AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2536754
INTRAESPA INC
520 12TH ST W STE 201
BRADENTON FL 34205-7442

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

PROTEST OF LIABILITY
DOCKET NO. 2009-139373L

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 August 31, 2009, is REVERSED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **July, 2010**.

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. - 2536754
INTRAESPA INC
GERARDO RAMIREZ
520 12TH ST W STE 201
BRADENTON FL 34205-7442

PROTEST OF LIABILITY
DOCKET NO. 2009-139373L

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Director, Unemployment Compensation Services
Agency for Workforce Innovation

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated August 31, 2009.

After due notice to the parties, a telephone hearing was held on February 3, 2010. A former accountant of the Petitioner, a current accountant of the Petitioner, an interpreter, and owner appeared and testified on behalf of the Petitioner. The Petitioner's attorney was present at the hearing. A tax specialist II appeared and testified on behalf of the Respondent. The Joined Party did not appear at the hearing.

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 and other individuals as translator/interpreters constitute insured employment pursuant to Sections 443.036(19), 443.036(21); 443.1216, Florida Statutes, and if so, the effective date of the liability.

Findings of Fact:

1. The Petitioner is a subchapter C corporation founded May 20, 2002, for the purpose of running a translator and interpreter service. The Petitioner uses the services of approximately six translator/interpreters that were considered independent contractors.

2. The translators/interpreters operate in a free-lance capacity. The translator/interpreters refer each other for jobs from different clients.

3. The Petitioner contracted with the State of Florida to provide translators and interpreters. The State or other client provides dockets and information for each job. The jobs are then handed out

to available translator/interpreters. The Joined Party would accept or decline the work at her discretion. The work would be performed wherever the Petitioner's client required.

4. The Joined Party provided services from December 2007, through September 26, 2008.

5. The Joined Party was free to work for a competitor. The Joined Party paid her own taxes.

6. The Joined Party was free to subcontract the work. The Joined Party was responsible for paying subcontractors.

7. The Petitioner maintained an office that the translator/interpreters were allowed to use. The office could be used for work from any client and was not restricted to work performed for the Petitioner.

8. Translator/Interpreters were paid an hourly rate negotiated with the Petitioner. The translator/interpreters submitted an invoice to the Petitioner every two weeks. The Petitioner did not provide insurance or benefits to the translator/interpreters.

9. The translator/interpreters supplied their own equipment. The equipment includes audio equipment, computers, and other specialized gear.

10. Some of the translator/interpreters provided their own malpractice insurance.

11. The translator/interpreters were not free to quit without liability.

Conclusions of Law:

12. The issue in this case, whether services performed for the Petitioner 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.

13. 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).

14. 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).

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. 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.

17. 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. 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.

18. The evidence presented in the hearing revealed that the Joined Party entered into a free-lance relationship with the Petitioner. The Petitioner acted as a broker between clients and the Joined Party. Free-lance relationships are considered the industry standard with translator/interpreters.

19. The record reflects that the Joined Party could refuse work freely. The record shows that the Joined Party could sub-contract the work to others and was free to perform services for competitors.

20. The work was skilled work, requiring knowledge of languages as well as the ability to operate the specialized equipment used to perform the work.

21. The record reflects that the Joined Party provided her own equipment necessary for the work.

22. A preponderance of the evidence in this case reveals that the Petitioner did not establish sufficient control over the Joined Party as to create an employer-employee relationship between the Joined Party and the Petitioner.

Recommendation: It is recommended that the determination dated August 31, 2009, be REVERSED.

Respectfully submitted on June 4, 2010.

KRIS LONKANI, Special Deputy
Office of Appeals