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**U.S. Citizenship
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FILE: [REDACTED] Office: CALIFORNIA SERVICE CENTER Date: DEC 16 2005
WAC-03-015-52037

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a dry cleaning and laundry services company. It seeks to employ the beneficiary permanently in the United States as a dry cleaning supervisor. As required by statute, a Form ETA 750, Application for Alien Employment Certification approved by the Department of Labor, accompanied the petition. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

The regulation at 8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by [Citizenship and Immigration Services (CIS)].

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the petition's priority date, which is the date the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). The priority date in the instant petition is March 27, 2001. The proffered wage as stated on the Form ETA 750 is \$931.76 per week, which amounts to \$48,451.52 annually. On the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary did not claim to have worked for the petitioner.

The I-140 petition was submitted on October 21, 2002. On the petition, the petitioner claimed to have been established on July 30, 1997, to currently have nine employees, to have a gross annual income of \$713,229.00, and to have a net annual income of \$20,617.00. With the petition, the petitioner submitted supporting evidence.

In a request for evidence (RFE) dated March 5, 2003, the director requested additional evidence relevant to the beneficiary's experience and additional evidence relevant the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the RFE, the petitioner submitted additional evidence. The petitioner's submissions in response to the RFE were received by the director on May 27, 2003.

In a second RFE, dated February 4, 2004, the director again requested additional evidence relevant to the beneficiary's experience and additional evidence relevant to the petitioner's continuing ability to pay the proffered wage beginning on the priority date.

In response to the second RFE, the petitioner submitted additional evidence, which was received by the director on April 13, 2004.

In a notice of intent to deny (ITD) dated May 7, 2004 the director stated that CIS intended to deny the petition. The director afforded the petitioner thirty days to submit additional information, evidence or arguments to support the petition.

In response to the ITD, the petitioner submitted additional evidence. The petitioner's submissions in response to the ITD were received by the director on June 3, 2004.

In a decision dated July 22, 2004, the director determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence, and denied the petition.

On appeal, counsel submits a brief and no additional evidence. Counsel states on appeal that the evidence establishes the petitioner's ability to pay the proffered wage during the relevant period, under several alternative methods of financial analysis.

Since no additional evidence is submitted on appeal, the AAO will evaluate the decision of the director based on the evidence submitted prior to the director's decision.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 750 labor certification application establishes a priority date for any immigrant petition later based on the ETA 750, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977). *See also* 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, CIS requires the petitioner to demonstrate financial resources sufficient to pay the first year of the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage, CIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered prima facie proof of the petitioner's ability to pay the proffered wage. In the instant case, on the Form ETA 750B, signed by the beneficiary on March 21, 2001, the beneficiary did not claim to have worked for the petitioner. However the record contains other evidence indicating that the beneficiary began working for the petitioner in 1997.

In the second RFE, the director had requested evidence to explain an inconsistency in evidence previously submitted concerning whether the beneficiary had worked for the petitioner. The beneficiary's file at that time included an undated Form G-325A of the beneficiary which had been submitted in support of the

beneficiary's Form I-485 Application to Register Permanent Residence of Adjust Status. The Form I-485 was filed on December 5, 2002, while the I-140 petition was still pending. On the Form G-325A the beneficiary states that he has been employed by the petitioner from 1997 through the present. That information is inconsistent with the beneficiary's statement on the Form ETA 750B that he has been unemployed from 1997 to the present.

In the second RFE, the director stated the following:

If the petitioner employs the beneficiary, submit the following objective evidence to corroborate wages paid.

IRS Computer Records: the petitioner is requested to Submit original computer printouts from the Internal Revenue Service (IRS), date stamped by the IRS, or IRS certified copies of the beneficiary's Form W-2 from the year 1997 through present.

(RFE, February 4, 2004, at 2).

In response to the second RFE the petitioner submitted an amended Form ETA 750B signed by the beneficiary on March 23, 2004 in which the beneficiary claimed to have worked for the petitioner beginning in September of 1997 and continuing through the date of the amended Form ETA 750B. The petitioner also submitted a letter dated March 23, 2004 from the beneficiary, on the letterhead of counsel, in which the beneficiary states that the original ETA 750B had contained a typing error and that the beneficiary's employment with the petitioner had for that reason been omitted from the original Form ETA 750B. In his letter, the beneficiary also states that he does not have a good social security number, but that he has filed income tax returns with the Internal Revenue Service utilizing a taxpayer identification number.

The record contains copies of Form W-2 Wage and Tax Statements of the beneficiary, which were submitted in response to the second RFE. The beneficiary's Form W-2's show compensation received from the petitioner, as shown in the table below.

Year	Beneficiary's actual compensation	Proffered wage	Wage increase needed to pay the proffered wage.
1997	\$7,145.00	not applicable	not applicable
1998	\$16,080.00	not applicable	not applicable
1999	\$16,750.00	not applicable	not applicable
2000	\$25,920.00	not applicable	not applicable
2001	\$30,420.00	\$48,452.52	\$18,031.52
2002	\$30,420.00	\$48,452.52	\$18,031.52
2003	\$30,420.00	\$48,452.52	\$18,031.52

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition. Moreover, the evidence in the record contains inconsistencies which raise doubts about the information on the beneficiary's Form W-2's.

The record contains IRS computer generated transcripts of the Form 1040A federal income tax returns of the beneficiary and his wife for 2000, 2001 and 2002. The beneficiary's social security number on those records

is a number ending in the three digits "436." That number is apparently the taxpayer identification number assigned to the beneficiary by the IRS, as described in the beneficiary's letter dated March 23, 2004.

The social security number for the beneficiary appearing on the beneficiary's Form W-2's is a number ending in the three digits [REDACTED]. The IRS tax transcripts indicate that at least as of the year 2000 the beneficiary had a taxpayer identification number. However, the record contains no explanation of why the petitioner continued to use the beneficiary's allegedly false social security number on the beneficiary's Form W-2's, even after a taxpayer identification number had been given to the beneficiary by the IRS.

The Board of Immigration Appeals, in *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988), has stated, "It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice." The record contains no explanation for the inconsistencies in the evidence noted above.

The beneficiary's Forms W-2 for 2001, 2002 and 2003 each show compensation in the identical amount of \$30,420.00. The deductions in each of the various categories shown on the W-2's are also identical in each of those years, except that the amount of Medicare tax withheld is stated to be \$441.16 in 2001, but is stated to be \$441.22 in 2002 and in 2003. In the years from 1997 through 2000 the beneficiary's Form W-2's show increases in compensation each year and the amounts withheld in the various categories accordingly differ from year to year. From 2001 through 2003 the beneficiary's Form W-2's show no further increases in compensation. Those years are the years at issue in the instant petition. The pattern of the beneficiary's compensation and withholding deductions is therefore different on the Form W-2's for the years before the priority date than on the Form W-2's for the year of the priority date and thereafter.

As noted above, in the second RFE the director specifically requested documentation certified by the IRS to corroborate the amount of wages paid to the beneficiary during the years at issue. The petitioner failed to submit evidence in the form requested. The record contains IRS tax transcripts of the Form 1040A individual federal income tax returns of the beneficiary and his wife, but those transcripts do not show the source or sources of any compensation received by the beneficiary or his wife. The record also contains IRS tax transcripts of the Form 1120 tax returns of the petitioner. But those transcripts do not show the amounts of compensation paid to any individual employees of the petitioner.

The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Although specifically requested by the director, the petitioner declined to provide documentation certified by the IRS which corroborates the amount of wages paid to the beneficiary during the years at issue. The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. See 8 C.F.R. § 103.2(b)(14).

For the foregoing reasons, the Form W-2 Wage and Tax Statements of the beneficiary for the years 2001, 2002 and 2003 cannot be considered as reliable evidence to establish the amount of any compensation paid by the petitioner to the beneficiary during those years.

As another means of determining the petitioner's ability to pay the proffered wage, CIS will next examine the petitioner's net income figure as reflected on the petitioner's federal income tax return for a given year, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v.*

Feldman, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd.*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc.*, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *See Elatos Restaurant Corp.*, 632 F. Supp. at 1054.

The evidence indicates that the petitioner is a corporation. The record contains copies of the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 2001, 2002 and 2003. The record before the director closed on June 3, 2004 with the receipt by the director of the petitioner's submissions in response to the ITD. As of that date the petitioner's federal tax return for 2003 was the most recent return available.

For a corporation, CIS considers net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions, of the Form 1120 U.S. Corporation Income Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
2001	\$20,617.00	\$48,451.52*	-\$27,834.52
2002	\$31,301.00	\$48,451.52*	-\$17,150.52
2003	\$23,791.00	\$48,451.52*	-\$24,660.52

* The full proffered wage, since the beneficiary's Form W-2's for those years are not considered to be reliable evidence of any compensation paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

As an alternative means of determining the petitioner's ability to pay the proffered wages, CIS may review the petitioner's net current assets. Net current assets are a corporate taxpayer's current assets less its current liabilities. Current assets include cash on hand, inventories, and receivables expected to be converted to cash within one year. A corporation's current assets are shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. If a corporation's net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets. The net current assets are expected to be converted to cash as the proffered wage becomes due. Thus, the difference between current assets and current liabilities is the net current assets figure, which if greater than the proffered wage, evidences the petitioner's ability to pay.

Calculations based on the Schedule L's attached to the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets		Wage increase needed to pay the proffered wage
	Beginning of year	End of year	
2001	-\$25,356.00	\$14,294.00	\$48,451.52*
2002	\$14,294.00	-\$27,778.00	\$48,451.52*
2003	-\$70,053.00**	-\$87,519.00	\$48,451.52*

* The full proffered wage, since the beneficiary's Form W-2's for those years are not considered to be reliable evidence of any compensation paid to the beneficiary in those years.

** The figure for net current assets for the beginning of 2003 differs from the figure for net current assets for the end of 2002. On the petitioner's Schedule L for 2003 the figure for the beginning of the year on line 17 for liabilities for mortgages, notes and bonds payable in less than one year differs from the corresponding figure on line 17 for the end of the year on the petitioner's Schedule L for 2002.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in any of the years at issue in the instant petition.

The record also contains copies of unaudited financial statements. Unaudited financial statements are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and of its ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Counsel asserts that alternative methods of financial analysis have been considered acceptable by the CIS Vermont Service Center. Counsel cites the minutes of a teleconference held on November 16, 1994 and counsel summarizes alternative methods of financial analysis reportedly described in that conference by the director of the Vermont Service Center. Minutes of a teleconference are not binding authority on the AAO, and in any event, the AAO is not required to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 44 F. Supp.2d 800, 803 (E.D. La. 2000), *affid.*, 248 F.3rd 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

Counsel asserts that depreciation expenses should be added to the petitioner's net income in calculating the petitioner's ability to pay the proffered wage. Similarly, the record contains a letter dated May 25, 2004 from a certified public accountant in which the accountant states that the petitioner's expenses for amortization of goodwill and for depreciation should be considered as additions to the petitioner's net income. Because of grammatical errors, the accountant's letter is unclear concerning the year or years to which the accountant's calculations are supposed to pertain.

Nonetheless, while it is true that in any particular year a taxpayer's depreciation deductions may not reflect the taxpayer's actual cash operating expenses, depreciation deductions do reflect actual costs of operating a business, since depreciation is a measure of the decline in the value of a business asset over time. See Internal Revenue Service, *Instructions for Form 4562, Depreciation and Amortization (Including Information on Listed Property)* (2004), at 1-2, available at <http://www.irs.gov/pub/irs-pdf/i4562.pdf>.

Aside from depreciation deductions, some taxpayers may claim deductions on their tax returns for other non-cash items such as amortization of the cost of business start-up expenses, amortization of the cost of good will, and depletion of oil, gas and timber reserves. Such deductions raise similar issues to those discussed above concerning depreciation deductions. *See Id.*, at 2; *Instructions for Form 1120 and 1120A* (2004), at 14-15; *Business Expenses*, IRS Pub. 535 (2004), at 30-42, available at <http://www.irs.gov/pub/irs-pdf/p535.pdf>.

For the foregoing reasons, when a petitioner chooses to rely on its federal tax returns as evidence of its ability to pay the proffered wage, CIS considers all of the petitioner's claimed tax deductions when evaluating the petitioner's net income. *See Elatos Restaurant Corp.* 632 F. Supp. at 1054. If a petitioner does not wish to rely on its federal tax returns as evidence of its ability to pay the proffered wage, the petitioner is free to rely on one of the other alternative forms of required evidence as specified in the regulation at 8 C.F.R. § 204.5(g)(2), namely, annual reports or audited financial statements. Moreover, even in situations where a petitioner's net income and net current assets for a given year are insufficient to establish the petitioner's ability to pay the proffered wage, the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Counsel also asserts that the director erred in calculating the petitioner's net current assets for the years in question. Counsel cites a memorandum dated May 4, 2004 by William R. Yates, Associate Director of Operations, CIS, as authority for counsel's assertions on this point. However, that memorandum does not support counsel's position. Counsel states that the evidence shows the petitioner's net current assets to be \$494,284.00 in 2001, \$442,529.00 in 2002 and \$399,681.00 in 2003. However the figures cited by counsel are in fact those for the petitioner's total assets at the end of each of those years. Counsel's figures fail to distinguish between current assets and other assets. Moreover, counsel's figures omit any consideration of liabilities of any sort.

Notwithstanding counsel's assertions, CIS considers only current assets and current liabilities when evaluating a petitioner's ability to pay the proffered wage. Current assets represent items which can be expected to be converted into cash within a short period of time, and current liabilities are items which can be expected to require payments of cash by the petitioner within a short period of time. *See Interoffice Memo.* from William R. Yates, Associate Director of Operations, CIS, to Service Center Directors and other CIS officials, *Determination of Ability to Pay under 8 CFR 204.5(g)(2)*, at 2, (May 4, 2004).

Counsel also cites several decisions of the AAO as authority for alternative methods of financial analysis which could be used in the instant petition. Counsel does not provide citations to any official publication of those cases. While 8 C.F.R. § 103.3(c) provides that precedent decisions of CIS are binding on all its employees in the administration of the Act, unpublished decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

Moreover, counsel fails to suggest how the reasoning in any of the cases cited by counsel might apply to the facts of the instant case. Counsel cites a unpublished decision of the AAO issued on January 31, 2003 as holding that CIS may consider a petitioner's net income as shown on its tax returns but that CIS must also consider the normal accounting practices of the petitioner if the ability to pay the proffered wage is not reflected in its tax returns. Counsel's assertions on that point add nothing of substance to the requirements of the regulation at 8 C.F.R. § 204.5(g)(2), which require evidence in one of three alternative forms, namely copies of annual reports, federal tax returns, or audited financial statements. In the instant case, the petitioner has submitted copies of its federal tax returns, but has not submitted copies of either annual reports or copies of audited financial statements. Therefore the record lacks a basis for any finding that the petitioner's normal accounting practices differ from those used on its tax returns.

Counsel cites a decision of the AAO allowing consideration of compensation paid to the sole shareholder of a medical corporation as additional evidence of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner's tax returns show compensation of officers in the amounts of \$35,000.00 in 2001, \$28,000.00 in 2002 and \$64,000.00 in 2003. The returns indicate that those amounts were paid to the two persons who each own 50% of the shares of the petitioner. However, no showing has been made that the petitioner's owners would be willing and able to forego the compensation they have received from the petitioner. Therefore the record lacks a sufficient basis for considering compensation paid to the petitioner's officers as additional income which is available to pay the proffered wage.

Counsel cites an AAO decision issued on August 4, 1992 as holding that CIS should give credit to the petitioner for compensation actually paid to the beneficiary when evaluating the petitioner's ability to pay the proffered wage. Such a holding would in fact reflect CIS policy. Nonetheless, in the instant case, the Forms W-2 of the beneficiary are not considered to be reliable evidence of the amounts of compensation paid to the beneficiary during the years 2001, 2002 and 2003, for the reasons discussed above. Furthermore, in his brief counsel fails to address any of the reasons cited in the director's decision for finding the beneficiary's Forms W-2 for those years not to be reliable evidence. Without a credible explanation supported by competent objective evidence that the amounts on the W-2's represent payments from the petitioner to the beneficiary, the AAO cannot consider any of the W-2's as evidence of compensation.

Counsel also cites the decision of the Board of Alien Labor Certification Appeals in *Matter of Ranchito Coletero*, 2002-INA-105 (BALCA January 8, 2004) (*en banc*) as holding that the employer's assets should be considered in determining whether the employer has the ability to pay the proffered wage. The facts of that case are not directly analogous to the instant case, since the employer in that case was a sole proprietorship, whereas the petitioner in the instant case is a corporation. But in any event, the relevant assets of the petitioner have been fully considered above, based on an analysis of the petitioner's net current assets for each of the years at issue in the instant petition.

For the foregoing reasons, the assertions of counsel in his brief fail to provide additional support to help establish the petitioner's ability to pay the proffered wage.

In his decision, the director correctly stated the petitioner's net income in 2001 and 2002 and correctly calculated the petitioner's year-end net current assets for each of those years. The director did not explicitly discuss the figures in the petitioner's tax return for 2003, even though a copy of that return was submitted for the record prior to the director's decision. The director found that the information on the petitioner's tax returns failed to establish the petitioner's ability to pay the proffered wage during the relevant period.

The director also considered the inconsistencies in the evidence concerning the beneficiary's employment with the petitioner and the failure of the petitioner to submit documentation certified by the IRS to corroborate the amount of any compensation paid by the petitioner to the beneficiary. The director correctly determined that the Forms W-2 of the beneficiary for the years 2001, 2002 and 2003 could not be considered to be reliable evidence of the amount of any compensation paid to the beneficiary during those years. The decision of the director to deny the petition was correct.

For the reasons discussed above, the assertions of counsel on appeal fail to overcome the decision of the director.

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The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.