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U.S. Department of Homeland Security
Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 20 Mass, 3/F
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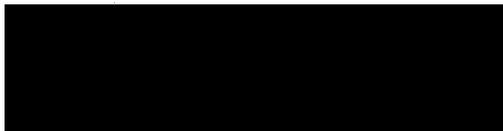
FILE: EAC 00 160 52475 Office: VERMONT SERVICE CENTER Date:

IN RE: Petitioner: [Redacted]
Beneficiary: [Redacted]

DEC 23 2003

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:



identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

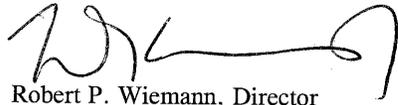
INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the nonimmigrant visa petition. On appeal, the Administrative Appeals Office (AAO) affirmed the director's decision to deny the petition. The matter is now before the AAO on a first motion to reopen and reconsider. The AAO will dismiss the motion.

The petitioner, 211 West 40th Street, Inc., states that it is the subsidiary of a Chinese business, China National Textile Import & Export Corporation. The U.S. entity is incorporated in the State of New York. In May 1997, the U.S. entity petitioned to classify the beneficiary as a nonimmigrant intracompany transferee (L-1A). The director approved the petition as valid from June 29, 1997 until May 31, 2000. The petitioner now endeavors to extend the petition's validity and the beneficiary's stay for three years. The petitioner seeks to employ the beneficiary's services as the U.S. entity's President at an annual salary of \$40,000.

On September 27, 2000, the director determined, however, that the beneficiary did not qualify as a manager or an executive. Consequently, the director denied the petition. The petitioner appealed the denial to the AAO. On March 7, 2001, the AAO dismissed the appeal. In turn, the petitioner submitted a motion to reopen and reconsider. The petitioner's brief in support of the motion asserts that the beneficiary is an executive or a manager.

In pertinent part, the regulation at 8 C.F.R. § 103.5(a)(2) states, "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." Based on the plain meaning of "new," a new fact is evidence that was unavailable and could not have been discovered or presented in the previous proceeding. Counsel submitted no new evidence with the motion. Therefore, the AAO will dismiss the petitioner's motion to reopen.

The AAO now turns to question of whether to grant the motion to reconsider. In relevant part, 8 C.F.R. § 103.5(a)(3) states:

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [CIS] policy. A motion to reconsider a decision on an application or petition must, when filed, also

establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

The motion states reasons for reconsideration and cites two unpublished cases. The petitioner's counsel, however, did not attach a copies of the cases; therefore, it is impossible to gauge the unpublished cases' relevance. Furthermore, as the cases are unpublished, they add no precedential weight to the matters at hand. While 8 C.F.R. § 103.3(c) provides that AAO precedent decisions are binding on all CIS employees in the administration of the Act, unpublished decisions are not similarly binding. Therefore, given failure to cite any precedent decisions, the AAO will dismiss the motion for reconsideration.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as are petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992) (citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *Abudu*, 485 U.S. at 110. In addition, 8 C.F.R. § 103.5(a)(2) states in pertinent part, "A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence."

Even if the AAO were to reopen and reconsider its earlier decision, the beneficiary's duties would not qualify as primarily managerial or executive. To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L), the petitioner must meet certain criteria. Specifically, within three years preceding the beneficiary's application for admission into the United States, 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. Furthermore, 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.

Under 8 C.F.R. § 214.2(1)(3), 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 (1)(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 serves in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Pursuant to 8 C.F.R. § 214.2(1)(14)(ii), a visa petition that involved the opening of a new office under section 101(a)(15)(L) may be extended by filing a new Form I-129, accompanied by:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (1)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (1)(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.

(F) The only issue in this case whether the beneficiary will primarily work as a manager or an executive.

In regard to the issue of whether a beneficiary has been and will be primarily performing managerial or executive duties, 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.

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). Moreover, a petitioner cannot claim that some of the duties of the proffered position entail executive responsibilities, while other duties are managerial. A petitioner must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are *either* in an executive or managerial capacity. *Id.* In this instance, counsel's March 20, 2002 brief asserts that the beneficiary will be serving as a manager and an executive; therefore, the petitioner must demonstrate that the beneficiary's responsibilities will meet the requirements of each capacity.

On March 29, 2000, June 23, 2000, and October 23, 2000, the petitioner's counsel submitted letters describing the beneficiary's duties. The descriptions in each letter are virtually identical. Furthermore, the organizational chart for 211 West 40th Street, Inc. restates the seven numbered duties listed in the three letters. Given that counsel's motion restates virtually *verbatim* the duties enumerated in the three letters and organizational chart, the AAO will only quote the duties listed in counsel's pending motion:

[The beneficiary] is responsible for overseeing the company's real estate investment, including the leasing of offices [*sic*] spaces in the building owned by our company; he also [*is*] responsible for exploring new investment opportunities, such as purchasing of all real properties. [The beneficiary] is in charge of the management of all real properties owned by our company. [The beneficiary's] role as President of our

company is being the sole decision maker for and on behalf of our company in the investment business in the U.S.

[The beneficiary's] duties include: (1) formulate immediate and intermediate and long term investment policies; supervise the general business of the company, through the assistance of the investment manager; (2) set financial plans and annual capital budget reports for the Board of Directors; (3) finalize negotiations with banks for obtaining the most favorable financing needed in our company's investments and future investment plans; (4) exercise personnel management authority concerning hiring, discharging, promotion and transferring of subordinates; (5) communicate with members of the Board for the approval of various investment plans and related capital plans; (6) solicitation for more financial support from the parent Company; (7) work with commissioned real estate brokers, such as CB Richard Ellis, in negotiating and signing of leases for real property holding of our company.

In the petitioner's own words, the bulk of the beneficiary's duties are essentially developing leads for future work which, by definition, qualify as performing a task necessary to provide a service or produce a product. For example, as noted above, he is "responsible for exploring new investment opportunities" and "formulat[ing] immediate and intermediate and long term investment policies." Likewise, he is responsible for "obtaining the most favorable financing" from banks. An employee who primarily performs the tasks necessary to produce a product or provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

Furthermore, counsel generally paraphrased the statutory definitions of "managerial" and "executive" capacity rather than specifically described the beneficiary's job duties. See sections 101(a)(44)(A)(i), (iv) and 101(a)(44)(B)(iii) of the Act. For example, counsel characterized the beneficiary as "exercis[ing] personnel management authority concerning hiring, discharging, promotion and transferring of subordinates." Despite presenting a lengthy list of duties, counsel used only broad terms to define the beneficiary's daily tasks. The petitioner did not explain in detail what it meant by "formulat[ing] . . . investment policies," "set[ting] financial

plans and annual capital budget reports," "communicat[ing] with members of the Board for the approval of various investment plans and related capital plans," or "work[ing] with commissioned real estate brokers, such as CB Richard Ellis, in negotiating and signing of leases."

Going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); see generally *Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Thus, the record lacks adequate supporting documentary evidence to demonstrate that the beneficiary's duties are primarily executive or managerial.

Petitioner's counsel asserts that the beneficiary is a manager or executive because he allegedly supervises a professional staff. "[T]he term profession shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32). 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. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). "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 U.S.C. § 1101(a)(44)(A)(iv).

Counsel states that the beneficiary supervises an investment manager (Angela Wu), a superintendent (Winston Gayle), and a commissioned real estate broker (CB Richard Ellis). The organizational chart described Angela Wu's duties as:

- Directing [the] company's investment projects by analyzing economic activities and corporate financial statements;

- Analyzing corporate operating statements prepared by [an] outside accounting firm and directing business activities accordingly to maximize profits;
- Exercising major authorities to control fiscal budget and corporate finance of the company;
- Reviewing of all investment activities to advise the president for modification of [the] company's position and progress toward established goals and policies; and
- Reviewing and negotiating the terms of leases of the building owned by the company.

The organizational chart, however, provides no information about the required education for this position. Therefore it is unclear whether she performs tasks that require at least a baccalaureate degree. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Further, the description of her duties are too general to convey an understanding of her job. Counsel does not define in terms of frequencies or examples what the terms "directing," "exercising," "reviewing," and "analyzing" actually mean. Similarly, counsel submitted no examples of the company's "investment projects" or "established goals and policies." As explained above, going on record without supporting documentary evidence is insufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS, supra*; *Republic of Transkei v. INS, supra*; *Matter of Treasure Craft of California, supra*. Thus, the record lacks adequate supporting documentary evidence to demonstrate that the beneficiary's duties are primarily executive or managerial. Thus, the record is insufficient to establish whether Angela Wu is actually a professional.

The organizational chart lists Winston Gayle's responsibilities as:

- Assisting [the] president and investment manager to [sic] prepare financial reports and other necessary records;
- Responsibility for office inventory control and updating;

- Coordinating the maintenance and repairs of the building owned by the company;
- Coordinating rental billing and collection;
- Conducting general bookkeeping; and
- Performing routine office activities

Again, the above description does not identify the required level of education for this position. The superintendent's tasks are mainly clerical rather than professional. That is, he performs tasks that do not require at least a baccalaureate degree. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Thus, the beneficiary is not supervising a professional employee.

The evidence and counsel's motion imply that, perhaps, the beneficiary supervises a real estate broker, CB Richard Ellis. While a real estate broker may, indeed, have the requisite education to qualify as a professional, the record lacks any information about CB Richard Ellis' education or job duties. The record contains several cancelled checks payable to CB Richard Ellis; however, the presence of these checks does not definitively establish the real estate broker as being on the petitioner's payroll. As previously explained, the lack of adequate supporting documentary evidence prevents the petitioner from meeting its burden of proof in these proceedings. *Matter of Treasure Craft of California*, *supra*. In sum, the record fails to demonstrate that the beneficiary supervises a staff of professionals.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The motion is dismissed.