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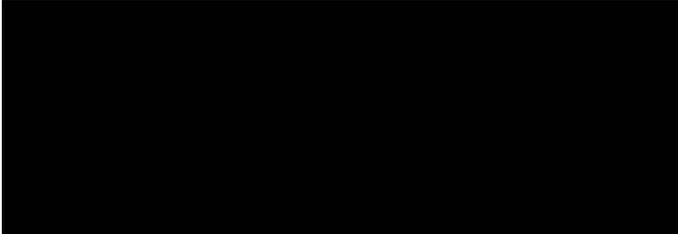
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U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

B6



FILE: [REDACTED]
EAC-06-072-51965

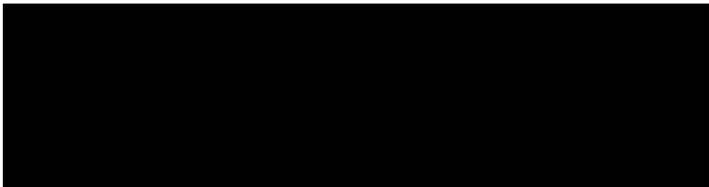
Office: VERMONT SERVICE CENTER

Date: **APR 13 2009**

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

PETITION: Immigrant 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)

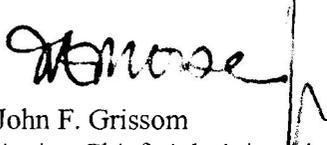
ON BEHALF OF PETITIONER:



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.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).


John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center,¹ and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a Chinese specialty cook (cook, specialty foreign food). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor (DOL). In his February 21, 2007 decision, the director determined that the record did not establish that the petitioner had the ability to pay the offered wage at the time of filing 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 the decision. Further elaboration of the procedural history will be made only as necessary.

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 nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

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 in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified

¹ The predecessor company in the trade name of Golden China Restaurant filed a Form I-140 Immigrant Petition for Alien Worker (EAC-02-242-52217) on the behalf of the same beneficiary based on the same certified labor certification with the Vermont Service Center on July 15, 2002. The petition was denied on August 6, 2003 due to abandonment. A subsequent motion to reopen was granted, however, the petition was denied because the petitioner failed to establish its ability to pay the proffered wage as of the date of filing and continuing to present. No further action was taken for the previous petition. The petitioner filed the instant petition as the successor-in-interest to the predecessor.

by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The record shows that DJC Corporation (FEIN: [REDACTED]) (DJC) filed a Form ETA 750 in its trade name of Golden China Restaurant on April 23, 2001 and the Form ETA 750 was certified on March 18, 2002 on behalf of the beneficiary. The proffered wage as stated on the Form ETA 750 is \$11.87 per hour (\$24,689.60 per year). The Form ETA 750 states that the position requires two years of experience in the job offered. On the Form ETA 750B signed by the beneficiary on March 30, 2001, the beneficiary claimed to have worked at Golden China Restaurant as a Chinese cook since July 2000. The instant I-140 petition on behalf of the beneficiary was submitted on January 5, 2006 by the instant petitioner, W & L International Corporation (FEIN: [REDACTED]) (W&L) as the successor-in-interest to DJC in the name of Golden China Restaurant. On the petition, the petitioner claimed to have been established in 1999, to have a gross annual income of \$203,389, to have a net annual loss of \$1,099, and to currently employ five workers.

The AAO maintains plenary power to review each appeal on a de novo basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also*, *Janka v. U.S. Dept. of Transp.*, NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's de novo authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.² On appeal counsel submits a brief. Other relevant evidence in the record includes an agreement for sale and purchase of Golden China Restaurant; W&L corporate and license documentation; W&L's corporate tax returns for 2004 and 2005; W&L's state unemployment reports for 2004 through 2006; DJC's corporate tax returns for 1999 through 2003; the beneficiary's W-2 forms, 1099 forms and some paychecks for 2003 through 2006; and the beneficiary's individual income tax returns for 2003 through 2005. The record does not contain any other evidence relevant to the petitioner's ability to pay the wage.

On appeal, counsel asserts that on March 15, 2004, the petitioner purchased Golden China Restaurant and became the successor-in-interest to DJC, and that the petitioner and DJC established the both companies' continuing ability to pay the proffered wage beginning on the priority date.

The successor-in-interest status requires documentary evidence that the successor-in-interest has assumed all of the rights, duties, and obligations of the predecessor company. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1986). The fact that the petitioner is doing business at the same location as the predecessor does not establish that the petitioner is a successor-in-interest. In *Matter of Dial Auto*, the Board of Immigration Appeals (BIA) instructed counsel to fully explain the manner by which the successor company took over the business of the predecessor

² 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).

and provide USCIS with a copy of the contract or agreement between the two entities to establish the assumption of all the rights, duties, and obligation from the predecessor company. *Matter of Dial Auto*, at 482. In the instant petition, the record contains a copy of an agreement of sale made on March 15, 2004 by which the petitioner purchased [REDACTED] located at [REDACTED] [REDACTED] from DJC on May 1, 2004. All of the rights, duties, and obligation necessary to replace the predecessor company as a petitioner in the instant matter were transferred to the petitioner. Accordingly, the petitioner is a successor-in-interest to DJC.

In addition, in order to maintain the original priority date, a successor-in-interest must demonstrate that the predecessor had the ability to pay the proffered wage. *Id.* In the instant case, the petitioner must establish that it has the ability to pay the proffered wage since May 1, 2004 to the present and that the predecessor, DJC, had the ability to pay the proffered wage from 2001, the year of the priority date, to April 2004 when the sale of business occurred. Therefore, the AAO will discuss whether or not the petitioner and the predecessor has established their ability to pay the proffered wage for the periods each of them is respectively responsible.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (USCIS) will first examine whether the petitioner or its predecessor employed and paid the beneficiary during that period. If the petitioner or the predecessor establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the beneficiary claimed to have worked for the petitioner since July 2000. Although counsel asserts that the beneficiary was paid \$18,000 per year in cash in 2000, 2001 and 2002, the record does not contain any documentary evidence for the beneficiary's compensation in 2000 through 2002. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). However, counsel submitted W-2 forms, 1099 forms or other documents showing the petitioner or the predecessor paid the beneficiary during the years 2003 through 2006. The documents in the record show that the beneficiary was paid \$18,000 (on W-2 and 1099 forms) in 2003 and \$6,000 (on W-2 form) in 2004 by the predecessor, and \$14,000 in 2004 and \$21,900 in 2005 (on W-2 forms) by the petitioner. The record also contains copies of paychecks showing the petitioner paid the beneficiary \$1,696 per month in 2006, however, there is no evidence that these paychecks were cashed since the petitioner only provided copies of the front sides of the paychecks. Therefore, the petitioner failed to establish that it or its predecessor paid the full proffered wage to the beneficiary in these relevant years. The petitioner is obligated to demonstrate that the predecessor could pay the full proffered wage of \$24,689.60 per year for 2001 and 2002, the difference of \$6,689.60 in 2003 between wages actually paid to the beneficiary and the proffered wage, and the petitioner could pay the full proffered wage for 2006 and the difference of \$4,689.60 in 2004, and \$2,789.60 in 2005 between wages actually paid to the beneficiary and the proffered wage with its net income or its net current assets.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, 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. Texas 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). Reliance on the petitioner's total income and wage expense is misplaced. Showing that the petitioner's total income exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, 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. Reliance on the petitioner's depreciation in determining its ability to pay the proffered wage is misplaced. The court in *K.C.P. Food Co., Inc. v. Sava* specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. 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. [USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support.

(Emphasis in original.) *Chi-Feng Chang* at 537.

The record contains copies of the petitioner's Form 1120, U.S. Corporation Income Tax Return, for 2004 and 2005, and the predecessor's Form 1120, U.S. Corporation Income Tax Return, for its fiscal years 1999 through 2003. According to the tax returns, the petitioner is structured as a C corporation and its fiscal year is based on a calendar year while the predecessor is structured as a C corporation but its fiscal year runs from June 1 to May 31. Since the priority date in this case is April 23, 2001, the predecessor's tax return for the fiscal year 1999 (covering June 1, 1999 to May 31, 2000) is not necessarily dispositive. The record before the director closed on October 25, 2006 with the receipt by the director of the petitioner's submissions in response to the director's second request for additional evidence (RFE). As of that date the petitioner's federal tax return for 2006 was not available yet. Therefore, the AAO will review and examine the predecessor's tax returns for 2000 through 2003

and the petitioner's tax returns for 2004 and 2005 in determining whether the petitioner established its continuing ability to pay the proffered wage from the year of the priority date to the present. These tax returns demonstrate the following financial information concerning the petitioner's ability to pay the proffered wage from the year of the priority date:

- In the fiscal year 2000 (6/1/00-5/31/01), DJC's Form 1120 stated a net income³ of \$5,557.
- In the fiscal year 2001 (6/1/01-5/31/02), DJC's Form 1120 stated a net income of \$10,320.
- In the fiscal year 2002 (6/1/02-5/31/03), DJC's Form 1120 stated a net income of \$25,350.
- In the fiscal year 2003 (6/1/03-5/31/04), DJC's Form 1120 stated a net income of (\$6,932). In 2004, the petitioner's Form 1120 stated a net income of (\$1,099).
- In 2005, the petitioner's Form 1120 stated a net income of \$1,409.

As previously noted, the predecessor's fiscal year runs from June 1 to May 31 of each year, and the beneficiary's IRS Form W-2 or Form 1099 cover the period from January 1 to December 31 of each year. Regardless of whether the predecessor was credited with paying the beneficiary's wages during the fiscal year or calendar year, the petitioner has not paid the beneficiary the full proffered wage during any relevant period. However, for this appeal, we will credit the predecessor with having paid the beneficiary the wages listed on her 2003 Form W-2 and Form 1099 in the predecessor's 2003 fiscal year, and the wages listed on her 2004 Form W-2 in the predecessor's 2004 fiscal year.

While the predecessor's net income in its fiscal year 2002 was sufficient to pay the full proffered wage of \$24,689.60 that year and thus established its ability to pay the proffered wage, the predecessor had insufficient net income to pay the full proffered wage in 2001 and the difference of \$6,689.60 between wages actually paid to the beneficiary and the proffered wage in 2003; and the petitioner had insufficient net income to pay the difference of \$4,689.60 in 2004 and \$2,789.60 in 2005. Therefore, the petitioner failed to establish its and its predecessor's continuing ability to pay the proffered wage from the priority date with their net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's assets. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, USCIS will consider net current assets as an alternative method of demonstrating the ability to pay the proffered wage.

³ Taxable income before net operating loss deduction and special deductions as reported on Line 28 of the Form 1120.

Net current assets are the difference between the petitioner's current assets and current liabilities.⁴ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

- The predecessor's net current assets during its fiscal year 2000 were \$3,230.
- The predecessor's net current assets during its fiscal year 2001 were \$19,106.
- The predecessor's net current assets during its fiscal year 2003 were \$0.⁵
- The petitioner's net current assets during 2004 were \$1,214.
- The petitioner's net current assets during 2005 were \$2,618.

Therefore, for the year 2001, the predecessor company did not have sufficient net current assets to pay the full proffered wage of \$24,689.60; for the year 2003, the predecessor did not have sufficient net current assets to pay the difference of \$6,689.60 between wages actually paid to the beneficiary and the proffered wage; and for the years 2004, the petitioner had insufficient net current assets to pay the difference of \$4,689.60 although its net current assets were almost sufficient to pay the difference between wages actually paid to the beneficiary and the proffered wage in 2005.

Therefore, from the date the Form ETA 750 was accepted for processing by DOL, the petitioner had not established that it or its predecessor had the continuing ability to pay the beneficiary the proffered wage for 2001, the year of the priority date, 2003, 2004 and 2005 through an examination of wages paid to the beneficiary, their net income or net current assets.

Counsel asserts on appeal that the director failed to consider the financial statements and bank statements submitted in the record in determining the petitioner's ability to pay the proffered wage. The record contains financial statements for the petitioner and the predecessor. However, as there is no accountant's report accompanying these statements, the AAO cannot conclude that they are audited statements. Counsel's reliance on unaudited financial records is misplaced. The regulation at 8 C.F.R. § 204.5(g)(2) makes clear that where a petitioner relies on financial statements to demonstrate its ability to pay the proffered wage, those financial statements must be audited. Unaudited financial statements are the representations of management. The unsupported representations of management are not reliable evidence and are insufficient to demonstrate the ability to pay the proffered wage.

⁴ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁵ The predecessor company left schedule L for its tax return for 2003 blank because it was not required to complete it as its gross receipts or total assets were under \$250,000 that tax year. The record does not contain any other type of evidence enumerated in 8 C.F.R. § 204.5(g)(2) to show the predecessor company's net current assets in 2003. Therefore, the AAO treats its net current assets as \$0.

Counsel also submitted bank statements for a checking account in the name of [REDACTED]. Counsel's reliance on the balances in the checking account is misplaced. First, bank statements indicate the checking account belongs to [REDACTED]. The AAO cannot determine that the checking account is the petitioner's business checking account. Second, even if this is the petitioner's business checking account, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Third, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Finally, no evidence was submitted to demonstrate that the funds reported on the bank statements somehow reflect additional available funds that were not reflected on its tax return that was considered in determining the petitioner's net current assets.

On appeal, counsel relies upon the Interoffice Memorandum from William R. Yates, USCIS Associate Director for Operation, on May 24, 2004 (Yates' May 24, 2004 memo) to support his assertions. The Yates' May 24, 2004 memo provides guidance to adjudicators to review a record of proceeding and make a positive determination of a petitioning entity's ability to pay if, in the context of the beneficiary's employment, "[t]he record contains credible verifiable evidence that the petitioner is not only is employing the beneficiary but also has paid or currently is paying the proffered wage." While the AAO consistently adjudicates appeals in accordance with the Yates' May 24, 2004 memo, counsel's interpretation of the language is overly broad and does not comport with the plain language of the regulation at 8 C.F.R. § 204.5(g)(2).

Counsel refers to decisions issued by the AAO concerning the ability to pay the proffered wage, but does not provide their published citations. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS 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).

Counsel also argues that totality of circumstances should be considered in determining the petitioner's ability to pay the proffered wage in this case. Although USCIS will not consider gross income without also considering the expenses that were incurred to generate that income, the overall magnitude of the entity's business activities should be considered when the entity's ability to pay is marginal or borderline. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

Matter of Sonogawa relates to petitions filed during uncharacteristically unprofitable or difficult years but only in a framework of profitable or successful years. The petitioning entity in *Sonogawa* 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 2001, 2003, 2004 and 2005 were uncharacteristically unprofitable years in a framework of profitable or successful years for the petitioner and the predecessor. Thus, assessing the totality of circumstances in this individual case, it is concluded that the petitioner has not proven its and the predecessor's financial strength and viability and has not established the ability to pay the proffered wage.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner and its predecessor could not pay the proffered wage from the day the Form ETA 750 was accepted for processing by DOL. The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.