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OCAHO Clarifies Meaning of "Independent Contractor," Rejects ICE Interpretation of "Employee" for Form I-9 Compliance

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On August 14, 2015, the U.S. Department of Justice's Executive Office for Immigration Review, Office of the Chief Administrative Hearing Officer (OCAHO) issued a decision clarifying the standard for "independent contractor" and rejecting ICE's interpretation of "employee." The case involved a U.S. Immigration and Customs Enforcement (ICE) complaint against a respondent who failed to present Forms I-9 for six individuals in response to a Notice of Inspection issued under the employer sanctions provision of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324(a)(2012). Specifically, in *U.S.A. v. Saidabror Siddikov*, Administrative Law Judge Ellen K. Thomas, pointedly noting that "we do not live in a binary world," applied a variety of precedential and regulatory standards to conclude that the affected individuals could not be properly classified as "employees" of Saidabror Siddikov d/b/a Beyond Cleaning Services (BCS) because their work was not performed on BCS' premises, took place independent of BCS and Mr. Siddikov's control, and was not steady in nature, with all of the individuals treated as autonomous by the Respondent. Moreover, BCS and Mr. Siddikov did not provide the individuals' supplies or equipment, did not determine their payment terms, and did not control the means and methods of their work. Furthermore, the individuals were not part of Mr. Siddikov or BCS' normal business operations and were not economically dependent on his organization, as they either operated their own companies or

otherwise provided their services to the general market. Thus, OCAHO concluded that Mr. Siddikov was not required to complete or produce Forms I-9 for the affected individuals, as they were properly considered “independent contractors” rather than “employees” of BCS.

Importantly, in explaining its decision, OCAHO applied a “totality of the circumstances” standard, noting that, under OCAHO case law, the determination of whether an individual qualifies as an “independent contractor” or as an employee requires a three-pronged analysis: 1) the regulatory criteria set forth in 8 C.F.R. § 274a.1(j); 2) OCAHO precedent; and 3) principles of agency law discussed in federal cases. To this end, among the factors contemplated under the applicable regulations for defining “independent contractors” are whether the individual supplies the tools and materials necessary to perform the work, makes services available to public, concurrently provides services to different clients, directs the order or sequence in which the work must be done, and determines work hours. C.F.R. § 274a.1(j) Similarly, OCAHO case law has held that, when an individual provides labor or services to a third party only and the putative employer lacks the authority to terminate or supervise the individual, or to determine the individual’s work schedule or working conditions, including work assignments, an employment relationship is not established. Finally, pursuant to the relevant common law standard, the key factor for determining who constitutes an “employee” is the hiring party’s right to control the manner and means by which the product is accomplished, subject to elements such as: the skills required to perform the work; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; the right of the hiring party, if any, to assign additional projects to the hired individual; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and compensating assistants; whether the work to be performed is part of the hiring party’s regular business; whether the hiring party is in business, and, finally, the provision of tax benefits and the tax treatment of the hired party. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-324.