



Marianas Administrative Code (“NMIAC”) at § 80-20.1-225(a). [Hearing Exhibit 1 at ¶¶ 1-2. But see Amended Determination on p. 3.]

- (2) Employer failed to submit three quarterly Total Workforce Listings for 2015 and two quarterly Total Workforce Listings for 2016 to the Department of Labor (“DOL” or “Department”) in accordance with Regulations at NMIAC § 80-20.1-505(b). [Hearing Exhibit 1 at ¶ 8.]
- (3) Employer failed to submit a complete Workforce Plan for 2016 to the Department in accordance with Regulations at NMIAC § 80-20.1-510(c). [Hearing Exhibit 1 at ¶ 9.]
- (4) Employer failed to comply with a Notice of Warning to Correct, issued on December 9, 2015, by contacting the Department’s Citizen Job Placement Section; and Employer remains out of compliance with the private sector workforce participation requirement of 30% of U.S. status-qualified participants. Regs. at NMIAC §§ 80-20.1-210(c)(3) and 435. [Hearing Exhibit 1 at ¶¶ 10-11.]

Employer operates a manpower business that supplies commercial cleaners and construction workers to work with other employers in Saipan. According to Employer, most of his commercial cleaners have worked at the Fiesta Resort & Spa or the Grandvrio Resort Saipan and most of his construction employees have worked at a construction project in San Vicente that is operated by a company called “Black Construction.” [Testimony of Mr. Imbo.]

**New Evidence:** At Hearing, new evidence surfaced that greatly expanded the scope of the hearing. [Hearing Exhibits 2 and 3.]<sup>1</sup> Employer testified that after Typhoon Soudelor hit Saipan in early August 2015, he greatly expanded his manpower business, employing, at one time or another during 2015 and 2016, **99 CW-1 workers.**<sup>2</sup> *Id.*

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<sup>1</sup> Employer’s Total Workforce Listing for the 3<sup>rd</sup> quarter of 2015 was entered into evidence as Hearing Exhibit 3. Employer’s Total Workforce Listing for the 4<sup>th</sup> quarter of 2016 was entered into evidence as Hearing Exhibit 2.

<sup>2</sup> Mr. Imbo testified that he employed 76 CW-1 workers by the end of 2016. Hearing Exhibit 2 shows that out of 76 current full-time employees, 74 employees hold CW-1 status and 2 employees hold EAD status; none are U.S. citizens or permanent residents. Moreover, Hearing Exhibit 2 shows that, counting those employed *at any time* during 2015 or 2016, Employer hired a total of 103 full-time workers: 99 were foreign national workers with CW-1 status; 2 workers had EAD status and 2 workers were U.S. citizens. [Hearing Exhibit 2.]

Documents submitted by Employer show this expansion. Records show that Employer's full-time workforce went from 8 CW-1 status workers in the third quarter of 2015, to 74 CW-1 status workers in the fourth quarter of 2016. This signals more than a ten-fold increase in employment of foreign national workers during a one-year period. As stated, altogether in 2015 and 2016, Employer hired a total of 99 full-time, CW-1 status workers. *Id.*

### **1. Failure to Post Job Announcements on DOL's Website:**

DOL Regulations state that an Employer who intends to hire or renew a foreign national worker on a full-time basis "must" post the JVA on the DOL's website. Regs. at NMIAC § 80-20.1-225(a). There are no waivers available with respect to this requirement. *Id.* at § 80-20.1-225(e).

**Amended Determination:** In its Determination, Enforcement charged that in 2014, 2015, and 2016, Employer had failed to post JVAs for one accountant position and 7 construction worker jobs, and then hired foreign national workers for those positions. *At Hearing, Employer admitted that he never registered as an employer online on DOL's website in order to post JVAs. Employer testified that he had increased his workforce in 2016 from 8 CW-1 status workers to 74 CW-1 status workers, all without posting a single JVA on DOL's website.* The most recent Total Workforce Listing, signed by Employer on January 17, 2017 (Hearing Exhibit 2), shows that *during 2015 and 2016, Employer employed, at one time or another, 99 CW-1 workers.* Based on this new evidence, Enforcement made an oral motion to amend its Determination according to proof. Employer did not oppose the motion, which was then granted by the Hearing Officer.

The Amended Determination asserts that Employer committed multiple violations of the Regulations when Employer hired and employed 99 full-time CW-1 workers without posting any JVAs for these positions on the Department's website.

At Hearing, Employer testified that he did not know that employers were required to publish JVAs or job vacancy/renewal announcements on the Department's website. Employer maintained that he had no idea that DOL's website even existed. Employer claims that he does not read local newspapers; therefore, he had never read or heard about employers getting sanctioned for failing to post JVAs. Employer, himself, prepared the CW-1 Petitions, which were approved based on job announcements published in local newspapers. Employer obtained full-time CW-1 status for 99 foreign national workers in the 2015-2016 time period. [Testimony of Mr. Imbo; see fn. 2.]

Based on the newly admitted evidence (Hearing Exhibit 2), Enforcement argued that Employer's employment of 99 full-time, CW-1 status workers without posting a single JVA on DOL's website, constitutes substantial, multiple violations of DOL's "posting" Regulation. *Id.* at § 80-20.1-225(a). [Testimony of Mr. Ulloa.]

## **2. Failure to Submit Quarterly Total Workforce Listings:**

DOL Regulations require employers to submit information *on a quarterly basis* regarding "the number and classification of employees for whom wages were paid during the quarter." Regs. at NMIAC § 80-20.1-505(b). This information is submitted in a document called the Total Workforce Listing. The Department requires employers to submit this information in order to qualify for a Certification of Compliance. [Testimony of Mr. Ulloa.]

Employer failed to submit Total Workforce Listings for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> quarters of 2015, as well as the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> quarters of 2016.<sup>3</sup> Employer did submit a Total Workforce Listing for the 3<sup>rd</sup> quarter of 2015 (Hearing Exhibit 3) in response to a document request from DOL in December 2015. Then, prior to the Hearing, Employer submitted a Total Workforce Listing for the 4<sup>th</sup> quarter of 2016, signed by Mr. Imbo on January 17, 2017. [This document was entered into evidence as Hearing Exhibit 2.] Employer's only response was that he had not realized that Total Workforce Listings were due on a quarterly basis.

Employer's failure to submit quarterly Total Workforce Listings explains how the Department remained unaware of the explosive growth of Employer's workforce in 2016. Based on the evidence, Enforcement moved for an order sanctioning Employer for failing to file six quarterly Total Workforce Listings in 2015 and 2016.

## **3. Failure to Submit Workforce Plans for 2015 and 2016:**

DOL Regulations require employers to file an updated Workforce Plan once every 12 months. [Regs. at NMIAC § 80-20.1-510.] In this case, the evidence shows that Employer never submitted a Workforce Plan to DOL in 2015 or 2016.<sup>4</sup> Again, Employer's conduct hindered DOL's efforts to enforce its preference regulations,

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<sup>3</sup> At Hearing, Enforcement orally amended ¶8 of its Determination to add the "3rd quarter" of the 2016 Total Workforce Listing to the list of missing documents.

<sup>4</sup> At Hearing, Enforcement orally amended ¶9 of its Determination to add an allegation that Employer failed to file the 2015 Workforce Plans.

as it effectively hid the fact that Employer's hiring of foreign national workers over U.S. citizens had skyrocketed in a relatively short period from about 8 CW-1 workers to 76 CW-1 workers. Employer, having filed no Total Workforce Listing or Workforce Plan for his business in 2016, kept the Department largely in the dark about the extent of his business expansion.

Prior to the Hearing, Employer submitted a Workforce Plan for 2017. [A copy of the Workforce Plan for 2017 was entered into evidence as Hearing Exhibit 4.] A brief review of this document reveals that it is inadequate in that it fails to describe the means by which Employer intends to improve his percentage of U.S. status-qualified citizens and permanent residents. [Testimony of Mr. Ulloa; Hearing Exhibit 4.]

Based on the evidence, Enforcement moved for sanctions against Employer for failing to submit Workforce Plans in 2015 and 2016, in violation of Departmental Regulations. [Regs. at NMIAC § 80-20.1-510.]

#### **4. Failure to Respond to DOL's Notice of Warning:**

In December 2015, the Department had already noticed that Employer was operating below the statutory minimum workforce participation goal of 30% in violation of labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] On December 9, 2015, the Department served Employer with a "Notice of Warning to Correct" which informed Employer that he was out of compliance and instructed him to contact the Department's Citizen Job Placement Section within ten days of the date of the Notice to obtain referrals of U.S. citizen applicants. [Regs. at NMIAC § 80-20.1-435; see Hearing Exhibit 5 (copy of the Notice of Warning to Correct, dated 12/09/15.)]

Employer never contacted Mr. Ulloa, as instructed, or made any other contact with the Citizen Job Placement Section. Employer testified that he "tried" to contact Mr. Ulloa by telephone several times but, after getting busy signals, he stopped trying. [Testimony of Mr. Imbo.] Once again, Employer's failure to contact the Department to discuss his workforce participation levels only served to allow him to go on ignoring local regulations regarding posting of jobs on DOL's website.

It is reasonable to suppose that if the Citizen Job Placement Section had known that Employer was in the process of hiring nearly *one hundred* CW-1 workers in early 2016, the Department would have moved aggressively to send citizen referrals to Employer to fill some of the job vacancies. [Testimony of Mr. Ulloa.]

The Hearing Officer notes Employer's dismal record of non-compliance with the minimum total workforce participation goals (30%) specified in CNMI's labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] Based on Employer's latest Total Workforce Listing (Hearing Exhibit 2), Employer currently employs 76 full-time employees, out of which 74 employees hold CW-1 status and 2 employees hold EAD<sup>5</sup> status. More than 97% of Employer's workforce consists of CW-1 workers; **none of Employer's 76 employees are U.S. citizens or permanent residents.** These statistics make it all the more egregious that this Employer never contacted the Department's Citizen Job Placement Section in 2015 or 2016 in an attempt to improve his percentage of U.S. workers (above zero percent) in his employ.

The Department asserts that Employer is at fault and should be sanctioned for failing to take appropriate steps to improve his workforce participation percentage of U.S. status-qualified workers in 2016, despite receiving a Notice of Warning to Correct from DOL.

### **CONCLUSIONS OF LAW**

The evidence established that: (1) Employer failed to post job announcements on DOL's website for 99 full-time positions during 2015 and 2016, which were then filled by CW-1 status employees; (2) Employer failed to file six quarterly Total Workforce Listings in 2015 and 2016; (3) Employer failed to submit Workforce Plans for 2015 and 2016, and submitted an inadequate Workforce Plan on January 17, 2017; and (4) Employer failed to respond to a Notice of Warning to Correct and made no effort to obtain DOL referrals of U.S. status-qualified job seekers. Based on the evidence presented, the Hearing Officer finds that Employer committed each of the violations listed above. [Regs. at NMIAC §§ 80-20.1-225(a), 505(b) and 510.]

**Sanctions:** In cases of violations under Chapter 2 of the Commonwealth Employment Act of 2007 (see 3 CMC § 4527), the Hearing Officer is authorized, but not required, to levy a maximum fine of \$2,000 for each violation. 3 CMC § 4528(f)(2).

The amount of fines in this area is left to the discretion of the Hearing Officer. The standard in determining appropriate sanctions should be one of reasonableness and

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<sup>5</sup> "EAD" status refers to an "Employment Authorization Document" which is issued by the federal government. The EAD permits a foreign national worker to work without restriction, and without prior approval, in the CNMI.

fairness, in accordance with the general principle that “[t]he hearing officer is authorized to...[u]se [his] inherent powers ...to further the interests of justice and fairness in proceedings.” Regs. at NMIAC §§ 80-20.1-485(c)(7) and (c)(14).

In its Determination, Enforcement asked that Employer be sanctioned with the maximum sanction of \$2,000 for “each violation.” [Hearing Exhibit 1 at p. 3.] At Hearing, Enforcement clarified that it was asking for separate monetary penalties for each count, meaning that each missed JVA and each missed Total Workforce Listing would result in a separate penalty. [Testimony of Mr. Ulloa.]

If the failure to post each separate JVA were to be considered a violation, it could result in total sanctions well in excess of \$100,000 for failure to post JVAs with respect to 99 jobs that then were given to CW-1 status workers (e.g.: 99 x \$2,000 = \$198,000). Obviously, such a fine would be completely excessive. On the other hand, the Hearing Officer is not required to group all counts together so that 5 missed JVAs and 50 missed JVAs result in the same penalty. Such a result would ignore the degrees of culpability that should be considered in determining an appropriate penalty.

The Hearing Officer examines the evidence to determine whether sanctions are appropriate and justified. In this case, the evidence showed that Employer failed to post JVAs on DOL’s website over a two-year period concerning 99 full-time jobs that he then provided to CW-1 workers. Although every job would not have been filled by local U.S. citizens or permanent residents, it is reasonable to assume that, at least, some of these jobs would have been of interest to the U.S. citizens and permanent residents who are registered on the DOL website and looking for work. Employer’s conduct showed an egregious disregard of CNMI labor regulations that are designed to ensure that employers give preference in hiring to U.S. citizens and permanent residents. The Hearing Officer finds that Employer’s disregard of the “posting” of 99 jobs justifies imposing substantial sanctions.

Second, Employer’s failure to file timely census-related documents kept DOL in the dark about Employer’s great expansion of his CW-1 workforce in early 2016. Just as he was expanding the number of foreign national workers in his employ, Employer received DOL’s Notice of Warning to increase his number of U.S status-qualified employees. Employer’s only response was a half-hearted attempt to contact Mr. Ulloa, which he abandoned after getting a “busy” signal on several phone calls. [Testimony of Mr. Imbo.] This conduct amounts to bad-faith and further warrants a substantial penalty.

Finally, I take notice of Employer's dismal record of non-compliance with the minimum total workforce participation goals (30%) specified in labor statutes and regulations. [3 CMC § 4525 and Regs. at NMIAC § 80-20.1-210(a).] Out of a current workforce of 76 full-time workers, Employer employs no U.S. citizens or permanent residents. [Hearing Exhibit 2.] This fact alone makes it all the more egregious that Employer made no effort to contact the Department of Labor to obtain referrals of U.S. status-qualified job seekers.

Employer raised several points that he argued should mitigate his penalty. First, Employer noted that much of his company's manpower work has now ended or is downsizing. Second, Employer claims he is currently making arrangements to repatriate many CW-1 status employees at considerable expense to his company. Third, Employer promised that he will take steps to educate himself about applicable labor statutes and regulations so that he will not commit labor-related violations in the future. Finally, Employer asked to be allowed to pay the sanctions over an extended period of time, given that he is currently covering repatriation expenses and cannot afford to pay the full sanction within 30 days. [Testimony of Mr. Imbo.]

**Holding:** Based on the evidence presented and the considerations noted, the Hearing Officer finds as follows: For Employer's failure to post 99 JVA's over a two-year period, Employer shall be sanctioned \$2,000 for each year of non-compliance with the posting regulations, for a combined sanction of **\$4,000**. [NMIAC § 80-20.1-225(a)]. For Employer's failure to submit Total Workforce Listings for three quarters in 2015 and three quarters in 2016, Employer shall be sanctioned \$200 per each deficient submission, amounting to a combined sanction of **\$1,200**. For Employer's failure to submit Workforce Plans for 2015 and 2016, Employer shall be sanctioned \$500 for each deficiency for a combined sanction of **\$1,000**. In addition, Employer shall be required to submit a revised Workforce Plan for 2017 within the next 30 days. Finally, Employer's failure to respond to the Notice of Warning to Correct will not be separately sanctioned; rather, it will be treated as an aggravating factor that further justifies the substantial penalties, totaling \$6,200 (\$4,000 plus \$1,200 plus \$1,000), that are assessed in this Order.

**Good cause having been shown, IT IS HEREBY ORDERED:**

1. **Judgment:** Judgment is hereby entered against Respondent Christopher G. Imbo on the charges of violating the Employment Rules and Regulations, NMIAC §§ 80-20.1-225(a), 505 and 510, as set forth in the amended Determination. For these violations, Respondent shall be sanctioned in the manner set forth below.



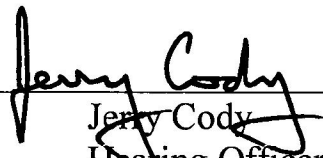
2. **Sanctions:** Respondent Christopher G. Imbo is hereby SANCTIONED in the total sum of six thousand two hundred dollars (\$6,200) for his conduct. The Respondent is ORDERED to pay the sanctions in three installments of \$2,000; \$2,000; and \$2,200. The three installments shall be due on the 28<sup>th</sup> day of February, March and April, 2017, respectively. Proof of payment shall be submitted to the Hearing Office on or before the due dates. 3 CMC §§ 4528(f)(2) and 4947(11).

3. **Updated Workforce Plan:** Respondent Christopher G. Imbo is ORDERED to submit an updated and complete Workforce Plan for 2017, by delivering copies of the document to the Enforcement and Compliance Office (attn: Mr. Ulloa) and to the Hearing Office no later than 30 days after the date of issuance of this Order. [Regs. at NMIAC § 80-20.1-510].]

4. **Future Compliance with DOL Regulations:** Respondent Christopher G. Imbo is ORDERED to post job vacancies and job renewals in the future on the Department's website in accordance with Regulations at NMIAC § 80-20.1-225(a). Failure to comply with this requirement may result in Enforcement filing new Agency charges that would be adjudicated in a due process hearing.

5. **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: February 9, 2017

  
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Jerry Cody  
Hearing Officer