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

Robert J. Misulich†

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"). He killed two employees and then turned the guns on two nearby children. He then fled the scene and drove to the northern end of the island, where he opened fire on a group of Korean tourists. He ultimately committed suicide on Banzai Cliff, the site of a mass suicide of Japanese troops during the Battle of Saipan in 1944.

The gunman, Lee Zhong Ren, 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. Guest workers like Lee came to the CNMI for employment during a major economic expansion...

† J.D. Candidate, University of Washington, 2011. The author would like to thank Professor Thomas Cobb for his insightful comments and guidance. Comments regarding this article can be directed to robert.misulich@gmail.com.
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.
11 See id.
12 Lee’s will stated, “Negotiations for business have failed.” WORLD NEWS CONNECTION, *supra* note 6.
15 See generally id.
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

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

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”). The CNMI legislature unanimously approved the Covenant, and after favorable consideration by the U.S. Senate, President Gerald Ford signed it into law in 1976.

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

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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.
27 De Leon Guererro, supra note 25, at 751.
28 Id.
29 Id.
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,”\textsuperscript{34} it became an “insular area” of the United States.\textsuperscript{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,\textsuperscript{36} II,\textsuperscript{37} III,\textsuperscript{38} and Sections 501\textsuperscript{39} and 805,\textsuperscript{40} unless the CNMI provides its consent. Article III conferred United States citizenship on almost all CNMI residents upon termination of the TTPI,\textsuperscript{41} and grants citizenship at birth to all persons born in the CNMI,\textsuperscript{42} including the children of guest workers. The Covenant also renders several significant federal laws inoperable within the CNMI unless Congress specifically applies them.\textsuperscript{43}

\textbf{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.\textsuperscript{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

\textsuperscript{34} Covenant, \textit{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.

\textsuperscript{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.

\textsuperscript{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.

\textsuperscript{37} Article II enables the CNMI to enact a constitution and creates a tripartite government.

\textsuperscript{38} Article III governs immigration and naturalization.

\textsuperscript{39} Section 501 incorporates some provisions of the U.S. Constitution in the CNMI.

\textsuperscript{40} Section 805 allows the CNMI to prevent the sale of real property to individuals who are not of indigenous Chamorro or Carolinian descent.


\textsuperscript{42} Covenant, \textit{supra} note 30, art. III, § 303.

\textsuperscript{43} Covenant, \textit{supra} note 30, art. V, § 503.

\textsuperscript{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, \textit{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, \textit{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, 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 and an exclusion from the U.S. customs area, while the federal government provided tariff-free access to the U.S. market.

Since the low local wages were unappealing to American workers, the CNMI sought to attract a labor force comprised of guest workers from nearby countries. In 1983, the CNMI legislature created several nonimmigrant guest worker visa classifications that remained central to CNMI immigration law until federalization in 2008. 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. No equivalent status exists in U.S. federal immigration law.

This strategy proved highly effective in attracting workers from countries such as the Philippines, China, Korea, and Vietnam. 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. 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. By 1999, the garment industry directly employed about 13,500 guest workers and 2,500 CNMI citizens. Growth in the tourism industry was also strong, and the number of visitors rose from 110,755 in 1980 to 726,690 by 1997.

45 Covenant, supra note 30, art. V, § 503(a)-(c).
47 Covenant, supra note 30, art. VI, § 603.
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.
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, squalid living conditions, and a feeling of political and social powerlessness. Unable to repay hefty recruiting fees through virtual indentured servitude, many workers were forced into prostitution.

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. Upon arrival, her supervisor did not provide the promised employment. Instead, she ordered Entena to perform sexual favors for customers, and informed Entena that waitressing would not cover her immigration and labor fees. These and similar accounts raised red flags in Congress regarding the institutional capacity of the CNMI to prevent further abuses.

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59 Beneath the American Flag, supra note 16, at 11.
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.
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 Ogunoro, Karidat).
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. When these changes took effect, they destroyed the competitive advantage Saipan had held in garment manufacturing. The CNMI was thrown into open competition with lower wage neighboring countries for exports to the United States. Unable to compete against cheaper competitors, CNMI garment manufacturers slashed employment by ninety-two percent between 2001 and 2008. Saipan’s last garment factory closed in 2009.

Tourism, the second prong of the CNMI economy, has also suffered significant declines. Although 726,690 mainly Japanese tourists entered the CNMI in 1997 and spent an estimated $581,000,000 in retail stores, the Asian Financial Crisis resulted in a twenty-eight percent reduction in arrivals by 1998. 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. By 2008, tourist arrivals generally stabilized at 396,497, with most visitors from Japan and South Korea.

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


81 Id. at 15.


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 63, at 6.
status or pathway to citizenship despite their long-term residency and substantial economic contributions.\footnote{Id. at 6-7.}


The CNRA is an omnibus bill\footnote{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.} addressing many different areas of federal law, including national parks and energy funding.\footnote{See generally CNRA, supra note 14.} 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."\footnote{See Id.} This section applies the U.S. Immigration and Nationality Act ("INA") to the CNMI and creates a transition plan for its gradual implementation.\footnote{See Id.} Application of the INA expressly terminates the CNMI immigration regime\footnote{CNRA Title VII, § 702, which extends the INA to the CNMI, is codified at 48 U.S.C. § 1806.} and requires all non-citizens in the CNMI to hold a standard federal
immigration status by the end of the transition period on December 31, 2014. Since the guest worker classification under former CNMI immigration law has no equivalent status under the INA, the CNRA created a “Commonwealth Only Transitional Worker” classification to last the duration of the transition period ending on December 31, 2014. 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. DHS must ensure that the number of permits is reduced to zero by the end of the transition period. Permit holders are allowed to transfer between employers under the same visa, and can petition for the admission of immediate relatives. Guest workers in the CNMI can also apply for standard U.S. visas during the transition period without regard to the national quota, although few would qualify under the standard U.S. visa classifications because of their occupations in the service industry and lack of specialized training.

The CNRA prevents DHS from deporting guest workers during the first two years of the transition period to provide time for these individuals to obtain a federal status, such as the Transitional Worker permit. 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. 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.
100 See GAO Report, supra note 10, at 17-19.
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.
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.
110 DOI Report, supra note 80, at 14.
only visa classifications after the end of the transition period on December 31, 2014.\footnote{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,\footnote{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.\footnote{113} Since few CNMI guest workers qualify for standard U.S. visas under the INA,\footnote{114} the CNRA creates a temporary transitional worker visa classification for such individuals.\footnote{115} The CNRA breathes life into this new visa classification until December 31, 2014, after which DHS may extend it in five-year increments.\footnote{116} The CNRA envisions future legislation or rulemaking

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

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. 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.” Initially, Fitial sought to invalidate the CNRA itself. 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”).

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. 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.

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. Instead, the agency waited until one month before the scheduled transition period. 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.
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. 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.”

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. Only after DHS approves the petition can the worker
legally leave and re-enter the CNMI or apply for CW-2 dependent visas.
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.

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.

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. 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.
140 See 48 U.S.C. § 1806(e).
141 See Office of Information and Regulatory Affairs, Commonwealth of the Northern Mariana
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

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.
discretionary. Petitioning for cancellation of removal, a third option, presents practically insurmountable challenges in this context. A cancellation of removal requires that the applicant has been continuously present in the United States for ten years. A single departure of more than ninety days destroys continuous presence, as do cumulative absences totaling over 180 days. 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. 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.

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. As stated previously, the CNRA does not guarantee any specialized visa category for guest workers after December 31, 2014. In the short-term, the CNRA provides no mechanism for guest workers to leave and re-enter the CNMI. 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. 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.

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153 8 C.F.R. § 1003.6(b).
155 Id.
157 Id.
159 See 8 U.S.C. §1226(c)(2).
162 See generally CNRA, supra note 14; Opinion 2, supra note 133, at 20.
163 See supra Part III.B.
As it stands, 20,654 guest workers\textsuperscript{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.\textsuperscript{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

\textsuperscript{165} DOI Report, \textit{supra} note 80, at 9.

\textsuperscript{166} 15,816 of the total 20,859 aliens in the CNMI have been residing there for five or more years. \textit{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.\(^ {176}\)

\(^{167}\) Cohen Testimony 2, supra note 83, at 5-6.

\(^{168}\) GAO Report, supra note 10, at 90.

\(^{169}\) See supra Part III.C.


\(^{171}\) DOI Report, supra note 80, at 18.

\(^{172}\) Id. at 1; see also 48 U.S.C. § 1806(h).


\(^{174}\) See id.


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. 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. 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. 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.

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, while indigenous Chamorros and Carolinians primarily work in the public sector. Although the economy of the CNMI appears bleak, local firms believe the worst of the crisis has passed. A recent DOI survey found that local businesses expect to increase guest worker employment by approximately sixteen percent before 2014. To provide the CNMI with the labor force it needs, any legislation directed toward the CNMI should reflect the needs of the economy. 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.
179 Id.
180 See supra Part III.C.
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. 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. 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.” 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. Although the bill passed the Senate by unanimous vote, it died in the House Committee on Resources. Senator Murkowski’s bill provides an effective model upon which normalization of status for the CNMI’s guest worker population could be achieved.

More recent attempts at federalization included similar provisions. The Northern Mariana Islands Covenant Implementation Act of 2007 (S. 1634) included a “One-Time Nonimmigrant Provision for Certain Long-Term Employees.” 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.

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 Northern Mariana Islands Covenant Implementation Act, 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.
193 Northern Mariana Islands Covenant Implementation Act, supra note 192, at § 6(h)(1)-(2).
194 Id.
opposed the permanent status provision.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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,”\textsuperscript{201} others have stated that deporting long-time guest workers would be unjust.\textsuperscript{202} Although the CNMI’s political parties generally oppose a permanent status provision, a

\textsuperscript{195} See Res. 80 (LS), 29th Leg. (Guam 2007).


\textsuperscript{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).

\textsuperscript{198} See generally id.

\textsuperscript{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).

\textsuperscript{200} See generally id.


\textsuperscript{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

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 agencies215 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 obligation220 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

213 See id. at 1 (statement of Congressman Romano L. Mazzoli).
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.
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. 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. 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, the last remaining U.S. insular area with its own immigration system, federalization in the CNMI should serve as a model rather than an example of haphazard injustice.

222 DOI Report, supra note 80 at 15.
223 See supra notes 196-199 and accompanying text.