COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS
DEPARTMENT OF LABOR
ADMINISTRATIVE HEARING OFFICE

In the Matter of:	)	Labor Case No. 17-052
Zajradhara, Zaji O.,	)	
Complainant,	)	
	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Haitian Construction Group,	)	
Respondent.	)	
	)	

This case came on for hearing on May 15, 2018, in the Administrative Hearing Office of the CNMI Department of Labor. Complainant Zaji O. Zajradhara appeared without counsel. Respondent Haitian Construction Group appeared through its corporate Secretary, Congxiang S. Palacios, and its counsel, Colin Thompson. The Department of Labor Enforcement Section appeared through its investigator, Ben Castro. Hearing Officer Jerry Cody, presiding.

After hearing the testimony and reviewing the record, the Hearing Officer makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

This labor complaint was brought by a U.S. citizen job applicant, Zaji O. Zajradhara ("Complainant") against Haitian Construction Group ("Employer"), alleging that the Employer violated the CNMI job preference laws by failing to consider Complainant's application for a job that Employer advertised in May 2017. Complainant requests damages against Employer pursuant to 3 CMC § 4528(a). Testimony of Mr. Zajradhara. [A copy of the handwritten Complaint, filed on 9/06/2017, was entered into evidence at Hearing Exhibit 1.]

During 2017, Employer employed 603 workers – all foreign national workers - to work in construction-related jobs on one or more construction projects in the CNMI. All of the workers had CW-1 status which expired during 2017. At Hearing, Employer's representatives stated that after posting job vacancy announcements ("JVAs") on DOL's website to renew certain workers in mid-2017,

Employer ultimately decided not to renew any of its CW-1 status workers. [Testimony of Ms. Palacios and representation of Mr. Thompson.]

Employer documented its drastic change of business plan in two Total Workforce Listings. The first Total Workforce Listing (entered into evidence as Hearing Exhibit 4) lists all 603 CW-1 status workers employed by Employer during the year of 2017. The next Total Workforce Listing (Hearing Exhibit 3), applicable to the 1st Quarter of 2018, represents that Employer employed no employees whatsoever during that first quarter of 2018. Both Listings were signed by corporate Secretary Congxiang S. Palacios, who testified at Hearing.

Employer offered no detailed testimony about its decision not to renew its foreign national workers at the end of 2017. Although Secretary Palacios confirmed that none of the 2017 CW-1 employees were renewed by Employer, Ms. Palacios was unable to give the reason for that business decision.[1] Attorney Colin Thompson surmised that Employer reacted to news that USCIS was not going to approve CW-1 workers in the construction industry in 2018; nevertheless, Mr. Thompson's comment remains conjecture. In any event, it seems that no workers' Petitions for renewal were approved and by the beginning of 2018, Employer no longer employed any foreign national workers in the CNMI.[2]

For the record, Employer does not dispute complainant's allegation that Employer never reviewed, contacted or interviewed complainant about the posted "road worker" job. [Statement at Hearing by Mr. Thompson.]

As summarized above, Employer never filled the posted road worker job with any foreign national worker – or with anyone else. As Ms. Palacios and Mr. Thompson confirmed, Employer abandoned its plan to employ road workers sometime after June 2017. *Id.*

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[1] Although she was labelled a consultant and given a corporate title, it appears that Ms. Palacios did not make high-level management decisions and was not aware of the details of why Employer decided not to pursue renewal of its construction employees. Management and control appeared to remain with Employer's President who resides in China. [Testimony of Ms. Palacios; representations of Mr. Thompson.]

[2] Many details regarding this business decision remain unknown, such as whether Employer submitted CW-1 Petitions and then backed out of the renewals, or simply decided not to submit renewal Petitions to USCIS. Employer's representatives also could not identify even the month that Employer decided to reduce its workforce to zero. [Testimony of Ms. Palacios and statements of Mr. Thompson.]

Determination: DOL's Enforcement Section investigated this case and concluded that Respondent had committed no violation of law or regulation. It recommended that Respondent not be sanctioned or found liable in this matter. [A copy of the Determination was entered into evidence as Hearing Exhibit 2.] Testimony of Mr. Castro.

CONCLUSIONS OF LAW

Complainant, a non-lawyer, did not cite the statute upon which his Complaint was based. The Hearing Officer construes the Complaint (Hearing Ex. 1) as alleging a violation of the CNMI job preference statute at 3 CMC § 4528(a).

The Commonwealth Employment Act of 2007, 3 CMC § 4528(a), states, in part, that "[a] citizen, CNMI permanent resident, or U.S. permanent resident who is qualified for a job may make a claim for damages if ...the employer rejects an application for the job without just cause, and the employer employs a person who is not a citizen, CNMI permanent resident, or U.S. permanent resident for the job."

In order to win his claim for damages under this statute, Complainant must prove all four elements of the statute: (1) that he was qualified for the job; (2) that his job application was rejected by the Employer without just cause; (3) that Employer then hired a foreign national worker for that position; and (4) that Employer failed to meet the so-called 30% requirement (ratio of citizens/permanent residents employed) in employer's full-time workforce. 3 CMC § 4528(a).

Three of the Four Elements of the Job Preference Charge Were Proven.

Based on the evidence presented, the Hearing Officer finds that Complainant proved three of the four elements of the Section 4528(a) offense.

First, evidence established that Employer in 2017 did not meet the 30% requirement of 3 CMC § 4525.[3] In fact, 100% of Employer's workforce in 2017 – 603 employees- consisted of foreign national workers who held CW-1 status. [See Total Workforce Listing at Hearing Exhibit 4.] In short, Employer's workforce participation percentage was well below the minimum requirement of 30%. Accordingly, this element of the offense is met.

[3] That statute requires employers to maintain a minimum workforce participation goal of 30%, meaning that 30% of Employer's full-time workforce must consist of U.S. citizens or U.S. permanent residents. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(c)(3).

Another element of a Section 4528(a) offense is to establish that Complainant was qualified for the job for which he applied. Employer posted simple qualifications on the JVA for this unskilled, "road worker" position. Based on Complainant's work history as reflected in his resume, the evidence supports a finding that Complainant was qualified to work in this unskilled job. Therefore, this element of the offense was established.

Another element of a Section 4528(a) offense is satisfied if the employer unjustly rejects the U.S. citizen for the job. In this case, that element was not completely adjudicated and established, but evidence suggests that Employer had no just cause to ignore or disregard Complainant's job application. Although all the facts are not entirely known and could not be developed through the testimony of Ms. Palacios who Employer asked to testify on its behalf. Employer admitted that it took no action to consider Complainant for the advertised position. Thus, it was entirely likely that Complainant would prevail on this element of the claim.

Complainant Failed To Prove that Employer Had Filled the Vacant or Renewed Positions With Foreign National Workers; Therefore, Complainant Cannot Prevail Under 3 CMC § 4528(a).

The final element of a job preference case is proving that Employer filled the vacant job with a foreign national worker after rejecting Complainant's job application without just cause. Employer argued that this element could not be proven as it had never filled the road worker jobs in 2018, but instead, allowed all of its CW-1 employees' status to terminate without renewal. The Hearing Officer agrees with Employer's argument.

Based on the above facts, the Hearing Officer holds that this important element of the Section 4528(a) offense cannot be established. Accordingly, Complainant cannot satisfy all of the elements of the offense and his request for damages should be rejected.

The Department being fully advised and good cause having been shown, IT IS HEREBY ORDERED:

1. **Judgment:** Based on the above findings and conclusions, judgment is hereby entered in favor of Respondent Haitian Construction Group and against Complainant Zaji O. Zajradhara on Labor Complaint No. 17-052, filed on September 6, 2017 (Hearing Exhibit 1).

2. **Appeal:** Any person or party aggrieved by this Order may appeal, in writing, to the Secretary of Labor within fifteen (15) days of the date of issuance of this Order. 3 CMC §§ 4948(a) and 4528(g).

DATED: May 25, 2018

Jerry Cody
Hearing Officer