

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

|                             |   |                             |
|-----------------------------|---|-----------------------------|
| In the Matter of:           | ) | Labor Case No. 17-021       |
| Zajradhara, Zaji O.,        | ) |                             |
| Complainant,                | ) |                             |
|                             | ) | <b>ADMINISTRATIVE ORDER</b> |
| v.                          | ) |                             |
|                             | ) |                             |
| SPN China News Corporation, | ) |                             |
| Respondent.                 | ) |                             |
| <hr/>                       |   |                             |

This case came on for hearing on April 17, 2018, in the Administrative Hearing Office of the CNMI Department of Labor (“DOL”). Complainant Zaji O. Zajradhara appeared without counsel. Respondent SPN China News Corporation appeared through its President, Betty Bai. The DOL Enforcement and Compliance Section (“Enforcement”) appeared through its investigator Patrick King. 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:**

**INTRODUCTION**

This labor complaint was brought by a U.S. citizen job applicant, Zaji O. Zajradhara (“Complainant”) against SPN China News Corporation (“Employer”), alleging that Employer had violated the CNMI job preference laws by failing to interview or hire Complainant for a job that Employee applied for in April 2017. [The Complaint was entered into evidence as Hearing Exhibit 1. The Complaint was signed on 4/06/2017, and filed with the Hearing Office on 6/2/2017.]

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). At Hearing, Complainant confirmed that he was seeking damages from the Employer pursuant to 3 CMC § 4528(a). That statute gives an individual the right to sue for damages if an employer unjustly rejects the job application of a qualified citizen or permanent resident in favor of a foreign national (i.e., CW-1 status) applicant.

## FINDINGS OF FACT

Employer publishes a local weekly newspaper in the Chinese language, called the “Saipan Chinese News.” The company, which has been in business in Saipan for many years, is operated entirely by its corporate President, Betty Bai. As of April 2017, and at present, Employer has no employees; Ms. Bai publishes the newspaper without the assistance of any employees. [Testimony of Ms. Bai.]

In 2017, Employer began looking for a sales agent who could help Employer find new advertisers within the growing Chinese tourist market in the CNMI. [*Id.*]

In March 2017, Employer posted a job vacancy announcement (“JVA”) on DOL’s website for an Advertising Sales Agent. [A copy of the JVA - JVA no. 17-03-47596 - was entered into evidence as Hearing Exhibit 2.] Employer’s President testified that she used a part-time accountant, Viray Enterprises, to assist her in posting the above-noted JVA.

The JVA listed job requirements, but did not list any foreign language requirement for this position. [Hearing Exhibit 2.]

Complainant read the JVA for “Advertising Sales Agent” on the DOL website and decided to apply for the job. In late March 2017, Complainant sent a message to Employer, attaching his resume, and sent the email to the email address that Employer had posted on its JVA: *saipanchinanet@gmail.com*. Complainant never received any response from Employer. On April 6, 2017, Complainant lodged his Complaint at the Hearing Office. (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. 17-021.)

Employer never read Complainant’s email during the months from March through August 2017. During discovery, Employer discovered Complainant’s email in the “spam” folder of Employer’s website. [Testimony of Ms. Bai.]

Employer’s President admitted at hearing that she never checked the website to review the six respondents who had posted an interest in the position. [See JVA with responses at Hearing Exhibit 2.] [Testimony of Ms. Bai.]

Employer never hired any person to fill the advertised position. As of the date of hearing, the position remained open.

**Determination:** This case was referred to Enforcement after the parties were unable to reach a settlement in mediation. Enforcement investigator Patrick King issued an Amended Determination, Notice of Violation and Notice of Hearing (hereinafter, Determination) on April 4, 2018. [A copy of the Determination was entered into evidence as Hearing Exhibit 3.]

The investigator found that Complainant meets the qualifications stated in the JVA, based on Complainant's submitted resume. The Determination recommended that Complainant be granted an interview by Employer for the Advertising Sales Agent position. [See Recommendation at Hearing Exhibit 3 at p. 3.] [Testimony of Mr. King.]

The Determination did not discuss the fact that the Employer had neglected to list one of her primary requirements for the position; namely, that the job applicant be bilingual in English and Mandarin. Employer had informed the investigator of this fact during investigation, but the investigator based his conclusions solely on the content of the posted JVA. [Testimony of Mr. King; Hearing Exhibit 3.]

### CONCLUSIONS OF LAW

**I. Complainant Did Not Prove All Elements of a Claim For Damages Under 3 CMC § 4528(a); therefore, Complainant's Request For Damages is DENIED.**

Complainant, a non-lawyer, did not cite the statute upon which his Complaint was based. To the extent that Complainant moved for "damages" the Hearing Officer construes the Complaint (Hearing Ex. 1) as alleging a violation of the CNMI job preference statute at 3 CMC § 4528(a). As stated above, this statute is the only CNMI-based statute that gives an individual job applicant the right to sue for damages provided that certain specific 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 a damage award of up to six months' wages, as well as sanctions of up to \$2,000 against the employer. 3 CMC §§ 4528(f)(1) and (f)(2).

In order to prevail on a 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 and permanent residents to non-U.S. based employees) in employer's full-time workforce. 3 CMC § 4528(a).

There are several problems with Complainant meeting the elements of this claim, based on the facts of this case. Most important is the fact that Employer never hired a foreign national worker, or anyone, to fill the advertised position. The gravamen of the statutory violation of 3 CMC § 4528(a) is that Employer has hired a foreign national worker over a qualified U.S. citizen. In this case, where no one was hired for the vacant job, Complainant cannot prove this important element of the offense.

Given that failure to prove the 4<sup>th</sup> element causes the claim to fail, the Hearing Officer shall not analyze whether other elements of the Section 4528(a) offense were satisfied.

Notwithstanding the above, the evidence presented in this case revealed serious deficiencies in the Employer's performance which are important to review as part of the record of this case. That record is reviewed below.

## **II. Employer Provided Materially Misleading Information to DOL Regarding its JVA for Advertising Sales Agent in violation of 3 CMC § 4963(d).**

The Commonwealth Employment Act of 2007, at 3 CMC § 4963(d), provides that:

An employer...shall not make a materially false statement or give materially misleading information, orally or in writing, to the Department or any employee or officer of the Executive Branch with respect to any requirement of [employment of foreign national workers].

Employer testified with respect to her search for an advertising sales agent, that she needs a person who is bilingual in the English and Mandarin languages. Ms. Bai testified that this was one of her primary requirements for the advertising sales agent job that she posted by means of a JVA on DOL's website in March 2017. In fact, during February and March 2017, Employer published a job announcement,

written in Mandarin, in its own newspaper, the Saipan Chinese News. *In the job advertisement that Employer published in its own newspaper, Employer listed the ability to speak both English and Chinese languages as a requirement of the job.* [Copies of these job advertisements, published on 2/17/17 and 3/03/17, were entered into evidence as Hearing Exhibits 4a and 4b, respectively.]

Despite its own listing of bilingual ability in its job advertisement in the Saipan China News, Employer omitted any reference to a bilingual requirement when it posted the JVA on DOL's website. Such an omission constituted a materially false statement and/or materially misleading information. 3 CMC § 4963(d).

When asked, under oath, why she neglected to put the bilingual requirement in the JVA posted on DOL's website, Employer's President, Ms. Bai, gave a completely unconvincing, inadequate response. Ms. Bai noted that she was "unsophisticated" and that she had used an accountant to help her prepare the JVA. The Hearing Officer finds this excuse to be disingenuous, given that Ms. Bai is highly educated, quite sophisticated and speaks fluent English. Ms. Bai has had more than a decade of experience as a newspaper owner in the CNMI and appears well able to understand and follow labor laws and regulations.

The above facts support a finding that Employer provided "materially misleading information" to DOL regarding the offered job. Such conduct violated 3 CMC § 4963(d), which makes it a violation for an employer to make a materially false statement or give materially misleading information, orally or in writing, to Department of Labor personnel.

**Procedural Note:** The above-noted issue was not specifically raised in the Determination. 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 to add charges related to this conduct. Accordingly, the finding that Employer violated 3 CMC § 4963(d) in connection with the JVA in this case shall not be used as a basis for additional sanctions against this Employer.

Enforcement is reminded that it has authority to add Agency charges in a Compliance Agency Case and it may issue a Notice of Violation regarding such charges and schedule hearing on the same for the same date and time as the already scheduled Labor Hearing. On the day of hearing, the Hearing Officer may take evidence on both the Labor and Compliance Agency Case in the same proceeding unless the Respondent-Employer objects to such a procedure.

**III. The Bilingual Requirement For the Sales Position Is Justified Under The Circumstances. Respondent Should Re-post its JVA for the Sales Associate Job with this Bilingual Requirement Added.**

At Hearing, Complainant took issue with Employer's insistence that bilingual ability was required for this position. Complainant noted that given that about 80% of advertisers who place ads in the Saipan Chinese News are local businesses, an Advertising Sales Agent could readily tap the local advertising market without having to speak Mandarin. [Testimony of Mr. Zajradhara.]

Employer responded that it was seeking to expand its marketing efforts to businesses on the mainland of China who might consider advertising in the CNMI. To this end, Ms. Bai believes that she needs a person who can converse in Mandarin with potential Mandarin-speaking advertisers. [Testimony of Ms. Bai.]

The Amended Determination recommended that Complainant be granted an interview by Respondent for the position of Advertising Sales Agent. [Hearing Exhibit 3, at p. 3.] Enforcement made its recommendation based on the fact that the JVA had omitted any reference to bilingual ability. [Testimony of Mr. King.]

Although it is a close case, the Hearing Officer finds that Employer made a credible argument for needing a sales associate who is bilingual in the English and Mandarin languages. It would serve no useful purpose to order Employer to hire a job applicant who cannot meet its expectations for the job. Nearly all of the newspaper's subscribers, and many of its advertisers, speak Mandarin as their primary, if not only, language. Any effort to lure advertisers from mainland China will necessarily require a Mandarin speaker to communicate effectively with those potential advertisers. Under the circumstances presented here, it is legitimate to require bilingual ability for this position.

Given that Employer intentionally omitted the bilingual requirement for this job in its initial JVA, and that Employer testified at hearing that she still needs to fill this position, Employer shall be ordered to re-post the JVA with the bilingual requirement. [See Order below at page 7.]

**CONCLUSION**

Based on the facts presented at the hearing, judgment shall be entered in favor of the Respondent (Employer) and against Complainant as to Complainant's claim under 3 CMC § 4528(a). Because Complainant was not able to prove the 4<sup>th</sup>

element of an offense under 3 CMC § 4528(a) – that Employer hired a foreign national worker after rejecting a U.S. citizen or permanent resident - Complainant shall not be awarded damages.


Secondly, the Hearing Officer finds that Employer provided false and/or misleading information to the Department of Labor when it omitted a bilingual requirement from its JVA for the Sales Agent position. This conduct violated 3 CMC § 4963(d); however, as Enforcement did not file separate Agency charges in connection with this case, no sanction shall be issued for this violation. [If charges were filed and judgment entered, Employer could be sanctioned monetarily up to two thousand dollars, pursuant to 3 CMC § 4964(j).]

Finally, Employer admits that bilingual ability is crucial for the position and that this requirement was not contained in its previously posted JVA. At a minimum, Employer should be ordered to re-post the JVA to include bilingual ability as well as any other legitimate prerequisites for the sales associate job.

**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 SPN China News Corporation and against Complainant Zaji O. Zajradhara on Labor Case No. 17-021, filed on June 2, 2017.
2. **Re-Posting of JVA:** Based on the above findings, Respondent SPN China News Corporation is hereby ORDERED to re-post its job vacancy announcement for the sales associate position, listing bilingual ability in English and Mandarin languages as a required skill. The new JVA shall be posted on DOL's website ([www.marianaslabor.net](http://www.marianaslabor.net)) no later than 30 days after the date of issuance of this Order. Failure to comply with this order may lead to monetary sanctions after a due process hearing. 3 CMC § 4947(11) and Regs. at NMIAC §§ 80-20.1-485(c)(13) and 485(c)(14).
3. **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 §§ 4528(g) and 4948(a).

DATED: July 12, 2018

  
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Jerry Cody  
Hearing Officer