

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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 In the Matter of the Petition of: :
 :
 RANJANA KHAN AND NAEEMUDDIN KHAN :
 AND PHOENIX HAND EMBROIDERY, INC., :
 :
 Petitioners, :
 :
 To Review Under Section 101 of the Labor Law: :
 An Order Under Article 12-A of the Labor Law, dated :
 July 14, 2009, :
 :
 - against - :
 :
 THE COMMISSIONER OF LABOR, :
 :
 Respondent. :
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DOCKET NO. PR 09-257

RESOLUTION OF DECISION

APPEARANCES

Manish Karna, designated representative, for petitioners.
Pico Ben-Amotz, Acting Counsel, NYS Department of Labor (Benjamin T. Garry of counsel), for respondent.

WITNESSES

Manish Karna for the petitioners.
Supervising Labor Standards Investigator Cloty Ortiz for the respondent.

WHEREAS:

The petition in this matter was filed with the Industrial Board of Appeals (Board) on September 14, 2009, and amended September 28, 2009, and seeks review of an order under Article 12-A of the Labor Law issued by the Commissioner of Labor (Commissioner or respondent) against petitioners Ranjana Khan and Naeemuddin Khan and Phoenix Hand Embroidery, Inc. on July 14, 2009. Upon notice to the parties a hearing was held on October 20, 2011, in New York, New York, before Devin A. Rice, the Board's Associate Counsel, and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses, and to make statements relevant to the issues.

The order is an order under Article 12-A of the Labor Law, which finds that the petitioners were an employer as defined by the Labor Law, were a contractor engaged in the apparel industry as defined in Labor Law § 340 (c), and employed production employees as defined in Labor Law § 340 (f). The order further finds that on November 26, 2008, the petitioners failed to register as an apparel manufacturer as required by Labor Law §§ 341 and 345 (1), and failed to comply with the twenty day time period for registration as specified in an order to register issued November 26, 2008 as required by Labor Law §§ 341 and 345 (2), and assesses a civil penalty in the amount of \$3,000.00 for failure to register on November 26, 2008, and an additional \$3,000.00 civil penalty for failing to register within twenty days of November 26, 2008, for a total civil penalty of \$6,000.00.

The petitioners allege in their petition, and argued at hearing, that they did not employ production employees during the relevant time period.

SUMMARY OF EVIDENCE

Petitioner Ranjana Khan is the president of Phoenix Hand Embroidery, Inc., a company which during the relevant time period imported jewelry from India for sale in the United States. Petitioner Naeemuddin (Naeem) Khan, the vice president of Phoenix Hand Embroidery, is Ranjana Kjan's husband. Naeem Khan is a 100% owner of Naeem Khan, Ltd., a fashion design company. In 2008, Phoenix Hand Embroidery and Naeem Khan, Ltd. operated out of the same location on West 36th Street in New York, New York.

Manish Karna is the accountant for Phoenix Hand Embroidery, and was familiar with the business operations of Phoenix Hand Embroidery and Naeem Khan, Ltd. in 2008. Karna testified that all of the employees who were working on the premises shared by Phoenix Hand Embroidery and Naeem Khan in 2008 worked for Naeem Khan. According to Karna, "no one works" for Phoenix Hand Embroidery. Khan explained that Phoenix imports and sells goods, and "the selling activity and everything is done from Naeem Khan Ltd." Karna testified that Phoenix paid Naeem Khan to do all the "outside work." Karna explained that Phoenix gave the work to Naeem Khan and Naeem Khan bills Phoenix. For example, Phoenix imports jewelry from India. Naeem Khan picks the jewelry up from customs and does whatever is necessary to sell the goods such as polishing or making repairs, and then Phoenix sells the jewels.

Khan testified that he was present when the Department of Labor (DOL) inspected the premises shared by Phoenix and Naeem Khan, and that Phoenix was not involved in manufacturing at that time. He believes the statement he made to the investigators "was taken in the wrong context."

Supervising Labor Standards Investigator Cloty Ortiz, who was then a Senior Labor Standards Investigator, testified that Labor Standards Investigator Edwin Bautista was the original investigator assigned to this matter. Ortiz was not Edwin Bautista's supervisor, but she did supervise Edwin Bautista's partner, Emy Bautista. Ortiz became aware of this matter after Edwin Bautista left DOL and the case was transferred to Emy Bautista. Ortiz testified that "At the time [she] became involved to handle the dealings with the employer when it came time to impose a penalty for failure to register."

Ortiz testified that the registration process was never completed for 2008, because an original signed application was never submitted. Ortiz explained that "if the application is not properly filled out, the process is not complete and hence the violation." Ortiz further testified that registration is necessary when production or manufacturing happens in New York and involves garments or accessories. Registration is not required if the production or manufacturing takes place out of state or outside the country. Ortiz explained that in this case, Phoenix was determined as required to register because they had a history of being registered and never let DOL know they were no longer a manufacturer. According to Ortiz, "if at some point they felt that, you know, they don't need it because they decided to stop contracting work here or manufacturing here and they are sending everything out of state or out of the country they have to let us know." Ortiz testified that the violation was supported by a site visit, and based on the information in the file, Karna had informed Edwin Bautista and Emy Bautista that Phoenix had employees. Ortiz further testified that there was no information in the file that Phoenix wasn't a manufacturer. Additionally, she explained that the order was issued because the application "wasn't completed in the way it was asked." Finally, she testified that DOL would not have issued the order if the investigators had concluded there was no manufacturing.

An order to register (as a garment manufacturer or contractor) was served on Phoenix Hand Embroidery by Emy Bautista and Edwin Bautista on November 26, 2008, requiring Phoenix to submit an application with appropriate fee and documentation, for an apparel industry certificate within 20 days. A Notice of Labor Law Violation was issued the same date finding Phoenix Hand Embroidery in violation of Article 12-A of the Labor Law. Notes in evidence prepared by Emy Bautista, who is still employed by DOL but did not testify, indicate that she did not observe any manual workers on the premises, but that she spoke to Karna, who informed her that he was not sure whether work is contracted out or produced on the premises. Other documents in evidence include emails between Karna and DOL concerning the registration process and the documents required.

Also in evidence is an application for renewal of apparel industry certificate of registration filed by Phoenix on January 10, 2009, that responds "no employees" to the question "do you have a contractual relationship with a labor organization?"

FINDINGS

The Board makes the following findings of fact and law pursuant to the provision of Board Rules of Procedure and Practice (Rules) 65.39 (12 NYCRR 65.39).

The burden of proof in a proceeding before the Board is on the petitioners to show that the order is invalid or unreasonable (Labor Law § 101, 103; 12 NYCRR 65.30). Therefore, the petitioners must show by a preponderance of the evidence that the order is unreasonable or invalid. We find for the following reasons that the petitioners have met this burden.

The order finds that the petitioners employed production employees as defined in Labor Law § 340 (f), which provides that "production employees" shall mean persons who directly perform the cutting, sewing, finishing, assembling, pressing or otherwise producing

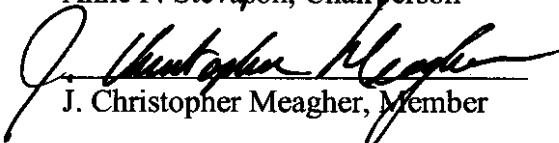
of any men's, women's, children's or infant's apparel, or a section or component of apparel, designed or intended to be worn by any individual which is to be sold or offered for sale." Based on this finding, the petitioners were cited for failing to register as an apparel manufacturer or contractor, and for failing to register as such within 20 days of issuance of an order to register.

Karna credibly testified that the petitioners employed no production employees in 2008, and that all production work performed at the premises shared by Phoenix and Naeem Khan was done by Naeem Khan's employees. Furthermore, Karna credibly testified that he never told the DOL investigators that Phoenix did manufacturing, and that his statement must have been misunderstood. The petitioners, having met their burden of proof to credibly explain how the business operated and that the petitioners employed no production workers, the burden then shifted to DOL, which produced no reliable evidence that the petitioners employed production employees and were, therefore, required to register as a contractor for 2008. The notes taken by the investigators state that no manual workers were observed on the premises. Neither of the investigators who conducted the on-site visit testified as to what they observed. Furthermore, we have no statements or testimony from any production workers employed by the petitioners. Accordingly, the order must be revoked.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

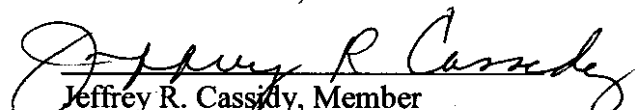
1. The order under Article 12-A of the Labor Law, dated July 14, 2009, is revoked; and
2. The petition for review be, and the same hereby is, granted.


 Anne P. Stevason, Chairperson


 J. Christopher Meagher, Member

 Jean Grumet, Member

 LaMarr J. Jackson, Member


 Jeffrey R. Cassidy, Member

Dated and signed in the Office
 of the Industrial Board of Appeals
 at New York, New York, on
 January 30, 2012.

of any men's, women's, children's or infant's apparel, or a section or component of apparel, designed or intended to be worn by any individual which is to be sold or offered for sale." Based on this finding, the petitioners were cited for failing to register as an apparel manufacturer or contractor, and for failing to register as such within 20 days of issuance of an order to register.

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Anne P. Stevason, Chairperson

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Jean Grumet, Member



LaMarr J. Jackson, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Rochester, New York, on
January 30, 2012.

Jeffrey R. Cassidy, Member