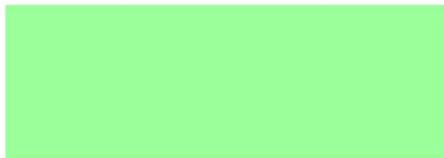




U.S. Citizenship
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Services

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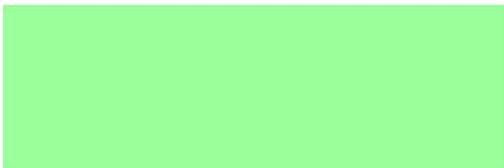


DATE: **NOV 13 2014** Office: VERMONT SERVICE CENTER FILE:

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,

Ron Rosenberg
Chief, Administrative Appeals Office

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

The petitioner filed a Form I-129, Petition for a Nonimmigrant Worker, seeking to qualify the beneficiary as an L-1A nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, a New York corporation established in [REDACTED] states that it operates a discount retail store. The petitioner states that it is a subsidiary of 3rd Street Leathers located in Pakistan. The petitioner seeks to employ the beneficiary as its director of operations for a period of three years.

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

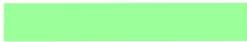
On appeal, the petitioner contends that the director's decision is erroneous and made without consideration to substantial evidence establishing that the beneficiary acts in a qualifying executive capacity.

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.

II. THE ISSUES ON APPEAL

A. Managerial or Executive Capacity (United States)

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

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.

1. Facts

The petitioner filed the Form I-129 on May 7, 2013. The petitioner states that it is a "flourishing retail business" selling a wide range of household and grocery items. The petitioner indicated on the Form I-129 that it earned \$491,657.70 in revenue during 2012 and that it currently employs five individuals.

The petitioner explained that the beneficiary would act in an executive capacity and that he would not perform any non-executive duties. In a support letter submitted with the petition, the petitioner explained that the beneficiary's proposed role as director of operations as follows:

- Oversee company operations to ensure efficiency, quality, service, and cost-effective management of resources.
- Lead corporation to establish a trade-name and expand corporation allowing it to become the premiere household discount store.
- Create and adapt administrative procedures as necessary; develop and implement productive workflow processes.
- Direct company planning and policy-making.
- Set fiscal goals for the company, and preparation of budget for effective utilization.
- Plan, develop, and implement strategies for generating revenues for the company.
- Ensure that the company adheres to all regulatory requirements.
- Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.
- Evaluate performance of managers for compliance with established policies and objectives for the company and contributions in attaining objectives.
- Determine areas needing cost reduction and program improvement.
- Evaluate reports on deliveries of goods and inventory and direct changes to product purchasing.
- Review processing schedules and orders to make decisions concerning inventory requirements, staffing requirements, work procedures, or duty assignments, considering budgetary limitations and time constraints.
- Create maintain and supervise a comprehensive quality assurance system. This includes all performance standards, processes and procedures, necessary checks and balances.
- Evaluate expansion of business in terms of locations for retail goods ultimately creating a self reliant import export system.
- Hire employees and create new positions to maximize productivity.
- Direct company operations to ensure a profit increase of at least \$50,000 within the first year.

The petitioner indicated that the petitioner employs a sales manager subordinate to the beneficiary who is responsible for performing sales activities on major accounts; forecasting revenue streams; formulating sales, policies, practices and procedures for sales staff; and placing all orders to assure the timely shipment of products. The petitioner provided an organizational chart showed that the sales manager supervises three sales representatives. Further, the chart reflected that [REDACTED] the minority owner of the

petitioning company, would act as director at a level equivalent to the beneficiary in the organizational structure. The petitioner did not provide duty descriptions for the director or for the sales representatives.

The petitioner submitted 2012 IRS Form W-2 Wage and Tax Statements indicating that its employees earned the following salaries during that year: Director - \$32,000; Sales Manager - \$7,200; and three sales representatives - \$3,000 each. In addition, the petitioner submitted photographs reflecting that it operates a [REDACTED] New York.

The director later issued a request for evidence (RFE) stating that the evidence submitted by the petitioner was insufficient to establish that the beneficiary would act in a qualifying managerial or executive capacity. As such, the director requested that the petitioner submit a letter describing the beneficiary's expected managerial duties, including the percentage of time he would spend on each task. Further, the director asked the petitioner to provide an organizational chart listing its employees, their job titles, duties, education levels, and salaries as well as payroll documentation and/or IRS tax documentation showing wages paid to the beneficiary's proposed subordinates.

In response, the petitioner indicated that the beneficiary would be employed in an executive capacity, rather than in a managerial capacity. The petitioner submitted the following additional duty description for the beneficiary:

1. Oversee company operations to ensure efficiency, quality, service and cost-effective management of resources. **(10%)**
 - a. Establish and adjust selling prices by monitoring costs, competition, and supply and demand.
 - b. Determine areas needing cost reduction and program improvement.
2. Lead corporation to establish a trade-name and expand corporation allowing it to become the premiere household discount store. **(10%)**
 - a. Create maintain and supervise a comprehensive quality assurance system. This includes all performance standards, processes and procedures, necessary checks and balances.
 - b. Acquire business for the company through the acquisition of new accounts, establishing new partnerships, and expanding the business beyond its current confines.
3. Create and adapt administrative processes as necessary; develop and implement productive workflow processes. **(5%)**
 - a. Review recommendations to hire additional employees and hire and fire employees as needed.
4. Direct company planning and policy-making. **(10%)**
 - a. Determine annual and gross-profit plans by forecasting and developing annual sales quotas for regions.
 - b. Meet with shareholders to discuss the progress and direction of the company.
 - c. Evaluate and analyze market trends.
 - d. Review activity reports and financial statements to determine progress and status in attaining objectives and revise objectives and plans in accordance with current conditions.

5. Direct company operations to ensure profit increase of at least \$50,000 within the first year. (20%)
 - a. Identify new business and sales targets.
 - b. Develop and implement sales goals for the sales team.
 - c. Direct the company in expanding sales by identifying new business for exploration.
 - d. Evaluate reports on deliveries of goods and inventory and direct changes to product purchasing.
6. Set fiscal goals for the company, and preparation of budget for effective utilization. (10%)
 - a. Review processing schedules and orders to make decisions concerning inventory requirements, staffing requirements, work procedures, or duty assignments, considering budgetary limitations and time constraints.
7. Plan, develop, and implement strategies for generating revenues for the company. (15%)
 - a. Drive the sales initiative through the development of sales campaigns and new business relationships.
 - b. Establishing pricing strategies and recommend selling prices.
 - c. Monitor costs, competition, supply and demand.
 - d. Product expected sales volume and profit for existing and new products.
 - e. Analyze sales trends and results.
8. Ensure that the company adheres to all regulatory requirements. (5%)
9. Evaluate performance of managers for compliance with established policies and objectives of the company and contributions in attaining objectives. (5%)
10. Evaluate expansion of business in terms of locations for retail good ultimately creating a self reliant import-export system. (5%)
 - a. Promote the company to local and regional clients.
11. Hire employees and create new positions to maximize productivity. (5%)

The petitioner stated that it "is growing to become the leading discount store in [REDACTED]. The petitioner submitted the same organizational chart and reiterated the duties of the sales manager, indicating that this employee will "handle all day to day duties and management of all sales representatives."

In denying the petition, the director concluded that the petitioner did not establish that the beneficiary would be primarily engaged in qualifying executive or managerial duties. The director found that the beneficiary's duty description was overly vague and failed to specify his actual daily duties. The director determined that the beneficiary's duties, and claimed executive position, were not consistent with the petitioner's asserted size, scope and staffing levels. Further, the director noted that the petitioner failed to submit duty descriptions for its proposed director and sales representatives and reasoned that the three sales representatives did not appear sufficient to support three managerial or executive level positions.

On appeal, the petitioner contends that the director failed to consider the beneficiary's duty description provided in response to the director's RFE. The petitioner asserts that the director incorrectly analyzed whether the beneficiary would act in a managerial capacity when the petitioner has consistently stated that he will be employed in an executive capacity. The petitioner states that the detailed duty description

provided for the beneficiary establishes that he will spend a majority of his time performing executive level duties. Further, the petitioner maintains that it is not necessary to submit the duties for its sales representatives and asserts that it is clear they perform sales duties and "other such day-to-day activities." The petitioner contends that the sales manager supervises the sales representatives and allows the beneficiary to focus on "higher level operations." In addition, the petitioner states that the director improperly relied solely on the size of the petitioner in denying the petition.

2. Analysis

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

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. See 8 C.F.R. § 214.2(l)(3)(ii). The definitions of executive and managerial capacity have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show 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).

In the present matter, the petitioner has submitted duties inconsistent with the nature of its business and scope of operations. The record reflects that the petitioner operates a single retail store selling a wide range of household and grocery items. However, the beneficiary's duty description indicates that he will acquire new accounts, develop sales quotas for regions, identify new business and sales targets, drive sales initiatives through the development of sales campaigns, and create a self-reliant import-export system, all duties reflecting the operation of a larger and more complex business rather than a single dollar store location. The duties described offer little insight into what the beneficiary would do on a day-to-day basis within the context of the petitioner's actual business. 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).

Further, the petitioner has not submitted details or sufficient supporting documentation to substantiate the assertion that the beneficiary will primarily be responsible for executive level duties, such as program improvement, establishing a trade name, creating and adapting administrative procedures, setting objectives, and ensuring adherence to regulatory requirements. In each case, the petitioner has not provided specific examples of programs the beneficiary will improve, administrative procedures he will create or adapt, objectives he will set or be tasked with, or regulations with which he will ensure compliance. 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. 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. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990); *Ayvr Associates, Inc. v.*

Meissner, 1997 WL 188942 at *5 (S.D.N.Y.). Overall, despite submitting a lengthy list of responsibilities, the petitioner has failed to provide sufficient detail or explanation of the beneficiary's proposed activities in the course of his daily routine that are relevant to the petitioner's current or likely business activities. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. at 1108, *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

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

Here, the petitioner has failed to submit relevant evidence requested by the director, such as duty descriptions for each of the beneficiary's subordinates including the director and sales representatives. The petitioner only provided a duty description for its sales manager. Failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

On appeal, the petitioner contends that it is clear that the sales representatives perform sales duties and "other such day-to-day activities." However, the duties of the sales manager are also inconsistent with a manager overseeing a retail location. For example, the petitioner stated that he is responsible for "sales activities on major accounts," "developing sales support staff," and "formulating sales policies." The duty description of the sales manager suggests that he and his subordinates would be performing duties consistent with selling products and services regionally through sales representatives rather a company operating a single retail location. Further, the duties of the beneficiary's colleague, the director, have not been provided. In sum, these discrepancies and the lack of evidence relevant to the duties of the beneficiary's subordinates leaves substantial question as to whether the beneficiary would be relieved from primarily performing non-qualifying operational tasks associated with operating the petitioner's store. 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).

In addition, IRS Forms W-2 submitted for the sales manager and representatives indicate that they work limited part-time hours which appear insufficient to operate the petitioner's store without the assistance of the beneficiary and the company's other director. In fact, these four sales employees earned only \$16,000 combined in 2012. The petitioner's evidence must substantiate that the duties of the beneficiary and his or her subordinates correspond to their placement in an organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or manager position. In the present matter, the totality of the record does not support a conclusion that the beneficiary's subordinate sales manager or the company's other director would be performing supervisory or managerial duties. Instead, the record indicates that all employees more likely than not perform the day-to-day duties of operating a retail business, and that the beneficiary would also be involved in the dollar store's daily operation.

In response to the director's RFE, the petitioner asserted that the petitioner is growing to be a "leading discount store in [REDACTED] and the petitioner explained that the beneficiary will be focused on expanding the business further and "creating a brand." However, the petitioner provided no supporting evidence to corroborate these assertions. Indeed, the evidence indicates that the petitioner operates one small retail location with minimal staffing and has otherwise not supported its assertion that it is a rapidly growing business in [REDACTED] with numerous other business prospects that would immediately support an executive position. The petitioner discloses that it earned nearly \$500,000 in revenue in 2012, but has provided no supporting documentation to substantiate this claim. In short, the evidence is not sufficient evidence to establish that the petitioner has operations to support three managerial or executive level positions primarily focused on supervisory and higher level duties.

On appeal, the petitioner asserts that the director mistakenly evaluated whether the beneficiary acts in a managerial capacity rather than an executive capacity. 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.*

Here, the petitioner has not demonstrated that the beneficiary will be employed in a qualifying executive capacity. First, as previously stated, the petitioner has provided a vague duty description for the beneficiary that fails to articulate or substantiate his primary performance of executive duties. In fact, the duties include inconsistencies that leave question as to the actual duties to be performed by the beneficiary. Further, the petitioner has failed to provide a complete picture of its organizational structure to corroborate that it has sufficient operational level employees to allow the beneficiary to primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. In fact, the petitioner provided a duty description for the part-time subordinate sales manager that is inconsistent with the nature of the petitioner's business. Therefore, the evidence presented fails to demonstrate that the beneficiary acts within a complex organizational hierarchy and that he will primarily direct the management of the organization and establish its goals and policies. The totality of the evidence indicates that the beneficiary would more likely be primarily engaged in non-qualifying operational tasks. Again, 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.

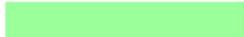
Furthermore, the petitioner contends that the director improperly based his decision on the size of the petitioner's business. Counsel correctly observes that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for USCIS to consider the size of the petitioning company in conjunction with other

relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Family Inc. v. USCIS*, 469 F.3d 1313 (9th Cir. 2006); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). The size of a company may be especially relevant when USCIS notes discrepancies in the record and fails to believe that the petitioner's assertions are true. *See Systronics*, 153 F. Supp. 2d at 15.

In the present matter, the director appropriately considered the petitioner's size in conjunction with other relevant factors in reaching his decision. As discussed herein, the petitioner has provided little detail and supporting evidence to substantiate that the beneficiary will primarily act as an executive. The petitioner has submitted duties for the beneficiary and his subordinate sales manager inconsistent with its operation as a single retail location. As such, it is not only the size of the petitioner which leads to a conclusion that the beneficiary is unlikely to act primarily in an executive capacity, but other relevant factors, such as the limited hours worked by the current staff and the lack of employees to perform the non-managerial or non-executive operations of the company. The petitioner is likely open for business on a daily basis for more than 40 hours a week, as is customary in the retail industry. The petitioner's four sales employees combined earned wages commensurate with the wages that would be paid to a single full-time worker at minimum wage. Based on this evidence, the company does not have the staffing needed to maintain a single worker at a cash register for all of its operating hours without assistance from the directors of the company. Further, the petitioner has not identified any staff who would be responsible for purchasing inventory, stocking shelves, and performing day-to-day administrative, bookkeeping and clerical matters associated with operating the store. The evidence does not support a finding that the beneficiary would reasonably be required to primarily perform executive-level duties.

Lastly, the petitioner further refers to two non-precedent AAO decisions in support of its assertion that the director must consider the petitioner's reasonable needs and not simply the number of employees. First, it should be noted that while 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all USCIS employees in the administration of the Act, unpublished decisions are not similarly binding. Further, the petitioner has furnished no evidence to establish that the facts of either non-precedent case referenced are analogous to those presented in the current matter. Indeed, one of the cited decisions involves a finding on the part of this office that the beneficiary qualified as a function manager. However, the petitioner does not assert that the instant beneficiary qualifies as a function manager. In fact, the petitioner questions the director's decision to consider whether the beneficiary acts in a managerial capacity. Regardless, the petitioner has not demonstrated that the beneficiary manages an essential function of an organization. As previously discussed herein, the petitioner has submitted contradictory and vague duty descriptions for both the beneficiary and his direct subordinate and failed to substantiate that the beneficiary would be primarily engaged in performing qualifying duties.

Based on the foregoing discussion, the petitioner has not established that the beneficiary will be employed in a qualifying managerial or executive capacity. For this reason, the appeal must be dismissed.



III. CONCLUSION

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.