

DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

PETITIONER:

Employer Account No. – 3173968
AMS INTERNATIONAL MARKETING INC
ATTN: ERICA PATINO
13790 NW 4TH ST STE 109
SUNRISE FL 33325-6216

PROTEST OF LIABILITY
DOCKET NO. 0019 3454 23-01

RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

ORDER

This matter comes before me for final Department 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 August 20, 2013, is REVERSED.

JUDICIAL REVIEW

Any request for judicial review must be initiated within 30 days of the date the Order was filed. Judicial review is commenced by filing one copy of a *Notice of Appeal* with the DEPARTMENT OF ECONOMIC OPPORTUNITY at the address shown at the top of this Order and a second copy, with filing fees prescribed by law, with the appropriate District Court of Appeal. It is the responsibility of the party appealing to the Court to prepare a transcript of the record. If no court reporter was at the hearing, the transcript must be prepared from a copy of the Special Deputy's hearing recording, which may be requested from the Office of Appeals.

Cualquier solicitud para revisión judicial debe ser iniciada dentro de los 30 días a partir de la fecha en que la Orden fue registrada. La revisión judicial se comienza al registrar una copia de un *Aviso de Apelación* con la Agencia para la Innovación de la Fuerza Laboral [*DEPARTMENT OF ECONOMIC OPPORTUNITY*] en la dirección que aparece en la parte superior de este *Orden* y una segunda copia, con los honorarios de registro prescritos por la ley, con el Tribunal Distrital de Apelaciones pertinente. Es la responsabilidad de la parte apelando al tribunal la de preparar una transcripción del registro. Si en la audiencia no se encontraba ningún estenógrafo registrado en los tribunales, la transcripción debe ser preparada de una copia de la grabación de la audiencia del Delegado Especial [*Special Deputy*], la cual puede ser solicitada de la Oficina de Apelaciones.

Nenpòt demann pou yon revizyon jiridik fèt pou l kòmanse lan yon peryòd 30 jou apati de dat ke Lòd la te depoze a. Revizyon jiridik la kòmanse avèk depo yon kopi yon *Avi Dapèl* ki voye bay DEPARTMENT OF ECONOMIC OPPORTUNITY lan nan adrès ki parèt pi wo a, lan tèt Lòd sa a e yon dezyèm kopi, avèk frè depo ki preskri pa lalwa, bay Kou Dapèl Distrik apwopriye a. Se responsabilite pati k ap prezante apèl la bay Tribinal la pou l prepare yon kopi dosye a. Si pa te gen yon stenograf lan seyans lan, kopi a fèt pou l prepare apati de kopi anrejistreman seyans lan ke Adjwen Spesyal la te fè a, e ke w ka mande Biwo Dapèl la voye pou ou.

DONE and ORDERED at Tallahassee, Florida, this 12 day of May, 2014.



Magnus Hines

Magnus Hines,
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

FILED ON THIS DATE PURSUANT TO § 120.52,
FLORIDA STATUTES, WITH THE DESIGNATED
DEPARTMENT CLERK, RECEIPT OF WHICH IS
HEREBY ACKNOWLEDGED.

Shanendra Y. Barnes

DEPUTY CLERK

5.16.14

DATE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Final Order have been furnished to the persons listed below in the manner described, on the 16th day of May, 2014.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
PO BOX 5250
TALLAHASSEE FL 32399-5250

By U.S. Mail:

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State of Florida
DEPARTMENT OF ECONOMIC OPPORTUNITY
c/o Department of Revenue

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RESPONDENT:

State of Florida
DEPARTMENT OF ECONOMIC
OPPORTUNITY
c/o Department of Revenue

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Magnus Hines
RA Appeals Manager,
Reemployment Assistance Program
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 20, 2013.

After due notice to the parties, a telephone hearing was held on February 5, 2014. A managing director appeared for the Petitioner; the Joined Party did not appear; A Senior Tax Specialist appeared for the Respondent. No proposed findings of fact or conclusions of law were received. The record of the case, including the recording of the hearing and any exhibits submitted in evidence, is herewith transmitted.

Issues:

Whether the Petitioner filed a timely protest pursuant to §443.131(3)(i); 443.1312(2); 443.141(2); Florida Statutes; Rule 73B-10.035, Florida Administrative Code.

Whether services performed for the Petitioner by the Joined Party constitute employment pursuant to §443.036(19); 443.036(21); 443.1216, Florida Statutes.

Findings of Fact, Timeliness:

1. On August 20, 2013 a determination was mailed to the Petitioner at its last-known address of record. It was timely received by the Petitioner at that address. Among other things, the determination advised:

This letter is an official notice of the above determination and will become conclusive and binding unless you file a written application to protest this determination, within twenty (20) days from the date of this letter. If your protest is filed by mail, the postmark date will be considered the filing date of your protest.

2. The Petitioner protested this determination on September 9, 2013, by fax. The Petitioner sent a copy of the protest by mail; it was postmarked September 11, 2013. The Respondent received the mailed protest on September 13, 2013 and thereupon processed the appeal. The Respondent does not have a record of a protest in this case submitted by fax. The Petitioner does not have any confirmation documentation of a successful fax transmittal. On October 4, 2013, an *Order to Show Cause* was mailed to the Petitioner, instructing the Petitioner to set forth in writing the reasons why its protest should not be dismissed for lack of jurisdiction. However, the Petitioner did not receive the *Order to Show Cause*. The Department later determined that the *Order to Show Cause* had been sent to an incorrect address. A hearing was scheduled to give the Petitioner an opportunity to present evidence about the issue.

Conclusions of Law:

3. Section 443.141(2)(c), Florida Statutes, provides:
Appeals.—The department and the state agency providing reemployment assistance tax collection services shall adopt rules prescribing the procedures for an employing unit determined to be an employer to file an appeal and be afforded an opportunity for a hearing on the determination. Pending a hearing, the employing unit must file reports and pay contributions in accordance with s. 443.131.
4. Rule 73B-10.035(5), Florida Administrative Code, provides:
Timely Protest.
 - (a)1. Determinations issued pursuant to Sections 443.1216, 443.131 and 443.1312, F.S., will become final and binding unless application for review and protest is filed with DOR within 20 days from the mailing date of the determination. If not mailed, the determination will become final 20 days from the date the determination is delivered.
 2. Determinations issued pursuant to Section 443.141, F.S., will become final and binding unless application for review and protest is filed within 15 days from the mailing date of the determination. If not mailed, the determination will become final 15 days from the date the determination is delivered.
 - (b) If a protest appears to have been filed untimely, DEO may issue an Order to Show Cause to the Petitioner, requesting written information as to why the protest should be considered timely. If the Petitioner does not, within 15 days after the mailing date of the Order to Show Cause, provide written evidence that the protest is timely, the protest will be dismissed.
5. Rule 73B-10.023(1), Florida Administrative Code, provides, in pertinent part:
 - a. Filing date. ... The date of receipt will be the filing date of any report, protest, appeal, or other document faxed to DEO or DOR....
6. The evidence in this case reflects that the determination was mailed to the Petitioner at its last-known address on August 20, 2013. The postmark date on the letter mailed was twenty-two days later, and if the postmark is taken to be the date of filing then the appeal was untimely. However, the Petitioner's witness gave un rebutted testimony that a fax protest was sent to the Respondent on the date noted on the protest letter itself, September 9, 2013. That would have been the 20th day from the date on the determination and thus a timely appeal. The Petitioner's witness admitted that there had been problems with faxes sent by the Petitioner to the Respondent, so the recollection of the Petitioner's witness was the only evidence as to the sending of an appeal on September 9, 2013. The Petitioner was unable to submit any fax confirmation, and there was no record by the Respondent that a fax from the Petitioner had been received on September 9, 2013. Still, the

testimony of the Petitioner's witness was not contradicted by any other evidence, so it should be accepted to allow a ruling on the merits of the case.

7. It is recommended that the Petitioner's appeal be accepted as filed within the time limits allowed by law.

Findings of Fact, Employment:

8. The Petitioner has been in business since 2003. It sells LED lighting in several different countries. It has a product catalog. In early 2012 there was a catalog in English and in Spanish, but none in Portuguese. The Petitioner desired to prepare a catalog that could be used in Brazil.
9. The Petitioner advertised online for a technical translator. The Joined Party responded to the ad and was selected to be the translator. The Petitioner hired the Joined Party to translate the product catalog into Brazilian Portuguese. The Joined Party would be paid by the hour. If the Joined Party finished the translation in less than 30 days he would receive an \$8000 bonus. Otherwise his sole compensation would be the hourly rate. The bonus was to encourage speedy completion of the project so that the managing director could take a catalog with him on a planned trip to Brazil. There was no written agreement between the parties.
10. The Joined Party started on March 13, 2012. He finished on April 27, 2012. The Joined Party was paid \$1705.80 on April 13, 2012 for his work to that point. He was paid an additional \$757.95 on May 15, 2013. The total payment, \$2463.75, was reflected on a 1099-MISC issued to the Joined Party for 2012. No taxes or other deductions were taken from the payments by the Petitioner to the Joined Party.
11. The Joined Party worked on the premises of the Petitioner when the managing director was available to give the Joined Party access to the office. The Joined Party told the managing director that he did not have a computer of his own, so the Joined Party used the Petitioner's computer while in the office. A paper copy of the catalog was made available to the Joined Party. The Joined Party could take the paper catalog out of the office.
12. The Petitioner did not require the Joined Party to be in the office at any particular time. The Petitioner did not require the Joined Party to work on the project only in the office. The Petitioner did not direct the Joined Party in the method of making the translation. The Joined Party submitted notes to the Petitioner showing hours he had worked on the project. This was the basis for the Petitioner's payment to the Joined Party. Once the Joined Party had completed the translation the project was at an end. The Joined Party did not provide further services to the Petitioner. The Petitioner used the translation in its sales efforts.
13. The Joined Party filed a claim for reemployment assistance benefits effective June 2, 2013, which established a base period consisting of the four quarters of 2012. One employer was listed on the wage transcript, and wages from that employer established the maximum weekly benefit amount and available credits. The Petitioner was not listed on the wage transcript as an employer. After an investigation, the Florida Department of Revenue issued the determination dated August 20, 2013 finding the Joined Party to have been an employee in his work as a translator for the Petitioner.

Conclusions of Law:

14. 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.

In Cantor v. Cochran, 184 So. 2d 173 (Fla. 1966), the Supreme Court of Florida adopted the test in 1 Restatement of Law, Agency 2d Section 220 (1958) used to determine whether an employer-employee relationship exists. Section 220 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 the one employed is 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 worker supplies the instrumentalities, tools, and a 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 time or job;
 - (h) whether or not the work is 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.

15. 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.
16. 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. The factors listed in Cantor v. Cochran are the common law factors that determine if a worker is an employee or an independent contractor. See, for example, Brayshaw v. Agency for Workforce Innovation, 58 So. 3d 301 (Fla. 1st DCA 2011).
17. The relationship of employer-employee requires control and direction by the employer over the actual conduct of the employee. This exercise of control over the person as well as the performance of the work to the extent of prescribing the manner in which the work shall be executed and the method and details by which the desired result is to be accomplished is the feature that distinguishes an independent contractor from a servant. Collins v. Federated Mutual Implement and Hardware Insurance Co., 247 So. 2d 461 (Fla. 4th DCA 1971); La Grande v. B. & L. Services, Inc., 432 So. 2d 1364 (Fla. 1st DCA 1983).
18. Section 73B-10.035, Florida Administrative Code, provides:
 - (7) Burden of Proof. The burden of proof will be on the protesting party to establish by a preponderance of the evidence that the determination was in error.
19. The evidence shows that the Joined Party was hired to provide his specialized skill for a single project. The Petitioner did not direct or control the Joined Party with respect to the methods by which the project was done. Where a worker must use independent judgment and skill to produce certain desired results, the worker will more likely be considered an independent contractor. See, for example, Florida Gulf Coast Symphony, Inc. v. Dept. of Labor and Employment Security, 386 So.2d 259 (Fla. 2d DCA 1980)(professional musicians were subject to the direction of a conductor in performance and during some practices, but work for the organization was just one of many

professional activities of the musicians; and the musicians spent substantial time and effort practicing independently: the musicians were independent contractors, rather than employees). Translating a document, especially a technical document such as an electrical product catalog, requires a high degree of skill. The Joined Party was not treated by the Petitioner as an employee for tax purposes. The evidence shows that the Joined Party was an independent contractor in his work as a translator for the Petitioner.

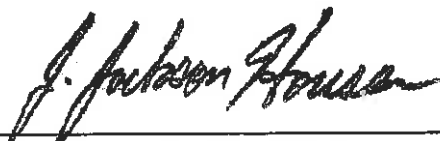
20. Some of the factors set out in Cantor v. Cochran appear to favor a finding of employment: the Joined Party was paid by the hour for his services; he worked on the Petitioner's premises, using the Petitioner's equipment; and the work was part of the business of the Petitioner. But even these factors do not strongly suggest employment in this case. The Joined Party was paid by the hour, but that was only a fraction of the potential compensation. The Petitioner desired an optimal result (translated catalog in less than 30 days) but was willing to settle for a secondary result (translated catalog, whenever). Thus, the evidence shows that the Joined Party's compensation was not solely by time, but there was a substantial contingent compensation based on the result. The secondary time payment actually allowed the Joined Party to exercise substantial control over his own compensation. The Joined Party used the Petitioner's equipment, but this was not required by the Petitioner; it was an accommodation to the Joined Party, so the provision of the tools for the job does not in this case show that the Petitioner was controlling how the translation was done. The catalog was certainly part of the Petitioner's business; but the Petitioner's business is selling light emitting diode (LED) lighting, an alternative to incandescent or fluorescent. The business of the Petitioner is not the production of translations. The services of the Joined Party, in other words, were part of, but a secondary aspect of, the main business of the Petitioner.

21. The evidence shows that the Petitioner did not control the methods by which the Joined Party produced the finished result. The Joined Party was an independent contractor, not an employee.

Recommendation: It is recommended that the determination dated August 20, 2013, finding that translators such as the Joined Party are employees, be REVERSED.

Respectfully submitted on March 21, 2014.





J. Jackson Houser, Special Deputy
Office of Appeals

A party aggrieved by the *Recommended Order* may file written exceptions to the Director at the address shown above within fifteen days of the mailing date of the *Recommended Order*. Any opposing party may file counter exceptions within ten days of the mailing of the original exceptions. A brief in opposition to counter exceptions may be filed within ten days of the mailing of the counter exceptions. Any party initiating such correspondence must send a copy of the correspondence to each party of record and indicate that copies were sent.

Una parte que se vea perjudicada por la *Orden Recomendada* puede registrar excepciones por escrito al Director Designado en la dirección que aparece arriba dentro de quince días a partir de la fecha del envío por correo de la *Orden Recomendada*. Cualquier contraparte puede registrar contra-excepciones dentro de los diez días a partir de la fecha de envío por correo de las excepciones originales. Un sumario en oposición a contra-excepciones puede ser registrado dentro de los diez días a partir de la fecha de envío por correo de las contra-excepciones. Cualquier parte que dé inicio a tal correspondencia debe enviarle una copia de tal correspondencia a cada parte contenida en el registro y señalar que copias fueron remitidas.

Yon pati ke *Lòd Rekòmande* a afekte ka prezante de eksklizyon alekri bay Direktè Adjwen an lan adrès ki parèt anlè a lan yon peryòd kenx jou apati de dat ke *Lòd Rekòmande* a te poste a. Nenpòt pati ki fè opozisyon ka prezante objeksyon a eksklizyon yo lan yon peryòd dis jou apati de lè ke objeksyon a eksklizyon orijinal yo te poste. Yon dosye ki prezante ann opozisyon a objeksyon a eksklizyon yo, ka prezante lan yon peryòd dis jou apati de dat ke objeksyon a eksklizyon yo te poste. Nenpòt pati ki angaje yon korespondans konsa dwe voye yon kopi kourye a bay chak pati ki enplike lan dosye a e endike ke yo te voye kopi yo.



SHANEDRA Y. BARNES, Special Deputy Clerk

Date Mailed:

March 21, 2014

Copies mailed to:

Petitioner

Respondent

Joined Party

Joined Party:

MARCUS V. SILVEIRA
320 COMMODORE DRIVE
APT 1516
PLANTATION FL 33325-2198

Other Addresses:

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