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

In the Matter of:	)	Labor Case No. 17-043
Zajradhara, Zaji O.,	)	
Complainant,	)	
	)	**ADMINISTRATIVE ORDER**
v.	)	
	)	
Li Feng (USA) Corporation,	)	
Respondent.	)	
	)	

This case came on for hearing on January 3, 2018, in the Administrative Hearing Office of the CNMI Department of Labor ("DOL"). Complainant Zaji O. Zajradhara appeared without counsel. Respondent Li Feng (USA) Corporation appeared through its President, Chen Wenfeng, its authorized representative, Chien-li ("Tony") Yen, and its counsel, Robert T. Torres and Oliver M. Manglona. The DOL Enforcement Section appeared through 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 Li Feng (USA) 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 5/17/2017, and officially filed on 6/2/2017.]

As of March 2017, Employer operated a small retail shop in Garapan called the "Mini Gift Shop," and a small tour business. Tony Yen served as authorized representative of the company and Chen, Wenfeng served as President. Employer employed two full-time employees: a salesperson, named Ms. Jiang Li, who left the company in June 2017, and a tour guide who resigned from the company in

May 2017. Both workers held CW-1 status. [See Total Workforce Listing at Hearing Exhibit 3.]

As of April 2017, Employer was planning to renew its CW-1 status Salesperson, Ms. Jiang Li, by filing a renewal Petition with the U.S. Citizenship and Immigration Services ("USCIS"). Given filing deadlines, the Petition needed to be filed with USCIS no later than April 2017, in order to be considered for fiscal year 2018. [Testimony of Mr. Yen.] After posting the job vacancy announcement ("JVA") described below, Employer filed the Petition with USCIS to renew Ms. Jiang Li. Several months later, however, Jiang Li left the CNMI due to a family emergency; the Petition was returned to Employer in early December 2017. *Id.*

In April 2017, Employer posted a JVA on DOL's website for the job of salesperson. [A copy of the JVA (JVA no. 17-04-49063) for "salesperson" was entered into evidence as Hearing Exhibit 2.] 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 *Id.* The JVA listed the job duties as: "Sells variety outlets to the public and other related duties." *Id.*

Complainant read Employer's JVA on the DOL website and decided to apply for the salesperson job. On April 26, 2017, Complainant emailed a message and his resume to the email address that Employer had listed on its JVA. Complainant received back an error message and reported to Mr. Ulloa at the DOL Employment Services Section that the email appeared invalid.

On May 18, 2017, Complainant submitted a Complaint letter to the Hearing Office, stating that he was filing 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. 17-043.)

At Hearing, Employer claimed it never realized that Complainant had emailed the company until October 2017. Employer's representative, Tony 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. Mr. Yen admitted that the website was not working; he claimed that it had been de-activated because he had not properly updated it. He also claimed that Employer had not received the Notice of Mediation; therefore, he only learned about this case when DOL's Enforcement Section contacted Employer in connection with its investigation of

the complaint. [Testimony of Mr. Yen.] (The Hearing Officer finds this portion of Mr. Yen's testimony to be credible.)

On October 3, 2017, Mr. Yen met with investigator Ben Castro about this case and was informed that Complainant had tried to send his resume and application for the salesperson job months earlier. Mr. Yen told the investigator that Employer would give Complainant an opportunity to interview for the salesperson job and would then make the decision of whether or not to hire him. [Testimony of Mr. Castro and Mr. Yen.]

Complainant was off-island for the entire month of October 2017. During that month, the parties exchanged emails about setting up a job interview for the salesperson position. [Testimony of Mr. Zajradhara and Mr. Yen.]

On October 16, 2017, a representative of Li Feng 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." [See copy of email excerpt at Hearing Exhibit 5(E).]

On November 2, 2017, Complainant returned to the CNMI and wrote to the Employer, stating: "Good day. I have now retruned (*sic*) to Saipan, if the position is still open you may contact me, again." [See copy of email at Hearing Ex. 5(C).]

In November 2017, Employer did not contact Complainant to set up an interview. Instead, Employer cancelled the JVA for salesperson. Employer's agent, Tony Yen, testified that Ms. Jiang Li had already left the CNMI due to a family emergency and she decided not to return to the CNMI. Mr. Yen claimed that sometime in November, he decided to cancel the JVA. He then visited DOL's Employment Services Section and sought assistance as to how to cancel the Employer's JVA for salesperson. [Testimony of Mr. Yen.]

As of late November and early December 2017, Employer did not intend to continue with the job interview; however, after discussing the matter with investigator Ben Castro on December 5, 2017, Employer decided to show "good faith" by continuing its discussions with Complainant about the salesperson job. [Testimony of Mr. Yen and Mr. Castro.]

On December 6, 2017, Employer responded: "Good day Zaji, can we meet today at 4:00 pm for interview? You can reach me at (phone number)." On December

6th in the early evening (5:28 pm), Complainant responded that he had just returned home and read the email – he suggested that the parties meet the following day. He also asked Mr. Chen, Wenfeng to telephone him as soon as possible.

On December 6 and 7, 2017, the parties engaged in further settlement discussions but were unable to agree on terms to settle this case. [Testimony of Mr. Zajradhara and Mr. Yen.]

On December 7, 2017, at 3:00 pm, Employer wrote: So, let me set up a interview date for you, how's your time?" Complainant responded at 3:04 p.m., stating: "No thank you. You attempted a settlement it has been recorded. So, now Mr. Cody will make the final determination. Have a great day. See you at the hearing. I guarantee you he will lose."

On December 18, 2017, Employer hired a lawful permanent resident, named Hong Ru Babauta, for the salesperson job.

On December 19, 2017, DOL's investigator Ben Castro issued a Determination against Employer (see below) based on Employer's failure to update the investigator by December 14, 2017, regarding whether Employer had interviewed Complainant or was planning to hire him. [Testimony of Mr. Castro.]

Determination: DOL's Enforcement Section investigated this case and concluded that Employer had violated CNMI labor laws or regulations by failing to hire a qualified U.S. citizen in this case. The investigator based his conclusion on the fact that Employer had promised on December 5, 2017, to update the investigator after it interviewed Complainant, but Employer had failed to do so as of December 12, 2017. [Determination at Hearing Exhibit 3, Findings, at p. 2, ¶ 1; and testimony of Mr. Castro.]

CONCLUSIONS OF LAW

Summary: As set forth below, the Hearing Officer ultimately finds that Employer did not violate the CNMI job preference statute at 3 CMC § 4528(a) because (a) Employer never actually rejected Complainant for the salesperson job; (b) Complainant declined to participate in a job interview for the position; and (c) Employer ultimately hired a lawful permanent resident to replace its CW-1 status salesperson.

Notwithstanding the above finding, the Hearing Officer notes that Employer's conduct was not blameless. First, Employer published an inaccurate or outdated email address with its JVA, which caused Complainant's email message to be rejected. Moreover, Employer's actions to consider Complainant, a U.S. citizen, for the salesperson job, were entirely contradictory. In mid-October 2017, Employer claimed it wanted to set up a job interview with Complainant; but then, upon learning that Complainant had returned to the CNMI on November 2, 2017, Employer did nothing. On the contrary, Employer took steps to cancel the JVA in November 2017, and made no effort either to interview Complainant or inform him of the cancelled JVA. On December 5, 2017, Employer changed its stance again, this time after discussing the matter with investigator Ben Castro. Evidently concerned with how its actions might be viewed by the Enforcement Section, Employer then engaged in settlement discussions with Complainant and, when those failed, again sought to schedule a job interview with him. In the end, Complainant's refusal to participate in the interview caused his own claim to fail. Then, at the eleventh hour, Employer found and hired a lawful permanent resident for the salesperson job, which enabled it to demonstrate "good faith" to counter the charge that it had ignored its obligation to consider and hire U.S.-qualfied workers over a foreign national worker.

Early Posting Of JVAs Is Not Unlawful: It should be noted from the outset that Employer's early posing of the JVA in April 2017, for a job with an anticipated start date of October 2017, was not improper or unlawful. The Hearing Officer has found no statute or regulation that makes the filing of a JVA months ahead of the anticipated start date, to be unlawful.

Wrong Email Address Listed on JVA: The fact that a bogus email address may have been listed in Employer's JVA is noted, but not dispositive of the issues in this case. Given that the anticipated start date was in October 2017, Employer was not under an obligation to interview job applicants back in April or May 2017. Having said this, of course, employers should take care to only list valid and operational email addresses on their published JVAs. For an employer to list a non-operational web address creates an inference that it may be intentionally avoiding email communication. The inference may be rebutted with testimony, as here, that the Employer took prompt steps to correct the error after learning that the email address was non-operational.

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Employer's Hiring of a Lawful Permanent Resident in December 2017 Did Not Violate CNMI Labor Statutes or Regulations:

The CNMI Department of Labor does not interfere with an employer's judgment as to which U.S. citizen to hire among several 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).]

In this case, DOL scrutinized Employer's hiring of the lawful permanent resident because of the timing of the hiring as well as the erratic conduct of the Employer.[1] Employer's conduct raised questions as to the sincerity of its expressed intent to consider Complainant for the job; however, the evidence shows that Complainant declined to be interviewed for the position several weeks before Employer chose to hire someone else for the job. Based on the facts presented, the hiring of the lawful permanent resident appears proper and lawful.

Complainant Failed To Prove 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 declined Employer's offer to interview him for the job on December 7, 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 (or renewed) position.

In this case, settlement discussions between the parties continued in early December 2017, during the time in which Employer was trying to set up a job interview with Complainant. On December 7, 2017, Employer made a last attempt

[1] A brief review of the chronological facts illustrates Employer's ever-shifting position: Employer informed Enforcement in early October 2017 that it would interview Mr. Zajradhara for the salesperson job; in mid-October 2017, Employer contacted Complainant to set up an interview and learned that Complainant would be available to be interviewed after November 2, 2017. In November 2017, Employer did not interview Complainant; instead, it cancelled the JVA. In early December 2017, Employer decided to interview Complainant after speaking about the matter with the labor investigator. On December 7, 2017, Complainant declined to be interviewed. On December 18, 2017, Employer hired a lawful permanent resident for the position.

to schedule a job interview with Complainant. Complainant expressly declined to participate in the interview, instead preferring to proceed to hearing at the Administrative Hearing Office. [See email correspondence at Hearing Exhibit 5.]

Complainant's refusal to interview for this job gave Employer an argument that it was Complainant, not Employer, who was obstructing the hiring process. Given that Complainant seemed to be dropping out of the competitive application process for this job, Employer was free to consider and hire a different job applicant. In this case, that applicant was a lawful permanent resident who is a U.S-qualified worker.

Complainant was primarily at fault for failing to participate in a job interview for the salesperson job in December 2017. By expressly declining Employer's request to conduct an interview for the position, Complainant caused Employer to believe that he was no longer interested in working for Employer. Complainant's refusal to cooperate to schedule the job interview caused the process to fail and gave the Employer a legitimate reason not to consider Complainant as a candidate for the job.

Complainant Failed To Prove Two Elements Of A Claim Under 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 two crucial elements 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 in December 2017, but Complainant rejected Employer's offer to interview him. The evidence clearly shows that on December 7, 2017, Complainant expressly rejected Employer's attempt to schedule a job interview. [See email correspondence at Hearing Exhibit 5.]

As to the third element of the offense, the evidence supports Employer's defense rather than Complainant's case. Employer did not renew its CW-1 status worker, Ms. Jiang Li, for the salesperson job. Rather, Ms. Li resigned and returned to China, and Employer hired a lawful permanent resident for the position. Therefore, the third element of a claim under Section 4528(a) – that a foreign national worker was hired for the position for which the citizen or permanent resident was rejected – did not occur in this case.

Given that at least two of the four elements of a charge under 3 CMC § 4528(a) cannot be proven by Complainant and, instead, weigh in favor of Employer, the evidence does not support Complainant's allegations that Employer violated CNMI preference law [3 CMC § 4528(a)] in this case.

CONCLUSION

In summary, based on the facts presented, judgment shall be entered in favor of Respondent (Employer) on Complainant's labor claim. Two crucial elements of the claim under 3 CMC § 4528(a) were found in Employer's favor. First, there was no evidence that Employer rejected Complainant's job application without just cause because, in fact, it was Complainant who rejected Employer's efforts to arrange a job interview in December 2017. Second, Employer did not employ a foreign national worker in the subject job, but instead, hired a lawful permanent resident for the position. Given that two requisite elements of a CNMI job preference offense could not be proven by Complainant, judgment shall be entered in favor of the Respondent Employer in this case.

It should be noted that Employer's erratic conduct as to scheduling a job interview with Complainant sent mixed messages that would lead a reasonable person to

question whether an employer's request to interview Complainant in December 2017, was done in good faith. Nevertheless, by failing to participate in the interview, Complainant caused his own claim to fail. Furthermore, Employer has now replaced its CW-1 status salesperson with a lawful permanent resident – thus, no violation of the CNMI's job preference statute [3 CMC § 4528(a)] has occurred.

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 Li Feng (USA) Corporation and against Complainant Zaji O. Zajradhara on Labor Case No. 17-043, filed on June 2, 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: July 11, 2018

Jerry Cody
Hearing Officer