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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JAPAN ENTERPRISES, INC., WORLD INTERNATIONAL CORP., and **JAGUAR LIMITED,** Appellants, vs. **PAMELA BROWN**, Attorney General, **ANTONIO P. SABLAN**, Acting Director, Office of Immigration, and **CNMI Government**, Appellees.	**CIVIL ACTION NO. 04-0555E** **AMENDED ORDER DENYING MOTION FOR TEMPORARY RESTRAINING ORDER BUT GRANTING MOTION FOR WRIT OF MANDAMUS** **[MODIFIED BY ERRATA ORDER ISSUED OCTOBER 5, 2006]**

I. Introduction

THIS MATTER came before the Court for a hearing on December 7, 2004, at 9:00 a.m. in courtroom 220A to consider Appellants' Japan Enterprises, Inc., World International Corp., and Jaguar Ltd.'s MOTION FOR AFFIRMATIVE TEMPORARY RESTRAINING ORDER OR WRIT OF MANDAMUS ("Appellants"). The Appellants appeared through their President, Mr. Takaharu Komoda, and were represented by Timothy H. Bellas, Esq. Appellees Attorney General Pamela Brown and Acting Director Antonio P. Sablan and the CNMI Government were represented by Assistant Attorneys General Justin Wolosz and Ian Catlett.

Having considered the arguments of counsel, the materials submitted and the applicable laws, the Court issued a ruling from the bench and now issues its written Order denying Appellants' request for a temporary restraining order but granting their request for a writ of mandamus for the reasons that follow.

II. Factual and Procedural Background

The Appellants are three private companies incorporated and doing business within the Commonwealth. Sometime in July, 2004, Appellants submitted seven applications to the CNMI Department of Labor for non-resident workers' permits. The Department of Labor approved the applications and forwarded the Appellants' applications to the Division of Immigration ("DOI") for their immigration entry permits.

On September 15, 2004, Appellants, having been informed orally from their agents that DOI would not release their applications/entry permits, wrote a letter to the Acting Director and asked for DOI's written explanation for its decision to withhold all the applications for all three corporations. Appellants did not receive any response in writing. On October 4, 2004, Appellants' attorney wrote to the Acting Director also asking for a written response to their request to be informed of whether the entry permits would be released and when. On October 18, 2004, the Acting Director of Immigration notified Japan Enterprise in writing that DOI had suspended the replacement employee applications for all three companies. The Acting Director cited the Attorney General's authority to suspend immigration applications for replacement workers "pending any investigation by the CNMI government." Without expressly denying or approving the applications, the Acting Director stated that "[s]hould the Division of Immigration feel that it is no longer necessary to suspend these applications, you or your counsel will be notified promptly." Thereafter, Appellants through their counsel, contacted the Attorney General herself and was informed that there was no indication when the investigation would be completed. Appellants never received any other written decision by the DOI, other than its decision to suspend the applications. Throughout this period, Appellants were aware that a criminal investigation had been initiated against

Japan Enterprises and one of its employees through the issuance of a search warrant on July 22, 2004, which was obtained by the Attorney General's Investigation Unit ("AGIU").

After Appellants filed their Notice of Appeal in this case, the Appellees acknowledged that a total of seven individual applications had been "suspended" by the DOI pending the outcome of an on-going criminal investigation. *See* Declaration of Erwin Flores (filed Dec. 6, 2004) ("Flores"). The criminal investigation concerns Mr. Takayuki Umeda, an assistant manager of "Club Micronesia," which is owned and operated by Appellant Japan Enterprises, Inc. *See* Appellees' Opp'n to Appellants' Request for a TRO or Writ of Mandamus, Sections A and B. In their criminal investigation, the AGIU seeks to determine whether Umeda, Umeda's alleged wife, and/or Club Micronesia engaged in unlawful conduct in recruiting and obtaining entry permits for nonresident workers. Flores, an Immigration Investigator within DOI, contends that "Immigration has delayed issuing a final decision while it performs a thorough review of all materials that have been submitted. Immigration is also waiting to see if additional information uncovered in the criminal investigation will bear on whether the permits should be granted." *See* Flores Declaration, ¶ 23. The Appellees contend that, because all of the Appellant companies have the same sole shareholder, director, president, secretary, and treasurer, and because the Appellant companies evidently share many of the same employees, the investigation concerns *all* of the Appellants and the investigation is therefore relevant to the DOI's decision of whether to grant or deny any of the Appellants' entry permit applications. At the December 7, 2004, hearing of Appellants' instant Motion, Appellees asserted that the criminal investigation is on-going, and that until their investigation is completed, they believed they did not have a duty to make a decision to grant or deny the applications because "[t]here is no law setting a time limit for deciding these permit applications, and no law requiring

that the Division of Immigration explain why decisions have not yet been made."[1] *See*, Appelles' Opp'n, at 5.

III. Analysis

A. Appellants' Request for a Temporary Restraining Order.

1. Legal Standard for a Temporary Restraining Order.

Motions for temporary injunctive relief "have long been reviewed under the same standard as motions for a preliminary injunction." *Andreiu v. Reno*, 223 F.3d 1111, 1114 (9th Cir. 2000) (*citing, e.g., Coleman v. PACCAR, Inc.*, 424 U.S. 1301, 1305, 96 S. Ct. 845, 847-848, 47 L. Ed. 2d 67 (1976)). The Commonwealth Supreme Court set forth the standard for determining whether to grant or deny a preliminary injunction in the case of *Pacific American Title Insurance & Escrow (CNMI), Inc. v. Anderson*, 1999 MP 15, 6 N.M.I. 15:

> In determining whether to grant a preliminary injunction, Commonwealth courts follow two interrelated tests used in the Ninth Circuit. Under the first test, the moving party must show both a probability of success on the merits and the possibility of irreparable injury. *Marianas Pub. Land Trust v. Commonwealth*, 2 C.R. 999, 1002. Alternatively, under the second test, the moving party is required to show that serious legal questions are raised and that the balance of hardships tips sharply in its favor. *Id*. at 1002-1003. The Ninth Circuit Court of Appeals has noted that these "are not separate tests, but the outer reaches 'of a single continuum.'" *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1201 (9th Cir. 1980).

Id. at ¶ 9, 6 N.M.I. at 17.

2. Appellants' Burden to Show Probability of Success on the Merits and the Possibility of Irreparable Injury.

The Appellants request that this Court issue an affirmative T.R.O. compelling the DOI to issue the requested entry permits. In order to obtain a T.R.O., the Appellants must first demonstrate a likelihood of success on the merits of their case and the possibility of irreparable injury. The Commonwealth's

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[1] The Court notes and takes judicial notice of the fact that on December 23, 2004, the Attorney General's Office filed criminal charges against Takayuki Umeda and Japan Enterprises Corp. *See Commonwealth v. Umeda, et al.*, Criminal Case No. 04-0402C.

Administrative Procedures Act (A.P.A.) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, is entitled to judicial review of the action within 30 days thereafter in the Commonwealth Superior Court." 1 CMC § 9112. "Agency action" is defined as including a "failure to act," an expression which this Court understands to mean, a failure to act within a reasonable time period. 1 CMC § 9101(c). The Appellants contend that the DOI, by deciding to "suspend" its final decision on the entry permit applications, has failed to act, and that this entitles them to judicial review. The Appellants' also contend that they have property and liberty interests in the issuance of the entry permits and that these interests implicate their due process rights under Article I, § 5 of the CNMI Constitution. The Appellants also suggest that these property rights implicate the due process clause of the Fifth Amendment of the U.S. Constitution, as incorporated by the Fourteenth Amendment and applied in the Commonwealth via Article V, Section 501 of the Commonwealth's Covenant. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

Because the Court finds that the Commonwealth A.P.A. and existing immigration statutes provide an independent basis for the resolution of this matter, the Court declines to rule on the constitutional question presented. *Sablan v. Tenorio*, 4 N.M.I. 351, 361 (1996). Appellants request that the Court order the DOI to issue the requested entry permits. Although the Court agrees with the Appellants that they are entitled to judicial review, the facts of this case do not establish that the Appellants are actually *entitled* to the entry permits. Nothing in the record indicates what documents were submitted to DOI or how those documents establish the Appellants' entitlement to the *issuance of the requested permits*. Indeed, the Appellants acknowledge that the determination of whether to grant or deny the entry permits has been placed within the limited discretion of the DOI by the Commonwealth Legislature, and that the DOI has not yet reached a determination. Given these facts, it is also apparent that the "serious legal questions" prong of the second T.R.O. test described above has also not been satisfied. For these reasons, the Appellants' request for a T.R.O. is denied.

B. Appellants' Request for a Writ of Mandamus

1. Legal Standard for a Writ of Mandamus

The Superior Court has the power to issue writs of mandamus necessary and appropriate to the full exercise of its jurisdiction. 1 CMC § 3202. "'It is generally accepted that an action in mandamus is proper to compel administrative agencies to exercise the powers entrusted to them, to perform ministerial acts and to enforce their rules and regulations.'" *Govendo v. Micronesian Garment Mfg*., 2 NMI 270, 287 (1991), (*quoting*, *Tew v. City of Topeka Police and Fire Civil Service Commission*, 697 P.2d 1279, 1283 (Kan. 1985)). "An agency 'ministerial act' for purposes of mandamus relief has been defined as a clear, non-discretionary agency obligation to take a specific affirmative action, which obligation is positively commanded and 'so plainly prescribed as to be free from doubt.'" *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 508 (9th Cir. 1997), (*quoting*, *Azurin v. Von Raab*, 803 F.2d 993, 995 (9th Cir. 1986), *cert. denied*, 483 U.S. 1021, 107 S. Ct. 3264, 97 L. Ed. 2d 763 (1987)). A writ of mandamus "is an extraordinary and expeditious legal remedy which proceeds on the assumption that the applicant has an immediate and complete legal right to the thing demanded." *Rhodes v. Clark*, 373 P.2d 348, 350 (Ariz. 1962).

> Such a writ will lie only where two conditions are presented: first the act, performance of which is sought to be compelled, must be "a ministerial act which the law specifically imposes as a duty resulting from an office," or if discretionary it must clearly appear "that the officer has acted arbitrarily and unjustly and in the abuse of discretion * * *."; and second there must exist no other "plain, speedy and adequate remedy at law."

Id. (citations omitted).

2. Analysis of Appellants' Claim to a Decision on Their Entry Permit Applications and the Entry Permits.

In 1983, the Commonwealth Legislature entrusted DOI with the duty to administer the application process for an entry permit. *See* P.L. 3-105, "Commonwealth Entry and Deportation Act of 1983," codified at 3 CMC §§ 4301, *et seq.* Under 3 CMC § 4331(a), the legislature prescribed that "[t]he

application process for an entry permit *shall be pursuant to regulation* of the [DOI]." (emphasis added). The legislature further provided as follows:

> No entry permit shall be issued if it appears to the immigration officer, from evidence in the application, or in the papers submitted therewith, that such alien is excludable or otherwise ineligible to receive an entry permit, or the application fails to comply with the provisions of law.

3 CMC 4331(f). Section 4331(f) therefore *prohibits* the issuance of an entry permit if either of these two conditions are found: the alien is excludable or otherwise ineligible to receive an entry permit, or the application fails to comply with the provisions of law.

Section 4332 similarly provides the various bases on which an entry permit *may* be denied by the DOI. An entry permit may be denied to an alien if:

> (1) the application forms and supporting documents are not in order, or
> (2) [t]here is reasonable cause to believe that the alien is excludable as defined in 3 CMC § 4322; or
> (3) [t]here is reasonable cause to believe that the alien poses a threat to the public health or safety of the Commonwealth.

3 CMC 4332(a). Any actual denial of an entry permit "shall be in writing, shall state the reasons for denial, and shall be provided to the applying alien." 3 CMC 4332(a). "Denial of an entry permit may be reviewed by the Attorney General *pursuant to procedures established by regulation.*" *Id.* (emphasis added).

At the hearing, counsel for all parties agreed that the existing Rules and Regulations promulgated pursuant to 3 CMC § 4331(a) do not provide for the time frame for when an immigration officer is to make a decision to grant or deny the entry permit, or when and how the Attorney General is to review the denial of an entry permit. The statutory language and the current regulatory provisions are silent on this issue. However, DOI's decision to "suspend" the Appellants' applications has no basis in either the entry permit application regulations or the Commonwealth Code. More significantly, a review of the statutes detailed above shows that the Commonwealth Legislature, in conferring to the DOI the authority to

review entry permit applications for non-resident workers, mandated that the DOI choose between two express options: (1) to grant, or (2) to deny. Applying the familiar common law maxim *expressio unius est exclusio alterius*, this Court finds that the legislature's reference to *only* those two possibilities operates to purposefully exclude any alternative, including the "suspensions" made in this case.

The facts reveal that, as a result of the "suspension" of the DOI's review of the applications, the application process has come to a standstill. In a letter dated October 18, 2004, the Acting Director of Immigration, informed the Appellants that, "[s]hould the Division of Immigration feel that it is no longer necessary to suspend these applications, you or your counsel will be notified promptly." *See*, APPEAL OF ADMINISTRATIVE ACTION, Exhibit C. In other words, the application process has been frozen, the applicants have not been given an opportunity to be heard, and they have not been given an indication of when the process might be restored. While it is true that the decision of whether to grant or deny the Appellants' applications is within the DOI's administrative discretion, whether or not *to make that decision* is not discretionary, but is an ordinary ministerial function required by statute. Appellees' counsel conceded at the hearing on this matter that, at some point in time, the indefinite postponement of this ministerial function would amount to a failure to act, but argued that such a point had not yet been reached in this case.

Had the "suspensions" of the Appellants' entry permit applications incorporated procedural safeguards such as a hearing to convey the concerns of the DOI and/or to consider any relevant evidence that the applicants might be able to provide to the DOI to address their concerns, and a statement as to when the final decision would likely be rendered, this Court might not consider them to be "suspensions" at all, but merely a point in the continuum of the application process. Naturally, some period of time will elapse between the date of the submission of the application and the date of the DOI's action in every case. In rendering its final decision, the DOI may take into consideration discoveries made in the course of an investigation by the AGIU. However, the application process cannot be indefinitely postponed due

to the pendency of a criminal investigation, regardless of whatever interest the DOI may have in delaying the determination.[2]

The facts of this case do not demonstrate that the Appellants are necessarily entitled to have their applications granted by the DOI, and for this Court to make such a decision would run counter to the express, discretionary authority conferred to the DOI by the Commonwealth Legislature. For this reason, the Appellants' request for a writ of mandamus compelling the issuance of the actual entry permits must also be denied. However, as to Appellants' claim of a right to have the DOI *issue a decision* on their applications, this Court does grant Appellants' request for the issuance of a writ of mandamus compelling the DOI to issue its final decision, as required under Commonwealth statutes 3 CMC § 4331 *et seq.*, within a reasonable time period, consistent with 1 CMC § 9112 ("Judicial Review of Contested Cases") and 1 CMC § 9101 (defining "agency action" as including a "failure to act"). As addressed at the hearing on this matter, the parties are ordered to submit supplemental briefings regarding what constitutes a reasonable time period in this case.

IV. Conclusion

For the foregoing reasons, the Appellants' Motion for a T.R.O. is DENIED, and the Appellants' Motion for a writ of mandamus is conditionally GRANTED.

The parties are ordered to submit supplemental briefs concerning what qualifies as a reasonable period of time for the DOI to take action on the Appellants' applications for entry permits by January 3, 2005. The Appelles will then be ordered to implement a procedural plan which will afford the Appellants a fair time frame within which the decision to grant or deny their entry permit applications will be

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[2] An indefinite suspension of a determination on the applications is tantamount to a denial of the applications without the necessity of the DOI's compliance with 3 CMC 4332(a) or offering any explanation of its action within the context of its statutory grant of authority. Even when entrusted with discretionary authority, an "agency must cogently explain why it has exercised its discretion in a given manner," else it is acting in a way that may be deemed arbitrary and capricious. *Public Citizen v. Steed*, 733 F.2d 93, 98 (C.A.D.C. 1984) (*quoting, Motor Vehicle Mfrs Ass'n of U.S., Inc., v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 49, 103 S.Ct. 2856, 2869, 77 L.Ed.2d 443 (1983).

rendered, together with a hearing at which they may introduce evidence addressing any reason(s) for denial. This plan shall also provide for an appeal to be taken from a decision to deny any applications, and for the determination of such appeal by the Attorney General within a reasonable period of time. The parties' respective plans will be reviewed by the Court for a determination as to their reasonableness and for ultimate implementation.

A status conference hearing on this matter is hereby scheduled for January 18, 2005, at 1:30 p.m. after which time the Writ of Mandamus will be issued.

SO ORDERED this 5th day of October, 2006, issued *nunc pro tunc* to January 7, 2005.

/S/_____
RAMONA V. MANGLONA, Associate Judge