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

In the Matter of:	)	Labor Case No. 17-040
Zajradhara, Zaji O.,	)	
Complainant,	)	
	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Yen's Corporation,	)	
Respondent.	)	
	)	

This case came on for hearing on January 16 and 19, 2018, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"). Complainant Zaji O. Zajradhara appeared without counsel. Respondent Yen's Corporation appeared through its President, Chien-li ("Tony") Yen, and its counsel, Oliver M. Manglona, of the law offices of Robert T. Torres. The DOL Enforcement Section appeared through investigator Patrick King. The DOL Employment Services Section appeared through James Ulloa. 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 Yen's Corporation ("Employer"). In essence, Complainant alleged that Employer violated CNMI job preference laws by rejecting Complainant's application for a job to which Employee applied in April 2017. Complainant requested damages of "back pay" from the Employer. [A copy of the Complaint was entered into evidence as Hearing Exhibit 1. The Complaint was signed on 5/2/2017, and filed with the Hearing Office on 6/2/2017.]

Employer is a small business engaged in document handling and translation services. As of March 2017, Employer employed only two persons: President Tony Yen, who holds an EAD (employment authorization document), and a Manager named Ms. Wang, Yan, who held CW-1 status.

Mr. Yen ceased his employment at the company in September 2017 when his EAD expired, but he continued serving as corporate President. On October 5, 2017, Employer hired a U.S. citizen, named Samson Shinder Hsieh, for the position as Manager, but also retained its CW-1 status Manager, Wang, Yan. As of the date of Hearing, Employer's work force consists of the two Managers. [Test. of Mr. Yen.]

In March 2017, Employer was planning to renew its CW-1 status Manager, Ms. Wang, by filing a renewal Petition with the U.S. Citizenship and Immigration Services ("USCIS"). The Petition needed to be filed with USCIS no later than April 2017, in order to be considered by the USCIS. *Id.*

In late March 2017, Employer posted a job vacancy announcement ("JVA") on DOL's website for the job of Manager. [A copy of the JVA (JVA no. 17-03-48291) for Manager was entered into evidence as Hearing Exhibit 2a.] The JVA listed an "anticipated start date" for the job as October 1, 2017, and opening and closing dates for the JVA as October 1 and October 16, 2017, respectively. The JVA listed the job duties as: "Manages business operations such as document handling and other related duties." *Id.*

After posting the JVA, President Tony Yen signed and filed a renewal Petition for its CW-1 status Manager, Ms. Wang, with USCIS. Prior to filing the Petition, Mr. Yen did not review the resumes of three applicants who had posted online responses to the JVA on March 28, 2017. [Testimony of Mr. Yen; Hearing Exhibit 2b (JVA including responses posted by job applicants).]

In April 2017, Complainant read the JVA for "Manager" on the DOL website and decided to apply for the job. On April 26, 2017, Complainant emailed the Employer, attaching his resume; he sent his email to the email address that Employer had listed on its JVA: *yenscorpspn@gmail.com*. Six days later, on May 2, 2017, Complainant submitted a Complaint letter to the Hearing Office, stating that he wanted to file a labor complaint because Employer had failed to contact him to consider him for the position. (The Complaint letter was officially accepted for filing by the Hearing Office on June 2, 2017, after Complainant's application for waiver of fees was granted. The case was filed as L.C. No. 17-040.)

At Hearing, Employer's President, Tony Yen, claimed he never realized that Complainant had emailed the company until September 2017. Mr. Yen testified that he had not opened the company website for many months; therefore, he had not known that Complainant had sent his resume to Employer until Employer received the Notice of Mediation in September 2017, indicating that a complaint

had been filed against Employer. On September 10, 2017, Mr. Yen and Complainant met in the Hearing Office's mediation session to discuss this case. The parties failed to resolve the case at that time.

Although Employer's JVA for Manager was published on DOL's website in March 2017, the JVA listed opening and closing dates of October 1 and 16, 2017, respectively. Complainant was off-island for the entire month of October 2017. In the first week of October 2017, the parties engaged in a series of email exchanges regarding the "manager" position. Below is a summary of the exchanges:

> **October 2, 2018:** Employer informed Complainant by email that the position required two years' work experience in document handling services and that Employer intended to hire a U.S. citizen, Mr. Hsieh, who was capable of speaking both English and Chinese. [Hearing Exhibit 5a.]
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> **October 2, 2018:** Zaji responded: "I shall continue my lawsuit." [Ex. 5b.]
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> **October 3, 2018:** Employer responded: "Since this job position is still open, I would like to schedule you for interview for tomorrow 10/04/17." [Hearing Ex. 5c.]
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> **October 3, 2018:** Zaji responded: "Unfortunately, I am out of town on business. I wish that you could have given me a better notice regarding this matter." [Hearing Ex. 5d.]
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> **October 3, 2018:** Employer responded: "When are you returning back to Saipan, please let me know your schedule, so I can set the interview date for you. [Hearing Ex. 5e.] Complainant never responded to this email. [Testimony of Mr. Yen and Mr. Zajradhara.]

On October 5, 2017, Employer hired Mr. Hsieh for the Manager job. [Testimony of Mr. Yen.]

On October 16, 2017, a representative of another company, Li Feng (USA) Corporation (Wenfeng Chen: lifengspn@gmail.com), emailed Complainant, stating: "we would like to set up a interview date for you to our company for the position of sales person, thank you." Complainant responded by email: "Thanks, currently I am off island for business. Shall return on nov. 2." [Hearing Exhibit 9.]

On November 2, 2017, Complainant returned to the CNMI. Complainant sent Li Feng (USA) Corporation an email announcing his arrival and stating that he was available for a job interview, but Complainant never responded to Mr. Yen's last email of 10/03/17, asking to set an interview date.

On about November 28, 2017, Employer sent another Employer Attestation (signed by Chien-Li Yen on 11/28/17) to USCIS with a request that read: "We advertised at CNMI Labor website, we've hired Samson Shinder Hsieh an US citizen on October 05, 2017 for the position of manager. We're requesting to continue process of this CW-1 petition for the business operation needs." [A copy of this document was entered into evidence as Hearing Exhibit 8.] Evidently, USCIS agreed to Employer's request, as Mr. Yen testified that Ms. Wang's CW-1 status was renewed by USCIS in December 2017. [Testimony of Mr. Yen.] In December 2017, Employer posted on the JVA of the DOL website that the Manager position had been filled.

Determination: DOL's Enforcement Section investigated this case and concluded that Employer had not violated any CNMI labor laws or regulations in this case. The investigator based his Determination on a finding that Employer was willing to interview Complainant but Complainant failed to respond back to Employer to set up the interview. [Determination at Hearing Exhibit 3, Findings at p. 2, ¶ 1; and testimony of Mr. King.]

CONCLUSIONS OF LAW

1. Employer's Early Posting of its JVA Did Not Violate CNMI Labor Statutes or Regulations.

Employer posted the JVA in March 2017, but listed an "opening date" for the JVA ***seven months*** in the future, on October 1, 2017. Complainant argued that Employer's early posting of this JVA was improper and/or unlawful. DOL's Employment Services Section provided a representative to testify as to its position on this issue. Mr. James Ulloa of DOL's Employment Services Section testified that such a practice (posting a JVA on DOL's website months before the official "opening" date of the JVA) could cause a "chaotic" situation, but that the practice did not violate any CNMI labor statute or regulation. [Testimony of Mr. Ulloa.] Indeed, the Hearing Officer finds no CNMI labor statute or regulation that imposes an obligation on Employer to limit the opening date of its JVA. The Hearing Officer concludes that Employer's early posting of its JVA was not unlawful.

2. Employer's Hiring of Mr. Samson Hsieh Did Not Violate CNMI Labor Statutes or Regulations.

Employer interviewed and hired a U.S. citizen as its full-time employee "Manager" during the JVA's official publication period (October 1 to 16, 2017). [Testimony of Mr. Yen; Hearing Exhibits 2a (JVA) and 4b (Total Workforce Listing).] Mr. Yen testified that he interviewed the job applicant, Samson Hsieh, on about October 1, 2017. Yen told Complainant on October 3, 2017, that he planned to hire Mr. Hsieh because, among other reasons, he was bilingual in English and Mandarin. Yen hired Mr. Hsieh two days later, on October 5, 2017. [Testimony of Mr. Yen.]

The CNMI Department of Labor does not scrutinize an employer's judgment as to which U.S. citizen to hire among citizen/permanent resident job applicants. The Employment Rules and Regulations state that "[a]ny citizen, CNMI permanent resident or U.S. permanent resident may be hired rather than a person referred without any justification required to be submitted to the Department." [Regs. at NMIAC § 80-20.1-235(c)(1).] Thus, an Employer's hiring decision between U.S. citizen job candidates is not normally subject to scrutiny by the CNMI Department of Labor.

In this case, the facts were examined more carefully due to the fact that Employer sought to renew its CW-1 status Manager even after it hired a U.S. citizen for the position. Mr. Yen testified that after he had hired Mr. Hsieh as Manager, he filed a written request with USCIS in mid-November 2017, asking to be allowed to renew Employer's foreign national worker, Ms. Wang, Yan. [A copy of Mr. Yen's submission to USCIS was entered into evidence as Hearing Exhibit 8.] In December 2017, USCIS approved the renewal Petition for Ms. Wang, Yan. [Testimony of Mr. Yen.]

3. Complainant Failed To Establish That Employer Rejected Complainant's Job Application Without Just Cause.

Holding: Complainant failed to establish that Employer rejected Complainant's job application without just cause because Complainant failed to respond to Employer's invitation to interview for the job.

Employer might have been required to hire Complainant over Ms. Wang, Yan, but Complainant never followed through on setting up a date to be interviewed by Employer. Mr. Yen sent an email to Complainant on October 3, 2017, asking

Complainant to contact him after he returned to the CNMI in November 2017, so that an interview date and time could be arranged. [Hearing Exhibit 5e.] Complainant admitted that he never answered that email either before or after he returned to Saipan on November 2, 2017. [Testimony of Mr. Zajradhara.]

At Hearing, Complainant argued that although he had not emailed directly to Tony Yen, Mr. Yen knew Complainant was returning to Saipan on November 2, 2017, because Complainant had informed Li Feng (USA) Corporation (hereinafter, "Li Feng Corp.") of that fact and Tony Yen was that company's authorized representative.[1]

The Hearing Officer does not accept Complainant's argument that notice to Li Feng Corp. amounted to notice to Yen's Corporation. Complainant responded to Li Feng Corp. on October 16, 2017, to a job interview for "sales person" – not manager; that request for an interview was made by Li Feng Corp. – not Yen's Corporation. Mr. Yen was not required to make assumptions about Complainant's continuing interest in the "manager" job, based on a response to a JVA for a "sales person" job from a different company. Further, Complainant neglected to follow up or clarify the situation after his return to Saipan on November 2, 2017. A simple message upon his return would have served to inform Employer that Complainant remained interested in interviewing for the "manager" job. Complainant made no effort to contact the Employer after he returned to the CNMI on November 2, 2017.

The Hearing Officer notes that scheduling a job interview requires the cooperation of both parties. If Complainant fails to act responsibly, such conduct, in effect, gives Employer an excuse not to go forward with considering the job applicant for the vacant position.

In this case, Complainant was primarily at fault for failing to cooperate and participate in a job interview for the manager job in November 2017. Admittedly, this is a close decision, given that Employer created confusion with its emails in October 2017, first telling Complainant that it intended to hire a qualified U.S. citizen who had bilingual ability, then sending a second email noting that the position was still "open" and asking Complainant to interview for the job. [See Hearing Exhibits 5a and 5c.] However, by not responding to Employer's request

[1] On October 16, 2017, Complainant emailed Wenfeng Chen of Li Feng Corp. that he would return to Saipan on November 2, 2017. [See Hearing Exhibit 9.] On November 2, 2017, Complainant emailed Wenfeng Chen that he was back in Saipan and available for an interview. [Testimony of Mr. Zajradhara.]

for an interview, Complainant caused Respondent to believe that he was no longer interested in the manager position. In short, it was Complainant's refusal to cooperate to schedule a job interview that caused the process to fail.

4. Complainant Failed To Prove That Employer's Conduct Violated The CNMI's Job Preference Law at 3 CMC § 4528(a).

Complainant, a non-lawyer, did not cite the statute upon which his Complaint was based. To the extent that Complainant moved for "back wages," the Hearing Officer construes the Complaint (Hearing Ex. 1) as alleging a violation of the CNMI job preference statute at 3 CMC § 4528(a). This statute is the only CNMI-based statute that gives an individual job applicant the right to sue for lost wages if certain elements are proven.

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." Violations of this statute may lead to damages of up to six months' lost wages, as well as monetary sanctions against the employer. 3 CMC §§ 4528(f)(1) and (f)(2).

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).

Complainant failed to meet the second element of this claim. As to the second element, Employer asserted that it did not "reject" Complainant's application; rather, Employer attempted to arrange to interview Complainant when he returned from an off-island trip in November 2017, but Complainant failed to follow up on Employer's offer to interview him. The Hearing Officer accepts Employer's argument as valid and therefore, finds there is insufficient evidence to prove that Complainant's job application was rejected without just cause – a second element of a charge under 3 CMC § 4528(a).

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Respondent's arguments regarding the first and fourth elements are unpersuasive. Employer also argued that it did not violate 3 CMC § 4528(a) because: (1) Employer hired a U.S. citizen (Mr. Hsieh) for the Manager position; and (2) Complainant failed to establish that he was qualified for the job. [See Respondent Yen's Corporation's Written Closing Arguments at pp. 5-7.]

First, the Hearing Officer disagrees with Employer's contention in its Closing Arguments that it satisfied its legal obligations by hiring a U.S. citizen for the Manager position. The fact that one U.S. citizen (Mr. Hsieh) was hired does not end the inquiry as to Complainant's job application because Employer also sought to renew its CW-1 Manager (Ms. Wang, Yan) and Complainant retained a legal preference under 3 CMC § 4528(a) for that job, if he was qualified.

Second, the Hearing Officer disagrees with certain arguments made by Employer in its Closing Arguments as to qualifications for the job. Employer's list of job duties in its JVA (Hearing Ex. 2) was so terse - stating that the applicant "manages business operations such as document handling and other related duties") that Complainant's work history appears sufficient to qualify him for the basic task of document handling. [Hearing Ex. 6 (resume) and testimony of Mr. Zajradhara.] In any event, Mr. Yen testified that the primary skill needed for the position was bilingual ability, which skill had been intentionally omitted from the published JVA. The issue of whether Complainant's lack of bilingual ability was sufficient grounds to reject his application was not fully addressed,[2] given that Complainant's failure to prove the second element (below) determined the outcome of this case.

Notwithstanding the above findings as to job qualifications, Complainant's claim under 3 CMC § 4528(a) must fail because Complainant did not establish the claim's second element – that Employer rejected Complainant's job application without cause.

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[2] One issue is whether the Employer could impose a bilingual requirement on the job, having failed to list that requirement in the JVA. A second issue is whether the bilingual requirement was justified. Given Mr. Yen's testimony that his customer base consisted nearly entirely of individuals speaking Mandarin, Employer made a strong case for needing a bilingual Manager; however, no ruling was made on this issue, or the first issue, given that Complainant's failure to prove the second element of the offense was dispositive of the entire case. [See below for discussion that Employer's failure to list the bilingual requirement in the JVA constitutes a potential violation of 3 CMC § 4963(d).]

5. Employer Should Be Faulted For Not Listing Bilingual Ability As A Requirement In Its JVA for Manager – The Omission Is A Potential Violation of 3 CMC § 4963(d).

At Hearing, Mr. Yen testified that Employer needs its managers to be bilingual in the English and Chinese languages because most, if not all, of Employer's clients are primarily Chinese-speaking individuals who need assistance with document handling issues. [Testimony of Mr. Yen.] Indeed, Employer eventually hired a U.S. citizen (Mr. Hsieh) who is bilingual in English and Mandarin and Employer's existing CW-1 Manager is bilingual.

When Employer submitted its JVA for Manager to DOL's Employment Services Section in March 2017, Employer did not list any language requirement in the "requirements" section of the JVA (see Hearing Exhibit 2a). ***Mr. Yen testified that he intentionally omitted reference to a language requirement because he didn't want "trouble" from DOL.*** [Testimony of Mr. Yen.]

The above facts, which were admitted by Mr. Yen under oath, support a finding that Employer provided "materially false" or "materially misleading information" to DOL regarding the offered job. Such conduct appears to violate 3 CMC § 4963(d), which states:

> An employer…shall not make a materially false statement or give materially misleading information, orally or in writing, to the Department…with respect to any requirement of this chapter [Chapter 3 – Employment of Foreign Nationals – beginning at 3 CMC § 4911].

Procedural Note: The above-noted issue was not specifically raised in the Determination and the Department of Labor did not file Agency charges against Employer for violating 3 CMC § 4963(d). Although the matter was addressed at the Hearing with the implied consent of the parties [see Regs. at NMIAC § 80–20.1-480(j)], Enforcement never moved at Hearing to add charges related to this conduct. Accordingly, the above-noted finding shall not be used as a basis for sanctions against this Employer.

The Hearing Officer notes that Enforcement has the authority to open a Compliance Agency Case to add charges to a Labor Case, if Enforcement concludes during a labor investigation that violations of law have occurred. In such cases, Enforcement may issue a Notice of Violation regarding the Agency charges and schedule the Agency hearing for the same date and time as the hearing

of the Labor Case. On the day of hearing, the Hearing Officer may take evidence regarding both cases in the same proceeding, or hear the cases separately if the Respondent objects to hearing the cases together and justice is served by bifurcating the hearing.

CONCLUSION

In summary, based on the facts presented, judgment shall be entered in favor of Respondent (Employer) on Complainant's labor claim. Because Complainant did not respond to Employer's efforts to arrange a job interview in November 2017, Complainant did not prove that Employer rejected Complainant's job application without just cause – a requisite element of an offense under 3 CMC § 4528(a). Therefore, Complainant shall not prevail on this alleged claim.

The hearing record establishes that Employer provided false and/or misleading information to the Department of Labor when it omitted a bilingual requirement from its JVA for the Manager's position. Although this conduct may have violated 3 CMC § 4963(d), Enforcement did not file separate Agency charges in connection with this case; therefore, no sanction shall be issued with respect to this finding.

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 Yen's Corporation and against Complainant Zaji O. Zajradhara on Labor Case No. 17-040 (Hearing Exhibit 1).[3]

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: July 11, 2018

Jerry Cody
Hearing Officer

[3] It should be noted that Complainant Zaji O. Zajradhara was sanctioned for his unprovoked outburst which ended the hearing on January 19, 2018. As a sanction, Complainant was prohibited from filing or otherwise submitting a Closing Argument in this case, pursuant to 3 CMC § 4947(11) and Regs, at NMIAC § 80-20.1-480(c). [See Interlocutory Order Re: Closing of Evidentiary Record; Respondent's Closing Argument; Sanction of Complainant, issued by this Hearing Officer on January 22, 2018.]