FOR PUBLICATION [Stamp filed on 10/5/06 at 1:38 p.m.]

IN THE SUPERIOR COURT OF 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** **ORDER GRANTING IN PART AND DENYING IN PART APPELLEES' MOTION TO RECONSIDER**

I. Introduction

THIS MATTER came before the Court for hearing on February 3, 2005, at 9:00 a.m., in courtroom 220A to consider Appellees' Motion to Reconsider Findings of Fact and Conclusions of Law contained in the Court's Order Denying Motion for Temporary Restraining Order but Granting Writ of Mandamus, issued on January 7, 2005. Appellees Attorney General Pamela Brown and Acting Director Antonio P. Sablan and the CNMI Government were represented by Assistant Attorneys General Ian Catlett and Justin Wolosz. The Appellants were represented by Timothy H. Bellas, Esq. Having considered the arguments of counsel, the motion submitted and the applicable

laws, the Court now issues its decision, granting in part and denying in part the Motion to Reconsider for the reasons as follow.

II. Analysis

In the Motion to Reconsider, Appellees raise three essential arguments: (1) that granting a writ of mandamus was inappropriate under the circumstances and under the applicable laws, (2) that the writ of mandamus granted by the Court was not requested by the Appellants, and that it therefore should not have been granted, and (3) that the Court was incorrect in holding that the Appellants have a property interest in the requested entry permits that invokes a Constitutional right to due process.[1] With respect to the Appellees' first argument, the Court disagrees, and reaffirms those portions of the Order that concern the appropriateness of granting the writ of mandamus issued in this case.

With respect to the second argument, the Court recognizes that the relief ultimately granted differed from the relief specifically requested in the text of Appellant's motion. However, the power of mandamus exists for the single purpose of compelling governmental entities and officials to do that which the law *already requires them to do,* and the scope of relief requested does not limit a court's power to issue writs of mandamus, any more than it limits the responsibilities of the governmental entity or official.[2] Likewise, it can hardly be said that the Court "usurps" a governmental entity's power by instructing it to do that which is already required of it by law. For these reasons, the Court also denies this portion of the Motion to Reconsider.

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[1] The Appellees also devote a portion of the Motion to Reconsider to "correct[ing] the record" concerning Immigration Regulation § 707. Section 707 was first raised by the Appellants in this matter during a status conference on January 18, 2005. *See*, Motion to Reconsider, at 7-9. The Appellees have also submitted three supplemental exhibits relating to the promulgation of Section 707. *See*, Appellees' Supplemental Submission Following Hearing on Motion to Reconsider (February 7, 2004). Because Section 707 was not raised until after the Court's Order was issued, the reasoning of the Order did not rely upon any legal or factual conclusion that could be drawn from it. Because the reasoning of the Court's Order was indepenedent of Section 707, any discussion of that section is moot for the purpose of reconsidering the Order. For this reason, this Order like the one before it will not address the meaning or effect of Section 707.

[2] The Appellees offer no legal authority in support of this portion of their argument, and the Court is not aware of any authority to support it.

In their third argument, the Appellees contend that neither an employer-applicant nor a prospective employee-alien has a property interest in an entry permit that invokes a Constitutional right to due process under either the U.S. or Commonwealth Constitutions. In support of this argument, the Appellees cite to one federal appellate decision and two federal district court opinions that, the Appellees contend, collectively stand for the idea that neither an alien nor an alien's prospective employer has a constitutionally protected property interest in the acquisition of a visa under the U.S. Constitution. *See Knoetze v. U.S. Dept. of State,* 634 F.2d 207 (5th Circ. 1981); *Aliens for Better Immigration Laws v. U.S.,* 871 F.Supp. 182(S.D.N.Y. 1994); *Spencer Enterprises, Inc. v. U.S.,* 229 F.Supp.2d 1025 (E.D. Calif. 2001). Because this Court's Order did not address the question of whether an *alien* has a protected property interest in an entry permit, that part of the Appellees' argument is irrelevant. The extent to which the permit application process touches upon the employer-applicant's constitutional rights has not been previously decided in the CNMI and that portion of the Court's opinion in this matter deserves reconsideration.

The decision to issue the writ of mandamus compelling the Commonwealth's Division of Immigration ("DOI") to decide upon the entry permit applications within a reasonable period of time rested upon two independent rationales. Firstly, the decision relied upon the Commonwealth's Administrative Procedures Act ("A.P.A.") and the Commonwealth's immigration statutes. The A.P.A. provides that a person may seek judicial review of an agency's "failure to act," and Commonwealth immigration statutes essentially require the DOI to grant or deny those entry permit applications before it within a reasonable period of time.[3] A second basis for the Order consisted of the Court's holding that the entry permit procedures set forth at 3 CMC § 4331 *et seq.*, confer to an

[3] In other words, the A.P.A. establishes both standing for the Appellants and jurisdiction for the Court, and the immigration statutes establish the Appellees' legal obligations, which are enforceable through the Court's mandamus power.

applicant a legitimate claim of entitlement that invokes a right to procedural due process of law. It is this second basis for the Court's decision that the Apellees address in the third argument of their Motion to Reconsider. As noted, the question of whether or not an applicant has a constitutionally protected interest in the entry permit application process has not been decided in the CNMI.[4]

In the case of *Sablan v. Tenorio,* 4 NMI 351 (1996), our Commonwealth Supreme Court held that a court "should 'not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of.''' *Id.*, at 361, (*quoting*, *Ashwander v. T.V.A.,* 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 (1936), which further stated that, "if a case can be decided on either of two grounds, one involving a constitutional question, the other question of statutory construction or general law, the Court will decide only the latter" (internal citations omitted)). The Court's recognition of a constitutionally-protected property interest in the requested entry permits was not *essential* to the conclusion that the Appellees must either grant or deny the entry permit applications requested by the Appellants. Given the importance and complexity of the constitutional question involved, and in light of the *Sablan* Court's holding, this Court agrees that the more prudent course of action is for it to strike those portions of the Order that concern the property interest issue.

[4] Although 3 CMC § 4302(b), consistent with the Appellees' cited authority, makes it clear that entry into the CNMI is not an entitlement, this does not necessarily translate into the proposition that an applicant has no due process rights in the matter. See, e.g., *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 559, 76 S.Ct. 637, 641, 100 L.Ed. 692 (1956) ("This is not to say that Slochower has a constitutional right to be an associate professor of German at Brooklyn College."); *Wieman v. Updegraff*, 344 U.S. 183, 192, 73 S.Ct. 215, 219, 97 L.Ed. 216 (1952) ("We need not pause to consider whether an abstract right to public employment exists."). The U.S. Supreme Court has recognized that certain minimal standards of fair and open proceedings must exist to safeguard against arbitrary and capricious agency actions, and that these standards may in fact constitute a fundamental right. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 576, n.15, 92 S.Ct. 2701, 2708, n.15, 33 L.Ed.2d 548 (1972) (citing, *Goldsmith v. U.S. Board of Tax Appeals*, 270 U.S. 117, 119, 46 S.Ct. 215, 216, 70 L.Ed. 494 (1926)). Both *Roth* and *Goldsmith* were relied upon in an immigration matter by the District Court in another case cited by Appellees, *K.C.P. Food Co., Inc., v. Sava*, 623 F.Supp. 1080, 1085 (D.C.N.Y. 1985) ("Since the granting of the petition and the issuance of a visa are within the discretion and authority of the [I.N.S.], due process is served so long as discretion is exercised… after a fair investigation, with notice and an opportunity to be heard."). In a properly presented case, the Court would be required to reconcile these authorities and determine the application of these principles to the case at hand. As explained, however, it is not necessary to reach the constitutional question in this case.

III. <u>Conclusion</u>

For the foregoing reasons, Appellees' Motion to Reconsider is GRANTED in part, with respect to the Appellees' request that the Court withdraw its holding that the Appellants have a property interest in the requested entry permits that invokes constitutional due process protections, and DENIED in part, with respect to all other portions of the Motion. The Court will issue an errata and an amended version of the Order Denying Motion for Temporary Restraining Order but Granting Writ of Mandamus, consistent with this Order.

SO ORDERED this 5th day of October, 2006.

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RAMONA V. MANGLOÑA, Associate Judge