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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

[redacted]

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

File: LIN-01-036-50105 Office: Nebraska Service Center Date: FEB 28 2003

IN RE: Petitioner: [redacted]
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)

IN BEHALF OF PETITIONER:

[redacted]

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 Service 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.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Myra L. Rosenberg
for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Nebraska Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a sewing machine sales and service company, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its general manager. The director determined that the petitioner had not established that there is a qualifying relationship between the U.S. and foreign entities or that the beneficiary had been or would be employed in the United States in a primarily managerial or executive capacity.

On appeal, counsel argues that there is a qualifying relationship between the U.S. and foreign entities, and that the beneficiary is employed in a primarily managerial or executive capacity.

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 demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(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 (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.

The U.S. petitioner states that it was established in 1999 and that it is an affiliate of Sewing Machine Specialists, CC, located in Durban, South Africa. The petitioner declares four part-time employees and one full-time employee and a gross annual income of approximately $250,000. It seeks to extend the petition's validity and the beneficiary's stay for one year at an annual salary of $30,000.

The first issue in this proceeding is whether the petitioner has submitted sufficient evidence to establish that there is a qualifying relationship between the U.S. and foreign entities.

8 C.F.R. 214.2(l)(1)(ii)(G) states:

> *Qualifying organization* means a United States or foreign firm, corporation, or other legal entity which:
>
> (1) Meets exactly one of the qualifying relationships specified in the definitions of a parent, branch, affiliate or subsidiary specified in paragraph (l)(1)(ii) of this section;
>
> (2) Is or will be doing business (engaging in international trade is not required) as an employer in the United States and in at least one other country directly or through a parent, branch, affiliate, or subsidiary for the duration of the alien's stay in the United States as an intracompany transferee; and
>
> (3) Otherwise meets the requirements of section 101(a)(15)(L) of the Act.

8 C.F.R. 214.2(l)(1)(ii)(I) states:

> *Parent* means a firm, corporation, or other legal entity which has subsidiaries.

8 C.F.R. 214.2(l)(1)(ii)(J) states:

> *Branch* means an operating division or office of the same organization housed in a different location.

8 C.F.R. 214.2(l)(1)(ii)(K) states:

> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and

> controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns directly or indirectly, less than half of the entity, but in fact controls the entity.

8 C.F.R. 214.2(l)(1)(ii)(L) states, in pertinent part:

> *Affiliate* means (1) One of two subsidiaries both of which are owned and controlled by the same parent or individual, or
>
> (2) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

The petitioner, Sewing Machine Specialists, LLC, claims to be an affiliate of the foreign entity, Sewing Machine Specialists, CC.

In a letter dated September 14, 1999, the petitioner was requested, to respond, in pertinent part, to the following:

> <u>The following evidence must be submitted in conjunction with the instant petition.</u>
>
> (a) Evidence that the United States firm and the foreign firm continue to be qualifying corporate organizations. Common ownership and/or control between the United States business entity and the foreign business entity must have been maintained. THE BENEFICIARY OF THE INSTANT PETITION PURCHASED A NEW BUSINESS ON OCTOBER 14, 2000, THEREFORE, IT APPEARS THE BENEFICIARY NEVER COMMENCED BUSINESS AT THE PREVIOUSLY APPROVED ENTITY AND A QUALIFYING RELATIONSHIP WOULD NOT EXIST BETWEEN THE U.S. ENTITY AND THE FOREIGN ENTITY.

In response, the petitioner, through counsel states, in pertinent part, that:

> **A. QUALIFYING BUSINESS RELATIONSHIP CONTINUES TO EXIST BETWEEN SOUTH AFRICAN AND U.S. ENTITIES.**
>
> The South African entity known as Sewing Machine Specialists, CC is a South African Close Corporation, jointly owned by GFM & Joneen Perryman. GFM and Joneen Perryman are also equal co-owners of a second South African Close Corporation, this one known as Pfaff Sewing & Knitting Centre. Both companies are engaged in the sale

and service of sewing and knitting machines and accessories.

The U.S. company is known as Sewing machine Specialists, LLC, an Oregon Limited Liability Company. SMS (US) is also jointly owned by GFM & Joneen Perryman. This is a qualifying relationship for L-1 visa purposes.

The RFE claims that the beneficiary, [named], purchased the new business on October 14, 2000, which destroyed the qualifying relationship for L visa purposes. The Immigration Service also claims that since the prior business in Beaverton did not go forward as planned the qualifying relationship for L visa purposes as proposed at the time of the approval and subsequent issuance of the L visa, was destroyed. This is incorrect.

Firstly, the relationship between the foreign entity and the newly formed US entity was created in March 1999, when SMS (US) was organized under the laws of [the] State of Oregon as a Limited Liability Company jointly owned by GFM and [redacted] Since GFM & [redacted] jointly own both SMS (SA) and Pfaff Knitting Centre (SA), the latter entity the previous foreign employer of the beneficiary, the relationship continues to exist. There have been no changes in ownership to either the South African entity, nor to the U.S. entity.

All relevant corporate documents indicate that the three corporate entities are jointly owned by [redacted] alone. [The beneficiary] is an employee. In October of 2000 when SMS purchased Viking Sewing & Vacuum Center after it was discovered that the owners of the Beaverton store had in fact leased SMS's future business premises to another, [the beneficiary] signed the purchase agreement documents as the US representative of SMS (US). This has been confirmed in documents submitted now from the corporate lawyers for SMS (US) and from [redacted] the owners of SMS (US). In addition, we have re-submitted signed Articles of Organization for the US Limited Liability Company, which clearly show that GFM & Joneen Perryman own the company.

The petitioner submitted additional documentary evidence indicating common ownership of the United States and foreign entities by GFM & Joneen Perryman.

Such documentary evidence consisted of the following:

* A letter from [redacted] August 1989 confirming ownership of SMS (SA);

* Founding statements for two South African Close Corporations;

* Confirmation letter from SMS (SA) regarding ownership of South African and US business entities;

* A letter from US corporate legal counsel regarding SMS, LLC (US);

* A signed Operating Agreement for US company showing equal ownership between GFM and Joneen Perryman.

Additionally, counsel submitted significant tax, earnings, insurance and other business documentation reflecting ownership and the conduct of business by SMS (SA), Pfaff Knitting Centre (SA) and SMS (US).

On appeal, counsel argues that a qualifying relationship continues to exist and was never destroyed. Counsel refers to the documentary evidence submitted in response to the Service's request for additional evidence as sufficient to corroborate the petitioner's claim. Counsel states that the petitioner is submitting additional evidence on appeal to "re-confirm" the qualifying corporate relationship.

On appeal, the petitioner submits the following:

1. Articles of Organization of Sewing Machine Specialists, LLC

2. A notarized sworn statement signed by GFM Perryman attesting to the fact that SMS (US) is jointly owned by GFM & Joneen Pettyman.

3. A notarized sworn statement signed by Joneen Perryman confirming the statement of facts as attested to by Graham (GFM) Perryman.

Regulations and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this nonimmigrant visa petition. Matter of Siemens Medical Systems, Inc., 19 I&N Dec. 362 (BIA 1986); Matter of Hughes, 18 I&N Dec. 289 (Comm. 1982); *see also* Matter of Church of Scientology International, 19 I&N Dec. 593 (BIA 1988) (in immigrant visa proceedings). In the context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. Id.

The regulation at 8 C.F.R. 103.2(b)(8) specifically allows the director to request additional evidence in appropriate cases. The petitioner was requested to submit evidence that the U.S. and foreign entities are qualifying organizations. From the evidence

of record it is concluded that both the foreign entities SMS (SA), Pfaff Knitting Centre (SA), as well as the United States entity SMS (US), are owned and controlled by the same two individuals in equal proportions. Accordingly, on review, it is concluded that the petitioner has submitted sufficient evidence to establish that there is still a qualifying relationship between the U.S. and foreign entities. Therefore, the petitioner has overcome this portion of the director's objections.

The second issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

> "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:

"Executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

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

The petitioner describes the beneficiary's duties as follows:

> [The beneficiary] will be fully responsible for retail operations; will manage four retail staff & train in new techniques including use of high-tech sewing machines, develop marketing campaign; establish instructional sewing classes/demonstrations in use of Viking High-tech sewing machines.

In a letter dated October 27, 2000, the petitioner stated, in pertinent part, that:

> In the US [the beneficiary] will assume sole responsibility for establishing US operational procedures, including marketing strategies, sales projections, financial controls and staffing requirements. He will utilize his in-depth knowledge of Viking sewing products to attract new customers and encourage sewing enthusiasts to upgrade [to] more sophisticated equipment.
>
> We anticipate gross sales to remain at the 1999 levels, which were $525,000. However, it is hoped that through the end of year 2001, revenues will have increased by 10% to 15%, once new management is in place. [The beneficiary] will manage a staff of four part-time employees who have agreed to remain with the store upon sale to SMS (US).

In response to a Service request for additional information dated June 30, 2001, the petitioner described the beneficiary's duties as follows:

> Due to the change in business circumstances described above (final approval of the petition took 10 months) whereby the beneficiary spent the first six weeks in L-1 status acquiring a business on behalf of SMS (US), he functioned in an executive capacity rather than as manager. As such, he assumed full responsibility in negotiating the purchase of Viking Sewing and Vacuum Center in Tacoma reporting directly to the owners of SMS (US) in South Africa for final approval.
>
> Since concluding the purchase, [the beneficiary] has spent almost all of his time managing the store. The duties performed include *training and managing staff of four sales people, conducting sales strategy meetings with staff to improve overall performance, drawing-up and managing class schedules for sales staff to train customers in the use of new sewing products, planning and implementing advertising & promotional campaigns, conducting inventory review, ordering new products from suppliers and distributors, managing daily cash flow, reconciling cash accounts and accounts payable, payroll, preparing financial records for submission to accountants on a monthly basis, tracking all daily transactions on business management software to generate business analysis reports to illustrate sales in comparison to sales projections, and preparing quarterly reports for management in South Africa.*

On appeal, counsel states that the petitioner now has a store manager, who has a degree in Home Economics and must therefore be considered a professional. Counsel states that since the beneficiary is directing a professional, he qualifies as an L-1 manager. For the purposes of this proceeding, the beneficiary must have been eligible for the benefit sought at the time of the filing of the petition for an extension. 8 C.F.R. 103.2(b)(12). The record indicates that at the time of the filing of the petition for an extension and up until the filing of the appeal, the beneficiary had a staff of only four part-time sales representatives. The addition of a new employee on appeal is not persuasive.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. The petitioner's descriptions are brief and in insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as conducting sales strategy meetings with staff to improve overall performance, drawing-up and managing class schedules for sales staff to train customers in the use of new sewing products, planning and implementing advertising & promotional campaigns, are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as conducting inventory review,

ordering new products from suppliers and distributors, managing daily cash flow, reconciling cash accounts and accounts payable, payroll, preparing financial records for submission to accountants on a monthly basis and tracking all daily transactions on business management software to generate business analysis reports to illustrate sales in comparison to sales projections, have not been demonstrated to be managerial or executive in nature. The use of the position title of "general manager" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title. It appears that the beneficiary directly supervises four part-time sales representatives.

Further, counsel's assertion on appeal notwithstanding, the petitioner's evidence is not sufficient in establishing that the beneficiary will be managing a subordinate staff of professional, managerial, or supervisory personnel who relieve him from performing nonqualifying duties.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this additional 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.