

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

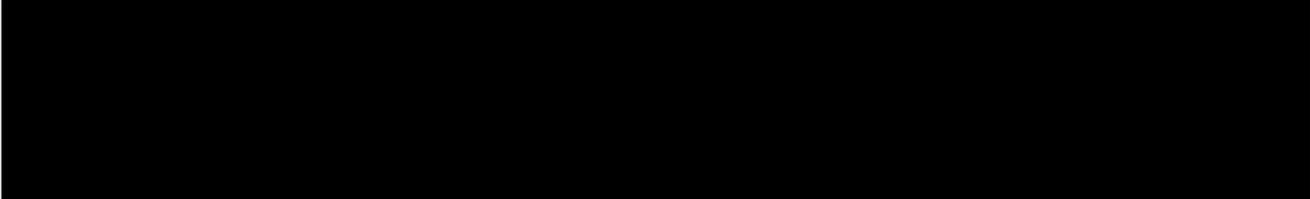
U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

PUBLIC COPY

B6



OCT 05 2010

FILE:



Office: VERMONT SERVICE CENTER

Date:

IN RE:

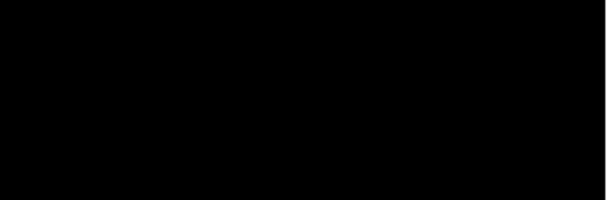
Petitioner:

Beneficiary:



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:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, revoked the approval of the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a private for-profit post-secondary school. On October 10, 2000, it filed a petition to permanently employ the beneficiary in the United States as a programmer analyst. The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A).¹

The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition is July 28, 2000, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

As set forth in the director's Notice of Revocation (NOR), the primary issue in this case is whether there exists a *bona fide* job opportunity for the position of programmer analyst. The AAO will also consider whether the beneficiary meets the minimum requirements of the offered position as set forth in the labor certification.²

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.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.³

¹ Section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), grants preference classification to qualified immigrants who are capable 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. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), also grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

² An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

³ The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 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).

On May 30, 2001, U.S. Citizenship and Immigration Services (USCIS) approved the petition. On January 9, 2006, the Director, Vermont Service Center (director) issued a Notice of Intent to Revoke (NOIR) the approval of the petition. The NOIR states that USCIS learned that the beneficiary "has not been working as a programmer analyst, as is indicated on the petition, but rather has been working to assist F-1 students." The NOIR contains a redacted copy of an investigative report which was prepared pursuant to a referral from the USCIS office processing the beneficiary's Form I-485, Application for Adjustment of Status. The report states the following:

- On September 16, 1998, the beneficiary was admitted into the United States in B-2 visitor status for six months.
- On February 8, 1999, the beneficiary applied to change her status from B-2 to F-1 student to attend the petitioner's school. The application was approved on July 1, 1999.
- On August 26, 1999, the beneficiary applied for asylum. After her asylum interview, the beneficiary claimed she was harassed and intimidated by the interviewer. Due to this allegation, a second official re-interviewed the beneficiary. The second interview failed to resolve the issues that were raised in the first interview, and the beneficiary's asylum application was denied on February 1, 2000.
- In her asylum application, the beneficiary claimed to have started working for [REDACTED] as a journalist following her graduation from university in 1996. However, she was unable to corroborate this employment.
- The record of proceeding for the instant petition contains an employment experience verification letter stating that the beneficiary was a part-time computer programmer for [REDACTED] from 1993 to 1998. However, the beneficiary did not mention this employment in her asylum application.
- An immigration officer called the petitioner's administrative offices to confirm the nature of the beneficiary's employment with the petitioner. The caller was routed to the beneficiary. During the call, the beneficiary initially claimed that she "deals with F-1 students." However, when the beneficiary realized that the officer was calling about her employment with the petitioner and not about a different employee of the petitioner, the beneficiary claimed to be a programmer analyst who maintained databases.
- During the beneficiary's adjustment interview, the interviewing officer asked the beneficiary for a person to call at the petitioner to confirm her position. The beneficiary instructed the officer to call the Human Resource Manager. The officer called the Human Resource Manager on June 18, 2003, and she told the officer that the beneficiary was employed with the petitioner as an administrative assistant.

The report states that the beneficiary's representations during the asylum proceedings, the results of the two calls to the petitioner, and other issues related to the petitioner's conduct in other immigration matters leads to the conclusion that a full fraud investigation should be conducted. The director issued the NOIR based on the results of this investigative report.

In response to the NOIR, the petitioner submitted the following evidence:

- Affidavit of [REDACTED] President of the petitioner. The affidavit states that the beneficiary was employed by the petitioner in 2000 as a part-time assistant in the Admissions Department while she was a student. The affidavit states that the beneficiary demonstrated "expertise in programming and working with relational databases" from her bachelor's and master's degrees in engineering and "previous computer programming experience." The affidavit states that the petitioner hired the beneficiary on a full time basis on March 15, 2001. Upon the approval of the instant petition, the petitioner "transferred [the beneficiary] to the position of Programmer Analyst" in July 2001. The affidavit further states that when the petitioner's Designated School Official (DSO) passed away in May 2002, the new DSO, [REDACTED], required a temporary administrative assistant for a "few months" until he could find a permanent candidate. The affidavit states that this assistance was provided by "a number of qualified and knowledgeable employees on a temporary basis," that the beneficiary provided "some support" to the new DSO during this period related to student enrollment verification and that these duties "did not take much time, and therefore did not affect her primary duties as a programmer analyst."
- Affidavit of [REDACTED] for the petitioner. The affidavit states that [REDACTED] joined the petitioner in June 2002 and one of his responsibilities is to serve as the school's DSO. The affidavit states that the beneficiary provided [REDACTED] with "detailed training [on the school's computer system] and invaluable help with tracking student records and creating customized reports." The affidavit states that the beneficiary's "assistance was extremely helpful to me during my first few months of employment." The affidavit also states that the beneficiary did not assist F-1 students, "but have been solely programming, analysis and maintenance of various systems and databases."
- Affidavit of [REDACTED], Director of the petitioner's IT Department. The affidavit states that, when [REDACTED] joined the petitioner in November 2002, the beneficiary was already working for the petitioner as a full-time programmer analyst.
- Affidavit of [REDACTED] of the petitioner. The affidavit states that Ms. Schaffer has been employed with the petitioner since June 9, 2003. The affidavit states that, on June 18, 2003, just over a week after she started the position, she received a call from an immigration officer in connection with the beneficiary's employment. The affidavit states that the immigration officer stated he was conducting an interview with the beneficiary and asked [REDACTED] to confirm the beneficiary's title with the petitioner. The affidavit states that [REDACTED] did not have the beneficiary's employment file in her office, so she put the officer on hold and asked a member of the Business Office staff for assistance with obtaining information pertaining to the beneficiary's position with the school. The affidavit claims that a member of the Business Office staff incorrectly told her that the beneficiary was employed as an administrative assistant, and that this title actually related to the beneficiary's part-time employment as a student prior to March 2001, and not her current full-time employment as a programmer analyst.

- Affidavit of the beneficiary. The affidavit states that the beneficiary initiated employment with the petitioner pursuant to F-1 Optional Practical Training on March 2000 as a part-time assistant to the Admission Department. The affidavit states that the beneficiary was offered a full-time programmer analyst position in March 2001. The affidavit states that, in 2002, the new DSO, [REDACTED], asked the beneficiary to assist him tracking foreign students' applications and responding to phone calls about their enrollment. The affidavit claims that "These tasks did not take much of my time and did not distract me from my responsibilities as a Programmer Analyst." The affidavit states that when an immigration officer called her in October 2002, which was during the period she was assisting [REDACTED], she initially thought the call pertained to an F-1 student at the school. The affidavit states that when the beneficiary realized that the officer was in fact calling about her position with the petitioner, she stated that her job was to maintain databases.

The record includes a copy of the petitioner's 2006 College Bulletin, which lists the petitioner's staff by department. The beneficiary's title is listed as "Programmer Analyst for [REDACTED] management/Coordinator for Institutional Research." It is also not clear what a "Coordinator for Institutional Research" entails, but it appears to be unrelated to the duties of a programmer analyst. Moreover, the beneficiary is listed in the section for the petitioner's "Administrative Support Staff." The other Administrative Support Staff positions are three receptionists, four administrative assistants, and one data entry operator. The beneficiary is not listed in the petitioner's Management Information Systems Office, which is headed by [REDACTED]. The positions in that department include computer-related positions such as LAN Supervisor, Network Administrator, Systems Administration Supervisor and LAN Technician.

On April 14, 2006, the director issued a NOR, notifying the petitioner of the revocation of the approval of the petition. The NOR concludes that the evidence submitted by the petitioner in response to the NOIR was not as persuasive as the information contained in the investigative report.

The petitioner appealed the revocation of the approval of the petition on May 2, 2006. The brief submitted in support of the appeal claims that the director erred in concluding that the evidence in the NOIR response was not sufficient to overcome the investigative report. The petitioner claims that the director did not give careful consideration to the numerous affidavits it submitted from individuals whom the petitioner claims have no personal interest in the beneficiary's petition.

Section 205 of the Act, 8 U.S.C. § 1155, states: "The Attorney General may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204." The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial. *Matter of Ho*, 19 I&N Dec. at 590 (citing *Matter of Estime*, 19 I&N 450 (BIA 1987)).

The petitioner claims to offer the beneficiary full-time, permanent employment as a programmer analyst. There is no requirement that the beneficiary be employed in the offered position prior to

obtaining lawful permanent residence. The employment-based immigrant visa process is prospective: it relates to the position that the beneficiary will perform upon obtaining lawful permanent residence. Here, in revoking the approval of the petition, the director concludes that the petitioner and the beneficiary falsely claim that the beneficiary has been employed by the petitioner in the offered position and that the beneficiary is not truly a programmer analyst. This conclusion potentially raises two issues: whether petitioner and beneficiary have engaged in material misrepresentation or fraud,⁴ and also whether there exists a *bona fide* job opportunity for the beneficiary with the petitioner in the position of programmer analyst. In the instant case, the NOR does not allege material misrepresentation or fraud. Accordingly, the primary issue on appeal is whether the evidence in the record is sufficient to establish that there exists a *bona fide* job opportunity for the beneficiary with the petitioner in the position of programmer analyst. It is within the role of USCIS to determine whether the job offer is realistic and that the petitioner intends to employ the beneficiary in accordance with the terms of the labor certification. *See Sunoco Energy Development Company*, 17 I&N Dec. 283 (R.C. 1979); *see also* 20 C.F.R. § 656.30(c)(2).

As is discussed above, the petitioner attempts to address the issues raised in the investigative report with affidavits of its employees. The only independent documentary evidence of the beneficiary's position with the petitioner is a 2006 College Bulletin which states that the beneficiary is part of the school's Administrative Support Staff along with administrative assistants and receptionists, and is not part of the school's IT department. The petitioner did not submit independent documentary evidence establishing that the beneficiary is a programmer analyst with the petitioner, such as a copy of the offer letter when she was allegedly promoted to the position in 2001, performance evaluations of her duties, examples of work she has produced in her position, or emails or correspondences related to the performance of her duties. Mere assertions, without documentary evidence to support the claim, will not satisfy the petitioner's burden of proof. *Matter of Obaighbena*, 19 I&N Dec. 533.

⁴ Section 212(a)(6)(C) of the Act provides:

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

Furthermore, a finding of fraud may lead to invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d). *See* 20 C.F.R. § 656.31(d) regarding labor certification applications involving fraud or willful misrepresentation:

Finding of fraud or willful misrepresentation. If as referenced in Sec. 656.30(d), a court, the DHS or the Department of State determines there was fraud or willful misrepresentation involving a labor certification application, the application will be considered to be invalidated, processing is terminated, a notice of the termination and the reason therefore is sent by the Certifying Officer to the employer, attorney/agent as appropriate.

534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

Although the affidavit of [REDACTED] states that the beneficiary obtained "expertise in programming and working with relational databases" from her bachelor's and master's degrees in engineering, there is no evidence in the record that the beneficiary has taken any computer courses. The sole evidence of the beneficiary's prior programming experience is an employment experience letter by [REDACTED], President of a company that appears to be named "[REDACTED]". [REDACTED] letter states that the beneficiary was employed as a part-time programmer for [REDACTED] from October 1993 until July 1998. The letter does not state how many hours per week the beneficiary performed this position. Further, the letter does not explain how [REDACTED] has knowledge of the beneficiary's employment at another company. Evidence relating to qualifying experience shall be in the form of letters from current or former employers and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien. 8 C.F.R. § 204.5(g). This experience letter does not meet these regulatory requirements. Further, on Part B of the labor certification, the beneficiary claims to have worked 20 hours per week for PhysMech Soft. However, it is unclear how this is possible since the beneficiary was attending university from 1989 to 1996. In addition, during her asylum application proceedings, not only does the beneficiary not mention her employment as a programmer, she also claims that she was employed as a journalist for the [REDACTED] following her graduation from university in 1996 until 1998. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591. Accordingly, the evidence in the record is not sufficient to establish that the beneficiary is a programmer analyst or meets the requirements of the offered position as set forth on the labor certification.⁵

The affidavits of [REDACTED] and the beneficiary concede that the beneficiary provided administrative support to [REDACTED] the school's new DSO, but claims that this role

⁵ The petitioner must establish that the beneficiary possessed all the education, training, and experience specified on the labor certification as of the 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); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401, 406 (Comm. 1986). *See also, Mandany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coorney*, 661 F.2d 1 (1st Cir. 1981). Therefore, beyond the decision of the director, it is concluded that the beneficiary does not meet the minimum requirements of the offered position.

only lasted for a few months, did not take up much of the beneficiary's time, was not really administrative in nature, and did not distract her from her primary duties as a programmer analyst. However, the affidavits of [REDACTED] and the beneficiary are inconsistent with each other. The beneficiary claims she started as a Programmer Analyst in March 2001, whereas the other affidavits claim she did not start in this role until July 2001. In attempting to minimize the beneficiary's role in providing administrative assistance to [REDACTED] claims in his affidavit that, until [REDACTED] was able to hire a full-time administrative assistant, "a number of qualified and knowledgeable employees [worked for [REDACTED]] on a temporary basis." However, the affidavits of [REDACTED] and the beneficiary do not claim that other employees also served as [REDACTED]'s administrative assistant during the period in question. [REDACTED] affidavit also attempts to characterize the beneficiary's assistance as being as closely related to a programmer analyst position as possible: his affidavit states that the beneficiary trained him on the school's computer system, tracked student records and created customized reports, but did not assist any F-1 students. His affidavit states that her duties "have been solely programming, analysis and maintenance of various systems and databases." However, the beneficiary's affidavit contradicts this claim. The beneficiary's affidavit states that she also responded to phone calls about the enrollment of F-1 students at the school. The affidavits of [REDACTED] and the beneficiary claim that [REDACTED] needed a full-time administrative assistant, and that the beneficiary temporarily assisted [REDACTED] in this capacity until such a person could be hired. Conversely, the affidavits also try to claim that the beneficiary only provided assistance with programming, analysis and maintenance of various systems and databases, and that this assistance only took up a fraction of her time. In other words, the affidavits claim that [REDACTED] needed a full-time administrative assistant, yet the beneficiary barely provided him with any assistance, and none of the assistance she provided was administrative in nature. These contradictory characterizations of the beneficiary's services undermine their credibility.

Further, the affidavit of [REDACTED] is misleading. The affidavit implies that the beneficiary, as a programmer analyst, was employed in his department. However, the petitioner's 2006 College Bulletin states that the beneficiary is a member of the Administrative Support Staff and not the school's IT Department.

In her affidavit, [REDACTED] claims that when she told an immigration officer that the beneficiary was employed by the petitioner as an administrative assistant, this information was provided to her from memory by a staff member of the school's Business Office. [REDACTED] claims that this staff member incorrectly told her the beneficiary's title from when she was a part-time employee prior to March 2001. However, the explanation that a staff member mistakenly provided the beneficiary's title from approximately two years earlier from memory is not, without additional corroboration, credible.

Further, it is noted that when the immigration officer spoke to the beneficiary on the telephone about her role with the petitioner during the period where she claims she was providing temporary administrative assistance to [REDACTED], she did not disclose this fact to the officer. There are some additional irregularities in the record. The record contains a letter from Mr.

Shchegol, dated July 18, 2001, stating that the petitioner intends to employ the beneficiary in the full time permanent position of programmer analyst at the annual salary of \$25,000. This is substantially lower than the \$71,000 offered wage listed on the labor certification and on the petition. The record also contains the beneficiary's Forms W-2, Wage and Tax Statement, for 2001, 2002, 2003 and 2004. These forms indicate that the beneficiary was paid a salary of \$21,404.31, \$30,307.77, \$35,969.96 and \$41,276.98, respectively. These salaries are substantially less than the offered wage of the programmer analyst position, the duties of which the petitioner claims the beneficiary is currently performing. Finally, according to the affidavits in the record, the beneficiary initiated employment as a full-time programmer analyst with the petitioner in July 2001. However, the petitioner filed the labor certification on July 28, 2000 and the instant petition on October 10, 2000. In other words, the petitioner initiated sponsoring the beneficiary for a full-time permanent programmer analyst position while the beneficiary was a student and employed with the school as a part-time administrative assistant.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. at 591-92. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The petitioner does not dispute the basic facts of the investigative report. Instead, the petitioner attempts to explain why, when immigration officers called the petitioner on two separate occasions, these checks undermined the petitioner's claim that the beneficiary was employed as a programmer analyst. For the reasons explained above, the petitioner's attempts to explain away the findings of the investigative report are not credible.

Considering the evidence in the record, the petitioner has failed to establish that the beneficiary is employed as a programmer analyst, and, crucially, that a *bona fide* job opportunity exists for the beneficiary with the petitioner as a programmer analyst. Instead, it appears that, despite her title, the beneficiary is employed with the petitioner in a largely administrative capacity, and that is the position in which the petitioner intends to continue employing her. USCIS may reject a fact stated in the petition that it does not believe to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. INS*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The evidence in the record also does not establish that the beneficiary meets the requirements of the offered position as set forth on the labor certification or generally qualifies as a programmer analyst.

The petition will remain revoked for the above stated reasons. 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.