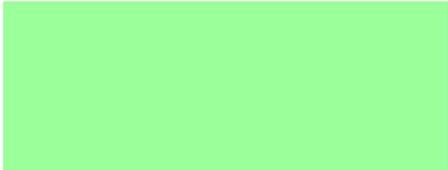




U.S. Citizenship  
and Immigration  
Services

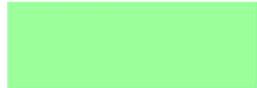
(b)(6)



DATE:

OFFICE: TEXAS SERVICE CENTER

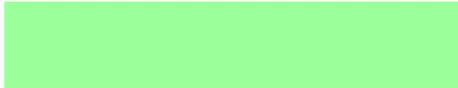
FILE:



NOV 07 2013

IN RE:

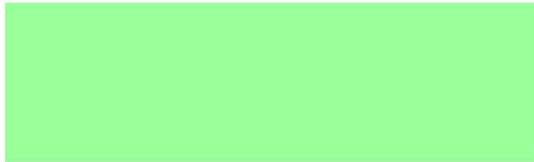
Petitioner:



Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:



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

The petitioner is a Tennessee limited liability company engaged in the land development and real estate businesses. The petitioner states that it is an affiliate of [REDACTED] located in Russia. The petitioner seeks to employ the beneficiary as its general manager. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director denied the petition, finding that the petitioner had failed to establish: (1) that it will employ the beneficiary in a qualifying managerial or executive capacity; or (2) that it has the ability to pay the beneficiary's proffered wage.

On appeal, counsel contends that the director misunderstood the structure of the company and the nature of the beneficiary's managerial and executive duties. In addition, the petitioner submits additional evidence that was previously unavailable in an attempt to establish its ability to pay the beneficiary's proffered wage.

#### I. The Law

Section 203(b) of the Act states in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

\* \* \*

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for a firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and who are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

The term "managerial capacity" means 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), provides:

The term "executive capacity" means 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.

## II. The Issues on Appeal

### A. Employment in a managerial or executive capacity

The first issue to be addressed is whether the petitioner has established that it will employ the beneficiary in a qualifying managerial or executive capacity.

In denying the petition, the director stated that the petitioner's descriptions of the beneficiary's proposed duties were overly vague. The director also acknowledged that the petitioner had submitted an organizational chart for an affiliated company called [REDACTED] but emphasized that the staffing of this company was not relevant to establishing that the petitioner has sufficient employees to support the beneficiary in a managerial or executive capacity. The director also noted discrepancies in the petitioner's submitted organizational charts and wages paid to its claimed employees. The director observed that the petitioner primarily employs part-time independent contractors, and concluded these employees could not be considered when assessing whether the beneficiary qualifies as acting in a managerial or executive capacity. The director also referenced a lease agreement which suggested that the petitioner was primarily engaged in the retail electronics business and not the real estate business as asserted. Ultimately, given the aforementioned insufficiencies and discrepancies in the evidence, the director concluded that the petitioner had failed to demonstrate that the beneficiary would be employed in a managerial or executive capacity.

On appeal, counsel asserts that the petitioner wholly owns another limited liability company called [REDACTED] with sufficient employees and income to qualify the beneficiary as a manager or executive. Counsel contends that the operations of [REDACTED] should be considered in analyzing whether the beneficiary will act in a qualifying managerial or executive capacity. Counsel states that the beneficiary's duties are "purely managerial" and asserts that the beneficiary is not responsible for the day-to-day operational duties of the business. Counsel submits an updated organizational chart, tax documents, and other evidence on appeal.

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.

In order to determine whether the beneficiary would be employed in a qualifying executive or managerial capacity, U.S. Citizenship and Immigration Services (USCIS) will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). In a support letter submitted with the petition, the petitioner provided the following explanation of the beneficiary's duties as its general manager:

Direct all operations, business policies, and decisions incident to the business expansion and land development projects of [the petitioner]. Directs the development of the business and establishes a solid business network in the region, with the strong support of local government officials. Prepares, implements, and oversees the company's strategic direction. Determines ongoing objectives, supervises the implementation of those policies and coordinates and directs land development strategies, real estate negotiations, and related marketing and logistics strategies. Establish financial and operational strategies and goals and responsible for all investments decisions. Responsible for profit, loss and asset management and for the ultimate financial viability of the company. Reviews development opportunities and recommendations of the Director of Sales and Logistics and the Property Manager and other contract consultants and property advisors to determine progress and status in attaining objectives and revises objectives and plans based on the business climate. Evaluates potential business partnerships for expansion in order to maximize investment returns.

The director later issued a notice of intent to deny (NOID) the petition, in which he acknowledged the position description provided and advised the petitioner that the beneficiary's duties were described in overly broad terms and failed to convey an understanding of the his day-to-day duties. In response to the director's NOID, the petitioner provided the following further explanation of the beneficiary's proposed duties in the United States.

- Increases management's effectiveness by recruiting, selecting, orienting, training, coaching, counseling, and disciplining managers; communicating values, strategies, and objectives; assigning accountabilities; planning, monitoring, and appraising job results; developing incentives; developing a climate for offering information and opinions; providing educational opportunities.
- Develops strategic plan by studying technological and financial opportunities; presenting assumptions; recommending objectives.
- Accomplishes subsidiary objectives by establishing plans, budgets, and results measurements; allocating resources; reviewing progress; making mid-course corrections.
- Coordinates efforts by establishing procurement, production, marketing, field, and technical services policies and practices; coordinating with Property Manager and other staff.
- Builds company image by collaborating with customers, government, community organizations, and employees; enforcing ethical business practices.
- Maintains quality service by establishing and enforcing organization standards.
- Maintains professional and technical knowledge by attending workshops; reviewing professional publications; establishing personal networks; benchmarking state-of-the-art practices; participating in professional societies.

- Contributes to team effort by accomplishing related results as needed.

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 by the petitioner, such as communicating values, strategies and objectives, developing strategic plans, establishing plans, budgets, and results measurements, establishing procurement, production, marketing, field and technical services policies and practices, and maintaining quality service, are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The petitioner does not specifically describe the strategies and objectives communicated, strategic plans developed, policies or practices established, or organizational standards enforced to ensure quality service. It is reasonable to expect the petitioner to provide some details regarding the beneficiary's specific duties, past actions and accomplishments as general manager, given the petitioner's claim that he has held this position since 2006. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. Overall, the petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of his daily routine. 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, 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 a complete understanding of a beneficiary's actual duties and role in a business. Here, a review of the totality of the evidence fails to support the petitioner's claim that it will employ the beneficiary in a qualifying managerial or executive capacity.

The petitioner has submitted three conflicting organizational charts as well as inconsistent descriptions of its corporate structure and conflicting statements regarding the nature of its business. In support of the petition, the petitioner submitted a three year lease dated July 11, 2011 for a retail electronics store located in Alabama. Elsewhere in support of the petition, the petitioner stated that it was engaged in purchasing, selling, and leasing real estate and other business development activities. The petitioner further noted that it employed two employees and eight independent contractors, including a director of sales and logistics, a property manager, a project manager, and "other contract consultants and property advisors to determine progress and status in attaining objectives and revises [*sic*] objectives and plans based on the business climate."

In the subsequent NOID, the director asked that the petitioner submit an organizational chart depicting the company's staffing as of the date the petition was filed, including all employees and independent contractors and their job titles, duties and education levels. Further, the director requested that the petitioner clarify whether the company is involved in the real estate development business or the electronics retail business. In response, the petitioner stated that it had formed a new limited liability company wholly owned by the beneficiary, called [REDACTED] to handle its "real estate development and leasing business." The petitioner submitted an organizational chart for this entity which reflects that [REDACTED] had six employees subordinate to the beneficiary and five independent contractors.

In support of the appeal, approximately six months subsequent to the NOID response, the petitioner provides a completely different organizational chart. The newly submitted organizational chart reflects two subordinates below the beneficiary, including a vice president of real estate investments and a vice president of finance and operations. Below the vice president level there are three additional employees, including the manager for property management and maintenance, a manager for land development and acquisitions, and a manager for business development. Further, the operational employees below the aforementioned managerial tier include a maintenance employee, a grounds keeper, an assistant property manager, two maintenance technicians, a "contractor," and four construction employees. In sum, the new organizational chart shows fifteen total employees or contractors.

The petitioner has submitted three conflicting organizational charts, and conflicting information regarding its business structure and focus. In light of these discrepancies, the petitioner has not met its burden to establish that its operations are sufficient to support the beneficiary primarily in a managerial or executive capacity. For instance, the petitioner originally stated that it employed a director of sales and logistics, a property manager, and a project manager. However, when asked by the director to submit an organizational chart relevant to the date of the filing of the petition, the newly provided organizational chart did not include a director of sales and logistics or a project manager and was in fact for a different company, [REDACTED]

Additionally, the submitted IRS Form 941 Employer's Quarterly Federal Tax Return relevant to [REDACTED] for the third quarter of 2012, specific to the time when the petition was filed in August 2012, reflects that [REDACTED] had only one employee and that it paid only \$7,692 in wages. The IRS Form 941 relevant to the third quarter of 2012 stands in contradiction to the petitioner's initial assertion that it had three employees and its subsequent assertion that it has six employees. Further, at the time of filing, the petitioner failed to mention the existence of [REDACTED]. It included a list with five U.S. companies owned by the beneficiary, but did not include [REDACTED] in this list, despite the fact that the company was established in June 2012. The petitioner also submits a 2012 IRS Form 1120S U.S. Income Tax Return for an S Corporation for [REDACTED] indicating that it paid \$43,293 in wages. However, a previously submitted IRS Form W-3 Transmittal of Wage and Tax Statement reflects that [REDACTED] paid \$77,271.30 in total wages in 2012. 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 fails to submit any evidence to support that it continued to have any employees or pay any wages after the formation of [REDACTED] nor has it provided sufficient supporting documentation to establish that it continues to operate the real estate investment business, or any type of business. Although the petitioner initially submitted a three-year lease for a retail electronics store as evidence of its ongoing business operations, the petitioner subsequently stated in response to the NOID that it "left the business." The petitioner has also indicated the [REDACTED] was formed in order to take over its real estate business. Further, the petitioner has also otherwise failed to demonstrate and document a location from which the claimed real estate and business development business operates, including sufficient space for its now asserted fifteen employees and/or contractors. If the petitioner itself is no longer engaged in either the retail or the real estate business, it is unclear how it continues to exist as an employer of a multinational manager or executive. While [REDACTED] appears to be the petitioner's affiliate, the petitioner in this matter is [REDACTED] and the petitioner must establish that this company is doing business and will continue to do business.

Regardless, even if the AAO were to consider [REDACTED] operations in determining whether the petitioner can support the beneficiary in a qualifying managerial or executive capacity, the petitioner has not submitted sufficient evidence to establish that [REDACTED] would be capable of supporting the beneficiary in this capacity. For instance, the petitioner provided spreadsheets, dated October 2011, indicating rental income received by [REDACTED] from [REDACTED] and a printout advertising the rental of apartments at these locations. However, the petitioner has not provided sufficient supporting documentation to establish that [REDACTED] owns and leases properties as asserted, such as title to the properties, agreement of sale and/or purchase, lease agreements with tenants, or documentation indicating the company's receipt of rent payments. Indeed, the director inquired as to this relevant information when he requested in the NOID "cop[ies] of the petitioner's contracts or agreements with real estate development/investment firms" and "receipts, invoices, and detailed reports to how the petitioner traded or exchanged goods or services."

As such, the petitioner has not submitted sufficient evidence of its operations, beyond the contradictory evidence previously discussed herein, to establish that the petitioner has sufficient operations to support the employees and contractors asserted in the petitioner's submitted organizational charts, and thereby the beneficiary in his stated managerial or executive capacity. In his decision, the director stated that independent contractors may not be considered in assessing whether a beneficiary qualifies as acting in a managerial or executive capacity. The AAO is not in agreement with this conclusion, as independent contractors may be considered in reviewing the totality of the evidence related to the beneficiary's claimed managerial or executive role, as long as their engagement is sufficiently documented in the record. However, in the present matter, IRS Form W-2 Wage and Tax Statements and IRS Form 1099s from 2012 demonstrate that only one of the beneficiary's subordinates earned more than the federal minimum wage for a full-time employee of \$15,080, casting doubt, in light of the other discrepancies and insufficiencies in the evidence, as to whether the beneficiary has sufficient managerial or supervisory subordinates to elevate him beyond that of a first-line supervisor. A managerial or executive employee must have authority over day-to-day

operations beyond the level normally vested in a first-line supervisor, unless the supervised employees are professionals. *See Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm'r 1988).

In conclusion, the petitioner has submitted overly vague duties for the beneficiary, accompanied by insufficient and inconsistent evidence relevant to its organization and operations. Accordingly, the petitioner has failed to establish that the beneficiary will be employed in a managerial or executive capacity. For this reason, the appeal will be dismissed.

### **B. Ability to Pay**

The remaining issue to be addressed is whether the petitioner has established that it has the ability to pay the beneficiary his proffered wage.

The director found that the petitioner had not demonstrated with sufficient evidence that the petitioner has the ability to pay the beneficiary's proffered wage. The director noted that the petitioner had insufficient net income or assets, as reflected in Schedule C of the beneficiary's most recent IRS Form 1040 U.S. Individual Income Tax Return from 2010, to pay the beneficiary's proffered wage of \$52,000.

On appeal, counsel references additional documentation submitted on the record, specifically, an IRS Form 1120S, U.S. Income Tax Return for an S Corporation, for the petitioner's affiliate [REDACTED] reflecting that this company earned net income of \$235,300 in 2012, thereby demonstrating sufficient income to pay the beneficiary his proffered wage of \$52,000.

8 C.F.R. § 204.5(g)(2) states:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

In determining the petitioner's ability to pay the proffered wage, USCIS will first examine whether the petitioner employed the beneficiary at the time the priority date was established. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, this evidence will be considered *prima facie* proof of the petitioner's ability to pay the beneficiary's salary. In the present matter, the petitioner did not submit sufficient documentation that wages have been

paid to the beneficiary during his time of asserted employment with the petitioner as an L-1A nonimmigrant intracompany transferee since October 2006. The petitioner submitted no evidence that the beneficiary previously received wages from the petitioner during the almost six years that the beneficiary was employed by the petitioner in the United States.

The petitioner did submit a letter dated January 25, 2013 from a bookkeeper, who stated that since it is a "sole member LLC" owned wholly by the beneficiary, and not a "C or S corporation," that the petitioner's income and expenses are reflected on the beneficiary's IRS Form 1040, U.S. Individual Income Tax Returns. The accountant further stated:

As a sole member LLC [the beneficiary] does not receive a paycheck. He receives his personal money as an owner draw. Owner draw is determined by subtracting expenses from income. At the end of the year any taxes he owes is determined on his 1040 tax return.

The rental business that belongs to [the beneficiary] has shown a positive cash flow for the last three years as shown in the enclosed cash flow statement.

As an alternate means of determining the petitioner's ability to pay, the AAO will next examine the petitioner's net income figure as reflected on the federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc. v. Sava*, the court held the Immigration and Naturalization Service (now USCIS) had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than on the petitioner's gross income. 623 F. Supp. at 1084. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. at 537; see also *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. at 1054.

In the current matter, based on counsel's assertions, the AAO will look to Schedule E of the beneficiary's IRS Form 1040 U.S. Individual Income Tax Return to determine the petitioner's net income, since the petition's priority date falls on August 29, 2012. The aforementioned 2011 individual tax return for the beneficiary reflects that the beneficiary incurred a loss of \$110,649, or an insufficient amount to compensate the beneficiary's proffered wage of \$52,000.

Finally, if the petitioner does not have sufficient net income to pay the proffered salary, the AAO will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets

and current liabilities. Net current assets identify the amount of "liquidity" that the petitioner has as of the date of filing and is the amount of cash or cash equivalents that would be available to pay the proffered wage during the year covered by the tax return. As long as the AAO is satisfied that the petitioner's current assets are sufficiently "liquid" or convertible to cash or cash equivalents, then the petitioner's net current assets may be considered in assessing the prospective employer's ability to pay the proffered wage.

In the present matter, the petitioner has not submitted sufficient evidence to establish that the petitioner has sufficient assets to compensate the beneficiary his proffered wage. Counsel submits on appeal a 2012 IRS Form 1120S for the petitioner's affiliate, [REDACTED] demonstrating that this company earned \$235,350 in net income. However, the net income of an affiliate wholly owned by the beneficiary is not relevant to establishing whether the *petitioner* has the ability to pay the beneficiary's proffered wage.

Therefore, the petitioner has not established with sufficient evidence that the petitioner has the ability to pay the beneficiary's proffered wage of \$52,000. 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 alternate 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.