AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2760134
AMDS TRADING INC
6356 NW 99TH AVE UNIT 12
DORAL FL 33178-2721

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

PROTEST OF LIABILITY
DOCKET NO. 2011-36989L

O R D E R

This matter comes before me for final Agency Order.

Having fully considered the Special Deputy's Recommended Order and the record of the case and in the absence of any exceptions to the Recommended Order, I adopt the Findings of Fact and Conclusions of Law as set forth therein. A copy of the Recommended Order is attached and incorporated in this Final Order.

In consideration thereof, it is ORDERED that the determination dated January 7, 2011, is MODIFIED to reflect a retroactive date of October 1, 2008. It is further ORDERED that the determination is AFFIRMED as modified.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **August, 2011**.

TOM CLENDENNING
Assistant Director
AGENCY FOR WORKFORCE INNOVATION

AGENCY FOR WORKFORCE INNOVATION
Unemployment Compensation Appeals
MSC 345 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:
Employer Account No. - 2760134
AMDS TRADING INC
ATTN: DIANE ABOUKHALIL
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DORAL FL 33178-2721

PROTEST OF LIABILITY
DOCKET NO. 2011-36989L

RESPONDENT:
State of Florida
Agency for Workforce Innovation
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 7, 2011.

After due notice to the parties, a telephone hearing was held on June 6, 2011. The Petitioner, represented by the Petitioner's president, appeared and testified. The Petitioner's vice president testified as a witness. The Respondent, represented by a Department of Revenue Tax Auditor II, appeared and testified. The Joined Party appeared and testified. The Joined Party's wife testified as a witness.

The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted. Proposed Findings of Fact and Conclusions of Law were not received.

Issue:

Whether services performed for the Petitioner by the Joined Party working as an export specialist constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Findings of Fact:

1. The Petitioner is a corporation which has operated a business involved in the exporting of automobiles and heavy equipment since 2004. The business is operated by the Petitioner's president. The Petitioner's vice president works in the business as the bookkeeper.
2. The Joined Party is the cousin of the Petitioner's vice president. In 2008 the Joined Party immigrated to the United States from Lebanon where the Joined Party was a student. The Petitioner's president contacted the Joined Party and offered a job to the Joined Party. The Joined Party had never worked in the United States or in any other country and he did not have any work experience.

3. The position which the Petitioner's president offered to the Joined Party involved completing documentation for the exports and acting as a messenger for the president. The president told the Joined Party that the job was for three hours per day and that the Petitioner would pay the Joined Party $8 per hour. The president told that Joined Party that he wanted the Joined Party to work as an independent contractor. The Joined Party accepted the Petitioner's offer and began work on October 1, 2008. The parties did not enter into any written agreement or contract.

4. Although the Joined Party did not have any prior experience in an export business, the work was simple and did not require formal training. The Joined Party worked in the Petitioner's office and quickly learned the job by observing the president. The Petitioner provided the workspace, a computer, a telephone, and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work.

5. The Joined Party was required to personally perform the work. He was not allowed to hire others to perform the work for him.

6. The Joined Party completed a weekly timesheet listing the beginning and ending work times for each day. He submitted the timesheet to the president at the end of each workweek. The Petitioner paid the Joined Party for the hours that the Joined Party worked on a weekly basis; however, the Petitioner did not withhold any payroll taxes from the pay. The Joined Party believed that he was the Petitioner's employee but he was not aware that employers normally withhold payroll taxes from the pay of employees.

7. After the Joined Party worked for the Petitioner for approximately one month the Petitioner increased the Joined Party's hours of work. The Joined Party's new work schedule was Monday through Friday from 9 AM until approximately 5:30 PM. The Petitioner gave the Joined Party a key to the Petitioner's office. The Petitioner gave the Joined Party a car to drive and reimbursed the Joined Party for the automobile expenses. The Joined Party was allowed to use the car for personal matters as well as company business.

8. Approximately 70% of the Joined Party's assigned duties were performed from the Petitioner's office. The Petitioner's president assigned some duties to the Joined Party which required the Joined Party to perform the work from other locations. The Joined Party was instructed to go to the loading facilities or warehouses to supervise the loading of containers of items that were being shipped by the Petitioner. The Petitioner instructed the Joined Party to check in the vehicles that were to be exported. The Joined Party was instructed to go to the port to clear customs and to occasionally he was instructed to transport vehicles from one location to another. If the Joined Party was not able to work as scheduled the Joined Party was required to notify the Petitioner.

9. The Joined Party needed to have a Seaport Security Identification Card in order for the Joined Party to enter Port Everglades. The Seaport Security Identification Card was issued to the Joined Party under the Petitioner's name because the Joined Party did not have his own company. The Joined Party did not have any business or occupational license, did not have business liability insurance, and did not advertise or offer services to the general public.

10. Depending on the work assignment the Petitioner occasionally paid the Joined Party a percentage of the job. The method and rate of pay was determined by the Petitioner. On one occasion the Petitioner paid a bonus to the Joined Party when the Joined Party sold a generator.

11. On one occasion the Joined Party requested a pay increase. The Petitioner responded by offering to either provide paid health insurance coverage for the Joined Party or to increase the hourly rate of pay to $9 per hour. The Joined Party opted to accept the increase in the hourly rate of pay. The Petitioner paid the Joined Party for some holidays.

12. The Joined Party was supervised by the Petitioner's president. The Petitioner's president checked the Joined Party's work to make sure that the work was completed properly. If the work was not

completed properly the Joined Party was required to redo the work. The Petitioner paid the Joined Party for any additional time required to redo the work.

13. The Petitioner issued two written warnings to the Joined Party due to poor work performance. The president informed the Joined Party that if the Joined Party received five warnings the Petitioner would discharge the Joined Party.

14. At the end of each year the Petitioner reported the Joined Party's earnings on Form 1099-MISC as nonemployee compensation.

15. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. On September 7, 2010, the Joined Party was absent due to illness. The Petitioner's president contacted the Joined Party by telephone while the Joined Party was absent due to illness and informed the Joined Party that the Joined Party was discharged because the Petitioner was not satisfied with the Joined Party's work performance.

16. The Joined Party filed an initial claim for unemployment compensation benefits effective September 12, 2010. The Joined Party did not receive credit for his earnings with the Petitioner. A *Request for Reconsideration of Monetary Determination* was filed and an investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an employee or as an independent contractor. On January 7, 2011, the Department of Revenue issued a determination holding that the Joined Party performed services for the Petitioner as an employee retroactive to January 1, 2009. The Petitioner filed a timely protest.

Conclusions of Law:

17. The issue in this case, whether services performed for the Petitioner by the Joined Party as an export specialist constitute employment subject to the Florida Unemployment Compensation Law, is governed by Chapter 443, Florida Statutes. Section 443.1216(1)(a)2., Florida Statutes, provides that employment subject to the chapter includes service performed by individuals under the usual common law rules applicable in determining an employer-employee relationship.

18. The Supreme Court of the United States held that the term "usual common law rules" is to be used in a generic sense to mean the "standards developed by the courts through the years of adjudication." United States v. W.M. Webb, Inc., 397 U.S. 179 (1970).

19. The Supreme Court of Florida adopted and approved the tests in 1 Restatement of Law, Agency 2d Section 220 (1958), for use to determine if an employment relationship exists. See Cantor v. Cochran, 184 So.2d 173 (Fla. 1966); Miami Herald Publishing Co. v. Kendall, 88 So.2d 276 (Fla. 1956); Magarian v. Southern Fruit Distributors, 1 So.2d 858 (Fla. 1941); see also Kane Furniture Corp. v. R. Miranda, 506 So.2d 1061 (Fla. 2d DCA 1987).

20. Restatement of Law is a publication, prepared under the auspices of the American Law Institute, which explains the meaning of the law with regard to various court rulings. The Restatement sets forth a nonexclusive list of factors that are to be considered when judging whether a relationship is an employment relationship or an independent contractor relationship.

21. 1 Restatement of Law, Agency 2d Section 220 (1958) provides:
    (1) A servant is a person employed to perform services for another and who, in the performance of the services, is subject to the other's control or right of control.

    (2) The following matters of fact, among others, are to be considered:
        (a) the extent of control which, by the agreement, the business may exercise over the details of the work;
        (b) whether or not the one employed is engaged in a distinct occupation or business;

(c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
(d) the skill required in the particular occupation;
(e) whether the employer or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work;
(f) the length of time for which the person is employed;
(g) the method of payment, whether by the time or by the job;
(h) whether or not the work is a part of the regular business of the employer;
(i) whether or not the parties believe they are creating the relation of master and servant;
(j) whether the principal is or is not in business.

22. Comments in the Restatement explain that the word "servant" does not exclusively connote manual labor, and the word "employee" has largely replaced "servant" in statutes dealing with various aspects of the working relationship between two parties.

23. In Department of Health and Rehabilitative Services v. Department of Labor & Employment Security, 472 So.2d 1284 (Fla. 1st DCA 1985) the court confirmed that the factors listed in the Restatement are the proper factors to be considered in determining whether an employer-employee relationship exists. However, in citing La Grande v. B&L Services, Inc., 432 So.2d 1364, 1366 (Fla. 1st DCA 1983), the court acknowledged that the question of whether a person is properly classified an employee or an independent contractor often cannot be answered by reference to "hard and fast" rules, but rather must be addressed on a case-by-case basis.

24. In the instant case there was no written agreement or contract. The Petitioner's president merely informed the Joined Party that the president wanted the Joined Party to work as an independent contractor. The fact that the Joined Party accepted the offer of work does not necessarily establish an independent contractor relationship.

25. The Florida Supreme Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. The agreement should be honored, unless other provisions of the agreement, or the actual practice of the parties, demonstrate that the agreement is not a valid indicator of the status of the working relationship. Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995). In Justice v. Belford Trucking Company, Inc., 272 So.2d 131 (Fla. 1972), a case involving an independent contractor agreement which specified that the worker was not to be considered the employee of the employing unit at any time, under any circumstances, or for any purpose, the Florida Supreme Court commented "while the obvious purpose to be accomplished by this document was to evince an independent contractor status, such status depends not on the statements of the parties but upon all the circumstances of their dealings with each other."

26. The Petitioner's business is the exportation of automobiles and heavy equipment. The Joined Party's assigned duties included, among other things, checking in the vehicles and equipment to be shipped, preparing the documents that were needed to export the vehicles and equipment, and supervising the loading of the automobiles and equipment. The Petitioner provided the place of work and everything that was needed to perform the work. The Joined Party did not have any expenses in connection with the work. The Joined Party did not have a business license or occupational license, did not have business liability insurance, and did not offer services to the general public. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was an integral and necessary part of the Petitioner's business.

27. The work performed by the Joined Party did not require any special skill or knowledge. The Joined Party did not have any prior experience as an export specialist and learned everything that he needed to know about the export industry from the Petitioner's president. The greater the skill or special knowledge required to perform the work, the more likely the relationship will be found

to be one of independent contractor. Florida Gulf Coast Symphony v. Florida Department of Labor & Employment Sec., 386 So.2d 259 (Fla. 2d DCA 1980)

28. The Petitioner determined the method and the rate of pay. Generally, the Petitioner paid the Joined Party by time worked. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment including commissions, bonuses, back pay awards, and the cash value of all remuneration in any medium other than cash. The Petitioner paid the Joined Party for some holidays when the Joined Party did not work. Holiday pay is a fringe benefit generally reserved for employees. In response to a request for a pay increase the Petitioner offered to provide paid health insurance instead. In addition to the factors enumerated in the Restatement of Law, the provision of employee benefits has been recognized as a factor militating in favor of a conclusion that an employee relationship exists. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004). The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

29. The Joined Party performed services for the Petitioner for a period of almost two years. Either party could terminate the relationship at any time without incurring liability for breach of contract. These facts reveal the existence of an at-will relationship of relative permanence. In Cantor v. Cochran, 184 So.2d 173 (Fla. 1966), the court in quoting 1 Larson, Workmens' Compensation Law, Section 44.35 stated: "The power to fire is the power to control. The absolute right to terminate the relationship without liability is not consistent with the concept of independent contractor, under which the contractor should have the legal right to complete the project contracted for and to treat any attempt to prevent completion as a breach of contract."

30. The Petitioner controlled what work was performed, when it was performed, where it was performed, and how it was performed. The Petitioner controlled the financial aspects of the relationship. Whether a worker is an employee or an independent contractor is determined by measuring the control exercised by the employer over the worker. If the control exercised extends to the manner in which a task is to be performed, then the worker is an employee rather than an independent contractor. In Cawthon v. Phillips Petroleum Co., 124 So 2d 517 (Fla. 2d DCA 1960) the court explained: Where the employee is merely subject to the control or direction of the employer as to the result to be procured, he is an independent contractor; if the employee is subject to the control of the employer as to the means to be used, then he is not an independent contractor.

31. It is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment. The determination issued by the Department of Revenue is retroactive to January 1, 2009, however, the Petitioner's testimony reveals that the Joined Party began performing services for the Petitioner on October 1, 2008. Therefore, the correct retroactive date is October 1, 2008.

Recommendation: It is recommended that the determination dated January 7, 2011, be MODIFIED to reflect a retroactive date of October 1, 2008. As modified it is recommended that the determination be AFFIRMED.

Respectfully submitted on July 1, 2011.

R. O. SMITH, Special Deputy
Office of Appeals