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

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: SEP 25 2014 Office: VERMONT SERVICE CENTER FILE [redacted]

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner states that it is engaged in the importation of cattle to the United States from Mexico. The petitioner, a Texas corporation established in 2008, states that it is a subsidiary of located in Mexico. The petitioner seeks to employ the beneficiary as the director of operations for a period of three years.

The director denied the petition on three separate grounds. First, the director found that the petitioner has not established that it has a qualifying relationship with the foreign entity. Further, the director concluded that the petitioner has not demonstrated that the beneficiary will be employed in a qualifying managerial or executive capacity in the United States. Lastly, the director found that the petitioner failed to establish that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO. On appeal, counsel contends that the petitioner has provided sufficient evidence to demonstrate that it is a subsidiary of the foreign entity, that the beneficiary will be employed in the United States in a qualifying managerial or executive capacity and that the beneficiary was employed in a qualifying managerial or executive capacity abroad.

I. THE LAW

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129, Petition for a Nonimmigrant Worker (Form I-129) shall be accompanied by:

(i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.

(ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.

(iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.

(iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

II. THE ISSUES ON APPEAL

A. QUALIFYING RELATIONSHIP

The first issue to be addressed is whether the petitioner has established that it has a qualifying relationship with the foreign entity.

The pertinent regulations at 8 C.F.R. § 214.2(l)(1)(ii) define the term "qualifying organization" and related terms as follows:

(G) *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:

(1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;

(2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee[.]

* * *

(I) Parent means a firm, corporation, or other legal entity which has subsidiaries.

* * *

(K) Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50–50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of

the entity, but in fact controls the entity.

(L) *Affiliate* means

(1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or

(2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

1. Facts

The petitioner filed the Form I-129 on September 10, 2013, and indicated therein that it is an affiliate of In letter submitted in support of the petition, the petitioner stated that the foreign entity operates a 10,000 acre ranch established in Mexico in 1970 that is dedicated to the export of livestock. The petitioner was established in the United States in 2008 as an office for sale and distribution of the foreign entity's livestock and beef. A "qualifying relationship chart" provided in support of the petition indicated that the foreign entity was "formerly known as and currently has a 60% ownership interest in the petitioner. The petitioner indicated on the Form I-129 that the beneficiary was employed by from 1994 until 2008. In a resume submitted for the beneficiary, he identifies his last foreign employer as

The petitioner submitted a Mexican federal tax registration document reflecting that the foreign entity commenced operations on October 6, 2008. The petitioner provided its Texas articles of incorporation dated October 13, 2008 indicating that the company was authorized to issue 1,000 shares. The petitioner submitted share certificates numbers 4 through 8, all dated November 3, 2008, reflecting the following distribution of shares: certificate number 4 issuing 200 shares to the beneficiary; certificate 5 issuing 200 shares to ; and certificates 6 through 8 each issuing 200 shares to

The petitioner provided its 2011 IRS Form 1120 U.S. Corporation Income Tax Return which indicated at Schedule K that the petitioner has three shareholders and at Schedule G that the beneficiary owned and controlled 33% of the company's voting stock. Schedule G did not identify any other shareholders. At Schedule K, where asked if any foreign or domestic corporation owns directly 20%, or indirectly owns 50% or more of the total voting power of all classes of the corporation's voting stock, the petitioner responded "No."

The director later issued a request for evidence (RFE) noting inconsistencies in the above-referenced evidence, including the fact that the petitioner had indicated in the Form I-129 that it was an affiliate of the foreign entity while also stating that it was a subsidiary elsewhere in the record. The director also noted that the petitioner failed to submit copies of its share certificates no. 1 through 3. Finally, the director noted that the evidence indicates that the petitioner issued 60% of its shares to and not to the claimed parent company.

As such, the director requested that the petitioner submit a stock ledger, stock purchase agreements, evidence of capital contributed to purchase shares in the petitioner and/or evidence that the foreign entity and were the same company. Further, the director pointed out the petitioner's failure to completely disclose its ownership in the 2011 Form 1120 and asked the petitioner to explain this discrepancy. In addition, the director specified that the petitioner could submit some or all of the following evidence to establish ownership: Forms 10K; a most recent annual report; meeting minutes; stock purchase agreements; a stock ledger; proof of stock purchases including wire transfers, banks statements, or deposit receipts; or federal corporate income tax returns.

In response to the RFE, the petitioner submitted the foreign entity's articles of formation in Mexico dated October 6, 2008 indicating that it has ten shareholders and issued a total of 100 shares. The foreign articles reflect that the beneficiary holds 19 shares in the foreign entity. The petitioner provided a letter dated December 18, 2013 from an accountant in Mexico stating that the foreign entity "for reasons of custom and to locate the company, has sometimes used, without prejudice, the name because at the ranch (property, land) is located above mentioned cattle." Counsel clarified that is the name of one of the foreign entity's cattle ranches and that the company does business under this name because much of the cattle herd is located at that ranch. Counsel asserted that Mexican law does not require any licensing or other administrative approval to operate under an assumed name.

In addition, the petitioner provided copies of its share certificates 1 through 3, each of which reflected the issuance of two hundred shares to on November 3, 2008. These share certificates were marked as void. The petitioner provided a "Unanimous Written Consent to Void Membership Certificates (in lieu of a Special Meeting) of the Directors" dated December 18, 2013 stating "the Directors agree to cancel certificates #1, #2, and #3 of the Corporation by virtue of a mistake of placing the name of the partner in the 3 certificates when preparing them." The petitioner also submitted a copy of its 2012 IRS Form 1120. As with the 2011 Form 1120, the petitioner indicated that it has three shareholders, that the beneficiary owns a 33% interest in the company, and that no foreign corporation owns at least 50% of the company's voting stock.

In denying the petition based on the petitioner's failure to establish a qualifying relationship, the director stated that the petitioner had submitted insufficient explanations and supporting evidence to resolve the discrepancies previously noted in the RFE. The director emphasized the petitioner's failure to submit supporting evidence to substantiate the petitioner's ownership, such as a stock ledger, stock purchase agreements, or evidence of the payment of consideration for issued stock.

On appeal, counsel contends that the totality of the evidence establishes that the foreign entity holds a controlling interest in the petitioner and that the entities qualify as parent and subsidiary. Counsel states that the first three share certificates were issued in error and immediately voided, as evidenced by the unanimous written consent of the board issued in December 2013. Counsel asserts that the director has erroneously discarded the written consent of the board based upon the fact that it is dated after the filing of the petition. Counsel states that it cannot submit a stock ledger or stock purchase agreements because they do not exist and contends that small closely held corporations, similar to the petitioner, commonly do not generate this documentation. Finally, counsel contends that the director makes an unsupported conclusion

that the petitioner's IRS Forms 1120 do not reflect that the foreign entity owns a majority of the petitioner's shares.

In support of the appeal, the petitioner submits what counsel refers to as the foreign entity's "*Acta Constituva*" or "act of assembly" as proof that the foreign entity established the U.S. subsidiary to further its cattle and beef production and sales in the U.S. market. Counsel asserts that this document corroborates that the foreign and U.S. companies have a qualifying parent-subsidiary relationship.

2. Analysis

Upon review of the submitted evidence, the petitioner has not demonstrated that it has a qualifying relationship with the foreign entity.

The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (Comm'r 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (Comm'r 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm'r 1982). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, USCIS is unable to determine the elements of ownership and control.

In the present matter, the petitioner has not submitted sufficient explanation and evidence to overcome the discrepancies in the evidence presented relevant to ownership in the petitioner. As noted by the director, discrepancies in the evidence leave question as to whether 60% of the petitioner's shares are owned and controlled by the foreign entity.

First, the petitioner provided IRS Forms 1120 reflecting only that the beneficiary holds 33% of the company's shares. In contradiction, the petitioner has submitted share certificates indicating that the beneficiary owns 20% of its shares. Counsel asserts that the petitioner submitted the tax returns as evidence of its business activities, not as evidence of its qualifying relationship with the foreign entity. Counsel states:

> The corporate tax returns indicate that Beneficiary has a minority share of the U.S. Company. The corporate tax returns do not signify, by omission, that the Foreign Company has no ownership of the U.S. Company. In fact, the corporate tax returns indicate that some unnamed entity, which is simply not listed on the tax return, has a majority ownership of the U.S. company. Thus, the Service makes unsupported claims of discrepant corporate tax returns.

The IRS Form 1120 specifies at Schedule G that the corporate tax payer must disclose any entities or individuals owning 20% or more the company's shares, and specifically requests that the corporate taxpayer indicate whether it is owned by a foreign corporation. The petitioner did not indicate that it is owned by a foreign entity as claimed in the record, nor did it identify Mr. [redacted] as a shareholder. Further, the petitioner did not indicate on its tax returns that the beneficiary owns a 20% interest in the company, as reflected in the company's stock certificates, but rather, it indicated on the Form 1120 that he owns a 33% interest as of 2011 and 2012. Counsel suggests that this information is irrelevant, because the tax return nevertheless indicates that "some unnamed entity" has a majority ownership. However, the tax return indicates that the petitioner has three shareholders and does not identify any shareholder with a 50% or greater ownership interest in the company.

The fact that the petitioner did not submit the Form 1120 to establish a qualifying relationship in this matter does not exempt the petitioner from explaining why the company ownership reported to the Internal Revenue Service is not consistent with the ownership information provided to U.S. Citizenship and Immigration Services (USCIS). 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

Furthermore, the petitioner has submitted share certificates indicating that it issued 600 shares to [redacted] rather than to the foreign entity. At the time of filing, the petitioner indicated that [redacted]" is a former name of the foreign entity. In response to the RFE, the petitioner indicated that the foreign entity currently does business as [redacted] and submits a letter from an accountant in Mexico in support of this claim. The petitioner has not provided any other documentation to substantiate that [redacted] are one and the same entity, and this discrepancy has not been adequately resolved. Counsel's explanation that [redacted] is the name of the foreign entity's main cattle ranch does not clarify why the stock certificates were issued in this name. The name does not appear on the foreign entity's business documents despite the claim that the name is currently in use. Further, the fact that the entity is referred to as a [redacted] suggests that it may be a separate legal entity and not simply a division or fictitious name of the foreign entity.

Here, the petitioner has submitted little other than stock certificates to document the foreign entity's asserted share ownership in the petitioner, despite the director's request. In response to the director's RFE, the petitioner offered no cogent explanations for the discrepancies in its tax forms or additional evidence to

address this issue, again, despite the direct request of the director. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, counsel claims that the petitioner, as a small, closely held company, does not have a stock ledger or stock purchase agreements to submit. However, this assertion does not account for the lack of any other evidence of the claimed stock issuances, such as meeting minutes, board resolutions, or evidence of consideration paid and received for the stock. 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'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i).

On appeal, the petitioner submits a notarized "act of assembly" dated September 3, 2008, which counsel indicates provides corroborating evidence that the petitioner was established as a subsidiary of However, this document predates the formation of the foreign entity by approximately one month. Further, the document indicates that ten individual shareholders met "at the physical address of " a company name that is not mentioned elsewhere in the record. The list of shareholders who attended this meeting does not match the list of ten shareholders in the articles of organization for executed on October 6, 2008. This newly-submitted evidence does not clarify the discrepancies addressed above.

Further, the evidence of record contains no evidence to establish that existed prior to October 5, 2008, one week before the formation of the U.S. entity, despite the petitioner's claim that the beneficiary was employed by this company from 1997 until 2008. Therefore, even if the petitioner had established a current qualifying relationship with the record does not establish that this entity was the beneficiary's foreign employer for at least one continuous year in the three years preceding his admission to the United States as a nonimmigrant in 2009.

For the foregoing reasons, the petitioner has not established that it has a qualifying relationship with the foreign entity. Accordingly, the appeal will be dismissed.

B. MANAGERIAL OR EXECUTIVE CAPACITY (UNITED STATES)

The next issue to be addressed is whether the petitioner has established that the beneficiary will be employed in a managerial or executive capacity in the United States.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

(i) manages the organization, or a department, subdivision, function, or component of the organization;

(ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

(iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

(iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

(i) directs the management of the organization or a major component or function of the organization;

(ii) establishes the goals and policies of the organization, component, or function;

(iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

Finally, if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. Section 101(a)(44)(C) of the Act.

A. Facts

In a support letter, the petitioner stated that it is "dedicated to the importation of cattle from Mexico." Further, the petitioner specified that it "has begun promoting and selling 100% organic agave nectar." The petitioner indicated in the Form I-129 that it earned over $5 million in revenue in 2012 and its 2012 Form 1120 showed that the company paid $84,000 in salaries and wages during that year. The petitioner stated that the beneficiary was being transferred to the United States to act as the director of operations. The record reflected that the beneficiary has an E-1 nonimmigrant visa authorizing his employment with the petitioner and the petitioner was seeking a change of status.

The petitioner did not submit a description of the beneficiary's duties at the time of filing, nor did it indicate on the Form I-129 its current number of employees. It provided an organizational chart depicting the

beneficiary as general manager overseeing an accountant, a manager of administration, an assistant, and a secretary. Further, the chart indicated that the manager of administration supervises a livestock manager and a manager of operations. The chart shows that the livestock manager oversees five unidentified contractors while the manager of operations is depicted as supervising two employees involved in "Ragave distribution." The petitioner provided names for these two employees and the manager of administration (. The petitioner's IRS Forms 941, Employer's Quarterly Federal Tax Return, for the second quarter of 2013 indicated that it had five employees and paid $25,200 in wages.

In the RFE, the director stated that the evidence submitted by the petitioner was vague and failed to identify the beneficiary's subordinates and their duties or specifically articulate the beneficiary's duties. As such, the director requested that the petitioner submit a letter describing the beneficiary's typical managerial or executive duties and the percentage of time he spends on specific tasks. Further, the director asked the petitioner to provide an organizational chart for the company listing all of its employees, their job titles, duties, education levels and salaries. The director requested that the petitioner submit copies of the company's payroll and/or applicable federal tax documentation reflecting wages paid to all of the employees under the beneficiary's direction.

In response, the petitioner described the beneficiary's duties as director of operations as follows:

- Developing and implementing a strategic business plan. Provide direction and leadership to supervisors to assist in development and in meeting outcomes of the company's strategic plan. 15%
- Direct, plan and implement policies, procedures and establish company objectives to ensure and quality standards are met to increase profitability and to enforce ethical business and agricultural practices. 15%
- Direct and coordinate with the managers and oversee administrative staff concerning pricing, sales, distribution, importation and exportation of product. Recruit, select, and train employees to maintain a safe and productive work environment. Improve program and service quality by devising new applications and updating procedures. 10%
- Engage in special educational trainings such as conferences and lectures in general agricultural, cattle sciences, farming trends, and ranching conditions that affect cattle to aid in monitoring company trends and to forecast company expansion in the cattle, organic beef, and syrup industries. 15%
- Analyze seasonal trends and make decisions in regards to the importation, exportation and breeding of cattle to maximize efficiency and increase profits. 15%
- Work closely with international locations to provide strategic direction on commercial execution and provide support as needed. Extensive involvement with the beef cattle improvement industry (trade associations, multi-national genetic companies, breed associations, etc.) will be required to determine market needs in order to grow market share. 10%
- Network with potential clients to expand the customer base of the company. 5%
- Delegate, assign, and develop cattle, organic beef and syrup expansion plans to managers, e.g. initiating a recent project to import U.S. heifers into Mexico. 10%

- Maintains final authority to approve or deny expenditures; has final authority over all financial and accounting decisions. 5%

The petitioner submitted an updated organizational chart indicating that the beneficiary supervises the following employees: (1) - Manager of Administration; (2) - Manager of Operations; (3) - Secretary; and (4) - Accountant (independent contractor). The chart reflects that Mr. supervises - Manager of Hispanic Markets, who in turn oversees - "Demo Operator" (also listed as an independent contractor). Finally, the chart indicates tha Livestock Manager, reports to the Manager of Operations.

The petitioner provided duty descriptions, salaries and educational backgrounds for each of the employees listed above. The petitioner stated that Mr. has a bachelor's degree in animal science, earns $35,000 annually, and is responsible for organizing and coordinating company functions and meetings, ensuring that the company has all of its operating licenses, placing requested inventory and equipment orders, implementing the company's cattle sales program in South Texas and developing and implementing a cattle exportation program. The petitioner indicated that Mr has a business degree, earns $35,000 annually and is responsible for overseeing the logistics of importation of cattle, organic beef and agave syrup; ensuring proper documentation for the import and export of cattle; and completing tasks related to client relationship management, business development, marketing and sales. The petitioner indicated that Mr. has a high school diploma, earns $25,000 per year, and is responsible for classifying cattle imported per USDA standards, ensuring compliance with federal customs and USDA requirements, collecting data and reporting on the condition of the cattle. The petitioner stated that Mr. has a bachelor's degree in accounting, earns $35,000 annually, and is responsible for meeting with potential customers and distributors to negotiate contracts and coordinating with the manager of operations on shipping and transport. The petitioner indicated that Mr. is responsible for setting up display tables at local grocery stores to market the company's products and asserted that he earns $100 per demonstration. The petitioner noted that it also employs "at least two" other contract demo operators, depending on the number of demonstrations scheduled. Finally, the petitioner stated that the secretary is a part-time employee who earns $500 per month.

Furthermore, the petitioner submitted a financial statement for 2012 indicating that it paid the following wages: (1) 20,496 to ' (2) $19,200 to ' " (3) $10,840 to (4) $9,048 t (5) $7,390 t " (6) $6,695 to ' and (7) 5,904 to ' The petitioner's IRS Forms 941 for the first three quarters of 2013 indicate that the company consistently employed five workers and paid $25,200 in wages each quarter.

In denying the petition, the director stated that the beneficiary's duties were overly vague and that the beneficiary's claimed subordinates were not substantiated by the evidence submitted.

On appeal, counsel asserts that the director's conclusion that the petitioner had not submitted supporting documentation to support the beneficiary's qualifying managerial or executive capacity is "manifestly untrue," and notes that the petitioner has provided a detailed duty description for the beneficiary and for his subordinates.

In support of the appeal, the petitioner re-submits its organizational chart and employee job descriptions, adding one additional contracted demo operator. In addition, the petitioner provides evidence that Mr. Mr. and Mr. have been issued E1 visas.

The petitioner also provides IRS Form W-2 Wage and Tax Statements for 2013 reflecting that the petitioner paid $19,200 to Mr. $19,200 to Mr. $19,200 to Mr. and $600 to one of the employees identified as a contract demo operator. In addition, IRS Forms W-2 from 2012 specify that the petitioner paid $24,000 to the beneficiary, $19,200 to and $9,600 to Mr. The petitioner's Form W-3 for 2013 indicates that the petitioner paid total wages of $101,400 to a total of six employees, but the petitioner did not provide all six W-2 forms.

Counsel asserts on appeal that the beneficiary oversees and controls other supervisory, managerial, and professional employees, including the manager of administration, the accountant, and the manager of Hispanic markets. Lastly, counsel contends that the director incorrectly presumed that the petitioner cannot support the beneficiary in a managerial or executive capacity based solely on the fact that it has six employees.

B. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that it will employ the beneficiary in a qualifying managerial or executive capacity.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Reciting the beneficiary's vague job responsibilities or broadly-cast business objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The duties offered for the beneficiary in his capacity in the United States, such as developing and implementing a strategic business plan; providing direction and leadership to supervisors, planning and implementing policies, procedures and establishing company objectives; improving program and service quality by devising new applications and updating procedures; working closely with international locations to provide strategic direction; and maintaining final authority to approve or deny expenditures are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The evidence of record includes no specific examples or documentation to substantiate the beneficiary's claimed duties. Given that the beneficiary has acted as the petitioner's director of operations since 2009, it is reasonable to expect a detailed description of his actual duties. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

Beyond the required description of the job duties, United States Citizenship and Immigration Service (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

On appeal, a primary assertion of counsel is that the beneficiary qualifies as a personnel manager through his oversight and control over other managerial and professional subordinates. The statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

The petitioner has not submitted sufficient evidence to establish that the beneficiary will act as a personnel manager. The petitioner contends in the provided subordinate duty descriptions that Mr. Manager of Administration; Manager of Operations; and Mr. , manager of Hispanic markets, all earn $35,000 per year and that Mr. the livestock manager, earns $25,000. For 2013, the petitioner provided evidence that it paid $19,200 each to Mr. Mr and Mr. and it has not provided a 2013 Form W-2 for the manager of operations. The petitioner has not provided an explanation for this discrepancy in the stated salaries and it is unclear whether the beneficiary's subordinates were working full time. Further, the petitioner has not provided a Form W-2 for the secretary, nor has it identified anyone filling the "assistant" position listed on the petitioner's original organizational chart. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)).

In addition, the petitioner emphasized its agave importation business at the time of filing and submitted an organizational chart reflecting that the manager of operations oversees this function along with two employees. The petitioner did not identify this separate "Ragave distribution" department or staff on the organizational chart submitted on appeal. The petitioner has also not explained or submitted sufficient evidence to demonstrate that the company has sufficient non-managerial employees to perform the operational and administrative functions inherent to the business, as five of the petitioner's six payroll employees are claimed to be managers. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. A review of the position descriptions provided for the beneficiary's subordinates reflects that they perform duties related to inventory

and equipment orders, sales, import logistics, and cattle classification and data collection, rather than managerial or supervisory duties.

Furthermore, the petitioner has not demonstrated that the beneficiary supervises professional subordinates. In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm'r 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966).

In the current matter, the petitioner has not established that the beneficiary's subordinates are professionals. On appeal, counsel submits additional evidence indicating that the manager of administration received a "certificate of completion" in "farm and ranch operations" from However, there is no indication that this certificate of completion is the equivalent of a bachelor's degree in animal science as the petitioner asserts. Further, the petitioner provides evidence indicating that the manager of is a certified accountant in Mexico. However, there is no explanation or evidence to demonstrate that Mr. certification as an accountant is required for entry into the position he performs. In addition, although the petitioner claims that the secretary has a bachelor's degree in business, it submits no supporting evidence to substantiate this assertion, it has not provided evidence of wages paid to this employee in 2013, and it has not explained how her secretarial duties qualify her as a professional consistent with the regulatory definition. Again, 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). As such, the petitioner has not submitted sufficient evidence to establish that the beneficiary oversees professional subordinates.

As discussed above, the petitioner has provided a vague duty description for the beneficiary relevant to his proposed position in the United States, and has not submitted sufficient supporting evidence to establish that the beneficiary primarily oversees and controls supervisory, managerial or professional subordinates. Therefore, the petitioner has not demonstrated that the beneficiary qualifies as a personnel manager.

Finally, on appeal, counsel contends that the director incorrectly considered the size of the petitioner's business in denying the petition. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. *See* § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

Counsel asserts that, because the petitioner imports and distributes products which are provided by its claimed parent company, it "reasonably needs only those persons responsible for the import and export of live cattle, produced meat, and agave syrup; persons responsible for marketing and sales; and persons responsible for general administration and accounting." The petitioner appears to represent that all of these functions are performed by the four managers, one part-time secretary and a contracted accountant, while the beneficiary primarily performs duties consistent with the statutory definitions of managerial and executive capacity. However, as noted, the record does not establish that the petitioner has been paying the subordinates managers their stated wages and does not contain evidence of wages paid to the administrative office staff. Further, given the relatively large scope of the business ($6 million in sales across three product lines) the petitioner has not clarified how the beneficiary's subordinates relieve him from involvement in non-managerial functions associated with sales, marketing and other areas of the business. Finally, the petitioner indicated that the beneficiary allocates a significant portion of his time to duties that are not traditionally managerial or executive in nature, noting that he will allocate 15% of his time to analyzing trends, 15% of his time to participating in conferences and lectures, 10% of his time on "involvement with the beef cattle improvement industry" to determine market needs, and 5% of his time networking with potential clients, while many of his remaining duties, as discussed above, generally paraphrased the statutory definition of executive capacity.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that he primarily performs duties that are managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. For the foregoing reasons, the record does not support a finding that the beneficiary will be employed in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

C. MANAGERIAL OR EXECUTIVE CAPACITY (FOREIGN EMPLOYMENT)

The last issue to be addressed is whether the petitioner demonstrated that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer for at least one continuous year in the three years preceding the date of his admission to the United States as a nonimmigrant.

1. Facts

In support of the Form I-129, the petitioner stated that the foreign entity operates a 10,000 acre ranch that has been in existence since 1970 specializing in organic beef and dedicated to the export of beef to the United States. On the Form I-129, the petitioner indicated that the beneficiary worked for [redacted] entity from 1994 to 2008, but did not specify in what capacity the beneficiary worked.

The petitioner provided the beneficiary's resume which specified that he acted as a "cow calf manager" and co-owner for [redacted] from 1994 through 1996, and from 1997 to the present. In addition, the beneficiary's resume reflected that the beneficiary acted as manager of the petitioning company from 2009 to the present.

In the RFE, the director indicated that the evidence presented was insufficient to demonstrate that the beneficiary worked for the foreign entity in a qualifying managerial or executive capacity for one continuous year within three years of filing the petition, noting that the Form I-129 stated that the beneficiary had not worked for the foreign entity since 2008. As such, the director requested that the petitioner submit copies of the beneficiary's pay, personnel and training records and an explanation of his work history with the foreign entity. Further, the director asked the petitioner to provide a description of the beneficiary's duties, including the percentage of time he spent on each qualifying managerial or executive duty. The director requested that the petitioner submit a foreign entity organizational chart reflecting the names of the employees, their titles, summaries of their duties, education levels and salaries.

In response, the petitioner stated that the beneficiary worked for the foreign entity as the director and manager of its artificial insemination program from 1997 to 2008, and had discretionary authority over the day-to-day business operations of the foreign entity and that he reported directly to the owner/president. The petitioner described his duties as follows:

- Was responsible for developing, implementing and overseeing the cattle production program for the Company, specifically the breeding and cow calf operations. 10%
- Instituted policies and procedures for standardized artificial insemination of cows and heifers across all ranches, including 10%
- Established safety and quality controls for each aspect of artificial insemination, which includes purchasing of quality, reputable stud semen; inspection and care of studs; semen withdrawal; artificial insemination; oversight of cows and heifers; care of pregnant cattle; and care of calves. 10%
- Maintained ethical and humane standards in the treatment of cattle during the artificial insemination process while ensuring profitability. 10%
- Attended continuing education training, conferences, and seminars to further knowledge base and aid in Artificial Insemination Program development to maximize efficiency in cattle production and increase profits. 10%
- Met and networked with organic and hormone-free cattle ranchers in Mexico and in the U.S. to consult on latest scientific and agricultural trends and advances. 10%
- Reviewed reports generated from the Artificial Insemination Supervisor and Cowboy Manager on herd health, insemination statistics, pregnancy data and calf births. 10%
- Instilled a commitment to artificial insemination to produce purebred cattle in the Artificial Insemination department. 10%
- Provided direction and leadership to department managers and supervisors, and oversaw the remainder of the department staff such as the Artificial Insemination Cowboys. 10%
- Maintained final authority and had oversight on hiring, termination, and promotion of employees. 10%

The petitioner submitted a portion of the foreign entity's organizational chart relevant to the beneficiary's department which reflected that he acted as the director and manager of the artificial insemination program. The chart showed that he supervised the Artificial Insemination Manager, who in turn supervised three

artificial insemination cowboys and a cowboy manager. The cowboy manager was shown to supervise four additional artificial insemination cowboys. The petitioner submitted duty descriptions and salaries for each of these positions.

The petitioner further provided a letter from the foreign entity's manager of ranch administration dated December 2, 2013 confirming that the beneficiary had been employed as director and manager of the artificial insemination program from 1997 to 2008.

In denying the petition, the director stated that the evidence presented did not establish that the beneficiary's subordinates were professionals and concluded that there was insufficient evidence to substantiate the foreign entity's employment of those subordinates.

On appeal, counsel contends that the petitioner has established by a preponderance of the evidence that the beneficiary was employed in a qualifying managerial or executive capacity. Counsel emphasizes that the petitioner submitted the beneficiary's detailed duty description, established that the foreign entity employs about fifty individuals, that the beneficiary reported directly to the president of the company and that he holds a 20% ownership interest in the foreign entity. Counsel states that the beneficiary was solely responsible for "developing, implementing and managing the [foreign entity's] cattle production program." Counsel asserts that the regulations require that a beneficiary supervise or control the work of other supervisory, managerial *or* professional employees, not solely professional employees, and indicates that the petitioner has established with sufficient evidence that the beneficiary supervised an artificial insemination manager, a cowboy manager, and a general ranch manager, who in turn have subordinates of their own.

Counsel provides an updated organizational chart on appeal, noting that the previous submission included errors. The revised chart reflects that the beneficiary supervised [redacted] General Ranch Manager, who oversees Mr. [redacted] the Artificial Insemination Supervisor. Counsel states that [redacted] has replaced [redacted] as an artificial insemination cowboy and notes that the actual name of [redacted]. The petitioner further submits identification cards for each of the beneficiary's asserted subordinate managers and their subordinates. The petitioner provides foreign entity payroll documentation from January 2012 through June 2012 indicating that it paid wages and salaries to over 40 employees, including overtime, during this period. The payroll record indicated that the beneficiary earned approximately 50,000 pesos monthly.

2. Analysis

Upon review of the petition and the evidence, and for the reasons discussed herein, the petitioner has not established that the beneficiary has been employed in a qualifying managerial or executive capacity with the foreign entity. Further, although not directly addressed by the director, the record does not establish that the beneficiary was employed by the foreign entity on a full-time basis for one continuous year in the three years preceding his admission to the United States as a nonimmigrant.

The regulation at 8 C.F.R. § 214.2(l)(1)(ii)(A) defines "intracompany transferee" as:

> An alien who, within three years preceding the time of his or her application for admission into the United States, has been employed abroad continuously for one year by a firm or corporation or other legal entity or parent, branch, affiliate or subsidiary thereof, and who seeks to enter the United States temporarily in order to render his or her services to a branch of the same employer or a parent, affiliate, or subsidiary thereof in a capacity that is managerial, executive or involves specialized knowledge. Periods spent in the United States in lawful status for a branch of the same employer or a parent, affiliate, or subsidiary thereof and brief trips to the United States for business or pleasure shall not be interruptive of the one year of continuous employment abroad but such periods shall not be counted toward fulfillment of that requirement.

The petitioner indicated on the Form I-129 that the beneficiary worked for the foreign entity from 1994 to 2008. The petitioner's resume stated that the beneficiary has worked as a cow calf manager with the foreign entity from 1997 to the present. The petitioner asserts that the beneficiary has worked for the petitioner since 2009, but does not specify the exact date he commenced working for the petitioner.[1] In response to the RFE, the foreign entity clarified that the beneficiary worked for the foreign entity from 197 to 2008.

Notwithstanding statements in the record indicating that the beneficiary left his full-time employment with the foreign entity in 2008, the petitioner provides organizational charts and 2012 payroll records indicating that the beneficiary currently acts as the director of the foreign entity's artificial insemination program. The conflicting assertions with respect to the beneficiary's foreign employment make it difficult to determine when, and whether, the beneficiary was employed with the foreign entity in a qualifying managerial or executive capacity. However, the totality of the evidence in the record suggests that the beneficiary has been employed in the United States as a nonimmigrant since 2009 and the petitioner must therefore establish that the beneficiary worked for the foreign entity in Mexico on a full-time basis for one continuous year in the three years preceding his admission, in this case, between January 2006 and January 2009.

The petitioner has not provided any payroll records or organizational charts relevant to the 2006 to 2009 time period. The petitioner also submits documentation reflecting that the foreign entity was not formed until October 2008, despite claiming that the beneficiary worked for the foreign entity from 1994 until 2008. 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. 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. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). As noted above, the petitioner has not established that [redacted] are the same entity.

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[1] USCIS records indicate that the beneficiary was granted L-1A classification from January 21, 2009 through January 20, 2010. The record reflects that his current E-1 visa was issued by the U.S. Consulate in Hermosillo, Mexico on January 22, 2010.

In sum, the petitioner has submitted no supporting documentation to substantiate the beneficiary's employment for one year during the three years preceding his admission to the United States in January 2009. 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. at 165 (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r 1972)). Even if the petitioner established that he continues to work for both the petitioner and the foreign entity intermittently, there is no evidence to suggest that he has been employed by the foreign entity on a full-time basis since obtaining nonimmigrant status in the United States. The petitioner cannot rely on 2012 payroll records to establish the beneficiary's one year of employment abroad, nor can it establish that he obtained his one year of qualifying employment in Mexico while concurrently employed by the petitioner in the United States. For this reason, the petition cannot be approved. 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 reviews appeals on a *de novo* basis).

Turning to the question of whether the petitioner established that the beneficiary's foreign employment was in a managerial or executive capacity, we will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must prove that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991).

Beyond the required description of the job duties, USCIS reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the company's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the business, and any other factors that will contribute to understanding a beneficiary's actual duties and role in a business.

Counsel contends that the beneficiary qualifies as a personnel manager, since he supervises managerial, supervisory or professional subordinates with the foreign entity, including the general ranch manager, artificial insemination supervisor and cowboy manager. Once again, the statutory definition of "managerial capacity" allows for both "personnel managers" and a "function managers." *See* section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(*2*). If a beneficiary directly supervises other employees, the beneficiary must also have the authority to hire and fire those employees, or recommend those actions, and take other personnel actions. 8 C.F.R. § 214.2(l)(1)(ii)(B)(*3*).

In the present matter, the petitioner has not submitted sufficient evidence to establish that the beneficiary oversaw, or oversees, managerial, supervisory or professional subordinates. As previously discussed, the petitioner has not offered any evidence of the foreign entity's organizational structure or staffing levels during the relevant time period (2006 to 2009) but instead seeks to establish the beneficiary's employment in a managerial or executive capacity based on the foreign entity's 2012 staffing levels. Accordingly, it is impossible to determine whether the beneficiary supervised managerial, supervisory or professionals workers in the time period preceding his initial admission to the United States. For the same reason, the record does not support a finding that the beneficiary managed an essential function of the foreign entity during the relevant time period, as there is insufficient evidence that the foreign entity employed personnel to perform the non-qualifying duties associated with the ranch's artificial insemination program.

For the foregoing reasons, the petitioner has not established that the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity for one continuous year in the three years preceding his application for admission to the United States as a nonimmigrant. For this additional reason, the appeal must be dismissed.

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.