U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

[redacted]

FILE: [redacted] Office: CALIFORNIA SERVICE CENTER Date: AUG 11 2006

WAC-04-114-50324

IN RE: Petitioner: [redacted]
Beneficiary

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:

[redacted]

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, Chief
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 residential care for the elderly. It seeks to employ the beneficiary permanently in the United States as a cook. 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 the petitioner had not established that the beneficiary possessed the requisite experience, and denied the petition accordingly.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into this decision. Further elaboration of the procedural history will be made only as necessary.

As set forth in the director's December 8, 2004 denial, two issues exist in this case. The first issue is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The second issue is whether or not the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

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. Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who hold baccalaureate degrees and who are members of the professions.

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 January 12, 1998. The proffered wage as stated on the Form ETA 750 is $11.55 per hour, which amounts to $24,024.00 annually.

A labor certification is an integral part of this petition, but the issuance of a Form ETA 750 does not mandate the approval of the relating petition. To be eligible for approval, a beneficiary must also have all the education, training, and experience specified on the labor certification as of the petition's priority date. 8 C.F.R. § 103.2(b)(1), (12). *See Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977); *Matter of Katigbak*, 14 I. & N. Dec. 45, 49 (Reg. Comm. 1971).

The regulation at 8 C.F.R. § 204.5(g)(1) states in pertinent part:

> Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received. If such evidence is unavailable, other documentation relating to the alien's experience or training will be considered.

The AAO takes a *de novo* look at issues raised in the denial of this petition. *See Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a de novo basis). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal[1]. Relevant evidence submitted on appeal includes the beneficiary's declaration dated February 3, 2005, copies of the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Returns for 2002 and 2003, a copy of a portfolio management account for the petitioner's sole shareholder, and a letter regarding the beneficiary's past employment experience dated February 1, 2005. Other relevant evidence in the record includes copies of the beneficiary's Form W-2 Wage and Tax Statements for 1998, 1999, 2001, 2002, and 2003, a letter regarding the beneficiary's past employment experience dated October 7, 1997, a notice from the Internal Revenue Service (IRS) dated March 10, 2003, and the petitioner's Form 1120 U.S. Corporation Income Tax Returns for 1998, 1999, and 2000. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage or the beneficiary's past experience.

Counsel states on appeal that the director erred in his conclusion and interpretation of evidence in the record, the director erred in not adhering to guidelines and/or precedent decisions, and the director erred in not allowing the petitioner to clarify any questions or doubts. Counsel also states that CIS should consider the pro-rated proffered wage for 1998, taxable income before deducting net operating loss, depreciation, the totality of the circumstances, wages paid to others, the beneficiary's declaration, and financial assets of the petitioner's sole shareholder in determining the petitioner's ability to pay the proffered wage. Furthermore, counsel states that no inconsistency exists between the letter regarding the beneficiary's past employment experience dated October 7, 1997 and the Form ETA 750.

The first issue in this case is whether or not the petitioner has the ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence.

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.

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

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 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 Sonegawa*, 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 December 26, 1997, the beneficiary did not claim to have worked for the petitioner. However, the record does contain copies of the beneficiary's Form W-2 Wage and Tax Statements. The beneficiary's Form W-2's for 1998, 1999, 2001, 2002, and 2003 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
1998	$13,335.00	$24,024.00	$10,689.00
1999	$11,325.00	$24,024.00	$12,699.00
2000	No Information	$24,024.00	$24,024.00
2001	$13,300.00	$24,024.00	$10,724.00
2002	$18,370.00	$24,024.00	$5,654.00
2003	$22,265.00	$24,024.00	$1,759.00

The above information is insufficient to establish the petitioner's ability to pay the proffered wage from 1998 to 2003.

Counsel states on appeal that "[the beneficiary] states she was paid an estimated $21,000.00 in wages from [the petitioner] in 2000." The beneficiary's declaration dated February 3, 2005 states that "[i]n the year 2000, I earned taxable wages from my employment with [the petitioner], estimated $21,000.00." Evidence that CIS will look at in determining whether the petitioner paid the beneficiary includes Form W-2's, Form 1099's, or other evidence of compensation from the petitioner. A declaration by the beneficiary in 2005 regarding an estimated amount she was paid in wages in 2000 is not persuasive evidence. In addition, the beneficiary's declaration, without supporting documentary evidence showing that she was in fact paid in 2000, is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Moreover, even if CIS does consider the beneficiary's declaration as persuasive evidence, a combination of $21,000.00 with a negative net income in 2000 or with $0.00 net current assets in 2000 is less than the proffered wage.

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.

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 1998, 1999, and 2000, and copies of the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Returns for 2002 and 2003. The record also contains a notice from the IRS dated March 10, 2003 stating that the petitioner's taxable income in 2001 is $13,105.00. The record before the director closed on March 10, 2004 with the receipt by the director of the petitioner's submission of the I-140 petition and supporting evidence. As of that date the petitioner's federal tax return for 2003 was not yet due. Therefore, the petitioner's tax return for 2002 is the most recent return available. On appeal, counsel submits the petitioner's Form 1120-A U.S. Corporation Short-Form Income Tax Return for 2003 along with other evidence, and the AAO will take the petitioner's 2003 tax return into consideration.

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, or the equivalent figure on line 24 of the Form 1120-A U.S. Corporation Short Form Tax Return. The petitioner's tax returns show the amounts for taxable income on line 28 or line 24 as shown in the table below.

Tax year	Net income	Wage increase needed to pay the proffered wage	Surplus or deficit
1998	$12,176.00	$10,689.00**	$1,487.00
1999	-$2,600.00	$12,699.00**	-$15,299.00
2000	-$638.00	$24,024.00*	-$24,662.00
2001	$13,105.00	$10,724.00**	$2,381.00
2002	$14,372.00	$5,654.00**	$8,718.00
2003	$13,473.00	$1,759.00**	$11,714.00

* The full proffered wage, since the record contains no persuasive evidence of any wage payments made by the petitioner to the beneficiary in 2000.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1999 and 2000.

As an alternative means of determining the petitioner's ability to pay the proffered wage, 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. On the Form 1120 U.S Corporation Income Tax Return, a corporation's current assets are

shown on Schedule L, lines 1 through 6. Its current liabilities are shown on lines 16 through 18. On the Form 1120-A U.S. Corporation Short-Form Income Tax Return, current assets are shown on Part III, lines 1 through 6, and current liabilities are shown on lines 13 and 14. 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 or Part III's of the petitioner's tax returns yield the amounts for net current assets as shown in the following table.

Tax year	Net Current Assets End of year	Wage increase needed to pay the proffered wage
1998	$0.00	$10,689.00**
1999	$0.00	$12,699.00**
2000	$0.00	$24,024.00*
2001	No Information[2]	$10,724.00**
2002	-$40,320.00	$5,654.00**
2003	-$60,681.00	$1,759.00**

* The full proffered wage, since the record contains no persuasive evidence of any wage payments made by the petitioner to the beneficiary in 2000.

** Crediting the petitioner with the compensation actually paid to the beneficiary in those years.

The above information is insufficient to establish the petitioner's ability to pay the proffered wage in 1999 and 2000.

Counsel states that "the proffered wage owed [to the beneficiary] must be pro-rated to reflect the fact that the labor certification was not filed until January 12, 1998."[3] CIS will not consider 12 months of income towards an ability to pay a lesser period of the proffered wage any more than we would consider 24 months of income towards paying the annual proffered wage. While CIS will prorate the proffered wage if the record contains evidence of net income or payment of the beneficiary's wages specifically covering the portion of the year that occurred after the priority date (and only that period), such as monthly income statements or pay stubs, the petitioner has not submitted such evidence. Regardless, a combination of the wages paid to the beneficiary in 1998 and the petitioner's net income in 1998 is sufficient to meet the full proffered wage.

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[2] The notice from IRS dated March 10, 2003 does not list the petitioner's current assets and current liabilities for 2001.

[3] Counsel states that the beneficiary's "daily gross wage is $92.40 per day, $92.40 multiplied by eleven (11) days in 1998 equals $1,016.40 in wages that must be subtracted from the proffered wage of $24,024.00." This calculation is incorrect because the annual proffered wage is calculated based on the assumption that the beneficiary works 40 hours per week. Nothing in the record contradicts this assumption. Counsel's calculation is based on the assumption that the beneficiary works 8 hours per day for every day of the week, and according to his calculation, the beneficiary works 88 hours in one week and four days.

Counsel states that "[t]he [d]irector erred in his interpretation of the . . . tax return[s] by [considering] taxable income after deducting . . . net operating loss." As stated above, CIS does consider net income to be the figure shown on line 28, taxable income before net operating loss deduction and special deductions.

Counsel also states that "because depreciation is not a capital outlay, but rather an allowance under tax law for loss in property or equipment value, depreciation should be added back to the taxable income (before net operating loss)." 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 court in *Chi-Feng Chang* further noted:

> Plaintiffs also contend the depreciation amounts on the 1985 and 1986 returns are non-cash deductions. Plaintiffs thus request that the court *sua sponte* add back to net cash the depreciation expense charged for the year. Plaintiffs cite no legal authority for this proposition. This argument has likewise been presented before and rejected. *See Elatos*, 632 F. Supp. at 1054. [CIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiff's argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) 719 F. Supp. at 537.

Counsel likewise states that for 1999, the totality of the circumstances should be considered, "especially when [the petitioner] has been in existence since July 1986 and that in 1999, the tax return reflects [the petitioner] paid $75,043.00 in salaries and wages." The totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967). *Matter of Sonegawa,* 12 I&N Dec. 612 (BIA 1967), relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere.

No unusual circumstances have been shown to exist in this case to parallel those in *Sonegawa*, nor has it been established that 1999 and 2000 were uncharacteristically unprofitable years for the petitioner. The fact that the petitioner has been in existence for 10 years is not in and of itself a unique factor that warrants a favorable exercise of discretion by the AAO. The fact that the petitioner paid $75,043.00 in salaries and wages in 1999 to its employees is likewise not a unique factor.

Additionally, salaries and wages paid to other employees are irrelevant to the issue at hand because they do not show whether or not the petitioner has additional funds to pay the beneficiary the proffered wage. In the case where the petitioner has established that the beneficiary will be replacing another worker performing the duties of the proffered position, the wages already paid to that employee may be shown to be available to

prove the ability to pay the proffered wage to the beneficiary at the priority date of the petition and continuing to the present. This does not appear to be the case here because the record does not name these workers, state their wages, verify their full-time employment, or provide evidence that the petitioner has replaced or will replace them with the beneficiary. There is likewise no evidence that the position of these workers involves the same duties as those set forth in the Form ETA 750.

Moreover, counsel states that "the financial asset[s] of [the petitioner's] owner/sole shareholder should be considered, just as if [the petitioner] was operated as a sole proprietorship, [and] to ignore [the sole shareholder's] personal assets would be to elevate form over substance and ignore the totality of the circumstances." Counsel specifically points to the certificate of deposit and investment account reflected in the sole shareholder's portfolio management account. CIS may not "pierce the corporate veil" and look to the assets of the corporation's owner to satisfy the corporation's ability to pay the proffered wage. It is an elementary rule that a corporation is a separate and distinct legal entity from its owners and shareholders. *See Matter of M*, 8 I&N Dec. 24 (BIA 1958), *Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm. 1980), and *Matter of Tessel*, 17 I&N Dec. 631 (Act. Assoc. Comm. 1980). Consequently, assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage.

Furthermore, counsel's assertion that the petitioner is essentially a sole proprietorship is without merit. The petitioner is structured as a corporation, thereby making it a separate and distinct legal entity from its sole shareholder and exempting its sole shareholder from the legal obligation to pay the beneficiary's proffered wage. Having done so, the petitioner cannot materially alter its classification as a corporation in order to make the sole shareholder's personal assets available. A petitioner may not make material changes in an effort to make a deficient petition conform to CIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988).

After a review of the evidence in the record, it is concluded that the petitioner has not established its ability to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence. The decision of the director to deny the petition was correct, based on the evidence in the record before the director.

For the reasons discussed above, the assertions of counsel on appeal and the evidence submitted on appeal fail to overcome the decision of the director regarding the petitioner's ability to pay the proffered wage.

The second issue in this case is whether or not the petitioner has established that the beneficiary met the petitioner's qualifications for the position as stated in the Form ETA 750 as of the petition's priority date.

The AAO will first evaluate the decision of the director, based on the evidence submitted prior to the director's decision. The evidence submitted for the first time on appeal will then be considered.

The Form ETA 750 states that two years of experience is required for the proffered position, and according to the Form ETA 750B, the beneficiary was employed by St. John Rattan & Wicker Core as a cook from January 1984 to January 1988. The record contains a letter regarding the beneficiary's past employment experience dated October 7, 1997. According to the letter, the beneficiary was employed by S[redacted] "from January 15, 1984 to January 31, 1988 as Chief Cook" and as "the Personnel Manager." The director found this evidence to be insufficient, inconsistent, and deficient. He determined that the letter is inconsistent with the duties described on the Form ETA 750 and it casts doubt on the actual duties and percentage of time between the beneficiary's work as a chief cook and a personnel manager and other duties not related to being a chief cook. He

also determined that the petitioner failed to submit evidence showing two years of experience as required on the Form ETA 750.

On appeal, counsel submits another letter regarding the beneficiary's past employment experience dated February 2, 2005. The letter indicates the amount of time the beneficiary worked as a chief cook and as a personnel manager, and the majority of the beneficiary's time during her employment with St. [redacted] is spent as a chief cook. The letter also indicates the duties performed by the beneficiary. Counsel states on appeal that the original letter is not inconsistent with the Form ETA 750 because "the fact that . . . [the beneficiary] was also a personnel manager does not negate [her] experience as a cook there," and the letter dated February 1, 2005 shows that the beneficiary "performed the bulk of her duties as a cook" and the duties listed "are wholly consistent with the duties [listed on the Form ETA 750]." The AAO finds that the beneficiary does possess the requisite experience based on documentary evidence in the record. Thus, the petitioner has overcome this portion of the director's decision.

Counsel asserts on the Form I290B Notice to Appeal that the director erred in his conclusion and interpretation of evidence in the record and the director erred in not adhering to guidelines and/or precedent decisions. These assertions have been addressed in the analysis of counsel's assertions and relevant evidence in the record, as shown above.

Counsel also states on the Form I290B Notice to Appeal that the director erred in now allowing the petitioner to clarify any questions or doubts. The regulation at 8 C.F.R. § 204.5(g)(2) states that the director may request additional evidence in appropriate cases. Hence, the director may, but is not required to, request additional evidence. In any event, the notice of appeal issued to the petitioner sufficiently overcomes any harm that resulted from the director not requesting additional evidence because the petitioner can file an appeal and submit additional evidence on appeal.

Despite the fact that the petitioner has shown that the beneficiary met the petitioner's qualifications for the position, it has failed to overcome the decision of the director regarding its ability to pay the proffered wage.

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.