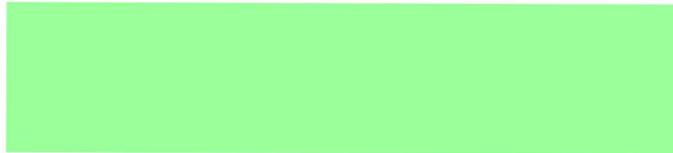


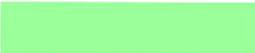
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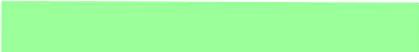
U.S. Department of Homeland Security  
U.S. Citizenship and Immigration Services  
Administrative Appeals Office (AAO)  
20 Massachusetts Ave., N.W., MS 2090  
Washington, DC 20529-2090



U.S. Citizenship  
and Immigration  
Services

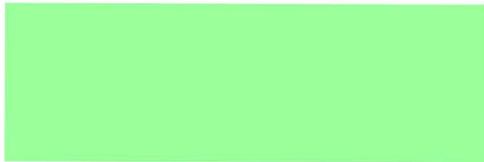


DATE: OCT 24 2013 Office: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

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

ON BEHALF OF PETITIONER:



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,

A handwritten signature in black ink, appearing to read "Ron Rosenberg".

Ron Rosenberg  
Chief, Administrative Appeals Office

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

The petitioner filed this nonimmigrant petition seeking to classify the beneficiary as an intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a Kansas limited liability company, is self-described as an agriculture business specializing in the production of corn, wheat, and milo. It claims to be an affiliate of the beneficiary's foreign employer in Mexico based on common ownership by the same individual. The beneficiary was previously granted one year in L-1A classification in order to open a new office and the petitioner seeks to extend his status so that he may continue to serve as its Business Operations Director.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that the beneficiary will function in a qualifying managerial capacity. Counsel submits a brief and additional evidence in support of the appeal.

### I. The Law

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

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

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior

education, training, and employment qualifies him/her to perform the intended services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

The regulation at 8 C.F.R. § 214.2(l)(14)(ii) also provides that a visa petition, which involved the opening of a new office, may be extended by filing a new Form I-129, accompanied by the following:

- (A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;
- (B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;
- (C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;
- (D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and
- (E) Evidence of the financial status of the United States operation.

## II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that it will employ the beneficiary in a qualifying managerial or executive capacity under the extended petition.

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

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

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

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

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

#### A. Facts

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 9, 2013. The petitioner indicated that it is an agriculture business specializing in the production of corn, wheat, and milo, with two employees and a gross annual income of \$166,000. On the L Classification Supplement to the Form I-129, the petitioner stated that the beneficiary will continue to hold the position of Business Operations Director and further described his duties as including, *inter alia*, the following: direct operations of the business; develop and implement employee conduct handbook; perform managerial functions including planning, controlling, organizing, and directing activities of the company; conceptualize and implement strategic goals and policies for the company; connect with buyers and other interested parties; preparation of all paperwork relating to business negotiations and contract policies; maintain records of paperwork and create reports; represent the company in business events to promote the company; responsible for hiring and working progress of new employees; set pay scales; compile tax reports relating to farm expenses; renew licenses; and manage client relationships.

In a letter submitted in support of the initial petition, the petitioner stated that the business is selling its products to a regional co-op, [REDACTED]. The petitioner stated that a marketing strategy is not necessary as the company's sole purpose is to supply the co-op. The petitioner explained that the company currently has two full-time employees and is in the process of hiring an additional full-time worker. The petitioner further claims that the company hired outside services for harvesting and irrigation.

The petitioner provided a copy of an organizational chart showing the beneficiary as Business Operations Director reporting to the President/Owner. The chart does not show any direct report to the beneficiary, but shows the following positions reporting to the President/Owner: contracted chemigation technician, contracted irrigation installer, farm hands to be hired, a logistics manager to be hired, an administrative assistant, and an independent accountant.

The petitioner submitted letter from a CPA transmitting the IRS Forms W-3 Transmittal of Wage and Tax Statements for 2012, IRS Forms W-2 Wage and Tax Statements for 2012, and IRS Form 941 Employer's Annual Federal Tax Return for Agriculture Employees. The letter states that the petitioner is exempt from Kansas unemployment taxes and therefore does not prepare and file federal or state unemployment tax returns. The petitioner's IRS Form W-2 Wage and Tax Statements for 2012 showed wages paid to the beneficiary of \$25,440 and to a [REDACTED] for \$10,400. The petitioner also provided an advisory letter from Professor [REDACTED] of the [REDACTED] who provides his opinion that the beneficiary's position is managerial in nature.

The director issued a request for additional evidence ("RFE") in which he instructed the petitioner to submit, *inter alia*, the following: (1) a more detailed description of the beneficiary's duties in the United States including percentage of time required to perform the duties; and (2) a copy of the U.S. company's State Quarterly Wage Report for the 3<sup>rd</sup> quarter of 2012.

The petitioner submitted a letter in response, stating that the beneficiary will spend 80% of his time on executive duties and 20% of his time on non-executive duties. The petitioner described the following duties as executive: implement strategic goals for the company; direct daily operations; review financial statements, sales reports, and performance data; create and monitor a budget; regularly monitor income and expenses; create and monitor procedures and controls for receiving and disbursing money; maintain records of paperwork; prepare all paperwork relating business negotiations and contracts policies; compile tax reports relating to farm expenses; work with the company accountant to prepare monthly and yearly reports; develop and implement employee conduct handbook; interview, hire, fire, train, and evaluate the working progress of the new employees; set pay scales; connect with buyers and other interested parties; finalize purchasing agreements; determine crops to be sold, set prices and credit terms.

As evidence of the beneficiary's executive level of authority, the petitioner provided copies of contracts, checks and purchase orders signed by the beneficiary, as well as receipts.

The petitioner provided the same CPA letter explaining that the petitioner is exempt from Kansas unemployment taxes and therefore does not prepare and file federal or state unemployment tax returns.

The director denied the petition finding that the petitioner had not established that the beneficiary will be employed in a managerial or executive capacity. The director determined that based on the organizational structure described, the beneficiary would be assisting in the day-to-day non-supervisory duties of the business. The director also stated that the description of the beneficiary's position did not contain sufficient specifics to demonstrate what the beneficiary does on a daily basis. With respect to the contracted workers, the director stated that the petitioner failed to provide sufficient evidence to establish the number of hours per month the beneficiary will be supervising the work of contracted services or to establish how they would otherwise relieve the beneficiary from performing non-qualifying duties. Finally, the director determined that the future hiring of employees has no bearing on whether the beneficiary's proposed duties will qualify as primarily managerial or executive.

On appeal, counsel asserts that the beneficiary's position is primarily managerial or executive in nature. Specifically, counsel states that the prior L-1A petition was approved based on evidence that is nearly

identical to the evidence submitted with the instant petition. Counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) in support of his assertion that the current petition can only be denied if USCIS specifically elucidates why the previous approval was erroneous. Counsel for the petitioner further asserts that the beneficiary's position description, combined with the expert opinion letter, provides sufficient specificity to demonstrate that the beneficiary's duties are managerial in nature. Counsel further claims that the petitioner's organization supports the reasonable needs of the business considering its use of contracted service providers. Finally, counsel states that the director denied the petition in part based on the petitioner's failure to submit evidence that was never requested, specifically, evidence of the number of hours the beneficiary allocates to the supervision of contract workers.

#### B. Analysis

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity.

As a preliminary matter, counsel contends that the director's review of this matter on one prior occasion resulted in approval of the beneficiary's L-1A petition and a finding that he would be employed in a managerial and executive capacity. Counsel asserts that U.S. Citizenship and Immigration Services (USCIS) failed to "specifically elucidate" how the previous adjudication was in error. Counsel cites *Omni Packaging, Inc. v. INS*, 733 F. Supp. 500 (D.C.P.R. 1990) in support of his assertion that the current petition can only be denied if USCIS specifically elucidates why the previous approval was erroneous. Counsel fails to note that the court in *Omni Packaging* revisited the issue and later determined that the Immigration and Naturalization Service had properly denied the immigrant petition and that it was not estopped from finding that the alien was not manager or executive after having determined that he was manager or executive for purposes of issuing an L-1 visa. *See Omni Packaging, Inc. v. INS*, 930 F. Supp. 28 (D.C.P.R. 1996).

A prior approval does not preclude USCIS from denying an extension of the original visa based on a reassessment of petitioner's qualifications. *Texas A&M Univ. v. Upchurch*, 99 Fed. Appx. 556, 2004 WL 1240482 (5th Cir. 2004). Further, the petitioner's prior petition to which counsel refers was a petition to authorize the beneficiary to enter the United States to open or to be employed by a new office. Thus, that petition was governed by the regulations pertaining to new offices. *See* 8 C.F.R. § 214.2(l)(3)(v). The present petition is a request for an extension of the beneficiary's status after completing a one-year period to open a new office. The present petition is governed by a different set of regulations pertaining specifically to new office extensions. *See* 8 C.F.R. § 214.2(l)(14)(ii). As different law and evidentiary requirements apply to the present petition, the director has a duty to carefully review the petitioner's representations and documentation to determine if eligibility has been established. Contrary to counsel's suggestion, the fact that a prior petition was approved on behalf of the beneficiary does not serve as prima facie evidence that eligibility has been established in the present proceeding. In making a determination of statutory eligibility, USCIS is limited to the information contained in the individual record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii).

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity each 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 show that the

beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary manages a business or a component of a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

The position descriptions the petitioner submitted at the time of filing and in response to the RFE are insufficient to establish that the beneficiary will be primarily performing managerial duties. Specifically, duties such as "conceptualize and implement strategic goals and policies," "direct the daily operations relating to the business management of the organization," and "lead the staff into effective working capabilities and control the working scenario of the organization" are vague and do not convey a specific understanding of what duties the beneficiary will perform as Business Operations Director of a farm. 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 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).

Furthermore, the petitioner states that the beneficiary will be connecting with buyers and other interested parties, finalizing agreements relating to purchase of the company's agricultural products, determining crops to be sold, setting prices and credit terms, representing the company at business events, promoting effective networking, evaluating the sales distribution network, managing relationships with clients, and conducting economic and commercial surveys to identify markets for the company's products. All of these duties relate to the sales and marketing of the petitioner's products and are not primarily managerial or executive in nature, particularly considering that the petitioner employs no other sales or marketing staff. Further, in a letter submitted in support of the initial petition, the petitioner explained that the company will primarily sell its goods to [REDACTED] a business that sells agricultural product to food manufactures and other similar business. The petitioner further states that a "marketing strategy will not be necessary as its sole function is to provide for [REDACTED]" To the extent that the above listed duties relate to marketing the company's product, the petitioner's statement regarding its relationship with the co-op casts doubt on the validity of submitted job description. 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).

On appeal, counsel relies on the letter of [REDACTED] Ph.D. of the [REDACTED] as evidence of the beneficiary's specific duties as well as supporting documentation for the premise that the beneficiary's duties are managerial or executive in nature. A review of Professor [REDACTED]'s opinion reveals that the petitioner provided him with a duty description for the U.S.-based "Director of Operations" position that is different from the descriptions included in the petitioner's letters prepared for review by USCIS. Professor [REDACTED] letter was written in October 2011 and pre-dates the approval of the new office petition granting the beneficiary one year in L-1A classification. As the beneficiary was not authorized to work for the petitioner at

the time Professor [REDACTED] wrote the letter, it is evident that he was provided with a speculative position description based on the company's expected scope of operations and staffing levels. The petitioner does not indicate that the beneficiary is currently performing the duties described in Professor [REDACTED]'s letter, nor has the petitioner grown to the point where the beneficiary is responsible for overseeing subordinate managers, supervisors, and department foreman, as stated in the 2011 version of his job description as quoted in the advisory opinion.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron Int'l.*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. The submission of letters from experts supporting the petition is not presumptive evidence of eligibility. *Id.*; *see also Matter of V-K-*, 24 I&N Dec. 500, n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated or is in any way questionable. *Matter of Caron Int'l.*, 19 I&N Dec. at 795. Professor [REDACTED]'s letter has limited probative value as it is based on a proposed position description prepared in 2011 rather than on the beneficiary's actual duties within the context of the petitioner's organization as it existed in January 2013.

Furthermore, even though the petitioner claims that the beneficiary direct and manages the business operations, it does not claim to have anyone on its staff to actually perform the daily first-line managerial duties of the farm operations as described above. Rather, based on the petitioner's initial claims and the petitioner's payroll evidence, the petitioner's staff at the time of filing consisted of the beneficiary as business operations director, an administrative assistant, and contracted services for accounting, chemigation technician, and irrigation installer, while the positions of logistics manager and farm hands were vacant. While the petitioner plans to hire additional staff, it has not established that it employed sufficient staff to perform all day-to-day non-managerial functions of a farm operation. If the beneficiary will be performing the first-line management functions, or the day-to-day operational tasks of the farm operations, the AAO notes that 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); *see also Matter of Church Scientology Intn'l.*, 19 I&N Dec. 593, 604 (Comm'r 1988).

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

Although the beneficiary is not required to supervise personnel, if it is claimed that his duties involve supervising employees, the petitioner must establish that the subordinate employees are supervisory, professional, or managerial. *See* § 101(a)(44)(A)(ii) of the Act.

According to the petitioner's IRS Forms W-2, Wage and Tax Statement, the only other employee of the company is the administrative assistant. The petitioner has not established that the position of administrative assistant is professional, supervisory, or managerial. Furthermore, the organizational chart does not clarify whether this position reports directly to the beneficiary or the President/Owner of the business. Thus, the petitioner has not established that the beneficiary qualifies as a personnel manager based on his supervision of an administrative assistant.

Counsel for the petitioner claims on appeal that the beneficiary will be utilizing the work of contracted for services as shown on the organizational chart. These contractors, however, do not appear to relieve the beneficiary of the day-to-day operations of the business. Without further information regarding the contracts or nature of the services provided, the petitioner fails to establish who will actually perform the daily first-line supervisory duties of the farm operations other than the beneficiary. Further, although the petitioner indicates that a logistics manager is "to be hired," the petitioner has not explained who is currently responsible for logistics functions within the petitioning company. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

When examining the managerial or executive capacity of a beneficiary, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record, including descriptions of a beneficiary's duties and those of his or her subordinate employees, the nature of the petitioner's business, the employment and remuneration of employees, and any other facts contributing to a complete understanding of a beneficiary's actual role in a business. The evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. An individual whose primary duties are those of a first-line supervisor will not be considered to be acting in a managerial capacity merely by virtue of his or her supervisory duties unless the employees supervised are professional. Section 101(a)(44)(A)(iv) of the Act.

Pursuant to section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C), if staffing levels are used as a factor in determining whether an individual is acting in a managerial or executive capacity, USCIS must take into account the reasonable needs of the organization, in light of the overall purpose and stage of development of the organization. In the present matter, however, the regulations provide strict evidentiary requirements for the extension of a "new office" petition and require USCIS to examine the organizational structure and staffing levels of the petitioner. *See* 8 C.F.R. § 214.2(l)(14)(ii)(D). The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C) allows the "new office" operation one year within the date of approval of the petition to support an executive or managerial position. There is no provision in USCIS regulations that allows for an extension of this one-year period. If the business does not have sufficient staffing after one year to relieve the beneficiary from primarily performing operational and administrative tasks, the petitioner is ineligible by regulation for an extension. In the instant matter, the petitioner has not reached the point that it can employ the beneficiary in a predominantly managerial or executive position.

Based on the foregoing discussion, the petitioner has failed to establish that it will employ the beneficiary in a managerial or executive capacity under the extended petition. The appeal will be dismissed.

The appeal will be dismissed for the above stated reasons. 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.