

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Reemployment Assistance Appeals
THE CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143**

PETITIONER:

Employer Account No. - 2560348
CHINA WELL INC
ATTN STELLA MENDEZ
315 86TH STREET APT 3
MIAMI FL 33141-4819

RESPONDENT:

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

**PROTEST OF LIABILITY
DOCKET NO. 2012-16723L**

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 January 5, 2012, is AFFIRMED.

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 _____ day of **July, 2012**.



Altemese Smith,
Assistant Director,
Reemployment Assistance Services
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

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 _____ day of July, 2012.

Shanendra Y. Barnes

SHANEDRA Y. BARNES, Special Deputy Clerk
DEPARTMENT OF ECONOMIC
OPPORTUNITY
Reemployment Assistance Appeals
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

By U.S. Mail:

CHINA WELL INC
ATTN STELLA MENDEZ
315 86TH STREET APT 3
MIAMI FL 33141-4819

NAYSSA A KALLINTERIS
3270 NW 102ND STREET
MIAMI FL 33147

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417

CHINA WELL INC
1108 KANE CONCOURSE
SUITE 302
BAY HARBOR ISLANDS FL 33154

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

**DEPARTMENT OF ECONOMIC OPPORTUNITY
Unemployment Compensation Appeals**

MSC 347 CALDWELL BUILDING
107 EAST MADISON STREET
TALLAHASSEE FL 32399-4143

PETITIONER:

Employer Account No. - 2560348
CHINA WELL INC
ATTN STELLA MENDEZ
315 86TH STREET APT 3
MIAMI FL 33141-4819



**PROTEST OF LIABILITY
DOCKET NO. 2012-16723L**

RESPONDENT:

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

RECOMMENDED ORDER OF SPECIAL DEPUTY

TO: Assistant Director,
Interim Executive Director,
Unemployment Compensation Services
DEPARTMENT OF ECONOMIC OPPORTUNITY

This matter comes before the undersigned Special Deputy pursuant to the Petitioner's protest of the Respondent's determination dated January 5, 2012.

After due notice to the parties, a telephone hearing was held on April 26, 2012. The Petitioner, represented by its Manager, appeared and testified. The Respondent, represented by a Department of Revenue Tax Specialist II, appeared and testified. The Joined Party 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 or Law were not received.

Issues:

Whether services performed for the Petitioner by the Joined Party and other individuals as office manager 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.

Whether the Petitioner meets liability requirements for Florida unemployment compensation contributions, and if so, the effective date of liability, pursuant to sections 443.036(19); 443.036(21), Florida Statutes.

NON-APPEARANCE: Whether there is good cause for proceeding with an additional hearing, pursuant to Florida Administrative Code Rule 73B-10.035(18).

Findings of Fact:

1. The Petitioner is a Florida corporation, formed in 1999, that is engaged in the business of apartment management. The Petitioner manages three apartment buildings and several units at another location. The Petitioner maintains an office for the transaction of its business in Dade County, Florida.
2. The Joined Party performed services for the Petitioner as an office manager from June 2010, until October 14, 2011. The Joined Party's sister is the Petitioner's president. When the Joined Party lost her prior job at a medical office, the Petitioner's president offered the Joined Party a position as an office manager. The Joined Party was told that the work would entail general office duties and that she would be paid \$500 per week. The Joined Party accepted the position. There was no written agreement between the parties for the Joined Party's services.
3. The Joined Party's duties included answering the telephone, filing, making bank deposits, entering data in QuickBooks, collecting and processing timesheets from other workers, and preparing reports. The Joined Party had prior clerical experience. The Petitioner told the Joined Party how to answer the telephone and how to enter data into the Petitioner's computer system.
4. The Joined Party was expected to work during the Petitioner's regular business hours, which were 9:00 a.m. to 5:00 p.m., Monday through Friday. The Joined Party was given a key to the office. The Joined Party opened the office at 9:00 a.m. and closed the office at 5:00 p.m. Most of the time, the Joined Party was the only worker at the office.
5. The Petitioner provided the work space, telephone, computer, software, and all other equipment and supplies needed to perform the work. The Joined Party had no expenses in connection with the work.
6. The Joined Party reported to the Petitioner's president. On two or three occasions each week, the Petitioner's president came to the office to review reports prepared by the Joined Party and to sign checks and other documents. If the Petitioner's president discovered any mistakes in the Joined Party's work, the Joined Party would correct them during her normal working hours. The Joined Party was not required to correct her work without compensation.
7. The Joined Party did not invoice for her services. The Joined Party was paid a salary of \$500 per week, on a bi-weekly basis. The Joined Party received sick pay and holiday pay. The Petitioner did not withhold payroll taxes from the Joined Party's pay. The Petitioner reported the Joined Party's earnings on a form 1099-MISC. When the Joined Party was preparing to file her federal income tax return for 2010, her accountant advised her that she was being considered "self-employed" by the Petitioner. The Joined Party continued the relationship after learning that she would be responsible for her own taxes because she needed the job.
8. The Joined Party did not have her own business, occupational license, or business liability insurance. The Joined Party was required to personally perform the work.
9. Either party could terminate the relationship at any time without penalty or liability. The Petitioner notified the Joined Party by letter dated October 13, 2011, that her services were no longer needed.
10. The Joined Party filed a claim for unemployment compensation benefits effective October 9, 2011. When the Joined Party did not receive credit for her earnings with the Petitioner, a *Request for Reconsideration of Monetary Determination* was filed. An investigation was assigned to the Department of Revenue to determine if the Joined Party performed services for the Petitioner as an independent contractor or as an employee.
11. On January 5, 2012, the Department of Revenue issued a determination holding that the services performed by the Joined Party and other individuals, as office manager, constitute insured employment retroactive to September 1, 2010. The Petitioner filed a timely protest.

12. Pursuant to the Petitioner's protest, a telephone hearing was scheduled for March 9, 2012. The Petitioner did not appear for the hearing, and, as a result, a Recommended Order of Dismissal was issued on March 13, 2012. The Petitioner did not receive the hearing notice because the notice was mailed to the Petitioner's former address. The special deputy attempted to contact the Petitioner by telephone at the time of the scheduled hearing and left voicemail messages for the Petitioner. The Petitioner's office was closed during the week in which the hearing was scheduled. After the Petitioner's manager returned to the office and heard the voicemail messages, the Petitioner filed a written request for rehearing on March 26, 2012.

Conclusions of Law:

13. Rule 73B-10.035(18), Florida Administrative Code, provides:

Request to Re-Open Proceedings. Upon written request of the Petitioner or upon the special deputy's own motion, the special deputy will for good cause rescind a Recommended Order to dismiss the case and reopen the proceedings. Upon written request of the Respondent or Joined Party, or upon the special deputy's own motion, the special deputy may for good cause rescind a Recommended Order and reopen the proceedings if the party did not appear at the most recently scheduled hearing and the special deputy entered a recommendation adverse to the party. The special deputy will have the authority to reopen an appeal under this rule provided that the request is filed or motion entered within the time limit permitted to file exceptions to the Recommended Order. A threshold issue to be decided at any hearing held to consider allowing the entry of evidence on the merits of a case will be whether good cause exists for a party's failure to attend the previous hearing. If good cause is found, the special deputy will proceed on the merits of the case. If good cause is not found, the Recommended Order will be reinstated.

14. The Petitioner failed to attend the March 9, 2012, hearing because the Petitioner did not receive notice of the hearing and was not aware of the hearing. The Petitioner made a timely request for reopening. Thus, good cause has been established and the Recommended Order of Dismissal is rescinded.
15. 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.
16. 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).
17. 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).
18. 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.
19. 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.
20. 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.
21. 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.
22. The evidence presented in this case does not reveal the existence of any agreement, verbal or written, specifying whether the Joined Party would perform services as an employee or as an independent contractor. In Keith v. News & Sun Sentinel Co., 667 So.2d 167 (Fla. 1995), the Court held that in determining the status of a working relationship, the agreement between the parties should be examined if there is one. In providing guidance on how to proceed absent an express agreement the Court stated "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."
23. The Petitioner’s business is apartment management. The Joined Party performed services on a full-time basis as an office manager. 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. The Joined Party did not have her own business. The Joined Party did not have any expense or financial risk associated with the work performed for the Petitioner.
24. The Petitioner exercised significant control over how the Joined Party performed the work. The Joined Party was required to perform the work at the Petitioner’s office during hours determined by the Petitioner. The Joined Party was told how to answer the telephone and how to enter certain data in the Petitioner’s system. The Petitioner provided all of the equipment and supplies needed for the work. The Joined Party was required to personally perform the work and could not hire others to perform the work for her. In Adams v. Department of Labor and Employment Security, 458 So.2d 1161 (Fla. 1st DCA 1984), the Court held that the basic test for determining a worker’s status is the employing unit’s right of control over the manner in which the work is performed. The Court, quoting Farmer’s and Merchant’s Bank v. Vocelle, 106 So.2d 92 (Fla. 1st DCA 1958), stated: “[I]f the person serving is merely subject to the control of the person being served as to the results to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be used, he is not an independent contractor.”
25. The Petitioner determined the rate and method of payment. The Joined Party was paid by time rather than by the job. The Joined Party received holiday pay and sick pay, benefits normally reserved for employees.

The fact that the Petitioner chose not to withhold taxes from the Joined Party's pay does not, standing alone, establish an independent contractor relationship.

26. Either party had the right to terminate the relationship at any time without incurring liability for breach of contract. The Joined Party performed services for the Petitioner for approximately sixteen months. 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."
27. It is concluded that the services performed for the Petitioner by the Joined Party as office manager constitute insured employment.
28. Section 443.1215, Florida Statutes, provides:
- (1) Each of the following employing units is an employer subject to this chapter:
- (a) An employing unit that:
1. In a calendar quarter during the current or preceding calendar year paid wages of at least \$1,500 for service in employment; or
 2. For any portion of a day in each of 20 different calendar weeks, regardless of whether the weeks were consecutive, during the current or preceding calendar year, employed at least one individual in employment, irrespective of whether the same individual was in employment during each day.
29. The Joined Party performed services for the Petitioner from June 2010 until October 2011. Those services are sufficient to establish liability based on the fact that the Petitioner employed at least one individual in employment during twenty calendar weeks during a calendar year.

Recommendation: It is recommended that the determination dated January 5, 2012, be AFFIRMED.

Respectfully submitted on June 1, 2012.

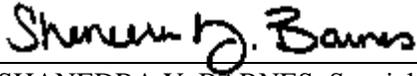


SUSAN WILLIAMS, Special Deputy
Office of Appeals

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 kenz 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:
June 1, 2012

Copies mailed to:

Petitioner
Respondent
Joined Party

NAYSSA A KALLINTERIS
3270 NW 102ND STREET
MIAMI FL 33147

DEPARTMENT OF REVENUE
ATTN: VANDA RAGANS - CCOC #1 4624
5050 WEST TENNESSEE STREET
TALLAHASSEE FL 32399

DOR BLOCKED CLAIMS UNIT
ATTENTION MYRA TAYLOR
P O BOX 6417
TALLAHASSEE FL 32314-6417