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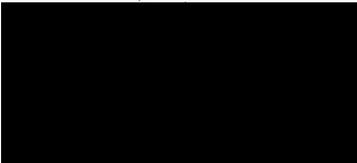


FILE: SRC 03 123 50276 Office: TEXAS SERVICE CENTER Date: JAN 27 2006

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

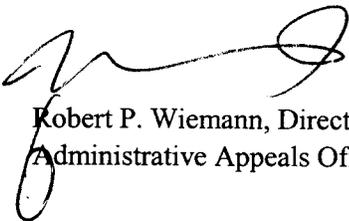
PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office 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.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, initially denied the nonimmigrant visa petition. The Administrative Appeals Office (AAO) subsequently withdrew the director's decision and remanded the petition to the director for further review and entry of a new decision. The director, after issuing a request for evidence and reviewing the petitioner's response, again denied the petition and certified her decision to the AAO. The AAO will affirm the director's decision to deny the petition.

The petitioner filed this nonimmigrant petition seeking to employ 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 was incorporated under the laws of the State of Texas and intends to engage in the retail and wholesale business. The petitioner claims to be a subsidiary of M/S Little Italy, located in Mumbai, India. The petitioner seeks to employ the beneficiary as the president of its new office in the United States for a one-year period.

The director denied the petition on May 12, 2003, concluding that the petitioner had not established that the beneficiary was employed by the foreign entity for one continuous year within three years preceding the filing of the petition. The petitioner subsequently submitted an appeal. In a decision dated May 19, 2004, the AAO withdrew the decision of the director and remanded the petition to the director for additional action and a new decision. The AAO noted that the record did not contain sufficient evidence to establish that: (1) the beneficiary was employed by the foreign entity in a qualifying managerial or executive capacity; (2) the petitioner had secured sufficient physical premises to house the new office in the United States; (3) a qualifying relationship exists between the foreign entity and the United States entity; or that (4) the beneficiary would be employed by the U.S. entity in a primarily managerial or executive capacity, or that the new office would support such a position within one year. Accordingly, the AAO instructed the director to request additional evidence addressing these issues and any other evidence she deemed necessary.

The director requested additional evidence on August 4, 2005, to which the petitioner submitted a response on October 1, 2005. The director denied the petition on October 14, 2005, determining that the evidence submitted was insufficient to establish: (1) that the petitioner had sufficient physical premises to house the new office; or (2) that the beneficiary would be employed by the United States company in a primarily managerial or executive capacity within one year. The director notified counsel for the petitioner that her decision was being certified to the AAO and advised that the petitioner had 30 days in which to submit a brief or statement in support of the petition. No brief or other documentation has been incorporated into the record as of this date.

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.

The regulation at 8 C.F.R. § 214.2(l)(3)(v) also provides that if the petition indicates that the beneficiary is coming to the United States as a manager or executive to open or be employed in a new office in the United States, the petitioner shall submit evidence that:

- (A) Sufficient physical premises to house the new office have been secured;
- (B) The beneficiary has been employed for one continuous year in the three year period preceding the filing of the petition in an executive or managerial capacity and that the proposed employment involves executive or managerial authority over the new operation; and
- (C) The intended United States operation, within one year of the approval of the petition, will support an executive or managerial position as defined in paragraphs (l)(1)(ii)(B) or (C) of this section, supported by information regarding:
 - (1) The proposed nature of the office describing the scope of the entity, its organizational structure, and its financial goals;
 - (2) The size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States; and
 - (3) The organizational structure of the foreign entity.

The first issue in the present matter is whether the beneficiary will be employed by the United States entity in a primarily 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.

The petition was filed on March 27, 2003. In an attachment to the Form I-129 petition, the petitioner provided the following description of the beneficiary's proposed position as its president:

[H]e will be responsible for hiring and firing managers; supervising subordinate employees, including at least one manager, who will supervise and oversee subordinate employees; overseeing preparation of sales and marketing reports; reviewing and analyzing sales data; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; and overseeing marketing campaigns developed by subordinate

managers. In the performance of his duties, the Beneficiary will receive minimum supervision from the other members of the Board of Directors, and the Beneficiary will exercises [sic] wide discretion and latitude in the performance of his duties.

The petitioner described its proposed business plan as follows:

The Petitioner wants to establish retail stores in Texas, and it expects to have a combined workforce of Ten (10) employees within the next Twelve (12) months. Petitioner is in the processing [sic] of reviewing and acquiring retail business projects. Petitioner believes that it can set up its operations by running efficient operations. . . .

The director did not address the beneficiary's employment with the United States entity in her May 12, 2003 decision. On remand, in a request for evidence dated August 4, 2005, the director instructed the petitioner to provide a description of the proposed business plan for the first year of operations, the beneficiary's proposed duties, and evidence to establish that the U.S. company will support a managerial or executive position within one year.

In a letter dated September 27, 2005, the petitioner provided the following description of the beneficiary's duties:

[H]e will be responsible for hiring and firing managers; supervising subordinate employees, including at least two (2) managers, who will supervise and oversee subordinate employees; overseeing preparation of sales and marketing reports; reviewing and analyzing sales data; negotiating lease agreements, sales and marketing agreements, and service contracts; establishing and implementing policies to manage and achieve marketing goals; review financial reports; review budgets and expense reports prepared by subordinate employees; managing the company; overseeing marketing campaigns developed by subordinate managers; and negotiating beauty & health products contracts.

In the performance of these duties, the Beneficiary will receive minimum supervision from the other members of the Board of Directors, and the Beneficiary will exercise wide discretion and latitude in the performance of his duties.

The petitioner also provided the following "business plan":

The Petitioner now wants to establish a retail and wholesale sales business, and it expects to have a combined workforce of Ten (10) employees within the next Twelve (12) to Twenty-Four (24) months. The Petitioner will purchase dollar store items and convenience store items on wholesale basis from local suppliers at close-out prices and then sell these items to other wholesalers, as well as through Petitioner's own retail store. The Petitioner intends to sell and market these items on wholesale and retail basis. Generally these types of businesses have a

profit margin of 25% - 30%. The Petitioner expects to have sales of \$700,000.00 gross profit of \$210,000.00 and net profit after paying all expenses and salaries of \$30,000.00.

The petitioner indicated that it intended to hire an initial staff of three employees upon approval of the petition. The petitioner also stated that the \$20,000 investment it received is sufficient to capitalize its business plan, and noted that its vendors would sell products to the company on credit, thus minimizing its capitalization requirements.

On October 15, 2005, the director denied the petition and certified her decision to the AAO for review. The director concluded that the petitioner had not established that the beneficiary will be employed in a qualifying managerial or executive capacity within one year. The director observed that the petitioner's description of the beneficiary's job duties was general in nature, and found the proposed business plan insufficient to demonstrate that the business will support a managerial or executive position.

Upon review of the petition and the evidence, the petitioner has not established that the beneficiary will be employed by the United States entity in a managerial or executive capacity within one year. 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 petitioner's description of the job duties 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 the instant matter, the petitioner has provided only a vague description of the beneficiary's job duties that fails to identify what his tasks will be on a day-to-day basis. For example, the petitioner indicates that the beneficiary will be responsible for "overseeing preparation of sales and marketing reports," "reviewing and analyzing sales data," "sales and marketing agreements, and service contracts" "overseeing marketing campaigns developed by subordinate managers," and "negotiating beauty and health products contracts." Some of these duties, such as negotiating purchase contracts, service contracts and sales agreements and analyzing sales data, appear to be non-qualifying operational duties necessary to sell the petitioner's products. An employee who primarily performs the tasks necessary to produce a product or to 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).

The petitioner's job description indicates that the beneficiary would perform some sales, marketing and financial tasks through other employees or "managers"; however, the petitioner failed to describe its proposed organizational structure as required by 8 C.F.R. § 214.2(l)(3)(v)(C)(I). Although the petitioner indicates that it would hire three employees after the L-1 petition is approved and up to ten employees within two years, the petitioner provided no other information regarding the positions of the beneficiary's proposed subordinates, such as their job titles and position descriptions. 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. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)). Without the required information regarding the positions to be filled during the first year of operations and the duties the beneficiary's subordinates will perform, the AAO cannot conclude that the beneficiary will

supervise a staff sufficient to relieve him from performing primarily non-qualifying duties associated with operating a wholesale business and retail store.

Whether the beneficiary is a managerial or executive employee turns on whether the petitioner has sustained its burden of proving that his duties are "primarily" managerial or executive. *See* sections 101(a)(44)(A) and (B) of the Act. Here, the petitioner fails to document what proportion of the beneficiary's duties would be managerial functions and what proportion would be non-managerial. The petitioner lists the beneficiary's duties as including both managerial and administrative or operational tasks, but fails to quantify the time the beneficiary spends on them. This failure of documentation is important because, as discussed above, several of the beneficiary's daily tasks, such as his involvement in purchasing and service contracts, do not fall directly under traditional managerial duties as defined in the statute. For this reason, the AAO cannot determine whether the beneficiary is primarily performing the duties of a manager or executive. *See, e.g. IKEA US, Inc. v. U.S. Dept. of Justice*, 48 F. Supp. 2d 22, 24 (D.D.C. 1999).

When a new business is established and commences operations, the regulations recognize that a designated manager or executive responsible for setting up operations will be engaged in a variety of activities not normally performed by employees at the executive or managerial level and that often the full range of managerial responsibility cannot be performed. In order to qualify for L-1 nonimmigrant classification during the first year of operations, the regulations require the petitioner to disclose its business plans and the size of the United States investment, and thereby establish that the proposed enterprise will support an executive or managerial position within one year of the approval of the petition. *See* 8 C.F.R. § 214.2(l)(3)(v)(C). This evidence should demonstrate a realistic expectation that the enterprise will succeed and rapidly expand as it moves away from the developmental stage to full operations, where there would be an actual need for a manager or executive who will primarily perform qualifying duties.

The petitioner's business plan comprises one short paragraph in the petitioner's September 27, 2005 letter and is not supported by any financial projections, market research, or other documentation. The petitioner intends to operate as a wholesaler and retailer of "dollar store items and convenience store items," and thus reasonably requires a lease for a retail store and warehouse space. As discussed in greater detail below, the petitioner initially submitted a lease for a premise to be used as a donut shop and subsequently provided a lease for 100 square feet of office space. Neither lease agreement suggests that the petitioner is prepared to do business in its intended area of business. The regulation at 8 C.F.R. § 214.2(l)(3)(v)(C)(2) requires the petitioner to disclose the size of the United States investment and the financial ability of the foreign entity to remunerate the beneficiary and to commence doing business in the United States. In this matter, the petitioner has disclosed that the foreign entity borrowed \$20,000 from an individual and two apparently unrelated U.S. companies in order to finance the petitioner. Without additional explanation regarding this financing arrangement, the AAO cannot find that the foreign entity has the financial ability to commence doing business in the United States.

Collectively, the vague job description, the petitioner's failure to describe its proposed organizational structure, and the minimal business plan submitted do not demonstrate a realistic expectation that the enterprise will succeed and rapidly expand to the point where it would require a manager or executive to perform primarily qualifying duties within one year. Accordingly, the AAO affirms the director's decision on this issue.

The second issue in this matter is whether the petitioner has secured sufficient physical premises to house the new office in the United States as required by 8 C.F.R. § 214.2(l)(3)(v)(A).

In support of the initial petition, the petitioner submitted (1) an unsigned, undated sublease agreement between an individual and the beneficiary's spouse for premises at an unidentified address in Harris County, Texas, to be used only as a donut shop; and (2) an "assignment of lease" document indicating that the beneficiary's spouse assigned her interests and rights in the lease agreement to the petitioning company on March 21, 2003, for the property located [REDACTED]

The director did not address the petitioner's lease agreement in his May 12, 2003 decision. However, in remanding the petition, the AAO noted that the petitioner did not provide evidence that the lessee obtained the consent of the landlord prior to assigning the premises to the petitioning company.

In her August 4, 2005 request for evidence, the director requested a copy of the lease agreement for the U.S. company. On October 1, 2005, the petitioner submitted a new lease agreement dated September 1, 2005, for a 100 square foot office to be used by the petitioning company for "office work" and no other purpose.

The director denied the petition on October 14, 2005 and certified her decision to the AAO for review. The director reviewed the petitioner's new lease agreement and determined that the petitioner's 100 square feet of office space is not sufficient space in which to house the petitioner's office, in light of the petitioner's intention to operate as a wholesaler and retailer.

On review, the petitioner has not established that it had sufficient physical premises to house the new office at the time the petition was filed. Although the director correctly noted that the new lease agreement does not appear to provide sufficient space for the petitioner to operate its intended business, the petitioner must establish eligibility at the time of filing the nonimmigrant visa petition. A visa petition may not be approved at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248 (Reg. Comm. 1978).

The sublease agreement and assignment of lease submitted with the initial petition were insufficient to establish that the petitioner had obtained sufficient premises to operate as a wholesaler and retailer at the time the petition was submitted in March 2003. The main lease agreement, presumably between "Billiard Designs, Inc." as landlord and "Mohamed Omer Surty" as tenant, has not been provided for the record. Therefore, the AAO cannot verify the legal standing of the "sublandlord" identified on the sublease agreement, nor determine whether the main lease agreement was still valid at the time the sublease was allegedly assigned to the petitioner. The sublease agreement is not signed or dated and does not identify the address or size of the premises in question. Again, 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. at 165. Finally, the sublease indicates that the premises is to be used only as a donut shop, while the petitioner claims that it intends to operate as a wholesaler and retailer of convenience store and dollar store products. 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).

Based on the foregoing discussion, the petitioner has not established that it had secured sufficient physical premises to house the new office. For this additional reason, the petition cannot be approved.

Beyond the decision of the director, the petitioner has not established that a qualifying relationship exists between the U.S. and foreign entities as required by 8 C.F.R. § 214.2(l)(3)(i). The petitioner claims to be a wholly-owned subsidiary of the foreign entity and has provided a stock certificate and stock transfer ledger indicating the issuance of 1,000 shares of stock to the foreign entity.

The regulation 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 visa classification. *Matter of Church Scientology International*, 19 I&N Dec. 593 (BIA 1988); *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). 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. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra*. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The regulations specifically allow the director to request additional evidence in appropriate cases. *See* 8 C.F.R. § 214.2(l)(3)(viii). As ownership is a critical element of this visa classification, the director may reasonably inquire beyond the issuance of paper stock certificates into the means by which stock ownership was acquired. As requested by the director, evidence of this nature should include documentation of monies, property, or other consideration furnished to the entity in exchange for stock ownership. Additional supporting evidence would include stock purchase agreements, subscription agreements, corporate by-laws, minutes of relevant shareholder meetings, or other legal documents governing the acquisition of the ownership interest.

In response to the director's request for canceled checks evidencing that the petitioner's claimed parent company in fact paid for its interest in the U.S. company, the petitioner submitted copies of three canceled checks in the amounts of \$10,000, \$5,000 and \$5,000 respectively, from Real King, Inc., Electro Circuits, and Stephan George. The petitioner stated that the foreign entity obtained loans in order to capitalize the U.S. company and noted that the \$20,000 investment is more than sufficient to pay for the 1,000 shares of stock issued. The petitioner also submitted copies of three promissory notes ostensibly made between the foreign entity and the three parties who provided the petitioner's funding. All three promissory notes appear to be

signed by the beneficiary on behalf of the foreign entity, although the petitioner stated that he was last employed by the foreign entity in 2001. None of the documents are signed by the holders of the promissory notes. Two of the three promissory notes are dated March 24, 2003, while all three checks were deposited into the petitioner's bank account a week earlier, on March 17, 2003.

Upon review, the AAO finds no credible evidence that the foreign entity has paid or will pay for its interest in the U.S. entity and therefore cannot find that the claimed parent-subsiidiary relationship exists between the two entities. The petitioner has not adequately explained why three unrelated parties transferred the investment funds to the U.S. company, rather than transferring these funds to the foreign entity, which purportedly holds the promissory notes. Nor has it explained why two of these parties would have transferred funds to the petitioning company one week before they formally agreed to loan money to the foreign entity. Finally, the AAO finds it significant that none of the promissory notes were acknowledged by the purported holders of the notes. Doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). For this additional reason, the petition cannot be approved.

Finally, the AAO finds insufficient evidence to establish that the beneficiary was employed by the foreign entity for one continuous year in the three years preceding the filing of the petition as required by 8 C.F.R. § 214.2(l)(3)(v)(B). The petitioner has consistently claimed that the beneficiary was employed by the foreign entity as its managing director from June 2000 until July 1, 2001. On April 8, 2003, the director requested payroll records from the foreign entity to confirm that the beneficiary was employed with the foreign entity for one continuous year between March 27, 2000 and March 27, 2003. In response the petitioner submitted monthly payroll records for the period from June 2000 through April 2001.

The director initially denied the petition on May 12, 2003, concluding that the beneficiary had not worked for the foreign entity for one continuous year prior to his admission to the United States in H-4 status on July 10, 2001. The director noted that the petitioner had not provided payroll records for a period of one full year.

On appeal, counsel for the petitioner submitted copies of the foreign entity's May and June 2001 payroll registers, asserting that, due to a simple oversight, they were not included in the response to the request for evidence. The AAO, in its June 16, 2005 decision, withdrew the director's decision and remanded the petition, but did not specifically address this issue or the evidence submitted by the petitioner on appeal. On review, the foreign entity's payroll records for May and June 2001 appear to be altered photocopies of the company's April 2001 payroll registry; only the dates have been changed. Again, doubt cast on any aspect of the petitioner's proof may undermine the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. at 591. As there is no other supporting documentary evidence in the record to substantiate the petitioner's claims that the beneficiary was employed by the foreign entity for one continuous year, the petition cannot be approved.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. See *Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683

(9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. 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 director's decision dated October 14, 2005 is affirmed. The petition is denied.