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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

August 14, 2015

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| UNITED STATES OF AMERICA,<br>Complainant,<br><br>v.<br><br>SAIDABROR SIDDIKOV D/B/A BEYOND CLEANING SERVICES,<br>Respondent. | ) | 8 U.S.C. § 1324a Proceeding<br>OCAHO Case No. 11A00022 |

# FINAL DECISION AND ORDER

## I. PROCEDURAL HISTORY

The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Saidabror Siddikov d/b/a Beyond Cleaning Services (BCS or respondent) failed to prepare, retain, or present I-9 forms for Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima. The action arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). Siddikov filed an answer on his own behalf denying the material allegations, and prehearing procedures were completed.

Presently pending is ICE's motion for summary decision. Siddikov did not file a response and the time for doing so has expired.[1]

## II. BACKGROUND INFORMATION

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014). A party has 10 days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion was filed on January 10, 2012 and Siddikov's response was due by January 27, 2012.

Saidabror Siddikov owns and operates a sole proprietorship in New Orleans, Louisiana under the name Beyond Cleaning Services (BCS). He says that the nature of the business is for the most part floor stripping and waxing. Siddikov's tax returns indicate that his wife, Danielle Dickie, is the owner of a different small business, an automobile repair and sales company. ICE served BCS with a Notice of Inspection (NOI) on or about July 1, 2009. Siddikov produced no I-9s, and said the six named individuals were at all times independent contractors, not employees for whom I-9 forms were required to be completed. On October 15, 2010, ICE served a Notice of Intent to Fine (NIF) on the company for failure to prepare, retain, or present I-9 forms for the six named individuals. BCS made a timely request for hearing and all conditions precedent to the institution of this proceeding have been satisfied.

## III. THE POSITIONS OF THE PARTIES

### A. The Government's Motion

The government asserts that under the Fifth Circuit's standards set out in *Hathcock v. Acme Truck Lines, Inc.*, 262 F.3d 522 (5th Cir. 2001), an individual is not an employee or an independent contractor just because the hiring entity classifies the individual as such. Rather, the most important factor in making the determination is the "right of control." Other factors to be considered include: the independent nature of the worker's business; the worker's obligation to furnish tools, supplies, and materials; the worker's right to control the progress of the work; the time for which the worker is employed; and whether the worker is paid by the hour or by the job. *Id*. at 525-26. Additional factors identified in *Herman v. Express Sixty-Minutes Delivery Serv. Inc.*, 161 F.3d 299, 303 (5th Cir. 1998), include the extent of relative investments, the degree of opportunity for profit or loss, the skill and initiative required, and the permanency of the relationship.

ICE contends that application of these factors indicates that BCS treated the workers as employees. The government says that Siddikov's responses to its discovery requests show that the status of the six individuals at issue is similar to that of the unskilled crab pickers whose status was at issue in *Breaux and Daigle, Inc. v. United States*, No. CIV. 88-1535, 1989 WL 119058 (E.D. La. May 17, 1989), and that they should be classified as employees, not independent contractors. First, ICE says BCS has control over the work, "as it identifies the customers, it has the customers provide all the tools for the job, the customers set the hours exclusively, and the workers are paid by the hour rather than by the job." The government points out that the workers have no investment or opportunity for profit or loss, the skill involved is minimal, and with at least some of them there was a presumption of an ongoing relationship.

ICE seeks penalties totaling $6600 for the six violations alleged. The government's motion was accompanied by exhibits consisting of A) Notice of Inspection (4 pp.); B) list of contractors provided by Siddikov; C) Notice of Intent to Fine (2 pp.); D) Interrogatories and Requests for

Production of Documents (5 pp.); E) Responses to Interrogatories and Requests for Production (18 pp.); and F) unreported decision in *Breaux and Daigle, Inc.*, 1989 WL 119058 (5 pp.).

B. The Respondent's Position

Siddikov did not file a response to the government's motion, but his position is set out in the letter-pleading he filed in lieu of an answer, in his prehearing statement, and in his responses to the government's discovery requests. Siddikov provided a chart with his answer evaluating each of the individuals against the Internal Revenue Services (IRS) criteria for determining status as an employee or an independent contractor. As to each, he indicated that while he told the individual where to go for a particular job, he did not tell them what tools or equipment to use, what other workers to hire, where to purchase supplies and services, what order or sequence to follow, or what portion of the work they had to do personally. Siddikov said he never gave the individuals detailed instructions, never evaluated their work, and never reimbursed any of their expenses. Payment was made either by the project or by the hour depending upon the particular customer's choice. The services of each individual were available to other customers, and two of them actually had their own companies: Alex and Lora Cleaning, and Brilliant Cleaning. Siddikov says there was no permanency to his relationships with Abdurashid Abdullaev, Luis Interiano, Abdumutal Kholmatov, or Zahar Fotima, but he did have ongoing relationships with Bogdan Garasemyuk and Aleksandr Zarechniyi.

Siddikov's prehearing statement said he personally did the jobs obtained by BCS, but when he could not perform a particular job himself, he either asked for help or gave out the job to someone else for a profit according to negotiated terms. As to specific cases, Siddikov said Abdurashid Abdullaev was a distant relative who, in addition to helping strip and wax floors, also worked on cars that Siddikov was fixing up for sale.[2] Siddikov said part of Abdullaev's compensation consisted of payment of his tuition and assistance with college expenses. The supplies and equipment for Abdullaev's floor stripping work were provided by the customer, and the equipment to fix the cars was provided by Siddikov. Abdullaev worked with several companies, and also had his own customers.

Bogdan Garasemyuk worked on projects subcontracted by AME janitorial services, and he was called to work and managed on those jobs by AME, which also provided the equipment and supplies. Siddikov said he received $3 an hour and Garasemyuk received $10 an hour for those jobs. Garasemyuk worked with several companies, but he was eventually hired by AME janitorial, and his relationship with Siddikov ended.

Luis Interiano worked on two projects for Siddikov; on the first he worked with two other contractors from BCS and several from other companies. On the second, Interiano completed

[2] This work apparently relates to the car repair and sales business owned by Siddikov's wife.

the job by himself. For both projects the supplies and equipment were furnished by the customer. Siddikov believes Interiano is actually an employee of the hospital and does the floor cleaning jobs on the side. Abdumutal Kholmatov[3] stripped and waxed floors for AME for about two months. He was managed on that job by AME, which also provided the equipment and supplies. Siddikov said he received $3 an hour and Kholmatov received $10 an hour for the job. He had no other relationship with Kholmatov after that job.

Aleksandr Zarechniyi also stripped and waxed floors for AME janitorial services at the airport, and he was also managed by AME, which provided the equipment and supplies. Siddikov said he received $3 an hour and Zarechniyi received $10 an hour for the job. Zarechniyi did several projects for BCS priced by the project, for which the customers provided equipment and supplies. Zarechniyi had his own company and brought his own help; he also worked with several different companies.

Zahar Fotima also had her own business and worked with other companies too. She stripped and waxed floors for AME janitorial on several occasions; she was managed on those jobs by AME, and AME provided the equipment and supplies.

Siddikov's responses to discovery requests provide the same basic information and reflect in addition that all these individuals worked for other customers at the same time, while he himself personally also worked as a subcontractor for two different companies, AME janitorial and another company known as SCSI. He had a written contract with SCSI, but not with AME. He was paid for these jobs at the rate of $13 an hour.

Exhibits accompanying Siddikov's answer included 1) response to subpoena NO 2009-415 (3 pp.); 2) IRS Independent Contractor Criteria (4 pp.); and 3) evaluation of the individuals against the IRS criteria.

## IV. STANDARDS APPLIED

In order to determine whether an individual is an independent contractor or an employee, OCAHO case law calls for a three level inquiry, looking first, to the specific regulatory factors set out in 8 C.F.R. § 274a.1(j); second, to OCAHO cases; and third, to principles of agency law discussed in federal cases. *See United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO no. 945, 368, 383 (1997).[4] Independent contractors are defined by applicable regulations to include

[3] The alternate spelling of this name as Holmatov appears in some of the filings.

[4] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages,

"individuals or entities that carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." Among the factors to be considered are whether the individual supplies the tools or materials, makes services available to the public, works for different clients at the same time, directs the order or sequence in which the work is to be done, and determines the hours in which the work will be done. 8 C.F.R. § 274a.1(j). OCAHO case law has observed in another context that where an individual provides labor or services only to a third party, and the putative employer has no power to fire the individual, to set the individual's work schedule or working conditions, to assign work, or to supervise the individual, there simply are not sufficient indicia to establish an employment relationship. *See United States v. Ronning Landscaping, Inc*., 10 OCAHO no. 1149, 9 (2012).

A variety of tests have been identified in the case law, including the common law standard set out in *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992) (pointing to the similarity of this standard to the ten-factor control test from the Restatement (Second) of Agency), *see Hudson*, 7 OCAHO no. 945 at 384, as well as the economic realities test discussed in *United States v. Bakovic*, 3 OCAHO no. 482, 853, 859 (1993). *Darden* reiterated the common law test previously set out in *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989), as follows:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; 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 paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

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seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

The Fifth Circuit, in which this case arises, has taken differing approaches depending upon the reason for which the inquiry is made. At least for purposes of coverage under the Federal Tort Claims Act, 28 U.S.C. § 2679(b)(1) (2012) (FTCA), the critical factor is whether the government controls the detailed physical performance of the individual involved. *Creel v. United States*, 598 F.3d 210, 213 (5th Cir. 2010). The other factors to be considered are those set out in the Restatement (Second) of Agency § 220 (1958). *Creel*, 598 F.3d at 213-214 (citing *Linkous v. United States*, 142 F.3d 271, 276 (5th Cir. 1998)). This standard is essentially the same as that set out in *Darden*.

For cases pursuant to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq. (2012) (FLSA), however, it is the economic realities test that provides the touchstone. Thus in *Thibault v. Bellsouth Telecomm., Inc.*, 612 F.3d 843, 845-46 (5th Cir. 2010), the court identified five relevant factors: 1) the permanency of the relationship; 2) the degree of control exercised by the alleged employer; 3) the skill and initiative required to perform the job; 4) the extent of the relative investments of the worker and the alleged employer; and 5) the degree to which the worker's opportunity for profit and loss is determined by the alleged employer. The focus of this test is on whether "as a matter of economic reality, the worker is economically dependent upon the alleged employer or is instead in business for himself." *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 343 (5th Cir. 2008). No single factor is determinative; instead each factor helps gauge the economic dependence of the alleged employee. *Id.*

Thus in *Hopkins*, where sales leaders had worked full time for the insurance company for many years, the company controlled their geographical territories and the choice of products they could sell, and Cornerstone also affirmatively prevented the sales leaders from selling competing products or operating other businesses, the sales leaders were found as a matter of economic reality to be Cornerstone's employees.[5] *Id*. at 346. But in *Thibault*, the court applied the same five factors to find that a splicer who was hired to help rewire BellSouth's New Orleans telecommunications grid after Hurricane Katrina was an independent contractor. The court noted first that Thibault did not work exclusively for the defendants, that he traveled from Delaware to Louisiana to work on the project, and that the defendants told him what needed to be repaired but did not specify how the splicing was to be accomplished. Although Thibault was paid at a fixed hourly rate, he had special skills and provided his own tools. Unlike the sales leaders in *Hopkins*, he worked only on the one specific job, and at all times had other business interests back in Delaware. The court concluded that Thibault was not economically dependent on BellSouth. *Thibault*, 612 F.3d at 849.

[5] That one of the sales leaders had previously defended a claim for sexual harassment under the Texas Commission on Human Rights Act, Tex. Lab. Code Ann. § 21.001 et seq. (West 2015) (TCHRA) by claiming to be an independent contractor outside the scope of TCHRA was not viewed as an impediment because the hybrid test results in a narrower definition than does the economic realities test. *Id*. at 347.

To determine whether an employment relationship exists for claims under the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2012) (Title VII), on the other hand, the court says it applies a "hybrid economic realities/common law control test," with the most important component being the right of control. *See Muhammad v. Dallas Cnty. Comm. Supervision and Corr. Dep't*, 479 F.3d 377, 380 (5th Cir. 2007). In *Junio v. Livingston Parish Fire Dist. No. 5*, 717 F.3d 431, 434 (5th Cir. 2013), the court characterized this test as "a variation of the common law agency test," and explained that the economic realities portion of the test asks whether the putative employee is dependent upon the particular business, while the common law control portion assesses the question of whether the putative employer has the right to control the details and means by which the work is performed. *Id*.

Scholars have questioned the significance of the distinctions among these various tests, noting that they are difficult to apply and that despite the putative differences, courts have tended to apply them in the same manner. *See, e.g.*, Lewis L. Maltby & David C. Yamada, *Beyond "Economic Realities:" The Case for Amending Federal Employment Discrimination Laws to Include Independent Contractors*, 38 B. C. L. REV. 239, 254 (1997). The common law and hybrid tests both look to the question of control over the details of the work as being of primary importance, and even the economic realities test also assumes that the degree of control or supervision over the work will be a critical component. So does the so-called IRS test,[6] which looks for both behavioral control and financial control, as well as the type of relationship between the parties. However the test itself is articulated, courts tend in practice to look at the totality of the circumstances.

Commentators have also expressed concerns that the traditional tests do not provide an adequate modern standard for determining who is or is not an employee. *See, e.g.*, Marc Linder, *Dependent and Independent Contractors in Recent U.S. Labor Law: An Ambiguous Dichotomy Rooted in Simulated Statutory Purposelessness*, 21 COMP. LAB. L. & POL'Y J. 187, 188 (1999). Prof. Linder concludes his analysis of the subject by suggesting that the jurisprudence of employee-independent contractor is intellectually bankrupt. *Id*. at 230. *See also* Richard R. Carlson, *Why the Law Still Can't Tell an Employee When it Sees One and How it Ought to Stop Trying*, 22 BERKELEY J. EMP. & LAB. L. 295, 302-04 (2001) (discussing the pre-industrial origins of worker classification); and *Defining 'Employee' in the Gig Economy*, N.Y. Times (July 19, 2015), http://www.nytimes.com/2015/07/19/opinion/Sunday/defining-employee-in-the-gig-economy.html (discussing growth of app-based businesses like Uber, Lyft, and Instacart).

We do not live in a binary world, *see generally* Badredine Arfi, *Linguistic Fuzzy Logic Methods in Social Sciences*, 12, (Springer-Verlag Berlin Heidelberg, 2010), and increasing numbers of contemporary workers appear to fall in the gray areas between the two categories. Some efforts have been made to bridge the gap. The Department of Transportation (DOT), for example,

[6] IRS Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

approached the problem directly. The Motor Carrier Safety Act of 1964, 49 U.S.C. § 13906 (2012), requires motor carriers in the interstate trucking industry to maintain an appropriate level of insurance coverage. To discourage motor carriers from using the employee/independent contractor distinction to avoid liability, DOT simply eliminated the distinction by regulation. *See* 49 C.F.R. § 390.5 (defining the term employee as, inter alia, a driver of a commercial motor vehicle, "including an independent contractor while in the course of operating a commercial motor vehicle"). Commentators have suggested other approaches as well. *See* Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605 (2012); Deborah Waire Post, *Contract and Dispossession*, 1 COLUM. J. RACE & L. 418 (2012); Karen R. Harned, Georgine M. Kryda & Elizabeth A. Milito, *Creating a Workable Legal Standard for Defining an Independent Contractor*, 4 J. BUS. ENTREPRENEURSHIP & L. 93 (2010). Meanwhile, in the face of increasing varieties of contingent or peripheral work arrangements, courts continue to struggle with the traditional tests.

## V. DISCUSSION AND ANALYSIS

To begin with, the government's reliance on the district court decision in *Breaux and Daigle* is misplaced because this is an unpublished decision entitled to no precedential value. I do, however, consult the subsequent decision of the Fifth Circuit affirming the result in that case, *Breaux and Daigle, Inc. v. United States*, 900 F.2d 49 (5th Cir. 1990), and find that the facts there are quite different from the facts in this case. In *Breaux and Daigle*, the crabmeat pickers at the employer's seafood packaging plant had at all times prior to January 1, 1984 been treated as employees. Contributions were withheld and payments made to IRS for them pursuant to the Federal Insurance Contribution Act, 26 U.S.C. § 3101 et seq. (2012) (FICA), and the Federal Unemployment Tax Act, 26 U.S.C. § 3301 et seq. (2012) (FUTA). In 1984, however, the company provided its pickers with forms that they signed agreeing that they would thereafter be treated as independent contractors. The company's purpose in making this change was to be more competitive in a market where other seafood processors treated their pickers as contractors. The district court was unimpressed with the rationale for the change.

Breaux and Daigle appealed from the district court's judgment denying its request for a refund of taxes paid and ordering it to pay additional taxes assessed by IRS. In affirming the district court's order finding the pickers to be employees, the circuit decision emphasized the importance of the company's right to control and direct the work, as well as to discharge the individuals in question. The court examined a variety of subfactors in making this determination. While there were some factors suggesting the pickers were independent contractors, such as the fact that they used their own tools, were free to come and go on their own time, and were paid by the amount of crabmeat they picked rather than by the hour, these facts were outweighed by the fact that the pickers worked on the company's own premises where they were subject to the company's supervision, both as to compliance with Food and Drug Administration (FDA) sanitation standards (including the right to send an individual home for forgetting a hair net), and as to the

quality of the work (including the right to terminate a picker if there was consistently too much fat or shell in the crabmeat he or she picked). The right to control and direct the individuals, as well as the right to terminate their services, was apparently determinative.

Here, in contrast, none of the work was performed on BCS' premises, there was no supervision or control either by BCS or by Siddikov himself, and most of the relationships were short-lived. The discrete jobs were on-again-off-again in nature, and the individuals had been treated all along as autonomous. Two of the individuals apparently had their own companies, and two others had regular jobs and moonlighted doing the floor jobs on the side.

Looking first to the regulatory factors at 8 C.F.R. § 274a.1(j), it appears that the named individuals performed those jobs independent of any supervision or control by BCS, that they all in fact worked for others at the same time, and the services of at least two were available generally in the market. While, as ICE points out, the individuals did not provide their own supplies or equipment, BCS and Siddikov did not provide their supplies or equipment either; these were provided by the customers. The choice of whether payment was made at an hourly rate or by the job was the customers' choice as well. The individuals did the work according to their own means and methods without control by BCS, their services were available to others, and they worked for different clients at the same time. While a few of the regulatory factors are indicative of employee status, these are simply outweighed by the factors indicative of independent contractor status.

There is substantial overlap between the definition in 8 C.F.R. § 274a.1(j) and the Restatement factors. As observed in *Darden*, the common law test has no "shorthand formula or magic phrase that can be applied to find the answer." 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 258 (1968)). Rather, all the aspects of the relationship have to be assessed and weighed. *Id*. Considering the totality of the circumstances, it appears that, apart from the fact that the actual work itself is unskilled, the remainder of the common law factors, to the extent they apply to the instant circumstances at all, also point in the direction of independent status for Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima. There is no evidence that any of these individuals was an essential part of Siddikov's normal business operations; they did not work for BCS either full time or exclusively, but simply provided Siddikov with an opportunity to "farm out" jobs he was unable to complete himself. There appear to be no permanent ongoing arrangements and no obligations on either side, whether for BCS to offer, or for any of the individuals to accept, additional jobs in the future. There is not a scintilla of evidence, moreover, that any of these individuals was economically dependent upon Siddikov or BCS for his or her livelihood as contemplated by the economic realities test.

Where an individual actually goes to the customers' own premises to provide relatively unskilled services, such as cleaning carpets or reading utility meters, the tasks to be performed will seldom be directly supervised or controlled by the company offering the services. *See generally* Richard

Bales et al., *A Comparative Analysis of Labor Outsourcing*, 31 ARIZ. J. INT'L & COMP. L. 579 (2014) (discussing various types of "detached employment," that is, where there is no relationship between the individuals receiving the services and those providing them). This may be one of the reasons that cleaning and maintenance work have historically been among the types of tasks that are most frequently subcontracted. *See* Clyde W. Summers, *Contingent Employment in the United States*, 18 COMP. LAB. L. J. 503, 503, 514-15 (1997).

When a dispositive issue is one on which the moving party would bear the burden of proof at trial, the moving party must come forward with sufficient competent evidence to support each essential element of the claim. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In consideration of the regulatory factors as well as the case law, I conclude that the government has not carried its burden of showing by a preponderance of the evidence that Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima, or any of them, were ever employees of BCS. BCS was accordingly not required to prepare I-9s for these individuals and the complaint must be dismissed.[7]

## VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Findings of Fact

1. Saidabror Siddikov owns and operates a sole proprietorship in New Orleans, Louisiana under the business name Beyond Cleaning Services.

2. Saidabror Siddikov d/b/a Beyond Cleaning Services was at all relevant times engaged in the business of floor stripping and waxing.

3. The Department of Homeland Security, Immigration and Customs Enforcement served Saidabror Siddikov d/b/a Beyond Cleaning Services with a Notice of Inspection on or about July 1, 2009.

4. Saidabror Siddikov d/b/a Beyond Cleaning Services did not produce any I-9 forms in response to the Notice of Inspection.

[7] Siddikov's interrogatory responses listed four individuals as employees: Asqarali Aliev, Tohirov Shaukat, Ibrohim Hojimatov, and Nuriddin Pardaev. ICE requests that BCS be fined for failure to present I-9s for them. Because these four individuals were named neither in the NIF nor in the complaint, and there is no other evidence as to their status such as wages paid to them, I decline to make any findings as to whether they would qualify as employees under 8 C.F.R. § 274a.1(j).

5. On October 15, 2010, ICE served a Notice of Intent to Fine (NIF) on Saidabror Siddikov d/b/a Beyond Cleaning Services.

6. Saidabror Siddikov d/b/a Beyond Cleaning Services made a request for hearing on or about November 14, 2010.

7. Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima are individuals who from time to time accepted and performed jobs referred to them by Saidabror Siddikov d/b/a Beyond Cleaning Services.

B. Conclusions of Law

1. Saidabror Siddikov is an individual and Beyond Cleaning Services is an entity within the meaning of 8 U.S.C. § 1324a(1) and 8 C.F.R. § 274a.1(b).

2. Saidabror Siddikov d/b/a Beyond Cleaning Services made a timely request for hearing and all conditions precedent to the institution of this proceeding have been satisfied.

3. The Department of Homeland Security, Immigration and Customs Enforcement failed to establish that Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima were ever employees of Saidabror Siddikov d/b/a Beyond Cleaning Services at any time during the relevant period.

4. When an individual provides labor or services only to a third party, and the putative employer has no power to fire the individual, to set the individual's work schedule or working conditions, to assign work, or to supervise the individual, there simply are not sufficient indicia to establish an employment relationship between the individual and the putative employer. *See United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 9 (2012).

5. Saidabror Siddikov d/b/a Beyond Cleaning Services did not hire Abdurashid Abdullaev, Bogdan Garasemyuk, Luis Interiano, Abdumutal Kholmatov, Aleksandr Zarechniyi, and Zahar Fotima for employment within the meaning of 8 U.S.C. § 1324a(a)(1)(B) and was not obligated to comply with the requirements of 8 U.S.C. § 1324a(b) with respect to them.

ORDER

The complaint is dismissed.

SO ORDERED.

Dated and entered this 14th day of August, 2015.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.