OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:	) OTA Case No. 20035913
	) CDTFA Case ID 008-030
R. BATTISTONI	)
	)
	)
	)

OPINION

Representing the Parties:

For Appellant: Paul S. Trusso, Attorney at Law

For Respondent: Amanda Jacobs, Tax Counsel III
Stephen Smith, Tax Counsel IV
Jason Parker, Chief of Headquarters Ops.

T. STANLEY, Administrative Law Judge: Pursuant to Revenue and Taxation Code (R&TC) section 6561 R. Battistoni (appellant) appeals a decision issued by respondent California Department of Tax and Fee Administration (CDTFA) denying appellant's petition for redetermination of the Notice of Determination (NOD) dated March 28, 2006. The NOD was for use tax of $9,689, a failure-to-file penalty of $968.90, an amnesty penalty of $968.90 that doubled the failure-to-file penalty[1] (amnesty double failure-to-file penalty), and applicable interest.

Office of Tax Appeals Administrative Law Judges Teresa A. Stanley, Michael F. Geary, and Josh Aldrich held an oral hearing for this matter in Cerritos, California, on February 24, 2021.[2] After the hearing, the record was closed, and this appeal was submitted for decision.

[1] In certain cases where a taxpayer is eligible to participate, but did not participate, in the Tax Amnesty Program, CDTFA is required to impose penalties at double the rate otherwise specified in the R&TC. (R&TC, § 7073(c).)

[2] Due to safety concerns with respect to COVID 19, the hearing was held electronically with the consent of both parties.

ISSUE

Did appellant purchase a vessel for use in California?[3]

FACTUAL FINDINGS

1. On June 20, 2002, appellant purchased a Hatteras 46-foot sport fishing vessel, United States Coast Guard (USCG) document number 1043075 (the vessel) for $125,000. The sale was completed when the seller delivered the vessel to appellant in the Pacific Ocean outside of California territorial waters.[4]
2. Appellant first functionally used the vessel outside of California territorial waters on June 20, 2002, and later the same day, appellant returned in the vessel to San Diego, California, where he docked it in a slip leased to him by Mr. Michael Hallmark. Appellant subleased the slip from June 20, 2002, through September 16, 2002, and departed the marina on September 20, 2002.[5]
3. Between June 20, 2002, and September 17, 2002, appellant used the vessel both within and outside of California territorial waters, including several overnight fishing excursions to the area outside of California's territorial waters.
4. On September 17, 2002, appellant and some friends took the vessel outside of California territorial waters for fishing, following which the vessel traveled to Ensenada, Mexico.
5. Appellant arranged to rent a slip for the vessel beginning on September 20, 2002, for approximately $360 (U.S. dollars) per month. The slip was located at Ensenada Cruiseport Village in Ensenada, Mexico (the Mexico marina).
6. The vessel returned to San Diego, California on or about July 10, 2003.
7. Appellant registered the vessel with the USCG on August 5, 2003.
8. Appellant filed a Combined State and Local Consumer Use Tax Return for Vessels (Form BOE-1169-B) with CDTFA on March 9, 2006. On the return, appellant reported a purchase price of $105,000, that the vessel was not purchased for use in California, and that no part of the purchase price was subject to use tax.

[3] Neither party addressed the penalties at the hearing.

[4] The Hallmark Yacht & Ship Brokers Vessel Purchase and Sale Agreement dated June 8, 2002, listed the sales price as $105,000 with a down payment of $10,000. However, both the broker and appellant, at the hearing, stated that the selling price was $125,000.

[5] Mr. Hallmark is the yacht broker who oversaw the sale of the vessel to appellant.

9. CDTFA issued a Notice of Determination to appellant on March 26, 2008, for use tax, penalties, and interest.
10. Appellant did not pay the liability or file a petition for redetermination before the NOD became final (within 30 days), and CDTFA imposed additional penalties. CDTFA also imposed a collection cost recovery fee because appellant did not pay the liability or enter into an installment payment agreement within 90 days.
11. CDTFA accepted appellant's untimely petition for redetermination as an administrative protest and subsequently issued a decision deleting the failure-to-file penalty and the amnesty double failure-to-file penalty, relieving interest for certain time periods, and otherwise denying the late protest.
12. Appellant timely appealed the decision to OTA.

DISCUSSION

Use tax applies to the storage, use, or other consumption in this state of tangible personal property purchased for use and used in California. (R&TC, § 6201.) The tax is owed by the person using or storing the property in California. (R&TC, § 6202(a).) When a vessel is first functionally used outside of California, it will nevertheless be presumed to have been purchased for use in this state if it is brought into California within 90 days after its purchase. (Cal. Code Regs., tit. 18, § 1620(b)(4).) Use tax does not apply to the purchase of a vessel prior to October 2, 2004, if the vessel is physically located outside of California one-half or more of the time during the six-month period immediately following its entry into this state. (Cal. Code Regs., tit. 18, § 1620(b)(4)(A).)

Appellant's burden of proof is by a preponderance of the evidence. (Cal. Code Regs., tit. 18, § 30219(c); *Appeal of Owens-Brockaway Glass Container, Inc.*, 2019-OTA-158P.) The term refers to evidence in our record that is more convincing than evidence *that is opposed to it*. (*Environmental Law Foundation v. Beech Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 322 [Citation].) Applying the exclusive record principle,[6] we may only consider and weigh the evidence in the record. Besides documentary exhibits, evidence includes testimony taken under oath or affirmation. (Gov. Code, § 11513; see e.g., *U.S. v. Black* (9th Cir. 2013) 543 Fed. Appx

[6] The doctrine known as the "exclusive record principle" provides that administrative decision-makers are limited to consideration of the evidence in the record, or officially noticed matters, and it is improper to use other sources of information as a substitute for record evidence. (Asimow et al., Cal. Practice Guide: Admin. Law (The Rutter Group 2020) ¶ 5:520.)

664, 672 ["The statement was supported by evidence because [the witness] was a percipient witness, and his testimony *is* evidence." (emphasis in original)]; see also *Herb Reed Enterprises, LLC v. Fla. Entm't Mgmt., Inc.* (9th Cir. 2013) 736 F.3d 1239, 1248, 1251.) We may not speculate that supporting documentation exists, which could have been submitted by the parties, but was not. To do so would deprive appellant of his right to respond to the allegations that supporting documentation existed and to answer to the documentation if it were admitted into evidence. (See *In re Pinheiro v. Civil Service Com. for County of Fresno* (2016) 245 Cal.App.4th 1458, 1467 [the right to a fair hearing is violated when a body considers evidence outside of the record]; see also *Vollstedt v. City of Stockton* (1990) 220 Cal.App.3d 265, 272-276 [the exclusive record principle is a fundamental element of due process].)

Appellant contends that California use tax does not apply to his purchase of the vessel because it was purchased outside of California; it was first functionally used outside of California; and it was stored, used, or both, outside of California for at least one-half of the six months following its entry into California. Appellant asserts that the vessel departed California on September 17, 2002, and did not return to California until July 3, 2003, which constitutes more than one-half of the 182-day test period (from June 20, 2002, through December 19, 2002). Appellant further asserts that the vessel was used outside of California for fishing in Mexican territorial waters on eight occasions between June 20, 2002, when it first docked in San Diego, and September 17, 2002, when it departed San Diego heading for Mexico; however, we need not reach a conclusion in that regard and discuss it no further.

There is no dispute that sale and delivery of the vessel took place outside of California. The contract for sale required delivery outside of California, and that delivery be made to appellant outside of California territorial waters. It is also not disputed that the first functional use of the vessel was outside of California territorial waters.[7] Finally, neither party disputes that on that same day, the vessel entered California and was docked in a subleased slip in San Diego, California. Thus, the only remaining question is whether appellant established that the vessel was located outside of California during at least one-half of the first six months after its first entry into this state. (Cal. Code Regs., tit. 18, § 1620(b)(4)(A).)

[7] A functional use is a use for the purposes for which the vessel was designed; here, a recreational vessel first operated outside of California. (See Cal. Code Regs., tit. 18, § 1620(b)(3).) CDTFA describes the "outer banks" as "beyond California's territorial waters near San Diego."

In support of his contention, appellant submitted a ship's log for the relevant time period; a declaration by the sublessor of the San Diego slip indicating that the vessel was stored in that slip from June 20, 2002, through September 17, 2002; a declaration from a passenger who accompanied appellant on one or more fishing trips outside of California; a contract for lease of a slip in Ensenada, Mexico beginning September 20, 2002; invoices for slip fees and work on the vessel at the Mexican marina, between November 2002 and July 2003; and a USCG vessel document showing the vessel arrived at Avalon (California), and documentation that was issued on August 5, 2003.[8] Appellant's witness, Mr. Hallmark, verified the accuracy of his declaration, and testified that his records reflect that the sublease at the San Diego marina concluded when the vessel left the marina on September 17, 2002. Appellant's witness, Mr. Johannsen, verified the accuracy of his declaration and testified that he accompanied appellant on a fishing trip that began on September 17, 2002, and concluded when they reached the Mexico marina on September 20, 2002.

The evidence presented by appellant supports his contention that the vessel was located outside of California for at least one-half of the test period. The testimony of the three witnesses, their corresponding declarations, and the invoices for slip rental and work performed on the vessel in Mexico all establish that the vessel left San Diego on September 17, 2002, fished in international waters, entered Mexican waters on September 20, 2002, without re-entering California waters, and remained in Mexican waters during the remainder of the test period.

First, we have uncontroverted testimony from three witnesses showing that the vessel left San Diego on September 17, 2020. Two of those witnesses also testified that the vessel was used for fishing in international waters until September 20, 2002, when it reached Mexican waters. After a two-day fishing trip, appellant and his witness testified that the vessel docked in Ensenada, Mexico for the remainder of the relevant six-month period. A slip rental document from September 20, 2002 through December 20, 2002 supports appellant's testimony that he initially rented a slip at the Mexico marina for three months. Invoices provided by appellant show services performed on the vessel in Mexico during the test period, which are also validated

[8] The document issued by the USCG does not indicate the date the vessel arrived at its hailing port of Avalon, California or the date appellant applied for registration of the vessel.

by corresponding entries in the ship's log[9] during the relevant test period; each referring to work done on the vessel in Mexico. Lastly, appellant continued to dock the vessel in Ensenada and to pay approximately $360 (U.S. dollars) plus 10 percent tax and a 2 percent state tax, until July 9, 2003, well after the end of the test period. According to appellant's testimony, appellant stored, fished, and otherwise used the vessel approximately once per month but made no trips with the vessel into California during that time. Appellant testified that he traveled from San Diego to Mexico approximately once per month, using his personal vehicle and sleeping on the vessel.

No ship's log notations or other documentary evidence shows that the vessel returned to California prior to July 2003. Moreover, a USCG Vessel Document was issued August 5, 2003, which comports with appellant's marina invoices, to show that it is more likely than not that the vessel was not returned to California until July 10, 2003.

Based on the uncontroverted evidence, we find that appellant established by a preponderance of the evidence that the vessel was located outside of California for at least one-half of the six-month period following its entry into the state.

CDTFA argued, and the dissent also points out, that there were inconsistencies in the Mexican marina documents[10], including differing fax stamps on the same date, there were overlapping invoices, and one witness had no knowledge of the location of the vessel after September 20, 2002. CDTFA states that it was "left to take [a]ppellant's word for the [ship's log];" and, appellant did not produce customs documents, which are the "most reliable method of verifying location."

We are not persuaded by doubts based largely on what additional documentary evidence the agency thinks appellant should have provided but did not. Additionally, we have no reason to discount the uncontroverted witness testimony. Evidence Code section 411 states that "[e]xcept where additional evidence is required by statute, the direct evidence of one witness

[9] Although the ship's log, on its own, may not provide a basis for a finding in appellant's favor, appellant testified that its creation was contemporaneous. The log entries corroborate and support witness testimony and other evidence.

[10] Appellant explained that his wife faxed credit card information to the marina from San Diego, and they faxed it back because it was in her name and requested approval from her.

who is entitled to full credit is sufficient for proof of any fact."[11] Furthermore, although California Code of Regulations, title 18, section 1620(b)(5) expressly calls for documentary evidence to support a finding that a vessel was not purchased for use in this state, the relevant section of the regulation does not. (See Cal. Code Regs., tit. 18, § 1620(b)(4).)

HOLDING

Appellant did not purchase the vessel for use in California.

DISPOSITION

CDTFA's decision is reversed.

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Teresa A. Stanley
Administrative Law Judge

I concur:

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Michael F. Geary
Administrative Law Judge

[11] If CDTFA believes it had reason to distrust the testimony or other evidence, it was incumbent upon the agency to demonstrate that at the hearing.

J. ALDRICH, dissenting:

The majority finds that R. Battistoni (appellant) met his burden of proof to show that the vessel at issue was used or stored outside of California for one-half or more of the test period.[12] I do not concur because the evidence offered is insufficient to rebut the presumption.

Appellant contends that use tax does not apply to his purchase of the vessel, and use thereof, because the vessel was purchased for use outside of California and was so used. Use tax applies to the storage, use, or other consumption in this state of tangible personal property purchased for use and used in California, unless an exemption or exclusion applies. (R&TC, § 6201.) The appellant has the burden of establishing entitlement to the exemption or exclusion claimed. (*Appeal of Snowflake Factory LLC*, 2020-OTA-270P, citing *Standard Oil Co. v. State Bd. of Equalization* (1974) 39 Cal.App.3d 766, 769-770.) An exemption or exclusion will not be inferred from doubtful statutory language; the statute must be construed liberally in favor of the taxing authority, and strictly against the claimed exemption. (*Ibid*.) For vessels purchased prior to October 2, 2004, a vessel purchased outside of California, which is first functionally used outside of California, but which is later brought into California, is presumed to have been purchased for use in this state if brought into California within 90 days after its purchase. (R&TC, § 6248; Cal. Code Regs., tit. 18, § 1620(b)(2)(B)(4).) Use tax will not apply if the vessel is used, stored, or both, outside of California one-half or more of the time during the six-month period immediately following its entry into this state. (Cal. Code Regs., tit. 18, § 1620(b)(2)(B)(4)(A).) Unsupported assertions are not sufficient to satisfy a taxpayer's burden of proof. (*Appeal of Talavera*, 2020-OTA-022P.)

To support his claim, appellant provided, in pertinent part, the following evidence: Invoices from Ensenada Cruiseport Village (Exhibits 3 & 4);[13] Taxpayer Vessel Log (Exhibit 5);[14] Declaration of Mr. Hallmark (Exhibit 6); Declaration of Taxpayer (Exhibit 7);

[12] The test period is June 20, 2002, through December 19, 2002.

[13] OTA's Exhibit Binder incorrectly stamped the pages for Exhibit 5 as "Exhibit 4" (pages 1 through 4), and incorrectly stamped the pages for Exhibit 4 as "Exhibit 5" (pages 1 through 9). However, the OTA Exhibit Index correctly listed the handwritten "Log" as Exhibit 5, and the additional MX invoices as Exhibit 4.

[14] Appellant submitted four handwritten pages from his ship's "Log" with his August 23, 2020 brief. On February 11, 2021, following the PHC, and in response to the copy of the Exhibit Binder that OTA furnished to appellant, appellant submitted an updated Exhibit Index and Binder and stated: "[appellant] intends to present the following exhibits during the hearing." The ship's log (exhibit 5) contained 5 pages, instead of the 4 pages in OTA's binder, in addition to a couple new exhibits which were discussed but not admitted into evidence (see footnote 15).

Declaration of Mr. Johansen (Exhibit 8); Sales and Use Tax Annotation (Annotation) of 105.0197 (Exhibit 9); Annotation of 105.0046 (Exhibit 10).[15] We also heard testimony from appellant, Mr. Hallmark, and Mr. Johansen during the hearing.

Exhibit 3 purports to be an invoice for a slip rental from September 20, 2002, through December 21, 2002 at the Ensenada Cruiseport Village, Mexico. Exhibit 4 purports to be additional invoices from Ensenada Cruiseport Village which are mostly outside of the test period. California Department of Tax and Fee Administration (CDTFA) determined that Exhibit 3 lacked credibility because it had two facsimile (fax) numbers imprinted thereon, one originating from Mexico and the other from the United States. Since one fax originated from the United States, CDTFA was concerned as to whether appellant was in Mexico with the vessel on September 20, 2002. On or about July 2, 2019, CDTFA asked appellant for an explanation regarding the multiple fax numbers, appellant did not have one. During briefing, appellant's counsel argued that "[n]o person can be held to know exactly what happened or why a marina in Mexico faxed the document, especially 19 years later." During the hearing, however, appellant offered a new theory. He asserted that Ensenada Cruiseport Village required two credit cards on file and that he used his credit card and the credit card of his wife. Appellant asserted that his wife faxed the invoice from their neighbor's home to Ensenada Cruiseport Village. This assertion, however, is unsupported. CDTFA was also concerned with the material differences between the invoices in Exhibit 3 and those in Exhibit 4. Appellant attributes these differences to the fact that Ensenada Cruiseport Village was a new marina. The size, location, and embellishment of the anchor emblem are different between Exhibit 3 and Exhibit 4. Exhibit 3 does not have the anchor watermark that appears on some of the invoices in Exhibit 4. Unlike Exhibit 3, the invoices in Exhibit 4 also bear what appears to be some sort of authorizing license or seal that reads *Secretaria de Hacienda y Credito Publico*.[16] Also, on either side of the

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The dissent cites to the version of Exhibit 5 that appellant submitted most recently, on February 11, 2021, with the understanding that this was the version of the log that appellant submitted into evidence.

[15] Exhibits 1 and 2 address facts not in dispute (e.g., purchase price, date of purchase, location of purchase, or entry into California). Exhibits 9 and 10 were not admitted into evidence.

[16] The image quality of the invoices renders them somewhat illegible. A close approximation was attempted; however, there is additional information that remains illegible.

invoices in Exhibit 4 there is additional text that does not appear on the invoices in Exhibit 3.[17] None of the invoices in Exhibit 3 or Exhibit 4 specify the vessel's registration number. Likewise, the invoices do not denote whether the vessel was docked at the rented slip. Thus, I find that Exhibits 3 and 4 are not sufficient to rebut the presumption because there are material differences in the invoices and even if accurate, they only establish a right to use a slip, not where the vessel was used, stored, or consumed.

Exhibit 5 is purported to be appellant's handwritten vessel log. Exhibit 5 consists of approximately five handwritten pages. Appellant argues that we should accept Exhibit 5 as supporting documentation. Appellant cites to Annotation 105.0197 and 105.0046 in support of his position.[18] These annotations are not analogous to this case because the analyses address the purchase and use of an aircraft under the common carrier exemption in R&TC sections 6366 and 6366.1, which is not at issue here. CDTFA argued that the log is unsupported. Although appellant claims that the log was contemporaneous, the log is not chronological (e.g., there are entries on the first page from June 1, 2002, through August 15, 2002; on the next page, there are again entries for June 20, 2002, through August 9, 2002). The anachronous entries tend to indicate that the entries were not, in fact, contemporaneous. Even if it were contemporaneous, appellant has not offered supporting documentation. Also, the log would be more persuasive if there were additional information, but the entries are relatively short and do not allow for a reconstruction of the purported travel. Thus, I find that Exhibit 5 is not sufficient to meet appellant's burden of proof because it lacks specificity and supporting documentation.

Exhibit 6 is the declaration of Mr. Hallmark under penalty of perjury that was signed approximately twelve years after the fact. Mr. Hallmark's declaration, in pertinent part, indicated that he sublet a slip to appellant between June 20, 2002, and September 16, 2002. Mr. Hallmark's further indicated that the vessel vacated the sublet slip on September 17, 2002. His testimony during the hearing tended to reiterate his declaration. Exhibit 6 and the corresponding testimony is of limited weight because it does not account for the use, storage, or consumption of the vessel after September 17, 2002. There is also inconsistent information regarding the sublet slip, as discussed in the next paragraph. I find that Exhibit 6 as well as

[17] For example, on the November 25, 2002 invoice there appears writing on the left side that reads, "IMPRESO EN CA IMPRESIONES . . . ." On the right side there appears, "NUMERO DE APROBACION ....."

[18] CDTFA's annotations do not have the force or effect of law. (*Praxair, Inc.,* 2019-OTA-301P; *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 25.)

Mr. Hallmark's testimony are insufficient to meet appellant's burden because Mr. Hallmark lacks personal knowledge of the vessel after September 17, 2002.

Exhibit 7 is the declaration of appellant under penalty of perjury which was signed approximately twelve years after the date of purchase. Appellant declared, in pertinent part, the following: he sublet a slip from Mr. Hallmark; he departed San Diego on September 17, 2002; he arrived at Cruiseport Village, Mexico on September 20, 2002; the vessel did not return to California until July 10, 2003; as well as the dates of various fishing trips between June 30, 2002, and September 1, 2002 that began and ended in California. Appellant indicated, during the hearing, that the sublease was from June 20, 2002, through September 20, 2002, which is four days longer than what Mr. Hallmark indicated. Appellant testified that from the beginning it was his intent to purchase the vessel offshore, to use the vessel offshore, and use the vessel outside of California. CDTFA argued that, as early as 2005, CDTFA had been in communication with appellant regarding his purchase of the vessel and requested additional documentation such as, customs or importation paperwork to show that the vessel entered Mexico on or before September 20, 2002, port of entry papers, a copy of appellant's passport, insurance documents, or proof of payments of the invoices such as a bank or credit card statement, to verify his claims that the vessel was in Mexico. The documents that CDTFA requested are not in the record. Since it was appellant's intent to use the vessel outside of California from the beginning, appellant had the opportunity to produce stronger and more satisfactory evidence, yet the evidence that appellant provided is less than satisfactory to rebut the presumption. (See Evid. Code, § 412.)[19] As a partial explanation for the lack of supporting or corroborating documentation, appellant asserted that the San Diego Harbor police took all Mexican paperwork on July 10, 2003.[20] Nonetheless, appellant did not present evidence of his attempt to retrieve the documents or any evidence to corroborate the alleged seizure. (See Evid. Code, § 413.) Without supporting documentation, "we are left to take Appellant's word for it", as CDTFA argued.

[19] OTA Rules for Tax Appeals section 30214(e)(4) provides, "Except as otherwise provided in the Rules for Tax Appeals, rules relating to evidence and witnesses contained in the California Evidence Code and California Code of Civil Procedure shall not apply to any proceedings, including oral hearings, before OTA. The following rules shall be applied to evidence presented to OTA: (4) The Panel may use the California rules of evidence when evaluating the weight to give evidence presented in a proceeding to OTA."

[20] It is unclear what documents the log is referring to and what, if any, were taken.

Thus, I find that appellant's testimony and Exhibit 7 are insufficient to satisfy appellant's burden because of the lack of supporting documentation.

Exhibit 8 is the declaration of Mr. Johansen, appellant's friend, under penalty of perjury that was signed approximately twelve years after the fact. Mr. Johansen declared, in pertinent part, the following: he fished with appellant on multiple occasions between June 20, 2002 and September 16, 2002; he was onboard the vessel on September 17, 2002, when it departed San Diego; he was onboard the vessel when it arrived at Cruiseport Village, Mexico; and, the vessel did not return to California between September 17, 2002, and September 20, 2002, because he and appellant were fishing in international waters. His testimony during the hearing essentially reiterated his declaration. Of note, Mr. Johansen indicated during testimony that he observed appellant "preparing the log [and] making entries in the log." Appellant, however, did not establish that the purported log in Exhibit 5 is the same log that Mr. Johansen was referencing during his testimony. Even if it were, the log in Exhibit 5 is not sufficient to meet appellant's burden because it is unsupported and lacks specificity. I, therefore, find that Exhibit 8 and Mr. Johansen's testimony are insufficient to satisfy appellant's burden because they do not account for the use, storage, or consumption of the vessel after September 20, 2002.

To reiterate, appellant bears the burden of proof to show that the vessel was used, stored, or both outside of California for half or more of the test period. While the declarations in Exhibits 6, 7, and 8, as well as the respective testimony are evidence, they are also unsupported by contemporaneous documentary evidence. The limited evidence proffered is insufficient to rebut the presumption that appellant purchased the vessel for use in California. Generally, rebutting this presumption should require contemporaneous documentary evidence sufficient to trace the location of the vessel to the claimed points outside this state. Furthermore, given the inconsistencies in the record, and the amount of time that has elapsed, there are also concerns regarding credibility. Based on the foregoing, appellant has not met his burden of proof.

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Josh Aldrich
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Josh Aldrich
Administrative Law Judge

Date Issued: 5/19/2021