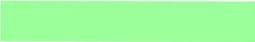




U.S. Citizenship  
and Immigration  
Services

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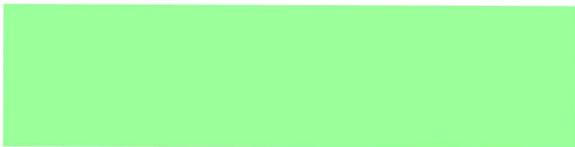


DATE: FEB 20 2015 OFFICE: CALIFORNIA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Petition for a Commonwealth of the Northern Mariana Islands (CNMI) Only Nonimmigrant Transitional Worker Classification Pursuant to 48 U.S.C. § 1806(d)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg  
Chief, Administrative Appeals Office

**DISCUSSION:** The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed.

## I. PROCEDURAL HISTORY

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center.<sup>1</sup> In the Form I-129CW visa petition, the petitioner describes itself as an amusement center, with six employees, that was established in [REDACTED]. In order to employ the beneficiary in what it designates as an arcade attendant position, the petitioner seeks to classify him as a CNMI-Only Nonimmigrant Transitional Worker (CW-1) pursuant to 48 U.S.C. § 1806(d).

The director denied the petition on behalf of the beneficiary, finding that the petitioner did not establish that the beneficiary was lawfully present in the Commonwealth of the Northern Mariana Islands (CNMI) at the time the petition was filed. The director stated that the record did not establish that the beneficiary was in a lawful immigration status. Further, the director noted that the beneficiary had been working without the proper authorization. The petitioner subsequently filed an appeal.

The record of proceeding contains: (1) the petitioner's Form I-129CW and supporting documentation; (2) the director's request for evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; (5) the Form I-290B and supporting materials; (6) our notice; and (7) the petitioner's response to our notice. We reviewed the record in its entirety before issuing our decision.

For the reasons that will be discussed below, we agree with the director that the petitioner has not established that the beneficiary was lawfully present in the CNMI at the time the petition was filed. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed.

## II. LAW

Under the regulatory provision 8 C.F.R. § 214.2(w)(2), an alien may be classified as a CW-1 nonimmigrant if, during the transition period, the alien:

- (i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category that DHS has designated as requiring alien workers to supplement the resident workforce;
- (ii) Is petitioned for by an employer;
- (iii) Is not present in the United States, other than the CNMI;

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<sup>1</sup> The petitioner requested CW-1 classification on behalf of five workers on the Form I-129CW. The petition was approved for four of the workers.

- (iv) If present in the CNMI, is lawfully present in the CNMI;
- (v) Is not inadmissible to the United States as a nonimmigrant or has been granted a waiver of each applicable ground of inadmissibility; and
- (vi) Is ineligible for status in a nonimmigrant worker or classification under section 101(a)(15) of the Act.

"Lawfully present in the CNMI" is defined as follows under 8 C.F.R. § 214.2(w)(1)(v):

- (A) At the time the application for CW status is filed, is an alien lawfully present in the CNMI under 48 U.S.C. § 1806(e); or
- (B) Was lawfully admitted or paroled into the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted or paroled as a visitor for a business or pleasure (B-1 or B-2, under any visa-free travel provision or parole of certain visitors from Russia and the People's Republic of China), and remains in a lawful immigration status.

The "transition period" is described at 48 U.S.C. § 1806(a):

- (2) Transition period  
There shall be a transition period beginning on the transition program effective date and ending on December 31, 2014, except as provided in subsections (b) and (d), during which the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of the Interior, shall establish, administer, and enforce a transition program to regulate immigration to the Commonwealth, as provided in this section (hereafter referred to as the "transition program").

We now turn to 48 U.S.C. § 1806, which states, in pertinent part, the following:

- (e) Persons lawfully admitted under the Commonwealth immigration law
  - (1) Prohibition on removal
    - (A) In general  
Subject to subparagraph (B), no alien who is lawfully present in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of section 212(a)(6)(A) of

the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)), until the earlier of the date –

- (i) of the completion of the period of the alien's admission under the immigration laws of the Commonwealth; or
- (ii) that is 2 years after the transition program effective date.

(B) Limitations

Nothing in this subsection shall be construed to prevent or limit the removal under subparagraph 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C. 1182 (a)(6)(A)) of such an alien at any time, if the alien entered the Commonwealth after the date of enactment of the Consolidated Natural Resources Act of 2008, and the Secretary of Homeland Security has determined that the Government of the Commonwealth has violated section 702(i) of the Consolidated Natural Resources Act of 2008.

(2) Employment authorization

An alien who is lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of the date –

- (A) of expiration of the alien's employment authorization under the immigration laws of the Commonwealth; or
- (B) that is 2 years after the transition program effective date.

(3) Registration

The Secretary of Homeland Security may require any alien present in the Commonwealth on or after the transition period effective date to register with the Secretary in such a manner, and according to such schedule, as he may in his discretion require. Paragraphs (1) and (2) of this subsection shall not apply to any alien who fails to comply with such registration requirement. Notwithstanding any other law, the Government of the Commonwealth shall provide to the Secretary all Commonwealth immigration records or other information that the Secretary deems necessary to assist the implementation of this paragraph or other provisions of the Consolidated Natural Resources Act of 2008. Nothing in this paragraph shall modify or limit section 262 of the Immigration and Nationality Act (8 U.S.C. 1302) or other provision of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] relating to the registration of aliens.

- (4) Removable aliens  
Except as specifically provided in paragraph (1)(A) of this subsection, nothing in this subsection shall prohibit or limit the removal of any alien who is removable under the Immigration and Nationality Act.
- (5) Prior orders of removal  
The Secretary of Homeland Security may execute any administratively final order of exclusion, deportation or removal issued under authority of the immigration laws of the United States before, on, or after the transition period effective date, or under authority of the immigration laws of the Commonwealth before the transition period effective date, upon any subject of such order found in the Commonwealth on or after the transition period effective date, regardless whether the alien has previously been removed from the United States or the Commonwealth pursuant to such order.

Under 48 U.S.C. § 1806(e)(1), the emphasis of the relevant time period is the earlier of the date of the expiration of the alien's admission under the immigration laws of the Commonwealth or two years after the transition program effective date.

### III. STANDARD OF PROOF

As a preliminary matter, it is noted that in the exercise of our administrative review in this matter, as in all matters that come within our purview, we follow the preponderance of the evidence standard as specified in the controlling precedent decision, *Matter of Chawathe*, 25 I&N Dec. 369, 375-376 (AAO 2010), unless the law specifically provides that a different standard applies.

The "preponderance of the evidence" standard does not relieve the petitioner from satisfying the basic evidentiary requirements set by regulation. The standard of proof should not be confused with the burden of proof. Specifically, the petitioner bears the burden of establishing eligibility for the benefit sought. A petitioner must establish that it is eligible for the requested benefit at the time of filing the petition. 8 C.F.R. § 103.2(b)(1). In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). As will be discussed, in the instant case, that burden has not been met.

### IV. EVIDENCE IN SUPPORT OF THE PETITION

In support of the petition, the petitioner submitted a copy of the foreign national worker permit (also known as an "umbrella permit") issued to the beneficiary on November 27, 2009. The permit is marked "TEMPORARY" and does not contain a photograph. Further, the biographic information regarding the beneficiary including his name, birthdate, citizenship and gender are hand-written. The

classification category "240K" is crossed out and handwritten as "240D."<sup>2</sup> The permit states "[n]ext filing date to avoid revocation, January 15, 2010."

On May 8, 2012, the director issued an RFE, requesting that the petitioner provide, *inter alia*, evidence that the beneficiary was lawfully present in the CNMI. The petitioner was permitted to submit any evidence that would establish eligibility for the benefit sought. The petitioner provided the following documentation with regard to the beneficiary:

- An affidavit from the beneficiary dated July 6, 2012. The beneficiary states that since receiving the temporary umbrella permit, he has been "going back forth tried to follow up but no body take action in [REDACTED] Immigration Office."
- A payment voucher issued to the beneficiary on November 20, 2009 by the Office of Attorney General Division of Immigration Services.
- An entry permit issued to the beneficiary on May 10, 2006 that was valid until May 5, 2007.
- A Form W-2CM, Wage and Tax Statement, for 2011 issued by the petitioner to the beneficiary.
- Excerpts of pages from the beneficiary's passport.

On appeal, the petitioner provided additional evidence, which included:

- An affidavit from the beneficiary dated September 6, 2012. The beneficiary states, in part:
  8. On November 27, 2009, I was issued by the CNMI Department of Labor a "Foreign National Worker Permit" aka "Umbrella Permit . . . . "
  9. When I was issued my umbrella permit, I noticed that it has a distinctive mark that reads "TEMPORARY" and I also noticed that I do not have a photograph in it.
  10. I asked one CNMI Immigration Officer about my observations.

<sup>2</sup> According to the CMMI Administrative Code 80-20.1-315, the umbrella permit category 240D is for immediate relatives of citizens, CNMI permanent residents, and U.S. permanent residents, while the category 240K is for foreign national workers. Notably, the employment contract between the petitioner and the beneficiary (signed on July 12, 2012) indicates that the beneficiary's work permit is under the category 240K. No explanation was provided.

11. The CNMI Immigration Officer told me that the machine that they were using to generate and print the umbrella permits has broken down and she asked me to come back "next week."

12. I followed the instruction of the CNMI [i]mmigration officer and went back to the CNMI [i]mmigration the next following week after November 27, 2009.

13. To my surprised when I came back that "next week" after November 27, 2009, I was told by CNMI immigration officers that they are no longer issuing immigration permits because the CNMI [g]overnment had already lost the authority to do so.

- A statement from [redacted] Manager, Labor Enforcement Office stating that "[the beneficiary] [redacted] was issued an umbrella permit in 2009."

After the submission of the appeal, the Secretary of the CNMI Department of Labor (DOL) sent U.S. Citizenship and Immigration Services (USCIS) a letter regarding the beneficiary. The letter references the Commonwealth's Protocol and Guidance published by the CNMI Department of Labor on March 16, 2010 (and provides a "Question and Answer" excerpt), indicating the following:

Question: My umbrella permit does not have a photograph? What should I do?

Answer: Your umbrella permit has already been revoked. You were required to appear prior to January 15, 2010 to obtain a new permit with a photograph, and you did not do so. No employer may accept an umbrella permit without a photograph.

In the letter, the Secretary of the CNMI DOL continues by stating the following:

The failure of the subject [the beneficiary] to appear prior to January 15, 2010 as provided by the official CNMI Department of Labor's Public Notice and Awareness Campaign Section C of the Protocol and further as clearly stated on the temporary permit provided as an attachment from your email dated January 30, 2014 states "Next Filing Date to Avoid Revocation January 15, 2010" was not accomplished in order to obtain a new permit with a photograph.

This is further validated by the CNMI LIIDS under this particular name bearing code "3" defined as Temporary Umbrella Permits Issued Without a Photograph with conditions (see Q & A above).

For the reasons cited above, the temporary permit for [the beneficiary] is automatically revoked prior to November 27, 2011 and is invalid.

We notified the petitioner of this information. In response to our notice, the petitioner submitted several supporting documents, including:<sup>3</sup>

- A letter from counsel dated August 5, 2014 to the Secretary of CNMI DOL, requesting "[a]ny order of a Labor hearing officer revoking the umbrella permit of [the beneficiary] [REDACTED]."
- A letter from the CNMI, DOL, Office of the Secretary, dated August 14, 2014.
- An affidavit from the beneficiary dated September 23, 2014, which states, in part:

When federalization of immigration approached, I applied for an umbrella permit. On November 27, 2009, I went to the CNMI Division of Immigration office on Rota to pick up my umbrella permit. The [i]mmigration officer on duty (I believe it was [REDACTED]) was very busy because that was the last day for umbrella permits to be issued, and a lot of people were there trying to get their permits. She could not find my permit, so she issued me a temporary one and told me to come back the following week to get one with a picture. I did go back the following week, but the Immigration office was closed. I went back approximately three times in December 2009, but each time the office was closed, and appeared to be closed permanently.

Notably, in this affidavit, the beneficiary withdraws his account of events in ¶¶11 and 13 of his affidavit dated September 6, 2012, and states that "it does not accord with my present recollection and is hereby withdrawn."

## V. DISCUSSION AND ANALYSIS

<sup>3</sup> The record also contains a declaration by [REDACTED] who claims to have represented other foreign nationals in connection with the issuance of umbrella permits. Mr. [REDACTED] asserts that some of his clients were issued temporary permits but were not able to obtain regular umbrella permits due to "a variety of ostensible technical or administrative problems."

We note that there is no evidence that Mr. [REDACTED] represents the petitioner in the instant matter or that he has any particular knowledge of the present facts. Importantly, Mr. [REDACTED] does not claim to be familiar with the beneficiary, his various accounts of the events, and whether or not he complied with the conditions of the temporary umbrella permit. Moreover, there is insufficient information regarding the individuals in the other cases to make a legitimate comparison and determination as to which facts, if any, are analogous to the instant case. Further, there is a lack of supporting evidence to substantiate Mr. [REDACTED] declaration. We also note that the letter does not contain any contact information for Mr. [REDACTED]. While we reviewed Mr. [REDACTED] affidavit, it does not establish that the beneficiary was lawfully present in the CNMI when the CW-1 petition was filed.

It must be noted that the petitioner submitted three affidavits from the beneficiary that recount the issuance of an umbrella permit and his subsequent actions. The beneficiary provides varying versions of the events. In the latest affidavit, the beneficiary withdraws a portion of his previous statement, simply stating that "it does not accord with [his] present recollection." We note that it is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

On appeal, the petitioner asserts that the beneficiary's temporary umbrella permit remained valid because a letter from the CNMI, DOL, Office of the Secretary (dated August 15, 2014) states that there is no record of a hearing officer revoking the permit. In addition, the petitioner refers to sections of the CNMI regulations as supporting this assertion.

The record of proceeding does not establish, however, that the beneficiary complied with the conditions set forth in the permit. Further, and importantly, the Secretary of the CNMI DOL notified us that the temporary permit for the beneficiary was "*automatically revoked* prior to November 27, 2011 and is invalid (emphasis added)." Thus, it appears that no specific action was required by a hearing officer (or anyone else) as the action was automatic. According to the Secretary, the temporary umbrella permit issued to the beneficiary was invalid at the time the petitioner filed the CW-1 petition.

In response to our notice, the petitioner claims, for the first time, that the beneficiary had a pending administrative appeal and that his prior permit continued to be in effect throughout the 2009 to 2011 transition period.<sup>4</sup> In support of this statement, the petitioner submitted a Notice of Hearing issued to the beneficiary for a hearing scheduled on January 21, 2009.<sup>5</sup>

We will briefly note that the hearing was scheduled approximately ten months *prior* to the issuance of the temporary umbrella permit. Importantly, the record does not contain any evidence that the hearing was continued or that the matter remained pending after January 21, 2009. Thus, while we reviewed the documentation, it does not establish that the beneficiary was lawfully present when the CW-1 petition was filed.

## VI. CONCLUSION

<sup>4</sup> Further, while the petitioner now claims that this information is relevant, we note that it was not previously mentioned by the petitioner when the petition was submitted, in response to the director's RFE, or when the appeal was submitted. No explanation for failing to previously make this assertion was provided by the petitioner.

<sup>5</sup> USCIS records indicate that the beneficiary's submission to USCIS on this matter was denied, and that a subsequently filed motion was dismissed.

Based upon a complete review of the record of proceeding, the petitioner has not met its burden to establish that the beneficiary was lawfully present in the CNMI when the petition was filed. Thus, the petitioner has not established eligibility for the benefit sought.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 128.

**ORDER:** The appeal is dismissed.