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

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OFFICE OF ADMINISTRATIVE APPEALS
BCIS, AAO, 20 Mass. 3/F
Washington, DC 20536



MAY 14 2003

File: WAC 01 205 50076 Office: CALIFORNIA SERVICE CENTER Date:

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

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: [Redacted]

PUBLIC COPY

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 the Bureau of Citizenship and Immigration Services (Bureau) 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
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Acting Director, California Service Center. The matter is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner imports and exports industrial equipment. It seeks to continue to employ the beneficiary temporarily in the United States as its president for an additional two years. The acting director determined that the petitioner had not established that the beneficiary would be employed in the United States in a managerial or executive capacity.

On appeal, counsel states that the petitioner outlined its business plan to hire additional personnel in response to the acting director's request for additional evidence. Counsel further states the beneficiary directs a major component of the organization as demonstrated by the Form 1120 for the year 2000 Corporate Tax Returns which states the company's sales at \$4,582,756. Counsel explains that the petitioner submitted tax returns for the German entity to demonstrate that the parent company is actively doing business and that the beneficiary's continued presence is necessary in the United States to continue growth in revenues from a major component of the organization.

Counsel argues that the U.S. entity is being virtually held back by the Bureau's failure to approve its petition to transfer the beneficiary. Counsel indicates that despite the financial investment in the U.S. subsidiary, the company cannot be expected to expand unless and until the president who has authority to hire, fire, and promote personnel can extend his L-1 status. Counsel submits the petitioner's U.S. Corporation Income Tax Return for 2000 to substantiate the petitioner's assertions on appeal.

8 C.F.R. § 214.2(1)(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 (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.

The issue to be addressed in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity.

8 C.F.R. § 214.2(1)(14)(ii) states that a visa petition under section 101(a)(15)(L) 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 (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.

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

iii. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner described the beneficiary's proposed job duties as follows:

As President of our U.S. Subsidiary, Mr. [REDACTED] reports to the Chief Executive Officer in Germany, Alexander Toren, and is responsible for all programs, services, and policies of the organization, including spending 40 percent of his time developing and executing programs, sales, budgets, legal responsibilities and required State and Federal organizational reporting; spending 20 percent of his time directing and coordinating all activities of staff; spending 40 percent of his time seeking contracts from private sources and maintaining effective public relations activities and relations with public and private organizations.

Maveg Industriearustungen GmbH owns controlling interest of Equity Technologies Corp. in the United States. Our company has aggressive sales goals. The President is responsible for the effective coordination of office activities in a manner which maximizes sales, earnings, customer satisfaction and development of personnel. The President initiates and develops objectives and policies, reviews financial statements to increase profits, and supervises the day-to-day business affairs of our organization. The President has the authority to engage in all personnel matters, including: hiring, firing, and promotion of our professional staff.

The President engages in making all the key business decisions in our organization. For example, the President supervises the office lease and office

organization and makes all the key decisions for marketing strategies and develops accounts in Los Angeles, USA. The President has the final word on whether our office will engage in transactions with a vendor based on his evaluation of possible benefits and risks associated with accepting the account. The President will hire additional professionals to implement his marketing strategies. The President will facilitate future expansion in the United States.

As President, Mr. [REDACTED] supervises the office administrator who is responsible for maintaining and organizing sales records. The office administrator also administers records management policies intended to standardize filing, protecting and retrieving budget expenditures and attendance records as directed by the President.

In addition, the President supervises the Account Executive, the Sales Manager, and Purchasing Manager. The Account Executive implements the marketing and sales strategies developed by Mr. [REDACTED] the President. The Account Executive engages in sales of our product and maintains relations with our client base. The account executive reports to the Sales Manager who directs the sales and market strategy, advertising, and company promotion. The Sales and Purchasing Managers report directly to the President. Mr. [REDACTED] reports directly to Alexander Toren, the Chief Executive Officer who oversees operations of our parent company. Mr. [REDACTED] remains in constant contact with Mr. [REDACTED] with regard to the ongoing activities in the Parent Company.

The acting director determined that the petitioner had failed to establish that the beneficiary was managing a subordinate staff of professional, managerial or supervisory personnel who relieved him from performing non-qualifying duties.

The petitioner was incorporated on April 1, 1999 and this visa petition was filed on June 5, 2001. The record shows that in 2000, during the firm's first full year of operation, the petitioner had gross receipts and sales of \$4,582,756 and paid \$105,600 in compensation to two officers, the beneficiary and Mr. [REDACTED]. Each received \$52,800 and devoted 50 percent of their time to the business. During the entire year of 2000, the company had only two part-time employees.

In this case, the descriptions of the beneficiary's job duties are insufficient to warrant a finding that the beneficiary will be employed in a managerial capacity. It appears, at most, the beneficiary will be performing operational rather than managerial duties. The petitioner has provided insufficient evidence to establish that the beneficiary has been or will be managing or

directing the management of a function, department, subdivision or component of the company.

Based upon the record, even considering the firm probably has an additional employee working for the enterprise, the petitioner has not provided evidence that the beneficiary will be managing a subordinate staff of professional, managerial or supervisory personnel who relieve him from performing non-qualifying duties. The beneficiary is the individual performing the necessary tasks for the ongoing operation of the company, rather than primarily directing or managing those functions through the work of others. For this reason, the petition may not be approved.

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. Here, that burden has not been met.

ORDER: The appeal is dismissed.