BEFORE THE

BOARD OF LAND AND NATURAL RESOURCES

THE STATE OF HAWAI'I

In the Petition of	)
	)
MĀLAMA CHUN For a Declaratory Order	)
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PETITION FOR DECLARATORY ORDER

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Petitioner MĀLAMA CHUN (Petitioner) hereby petitions the State of Hawai'i Board of Land and Natural Resources (BLNR) for declaratory ruling regarding the authority of the Department of Land and Natural Resources' Division of Aquatic Resources (Department) to issue commercial licenses to persons not lawfully admitted to the United States.

This Petition is submitted pursuant to Hawaii Administrative Rules (HAR) §§ 13-1-10 ("Appearance and practice before the Board"), 13-1-27 ("Petition for declaratory ruling") and Hawaii Revised Statutes (HRS) § 91-8. These laws are "meant to provide a means of seeking a determination of whether and in what way some statute, agency rule, or order, applies to the factual situation raised by an interested person." *Citizens Against Reckless Development v. Zoning Bd of Appeals*, 114 Hawai'i 184, 196-97, 159 P.3d 143, 155-56 (2007).

I. Petitioners' Interests and Reasons for Submitting this Petition.

A fleet of approximately 140 fishing boats docks mainly at Piers 17 and 38 in Honolulu. About 700 foreign citizens work on these boats, catching approximately $110 million worth of seafood annually.[1] These foreign workers lack many basic rights guaranteed under U.S. labor laws and do not enjoy active enforcement of Hawai'i labor laws to their workplaces. According to U.S. Attorney Florence Nakakuni, the chief federal law enforcement official in Hawai'i, "People say . . .

1 Martha Mendoza & Margie Mason, "Hawaiian seafood caught by foreign crews confined on boats," *Associated Press* (Sep. 8, 2016) *available at*: http://bigstory.ap.org/article/39ae05f117c64a929f0f8fab091c4ee1/hawaiian-seafood-caught-foreign-crews-confined-boats.

they're like captives. . . But they don't have visas, so they can't leave their boat, really."[2] The alien, non-resident, non-citizen fishermen generally hold a crewmen's landing permit, which is the I-95 document issued by the Department of Homeland Security, U.S. Customs and Border Protection, that is stamped with the statement, "Permission to land temporarily at all U.S. ports is refused" and are subject to a deportation order via I-259 where their request for permission to land was refused and are detained on board at the will of the boat owner or captain who also holds their passports.

Malama Chun is a resident of Pa'ia, Maui, Hawai'i. Chun is a Native Hawaiian waterman whose cultural practices include fishing. His father was also a fisherman and throughout their lives, they have observed a massive decline in fish stocks, which interferes with their ability to fish. Chun is concerned about the broader environmental effects of overfishing and believes that giving commercial fishing licenses to persons who are not lawfully admitted and cannot easily or legally communicate with the Department regarding the witnessing of harmful acts against Hawaii's natural resources is a contributing cause to the decline of Hawaii's fisheries and such decline directly impacts Chun's cultural practices including fishing and is otherwise contrary to law.

Chun also believes that issuing commercial fishing licenses to individuals who are subject to deportation orders and who cannot freely communicate with constituted authority and who are held on ships by their captains is contrary to the Kānāwai Māmalahoe, or law of the Splintered Paddle, which is adopted at Article IX, Section 10 of the Hawai'i State Constitution. Kānāwai Māmalahoe specifically states that all people have the freedom of movement "a moe i ke ala, 'a'ohe mea nāna e ho'opilikia" [and to sleep by the road without fear of problem/harm]. These unfair and illegal labor practices violate this constitutional and Hawaiian Kingdom-era law protecting the rights of the common person, specifically the vulnerable foreign workers that are exploited by the longline fishing industry. By continuing to illegally issue commercial fishing licenses, the Department offends this constitutional mandate and Petitioner's ability to engage in a community that is guaranteed public safety.

II. Designation of Authorities in Question.

HRS §189-2, titled "Commercial marine license" provides in relevant part: "(a) No person shall take marine life for commercial purposes whether the marine life is caught or taken within or outside of the State, without first obtaining a commercial marine license as provided in this section." HRS §189-5, titled "Aliens not admitted to United States," provides:

2 Mendoza et al, *supra* note 1.

> It is unlawful for any person who has not been lawfully admitted to the United States to engage in taking marine life for commercial purposes in the waters of the State. The term "United States" as used in this section, includes the several states and the territories and possessions of the United States.
>
> Article 9, section 10 of the Hawai'i Constitution provides:
> The law of the splintered paddle, mamala-hoe kanawai, decreed by Kamehameha I--Let every elderly person, woman and child lie by the roadside in safety--shall be a unique and living symbol of the State's concern for public safety.
>
> The State shall have the power to provide for the safety of the people from crimes against persons and property.

Taken together, HRS §§189-2 and -5 and article 9, §10 of the State Constitution prohibit the Department from issuing commercial licenses to any person who has not been lawfully admitted to the United States and no such person may take or sell marine life for commercial purposes by reason that they would not be able to first obtain a commercial marine license.

III. Concise Statement of Petitioners' Contention.

Petitioner contends that the Department's practice of issuing commercial licenses to persons holding a crewmen's landing permit, the I-95 document issued by the Department of Homeland Security, U.S. Customs and Border Protection, that is stamped with the statement, "Permission to land temporarily at all U.S. ports is refused" and are subject to a deportation order via I-259 where their request for permission to land was refused and are detained on board awaiting deportation violates prohibitions against persons not been lawfully admitted to the United States to engage in taking marine life for commercial purposes pursuant to Chapter §189, HRS. The Department lacks the authority to issue commercial fishing licenses to such persons because they are not lawfully admitted to the United States.

IV. Memorandum of Authorities

HAR §13-1-27(b)(5) requires submission of a "memorandum of authorities, containing a full discussion of the reasons, including legal authorities, in support of such position or contention." *Id.* Petitioner contends the Department is not authorized to issue commercial fishing licenses to non-immigrant persons holding an I-95 that is stamped with "Permission to land temporarily at all U.S. ports is refused" and subject to a deportation order via I-259 where their request for permission to land was refused and are detained on board awaiting deportation because such documents are not proof that a person is lawfully admitted to the U.S. and such issuances of commercial fishing licenses violates HRS § 189-2 and § 189-5.

A. "Lawfully admitted to the United States" indicated only those who were "admitted" as a permanent resident and not merely "present."

The term "lawfully admitted to the United States" is not defined in HRS chapter 189 and did not appear in Hawai'i statutes governing commercial fishing licenses until 1949. At that time, federal courts interpreted the term: "[l]awfully admitted' means lawfully admitted to the United States for permanent residence." *In the Matter of Deg*-----, 3 I. & N. Dec. 159, 160 (BIA 1948) (citing *Domenici v. Johnson*, 10 F.2d 433, 435 (1st Cir. 1926) (addressing alien seaman seeking discharge from the vessel)). "Lawfully admitted means lawfully admitted for permanent residence." *Int'l Mercantile Marine Co. v. Elting*, 67 F.2d 886, 887 (2d Cir. 1933) (addressing nonquota immigrants, which are permanent residents returning from temporary visits abroad) quoting *U.S. ex rel. Stapf v. Corsi*, 287 U.S. 129, 133 (1932).

Congress later amended immigration and other maritime laws to use the phrase "lawfully admitted to the U.S. for permanent residence" exclusively to make clear the meaning of "lawfully admitted." *See e.g.* 46 U.S.C. § 8106(a)(1)(A)(i) & (ii) (distinguishing "an alien lawfully admitted to the United States for permanent residence" and persons "possess[ing] a United States nonimmigrant visa for individuals desiring to enter the United States temporarily for business" in the context of freight vessel riding gangs); 46 U.S.C § 8103 (b)(1)(A)(ii) (allowing unlicensed seamen if they are "an alien lawfully admitted to the United States for permanent residence"); 43 U.S.C.§ 1356(a)(3) (requiring regulations for Coast Guard vessels or rigs crewed or manned by aliens lawfully admitted to the United States for permanent residence); 8 U.S.C.§ 1151(a) (limiting those eligible for visas or status as an alien lawfully admitted to the United States for permanent residence). Currently, the term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed. 8 U.S.C. § 1101(20).

Being "lawfully admitted to the United States for permanent residence" is distinct from merely being "lawfully present" in the U.S. *See* 49 C.F.R. § 24.208(g) (those not lawfully present in the U.S. can seek relocation assistance if they demonstrate their immediate relation to an alien lawfully admitted for permanent residence in the United States). As noted by a California district court:

> Those lawfully "admitted" under federal immigration law are those who an immigration officer determines to satisfy admissibility criteria at the time of entry. 8 U.S.C. § 1182. Thus, it is likely that there are aliens who are lawfully present in the United States, but who were never lawfully "admitted" as federal law defines that term. These include, for example,

> persons who entered illegally but then were granted asylum under 8 U.S.C. § 1158. Conversely, some aliens who were lawfully "admitted" under the INA, but have overstayed their visas, may no longer be lawfully present. The plain language of subsection (b)(3) would include these aliens while the construction urged by defendants would exclude them.

League of United Latin Am. Citizens v. Wilson, 908 F.Supp. 755, 772 n.11 (C.D. Cal. 1995), *on reconsideration in part*, 997 F.Supp. 1244 (C.D. Cal. 1997). We note here that there is no such entity as a person "illegally present" in the U.S. Rather, there exists persons who are "out of status," who are present in the U.S. but have failed to maintain a lawful immigration status or have violated the terms of their nonimmigrant status, or they are present in the U.S. "without authorization," which is the category these fishermen fall within as I-95 holders with the stamp specifying "Permission to land temporarily at all U.S. ports is refused" and subject to a deportation order via I-259 where their request for permission to land was refused and are detained on board until deportation must be considered. They are under no circumstances lawfully admitted into the United States.

Aliens lawfully "admitted" are those *admitted* into the U.S. and not those merely present. The I-95 documents of alien crewmembers were explicitly stamped with the statement "Permission to land temporarily at all U.S. ports is refused." Thus, they were not determined to be admissible and were not "lawfully admitted" as required by the plain language of HRS §189-5.

B. Legislature intended to restrict, not expand the scope of persons eligible for commercial fishing licenses with the 1949 amendments.

The plain language of HRS §189-5 prohibits issuance of licenses to aliens holding I-95 documents stamped with the statement, "Permission to land temporarily at all U.S. ports is refused" and who are subject to a deportation order via I-259 where their request for permission to land was refused and are detained on board until deportation from obtaining commercial fishing licenses. *Id.* Should the phrase "lawfully admitted" be determined ambiguous, the legislative history of the statute bears out an intention to prevent such persons from being issued commercial licenses.

> First, the fundamental starting point for statutory interpretation is the language of the statute itself. Second, where the statutory language is plain and unambiguous, our sole duty is to give effect to its plain and obvious meaning. Third, implicit in the task of statutory construction is our foremost obligation to ascertain and give effect to the intention of the legislature, which is to be obtained primarily from the language contained in the statute itself. Fourth, when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists. And fifth, in construing an ambiguous statute, the meaning of the ambiguous words may be sought by examining the context, with which the ambiguous words, phrases, and sentences may be compared, in order to ascertain their true meaning.

Awakuni v. Awana, 115 Hawai'i 126, 133, 165 P.3d 1027, 1034 (2007) (citation omitted) quoted by *Hawaii Gov't Employees Ass'n, AFSCME Local 152, AFL-CIO v. Lingle*, 124 Hawai'i 197, 202, 239 P.3d 1, 6 (2010). Examination of the legislative history of HRS §189-5 demonstrates an intention to restrict the class of non-resident and non-citizen persons eligible to obtain commercial fishing permits.

Prior to the passage of the 1901 Organic Act, Hawai'i regulated fishing rights as private property within the territorial waters and beyond the territorial waters was considered the high sea outside the jurisdiction of the Territory of Hawai'i. In 1925, the Territory of Hawai'i began to actively regulate its fisheries and required commercial fishing permits.

> It shall be unlawful for any person except resident citizens of the Territory of Hawaii or commercial fishermen who have been granted permits, to take, kill, fish for or assist in fishing for any of the marine fishes . . . within the jurisdiction of the Territory of Hawaii . . . . and it shall be unlawful for any person whatsoever to engage in commercial fishing without first having secured a permit from the boar do fish and game commissioners. . . .

1925 Haw Sess. Laws Act 201, §1 at 243 (S.B. No. 203). These permits were granted to resident citizens and "to other persons upon the applicant furnishing to the commission or its agent satisfactory proof that said applicant is qualified to engage in commercial fishing and upon the payment of five dollars ($5.00), and also upon the applicant furnishing name, address and place of birth." 1925 Haw Sess. Laws Act 201, §3 at 243. The purpose of S.B. No. 203 was "to regulate the fishing industry of the Territory by prohibiting aliens from fishing within the waters of the Territory, excepting in the case of commercial fishermen who are granted permits to carry on the business of fishing[.]" 1925 House Journal 1684.

In 1929, Act 187 (HB No. 245) modified the system to specify three classes of people subject to regulation: "citizens of the United States", "commercial fishermen" and "any person [expressly including aliens] angling in the day time".

> Section 3. It shall be unlawful for any person, except citizens of the United States and commercial fishermen, to take, kill, fish for, or assist in fishing for, any fresh-water, or marine fish, or other marine animals suitable for food, within the jurisdiction of the Territory of Hawaii, by any means whatsoever; provided, however, that this Act shall not apply to any person angling in the daytime; and provided further that any alien may lawfully fish in the day time with a throw net the mesh of which shall not be less than three inches, or angle at night, upon first obtaining from the division a license therefor as in this Act provided."

1929 Haw. Sess. Laws Act 187, §1-3, at 199-202.

In 1947, RLH §1259(a)-(c) was amended to provide that a fee for a commercial fishing license for U.S. citizens who were residents of the Territory for not less than one year was $5.00, for

nonresident citizens the fee was $10.00, and "a person other than a citizen of the United States" was to pay a $15.00 fee. 1947 Haw. Sess. Laws Act 39 §5, at 44.

In 1949, RLH §1216 was amended to provide:

> **Aliens not admitted to United States.** It shall be unlawful for any person who has not been lawfully admitted to the United States to engage in commercial fishing in the waters of the Territory of Hawaii. The term 'United States,' as used in this section, includes the several states and the territories and possessions of the United States, and the term 'commercial fishing' shall have the meaning given in section 1256, as the same may be amended.

1949 Haw. Sess. Laws Act 211 §1, at 68. As above-discussed, the term "lawfully admitted to the United States" meant "lawfully admitted to the U.S. as a permanent resident". The legislature also amended RLH §1259 to increase fees for non-residents: "The fee for a commercial fishing license shall be (a) ten dollars for any person who has resided in the Territory for one year or longer; and (b) twenty dollars for all other persons." 1949, Haw. Sess. Laws Act 272 (Series A-40) §5, at 72-74. The 1949 House standing committee report provides in relevant part:

> The purpose of this bill is to correct various provisions of Chapter 19 relating to fishing. **Aliens not admitted to the United States, as distinguished from aliens who are legally in the United States, are banned from commercial fishing.** Minimum sizes of nets and traps of various fishes are revised, and other amendments are made. The bill is designed to correct possible difficulties in enforcing present laws in view of recent decisions of the Supreme Court of the United States.

H.R. Stand. Comm. Rep. No. 703, 1949 Haw. H.J. 1817 (1949) (emphasis added). In other words, the 1949 amendment to the class of persons regulated limited or was a restriction on the class of people who could obtain a commercial fishing license. Before 1949, there was no limitation on the issuance of commercial fishing licenses to persons who were not "lawfully admitted." But in 1949, this limitation was added restricting commercial fishing to persons who were "lawfully admitted" and excluding all others.

In 1955, Act 96 (HB No. 942) "removes certain restrictions on alien fishing," including restrictions on non-commercial alien fishers from fishing at night, fishing within 1 mile of the high water mark, and from taking limu for non-consumption/non-medicinal purposes.[3] "The general

3 "Section 1215 of the Revised Laws of Hawaii 1945 is repealed, relating to restrictions of aliens who are not commercial fishermen from fishing for food except during daylight hours." Stand. Comm. Rep. No. 461, 1955 House Journal, at 731. "Section 1216 of the Revised Laws of Hawaii 1945, as amended by Act 211 of the Session Laws of 1949, is repealed, and its provisions that aliens who are lawfully admitted to the United States may fish commercially are incorporated in Section 1260 of this bill. "Section 1217 of the of the Revised Laws of Hawaii 1954 is repealed, relating to the prohibition of all aliens who are not eligible to become citizens from inshore fishing within one mile seaward of the

purpose of this Bill is threefold. It reorganizes certain existing laws relating to commercial fishing licenses, eliminates the provisions relating to excess catch, and removes certain restrictions on alien fishing." Stand. Comm. Rep. No. 461, 1955 House Journal, at 731. However, Act 96 of 1955 maintained by readoption of the "lawfully admitted" requirement for commercial licenses specifically. 1955 Haw. Sess. Laws Act 96 §6 at 84-85. The restrictive regulatory focus remained on non-resident, alien commercial fishermen while restrictions over non-commercial fishing were dropped as to these persons.

In 1981, the legislature merely amended HRS §189-5 to indicate the change to Statehood status: "**Aliens not admitted to United States.** It shall be unlawful for any person who has not been lawfully admitted to the United States to engage in commercial fishing in the waters of the State. The term 'United States,' as used in this section, includes the several states and the territories and possessions of the United States." 1981 Haw. Sess. Laws Act 85 §82, at 155.

The legislative history of HRS §189-5 bears out a tightened focus on disallowing the issuance of commercial fishing permits to those not lawfully *admitted* into the U.S. for permanent residency. Fishers holding I-95 permits stamped with the statement "Permission to land temporarily at all U.S. ports is refused" are clearly not within the scope of those admitted into the U.S. for permanent residency. Accordingly, this Petition is presented to obtain a declaratory order that those persons who are not lawfully admitted into the United States as evidenced by I-95 which says "permission to land refused" or or hold a deportation order via I-259 where their request for permission to land was refused and are detained on board are not eligible to obtain commercial marine licenses and the Department lacked authority to issue such licenses.

DATED: Honolulu, Hawaii April 12, 2017

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high water mark, except for taking of bait."