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A Lesser-Known Immigration Crisis: Federal Immigration Law in the Commonwealth of the Northern Mariana Islands

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A LESSER-KNOWN IMMIGRATION CRISIS: FEDERAL IMMIGRATION LAW IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

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Abstract: After voluntarily entering into a political union with the United States, the Commonwealth of the Northern Mariana Islands ("CNMI") administered its own immigration system and allowed thousands of guest workers to enter and remain indefinitely. Guest workers contributed to the exponential growth of the CNMI economy during the 1980s and 1990s. However, labor and human rights abuses under this system led to public outrage in the mainland United States, prompting numerous attempts to bring the CNMI within the jurisdiction of federal immigration law. Federalization occurred after Congress passed the Consolidated Natural Resources Act of 2008 ("CNRA"). Although well intentioned, the existing federalization program places thousands of legal guest workers in an extremely precarious situation. This comment argues that Congress should pass additional legislation granting permanent resident status to long-term CNMI guest workers.

I. INTRODUCTION

On November 20, 2009, a man checked out two weapons from a firing range on Saipan, the largest island of the United States Commonwealth of the Northern Mariana Islands ("CNMI").[1] He killed two employees[2] and then turned the guns on two nearby children.[3] He then fled the scene and drove to the northern end of the island, where he opened fire on a group of Korean tourists.[4] He ultimately committed suicide on Banzai Cliff, the site of a mass suicide of Japanese troops during the Battle of Saipan in 1944.[5]

The gunman, Lee Zhong Ren,[6] was one of the thousands of guest workers who entered the CNMI under its own unique immigration laws, which until recently were not subject to federal control.[7] Guest workers like Lee came to the CNMI for employment during a major economic expansion

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1 *Gunman Opens Fire on Pacific Island Saipan: 5 Dead*, ASSOCIATED PRESS, Nov. 20, 2009.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Rampage Takes 4 Lives on Resort Isle*, ASSOCIATED PRESS, Nov. 21, 2009.

6 *ROK Daily: Saipan Shooting Spree Gunman Was Korean Chinese*, WORLD NEWS CONNECTION, Nov. 23, 2009.

7 *See* Amended Complaint for Declaratory and Injunctive Relief at ¶ 2, *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7 (D.D.C. 2009) (No. 08-CV-1572 (PLF)) ("Foreign workers today make up a full two-thirds of the CNMI's working population.")

in the 1980s and 1990s, which was founded on garment manufacturing and tourism.[8]

However, this rapid economic expansion did not last. Following the 1997 Asian Financial Crisis and subsequent external shocks, the CNMI economy went from "bleak to bleaker."[9] After the collapse of the garment industry, tourism is the one remaining prong of the CNMI economy.[10] The emergence of one news story like the Lee rampage jeopardizes future tourist arrivals, underscoring the fragility of the entire CNMI economy.[11] Economic uncertainty has caused widespread despair among the guest worker population, including the breakdown of shooter Lee Zhong Ren.[12]

Against this backdrop of economic uncertainty, on November 28, 2009, U.S. immigration law came into effect in the CNMI for the first time[13] following the enactment of the Consolidated Natural Resources Act of 2008 ("CNRA").[14] This law extended the Immigration and Nationality Act ("INA") to the CNMI and terminated the CNMI's own immigration regime.[15] The CNRA is designed to prevent the reoccurrence of highly publicized labor and human rights abuses against CNMI guest workers that took place during the past two decades.[16] However, federalization has created significant uncertainty for guest workers, most of whom do not qualify for a U.S. visa despite their long-term legal residency in the CNMI.[17] The new law splits guest worker parents from their U.S. citizen children.[18] It

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[8] *Id.*

[9] Leroy O. Laney, *CNMI Economic Outlook in 2009: Going From Bleak to Bleaker*, FIRST HAWAIIAN BANK ECONOMIC FORECAST, 2009 GUAM-CNMI EDITION at 7, http://www.fhb.com/pdf/EconomicForecastGuam2009.pdf (last visited Nov. 13, 2010).

[10] U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-751, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: MANAGING POTENTIAL IMPACT OF APPLYING U.S. IMMIGRATION LAW REQUIRES COORDINATED FEDERAL DECISIONS AND ADDITIONAL DATA 59 (2008) [hereinafter GAO Report], *available at* http://www.gao.gov/new.items/d08791.pdf. The Government Accountability Office (GAO) is an arm of the U.S. Congress that performs research on the legal status and effects of legislation.

[11] *See id.*

[12] Lee's will stated, "Negotiations for business have failed." WORLD NEWS CONNECTION, *supra* note 6.

[13] *See* 74 Fed. Reg. 55095 (Oct. 27, 2009).

[14] Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, 122 Stat. 754-876 [hereinafter CNRA].

[15] *See generally id.*

[16] *See generally* HOUSE COMMITTEE ON NATURAL RESOURCES AND GEORGE MILLER, BENEATH THE AMERICAN FLAG (1998), *available at* http://www.barryyeoman.com/pdfs/CNMI.pdf (last visited Nov. 13, 2010); Statement of David B. Cohen, Deputy Assistant Security of the Interior for Insular Affairs, on H.R. 3079, Northern Mariana Covenant Implementation Act and Northern Mariana Islands Delegation Act, to The House Committee on Natural Resources and Subcommittee on Insular Affairs (Aug. 15, 2007) [hereinafter Cohen Statement 1].

[17] GAO Report, *supra* note 10, at 80.

[18] *See infra* Part IV.A.

deprives the CNMI of the workforce it needs to rebuild its economy,[19] and the CNMI government alleges that it constitutes the greatest federal intrusion into local affairs to date.[20]

This comment argues that although federalization was well intentioned, it subjects thousands of legal CNMI guest workers to deportation after November 28, 2011 through no fault of their own.[21] The existing legislation also imposes a number of handicaps on guest workers, including an inability to leave and re-enter the CNMI.[22] To remedy these serious omissions, Congress should pass new legislation to grant permanent resident status to long-term CNMI guest workers.

Part II introduces the history of the CNMI and its relationship with the United States, discusses the former CNMI immigration regime, and outlines the changes made by the CNRA. Part III discusses the more technical aspects of federalization, including Congress's attempts at flexibility and areas where this approach fell short. Part IV argues that the current approach does not resolve the long-term status of CNMI guest workers, and that Congress should enact legislation to do so. Part V concludes that without change, federalization could impose an extreme and irrational injustice upon thousands of legal guest workers who contributed greatly to the development of the CNMI, while preventing the CNMI from maintaining the labor force it needs to improve its economic condition.

II. FEDERALIZATION DRAMATICALLY CHANGED IMMIGRATION LAW IN THE CNMI

This section introduces the history of the CNMI and its political relationship with the United States. It describes the previous CNMI immigration regime and discusses the events that led to federalization. It also explains the details of the new federal law.

A. The History of the CNMI and Its Relationship with the United States Create a Unique Context for Federalization

A summary of the history of the CNMI and its relationship with the United States is necessary to appreciate the significance of the CNRA. The CNMI is an archipelago of fourteen Pacific islands located north of the

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[19] *See* GAO Report, *supra* note 10, at 36-38.
[20] *See* Amended Complaint for Declaratory and Injunctive Relief, *supra* note 7, at ¶ 3.
[21] *See infra* Part III.C.
[22] *See infra* Part III.B.

United States territory of Guam.[23] The United States conquered this archipelago during World War II.[24] After the war ended, the United Nations established the Trust Territory of the Pacific Islands ("TTPI"), which included the modern-day CNMI.[25] Under an agreement with the U.N. Security Council, the United States became the trustee to administer the TTPI.[26] Although other TTPI states chose to declare independence upon termination of the trusteeship, the CNMI voluntarily sought closer ties to the United States.[27]

The United States and the CNMI began treaty negotiations in 1972, which culminated in the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant").[28] The CNMI legislature unanimously approved the Covenant,[29] and after favorable consideration by the U.S. Senate, President Gerald Ford signed it into law in 1976.[30]

The Covenant contains ten articles that govern the relationship between the United States and the CNMI.[31] The Covenant is "mutually binding" and constitutes "a sovereign act of self-determination."[32] Under the Covenant, the CNMI is "a self-governing commonwealth . . . in political union with and under the sovereignty of the United States of America."[33]

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[23] Department of the Interior – Office of Insular Affairs, Insular Area Summary for the Northern Mariana Islands, http://www.doi.gov//oia/Islandpages/cnmipage.htm (last visited Nov. 13, 2010).

[24] THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS, WELCOMING AMERICA'S NEWEST COMMONWEALTH: THE SECOND INTERIM REPORT OF THE NORTHERN MARIANA ISLANDS COMMISSION ON FEDERAL LAWS TO THE CONGRESS OF THE UNITED STATES 13-14 (1985).

[25] *See United States v. De Leon Guererro*, 4 F.3d 749, 751 (9th Cir. 1993). The TTPI also included several modern-day sovereign nations including the Federated States of Micronesia, the Republic of Palau, and the Republic of the Marshall Islands.

[26] *Id.*; Trusteeship Agreement for the Former Japanese Mandated Islands, Jul. 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, art. 3. President Truman approved the Agreement on Jul. 18, 1947, pursuant to the authority of a joint resolution of Congress on the same date. 61 Stat. 397 (1947).

[27] *De Leon Guererro*, *supra* note 25, at 751.

[28] *Id.*

[29] *Id.*

[30] *See id.*; Act Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241, 90 Stat. 263 (1976) [hereinafter Covenant].

[31] *De Leon Guererro*, *supra* note 25, at 752. For further information regarding this topic, *see id.* at 754 ("The Covenant has created a 'unique' relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations."); *See also Eche v. Holder*, No. 010-00013, 2010 WL 3911274 at *5 (D. N. Mar. I. Oct. 7, 2010).

[32] Covenant, *supra* note 30, preamble.

[33] Covenant, *supra* note 30, art. I, § 101.

Although the CNMI retained a right of "local self-government,"[34] it became an "insular area" of the United States.[35]

Under the Covenant's mutual consent provision, Congress agreed to limit its exercise of legislative authority over the CNMI with respect to "fundamental provisions" of the Covenant, including Articles I,[36] II,[37] III,[38] and Sections 501[39] and 805,[40] unless the CNMI provides its consent. Article III conferred United States citizenship on almost all CNMI residents upon termination of the TTPI,[41] and grants citizenship at birth to all persons born in the CNMI,[42] including the children of guest workers. The Covenant also renders several significant federal laws inoperable within the CNMI unless Congress specifically applies them.[43]

B. The Covenant Allowed the CNMI to Administer Its Own Immigration System, Which Was Criticized for Labor and Human Rights Abuses

After signing the Covenant, CNMI leaders sought to boost the local standard of living to that of the mainland United States, despite the small island economy and the lack of an adequate labor force.[44] The Covenant provided the means to do so. Since the Covenant exempted the CNMI from federal immigration law and the minimum wage provisions of the Fair Labor

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[34] Covenant, *supra* note 30, art. I, § 103. The Covenant does not expressly define "local self-government, and this term has been the subject of litigation. *See infra* Part III.B.

[35] An "insular area" is a jurisdiction that is neither part of one of the several states nor a federal district, while still within the sovereignty of the United States. The CNMI, Guam, American Samoa, Puerto Rico, and the U.S. Virgin Islands are among the insular areas of the United States. Department of the Interior – Office of Insular Affairs, Definitions of Insular Area Political Organizations, *available at* http://www.doi.gov/oia/Islandpages/political_types.htm.

[36] Article I governs the political relationship between the CNMI and the United States. It brings the CNMI under the sovereignty of the United States while granting the CNMI a right to local self-government.

[37] Article II enables the CNMI to enact a constitution and creates a tripartite government.

[38] Article III governs immigration and naturalization.

[39] Section 501 incorporates some provisions of the U.S. Constitution in the CNMI.

[40] Section 805 allows the CNMI to prevent the sale of real property to individuals who are not of indigenous Chamorro or Carolinian descent.

[41] Covenant, *supra* note 30, art. III, §§ 301-302. The TTPI terminated with respect to the CNMI on Nov. 3, 1986. *See* Pres. Proc. No. 5564 of Nov. 3, 1986, 51 Fed. Reg. 40399 (codified at 48 U.S.C. § 1801 note).

[42] Covenant, *supra* note 30, art. III, § 303.

[43] Covenant, *supra* note 30, art. V, § 503.

[44] The TTPI administration was criticized for its restrictive economic policies, which prevented off-island investors from bringing funds into the islands, and barred even U.S. citizens from visiting or investing. Motion for a Preliminary Injunction at 14, *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7 (D.D.C. 2009) (No. 08-CV-1572 (PLF)); Santos Decl. at ¶ 9, *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7 (D.D.C. 2009) (No. 08-CV-1572 (PLF)).

Standards Act,[45] the CNMI was able to import labor from neighboring Pacific Rim countries for wages far below those of the mainland United States. The Covenant also provided an exemption from Jones Act cabotage shipping laws[46] and an exclusion from the U.S. customs area,[47] while the federal government provided tariff-free access to the U.S. market.[48]

Since the low local wages were unappealing to American workers,[49] the CNMI sought to attract a labor force comprised of guest workers from nearby countries.[50] In 1983, the CNMI legislature created several nonimmigrant guest worker visa classifications that remained central to CNMI immigration law until federalization in 2008.[51] The "K Permit" classification enabled guest workers to enter and remain indefinitely, subject to employment by an enterprise approved by the CNMI Department of Labor.[52] No equivalent status exists in U.S. federal immigration law.[53]

This strategy proved highly effective in attracting workers from countries such as the Philippines, China, Korea, and Vietnam.[54] Guest workers became the majority of the CNMI labor force and enabled the CNMI to build a successful economy based on garment manufacturing and tourism.[55] Economic growth was exponential. Between 1980 and 1995, the CNMI boasted one of the world's fastest growing economies, with an average employment growth rate of 12.7% per annum.[56] By 1999, the garment industry directly employed about 13,500 guest workers and 2,500 CNMI citizens.[57] Growth in the tourism industry was also strong, and the number of visitors rose from 110,755 in 1980 to 726,690 by 1997.[58]

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[45] Covenant, *supra* note 30, art. V, § 503(a)-(c).

[46] Covenant, *supra* note 30, art. V, § 503(b); 46 U.S.C. § 55101 (2006). The Jones Act requires shipping between two ports within the United States (cabotage) to be handled by U.S.-built and flagged vessels.

[47] Covenant, *supra* note 30, art. VI, § 603.

[48] *See* United States International Trade Commission, Harmonized Tariff Schedule of the United States, General Notes, 3(a)(iv) (2010), *available at* http://www.usitc.gov/publications/docs/tata/hts/bychapter/1000gn.pdf#page=3.

[49] *See* Decl. of Jacinta Kaipat at ¶ 19, *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7 (D.D.C. 2009) (No. 08-CV-1572 (PLF)).

[50] *Id.* at ¶ 24.

[51] *See* Commonwealth Entry and Deportation Act of 1983, N. Mar. I. Pub. L. 3-105, §6(c); *See also* Non-resident Worker Act, N. Mar. I. Pub. L. 3-66 (1983).

[52] *See* GAO Report, *supra* note 10, at 17-18.

[53] *Id.*

[54] Decl. of Jacinta Kaipat, *supra* note 49, at ¶ 20.

[55] GAO Report, *supra* note 10, at 73.

[56] *Id*.

[57] *Id*.

[58] *See* Decl. of Perry Tenorio attachment, *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7 (D.D.C. 2009) (No. 08-CV-1572 (PLF)).

Although it was successful in achieving growth, the CNMI economy became fraught with highly publicized labor and human rights violations. Conditions for guest workers were often extremely difficult. Reports from Saipan described long hours without weekends or holidays,[59] squalid living conditions,[60] and a feeling of political and social powerlessness.[61] Unable to repay hefty recruiting fees through virtual indentured servitude,[62] many workers were forced into prostitution.[63]

It is not difficult to find heart-wrenching stories. For example, Kayleen Entena, a twenty-three-year-old guest worker from the Philippines, testified that as recently as September 2005, she was recruited to work in Saipan with the promise of employment in the restaurant industry.[64] Upon arrival, her supervisor did not provide the promised employment.[65] Instead, she ordered Entena to perform sexual favors for customers, and informed Entena that waitressing would not cover her immigration and labor fees.[66] These and similar accounts raised red flags in Congress regarding the institutional capacity of the CNMI to prevent further abuses.[67]

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[59] BENEATH THE AMERICAN FLAG, *supra* note 16, at 11.

[60] *Id.* at 12. "In one tin dwelling, three women share a queen-sized bed that rests on a slab of concrete. The smell of frying vegetables wafts through the 'kitchen' - a few hot plates and water-filled plastic buckets outside on a concrete counter. Nine people share one toilet." Rebecca Clarren, *Paradise Lost*, Ms. Magazine, Spring 2006, *available at* http://www.msmagazine.com/spring2006/paradise_full.asp.

[61] Greg Holloway, Comment, *The Effort to Stop Abuse of Foreign Workers in the U.S. Commonwealth of the Northern Mariana Islands*, 6 PAC. RIM L. & POL'Y J. 391, 398-99 (1997). "The utilization of large numbers of indebted foreign workers to work for little money has created a two-tier, caste system within the CNMI. The upper tier consists of the local Chamorro and Carolinian population and other U.S. citizens who control all of the land as well as the political and financial power in the islands. The bottom tier, composed of alien workers existing outside typical legal and financial protections, is in every sense a secondary population with no opportunity to rise economically, politically, or socially." BENEATH THE AMERICAN FLAG, *supra* note 16, at 24.

[62] Farrah-Marisa Chua Short, Comment, *An Experiment in Protecting Workers' Rights: The Garment Industry of the U.S. Commonwealth of the Northern Mariana Islands*, 7 U. PA. J. LAB. & EMP. L. 971, 977 (2005).

[63] Clarren, *supra* note 60.

[64] *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 72 (Feb. 8, 2007) (prepared statement of Kayleen D. Entena, Resident, the Philippines) [hereinafter Entena Statement].

[65] *Id.*

[66] *Id.* Entena was later assisted by neighbors and taken to Guma Esperanza, part of the local equivalent of Catholic Charities and the only such shelter in the CNMI. *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing Before the S. Comm. on Energy and Natural Resources*, 110th Cong. 58-59 (Feb. 8, 2007) (prepared statement of Lauri Ogumoro, Karidat).

[67] *See infra* Part II.D; *See also Oversight Hearing on "The Implementation of Public Law 110-229 to the Commonwealth of the Northern Mariana Islands and Guam: Hearing Before the H. Sub. Comm. on Insular Affairs, Comm. on Natural Resources*, 111th Cong. 1 (May 18, 2010) (statement of Anthony M. Babauta, Assistant Secretary of the Interior).

C. The CNMI Economy Faltered After the 1990s, Yet Thousands of Guest Workers Remained

Despite two decades of rapid expansion, the CNMI economy struggled against significant external challenges after the late 1990s. In 2005, the United States eliminated quotas on textile imports in accordance with its World Trade Organization commitments.[68] When these changes took effect, they destroyed the competitive advantage Saipan had held in garment manufacturing.[69] The CNMI was thrown into open competition with lower wage neighboring countries for exports to the United States.[70] Unable to compete against cheaper competitors, CNMI garment manufacturers slashed employment by ninety-two percent between 2001 and 2008.[71] Saipan's last garment factory closed in 2009.[72]

Tourism, the second prong of the CNMI economy, has also suffered significant declines. Although 726,690 mainly Japanese tourists entered the CNMI in 1997[73] and spent an estimated $581,000,000 in retail stores,[74] the Asian Financial Crisis resulted in a twenty-eight percent reduction in arrivals by 1998.[75] Declines also followed the September 2001 attacks on the United States, the 2003 SARS outbreak, and the withdrawal of Japan Airlines from the CNMI due to the airline's poor financial condition.[76] By 2008, tourist arrivals generally stabilized at 396,497, with most visitors from Japan and South Korea.[77]

After the collapse of the garment industry and reductions in tourism, together accounting for eighty-five percent of all economic activity,[78] the CNMI "descended into an economic depression of substantial proportions."[79] But despite the failing economy, thousands of legal guest workers remained. According to an April 2010 report, 20,654 legal aliens

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[68] GAO Report, *supra* note 10, at 74.
[69] *Id*.
[70] *See id*.
[71] *Id*. The number of garment jobs fell from approximately 21,000 in 2001 to 1,751 by July 2008.
[72] Laney, *supra* note 9, at 7.
[73] Decl. of Perry Tenorio attachment, *supra* note 58.
[74] *Territories of Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands Hearing Before the S. Comm. On Energy and Natural Resources*, 109th Cong. 29 (Mar. 1, 2006) (prepared statement of Hon. Pedro A. Tenorio, Resident Representative to the United States) [hereinafter Tenorio Statement].
[75] Decl. of Perry Tenorio attachment, *supra* note 58.
[76] *Id*.
[77] *Id.*
[78] Tenorio Statement, *supra* note 74, at 31.
[79] Amended Complaint, *supra* note 7, at ¶ 46.

resided in the CNMI, 16,304 of whom were guest workers.[80] In fact, 15,816 guest workers have lived in the CNMI for five or more years, and have become de-facto CNMI permanent residents.[81] With the federalization of CNMI immigration law under the CNRA, these individuals and their families face an uncertain future and potential deportation despite their legal entry into the CNMI, long-term residency, and substantial contributions to the CNMI economy.

D. The Consolidated Natural Resources Act of 2008 Terminated the CNMI Immigration Regime and Established a Transition Period for Federalization

Despite recent improvements in CNMI laws to tackle immigration and labor abuses,[82] Congress remained worried that the local immigration regime could lead to continued harms.[83] In Congressional testimony between 2006 and 2008, federal officials discussed concerns regarding national security,[84] human trafficking,[85] and the inability of the CNMI to adequately enforce its own immigration and labor laws. David Cohen, Secretary of the Department of the Interior ("DOI"), stated that the CNMI "remains a two-tier economy."[86] He argued this structure creates an inherent risk of abuse, as guest workers are more or less an underclass with no permanent immigration

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[80] The remainder of the total 20,654 legal aliens consists of immediate relatives of guest workers and foreign students. SECRETARY OF THE INTERIOR, OFFICE OF INSULAR AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, REPORT ON THE ALIEN WORKER POPULATION IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS 9 (2010) [hereinafter DOI Report], *available at* http://doi.net/oia/reports/042810_FINAL_CNMI_Report.pdf.

[81] *Id*. at 15.

[82] The Commonwealth Employment Act of 2007 contained a variety of favorable provisions for guest workers. The Act required employers to post bonds for the payment of wages, it required the approval of employment contracts by the CNMI Department of Labor, and it required employers to cover the cost of repatriating workers upon termination of the contract. *See* Commonwealth Employment Act, 2007 N. Mar. I. Pub. L. 15-108 (codified at 3 N. MAR I. CODE § 4401). The CNMI legislature also amended the Commonwealth Entry and Deportation Act to tackle criminal immigration abuses such as human trafficking, marriage fraud, and fraudulent recruiting. *See* An Act to Amend the Commonwealth Entry and Deportation Act in the Commonwealth Code, 2006 N. Mar. I. Pub. L. 15-17 (codified at 3 N. MAR. I. CODE §§ 4361-5179).

[83] *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing before the S. Comm. on Energy and Natural Resources*, 110th Cong. 10 (2007) (prepared statement of David B. Cohen, Deputy Assistant Secretary for Insular Affairs, Department of the Interior) [hereinafter Cohen Statement 2].

[84] Cohen Statement 1, *supra* note 16, at 3. The United States may have a greater national security concern in the CNMI at this time due to a buildup of American forces in nearby Guam.

[85] The rate of human trafficking in the CNMI is estimated to be 8.8 to 10.6 times higher than in the United States as a whole. *Id. See also* Entena Statement, *supra* note 64.

[86] Cohen Statement 2, *supra* note 83, at 6.

status or pathway to citizenship despite their long-term residency and substantial economic contributions.[87]

In response to two decades of complaints from labor groups and outraged constituents in the mainland United States, members of Congress introduced several bills to federalize CNMI immigration law.[88] After these bills died in committee,[89] the media attributed this failure to the efforts of disgraced former lobbyist Jack Abramoff on behalf of his CNMI government clients.[90] Two years after Abramoff's convictions for fraud, corruption of elected officials, and tax evasion,[91] the Consolidated Natural Resources Act of 2008 ("CNRA") passed Congress and was signed into law by President George W. Bush.[92]

The CNRA is an omnibus bill[93] addressing many different areas of federal law, including national parks and energy funding.[94] The section relating to the CNMI is known as the "Act to Implement Further the Act Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States America."[95] This section applies the U.S. Immigration and Nationality Act ("INA") to the CNMI and creates a transition plan for its gradual implementation.[96] Application of the INA expressly terminates the CNMI immigration regime[97] and requires all non-citizens in the CNMI to hold a standard federal

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[87] *Id.* at 6-7.

[88] *See, e.g.*, Northern Mariana Islands Delegate Act of 2007, H.R. 3079, 110th Cong. (2007); Northern Mariana Islands Covenant Implementation Act of 2000, S. 1052, 106th Cong. (2000); Insular Fair Wage and Human Rights Act of 1997, H.R. 1450, 105th Cong. (1997); Omnibus Territories Act of 1995, H.R. 602, 104th Cong. (1995). *See also* James Brooke and Kate Zernike, *In Pacific Islands, Mixed Feelings About a Lobbyist's Work*, NEW YORK TIMES, May 6, 2005, *available at* http://www.nytimes.com/2005/05/06/politics/06abramoff.html.

[89] *See* Walter F. Roche, Jr. and Chuck Neubauer, *A Question of Influence*, LOS ANGELES TIMES, May 6, 2005.

[90] *See Id.*

[91] *See United States v. Abramoff*, No. 1:06-CR-00001 (D.D.C. 2006); *United States v. Kidan*, No. 0:05-CR-60204 (S.D. Fla. 2005) (convictions of Jack Abramoff and co-defendant Adam Kidan for wire fraud and mail fraud); *See also Coushatta Tribe of Louisiana v. Abramoff*, No. 07-1886, 2009 WL 2406303 (W.D. La. 2009) (civil action brought by former Abramoff clients); Susan Schmidt and James V. Grimaldi, *Abramoff Pleads Guilty to Three Counts*, WASHINGTON POST, Jan. 4, 2006.

[92] *See* CNRA, *supra* note 14.

[93] An "omnibus bill" packages together several measures into one or combines diverse subjects into a single bill. C-SPAN Congressional Glossary, http://www.c-span.org/guide/congress/glossary/glossary.htm.

[94] *See generally* CNRA, *supra* note 14.

[95] *See Id.*

[96] CNRA Title VII, § 702, which extends the INA to the CNMI, is codified at 48 U.S.C. § 1806.

[97] 48 U.S.C. § 1806(f).

immigration status by the end of the transition period[98] on December 31, 2014.[99]

Since the guest worker classification under former CNMI immigration law has no equivalent status under the INA,[100] the CNRA created a "Commonwealth Only Transitional Worker" classification to last the duration of the transition period ending on December 31, 2014.[101] The CNRA grants sole discretion to the Secretary of the Department of Homeland Security ("DHS") to determine the number, terms, and conditions of Transitional Worker permits to be issued.[102] DHS must ensure that the number of permits is reduced to zero by the end of the transition period.[103] Permit holders are allowed to transfer between employers under the same visa,[104] and can petition for the admission of immediate relatives.[105] Guest workers in the CNMI can also apply for standard U.S. visas during the transition period without regard to the national quota,[106] although few would qualify under the standard U.S. visa classifications because of their occupations in the service industry and lack of specialized training.[107]

The CNRA prevents DHS from deporting guest workers during the first two years of the transition period[108] to provide time for these individuals to obtain a federal status, such as the Transitional Worker permit.[109] This provision prevents DHS from deporting ninety-nine percent of the 20,859 aliens in the CNMI until November 28, 2011 for being present without a federal status under the INA.[110] The CNRA provides no specialized CNMI-

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[98] *See* 48 U.S.C. §1801(a), (d), (e); *See also* GAO Report, *supra* note 10, at 17-19.

[99] 48 U.S.C. § 1806(a)(2).

[100] *See* GAO Report, *supra* note 10, at 17-19.

[101] *See* 48 U.S.C. § 1806(d).

[102] *Id.* For information on how a guest worker would obtain a Transitional Worker permit, *see infra* Part III.A.

[103] *Id.* The CNRA grants broad discretion to the Secretary to achieve this mandate, by using "any reasonable method and criteria." The purpose of reducing the number of such permits to zero is to eliminate any special treatment for the CNMI under federal immigration law.

[104] 48 U.S.C. § 1806(d)(4).

[105] 48 U.S.C. § 1806(d)(6).

[106] 48 U.S.C. § 1806(b).

[107] "Although access to foreign workers in the CNMI will be available through exemptions from the usual caps on H nonimmigrant worker visas during the initial transition period . . . few CNMI foreign workers are likely to meet the requirements for these visas." GAO Report, *supra* note 10, at 80.

[108] Although the CNRA called for a transition period starting date of June 1, 2009, DHS delayed the starting date until November 28, 2009. *See* 48 U.S.C. § 1806(a)(1); Commonwealth of the Northern Mariana Islands Transitional Worker Classification, 74 Fed. Reg. 55094 (Oct. 27, 2009). Therefore, the two-year grace period begins on November 28, 2009 and ends on November 28, 2011.

[109] 48 U.S.C. § 1806(e)(1).

[110] DOI Report, *supra* note 80, at 14.

only visa classifications after the end of the transition period on December 31, 2014.[111]

III. A FAILURE OF ADEQUATE RULEMAKING AND THE LACK OF A LONG-TERM STATUS PROVISION PLACES NEARLY HALF OF THE CNMI POPULATION IN AN EXTREMELY PRECARIOUS SITUATION

The CNRA and its enabling regulations appear reasonable on their face. However, a failure of proper rulemaking led to an injunction against essential regulations to carry out the transition, thereby preventing federalization from moving forward in the short-term. Moreover, the lack of a long-term permanent status provision places half of the CNMI population in an extremely precarious situation.

A. The CNRA and DHS Regulations Attempted to Accommodate Long-Term CNMI Guest Workers

Although the CNRA terminated a well-established local immigration regime and prompted an understandably furious response from the CNMI government,[112] the legislation and its enabling regulations are not patently unreasonable. Congress was aware of the unique status of the CNMI's guest workers, and it provided some flexibility for their transition to a federal status in the short-term. The regulations promulgated by DHS attempted to carry out this directive.

Starting on day one of the transition, November 28, 2009, the CNRA gives guest workers a two-year grace period to obtain a federal status before being subject to deportation for lack of a federal status.[113] Since few CNMI guest workers qualify for standard U.S. visas under the INA,[114] the CNRA creates a temporary transitional worker visa classification for such individuals.[115] The CNRA breathes life into this new visa classification until December 31, 2014, after which DHS may extend it in five-year increments.[116] The CNRA envisions future legislation or rulemaking

[111] 48 U.S.C. § 1806(d)(5). The CNRA does, however, allow DHS to extend the transition period in five-year increments.

[112] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-553, COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: DHS SHOULD CONCLUDE NEGOTIATIONS AND FINALIZE REGULATIONS TO IMPLEMENT FEDERAL IMMIGRATION LAW 17-20, 29-38 (2010) [hereinafter GAO Report 2], *available at* http://www.gao.gov/products/GAO-10-553; *See also infra* Part III.B.

[113] 48 U.S.C. § 1806(e).

[114] GAO Report, *supra* note 10, at 80.

[115] 48 U.S.C. § 1806(d).

[116] *See* 48 U.S.C. § 1806(d)(5)(A).

pertaining to the CNMI's guest worker population, as it instructs the Department of the Interior ("DOI") to submit a report containing the number of aliens residing in the CNMI, a description of their legal status, the number of years each alien has been residing in the CNMI, economic information, and a recommendation as to whether guest workers should be granted permanent resident status.[117]

DHS promulgated an Interim Final Rule to implement the Temporary Worker classification on October 27, 2009.[118] Scheduled for implementation on November 28, 2009,[119] the Rule recognized that guest workers constitute a majority of the CNMI labor force.[120] It created a new CW-1 CNMI-only Temporary Worker visa and a CW-2 visa for dependents.[121] The CW-1 visa would be available to guest workers who are ineligible for other classifications under the INA.[122] Employers would submit a petition for a CW-1 visa on the employee's behalf, certifying that U.S. citizens are not available to perform the same work.[123] DHS would then determine whether the employer is "legitimate," that the business does not engage in prostitution, human trafficking, or other illegal activities.[124] The Rule would not expressly bar any particular type of worker from receiving a CW-1 visa, although DHS expressed concern over dancers, domestic workers, and hospitality workers.[125] CW-1 and CW-2 visas would be renewable annually and would not be valid for travel to any other part of the United States.[126]

Although the federal system envisioned by the CNRA and the Interim Final Permit Rule lacks the laissez-faire approach of the former CNMI immigration regime, the law and the regulation still provide a method for guest workers to obtain a federal status. The Rule accounted for the labor and human rights concerns that precipitated federalization.[127] On its face, this approach appears reasonable. However, a federal court injunction against the Interim Permit Rule and the lack of an established framework for

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[117] *See* 48 U.S.C. § 1806(h).
[118] *See* 74 Fed. Reg. 55094 (Oct. 27, 2009).
[119] *See id*.
[120] *Id.* at 55095.
[121] *Id.* at 55096.
[122] *Id.*
[123] *Id.* at 55096-97.
[124] *Id.*
[125] *Id.* at 55097.
[126] *Id.* at 55100.
[127] *See id.* at 55097. DHS appears to be subjecting applications from dancers, domestic workers, and hospitality workers to increased scrutiny, as workers in these professions have previously been subject to abuse.

the post-transition period threw a monkey wrench into the smooth operation of the transition originally contemplated by Congress.

B. An Injunction Against a Crucial Guest Worker Permit Rule and Unresolved Questions Regarding the Post Transition Period Have Created Extreme Uncertainty for Guest Workers

After Congress passed the CNRA, Governor Benigno Fitial filed suit against the United States on behalf of the CNMI.[128] The complaint alleged that the CNRA violates a provision of the Covenant that provides the CNMI with veto power over legislation involving "local self-government."[129] Initially, Fitial sought to invalidate the CNRA itself.[130] But after DHS promulgated the Interim Final Rule on October 27, 2009 without a notice-and-comment period, Fitial amended his complaint with a second cause of action under the Administrative Procedure Act ("APA").[131]

On November 25, 2009, the U.S. District Court for the District of Columbia issued separate opinions on these issues. The Court dismissed Fitial's statutory challenge under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[132] But in its second opinion, the Court found that Fitial was likely to prevail on his APA claim, and it issued a preliminary injunction barring DHS from administering its Interim Permit Rule scheduled to take effect three days later.[133]

The Court's disapproval of DHS's conduct was clear. Judge Friedman writes in his opinion that DHS failed to present any evidence that it worked diligently to prepare the Interim Permit Rule following passage of the CNRA in May 2008.[134] Instead, the agency waited until one month before the scheduled transition period.[135] DHS published its Rule without

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[128] Named defendants include the United States, DHS, the Secretary of DHS, the U.S. Department of Labor, and the Secretary of the U.S. Department of Labor. *See* Amended Complaint, *supra* note 7.

[129] *Id.* at ¶ 32.

[130] *Id.* at ¶ 103.

[131] *Id.* at ¶¶ 102-03.

[132] *Commonwealth of the Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 91 (D.D.C. 2009) [hereinafter Opinion 1]. In a detailed opinion, Judge Friedman found that the Covenant unambiguously authorized Congress to federalize immigration law in the CNMI, and even if it did not, Congress's action passed the balancing of the interests test introduced by *United States v. De Leon Guererro*, *supra* note 25. *See id.*

[133] *Commonwealth of the Northern Mariana Islands v. United States*, 686 F. Supp. 2d 7, 22 (D.D.C. 2009) [hereinafter Opinion 2].

[134] *Id.* at 15. "In short, the Rule will enact far-reaching changes that likely will have significant effects on the CNMI labor market, and it will do so despite the fact that it has not 'been tested via exposure to diverse public comment.'" *Id.* at 18 (quoting *Environmental Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)).

[135] *Id.* at 15-17.

adhering to the APA's mandatory notice-and-comment procedures, thereby denying affected individuals an opportunity to participate in the rulemaking process.[136] Additionally, the Court found that DHS "failed to comply fully with Congress' intent to secure meaningful involvement of the Commonwealth in the transformation of the CNMI's immigration system."[137]

The Court noted several significant flaws in the Interim Permit Rule. For example, a worker must convince his or her employer to petition DHS for a CW-1 visa, which involves substantial paperwork and an annual fee of $150 per worker.[138] Only after DHS approves the petition can the worker legally leave and re-enter the CNMI or apply for CW-2 dependent visas.[139] It is difficult to fathom why an employer would feel motivated to petition for CW-1 visas when the CNRA prevents deportation of legal guest workers before November 28, 2011.[140]

More significantly, DHS's improper rulemaking and the resulting injunction have prevented guest workers from transitioning to a federal immigration status. As discussed above, the CNRA provided a two-year grace period ending on November 28, 2011 for guest workers to obtain a federal status. The Interim Permit Rule would have provided the means to obtain a federal status before the end of this grace period. But by blocking the Rule, the injunction barred the mechanism through which guest workers would obtain a Transitional Worker status before the November 28, 2011 deadline. As of this writing, DHS has not published a new rule, and has failed to meet its own deadline of September 30, 2010 for doing so.[141]

With the exception of one provision allowing DHS to extend the transition period beyond December 31, 2014 in five-year increments, the existing federalization program does not provide a framework for the long-term integration of guest workers in the CNMI.[142] With the lack of adequate rulemaking for the transition of guest workers to a federal status in the short term and the lack of a long-term vision for the normalization of guest workers under federal law, the futures of thousands of legal CNMI guest workers remain in question.

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[136] *Id.* at 14.
[137] *Id.* at 22.
[138] *Id.* at 19-20.
[139] *See id.*; 74 Fed. Reg. 55099 (Oct. 27, 2009).
[140] *See* 48 U.S.C. § 1806(e).
[141] *See* Office of Information and Regulatory Affairs, Commonwealth of the Northern Mariana Islands Transitional Workers Classification, *available at* http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201004&RIN=1615-AB76.
[142] *See generally* CNRA, *supra* note 14.

C. Flaws in Federalization Leave Thousands of Legal Guest Workers in An Extremely Precarious Position

Ultimately, the CNRA provides legal guest workers with two years to obtain a federal immigration status.[143] But as noted previously, few guest workers would qualify for a visa under federal immigration law, and the Transitional Worker Permit that was intended to remedy this problem has been barred by an injunction.[144] To legalize the status of aliens within the CNMI prior to federalization, the CNMI government granted an "umbrella permit" to anyone who applied and paid the applicable fees.[145] This included guest workers whose "K permits" had expired or who no longer held employment.[146] Under the CNRA, umbrella permit holders are not subject to deportation until November 28, 2011.[147] What will happen after this date is unclear.

Although the CNRA does not expressly call for deportations after November 28, 2011, the law supports the notion that workers without a federal status after this date are deportable.[148] The CNRA references 8 U.S.C. § 1182(a)(6), a section of the INA entitled "Illegal entrants and immigration violators."[149] This section of the INA states that "[a]n alien present in the United States without being admitted or paroled…is inadmissible."[150] After November 28, 2011, CNMI guest workers will presumably fall into this category. Under 8 U.S.C. § 1227, any alien in or admitted to the United States *shall be removed* if the alien is "inadmissible."[151]

Although the INA contains some workarounds to avoid deportation, the CNRA presents important complications to some of the remedies available in other contexts. The CNRA expressly bars asylum during the transition period ending on December 31, 2014.[152] Obtaining a stay of removal is another option, but administration of a stay is entirely

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[143] CNRA, *supra* note 14, Sec. 702(a) §6(e)(1).

[144] *See supra* Part III.B. As of Nov. 13, 2010, the docket of *Commonwealth of the Northern Mariana Islands v. United States* reflects that the preliminary injunction against the Interim Permit Rule remains in place and that proceedings are stayed pending the promulgation of a Final Rule concerning the CNMI Transitional Worker classification.

[145] DOI Report, *supra* note 80, at 10.

[146] *See id*.

[147] CNRA, *supra* note 14, Sec. 702(a) §6(e)(1).

[148] *See generally* CNRA, *supra* note 14.

[149] *See* 48 U.S.C. § 1806(e)(1).

[150] *See* 8 U.S.C. § 1182(a)(6)(A)(i).

[151] *See* 8 U.S.C. § 1227(a)(1).

[152] 48 U.S.C. § 1806(a)(7).

discretionary.[153] Petitioning for cancellation of removal, a third option, presents practically insurmountable challenges in this context.[154] A cancellation of removal requires that the applicant has been continuously present in the United States for ten years.[155] A single departure of more than ninety days destroys continuous presence,[156] as do cumulative absences totaling over 180 days.[157] It is not difficult to imagine that veteran CNMI guest workers would have exceeded these numbers after years of occasional departures.

In addition to having fewer remedies to removal, individuals without a visa status in the CNMI may be subject to greater immigration enforcement than in other U.S. jurisdictions. Locating and deporting guest workers on a small island would not present a major challenge. Under the INA, ICE agents have authority to interrogate and arrest anyone believed to be an alien.[158] Non-citizens may be detained until removal or released on bond, but they bear the burden to show that a release on bond is warranted.[159]

The specter of deportation after November 28, 2011 and the current inability to obtain a Transitional Worker permit because of the injunction have caused deep concern among guest workers about their ability to remain in the CNMI.[160] As stated previously, the CNRA does not guarantee any specialized visa category for guest workers after December 31, 2014.[161] In the short-term, the CNRA provides no mechanism for guest workers to leave and re-enter the CNMI.[162] The barred Interim Permit Rule would have enabled guest workers and their families to freely leave and re-enter after obtaining CW-1 or CW-2 visas, but because of the injunction, this option is unavailable.[163] Although DHS is currently using its authority to grant "advance parole" to leave and re-enter, Congressman Gregorio Sablan noted that workers have been detained by off-island DHS agents who are unfamiliar with this makeshift practice.[164]

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[153] 8 C.F.R. § 1003.6(b).
[154] *See* 8 U.S.C. § 1229b(b)(1).
[155] *Id.*
[156] 8 U.S.C. § 1229b(d)(2).
[157] *Id.*
[158] 8 U.S.C. § 1357(a)(1).
[159] *See* 8 U.S.C. §1226(c)(2).
[160] *See* Zaldy Dandan, *Variations: Status Woe*, MARIANAS VARIETY, May 21, 2010, *available at* http://www.mvariety.com/2010052026713/editorials-columns/variations-status-woe-2.php.
[161] *See* 48 U.S.C. § 1806(d).
[162] *See generally* CNRA, *supra* note 14; Opinion 2, *supra* note 133, at 20.
[163] *See supra* Part III.B.
[164] *See* Congressman Gregorio Kilili Sablan, *Kilili Dissatisfied with CBP Recognition of Travel Documents*, *available at* http://sablan.house.gov/2010/06/kilili-dissatisfied-with-cbp-recognition-of-travel-documents.shtml.

As it stands, 20,654 guest workers[165] who legally entered the CNMI and otherwise complied with the law may face deportation as "illegal entrants and immigration violators" after November 28, 2011. The existing legislation and regulations do not adequately resolve this issue. New rulemaking and congressional action are essential.

IV. DHS SHOULD CONDUCT PROPER RULEMAKING TO IMPROVE FEDERALIZATION IN THE SHORT-TERM AND CONGRESS SHOULD AMEND THE CNRA TO NORMALIZE THE LONG-TERM STATUS OF CNMI GUEST WORKERS

Under the CNRA, even long-term guest workers who are raising U.S. citizen children in the CNMI may be subject to deportation as "illegal entrants and immigration violators" after November 28, 2011. Subjecting 20,654 legal guest workers to deportation through no fault of their own would be an extreme and irrational injustice. This section argues that Congress should pass legislation to normalize the status of long-term CNMI guest workers. Support for such legislation can be found in previous attempts to federalize CNMI immigration law and in similar legislation, such as the Virgin Islands Nonimmigrant Adjustment Act of 1981.

A. Congress Should Grant Permanent Resident Status to Long-Term CNMI Guest Workers

The existing federalization program fails to accommodate thousands of long-term CNMI guest workers who were unable to obtain a permanent status—despite building their lives and raising families in the CNMI under its now-terminated local immigration laws.[166] The Department of the Interior addressed the plight of long-term guest workers in Congressional testimony that led to passage of the CNRA. Secretary Cohen stated:

> [F]oreign employees have been working in the CNMI for five, ten, fifteen or more years, (and) their children are U.S. citizens. These employees were invited to come to the CNMI because they were needed, they came and have stayed legally, and they have contributed much to the community. They were essential in building the CNMI economy from the ground up from what

[165] DOI Report, *supra* note 80, at 9.

[166] 15,816 of the total 20,859 aliens in the CNMI have been residing there for five or more years. *Id.* at 9-15.

> it was at the inception of the Commonwealth: a rural economy with little industry, tourism or other commercial activity. Long-term foreign employees are integrated into all levels of the CNMI's workforce and society, serving as doctors, nurses, journalists, business managers, engineers, architects, service industry employees, housekeepers, farmers, construction workers, and in countless other occupations.[167]

Despite Secretary Cohen's testimony and GAO estimates that approximately 4,728 U.S. citizen children in the CNMI were born to guest worker parents,[168] the CNRA and DHS regulations fail to address this important issue. Currently, the parents of one-quarter of all children in the CNMI may be subject to deportation as "illegal entrants and immigration violators" on November 28, 2011.[169] Deportations would presumably occur regardless of the amount of time a guest worker has resided in the CNMI.[170]

Congress should grant permanent immigrant status to guest workers who have resided in the CNMI for five or more years—a position adopted by the Department of the Interior in its April 2010 report to Congress,[171] submitted as required by the CNRA.[172] Adding a new "CNMI Nonimmigrant Worker Adjustment" group to the EB-4 "Certain Special Immigrants" category of the INA would be a convenient means to do so.[173] This catch-all provision grants immigrant visas to ministers and other religious workers, certain overseas employees and retirees of the U.S. government, and others.[174] More recently, Congress added Iraqi and Afghan translators with the U.S. Armed Forces to this group,[175] as well as Iraqis employed on behalf of the United States in Iraq after March 20, 2003,[176]

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[167] Cohen Testimony 2, *supra* note 83, at 5-6.

[168] GAO Report, *supra* note 10, at 90.

[169] *See supra* Part III.C.

[170] In one instance, human rights advocate Wendy Doromal reports that a guest worker couple residing in the CNMI for at least twenty-seven years with two U.S. citizen children serving in the U.S. military will face possible deportation after November 28, 2011. *See* Wendy L. Doromal, U.S. Commonwealth of the Northern Mariana Islands (CNMI) Labor and Human Rights Status Report, Jul. 26, 2007, *available at* http://www.scribd.com/doc/12609878/1208-CNMI-Status-Report-Doromal.

[171] DOI Report, *supra* note 80, at 18.

[172] *Id.* at 1; *see also* 48 U.S.C. § 1806(h).

[173] *See* 8 U.S.C. 1101(a)(27)(C).

[174] *See id*.

[175] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, §1059, 119 Stat. 3136, 3147.

[176] *See* National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, §1244, 122 Stat. 3, 397.

demonstrating Congress's willingness to provide exceptions to the usual INA visa classifications in the spirit of fairness and justice.

Supporters of the existing legislation and regulations may argue that lifting the injunction against the Interim Permit Rule would adequately resolve this issue.[177] However, the Interim Permit Rule is flawed. As the second *Commonwealth of the Northern Mariana Islands v. United States* opinion points out, the Permit Rule requires workers to convince their employers to petition DHS for a CW-1 permit at a cost of $150, even though such workers could legally remain within the CNMI until November 28, 2011 without transitioning from a valid CNMI umbrella permit to a federal CW-1 permit.[178] At the same time, the Rule provides no mechanism for workers legally present in the CNMI to leave and re-enter the CNMI during the two-year grace period ending on November 28, 2011.[179] Moreover, the CW-1 permit would not resolve the status of long-term guest workers, as the CW-1 classification would itself expire at the end of the transition period on December 31, 2014.[180]

Supporters of the existing laws may also argue that the current economic crisis in the CNMI eliminates any need for guest workers. This argument ignores the fundamental nature of the CNMI economy, where guest workers comprise almost the entire private sector workforce,[181] while indigenous Chamorros and Carolinians primarily work in the public sector.[182] Although the economy of the CNMI appears bleak, local firms believe the worst of the crisis has passed.[183] A recent DOI survey found that local businesses expect to increase guest worker employment by approximately sixteen percent before 2014.[184] To provide the CNMI with the labor force it needs, any legislation directed toward the CNMI should reflect the needs of the economy.[185] Subjecting 20,654 legal guest workers to deportation does not achieve this objective.

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[177] The injunction barring DHS from issuing CW-1 visas is a preliminary injunction based on the likely success of the CNMI's APA challenge. *See* Opinion 2, *supra* note 133. Withdrawal of the suit or failure on the merits would lift the injunction and enable the issuance of CW-1 permits.

[178] *See* 48 U.S.C. § 1806(e).

[179] *Id.*

[180] *See supra* Part III.C.

[181] *See* CNMI DEPARTMENT OF LABOR, ANNUAL REPORT OF THE SECRETARY OF LABOR, 21-22 (2009) [hereinafter CNMI Labor Report], *available at* http://www.marianaslabor.net/news/ar2009.pdf.

[182] *Id.*

[183] DOI Report, *supra* note 80, at 17.

[184] *Id.*

[185] *Id.* at 18.

B. Previous Attempts to Federalize CNMI Immigration Law Support Passage of a Permanent Status Provision

Previous federalization bills contained provisions granting a permanent status to long-term CNMI guest workers. In 2000, Alaska Senator Frank Murkowski introduced legislation with a grandfather provision for long-term CNMI guest workers.[186] The provision would have enabled employers to petition for permanent status on behalf of workers in the same occupation for four or more years, without counting against the national quota.[187] The bill would have provided 180 days to file a petition for a change in status from guest worker to that of an "alien lawfully admitted for permanent residence."[188] The bill contained a similar transition period from CNMI immigration law to federal control as under the CNRA, but the transition period would have lasted approximately ten years, leaving ample time for implementation.[189] Although the bill passed the Senate by unanimous vote, it died in the House Committee on Resources.[190] Senator Murkowski's bill provides an effective model upon which normalization of status for the CNMI's guest worker population could be achieved.[191]

More recent attempts at federalization included similar provisions. The Northern Mariana Islands Covenant Implementation Act of 2007 (S. 1634)[192] included a "One-Time Nonimmigrant Provision for Certain Long-Term Employees."[193] The provision would have granted a federal status to aliens who continually resided in the CNMI for at least five years prior to Act's implementation who 1) held lawful immigration status in the CNMI and 2) submitted an application within one year.[194]

Some politicians from the CNMI and nearby Guam, although opposed to federalization in general, expressed specific opposition to the permanent status provision in S. 1634. Senators Judith Guthertz and Judith Won Pat led a successful effort to pass Resolution 80 in the Guamanian Senate, which

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[186] *See* A Bill to Implement Further the Act Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, and for Other Purposes, S. 1052, 106th § 6 Cong. (2000).

[187] *Id*. at § 6(i)(1)(D).

[188] *Id*. at § 6(i)(1)(B).

[189] *See id*. at § 6(a).

[190] *See supra* note 186.

[191] Notably, S. 1052, which contained this normalization provision, was co-sponsored by Senator Jeff Bingaman, who himself sponsored the CNRA, which lacks a normalization provision.

[192] Northern Mariana Islands Covenant Implementation Act, S. 1634, 110th Cong. (2007). *See also* Northern Mariana Islands Immigration, Security, and Labor Act, H.R. 3079, 110th Cong. (2007).

[193] Northern Mariana Islands Covenant Implementation Act, *supra* note 192, at § 6(h)(1)-(2).

[194] *Id.*

opposed the permanent status provision.[195] Guthertz alleged, "If even half of the 15,000 to 20,000 foreign workers residing in the [CNMI] came to Guam, our government resources would be stretched to their limits and beyond."[196]

Oscar Babauta, the Speaker of the CNMI House of Representatives, claimed that extending permanent status to guest workers "may create a massive financial drain on our modest public resources, particularly in the areas of education, health, and public safety."[197] Babauta failed to explain the nature of this "financial drain" in light of the fact that guest workers are not of school age and have been living and paying taxes in the CNMI for many years.[198] CNMI Governor Fitial did not attempt to make a provision of services argument. Instead, in his testimony before the House of Representatives Committee on Natural Resources, he briefly alleged that a permanent status provision would increase "divisiveness between guest workers and the indigenous peoples of the Commonwealth."[199] Fitial did not elaborate or provide any justification, and testimony to the Committee offers no indication of CNMI public opinion for or against normalization.[200]

Public opinion in the CNMI appears mixed. While some individuals of Chamorro and Carolinian descent have expressed concern over "becoming disenfranchised in their own homeland,"[201] others have stated that deporting long-time guest workers would be unjust.[202] Although the CNMI's political parties generally oppose a permanent status provision, a

[195] *See* Res. 80 (LS), 29th Leg. (Guam 2007).

[196] Judith Guthertz, *CNMI "Federalization" Would Tax Guam Resources*, MARIANAS VARIETY, Oct. 11, 2007, *available at* http://archives.pireport.org/archive/2007/October/10-11-com.htm.

[197] *Bill to Amend the Joint Resolution Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands: Legislative Field Hearing on H.R. 3079 Before the H. Sub. Comm. on Insular Affairs, Comm. on Natural Resources*, 110th Cong. 43 (Aug. 15, 2007) (statement of the Hon. Oscar M. Babauta, Speaker of the House, Fifteenth Northern Marianas Commonwealth Legislature).

[198] *See generally id.*

[199] *Bill to Amend the Joint Resolution Approving the Covenant to Establish a Commonwealth of the Northern Mariana Islands: Legislative Field Hearing on H.R. 3079, Before the H. Sub. Comm. on Insular Affairs of the Comm. on Natural Resources*, 110th Cong. 38 (Aug. 15, 2007) (statement of the Hon. Benigno R. Fitial, Governor of the Commonwealth of the Northern Mariana Islands).

[200] *See generally id.*

[201] Gemma Q. Casas, *Locals Weigh In On Interior's Recommendation*, MARIANAS VARIETY, May 6, 2010, *available at* http://www.mvariety.com/2010050526298/local-news/locals-weigh-in-on-interiors-recommendation.php.

[202] One individual stated, "I don't think it's right to send them back home…[t]his is their home too." Another said, "It's a big island, we can share." A local government employee said, "A lot of these workers have been here for 20 to 30 years. They've constructed many of our buildings… There should be equality." *Id.*

public rally against DOI's permanent status recommendation failed to attract more than a few hundred people.[203]

C. The Virgin Islands Nonimmigrant Adjustment Act of 1981 Provides Further Support for a Permanent Status Provision

The Virgin Islands Nonimmigrant Adjustment Act of 1981 provides further support for a permanent status provision.[204] Beginning in 1956 and continuing through the 1960s, the Immigration and Naturalization Service ("INS")[205] permitted thousands of workers from nearby Caribbean countries to enter the U.S. Virgin Islands ("USVI")[206] under federal H-2 Temporary Worker visas during a period of major economic growth and low unemployment.[207] The INS permitted the year-round employment and residence of nonimmigrants in the USVI even though H-2 visas only contemplate seasonal employment of nonimmigrants and their subsequent departure.[208]

As in the CNMI, nonimmigrant workers eventually comprised about half of the USVI workforce,[209] with most workers residing there for many years.[210] Slower economic growth in the 1970s reduced the number of H-2 workers,[211] yet many such workers remained in the USVI, as it had become their home.[212]

With the understanding that long-term H-2 workers became a "permanent part of the social and economic structure of the islands and that the federal government has a moral obligation to resolve [their] uncertain

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[203] Gemma Q. Casas, *Political Parties Unite vs. Improved Status*, MARIANAS VARIETY, May 31, 2010, *available at* http://www.mvariety.com/2010053026972/local-news/nmi-political-parties-unite-vs-improved-status.php.

[204] Virgin Islands Nonimmigrant Adjustment Act of 1981, Pub. L. No. 97-271, 96 Stat. 1157.

[205] In 2002, the INS was dissolved and its service and benefit functions transitioned into DHS as the Bureau of Citizenship and Immigration Services. *See generally* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[206] The U.S. Virgin Islands, like the CNMI, is a U.S. "insular area." Department of the Interior – Office of Insular Affairs, Insular Area Summary for the U.S. Virgin Islands, http://www.doi.gov/oia/Islandpages/vipage.htm (last visited Nov. 13, 2010).

[207] *Virgin Islands Nonimmigrant Alien Adjustment Act of 1981: Hearing on H.R. 3517 Before the Subcomm. on Immigration, Refugees, and International Law of the H. Comm. on the Judiciary*, 97th Cong. 11 (1981) (testimony of Ron de Lugo, Delegate, Virgin Islands). Although the CNMI operated its own immigration system prior to federalization, the USVI had always been under the jurisdiction of the INA. *See id.* at 57 (formal legal opinion submitted by Theodore H. Olson, U.S. Department of Justice).

[208] *Id.* at 23 (statement of Honorable Juan Luis, Governor, Virgin Islands).

[209] *Id.* at 48 (prepared statement of David O. Williams, Administrator, U.S. Employment Service, U.S. Department of Labor).

[210] *Id.*

[211] *Id.*

[212] *See id.* at 34 (statement of Congressman Romano L. Mazzoli).

status,"[213] Congress granted permanent resident status to nonimmigrant workers residing in the USVI since June 1975. The legislation created the Interagency Task Force on Federal Assistance to the Virgin Islands to meet needs arising from adjusting the status to H-2 workers to permanent residents.[214] The task force was comprised of the secretaries of four federal agencies[215] and three high-ranking USVI government officials.[216] The task force analyzed and assessed the impact on the USVI in providing healthcare, education, housing, and other social services to individuals whose immigration status was adjusted under the Act, and reported to Congress any need for assistance to the USVI government in meeting these needs.

Congress was particularly concerned over the fate of USVI H-2 workers who could face deportation, as they were parents of U.S. citizen children. Concerns expressed by USVI Delegate Ron de Lugo regarding out-of-status guest workers mirror those of DOI Secretary David Cohen in the context of the CNMI today:

> [T]hese people . . . came as part of our labor force. They are working people and have helped build our community. Now, they are between jobs. They are subject to deportation, they are aliens and their children are U.S. citizens. They have to go back home. The children cannot follow.[217]

The nonimmigrant workers of the USVI, like the CNMI's current guest worker population, endured many harsh inequities, including pay below the minimum wage, substandard housing, and low social status.[218] Yet they had become de-facto island residents following many years of employment.[219] As the 97th Congress identified a moral obligation[220] to normalize the status of legal aliens in the USVI facing deportation through no fault of their own,[221] so too should the present Congress extend

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[213] *See id*. at 1 (statement of Congressman Romano L. Mazzoli).

[214] Virgin Islands Nonimmigrant Adjustment Act of 1981, *supra* note 204 at § 4.

[215] These included the Department of Health and Human Services, the Department of Education, the Department of Housing and Urban Development, and the Department of the Interior. *Id.*

[216] These included Governor of the USVI, the Chief Judge of the Territorial Court, and the President of the USVI Legislature. *See generally id.*

[217] *Virgin Islands Nonimmigrant Alien Adjustment Act of 1981: Hearing on H.R. 3517 Before the Subcomm. on Immigration, Refugees, and International Law*, *supra* note 207 at 35 (statement of Ron de Lugo, Delegate, Virgin Islands).

[218] *Id.* at 68 (prepared statement of Rev. Dr. Peter J. Stephen, Member, Alien Emphasis Advisory Council).

[219] *Id.*

[220] *See id*. at 1 (statement of Congressman Romano L. Mazzoli).

[221] *Id*. at 22 (prepared statement of Ron de Lugo, Delegate, Virgin Islands).

permanent resident status to guest workers in the CNMI who face deportation after November 28, 2011. Congress should also establish a multi-agency task force as it did in the USVI to address and resolve local government funding issues resulting from this proposed action.

V. CONCLUSION

Although well intentioned, the current federalization program lacks necessary provisions to normalize the status of long-term guest workers and their families. Thousands of guest workers are the parents of U.S. citizen children who have been raised in the CNMI and know no other place. As it is, the law causes serious hardship and potentially splits families apart and harms children. It also deprives the CNMI of the workforce it needs to rebuild its economy.

As Congress enacted specific legislation to normalize the status of guest workers in the USVI, recognizing their long-term economic contributions and de-facto permanent residence, Congress should do the same for the 15,816 guest workers who have lived in the CNMI for five or more years.[222] Doing so would prevent the extreme and irrational injustice of subjecting long-term legal residents and parents of one-quarter of CNMI children to deportation. Funding and provision of services concerns raised by certain local politicians are unsubstantiated and are not indicative of public opinion in the CNMI.[223] To alleviate any such concerns, Congress should create a task force to determine the impact of normalization on the fiscal status of the CNMI and provide adequate compensation to meet these needs.

Federalization of immigration law in the CNMI is incomplete without a provision to normalize the status of long-term guest workers. Subjecting thousands of legal workers to deportation, through no fault of their own, is flatly unjust. Congressional action enacted from a distance of 7,800 miles must be well informed and must take into account the unique circumstances of the CNMI. With the specter of federalization of immigration law in American Samoa,[224] the last remaining U.S. insular area with its own immigration system,[225] federalization in the CNMI should serve as a model rather than an example of haphazard injustice.

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[222] DOI Report, *supra* note 80 at 15.

[223] *See supra* notes 196-199 and accompanying text.

[224] *Authorities Raid American Samoa Immigration Office*, ASSOCIATED PRESS, Jan. 8, 2010.

[225] Fili Sagapolutele, *AG Says Now Not the Time to Form Immigration Department*, SAMOA NEWS, *available at* http://www.samoanewsonline.com/viewstory.php?storyid=12915.