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UNITED STATES DEPARTMENT OF AGRICULTURE

BEFORE THE SECRETARY OF AGRICULTURE

In re:	)	
	)	
GRETCHEN MOGENSEN,	)	AWA Docket No. 16-0042
	)	
Respondent	)	

DECISION AND ORDER GRANTING
RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Introduction

The Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes [Rules of Practice], set forth at 7 C.F.R. § 1.130 *et seq.*, apply to adjudication of the instant matter. This case involves a letter filed by pro-se petitioner Gretchen Mogensen [Petitioner] upon her objection to the United States Department of Agriculture's [USDA] [Respondent] denial of her application for an exhibitor's license under the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) [Act or AWA].

The AWA vests USDA with the authority to regulate the transportation, purchase, sale, housing, care, handling, and treatment of animals subject to the Act. Pursuant to the AWA, persons who sell and transport regulated animals, or who use animals for research or exhibition, must obtain a license or registration issued by the Secretary of USDA. 7 U.S.C. § 2133. Further, the AWA authorizes USDA to promulgate appropriate regulations, rules, and orders to promote the purpose of the Act. 7 U.S.C. § 2151. The Act and regulations fall within the enforcement authority of the Animal and Plant Health Inspection Service [APHIS], an agency of USDA. APHIS is the agency tasked to issue licenses under the AWA.

This matter is ripe for adjudication, and this Decision and Order[1] is based upon the documentary evidence and arguments of the parties as I have determined that summary judgment is the appropriate method of disposition of this case.

Issue

The primary issue is whether, considering the record, summary judgment may be entered in favor of USDA and Petitioner's request for a hearing may be dismissed.

Procedural History

On October 8, 2014, Petitioner submitted to APHIS an application for a Class C Exhibitor's license under the AWA. By letter dated December 28, 2015, APHIS denied Petitioner's application.

On February 1, 2016, Petitioner filed with the Hearing Clerk for the Office of Administrative Law Judges [OALJ] [Hearing Clerk] a letter objecting to APHIS's denial and requesting a hearing before OALJ.[2] On February 25, 2016, counsel for Respondent filed a "Response to Petitioner's January 28, 2016, Letter."

By order issued June 16, 2016, I set a schedule for the exchange and filing of evidence by the parties. On July 18, 2016, Respondent filed a "Request to Modify Order," which I granted by order dated July 22, 2016.

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[1] In this Decision and Order, documents submitted by Petitioner shall be denoted as "PX-#," and documents submitted by Respondent shall be denoted as "RX-#."

[2] Although it does not expressly request a hearing, the end of Petitioner's letter reads: "I am prepared to further discuss and answer any concerns USDA may have about my qualifications or past work history. I am available at your convenience. Thank you in advance for your consideration of this matter." Additionally, in correspondence to Petitioner dated February 5, 2016, the Assistant Hearing Clerk referred to Petitioner's letter as "the Request for Hearing." In consideration of the foregoing, I deem Petitioner's letter a request for hearing.

On October 3, 2016, Respondent filed a Motion for Summary Judgment, together with supporting documentation and affidavits. On October 4, 2016, the Hearing Clerk sent Petitioner a copy of the Motion for Summary Judgment via certified mail. The Motion was returned unclaimed on October 27, 2016 and, pursuant to section 1.147 of the Rules of Practice (7 C.F.R. § 1.147(c)(2)), the Hearing Clerk remailed the Motion to the same address by regular mail on November 1, 2016. As of this date, Petitioner has not filed a response to the Motion.[3] Regardless, the record is sufficiently developed to allow me to conclude there are no material facts in dispute and that entry of summary judgment in favor of Respondent is appropriate.

All documents are hereby admitted to the record.

Summary of the Evidence[4]

Documentary Evidence

RX-1	Application for License, dated 10/08/2014
RX-2	Letter from APHIS to Petitioner denying Petitioner's license application, dated 12/28/2015
RX-2(a)	Business Entity Details – SCC e-File, dated 09/29/2106
RX-3	Affidavit of Karl Mogensen, dated 02/14/2015
RX-4	APHIS Inspection Report, dated 03/09/2015

[3] When a motion for summary judgment has been sent by certified or registered mail and returned as unclaimed or refused, "it shall be deemed to received by such party on the date of remailing by ordinary mail to the same address." 7 C.F.R. § (1.147(c)(1)). In this case, the Motion for Summary Judgment was remailed by ordinary mail to the same address on November 1, 2016. Petitioner had twenty (20) days from the date of remailing to file a response. Weekends and federal holidays shall be included in the count; however, if the due date falls on a Saturday, Sunday, or federal holiday, the last day for timely filing shall be the following work day. 7 C.F.R. §§ 1.147(g), (h). In this case, Petitioner's response was due on November 21, 2016 but no response was filed.

[4] This summary judgment relies upon the pleadings and upon declarations and documentary evidence attached to Respondent's Motion.

RX-5 Affidavit of Jessica C. Jimerson, dated 01/28/2015

RX-6 Letter from APHIS to Petitioner ("RE: DANGEROUS ANIMAL LETTER"), dated 08/24/2015

On or about October 8, 2014, Petitioner submitted an application for an AWA exhibitor's license for a "corporation" identified as "Zoo Impressions, LLC." RX-1. Petitioner named herself as the owner of Zoo Impressions, LLC and indicated that the "largest number of animals" she "held, owned, leased or exhibited" during the previous business year was one ("wild/exotic" feline). RX-1. The AWA application stated listed the address of Zoo Impressions, LLC as 5943 South Lee Highway, Natural Bridge, Virginia 24578. RX-1.

By letter dated December 28, 2015, APHIS denied Petitioner's application on the grounds that the application was defective[5] and that APHIS had "reason to believe that [Petitioner] was unfit to be licensed, and that the issuance of a license to [Petitioner] would be contrary to the purposes of the Act." RX-2. Specifically, APHIS found that Petitioner had "mishandled a DeBrazza monkey while attempting to file down the animal's teeth." RX-2.

In her letter filed February 1, 2016, Petitioner admitted that her application for an AWA exhibitor's license had been denied. Petitioner admitted that she was advised to make changes to her application or "fill out another one." With regard to APHIS's charge that Petitioner was unfit to be licensed due to Petitioner's mishandling of a DeBrazza monkey, Petitioner claimed that she had "provided an affidavit regarding the handling of the primate." Petitioner did not, however, file a copy of the affidavit with the Hearing Clerk. Additionally, Petitioner admitted that she "acted under the direct order, aid and supervision of the park manager and veterinary technician" and that

[5] APHIS stated that Petitioner's application was "incomplete and contain[ed] conflicting information about the identity of the applicant." PX-2. APHIS noted that Block 7 of the application identified the applicant as a corporation while the name in Block 1 of the application was "Gretchen K. Mogensen." RX-1, RX-2.

she was "no longer employed with that park" and "left the facility due to various concerns [she] had with their housing and care protocols or lack thereof."

The handling at issue is described in an APHIS Inspection Report dated March 9, 2015, which references a video showing an "extremely agitated" DeBrazza monkey in an "undersized pet carrier . . . exhibiting signs of behavioral distress during attempts at provided a medical treatment by facility staff." RX-4 at 13. According to the Inspection Report, the video showed, among other things, "the monkey being repeatedly jabbed with sticks" in an effort to move the monkey from "an airline-type plastic pet carrier" and into "a small squeeze cage." RX-4 at 13. The Inspection Report indicates that "facility personnel" made loud noises "in apparent attempts to scare the monkey into the squeeze cage," and in turn the monkey began to "frantically" move back and forth in the small carrier. RX-4 at 13. Additionally, Petitioner admitted in her February 1, 2016 letter that she "acted under the direct order, aid and supervision of the park manager and veterinary technician" and that she was "no longer employed with that park" and "left the facility due to various concerns [she] had with their housing and care protocols or lack thereof."

Legal Standards

Summary judgment is proper in cases where there is "no genuine issue as to any material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). An administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery, or other materials show that there is no genuine issue as to any material fact. *Veg-Mix, Inc. v. United States Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987) (affirming the Secretary of Agriculture's use of summary judgment under the Rules and rejecting Veg-Mix, Inc.'s claim that a hearing was required because it answered the complaint with a denial of the allegations); FED. R. CIV. P. 56(c).

An issue is "genuine" if sufficient evidence exists on each side so that a rational trier of fact could resolve the issue either way, and an issue of fact is "material" if under the substantive law it is essential to the proper disposition of the claim. *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 4 664, 670 (10th Cir. 1998). The mere existence of some factual dispute will not defeat an otherwise properly supported motion for summary judgment because the factual dispute must be material. *Schwartz v. Brotherhood of Maintenance Way Employees*, 264 F.3d 1181, 1183 (10th Cir. 2001).

The usual and primary purpose of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477, U.S. 317, 323-34 (1986). If the moving party properly supports its motion, the burden shifts to the non-moving party, who may not rest upon the mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial. *Muck v. United States*, 3 F.3d 1378, 1380 (10th Cir. 1993). In setting forth these specific facts, the non-moving party must identify the facts by reference to affidavits, deposition transcripts, or specific exhibits. *Adle*r, 144 F.3d at 671. The non-moving party cannot rest on ignorance of facts, on speculation, or on suspicion and may not escape summary judgment in the mere hope that something will turn up at trial. *Conaway v. Smith*, 853 F.2d 789, 793 (10th Cir. 1988). However, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 242-43 (1986).

Here, APHIS denied the license application primarily on the grounds that Petitioner was found unfit to be licensed and that to issue a license to Petitioner would be contrary to the purposes of the AWA. Pursuant to 9 C.F.R. § 2.11(a), a license shall not be issued to any applicant who:

> (6) Has made any false or fraudulent statements or provided any false of fraudulent records to the Department or other government agencies, or who has pled *nolo*

> *contendre* (no contest) or has been found to have violated any Federal, State, or local laws or regulations pertaining to the transportation, ownership, neglect, or welfare of animals, or is otherwise unfit to be licensed and the Administrator determines that the issuance of a license would be contrary to the purposes of the Act.

9 C.F.R. § 2.11(a)(6).

Discussion

The facts in this license-denial case are not in dispute. It is plain that APHIS properly denied Petitioner's application for an AWA exhibitor's license and that a hearing is not necessary.

APHIS denied Petitioner's license application on the grounds that: (1) Petitioner's application was incomplete and contained "conflicting information about the identity of the applicant"; and (2) Petitioner was unfit to be licensed and that for APHIS to issue a license to her would be "contrary to the purposes of the Act." The denial letter continued: ". . . [E]vidence shows that on or about May 20, 2014, [Petitioner] mishandled a DeBrazza monkey while attempting to file down the animal's teeth." RX-2 at 1.

The record establishes that Petitioner's license application was defective. Upon examination of the application, it is evident that the submitter sought a license for Zoo Impressions, LLC rather than for Petitioner as an individual. According to the Secretary of State for the Commonwealth of Virginia, the limited-liability company known as Zoo Impressions, LLC (SCC ID: S4584068) was formed by Petitioner on June 10, 2013, with Petitioner as its registered agent. RX-3. The address of Zoo Impressions, LLC is the same address that appears on the AWA application. Zoo Impressions, LLC, however, is no longer chartered as a limited-liability company according to the Secretary of State, whose website shows the entity as "Canceled." RX-3. Pursuant to AWA regulations, a license may only be issued to a "person." 7 C.F.R. § 2.1(a). According to the Act, the term "person" includes "any individual, partnership, firm, joint-stock company,

corporation, association, trust, estate, or other legal entity." 7 U.S.C. § 2132(a); *see also* 9 C.F.R. § 1.1. Zoo Impressions, LLC is no longer a legal entity and therefore cannot be licensed.

Petitioner argues in her February 2016 letter that, at the time her license application was submitted, the information provided on it was correct. She argues that Dr. Ellen Magid advised her "it would be best to fill out another application" but that she never received a new application package. Petitioner argues that her attempts to contact Dr. Ellen Magid about not receiving the new application were met with "little response and no reply." Although Petitioner's explanation is understandable, it does not alter the fact that the sole application on file with APHIS was incomplete or inaccurate.

Further, the record establishes that APHIS had reason to find Petitioner unfit to be licensed under the AWA. Respondent submitted two APHIS inspection reports documenting Petitioner's mishandling of animals, such as a DeBrazza monkey, and other violations of AWA regulations (RX-4); these inspection reports were further supported by affidavits of Karl Mogensen (RX-3) and Jessica Jimerson (RX-5), along with correspondence by APHIS addressed to Petitioner (RX-2, RX-6). I find this evidence sufficient to support APHIS's determination to deny Petitioner's application and a proper exercise of USDA's authority to regulate the AWA.

Furthermore, Petitioner has failed to file any documents or pleadings that would rebut Respondent's Motion for Summary Judgment. I find that the record is sufficiently developed to conclude that entry of summary judgment in favor of Respondent is appropriate.

Based upon the foregoing, I find that a hearing is not necessary in this matter. Accordingly, Petitioner's request for hearing shall be denied.

Findings of Fact

1. Petitioner Gretchen Mogensen is an individual with a mailing address in Virginia.

2. On or about August 8, 2014, Petitioner submitted an application to APHIS for an Animal Welfare Act exhibitor's license for an entity identified on the application as "Zoo Impressions, LLC." RX-1. A review of the application indicates that it seeks a license for Zoo Impressions, LLC and not for Petitioner as an individual. Petitioner identified herself as the owner of Zoo Impressions, LLC. RX-1.
3. The limited-liability company known as Zoo Impressions, LLC (SCC ID: S4584068) was formed by Petitioner on June 10, 2013, with Petitioner as its registered agent. RX-2(a) at 1.
4. The AWA application stated the address of Zoo Impressions, LLC as 5943 South Lee Highway, Natural Bridge, Virginia 24578. RX-1. The address of Zoo Impressions, LLC is the same address that appears on the AWA application.
5. Zoo Impressions, LLC is no longer chartered as a limited liability company according to the Secretary of State, which shows that entity as "Canceled." RX-3. Pursuant to the AWA, Zoo Impressions, LLC is no longer a legal entity and therefore cannot be licensed. 7 U.S.C. § 2132(a); 9 C.F.R. § 2.1(a).
6. By letter dated December 28, 2015, APHIS denied Petitioner's application because the application was defective and APHIS considered Petitioner unfit to be licensed. RX-2.
7. APHIS denied Petitioner's application for good cause.

Conclusions of Law

1. The Secretary, USDA, has jurisdiction in this matter.
2. The material facts involved in this matter are not in dispute, and the entry of summary judgment in favor of Respondent is appropriate.
3. APHIS's denial of a license to Petitioner, pursuant to 9 C.F.R. § 2.11(a)(6), promotes the remedial nature of the AWA and is hereby AFFIRMED.

ORDER

1. Respondent's Motion for Summary Judgment is hereby GRANTED.

2. Petitioner's request for a hearing is hereby DISMISSED, with prejudice.

This Decision and Order shall be final and effective without further proceedings thirty-five (35) days after service unless an appeal to the Judicial Officer is filed with the Hearing Clerk within thirty (30) days after service, pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

Copies of this Decision and Order shall be served by the Hearing Clerk upon each of the parties with courtesy copies provided via email where available.

Done at Washington, D.C.,
this 22nd day of March, 2017

[redacted]

Bobbie J. McCartney
Chief Administrative Law Judge

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