

Businesses score temporary victory in foreign labor lawsuit

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(Photo: Pacific Marketplace file photo)

District Court of Guam Chief Judge Frances Tydingco-Gatewood on Wednesday issued a preliminary injunction, prohibiting the federal government from continuing its current practice of denying nearly every request by Guam businesses for the use of temporary skilled foreign labor.

"It's a victory," said attorney Jeff Joseph, who represents plaintiffs in a lawsuit against the federal government. "The court recognized the harm caused by the government's decisions."

The Guam Contractors Association and nearly a dozen local businesses that have used foreign workers under the federal H-2B visa program sued the federal government in October 2016 after federal immigration officials started to reject nearly every visa petition under the program.

A foreign labor force that once numbered more than 1,000 has dwindled to fewer than 50. The loss of the foreign labor force has limited the ability of local contractors to take on new jobs and is expected to drive up the cost of construction on Guam.



Chief Judge Frances Tydingco-Gatewood is shown in her courtroom at the District Court of Guam in Hagatna on March 4. (Photo: PDN file photo)

"These rare circumstances call for rare relief," Tydingco-Gatewood said, stating the high rejection rate of worker visas threatens the parties, the island, and the nation.

She stated an agency has "wide latitude" to administer its programs, but the current course poses serious legal questions. She said evidence was provided that the federal government, before 2015, approved nearly all requests for worker visas, but in 2015 denied about 76 percent of requests. During 2016, it denied nearly all requests, she stated.

According to the judge's order, the U.S. Citizenship and Immigration Services is prohibited from applying the reasoning it used during fiscal 2015 and fiscal 2016 to reject visa applications for foreign workers. That is, it cannot rely on "peakload" or "one-time occurrence" conditions as reasons to deny visa applications, the order states.

It cannot use those reasons to deny any past or future petitions for worker visas, the order states. The judge also nullified the agency's earlier visa denials.

Attorney Joseph, who is based in Denver, said the judge's decision reopens the visa petitions for Guam, pending the outcome of the lawsuit, and prohibits USCIS from rejecting future petitions based on the temporary need reasoning it used to reject previous applications.

"It's not a blanket approval. Petitions can be denied on other grounds, but the previous petitions were denied because of the temporary need reason by the government," Joseph said.

The federal government still has the option of appealing the judge's order to the U.S. Court of Appeals for the Ninth Circuit, Joseph said. He said he plans to contact the attorney for USCIS to determine whether it plans to appeal or whether it will reopen the denied petitions for the plaintiffs.

The military's budget allows as many as 4,000 temporary foreign workers to be used on Guam, but only for projects related to the military.

Joseph said that provision helps military contractors but leaves other Guam employers out in the cold, including those involved in tourism, civil construction, landscaping, healthcare and other industries.

Federal Magistrate Judge Joaquin Manibusan had recommended that the request for an injunction be denied because he believed the plaintiffs were unlikely to win their case.

Tydingco-Gatewood instead found, "The employers have established near certain substantial and irreparable harm, and the balance of the equities and public interest factors weigh heavily in their favor."

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