AGENCY FOR WORKFORCE INNOVATION
TALLAHASSEE, FLORIDA

PETITIONER:
Employer Account No. - 2925688
NAILS STUDIO INC
5798 COVINGTON COVE WAY
ORLANDO FL 32829

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

PROTEST OF LIABILITY
DOCKET NO. 2010-14981L

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 November 19, 2009, is AFFIRMED.

DONE and ORDERED at Tallahassee, Florida, this _____ day of **September, 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. - 2925688
NAILS STUDIO INC
PHONG CHUONG
1201 WINTER GARDEN VINELAND RD STE 9
WINTER GARDEN FL 34787-4380

PROTEST OF LIABILITY
DOCKET NO. 2010-14981L

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 November 19, 2009.

After due notice to the parties, a telephone hearing was held on July 1, 2010. The Petitioner appeared and testified. The Petitioner's daughter served as a translator. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified.

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 as a nail technician constitute insured employment, and if so, the effective date of liability, pursuant to Section 443.036(19), 443.036(21); 443.1216, Florida Statutes.

Whether the Petitioners corporate officers received remuneration for employment which constitutes wages, pursuant to Sections 443.036(21), (44), Florida Statutes; Rule 60BB-2.025, Florida Administrative Code.

Findings of Fact:

1. The Petitioner is a subchapter S corporation which purchased an existing business, a nail salon, in December 2007. The Petitioner's president was active in the operation of the business. The president worked as a nail technician, worked the front desk, and operated the business. The business hours were from 9:30 AM until 8 PM. The president worked six days a week and

worked approximately 60 hours per week during all weeks of the year. In March 2010 the Petitioner sold the business.

2. The Joined Party began working for the Petitioner as a nail technician in January 2008. The Joined Party last worked for the Petitioner on October 22, 2008. In addition to the Joined Party approximately three other nail technicians worked in the Petitioner's business.
3. There was no written agreement between the Petitioner and the Joined Party.
4. The Petitioner provided the Joined Party with a work station in the Petitioner's salon. The Petitioner did not provide the Joined Party with a key to the Petitioner's salon. The Joined Party was restricted to performing services only during the Petitioner's regular business hours. The Joined Party had set hours of work.
5. The Joined Party provided her own nail technician tools. The Petitioner provided all of the supplies including nail polish. The Joined Party did not pay the Petitioner for use of the Petitioner's supplies and did not pay rent to the Petitioner for use of the work station.
6. The Joined Party was required to personally perform the work. The Joined Party was not allowed to hire others to perform the work for her.
7. The Joined Party was required to keep the Petitioner informed of the progress of the work.
8. The Joined Party worked under the Petitioner's name. The Joined Party was required to obtain permission from the Petitioner for anything that the Joined Party wanted to do.
9. The Petitioner worked the front desk in the salon. The Petitioner greeted the walk-in customers and answered the telephone when customers called for appointments. Unless the customer requested a specific nail technician, the Petitioner determined which nail technician would perform the work for the customer.
10. The Petitioner had a salon price list for each service that the nail technicians provided. The Petitioner determined the amounts to be charged to the customers. When the Joined Party collected fees from the customers for the nail services the Joined Party was required to put all of the money in the Petitioner's cash register.
11. The Joined Party did not bill the Petitioner for the services which she performed. The Petitioner computed the amount of the Joined Party's earnings. The Petitioner paid the Joined Party 50% of the fees collected from the services performed by the Joined Party. Generally, payday was on Friday. However, if a nail technician did not work on Friday the Petitioner paid the nail technician on Monday.
12. The Petitioner did not withhold any taxes from the Joined Party's pay. At the end of 2008 the Petitioner's accountant reported the Joined Party's earnings in the amount of $14,293 to the Internal Revenue Service on Form 1099-MISC as nonemployee compensation.
13. During 2008 the Petitioner earned approximately $30,000 to $40,000. In 2009 the Petitioner earned approximately $30,000. The Petitioner did not register with the Florida Department of Revenue to pay unemployment tax on the earnings of the Petitioner's president or the earnings of the nail technicians.
14. The Joined Party filed a claim for unemployment compensation benefits effective August 2, 2009. The filing on that date established a base period from April 1, 2008, through March 31, 2009. When the Joined Party did not receive credit for her 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 as an employee or as an independent contractor.

15. The Department of Revenue provided Form 6061, *Independent Contractor Analysis*, for the Petitioner to complete as part of the investigation. The Petitioner completed the form and returned it to the Department of Revenue. Based on the information provided the Department of Revenue issued a determination on November 4, 2009, holding that the Joined Party was an employee of the Petitioner retroactive to January 1, 2008. Subsequently, the Petitioner altered the *Independent Contractor Analysis* and resubmitted the form to the Department of Revenue. The Department of Revenue received the altered form. On November 19, 2009, the Department of Revenue issued a Reaffirmation Notice holding that the Joined Party performed services for the Petitioner as an employee and also holding "The person(s) performing services for the Petitioner as corporate officers are statutorily covered employees and reportable for unemployment tax purposes." The Petitioner filed a written protest by mail postmarked December 9, 2009.

Conclusions of Law:

16. 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.

17. 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).

18. 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).

19. 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.

20. 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.

21. 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.

22. 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.

23. There was no written agreement or contract between the Petitioner and the Joined Party. No evidence was presented concerning any verbal agreement of hire. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995) the court provides guidance on how to proceed absent an express agreement, "In the event that there is no express agreement and the intent of the parties cannot be otherwise determined, courts must resort to a fact specific analysis under the Restatement based on the actual practice of the parties."

24. The Petitioner is a nail salon. The Joined Party performed services for the Petitioner as a nail technician and provided the nail services to the Petitioner's customers. The work performed by the Joined Party was not separate and distinct from the Petitioner's business but was a necessary and integral part of the Petitioner's business.

25. The Petitioner provided the place of work and all of the supplies, including nail polishes that were used to perform the work. The Joined Party provided her own hand tools. It was not shown that the hand tools represent a significant investment in a business. It was not shown that the Joined Party was at risk of suffering a financial loss from performing services for the Petitioner.

26. The Petitioner paid the Joined Party a 50% commission for the work which the Joined Party performed. Section 443.1217(1), Florida Statutes, provides that the wages subject to the Unemployment Compensation Law include all remuneration for employment, including commissions. The Petitioner determined the amounts that were charged to the customers and determined the amount of the Joined Party's earnings. The Petitioner paid the Joined Party on a regularly established payday rather than at the time the Joined Party performed the services. The fact that the Petitioner chose not to withhold payroll taxes from the pay does not, standing alone, establish an independent contractor relationship.

27. The Joined Party performed services for the Petitioner for a period of approximately ten months. The relationship was a continuing relationship of relative permanence rather than for a specific period.

28. No evidence was presented concerning the belief of the parties about whether it was the intent of the parties to create an employer-employee relationship. No evidence was presented to show whether in the locality the work of a nail technician is usually done by an employee or by a specialist without supervision.

29. The "extent of control" referred to in Restatement section 220(2)(a), has been recognized as the most important factor in determining whether a person is an independent contractor or an employee. Employees and independent contractors are both subject to some control by the person or entity hiring them. The extent of control exercised over the details of the work turns on

whether the control is focused on the result to be obtained or extends to the means to be used. A control directed toward means is necessarily more extensive than a control directed towards results. Thus, the mere control of results points to an independent contractor relationship; the control of means points to an employment relationship. Furthermore, the relevant issue is "the extent of control which, by the agreement, the master may exercise over the details of the work." Thus, it is the right of control, not actual control or actual interference with the work, which is significant in distinguishing between an independent contractor and an employee. Harper ex rel. Daley v. Toler, 884 So.2d 1124 (Fla. 2nd DCA 2004).

30. The Petitioner testified that the Joined Party worked under the Petitioner's name and for that reason the Joined Party had to obtain permission from the Petitioner for anything that the Joined Party wanted to do. That testimony reveals that the Petitioner exercised significant control over the means and manner of performing the work. The Petitioner controlled what work was performed, when the work was performed, and where the work was performed. The Petitioner controlled the financial aspects of the relationship. Accordingly, it is concluded that the services performed for the Petitioner by the Joined Party constitute insured employment.

31. Section 443.1216(1)(a)1., Florida Statutes, provides that the employment subject to the Unemployment Compensation Law includes a service performed by an officer of a corporation.

32. Section 443.036(20)(c), Florida Statutes provides that a person who is an officer of a corporation, or a member of a limited liability company classified as a corporation for federal income tax purposes, and who performs services for the corporation or limited liability company in this state, regardless of whether those services are continuous, is deemed an employee of the corporation or the limited liability company during all of each week of his or her tenure of office, regardless of whether he or she is compensated for those services. Services are presumed to be rendered for the corporation in cases in which the officer is compensated by means other than dividends upon shares of stock of the corporation owned by him or her.

33. The Petitioner is a corporation and the Petitioner's president was very active in the operation of the business. Therefore, the Petitioner's president was a statutory employee of the Petitioner.

34. In Spicer Accounting, Inc. v. United States, 918 F.2d 90 (9th Cir. 1990), the court determined that dividends paid by an S corporation to an officer of the corporation who performed services for the business, were wages subject to federal employment taxes, including federal unemployment compensation taxes. The court relied upon federal regulations which provide that the "form of payment is immaterial, the only relevant factor being whether the payments were actually received as compensation for employment."

Recommendation: It is recommended that the determination dated November 19, 2009, be AFFIRMED.

Respectfully submitted on July 6, 2010.

R. O. SMITH, Special Deputy
Office of Appeals