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Employers face setback on foreign labor case

Gaynor Daleno and Andrew Roberto | The Guam Daily Post Aug 16, 2017 Updated 14 min ago



MILITARY PROJECTS: A hangar is shown at Andersen Air Force Base in February. Various military construction projects, including hangar and housing facilities on the base, have been awarded or will be awarded, but Guam construction industry officials have said they can't find enough skilled construction workers locally. Norman M. Taruc/The Guam Daily Post

Guam employers who sued U.S. Attorney General Jeff Sessions over the near-100 percent denial of petitions for foreign workers on H-2B visas may have met another setback in federal court.

Magistrate Judge Joaquin V.E. Manibusan Jr., in a decision released yesterday, said he is recommending that Chief Judge Frances Tydingco-Gatewood deny a motion for a preliminary

injunction against the Justice Department, a legal avenue the plaintiffs had hoped would reopen approvals for these types of visa petitions.

A preliminary injunction is an "extraordinary and drastic remedy," according to the magistrate judge.

The magistrate judge acknowledged that there's a public interest at stake on the issue: A delay in the military construction projects or a shutdown of businesses as a result of labor shortages will affect Guam's economy.

"The court concurs that the denials of the H-2B petitions has negatively impacted Guam's economy," Manibusan said.

"However, although the plaintiffs have shown that they are likely to suffer irreparable harm in the absence of a preliminary injunction, and that the balance of equities and the public interest appears to tip in favor of the plaintiffs, the court finds that the plaintiffs have failed to demonstrate that they are likely to succeed on the merits of their claims," the magistrate judge said.

Hundreds of millions of dollars in military construction contracts are at stake if the employers can't find the labor they need for the projects, the Guam Contractors Association has stated.

John Robertson, vice chairman of the board for the association, said the recruitment of skilled construction workers through the H-2B visa program has been brought to a standstill.

"That's had a negative impact on contractors that is continuing to this year," he said.

He said that although Guam Delegate Madeleine Bordallo has included language in the National Defense Authorization Act that would allow skilled foreign workers to come into Guam to work on military projects, such legislation will not help with construction projects geared toward tourism.

The magistrate judge's recommendation will still need the concurrence of Chief Judge Tydingco-Gatewood.

The plaintiffs have 14 days to respond to the magistrate judge's recommendation.

High rejection rates

Some of Guam's largest employers, mostly in construction, but also including a few in health care, have said their ability to fulfill existing contracts has been hampered by immigration desk officers' high

rejection rates for petitions to hire or extend the employment of foreign workers on H-2B visas.

As an example, Ace Builders stated in the lawsuit it has more than \$100 million in contracts, 75 percent of which are with the military.

"The company has been a successful user of the H-2B visa program since 2008, and had enjoyed a 100 percent approval rate on its petitions up until 2016, according to the lawsuit.

Just one of Ace Builders' military contracts has a liquidated damages clause of \$56,000 per day if a project is not completed as scheduled, according to the lawsuit.

In past years, Guam would see around 1,400 workers on H-2B visas in a year, but now, because of the high rejection rates, fewer than 100 workers on H-2B visas remain, according to previous statistics from the local labor department.

H-2B approval rates were 95 percent between 1995 and 2015, but last year, that rate went down to 0.3 percent, according to the plaintiffs. The high denial rates occurred even before the Trump administration took office.

Reliance on H-2B program

The plaintiffs contended that they have "historically relied" on the H-2B program "to supplement their existing workforce because of a peak load need for temporary workers to complete a project, and/or meet the needs of their businesses or because of a one-time occurrence need."

These employers asserted that they "have not changed the nature of their businesses, their hiring practices, or their contracts" and that "(n)othing about the petitions ... filed varied in any significant way from previous petitions," court documents state.

The Guam employers said beginning in 2015, the U.S. Citizenship and Immigration Service began denying their petitions "based on a new interpretation of 'temporary need.'"

The magistrate judge cites immigration law, which places the burden of proof upon the employer – as the applicant – to establish that a prospective employee is eligible for H-2B classification.

"If the evidence submitted with a petition does not establish an employer's eligibility, USCIS may deny the petition, request more information or evidence be submitted within a specified period of time, or notify the employer of its intent to deny the petition and the basis for the proposed denial and require

the employer to submit a response within a specified period of time," according to immigration law the magistrate judge cited.