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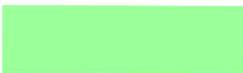
U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



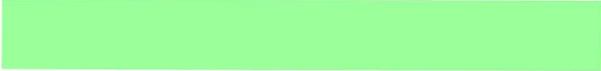
U.S. Citizenship
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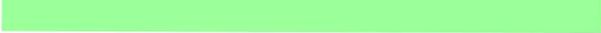
Date: **OCT 10 2012**

Office: NEBRASKA SERVICE CENTER

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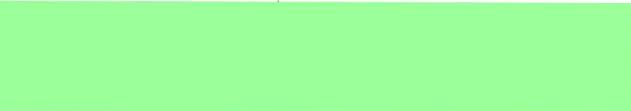
IN RE:

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 AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to 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 preference visa petition was denied by the Director, Nebraska Service Center, 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 cook, Mexican style. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (DOL). The director determined that the petitioner had not submitted all the required initial evidence. The director 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.

As set forth in the director's May 22, 2009 denial, the issues in this case are: 1) whether or not the petitioner had the continuing ability to pay the proffered wage beginning on the priority date; and 2) whether or not the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. The director noted that the required initial evidence regarding these issues was not submitted with the petition.

If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, U.S. Citizenship and Immigration Services (USCIS), in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). The petitioner filed its petition with USCIS on April 7, 2008, and is thus subject to this provision. Therefore, the director was not obligated to issue a Request for Evidence (RFE) seeking the missing initial evidence of the petitioner's eligibility. A labor certification certified by the Department of Labor was filed with the petition.

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

Here, the Form ETA 750 was accepted on August 6, 2001. The proffered wage as stated on the Form ETA 750 is \$11.85 per hour (\$24,648.00 per year based on 40 hours per week). The Form ETA 750 states that the position requires two years of experience in the job offered of cook, Mexican style.

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.¹

The evidence in the record of proceeding shows that the petitioner is structured as a sole proprietorship as several Schedules C, Profit or Loss from Business, from the personal tax return of [REDACTED] (Social Security number XXX-XX-[REDACTED]) for the business known as [REDACTED] and for [REDACTED], both located at [REDACTED] were submitted. However, the record also contains a copy of Form 565, Partnership Return of Income, for the state of California for [REDACTED] located at [REDACTED] and utilizing Federal employer identification number (FEIN) [REDACTED] as well as copy of a Schedule E from the personal tax return of another individual, [REDACTED] (Social Security number XXX-XX-[REDACTED]), which reflects the existence of one partnership named [REDACTED] (FEIN [REDACTED]) and one partnership named [REDACTED]. No federal income tax returns or other regulatory-prescribed evidence of the ability to pay the proffered wage was submitted on behalf of any partnership. [REDACTED] signed both the Form ETA 750 and the Form I-140 as the general manager of the business. No evidence was submitted to establish the role, if any, of [REDACTED] in regards to the business. On the petition, the petitioner claimed to have been established in 2001 and to currently employ one worker. On the Form ETA 750B, signed by the beneficiary on June 15, 2001, the beneficiary does not claim to have worked for the petitioner.

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

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).

evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, USCIS 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 Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner 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 petitioner has not established that it employed and paid the beneficiary the full proffered wage from the priority date, August 6, 2001. Forms W-2 were submitted into the record of proceeding with a prior Form I-140 indicating that the petitioner paid the beneficiary wages according to the table below.²

- In 2001, the Form W-2 stated wages paid to the beneficiary of \$3,118.75.
- In 2002, the Form W-2 stated wages paid to the beneficiary of \$12,420.00.
- In 2003, the Form W-2 stated wages paid to the beneficiary of \$14,528.50.
- In 2004, the Form W-2 stated wages paid to the beneficiary of \$11,816.00.
- In 2005, the Form W-2 stated wages paid to the beneficiary of \$13,314.00.
- In 2006, the Form W-2 stated wages paid to the beneficiary of \$12,477.50.

Therefore, as the proffered wage was \$24,648.00 per year, the petitioner did not pay the beneficiary the proffered wage in any of the periods covered by the Forms W-2 but would be obligated to demonstrate its ability to pay the difference between wages it actually paid and the proffered wage as shown in the table below.

Year	Proffered Wage	Wages Paid	Balance
2001	\$24,648.00	\$3,118.75	\$21,529.25
2002	\$24,648.00	\$12,420.00	\$12,228.00
2003	\$24,648.00	\$14,528.50	\$10,119.50
2004	\$24,648.00	\$11,816.00	\$12,832.00
2005	\$24,648.00	\$13,314.00	\$11,334.00
2006	\$24,648.00	\$12,477.50	\$12,170.50

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

² The beneficiary's Form W-2 for 2002 lists the employer as [REDACTED] II. The FEIN is listed as [REDACTED] The beneficiary's Forms W-2 from 2001, 2003, 2004, 2005, and 2006 list the employer as [REDACTED] and utilize the same FEIN.

on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). 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).

The petitioner is a sole proprietorship, a business in which one person operates the business in his or her personal capacity. Black's Law Dictionary 1398 (7th Ed. 1999). Unlike a corporation, a sole proprietorship does not exist as an entity apart from the individual owner. *See Matter of United Investment Group*, 19 I&N Dec. 248, 250 (Comm'r 1984). Therefore the sole proprietor's adjusted gross income, assets and personal liabilities are also considered as part of the petitioner's ability to pay. Sole proprietors report income and expenses from their businesses on their individual (Form 1040) federal tax return each year. The business-related income and expenses are reported on Schedule C and are carried forward to the first page of the tax return. Sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of their adjusted gross income or other available funds. In addition, sole proprietors must show that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *Ubeda*, 539 F. Supp. at 650, the court concluded that it was highly unlikely that a petitioner could support himself, his spouse and five dependents on a gross income of slightly more than \$20,000 where the beneficiary's proposed salary was \$6,000 or approximately thirty percent (30%) of the petitioner's gross income.

The record before the director closed on April 7, 2008, with the filing of the instant petition. Therefore, the proprietor's 2007 tax return was not yet due, and the 2006 tax return was the most recent return due. In the instant case, the sole proprietor supports a family of three. The proprietor submitted a complete Form 1040 with Schedule C for 2005 only. The proprietor submitted copies of the Schedule C only for 2003, 2004, 2005, 2006, 2007, and 2008. The proprietor failed to submit complete federal income tax returns for 2001, 2002, 2003, 2004, and 2006. The proprietor also submitted a copy of the Schedule C for 2001 from the personal tax return of another individual, Francisco Brito, as noted above. The proprietor's tax returns reflect the following information for the following years:

	<u>2005</u>
Proprietor's adjusted gross income (Form 1040, line 37)	\$23,199.00

In 2005, the sole proprietor's adjusted gross income of \$23,199.00 is in excess of the unpaid balance of the proffered wage; however, the record does not contain any evidence of the proprietor's

monthly household expenses. The AAO notes that it is unlikely that the proprietor could support himself and his family on \$11,865.00, which is what remains after the \$11,334.00 balance above is subtracted from the proprietor's adjusted gross income. Further, the proprietor is required to demonstrate the continuing ability to pay the proffered wage beginning on the priority date, and the proprietor has failed to submit complete tax returns which contain the amount of adjusted gross income for 2001, 2002, 2003, 2004, and 2006.

In addition, the AAO notes that research conducted in all available databases revealed that the beneficiary is associated with more than one Social Security number (SSN). The SSN listed on the beneficiary's Forms W-2 is XXX-XX- and was not used on the beneficiary's Form 1040 which used XXX-XX-. Further, an additional third SSN is associated with the beneficiary at her address of

Misuse of another individual's SSN is a violation of Federal law and may lead to fines and/or imprisonment and disregarding the work authorization provisions printed on your Social Security card may be a violation of Federal immigration law. Violations of applicable law regarding Social Security Number fraud and misuse are serious crimes and will be subject to prosecution.³

³ The following provisions of law deal directly with Social Security number fraud and misuse:

• **Social Security Act:** In December 1981, Congress passed a bill to amend the Omnibus Reconciliation Act of 1981 to restore minimum benefits under the Social Security Act. In addition, the Act made it a felony to...*willfully, knowingly, and with intent to deceive the Commissioner of Social Security as to his true identity (or the true identity of any other person) furnishes or causes to be furnished false information to the Commissioner of Social Security with respect to any information required by the Commissioner of Social Security in connection with the establishment and maintenance of the records provided for in section 405(c)(2) of this title.*

Violators of this provision, Section 208(a)(6) of the Social Security Act, shall be guilty of a felony and upon conviction thereof shall be fined under title 18 or imprisoned for not more than 5 years, or both. See the website at http://www.ssa.gov/OP_Home/ssact/title02/0208.htm (accessed on April 26, 2011).

• **Identity Theft and Assumption Deterrence Act:** In October 1998, Congress passed the Identity Theft and Assumption Deterrence Act (Public Law 105-318) to address the problem of identity theft. Specifically, the Act made it a Federal crime when anyone...*knowingly transfers or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law.*

Violations of the Act are investigated by Federal investigative agencies such as the U.S. Secret Service, the Federal Bureau of Investigation, and the U.S. Postal Inspection Service and prosecuted by the Department of Justice.

Matter of Ho, 19 I&N Dec. 582, 591 (BIA 1988), states: "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."

Therefore, doubts have been cast on the reliability and sufficiency of the amount of wages paid to the beneficiary under the SSN on the Forms W-2 in the record, and this evidence of payment is deemed insufficient. Further, the AAO notes that the wages listed on the Forms W-2 are in excess of the wages reported by the business on the individual Schedules C in 2003 through 2006. The proprietor has not addressed how the beneficiary could have been paid more wages than the total amount of wages reported on the Schedules C in each year.

On appeal, counsel asserts that in the past, USCIS issued requests for evidence before denying petitions and that USCIS has now unfairly adopted a "hard line policy." Counsel further asserts that he is now submitting evidence with the appeal which was "always available and partially ignored" and that he will submit a brief with additional evidence to the AAO in a timely manner.

As previously noted above, the director was not obligated to issue an RFE seeking the missing initial evidence of the petitioner's eligibility. If all required initial evidence is not submitted with the application or petition, or does not demonstrate eligibility, U.S. Citizenship and Immigration Services (USCIS), in its discretion, may deny the petition. 8 C.F.R. § 103.2(b)(8)(ii)(rule effective for all petitions filed on or after June 18, 2007). The petitioner filed its petition with USCIS on April 7, 2008, and is thus subject to this provision.

The AAO further notes that if the evidence was always available as counsel contends, it is not clear why counsel did not submit the evidence with the petition. Further, the assertions that: 1) the evidence was always available, and 2) that the evidence was partially ignored are in conflict. If the evidence was available but not sent, then the director could not have ignored it. No additional briefs or evidence have been submitted beyond those submitted with the appeal.

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).

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. See *Matter of Sonogawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). 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. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

In the instant case, the proprietor's gross receipts as reported on the Schedules C varied, and it does not appear that the amounts the business earned for the proprietor were substantial. The amount of wages paid reflected on the Schedules C was insubstantial and never more than the \$14,599.00 reported on the 2008 Schedule C submitted with the appeal. The Form I-140 indicated that the business had one employee, and doubts were noted above regarding the sufficiency of the wage evidence. Incomplete tax returns were provided, and thus the proprietor's adjusted gross income in 2001, 2002, 2003, 2004, and 2006 could not be determined. Additionally, there are no other factors present in the record such as reputation, uncharacteristic expenditures or losses, replacement of employees or intent to forego officer's compensation, which would indicate that the financial condition of the petitioner should be given less weight. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the proprietor had the continuing ability to pay the proffered wage beginning on the priority date.

The petitioner must also demonstrate whether or not the beneficiary possessed all the education, training, and experience specified on the labor certification as of the priority date. No evidence regarding this issue was submitted with the initial filing of the Form I-140.

As stated previously, section 203(b)(3)(A)(i) of 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 petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on its labor certification application, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Acting Reg'l Comm'r 1977). As stated above, the labor certification application was accepted on August 6, 2001.

On appeal, counsel submits a copy of an experience letter from [REDACTED] owner of [REDACTED] [REDACTED] dated August 10, 2001. The letter states that the

beneficiary worked for [REDACTED] as a cook from October 5, 1998, to March 25, 2000.

To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. 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'r 1986). *See also, Madany 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. Coomey*, 661 F.2d 1 (1st Cir. 1981). According to the plain terms of the labor certification, the applicant must have two years of experience in the job offered.

The beneficiary set forth her credentials on the labor certification and signed her name under a declaration that the contents of the form are true and correct under the penalty of perjury. On the section of the labor certification eliciting information of the beneficiary's work experience, she states that she worked as a cook, but failed to provide the names of any employers or the specific dates of any employment. The beneficiary did not list the employment with [REDACTED] on the labor certification.

In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

The regulation at 8 C.F.R. § 204.5(1)(3) provides:

(ii) *Other documentation—*

(A) *General.* Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

(B) *Skilled workers.* If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the individual labor certification, meets the requirements for Schedule A designation, or meets the requirements for the Labor Market Information Pilot Program occupation designation. The minimum requirements for this classification are at least two years of training or experience.

The AAO also notes that 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*, 299

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).

The AAO affirms the director's decision that the preponderance of the evidence does not demonstrate that the beneficiary acquired two years of experience from the evidence submitted into this record of proceeding. Thus, the petitioner has not demonstrated that the beneficiary is qualified to perform the duties of the proffered position.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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.