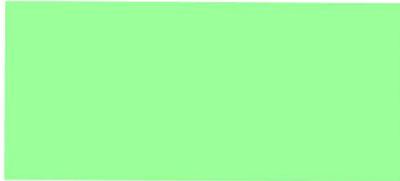


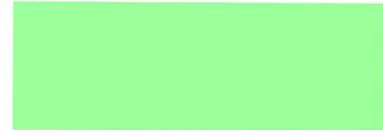


U.S. Citizenship  
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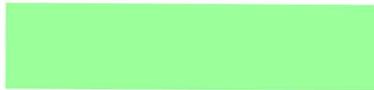
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DATE: **MAR 31 2014** OFFICE: TEXAS SERVICE CENTER

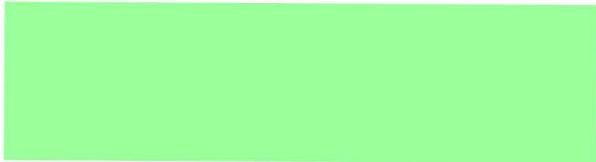


IN RE: Petitioner:  
Beneficiary:



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 employment-based immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner filed the Form I-140, Immigrant Petition for Alien Worker, 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 petitioner, a New York corporation established in 1997, is a newspaper publisher. It claims to be a subsidiary of [redacted] located in Turkey. The petitioner seeks to employ the beneficiary in the position of publisher.

The director denied the petition based on four independent grounds of ineligibility. Specifically, the director found that the petitioner failed to establish: (1) that it has a qualifying relationship with the foreign entity; (2) that the foreign entity employed the beneficiary in a qualifying executive or managerial capacity; (3) that it will employ the beneficiary in a qualifying managerial or executive capacity; and (4) that the foreign entity is doing business in a regular, systematic, and continuous manner as defined by the regulations.

On appeal, counsel asserts that the director's denial was contrary to the statute and regulations and against the weight of the evidence submitted. The petitioner states that it has established by a preponderance of the evidence that all eligibility requirements have been met. The appeal consists of counsel's brief and additional documentary evidence.

**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.

Additionally, the regulations at 8 C.F.R. § 204.5(j)(3)(i) state that the petitioner must provide the following evidence in support of the petition in order to establish eligibility:

- (A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or
- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;
- (C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and
- (D) The prospective United States employer has been doing business for at least one year.

## II. Qualifying Relationship

The first issue to be discussed is whether the petitioner has established that it has a qualifying relationship with the foreign entity. To establish a "qualifying relationship" under the Act and the regulations, the petitioner must show that the beneficiary's foreign employer and the proposed U.S. employer are the same employer (i.e. a U.S. entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." See generally § 203(b)(1)(C) of the Act, 8 U.S.C. § 1153(b)(1)(C); see also 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary").

The pertinent regulation at 8 C.F.R. § 205.5(j)(2) defines a "subsidiary" as follows:

*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.

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.

The petitioner has consistently claimed to be a subsidiary of the Turkish company [REDACTED] based on the following stock ownership: 60 percent (300 of 500 issued shares) by [REDACTED] percent (100 shares) by the beneficiary, and 20 percent (100 shares) by [REDACTED]. The petitioner indicates that it has had a total of nine different shareholders since its incorporation in 1997.

In request for evidence (RFE) issued on May 18, 2011, the petitioner was instructed to submit copies of all stock certificates issued since its establishment and a copy of its stock ledger. The petitioner provided copies of stock certificates 3, 5, 7, 8 and 11 prior to the adjudication of the petition. The petitioner also submitted several documents titled "Written Consent and Action in Lieu of a Meeting of the Board of Directors," in which two directors of the company, [REDACTED] and [REDACTED] authorized the transfer of shares and issuance of new stock certificates reflecting each successive owner's shareholding. The petitioner indicated that it does not maintain a stock ledger and it provided no explanation for the absence of the missing certificates. The director denied the petition, in part, based on the petitioner's failure to provide the requested evidence. See 8 C.F.R. § 103.2(b)(14).

On appeal, counsel asserts the petitioner submitted stock certificates showing the company's current ownership as stated in the record and accounted for all outstanding shares. Counsel contends that the director's requests for copies of all stock certificates issued to date indicated that he was "seeking evidence beyond the standard of proof applicable to this case." Counsel further asserts that the director "did not afford any probative value to [the petitioner's] share lineage."

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.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 204.5(j)(3)(ii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

Therefore, it was appropriate for the director to request copies of all share certificates issued by the petitioner to date, as the record indicated that each current claimed owner had received their shares from a former owner. The petitioner now submits additional stock certificates on appeal and asserts that they could not be provided in response to the RFE because the director provided only 33 days for the petitioner to respond. However, the petitioner did not indicate at the time it responded to the RFE that it was submitting an incomplete response. In fact it indicated that all issued stock certificates were accounted for in its response. Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO need not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaighbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted the documents in response to the director's request for evidence. *Id.*

Nevertheless, on appeal, the petitioner now submits its stock certificate numbers 2, 4, 5, 6 and 10 for the first time and provides a history of the company's ownership. The petitioner also introduces a revised version of the company's "share lineage" as counsel states that "[the petitioner] was founded with 200 shares of company stock. Ownership interests were controlled by three individuals: [REDACTED] (100 shares), [REDACTED] (50 shares)."

In response to the RFE, the petitioner had indicated that all certificates were being submitted and stated:

Please note that the initial shareholders of [the petitioner] were [REDACTED] (50 shares) and [REDACTED] (50 shares) and [REDACTED] (100 shares). The former two shareholders sold their shares to [the beneficiary] effective January 1, 2001. [REDACTED] sold his shares to [REDACTED] owns 300 shares of [the petitioner].

Several other unresolved discrepancies and omissions in the petitioner's evidence remain.

First, none of the nine submitted stock certificates has a date of issuance recorded despite there being a space to indicate the date on each certificate. These omissions have not explained and the lack of dates hinders USCIS' ability to trace the ownership interests of the company, particularly because many of the certificates were inexplicably issued out of order.

Second, the record reflects that none of the certificates has been canceled. According to the written consents of the Board of Directors, the transfer of shares recorded on the reverse side of the certificates was also to be

reflected in the issuance of new certificates each time a new owner acquired transferred shares. While new certificates were issued, the old certificates were not canceled.

Third, the petitioner has not accounted for the issuance of its stock certificate No. 1, and instead the record seems to indicate that the claimed original shareholders received certificate Nos. 2, 3 and 4. At the same time, the petitioner submitted an "Indemnification and Lost Stock Certificate Affidavit" executed by [REDACTED] on April 26, 2007, which indicates that he previously owned and lost stock certificate number 1 (100 shares). There is no other acknowledgement that he was a founding stockholder of the company. According to [REDACTED] affidavit "the corporation is willing to issue a new certificate evidencing ownership of such shares upon being indemnified against any loss resulting from claims by any one presenting the original certificate." [REDACTED] indicated that he "indemnifies and agrees to hold [the petitioner] harmless from and against any liability of any kind to anyone resulting from the presentation of an original certificate No. 1," in consideration of the issuance of a new certificate.

It is unclear when [REDACTED] acquired certificate number 1 or how this lost certificate affects his current ownership interest in the company. Elsewhere in the record, the petitioner indicated that [REDACTED] acquired his current 100 shares from [REDACTED] on January 1, 2005. According to the Board of Directors written consent, the company was to issue 100 shares to [REDACTED] on stock certificate No. 11. The petitioner submitted a copy of this certificate indicating that [REDACTED] owns 100 shares, but there is no basis to conclude that this is the re-issued certificate mentioned in his affidavit, rather than the certificate issued as a result of his purchase of shares from [REDACTED]. Moreover, other evidence in the record, namely the multiple "Written Consent and Action in Lieu of a Meeting of the Board of Directors," dating back to May 2000 are signed by [REDACTED] in his capacity as a director, suggesting that his role with the company pre-dates the issuance of shares to him in 2005. If he has continuously held the 100 shares issued to him on stock certificate number 1, and if stock certificate number 1 was the original certificate issued by the company, this fact would call into question the petitioner's subsequent claims regarding its ownership.

Similarly, the petitioner has not established whether its stock certificate no. 9 is issued and outstanding. According to a Written Consent and Action in Lieu of a Meeting of the Board of Directors, certificate no. 9 was to be issued to [REDACTED] on July 1, 2000 pursuant to his purchase of 100 shares from [REDACTED] the owner of stock certificate No. 6. However, the record reflects that [REDACTED] received stock certificate no. 10. Further, the certificate issued to [REDACTED] presumably on or about July 1, 2000, was signed by the beneficiary in his capacity as "president" five months before he became a shareholder in the company. The petitioner did not explain this apparent discrepancy, and there is no evidence that the beneficiary held the office of president of the petitioning company or that he had any connection with the company prior to January 1, 2001. Absent clarification on the status of stock certificate no. 9, the AAO cannot determine whether additional shares of the company are issued and outstanding.

There are other similar inconsistencies in the record. For instance, according to the written consents from the Board of Directors accompanying the transfer of 50 shares from [REDACTED] to the beneficiary and 50 shares from [REDACTED] to the beneficiary on January 1, 2001, he was to receive stock certificates No. 8 and 10. The record reflects that stock certificate no. 10 had been issued to [REDACTED] the previous year, and stock certificate no. 8 was issued to the petitioner's claimed parent company in 2007. The only certificate issued to

the beneficiary was stock certificate no. 7 for 100 shares. Again, since none of the share certificates are dated, none of the certificates have been canceled, there is no stock ledger, and information in the accompanying written consents from the Boards of Directors does not consistently match the stock certificates, it is difficult for USCIS to determine the exact ownership of the company.

Finally, the record contains a letter dated April 17, 2008 from the foreign entity's director of human resources, who stated that the beneficiary "owns 60 percent of [REDACTED] USA shares," in direct contradiction to the petitioner's claims that it is owned by [REDACTED].

A few errors or minor discrepancies are not reason to question the credibility of an alien or an employer seeking immigration benefits. *See, e.g., Spencer Enterprises Inc. v. U.S.*, 345 F.3d 683, 694 (9th Cir., 2003). However, anytime a petition includes numerous errors and discrepancies, and the petitioner fails to resolve those errors and discrepancies after USCIS provides an opportunity to do so, those inconsistencies will raise concerns about the veracity of the petitioner's assertions. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought. *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010). The "preponderance of the evidence" standard requires that the evidence demonstrate that the applicant's claim is "probably true," where the determination of "truth" is made based on the factual circumstances of each individual case. *Id.* at 376 (citing *Matter of E-M-*, 20 I&N Dec. 77, 79-80 (Comm'r 1989)). In evaluating the evidence, the truth is to be determined not by the quantity of evidence alone but by its quality. *Id.* Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is "probably true" or "more likely than not," the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardozo-Fonseca*, 480 U.S. 421 (1987) (discussing "more likely than not" as a greater than 50 percent probability of something occurring). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.

Here, due to the discrepancies and omissions in the submitted documentation, the director's denial of the petition based on a lack of evidence of the petitioner's qualifying relationship with the foreign entity was appropriate. In light of these deficiencies, the appeal will be dismissed.

### III. Employment in a Managerial or Executive (Foreign)

The next issue to be addressed is whether the petitioner has established that the beneficiary was employed in a qualifying managerial or executive capacity with the foreign employer.

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.

The director concluded that the petitioner had not submitted sufficient evidence to establish that foreign entity employed the beneficiary in a managerial or executive capacity. The director noted the prevalence of non-qualifying operational duties in the beneficiary's duty description.

On appeal, counsel asserts that the petitioner has established by a preponderance of the evidence that the beneficiary was employed in a managerial or executive capacity in one of the three years prior to his admission to the United States in March 1999. Counsel asserts that the foreign entity employed the beneficiary as "associate manager, import and export, and deputy general director" from December 1993 to December 1997 and later as legal counsel from December 1997 to March 1999. Counsel states that the beneficiary qualified as a personnel manager, function manager and executive in his capacity as associate manager, import and export, and as a function manager in his capacity as legal counsel.

Upon review, and for the reasons discussed herein, the petitioner has not established that the foreign entity employed the beneficiary in a qualifying managerial or executive capacity.

In order to determine whether the beneficiary was 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 support of the Form I-140 Petition for an Immigrant Worker, the petitioner provided the following description of the beneficiary's duties with the foreign employer in his capacity as associate manager, export and import and deputy general director from December 1993 to December 1997:

[The beneficiary] was the person in charge of all matters related to import and export of goods needed for the company's operations throughout Turkey, including purchasing paper, press equipment, and other auxiliary equipment, which formed the major expenditures for the newspaper operations. As nearly all of the required equipment had to be imported from outside Turkey, he managed and oversaw an essential function of the company's business. As Associate Manager, Import and Export and Deputy General Director, [the beneficiary] oversaw an annual \$2 million budget and supervised 15 professional employees. With respect to these employees, [the beneficiary] had authority to recommend hiring and firing, as well as other personnel matters such as performance reviews, scheduling and reviewing work, and retaining consultants or contractors. He had the authority to expend the company's resources in connection with his import/export function, and negotiated contracts and other legal documents. [The beneficiary] received only general direction from higher level executives, such as the General Director, and exercised discretion over day-to-day operations of the import/export function.

The petitioner also noted that the beneficiary was employed as legal counsel for the foreign employer from December 1997 up to his initial B1/B2 entry into the United States in March 1999. The petitioner did not provide a duty description for this position at the time of filing.

In the RFE, the director requested that the petitioner submit a definitive statement from the foreign entity describing the beneficiary's job duties. The director asked that the foreign entity provide a detailed list of his duties and the percentage of time he spent on each task. The director also requested the job titles and job descriptions for the employees that the beneficiary supervised while working abroad and requested evidence of wages paid to the subordinate employees.

In response, the petitioner reiterated the previously provided job description and included the following breakdown of how the beneficiary allocated his time:

More specifically, as Associate Manager, Import and Export, and Deputy General Director, [the beneficiary] was responsible for overseeing the approval of purchasing decisions (15%). He oversaw and approved accounting books (25%) and he evaluated balance sheet data (15%). In addition, he oversaw the communication with the company's major vendors and customers (15%) and managed the activities of his subordinates (15%).

Further, the petitioner submitted the following duty description for the beneficiary in his capacity as legal counsel for the foreign employer:

From December 1997 until March 1999, [the beneficiary] again<sup>1</sup> served as Legal Counsel [for the foreign employer] until his departure to the United States in March 1999. In this position, [the beneficiary] **did not** directly supervise any subordinate workers – rather, he managed the function of providing legal counsel to the company. As legal counsel, [the beneficiary] was responsible for overseeing all domestic and international contract negotiations and contract management matters for the organization which took 60% of his time. He also represented the newspaper in labor negotiations and legal proceedings involving the company's employees which he spent 40% of his time.

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 beneficiary are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. The petitioner stated that the beneficiary's duties included approving purchasing decisions,

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<sup>1</sup> The petitioner also asserts that the beneficiary served as legal counsel for the foreign entity from September 1990 to December 1993.

overseeing and approving accounting books, evaluating balance sheets, and overseeing communication with the company's major vendors and customers. Although the director requested information regarding the amount of time the beneficiary's allocated to specific tasks, the petitioner assigned percentages to these broad areas of responsibility and provided no additional information. In the case of each aforementioned duty, the petitioner has not provided details, specifics or supporting documentation to give these asserted duties more probative value, such as specific purchasing decisions made or vendors and customers with which the beneficiary had direct contact. Further, with respect to the beneficiary's asserted role as legal counsel, the petitioner provided an even broader breakdown of how he allocated his time without specifying any day-to-day tasks. 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)). Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature, otherwise meeting the definitions would simply be a matter of reiterating the regulations. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

On appeal, counsel asserts that the beneficiary qualified both as a personnel and function manager in his former capacity as the associate manager, import and export, and deputy general director. Counsel also states the beneficiary qualified as a function manager pursuant to his role as legal counsel. 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). 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).

The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). The term "essential function" is not defined by statute or regulation. If a petitioner claims that the beneficiary is managing an essential function, the petitioner must furnish a written job offer that clearly describes the duties to be performed in managing the essential function, i.e. identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. See 8 C.F.R. § 204.5(j)(5). In addition, the petitioner's description of the beneficiary's daily duties must demonstrate that the beneficiary manages the function rather than performs the duties related to the function. An employee who "primarily" performs the tasks necessary to produce a product or to provide services is not considered to be "primarily" employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties).

The petitioner has not submitted sufficient evidence to establish that the beneficiary qualified as a personnel manager in his capacity as associate manager and deputy general director. The petitioner stated that the beneficiary supervised "15 professionals" in this role. It submitted an undated foreign organizational chart reflecting that the beneficiary had five subordinates, including a driver and a secretary and three employees depicted as supervisors (an accounting generalist, finance generalist, and a purchasing generalist). The accounting generalist was depicted as having two subordinates, the finance generalist as having three subordinates and the purchasing generalist as having five subordinates. However, the petitioner did not submit sufficient supporting evidence to establish that the foreign entity employed the individuals depicted on the organizational chart at the time the beneficiary worked for the company. 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.

The director specifically requested that the petitioner submit tax forms, or other salary information, for the employees that were supervised by the beneficiary. However, the petitioner did not submit this documentation. The petitioner stated that tax forms and salary information is only archived for 10 years, and therefore not available. The non-existence or other unavailability of required evidence creates a presumption of ineligibility. 8 C.F.R. § 103.2(b)(2)(i). If a required document does not exist or cannot be obtained, the petitioner must demonstrate this and submit secondary evidence pertinent to the facts at issue. *Id.* The petitioner was able to provide an organizational chart with names and therefore appears to have maintained some type of records dating back to the relevant time period.

Regardless of whether the evidence is available, it is nonetheless the petitioner's burden to demonstrate that these employees worked for the foreign entity during the asserted period and that beneficiary's subordinates were supervisors, managers or professionals. However, the petitioner submitted only one-sentence job descriptions for these employees that provide little insight into their actual duties and failed to identify any supervisory or managerial duties. For instance, the duty description for the accounting generalist states that he "coordinate[d] the accounting activities, prepare[d] balance sheet[s], overs[aw] budget." Also, although the petitioner notes that all three of the generalists the beneficiary supervised had an "undergraduate" education, no documentation or evidence is provided to support this assertion. Further the record does not support the petitioner's claim that the beneficiary supervised "15 professionals" given that the supervised employees included three office boys, a driver, a clerk and a secretary. As such, the petitioner has not demonstrated with sufficient evidence that the beneficiary acted as a personnel manager in his capacity as associate manager, import and export, and deputy general director.

Additionally, the petitioner has not established that the beneficiary qualified as a function manager in either of his claimed positions with the foreign employer. As discussed above, the petitioner has failed to clearly describe beneficiary's duties in managing the claimed essential functions. *See* 8 C.F.R. § 204.5(j)(5). Additionally, the petitioner's assertion that the beneficiary acted in a managerial capacity as legal counsel for the foreign employer without any subordinate employees is not credible. While the beneficiary may have held authority to negotiate contracts and resolve labor issues as counsel, the petitioner has not established that he singlehandedly managed these activities for a company claimed to have over 800 employees. The petitioner did not offer an organizational chart reflecting the organization of its legal department, but instead submitted a chart depicting the beneficiary as legal counsel, reporting to the general manager, with no

additional employees to assist him with legal issues. The petitioner has not established that the beneficiary acted as a function manager in either of his capacities with the foreign employer.

Lastly, counsel contends that the beneficiary qualified as an executive pursuant to his former role as associate manager, import and export, and deputy general director. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

The petitioner has not provided sufficient evidence to demonstrate that the foreign entity employed the beneficiary in an executive capacity. As noted, the petitioner provided a vague and non-probative duty description. As such, the record does not specifically discuss goals and policies that were established by the beneficiary or management decisions that were made by the beneficiary. Also as previously discussed, the petitioner did not submit sufficient evidence to establish that the beneficiary had managerial subordinates as necessary to elevate him in a complex organizational hierarchy or allow him to primarily focus on broad goals and policies. In fact, the petitioner compared the beneficiary's duties to that of a purchasing manager, a position not typically classified as executive in nature.

The petitioner has not provided sufficient evidence to demonstrate that foreign entity employed the beneficiary in a qualifying managerial or executive capacity. Accordingly, the appeal will be dismissed.

#### **IV. Employment in a Managerial or Executive Capacity (United States)**

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

In denying the petition, the director observed that the duty description provided for the beneficiary was overly vague. The director also noted that the petitioner had failed to submit an organizational chart for the petitioner, and accompanying duties, titles and salaries for the beneficiary's subordinates. The director further referenced the petitioner's failure to submit IRS Form W-2's relevant to the beneficiary subordinates, as directly requested by the director.

On appeal, counsel asserts that the director misinterpreted the support letter provided by the petitioner and failed to consider all of the evidence submitted on the record. Counsel states that the beneficiary supervises

the work of other managerial, supervisory and professional employees, thereby qualifying him as a personnel manager. Counsel also asserts that the beneficiary qualifies as an executive. Counsel further notes that the director's determination that the petitioner failed to submit requested evidence was in error, since the petitioner provided a detailed organizational chart and the requested tax documentation.

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

Again, 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 support of the Form I-140, the petitioner described the beneficiary's proposed duties in the capacity of publisher as follows:

[The beneficiary] will be responsible for overseeing the effectiveness of managers under his supervision; oversee the financial results of the company; and have final say on all contract negotiations. As the executive representative of [the foreign employer's] board of directors to [the petitioner], he will answer only to [redacted] the executive in charge and part-owner of [the foreign employer]. [The beneficiary] will have management authority over all employees of [the petitioner], including the CEO, Advertisement Manager, IT Manager, and Financial Analyst, as well as several News Correspondents, including hiring and firing, vacation requests, promotion and training requirements.

As Publisher, [the beneficiary] makes all strategic decisions about which media outlet channels the company should utilize, which service providers to have business relationships with, and which product suppliers to contract with. He is responsible for making executive decisions on whether and how to expand the business, including hiring and promoting employees, and negotiating and signing contracts on behalf of the company. [The beneficiary] prepares company budgets and determines methods for reaching budgetary goals. He decides whether and how to expand channels for advertising sales, and what partnerships to enter into. In fulfilling his duties as Publisher of [the petitioner], [the beneficiary] receives only general direction from the overseas parent company.

In the RFE, the director requested that the petitioner submit a definitive statement describing the beneficiary's job duties. The director asked that the petitioner provide a detailed list of duties and the percentage of time to be spent on each task. In response, the petitioner provided the following additional explanation:

Having begun the process of building up the [petitioner] since 2005, [the beneficiary] will continue to be the leading force in shaping the direction, goals, and policies of [the petitioner].

As Publisher, [the beneficiary] will exercise discretionary decision-making authority with respect to the activities of the company and its expansion. He will continue to establish the company's salary structure, pay policies, recruiting and hiring, and performance appraisal programs (10%). He will be responsible for setting and controlling the company's budget, including having authority to expend the company's resources, contract with outside providers, and enter into contracts on behalf of the company (10%). [The beneficiary] will review reports from other employees concerning the day-to-day operations of the company (15%); and review the work performed by the other employees of the company (10%). He will be responsible for developing [the petitioner's] strategic initiatives (20%); approve and evaluate the success of new initiatives (15%); and oversee the expansion of the business in the United States (20%).

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).

Again, 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 are overly vague and provide little probative value as to the beneficiary's actual day-to-day activities. Despite the petitioner's claim that the beneficiary has been the petitioner's publisher since 2005, the petitioner offers no specifics or details regarding budgetary decisions made, strategic policies or goals implemented, or business expansion accomplished. Indeed, the beneficiary's provided duties could be the general duties of an executive or manager in any industry and provide little insight into what he does within the context of the petitioning organization. Specifics are clearly an important indication of whether a beneficiary's duties are primarily executive or managerial in nature. 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. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. at 1108, *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at \*5 (S.D.N.Y.).

In addition, there are discrepancies and omissions in the record that have not been resolved. As noted above, the petitioner failed to provide details and specifics regarding the beneficiary's daily activities. The petitioner did submit various distribution contracts entered into with third parties. However, despite stating that the beneficiary would be responsible for negotiating and signing contracts on behalf of the company, none of the four contracts on the record are signed by the beneficiary nor is any evidence submitted to demonstrate that

the beneficiary was involved in the negotiation of these contracts.<sup>2</sup> In fact, a lease submitted on the record dated March 31, 2006 is signed by [REDACTED] who is listed as the publisher of the petitioner.

Additionally, the petitioner submitted contradictory information regarding the number and types of subordinates the beneficiary will supervise. In a support letter submitted with the petition in 2007, the petitioner stated that the beneficiary would be supervising an "Advertisement Manager, IT Manager, and Financial Analyst, as well as several News Correspondents." The petitioner did not submit an organizational chart at the time of filing, nor did it provide position descriptions for these claimed subordinates. The record does include an organizational chart dated May 1, 2008. This chart does not include an IT manager or a financial analyst, but a CEO/president, a business manager, a business administrative employee, an advertising and marketing employee, a customer representative, a writer, a political analyst and two correspondents. Later, in response to the director's RFE, yet another organizational structure is presented including a CEO/president, columnist, web editor, editor, education editor, a PR/marketing employee, accountant, three correspondents, and a press review employee. The only job duties provided for the beneficiary's subordinates accompany the most recent organizational chart submitted in 2011, which identifies 12 subordinate employees. A petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971). Notably, the petitioner did not claim to employ any editors at the time of filing and it is unclear who would have performed this role.

On appeal, counsel contends that the beneficiary will supervise other managers, supervisors or professionals, and thus qualifies as a manager based on his supervision of personnel. However, the petitioner did not provide position descriptions for the employees claimed to report to the publisher position at the time of filing, nor did it provide an organizational chart showing the hierarchy of the company. The AAO cannot determine that the beneficiary would be supervising supervisors, managers or professionals based solely on the job titles of the individuals he would supervise.

In addition, the petitioner contends that the beneficiary qualifies as an executive in his current, and prospective, role as publisher. The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of managerial employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.*

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<sup>2</sup> The AAO notes that the record demonstrates that all provided contracts were executed after the beneficiary's asserted commencement of employment as publisher in 2005.

The petitioner has not provided sufficient evidence to establish it will employ the beneficiary in an executive capacity. As noted, the petitioner has submitted a vague and non-probative duty description for the beneficiary that provides no detail regarding the nature of his day-to-day tasks, despite the petitioner's claims that he already holds this position as an employee of the foreign entity. Additionally, the petitioner has submitted inconsistent organizational charts without sufficient explanation. As referenced above, an individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the enterprise as an owner. The petitioner must demonstrate that the beneficiary operates within a complex organizational hierarchy as necessary to allow the beneficiary to primarily focus on directing management and implementing goals and policies. The petitioner has not provided sufficient evidence to establish that the beneficiary is primarily focused, and will focus, on these duties. Therefore, the petitioner has not established that the beneficiary will act primarily in an executive capacity as defined by the Act.

Finally, the AAO observes that the petitioner consistently asserts that the beneficiary has been in the United States in I nonimmigrant status and, since 2005, has acted in the capacity of publisher for the petitioner on behalf of the foreign entity. However, the petitioner has not submitted evidence to support these assertions. In fact, the record does not include any specifics, details, or supporting documentation regarding the beneficiary's actions as publisher despite its claims that he has been working in this role since 2005. Rather, there is evidence in the record suggesting that others have been acting in the capacity of publisher in direct contradiction to the petitioner's statements. Further, the foreign entity's claimed acquisition of the petitioner occurred in 2007, not 2005. Thus, the petitioner's claim that the foreign entity has compensated the beneficiary to serve as the petitioner's publisher on its behalf since 2005 has not been adequately explained. The record does not contain adequate support for the petitioner's claim that the beneficiary currently holds this position as an I nonimmigrant and employee of the foreign entity. While there is no requirement that the beneficiary be a current employee of the petitioning company to meet the eligibility criteria for this classification, the absence of documentation to support the petitioner's claims raises questions regarding the U.S. job offer.

In conclusion, the petitioner has provided a vague and non-specific duty description for the beneficiary in his proposed capacity with the petitioner and has failed to provide information regarding the nature of the duties performed by his subordinates as of the date of filing. For this additional reason, the appeal must be dismissed.

#### **V. Doing Business Abroad**

The final issue addressed by the director is whether the petitioner has established that the foreign employer is doing business as defined by the regulations.

The regulations at Title 8 C.F.R. § 204.5(j)(2), state that "doing business" means the regular, systematic and continuous provision of goods and/or services by a firm, corporation or other entity and does not include the mere presence of an agent or office."

The petitioner stated that the foreign employer, [REDACTED], is a media and publishing conglomerate based in Turkey known for publishing the country's largest daily newspaper [REDACTED]. Additionally, the petitioner stated that the foreign employer also publishes additional media including the magazines [REDACTED] and that it has a substantial online site dedicated to providing the news in Turkey.

As noted, the director found that the petitioner had not demonstrated that the foreign employer was doing business in a regular, systematic and continuous fashion as defined by the regulations. The director noted that the petitioner had not submitted any evidence beyond tax documentation reflecting that the foreign employer had paid taxes, and that this alone, did not establish the foreign employer as doing business.

On appeal, counsel states that the petitioner had established by preponderance of the evidence that the foreign employer is doing business based on its submission of substantial documentation related to the foreign employer's operations. On appeal, the petitioner submits the front pages of numerous publications printed by the foreign employer including [REDACTED].

Upon review, the petitioner has established that the foreign entity is doing business as defined in the regulations.

The director concluded that the petitioner had only submitted evidence illustrating that the foreign employer had paid taxes in Turkey, and in turn, that this was not sufficient to establish that the foreign employer was doing business in a regular, systematic, and continuous fashion. The AAO concurs with counsel that the director's conclusion was in error. The petitioner submitted other substantial evidence of the foreign employer's operations, including balance sheets and financial information for multiple years showing substantial income, screenshots of the foreign employer's news website, numerous examples of publications and periodicals printed by the foreign employer, detailed information regarding the foreign employer's circulation of newspapers abroad, along with evidence of taxes paid by the foreign employer in Turkey.

In sum, the AAO finds that the evidence is sufficient to establish by a preponderance of the evidence that the foreign entity is doing business consistent with the regulations. The director's determination with respect to this ground for denial will be withdrawn.

## VI. Employment Abroad

Although not addressed in the director's decision, the record as presently constituted does not contain sufficient evidence that the foreign entity employed the beneficiary for one year during the requisite three-year time period.

The pertinent regulation at 8 C.F.R. § 205.5(j)(3)(i) states that the petitioner must submit the following evidence to qualify the beneficiary as a multinational executive or manager:

- (i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

\* \* \*

- (B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity

The petitioner indicates that the foreign entity employed the beneficiary in a managerial or executive capacity from 1993 until March 1999, when he was admitted to the United States as a B-2 visitor. The beneficiary was last admitted to the United States on September 21, 1999.

The petitioner indicates that the beneficiary was granted I nonimmigrant status in October 2001, and that the status was approved based on his "continued service to [redacted] as a journalist and editor. Since 2005 he has been serving as Publisher of [the petitioner] while remaining employed by [redacted]" In support of the petition, the petitioner provided pay stubs as evidence of the beneficiary's employment with [redacted] However, the documents were dated January 2000 through December 2002. The petitioner does not indicate that the beneficiary was an employee of [redacted] during the period from March 1999 until October 2001 so it is unclear what role he held at this time. Although the petitioner indicates that the beneficiary's I visa is based on his continued relationship as a journalist and editor with the foreign entity, there is no evidence that he ever served in either of these roles before receiving an I visa; rather the petitioner indicates that the beneficiary served as an import and export manager and as legal counsel for the foreign entity. It is also unclear how he began serving as publisher for the petitioning company in 2005 on an I visa issued under the sponsorship of the foreign entity, prior to the formation of the claimed qualifying relationship between the companies in 2007.

Nevertheless, the petitioner is required to provide evidence that the beneficiary was employed by the foreign entity prior to his admission to the United States as a nonimmigrant. In a Notice of Intent to Deny issued on March 31, 2008, the director advised the petitioner as follows:

The record indicates that the beneficiary was employed by [redacted] from 1990 in various positions until March 1999. Yet, the Service has information that, at this same time, the beneficiary was employed as a personal assistant and care provider to [a Turkish citizen].

The director advised the petitioner that it should submit independent, objective evidence to resolve this inconsistency. In response, the petitioner submitted a statement from the beneficiary indicating that he has never been employed by the Turkish citizen named by USCIS, but is married to that individual's niece. He indicated that he has assisted this individual in his free time but has not been employed or paid by him.

The petitioner did not, however, submit any documentary evidence to corroborate the beneficiary's employment with the foreign entity. As noted above, the petitioner's initial evidence documented the beneficiary's salary from the foreign entity for the three-year period from January 2000 until December 2002, thus suggesting that the petitioner was aware that it needed to corroborate the beneficiary's employment abroad. However, the petitioner never offered any documentation for the relevant period prior to March 1999, even after the director pointed out an apparent discrepancy in the beneficiary's employment history. Accordingly, the petitioner has not established that the beneficiary was employed by the claimed parent company during the relevant three-year period. For this additional 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).

## VII. 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.