

IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE
NORTHERN MARIANA ISLANDS,

Plaintiff,

v.

LAO QIONG XAO, LI HONG, and
ZHANG DAO QIAN,

Defendants.

Criminal Case No. 99-016

**ORDER DENYING MOTION
TO DISMISS**

I. PROCEDURAL BACKGROUND

This matter came before the Court on March 3, 1999, in Courtroom A on Defendants' motion to dismiss. Aaron Williams, Esq. appeared on behalf of Plaintiff. David A. Wiseman, Esq. appeared on behalf of Defendants. The Court, having reviewed the memoranda, declarations, and exhibits, having heard and considered the arguments of counsel, and being fully informed of the premises, now renders its written decision.

[p. 2]

II. FACTS

On October 24, 1998, the Attorney General filed a petition for order to show cause why Defendant Lao Qiong Xiao (hereinafter referred to as "Defendant") should not be deported.¹ The petition alleged, among other things, that Defendant was found working illegally for Man On Enterprise, Inc. in Garapan, Saipan.

¹ See Civil Action No. 98-1189.

FOR PUBLICATION

On January 7, 1999, Defendant and the Attorney General entered into a stipulation whereby the parties agreed that the deportation case against Defendant be dismissed. However, on January 15, 1999, the Attorney General filed a criminal information against Defendant alleging one count of unlawful employment by an alien under 3 CMC § 4361(f) and two counts of perjury under 6 CMC § 3306.

On February 17, 1999, Defendant filed the instant motion to dismiss contending that the Attorney General waived prosecution under 3 CMC § 4361(f) by electing to proceed with a deportation case against Defendant.²

III. ISSUES

1. Whether the government waived prosecution by pursuing the deportation case against Defendant?

IV. ANALYSIS

A. Waiver

Defendant contends that the government waived its right to prosecute her under 3 CMC § 4361(f) by electing to proceed with a deportation action. As such, the criminal action must be dismissed.

[p. 3] 3 CMC § 4361(f) provides as follows:

Any alien who is employed by another or is self-employed within the Commonwealth without lawful documentation and authority to be so employed is guilty of the misdemeanor of unlawful and undocumented employment by an alien, and upon conviction thereof shall be imprisoned for not more than six months, or fined not more than \$500.00, or both. *At the discretion of the Attorney General, any alien believed to be in violation of this section may be subjected to deportation proceedings as an undesirable alien in lieu of prosecution.*

3 CMC § 4361(f)(emphasis added).

In the case at bar, Defendant contends that the government is estopped from prosecuting her under 3 CMC § 4361(f) as the government opted to deport her “in lieu of prosecution”. However,

² Although the caption in this criminal matter includes three named defendants, only Defendant Lao Qiong Xao is the subject of the instant motion. Arrest warrants remain outstanding for the other two defendants. The Court also notes that the instant motion originally included, as a secondary argument, an allegation that the government’s outrageous conduct violated Defendant’s due process rights. However, this argument was orally withdrawn by defense counsel at the hearing on the motion.

the Court is not persuaded by this argument. First, the Court finds nothing in the language of 3 CMC § 4361(f) prohibiting the government from pursuing criminal charges merely because civil deportation proceedings were pursued “in lieu of” prosecution. It is well settled that the government may have both a civil and a criminal cause of action as a result of a single factual situation. United States v. Ursery, ___ U.S. ___, 116S.Ct. 2135, 2140, 135 L.Ed.2d 549 (1996)(civil forfeiture actions and criminal prosecutions arising out of same conduct); United States v. National Ass’n of Real Estate Bds., 339 U.S. 485, 493, 70 S.Ct. 711, 716-717, 94 L.Ed. 1007 (1950)(civil and criminal actions for violation of Sherman Act); Helvering v. Mitchell, 303 U.S. 391, 397, 58 S.Ct. 630, 632, 82 L.Ed. 917 (1938)(civil assessment for tax fraud and crime of tax evasion). Second, the civil deportation case and the subsequent criminal case do not involve the same cause of action. Defendant is charged in the criminal matter for allegedly violating 3 CMC § 4361(f), whereas the deportation proceeding was brought under 3 CMC §§ 4340(e), 4340(f), and 4437(e). Finally, in order for a stipulated judgment to have some type of estoppel effect, it must clearly show that the parties intended to foreclose particular issues in future litigation. United States v. Brekke, 97 F.3d 1043, 1049 (8th Cir.1996)(government stipulated to dismissal of civil action without relinquishment to prosecute). Here, the government made no factual concessions in its stipulated dismissal. The only facts contained in the stipulated dismissal are that the matter be dismissed, the bail be exonerated, and that Defendant’s passport be returned.

V. CONCLUSION

For all the reasons stated above, Defendant’s motion to dismiss is **DENIED**.

So ORDERED this 14 day of April, 1999.

/s/ Timothy H. Bellas _____

TIMOTHY H. BELLAS, Associate Judge