association” that admits members based on their outstanding achievements.

Finally, we note that the Petitioner’s appellate brief mentions that he “is a Charter Founder Member of two reputed International organizations, Kiwanis International and Rotary Club of Boudha (Kathmandu).” The record reflects that the Petitioner’s initial evidence included documentation of his membership with these organizations. However, despite multiple opportunities to do so, he has not submitted evidence that either organization requires outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields. We note that the international reputation of a given organization is not a relevant consideration when evaluating whether his membership satisfies this criterion.

For the reasons discussed above, the Petitioner did not establish that he satisfies this criterion.

Published material about the individual in professional or major trade publications or other major media, relating to the individual’s work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation. 8 C.F.R. § 204.5(h)(3)(iii)

The Petitioner submitted 18 articles from various publications in Nepal, including *Gorkhapatra*, *Annapurna Post*, *Nepal Samacharpatra*, *Taja Khabar Weekly*, *Nami Weekly*, *Rastra Vani* magazine, *Madhyanha*, *Naya Patrika* and *Guide Nepal*.² Not every submitted article meets all required elements of the regulation at 8 C.F.R. § 204.5(h)(3)(iii), as some do not identify the author. An article titled [redacted] published by *Ghorkhapatra* in [redacted] 2019, mentions the Petitioner and his company, but is not about him. However, upon review, many of the submitted articles are about the Petitioner, relate to his work in the mountaineering and rock-climbing field, and include the required title, date and author of the material and an English translation.

Therefore, to meet this criterion, the Petitioner must establish that these articles were published in professional or major trade publications or other major media. The Petitioner's evidence should establish that the circulation (on-line or in print) is high compared to other circulation statistics and show who the intended audience of the publication is.³

The initial evidence included a letter from a representative of Press Council Nepal who certifies the "grading" of the publications in which the articles were published. Specifically, the representative states that *Annapurna Post*, *Gorkhapatra*, *Naya Patrika*, and *Nepal Samacharpatra* are daily "National 'A' Grade" publications, *Madhyanha* and *Taja Khabar* are "National 'B' Grade" publications and *Nami* is a "Local 'C' Grade." However, the letter did not provide an explanation of this publication grading system, nor did the Petitioner submit any additional evidence explaining the system. The Petitioner has emphasized that Press Council Nepal "is the regulating agency of media in Nepal," and "prescribes and classifies the 'Category of News Papers' based on the prescribed rules." However, these "prescribed rules" are not explained or documented. Without additional context and information regarding the relative circulation statistics of these publications, we cannot conclude, for example, that all 'A' Grade publications would automatically qualify as major media.

The Petitioner subsequently submitted letters from the publishers of eight newspapers, but this additional evidence was not sufficient to demonstrate that any of these publications qualifies as major media.⁴ For example, a letter from the editor-in-chief of *Gorkhapatra* states that it is the oldest national daily newspaper in Nepal and mentions the topics covered by the paper. The editor of the *Annapurna Post* describes the publication as "a national daily newspaper" and confirms that it has published articles about the Petitioner. The news chief of *Nepal Samcharpatra* mentions that the newspaper has a circulation of 60,000 copies daily but there is no context for us to evaluate how this circulation figure compares to that of other newspapers in Nepal. The editor of *Madhyanha National Daily* states that this publication "ranks within top 25 among the daily newspaper," but is not accompanied by independent evidence of newspaper rankings within Nepal, and it is unclear whether the referenced rankings were based on circulation or some other measure. The Petitioner has not shown that he meets this criterion based on the submitted newspaper articles.

As noted, the Petitioner also submitted an excerpt from the [redacted] 2019 issue of *Guide Nepal*, a [redacted]
[redacted] It is unclear

² The referenced articles are related to the Petitioner's work in the field of mountaineering and rock climbing. He submitted eight additional articles which discuss his involvement in social welfare activities in Nepal.

³ See USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7.

⁴ While we discuss only a sampling of these letters here, we have reviewed and considered each one.

whether the article, which does not identify an author as required by the regulation, is an article about the Petitioner authored by the publisher, or whether it is part of the advertisement for the Petitioner's company. The Petitioner also did not provide evidence demonstrating the intended audience or circulation figures for *Guide Nepal*. Although it is [redacted], an association in the Petitioner's field, the fact that it is published in the English language suggests that its intended audience may be foreign visitors in Nepal, rather than professionals in the field. The Petitioner did not establish that *Guide Nepal* is a professional or major trade publication or other major medium.

For the reasons discussed above, the Petitioner did not establish that he satisfies this criterion.

Evidence of the individual's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specialization for which classification is sought. 8 C.F.R. § 204.5(h)(3)(iv)

The Director determined that the Petitioner satisfied this criterion, and the record reflects that the Director reached this conclusion based solely on the Petitioner's initial evidence. We will withdraw the Director's determination that this criterion has been met.

The Petitioner's initial evidence included:

- A [redacted] 2019 letter from [redacted], who states: "[The Petitioner] has worked as member of jury for rock climbing competition organized by [redacted] on [redacted] 2010."
- A [redacted] 2008 letter from [redacted] NMIA, who states: "[The Petitioner] has been appointed as a member of Jury for the Rock-Climbing Training Competition organized by [NMIA] from [redacted] 2008."
- An [redacted] 2019 letter from [redacted] who states that the Petitioner participated as a jury member of a "talk show about potential trek and climbing destination in lower Everest region and poetry competition." He indicates that the talk show was part of the [redacted] organized by [redacted]

The Petitioner also provided two photographs that depict him among groups of unidentified people with the handwritten captions: "Petitioner performing jury member in the competition" and "Petitioner as a jury member in the competition."

Here, the Petitioner did not provide evidence corroborating the letters from these organizations, such as documentation detailing his responsibilities as a jury member for the referenced rock-climbing competitions or any other evidence regarding these competitions and how they were judged. Without this evidence, we cannot determine that his role as a "member of jury" involving judging the work of others in his field. Accordingly, the Petitioner has not established that he meets the requirements of this criterion.

Evidence of the individual's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field. 8 C.F.R. § 204.5(h)(3)(v)

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that not only has he made original contributions but that they have been of major significance in the field.⁵ For example, a petitioner may show that the contributions have been widely implemented throughout the field, have remarkably impacted or influenced the field, or have otherwise risen to a level of major significance.

The Director determined that the Petitioner documented his accomplishments as a mountaineering guide and tourism entrepreneur and acknowledged evidence that he has constructed rock-climbing routes and promoted rock climbing tourism in Nepal. The Director noted that such achievements are not irrelevant, but he also emphasized the Petitioner's intention to work in the field of coaching and concluded that the Petitioner had not provided evidence demonstrating that he had made original contributions of major significance relevant to training or coaching rock climbers. He observed, for example, that the Petitioner did not establish that he had developed "original coaching techniques that had been widely adopted throughout the sport of rock climbing or significantly influenced rock climbing competitors and instructors."

On appeal, the Petitioner emphasizes that the newly submitted letter from [redacted] of NMIA demonstrates "his outstanding original contributions and continued engagement as an expert coach in the field of mountaineering and rock climbing." [redacted] indicates that the Petitioner has been "a key resource person" who helped design NMIA's courses in mountaineering, climbing, rock-climbing, mountain rescue and mountain navigation. He states that the Petitioner's "outstanding original contributions" in the area of coaching and training include: (1) design, development and implementation of NMIA's Basic and High Mountain Rescue Training Program; (2) design, development and installation of "the Night Rock Climbing"; (3) design, development and installation of 19 rock climbing venues and routes in Nepal; (4) design and development of the NMIA Instructors Selection process; and design and development of the rock-climbing course syllabus and course.

The Petitioner also submits supplemental evidence, primarily consisting of notices announcing NMIA's training courses in the above-referenced areas. However, the record does not contain further evidence of his participation in creating these courses and we note that the Petitioner did not previously claim eligibility under this criterion based on his development of training courses, techniques or materials on behalf of NMIA. The record does not support a determination that the Petitioner has developed original training techniques that have widely impacted or influenced his field.

Prior to submitting this new evidence on appeal, the Petitioner had consistently maintained that his major contribution to his field is "initiating the concept of Rock Climbing in Nepal." Specifically, he emphasized the importance of rock climbing as an essential skill for those participating in advanced mountaineering expeditions and stated that he "opened 19 rock climbing routes in Nepal where a climber [can] get trained before going to the mountain." The testimonial evidence in the record, as well as his awards and published materials about him, demonstrate that he received some recognition for undertaking the opening of these climbing routes in 2018 and 2019.

⁵ See USCIS Policy Memorandum PM 602-0005.1, *supra*, at 7 (providing an example that although funded and published work may be "original," this fact alone is not sufficient to establish that the work is of major significance).

For example, a letter from [redacted] of Iceland Trekking and Expedition Pvt. Ltd states that the Petitioner is “one of the initiator[s] to work in rock climbing sector of Nepal” and states that “the rock climbing spot initiated by him is now being used for training purposes like NMA [Nepal Mountaineering Association], and [NMIA].” [redacted] states that the Petitioner “initiated a Rock Climbing in Nepal which is an essential component for a mountaineering professional before going to climb high mountains.” He explains that “[t]raining on rock climbing not only helps climbers to clim[b] the mountain successfully, but also helps for the rescue of the climbers in case they are in troubles during expedition or trekking.” [redacted] and [redacted] [redacted] states that the Petitioner has made an “extraordinary contribution in the field of tourism in Nepal,” noting that “despite the huge scope of the tourism in Nepal, the area of rock climbing was not open professionally for sport or as a main profession of tourism.”

Although the letters praise the Petitioner for his efforts to expand the availability of rock-climbing courses in Nepal and explain the benefits of rock climbing training, they do not contain specific, detailed information explaining how his contributions have been both original and of major significance in the field. Letters that specifically articulate how a petitioner’s contributions are of major significance to the field and its impact on subsequent work add value.⁶ On the other hand, letters that lack specifics do not add value, and are not considered to be probative evidence that may form the basis for meeting this criterion.⁷

The Petitioner also submitted several newspaper articles that mention his role in the construction and enhancement of rock-climbing routes in [redacted] National Park. A September 2018 article from *Annapurna Post* titled [redacted] notes that [redacted] [redacted] noting that “[o]nly some routes built up by foreigners were used for climbing.” The article mentions that [redacted] routes for rock climbing were started for exploring and expansion in the investment of private sector” and mentions the Petitioner’s work [redacted]. Another 2018 article from *Annapurna Post*, titled [redacted] mentions that [redacted] [redacted]. [redacted] noting that “guides are united to make hub of rock climbing in each district so that it will contribute for the development of tourism sector.” The article mentions that, in Nepal, rock climbing is available in several locations (and not only the [redacted] National Park project in which the Petitioner was involved) and highlights that the “private sector has been assisting in developing, exploring and expanding rock climbing routes.”

The evidence indicates that the Petitioner has been a key figure among more widespread private sector efforts to expand the availability of rock climbing areas in Nepal’s tourism industry. While these efforts may be considered relatively novel in Nepal, it is unclear how the construction of rock climbing routes by traditional means is “original” or how the Petitioner’s work has already influenced or impacted the field in a way that is of major significance. Further, while the Petitioner has received recognition for his recent development and enhancement of rock-climbing routes in [redacted] National Park, the record lacks support for claims that he was the sole initiator or originator of rock-climbing in Nepal.

⁶ See USCIS Policy Memorandum PM 602-0005.1, *supra*, at 8-9.
⁷ *Id.* at 9.

For the reasons discussed above, considered both individually and collectively, the Petitioner has not shown that he has made original contributions of major significance in the field.

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding that it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward the top. USCIS has long held that even athletes performing at the major league level do not automatically meet the “extraordinary ability” standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm’r 1994). Here, the Petitioner has not shown that the significance of his work is indicative of the required sustained national or international acclaim or that it is consistent with a “career of acclaimed work in the field” as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated his eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.