

FILED
Clerk
District Court

MAY 05 2015

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS**

for the Northern Mariana Islands
By
(Deputy Clerk)

BELAL HOSSAIN, WENLI ZHONG,
PUKAR PATEL, and DOES 1 to 500,

Plaintiffs,

v.

JEH JOHNSON, Secretary, Department of
Homeland Security, LEON RODRIGUEZ,
Director, United States Citizenship and
Immigration Services, and KATHY A.
BARAN, Director, California Service Center,
United States Citizenship and Immigration
Services,

Defendants.

CIVIL CASE NO. 1:14-cv-00027

**DECISION AND ORDER GRANTING
DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

In 2011 Hong Kong Entertainment (Overseas) Investments, Ltd. ("HKE"), the owner of the Tinian Dynasty Hotel and Casino, petitioned the United States Citizenship and Immigration Service ("USCIS") for CW-1 work permits for the three named Plaintiffs and several hundred other foreign contract workers it employed. When USCIS denied the petitions, three workers filed this lawsuit, claiming that the denials, which left them out of lawful status and without permission to work, deprived them of their rights to due process and equal protection of the laws.

Defendants, who will be referred to collectively as "the Government," have moved to dismiss the lawsuit on grounds that the district court lacks subject matter jurisdiction over the action, that the Plaintiffs lack standing, and that the complaint fails to state a due process or equal protection claim. The matter is fully briefed,¹ and came on for a hearing on April 23, 2015.

¹ Government's Motion to Dismiss ("MTD"), Mar. 14, 2015, ECF No. 3; Plaintiffs' Opposition, Apr. 9, 2015, ECF No. 8; Government's Reply, Apr. 17, 2015, ECF No. 9.

1 Having carefully considered all the papers and the arguments of counsel, the Court finds that it
2 lacks jurisdiction to review USCIS's denial of the petitions because there has been no final
3 agency action, which is a precondition of judicial review. For that reason, the Government's
4 motion will be granted and the case dismissed without prejudice to Plaintiffs to refile once final
5 agency action (if unfavorable) has been taken.

6 II. BACKGROUND

7 This statement of the background facts is based on the Complaint (ECF No. 3), together
8 with attached exhibits and other documents on which it necessarily relies. *See Parks School of*
9 *Business, Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *Marder v. Lopez*, 450 F.3d 445,
10 448 (9th Cir. 2006).

11 Named Plaintiffs Belal Hossain, Wenli Zhong, and Pukar Patel were foreign contract
12 workers for HKE at the Tinian Dynasty. Each of them has been residing in the Commonwealth
13 for more than ten years. (*Id.* ¶¶ 24–28.) Zhong and Hossain each has four minor children, all but
14 one of whom is a U.S. citizen. (*Id.* ¶¶ 26, 28.) Patel transferred to HKE from another employer in
15 2013. (*Id.* ¶ 25.) Zhong started working for HKE in 2011, Hossain in 2013. (*Id.* 26–27.)

16 HKE employs around five hundred foreign contract workers at the Tinian Dynasty.
17 (Compl. ¶ 10.) All these employees need work authorizations, known as CW-1 permits. (*Id.* ¶
18 15.) The CW-1 permitting process was established by the Secretary of Homeland Security
19 pursuant to section 702 of the Consolidated Natural Resources Act of 2008, Pub. L. 110-229,
20 122 Stat. 754, codified at 48 U.S.C. § 1806. The agency tasked with administering the permitting
21 process is USCIS. (Compl. ¶ 19.)

22 In November 2011, HKE submitted 69 CW-1 petitions to USCIS covering 520
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1 employees. (*Id.* ¶ 40.) In May 2012, HKE received a Request for Evidence (“RFE”) concerning
2 most of its petitions and having to do with HKE’s eligibility as an employer and its compliance
3 with various federal requirements. (*Id.* ¶ 42; Ex. 2.) In September 2012, it received further RFEs
4 from USCIS.

5 On October 26 and December 18, 2012, USCIS issued Notices of Intent to Deny
6 (“NOID”) in connection with HKE’s petitions. (*Id.* ¶¶ 50, 57.) The NOIDs advised HKE that it
7 had provided insufficient evidence of compliance with Commonwealth and federal labor
8 regulations, and noted that HKE was the subject of an investigation by the Department of Labor
9 for alleged withholding of overtime earnings from employees. (*Id.* ¶¶ 52, 58; Ex. 4, 6.) HKE
10 timely responded to the NOIDs. (*Id.* ¶ 56.)

11 Beginning February 4, 2013, HKE received approvals of CW-1 petitions covering more
12 than five hundred employees. (*Id.* ¶ 59.) In July 2013, HKE received Notices of Intent to Revoke
13 (“NOIR”), advising that USCIS intended to revoke those same approvals. (*Id.* ¶ 63.) The reason
14 USCIS gave for reconsidering its approval was new allegations that since January 2013, HKE
15 was still not paying its employees their wages. (*Id.* Ex. 8.) In addition, USCIS issued notices that
16 it intended to deny pending CW-1 petitions. (*Id.* ¶¶ 66–67.) HKE timely filed a response to those
17 notices. (*Id.* ¶ 69.)

18 During this same period, in April 2013, the Government brought criminal charges against
19 HKE in this district for alleged failure to file currency transaction reports. Notwithstanding the
20 pendency of the criminal case, USCIS lifted the NOIRs, but not the NOIDs. (*Id.* ¶¶ 70, 74–75.)

21 In January 2014, HKE filed more CW-1 renewal petitions, and in February USCIS began
22 issuing notices that it would deny them. (*Id.* ¶ 76–77, Ex. 10.) HKE timely responded with a
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1 single compilation covering all petitions, as USCIS had previously allowed. (*Id.* ¶ 79.) Its
2 response included information about an agreement for Mega Stars, a Commonwealth
3 corporation, to acquire HKE, thereby providing expanded financial resources. (*Id.* ¶ 78.)

4 In July 2014, HKE again received NOIDs in connection with its CW-1 petitions. (*Id.* ¶
5 80; Ex. 11.) These notices questioned whether HKE was a legitimate employer and whether its
6 employees were eligible to receive or renew CW-1 status. (*Id.* ¶ 81.) They also advised HKE that
7 it would have to respond to each NOID for each petition separately, a requirement that
8 significantly burdened HKE. (*Id.* ¶¶ 83–84.)

9 On December 8, 2014, USCIS issued decisions denying all of HKE’s CW-1 petitions,
10 principally because of the pending criminal case. (*Id.* ¶ 88–89.) In particular, USCIS noted that
11 on September 22, 2014, a superseding indictment was filed including 158 counts of violation of
12 the Bank Secrecy Act over nearly four years dating back to September 2009. (*Id.* Ex. 12, pp. 4–
13 10.)²

14 Along with the denial decisions themselves, USCIS issued a Notice of Decision
15 informing HKE that by order of the Director of the California Service Center, an extension of
16 nonimmigrant status requested on behalf of Plaintiff Zhong and two other foreign workers had
17 been denied. (*Id.* Ex. 12, pp. 2–3.) The Notice of Decision further stated the following:

18 The decision resulting in the denial of Form I-129CW leaves the
19 beneficiaries without lawful immigration status. Absent an approved
20 application or petition which would bestow valid immigration status upon
21 the beneficiaries, they are now present in the United States in violation of
the law. Failing to maintain valid immigration status or remaining in the
United States beyond the expiration of status will affect the beneficiaries’
ability to return to the United States in the future. If the beneficiaries are

22 ² The parties acknowledged at the hearing that HKE’s appeals of those decisions to the agency’s
23 Administrative Appeals Office (“AAO”) are now pending.

1 currently not in a valid immigration status or the date listed on the Form I-
 2 94 has already passed, this Notice of Decision leaves the beneficiaries
 3 without lawful immigration status and the beneficiaries are hereafter present
 in the United States in violation of the law and are required to depart the
 United States immediately.

4 There is no appeal to this Decision. However, pursuant to 8 CFR 103.5,
 5 a motion can be filed on Form I-290B. Such motion must be accompanied
 by the proper fee and filed within 30 days of this notice.

6 Please note that if you timely file a motion with USCIS, and if the
 7 motion is granted, the petition will be reopened and approved and the
 beneficiary will be accorded the classification sought.

8 (*Id.*) A similar Notice of Decision issued denying a status extension to Plaintiff Patel and one
 9 other foreign worker. (*Id.* Ex. 13, pp. 2–3.)³

10 On December 24, 2014, Plaintiffs filed this lawsuit. They complain that USCIS denied
 11 them due process when, among other things, it unfairly considered the criminal case in
 12 determining that HKE is not a legitimate employer, and failed to consider the effect of HKE's
 13 acquisition by Mega Stars; and that the agency impermissibly treated renewal petitions
 14 differently from transfer petitions, thereby denying the beneficiaries of renewals equal protection
 of the laws.

15 **III. LEGAL STANDARD**

16 Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must be
 17 dismissed if it fails to state a claim upon which relief can be granted. On a Rule 12(b)(6) motion,
 18 all well-pleaded factual allegations are taken as true. *Hebbe v. Pliler*, 627 F.3d 338, 341–42 (9th
 19 Cir. 2010). Although a complaint does not need “detailed factual allegations, . . . a plaintiff's
 20 obligation to provide the grounds of his entitlement to relief requires more than labels and
 21 conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]” *Bell*
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23 ³ The Complaint and exhibits are silent as to the decision regarding any petition on behalf of Plaintiff Hossain.

1 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and internal quotation marks
2 omitted). Legal conclusions couched as factual allegations do not suffice. *Ashcroft v. Iqbal*, 556
3 U.S. 662, 678 (2009). The claim to relief must contain sufficient well-pleaded facts to be
4 “plausible on its face.” *Twombly*, 550 U.S. at 570 (2007). A claim is facially plausible “when the
5 plaintiff pleads factual content that allows the court to draw the reasonable inference that the
6 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. The purpose of this
7 standard is “to give fair notice and to enable the opposing party to defend itself effectively[.]”
8 and to ensure “that it is not unfair to require the opposing party to be subjected to the expense of
9 discovery and continued litigation.” *Starr v. Bacca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

10 **IV. DISCUSSION**

11 The Government asserts four grounds to dismiss the complaint: (1) the Court lacks
12 subject matter jurisdiction to review USCIS’s denial of the CW-1 permits because Plaintiffs are
13 not challenging a final agency action; (2) Plaintiffs lack standing to sue because they are outside
14 the zone of interest of the statutes and regulations establishing the CW-1 permitting scheme; (3)
15 Plaintiffs have no property interest in the CW-1 permits that would support a due process claim;
16 and (4) Plaintiffs’ equal protection claim is implausible. Whenever a district court determines
17 that it lacks subject matter jurisdiction, it must dismiss the action. Fed. R. Civ. P. 12(h)(3).
18 Therefore, the natural starting place to discuss the Government’s motion is the jurisdictional
19 question.

20 In the Administrative Procedure Act (“APA”), Congress provided for judicial review of
21 agency actions that have caused a person to suffer a legal wrong. 5 U.S.C. § 702. For an agency
22 action to be reviewable, it must be “final agency action for which there is no other adequate
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1 remedy in a court . . .” 5 U.S.C. § 704. The question, then, is whether the denials of HKE’s CW-
2 1 petitions on behalf of the Plaintiffs are final agency actions.

3 Finality is a jurisdictional requirement. *Fairbanks North Star Borough v. U.S. Army*
4 *Corps of Engineers*, 543 F.3d 586, 591 (9th Cir. 2008). “For an agency action to be final, the
5 action must (1) mark the consummation of the agency’s decisionmaking process and (2) be one
6 by which rights or obligations have been determined, or from which legal consequences flow.”
7 *Or. Natural Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) (internal
8 quotation marks omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 178 (1995)). The first prong
9 of the test is satisfied if the agency “has rendered its last word on the matter.” *Id.* at 984 (citation
10 omitted). An appeal to a superior agency authority “renders an agency action nonfinal” under the
11 APA. *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407 (9th Cir. 1996).

12 Here, USCIS’s denial of CW-1 petitions is appealable to the AAO. Indeed, the notices
13 that USCIS sent out advised HKE of its right of appeal and of the filing deadline and procedure.
14 (Compl. Ex. 12, p. 4, Decision, Form I-292.) The Complaint doesn’t say whether HKE has
15 appealed the denials; but in its opposition brief HKE conceded it has filed intraagency appeals,
16 and at the hearing it acknowledged that the appeals are now pending. Therefore, the agency has
17 not “rendered its last word on the matter,” and the petition denials are not final agency actions.

18 Plaintiffs maintain that the denials of HKE’s petitions should be regarded as final agency
19 actions because their effect on the beneficiaries – the foreign worker Plaintiffs – is final. (Opp’n
20 2–3.) The denial of extensions leaves the workers without lawful immigration status, renders
21 their continued presence in the United States unlawful, and requires them to depart the country
22 immediately. (Compl. Ex. 12, p. 2, Notice of Decision, Form I-541.) This result, Plaintiffs argue,
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1 is consistent with the requirement that in determining whether agency action is final, courts must
2 adopt a “pragmatic” and “flexible” approach to the interpretation of finality. *Or. Natural Desert*
3 *Ass’n*, 465 F.3d at 982. Among the factors to be considered is “whether the action amounts to a
4 definitive statement of the agency's position or has a direct and immediate effect on the day-to-
5 day operations of the subject party, or if immediate compliance [with the terms] is expected.” *Id.*
6 (citations and internal quotation marks omitted).

7 Plaintiffs have made a strong showing that the denial of extensions has significant legal
8 consequences for them. Because of the denial, they are out of status, unauthorized to work and,
9 as the Government conceded at the hearing, accruing “unlawful presence.” An alien who remains
10 in the United States after his authorized period of stay has expired is deemed to be unlawfully
11 present. 8 U.S.C. § 1182(a)(9)(B)(ii). An alien who accrues more than 180 days of unlawful
12 presence and voluntarily departs the United States must wait at least three years before seeking
13 to be readmitted; if one year or more of unlawful presence has accrued, the bar to readmission is
14 for ten years. 8 U.S.C. § 1182 (a)(9)(B)(i). At the hearing, the Government gave assurances that
15 if HKE prevails on its appeal of the CW-1 denials, Plaintiffs will get their extensions and return
16 to lawful status, and the time accrued in unlawful presence will roll back. However, every day
17 that Plaintiffs remain in the United States during the pendency of the appeal, they accumulate
18 unlawful presence that may never be rolled back (if the AAO affirms the decisions) and risk
19 being placed in removal proceedings by Immigration and Customs Enforcement (“ICE”).⁴
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22 ⁴ At the hearing, counsel for the Government confirmed that ICE has the power to initiate action to have Plaintiffs
23 removed, given that they are out of status, but opined that it would not exercise that power while HKE’s appeal is
24 pending.

Moreover, USCIS's denial of extensions (as opposed to its denial of the petitions) is not appealable. (Compl. Ex. 12, p. 2, Notice of Decision.)

The problem for Plaintiffs is that their lawsuit doesn't really challenge the decision to deny them extensions. They don't assert that they are entitled to extensions regardless of whether their employer's CW-1 petitions on their behalf are approved. Instead, they challenge the correctness of the underlying decision to deny the CW-1 petitions. *That* decision clearly is not final, for the AAO is now in the process of reviewing it. For this Court to undertake its own review while the administrative appeal is pending would waste resources and create the sort of duplication that Section 704 of the APA was intended to avoid. *See Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988).

V. CONCLUSION

Because the petition denials are not final, the Court lacks subject matter jurisdiction and must dismiss this action. It is unnecessary, therefore, to determine whether Plaintiffs, as beneficiaries of HKE's petitions, have standing to sue and can state a claim on which relief may be granted.

The Government's Motion to Dismiss is GRANTED WITHOUT PREJUDICE to Plaintiffs to refile after the AAO has issued its decision and the agency's action is final.

SO ORDERED this 5th day of May, 2015.



RAMONA V. MANGLONA
Chief Judge