DEPARTMENT OF HOMELAND SECURITY

8 CFR Parts 103, 214, 274a, and 299

[CIS No. 2459–08; DHS Docket No. USCIS–2008–0038]

RIN 1615–AB76

Commonwealth of the Northern Mariana Islands Transitional Worker Classification

AGENCY: U.S. Citizenship and Immigration Services, DHS.

ACTION: Final rule.

SUMMARY: On October 27, 2009, the Department of Homeland Security published an interim rule creating a new, temporary, Commonwealth of the Northern Mariana Islands (CNMI)-only transitional worker classification (CW classification) in accordance with title VII of the Consolidated Natural Resources Act of 2008 (CNRA). The CW classification is intended to provide for an orderly transition from the CNMI permit system to the U.S. Federal immigration system under the immigration laws of the United States, including the Immigration and Nationality Act (INA). This final rule implements the CW classification and establishes that a CW transitional worker is an alien worker who is ineligible for another classification under the INA and who performs services or labor for an employer in the CNMI during the five-year transition period. CNMI employers may now petition for such workers. The rule also establishes employment authorization incident to CW status.

DATES: This final rule is effective on October 7, 2011.

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SUPPLEMENTARY INFORMATION:

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I. Background

The Commonwealth of the Northern Mariana Islands (CNMI or Commonwealth) is a U.S. territory located in the Western Pacific that has been subject to most U.S. laws for many years. Before November 2009, the CNMI administered its own immigration system under the terms of the 1976 Covenant with the United States. *See* A Joint Resolution to Approve the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Covenant Act), Public Law 94–241, sec. 1, 90 Stat. 263, 48 U.S.C. 1801 note (1976). On May 8, 2008, President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA). *See* Public Law 110–229, 122 Stat. 754, 853 (2008). Title VII of the CNRA extends U.S. immigration laws to the CNMI. *Id.* The stated purpose of the CNRA is to ensure effective border control procedures, to properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI (phasing-out the CNMI's nonresident contract worker program while minimizing to the greatest extent practicable the potential adverse economic and fiscal effects of that phase-out), to maximize the CNMI's potential for future economic and business growth, and to assure worker protections from the potential for abuse and exploitation. *See* sec. 701 of the CNRA, 48 U.S.C.A. 1806 note.

Section 702 of the CNRA stated that U.S. immigration laws would apply to the CNMI starting approximately one year after the date of enactment, subject to certain transition provisions unique to the CNMI. *See* 48 U.S.C. 1806(a). On March 31, 2009, the Secretary of Homeland Security postponed the effective date of the transition program from June 1, 2009 (the first day of the first full month commencing one year from the date of enactment of the CNRA) to November 28, 2009, using her discretion provided by the CNRA.[1] The transition period concludes on December 31, 2014. *See* 48 U.S.C. 1806(a)(2).

Since 1978, the CNMI has admitted a substantial number of foreign workers through an immigration system that provides a permit program for foreigners entering the CNMI, such as visitors, investors, and workers. Foreign workers under this program constitute a majority of the CNMI labor force. Such workers outnumber U.S. citizens and other local residents in most industries central to the CNMI's economy.[2] The transitional worker program implemented under this rule is intended to provide for an orderly transition for those workers from the CNMI permit system to the U.S. Federal immigration system under the INA and to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and as foreign workers obtain U.S. immigrant or nonimmigrant status. *See* 48 U.S.C. 1806(d).

The CNRA contains several CNMI-specific provisions affecting foreign workers during the transition period. Section 702(a) of the CNRA mandates that:

- During the transition period, the Secretary of Homeland Security must ''establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits [3] to be issued to prospective employers'' for the transitional workers.
- Foreign workers may qualify for the transitional worker classification if not otherwise eligible for admission under the INA.
- Transitional workers may apply to USCIS during the transition period for a change of status to another nonimmigrant classification or to adjust status to that of a lawful permanent resident in accordance with the INA.
- The transitional worker program will terminate at the end of the transition period unless the program is extended by the U.S. Secretary of Labor. Transitional workers must then adjust or change status to an immigrant or another nonimmigrant status under the INA if they want to remain legally in the CNMI. Otherwise, such transitional workers must depart the CNMI or they will become subject to removal. *See* 48 U.S.C. 1806(d).

II. Interim Final Rule

In accordance with the CNRA, on October 27, 2009, DHS published an interim rule amending regulations at 8 CFR 214.2(w) to create a new CNMI-only transitional worker classification (CW classification) intended to be effective for the duration of the transition period. *See* 74 FR 55094. DHS provided a 30-day comment period in the interim rule, which ended on November 27, 2009. *Id.* The interim rule

[1] *See* DHS Press Release, ''DHS Delays the Transition to Full Application of U.S. Immigration Laws in the Commonwealth of the Northern Mariana Islands'' (Mar. 31, 2009), *available at http://www.dhs.gov/ynews/releases/pr_1238533954343.shtm.*

[2] *See* GAO, Commonwealth of the Northern Mariana Islands: Pending Legislation Would Apply U.S. Immigration Law to the CNMI with a Transition Period, GAO–08–466 (Mar. 18, 2008); GAO, U.S. Insular Areas: Economic, Fiscal, and Accountability Challenges. GAO–07–119 (Dec. 12, 2006); GAO, Commonwealth of the Northern Mariana Islands: Serious Economic, Fiscal and Accountability Challenges, GAO–07–746T (Apr. 19, 2007).

[3] The CNRA refers to a system of permits. Note that we have retained this language when referencing the statute. In this context, however, the use of the term ''permit'' is synonymous with CW status, and the latter term is used more extensively in this discussion.

was to become effective on November 27, 2009. *Id.*

On November 25, 2009, the U.S. District Court for the District of Columbia enjoined implementation of the interim rule.[4] *See CNMI* v. *United States,* 670 F. Supp. 2d 65 (D.D.C. 2009). On December 9, 2009, DHS published a notice in the **Federal Register** reopening and extending the public comment period for an additional 30 days. *See* 74 FR 64997. The reopened comment period ended on January 8, 2010. *Id.* The comments received during both comment periods were considered and are discussed below.

The interim rule set forth the requirements and procedures for nonimmigrant status within the transitional worker classification. Specifically, the interim rule included provisions to:

- Classify transitional workers using an admission code of CW–1 for principal transitional workers and CW–2 for dependents;
- Allow aliens who were previously admitted to the CNMI under the CNMI nonresident worker permit programs to be granted CW status by USCIS;
- Allow workers, who would not be eligible for any other lawful status under the INA, to enter or remain in the CNMI as transitional workers during the transition period; and
- Establish eligibility criteria, limitations and parameters for the CW–1 nonimmigrant program as required by or consistent with an interpretation of the applicable provisions of section 702(a) of the CNRA, and prescribe procedural requirements for petitioners. *See* 74 FR 55094.

DHS has complied with the injunction by declining to accept any petition for CW classification under the interim rule or otherwise to implement the interim rule. The interim rule has been incorporated into the Code of Federal Regulations. *See* 8 CFR 214.2(w).

III. Final Rule

This final rule provides the requirements to obtain status as a transitional worker in the CNMI. The final rule adopts most of the changes set forth in the interim rule. The rationale for the interim rule and the reasoning provided in the preamble to the interim rule remain valid with respect to these regulatory amendments, and DHS adopts such reasoning in support of the promulgation of this final rule.

In response to the public comments received on the interim final rule, DHS has modified some provisions for the final rule. These changes are explained in detail in the summary of comments and responses and summarized below:

1. The final rule clarifies the authority and process by which applicants in the CNMI can be granted CW–1 or CW–2 status in the CNMI without having to travel abroad to obtain a nonimmigrant visa. Specifically, it clarifies that DHS may grant a section 212(d)(3)(A)(ii) waiver to an alien who is physically present in the CNMI and approved for an initial grant of CW–1 transitional worker status or CW–2 dependent status in the CNMI. Such aliens will be inadmissible under section 212(a)(7)(B)(i)(II) of the INA for lack of a CW–1 or CW–2 transitional worker visa issued by the U.S. Department of State (DOS) and also may (unless changing to CW–1 status from another nonimmigrant status under the INA) be aliens present in the United States without admission or parole and thus inadmissible under section 212(a)(6)(A)(i) of the INA. This final rule permits a waiver of those two grounds of inadmissibility for aliens lawfully present in the CNMI as defined by new 8 CFR 214.2(w)(1)(v) with appropriate documentation. DHS will determine, on a case-by-case basis, whether an alien is eligible for the waiver. The alien will not have to file a specific form or fee in order to request a waiver of these two grounds of inadmissibility. *See* new 8 CFR 214.2(w)(24).

2. The final rule describes how beneficiaries of approved employer petitions and their dependents (spouses and minor children) may obtain CW status. Principal beneficiaries and their dependents outside the CNMI will be instructed to apply for a visa. For principal beneficiaries within the CNMI, the petition itself (including the biometrics provided under new 8 CFR 214.2(w)(15)) serves as the application for CW–1 status. Dependents present in the CNMI may apply for CW–2 dependent status on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. CW–2 status may not be approved until approval of the CW–1 petition. A spouse or child applying for CW–2 status on Form I–539 (or such alternative form as USCIS may designate) may apply for a waiver of the filing fee based upon inability to pay as provided by 8 CFR 103.7(c). *See* new 8 CFR 214.2(w)(14).

3. The interim rule provided that an alien with CW–1 or CW–2 status who enters or attempts to enter, travels or attempts to travel to any other part of the United States without the appropriate visa or visa waiver, or who violates the conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated CW–1 or CW–2 status. This final rule retains the travel restriction but provides a limited exception. Philippine nationals who hold CW status or intend to apply for admission to the CNMI in CW status may travel, if otherwise permissible, between the CNMI and the Philippines through Guam so long as the travel is on a direct Guam transit itinerary. Such direct Guam transit will not be considered a violation of the conditions of the Philippine national's CW status. *See* new 8 CFR 214.2(w)(22)(iii).

4. The interim final rule provided for attestations by petitioning employers and biometric collection from beneficiaries in the CNMI. This final rule strengthens the terms of the attestation that the employer must sign with respect to its compliance with the required terms and conditions of employment and compliance with applicable laws. It requires an employer to attest that it is an eligible employer and will continue to comply with the requirements for an eligible employer until such time as the employer no longer employs the worker. *See* new 8 CFR 214.2(w)(6)(ii)(D). The final rule is also more specific as to the information that may be required from beneficiaries regarding immigration status and the need to pay a biometrics fee with each application (unless the beneficiary is under 14 years of age, or is age 79 or older). *See* new 8 CFR 214.2(w)(6)(ii) and (15).

5. The interim final rule provided for need-based waivers of petition filing fees. The final rule also provides for a need-based waiver of the filing fee for dependent family members seeking CW–2 status in the CNMI. *See* new 8

[4] On September 12, 2008, the CNMI government filed a lawsuit challenging the legality of certain provisions of the CNRA and a motion requesting that those provisions be enjoined. On November 2, 2009, the CNMI government filed an amended complaint, alleging violations of the Administrative Procedure Act, which generally provide for notice and public comment before new rules can go into effect, and seeking a preliminary injunction with regard to the CNMI-only transitional worker classification (CW classification) interim final rule. On November 25, 2009, the court issued several rulings in that lawsuit. First, the court agreed with the United States that the provisions of the CNRA extending U.S. immigration law to the CNMI beginning on November 28, 2009 do not violate the Covenant between the United States and the CNMI or the U.S. Constitution. The court dismissed the two counts of the CNMI's complaint alleging these violations. *CNMI* v. *United States,* 670 F. Supp. 2d 65 (D.D.C. 2009). The transition to U.S. immigration law took place on November 28, 2009 as scheduled. The court entered the requested preliminary injunction and enjoined the CNMI-only transitional worker interim final rule. *Id.* On June 21, 2010, the district court entered a minute order staying proceedings pending the promulgation of the CNMI-only transitional worker final rule.

CFR 103.7(c)(3)(iii). The fee provision is also technically revised to conform the rule to 8 CFR 103.7, as reorganized in the DHS final rule, U.S. Citizenship and Immigration Services Fee Schedule, 75 FR 58961 (Sept. 24, 2010).

6. Consistent with the CNRA, the interim final rule provided for a maximum number of CW–1 visas of 22,417 for the time period between the rule's effective date and September 30, 2010. The numerical limitation for that period of time is now moot, so the limitation is revised to extend the 22,417 number to fiscal year 2011 (beginning October 1, 2010). The final rule reduces the number of CW visas by one (to 22,416) for the subsequent fiscal year, fiscal year 2012 beginning October 1, 2011. Unused numbers will not carry over from one fiscal year to the next. *See* new 8 CFR 214.2(w)(1)(viii).

7. The final rule clarifies the impact of a pending petition or application by providing that a foreign national with CW–1 status may under certain circumstances work for a prospective new employer after the prospective new employer files a Form I–129CW petition on the employee's behalf. *See* new 8 CFR 214.2(w)(7)(iii) and 274a.12(b)(23). The final rule also provides that a lawfully present, work authorized and employed beneficiary of a CW–1 petition filed on or before November 27, 2011 applying for a grant of status in the CNMI may lawfully continue the employment in the CNMI until a decision is made on the petition. *See* new 8 CFR 274a.12(b)(23). The final rule makes a conforming clarification to the definition of ''lawfully present in the CNMI'' to ensure that aliens remain eligible for CW status after November 27, 2011 based upon an application for CW status filed before that date. *See* new 8 CFR 214.2(w)(1)(v)(A).

8. The final rule clarifies petition validity and admission periods. A petition is valid for admission to the CNMI in CW status during its validity period, and up to ten days before the start of the validity period. *See* new 8 CFR 214.2(w)(16). Admission to the CNMI and authorized employment in CW status is limited to the petition validity period, not to exceed one year. *See* new 8 CFR 214.2(w)(13). CW status expires ten days after the end of the petition's validity period, when the alien violates his or her status (or, in the case of a status violation caused solely by termination of employment, 30 days after the date of termination if a new employer files a nonfrivolous petition within that 30-day period), or at the end of the transitional worker program, whichever is earlier. *See* new 8 CFR 214.2(w)(7)(v) and (w)(23). The transitional worker program will terminate either upon the end of the transition period or, if the transitional worker provisions of the CNRA are extended by the Secretary of Labor pursuant to 48 U.S.C. 1806(d)(5), at the end of that extended period, whichever is later. *See* new 8 CFR 214.2(w)(23).

9. The final rule clarifies that a biometric services fee may be collected for each beneficiary of a CW–1 petition and or the spouse or children applying for extension or change of status, in addition to the biometrics fee paid at the time of the initial request. The final rule also specifies that a biometric services fee may be required for each beneficiary for which CW–1 status is being requested and for each CW–2 on the application. Further, a biometrics services fee will be required in order to cover the costs of conducting the necessary background checks and for identity verification even when the biometrics of the applicant of beneficiary is stored and reused and not collected again in connection with the new request. *See* new 8 CFR 214.2(w)(15). This change is consistent with biometrics collection policies in other programs managed by USCIS and does not represent a substantive change.

10. The final rule makes a number of other minor clarifying and updating changes, such as removing references to petitions filed before the transition program effective date since no such petitions could have been filed, clarifying the definition of ''transition period'' to extend the time period of the CW program to conform to any extension by the U.S. Secretary of Labor, and updating the definition of ''lawfully present in the CNMI.'' *See, e.g.,* new 8 CFR 214.2(w)(1)(v) and (xi).

11. The interim final rule proposed that denied petitions may be appealed to the USCIS Administrative Appeals Office. *See* new 8 CFR 214.2 (w)(21). The final rule adds the phrase ''or any successor body'' to the provision describing where a denial may be appealed.

IV. Public Comments Received on the Interim Final Rule

During the initial and extended comment periods, DHS received 146 comments from a broad spectrum of individuals and organizations, including the CNMI Governor's Office, the Saipan Chamber of Commerce, a former Senator of the CNMI, and other interested organizations and individuals. DHS considered the comments received and all other material contained in the docket in preparing this final rule. This final rule does not address comments that were beyond the scope of the interim final rule, including those seeking changes to United States statutes, changes to regulations or petitions (outside the scope of the interim rule), or changes to the procedures of other DHS components or agencies. The final rule also does not address comments on the CNMI's government functions. All comments and other docket material are available for viewing at the Federal Docket Management System (FDMS) at *http://www.regulations.gov,* docket number USCIS–2008–0038.

A. Summary of Comments

Of the 146 comments received, four comments supported the provisions in the rule as a whole and welcomed the efforts of DHS to minimize, to the greatest extent practicable, potential adverse economic and fiscal effects of federalization and to maximize the Commonwealth's potential for future economic and business growth.

Most commenters expressed concerns over specific provisions in the interim final rule, such as: The transitional worker eligibility requirements; the exclusion of certain occupational categories; the transitional worker classification's allocation system; the petitioning requirements; the ability to acquire transitional worker status in the CNMI without a visa; the requirement to obtain a visa to re-enter the CNMI; and the length of the transition period. Several commenters suggested limiting the transitional worker classification to foreign workers already in the CNMI. Some opposed the blanket exclusion of certain occupational categories and stated that any exclusion would negatively impact the CNMI economy. Other commenters stated that DHS did not meet the requirement to establish and enforce a transitional worker permit system that provides for the allocation and reduction of workers. Many opposed the petitioning requirement and fees by suggesting the automatic conversion of all CNMI permits into transitional worker status. Others opposed the travel restrictions on the transitional worker classification and the visa requirement to re-enter the CNMI. Some suggested that DHS permit travel in the CW status, on the CNMI permit, or issue a waiver of the visa requirement.

B. General Comments

The comments received and DHS responses are organized by subject area and addressed below.

Sixty-one commenters expressed concern, supported, or offered general suggestions regarding the transitional worker rule.

1. System of Permits Versus System of Status

Two commenters stated that the CNRA did not authorize DHS to create a new status for workers. They argued that transitional worker status is not necessary because DHS only needs to control worker permits. The commenters suggested that the statute provides no basis for transforming the system of ''permits'' for employers into a system of ''status'' for alien workers. They argued that the term ''permit'' applies only to an employer and is not synonymous with the term ''CW status'' which applies only to a worker. The commenters added that DHS created a ''status'' for workers instead of following Congressional intent to create a ''permit'' for employers. The commenters wrote that, by doing so, DHS intended to restrict workers from moving from employment under Commonwealth-approved contracts to Federal permit-approved employment and back again during the first two years of the transition program. The commenters added that the statutory provision allowing ''registration'' of aliens present in the Commonwealth did not authorize DHS to create a separate ''status'' for persons so registered. *See* 48 U.S.C. 1806(e)(3).

DHS interprets the CNRA to authorize DHS to administer the permit system in a manner deemed most reasonable and efficient. *See* 48 U.S.C. 1806(d)(2). The CNRA also authorized DHS, in its discretion, to implement a registration program to aid in the federalization process. *Id.* at 1806(e)(3). The CNRA did not state that the Federal permit system should mirror the current CNMI permit system under its prior immigration laws. It is not reasonable for DHS to administer a permit system outside of the immigration laws of the United States. DHS interprets the CNRA to allow it to establish a classification within its existing system. While the CNMI's formerly applicable immigration law refers to a system of ''permits'' and Federal immigration law refers to ''status,'' both terms apply to the alien's period of stay and conditions of such stay. DHS believes it is reasonable to interpret that the CNMI permit is comparable to the federal immigration status because they both set conditions for the admission of the foreign workers. As such, DHS implemented a transitional worker program to be consistent with federal immigration laws, including all fees, petition and application procedures. Therefore, the final rule requires that employers petition for transitional workers and allows employees to change employers under INA section 248 and obtain lawful permanent status, if eligible, under INA section 245. *See* new 8 CFR 214.2(w)(5) and (7). The CNMI permit system did not offer such flexibility. While DHS did not use the CNRA's registration provision in developing the rule, it provides a transitional program as mandated by the CNRA within the parameters of the existing Federal system.

2. Immediate Implementation

Four out of 61 commenters suggested that the transitional worker rule be immediately implemented to avoid adverse effects on the CNMI's fragile economy. One of these commenters supported the rule as a whole and welcomed the efforts of DHS to provide for an orderly transition by addressing security, foreign labor, illegal activity, and the promotion of U.S. citizen hiring. Another commenter requested that the rule be finalized only after issuance of the congressionally mandated U.S. Government Accountability Office (GAO) report.[5]

DHS appreciates the support of its efforts and the concerns expressed about minimizing the effect of the transition on the CNMI economy. Consistent with the statement of congressional intent in the CNRA, this final rule attempts to avoid adverse effects to the CNMI economy by providing as much flexibility as possible in administering the CW classification. See 48 U.S.C. 1806 note. DHS continues to work with other Federal agencies to coordinate implementation of the CNRA. Such coordination will extend to the statutorily mandated reports to Congress, including the GAO Report (GAO–10–553) released on May 7, 2010, and the recommendations contained therein. Accordingly, DHS has not adopted the suggestions that the final rule be immediately implemented or delayed, and this rule implements the CW classification.

3. Lawful Permanent Residence

Forty-one out of 61 commenters suggested that, to support a stable work force, foreign workers in the CNMI should be given lawful permanent residence, some other improved immigration status, or a pathway to U.S. citizenship. Many of the commenters suggested such status for guest workers who have worked in the CNMI for years. Others suggested lawful permanent residence, some other improved immigration status, or a pathway to U.S. citizenship for all foreign workers, regardless of their time in the CNMI. Some suggested such status for long-term guest workers with U.S.-born children or families within the CNMI.

Three of the commenters suggested that DHS create and grant a unique permanent status (Lawful Permanent Resident (LPR)-CNMI Only) to foreign workers who have been living in the CNMI for 3 years on the enactment date of the CNRA (May 8, 2008), and who are otherwise admissible. One commenter suggested a scoring system to decide how to grant permanent residence. One suggested a permanent CNMI-only H–2 program.

While these suggestions fall outside the scope of this regulation, it is important to note that the CNRA authorizes the Secretary of Homeland Security to create only a nonimmigrant classification in the Commonwealth during the transition period. *See* 48 U.S.C. 1806(d). In compliance with the CNRA, DHS is establishing a nonpermanent classification, available only during the transition period (unless extended by the Secretary of Labor), to provide a guest worker with lawful nonimmigrant status. *See* new 8 CFR 214.2(w)(1)(xi). The CNRA does not provide DHS with authority to create a permanent immigration path specifically for the CNMI, nor does any other law. Under the CNRA, a transitional worker may adjust to lawful permanent resident status throughout the transition period, if eligible through another immigrant-based petition or application under the provisions of the INA. *See* 48 U.S.C. 1806(d)(1). For these reasons, DHS is unable to accept the suggestions of these commenters.

4. Immigration Law

One commenter expressed concern regarding the complexity of the immigration laws and the effect of such complex laws on small businesses. DHS understands the concerns of the commenter and agrees that immigration law is complex. Nonetheless, DHS has no power to change the immigration laws and is unable to make any changes in the rule to address this commenter's concerns. DHS understands that the transition of the CNMI to the U.S. immigration system offers both benefits and challenges to the CNMI population. This rule promulgates provisions governing CW status consistent with other INA nonimmigrant categories. The rule attempts to incorporate standard elements from other nonimmigrant categories to maintain regulatory consistency. Employers wishing to

[5] The GAO report was released on May 7, 2010. *See* GAO, *Commonwealth of the Northern Mariana Islands, DHS Should Finalize Regulations to Implement Federal Immigration Law,* No. GAO–10–553 (May 7, 2010), available at *http://www.go.gov/new.items/d10553.pdf.*

employ foreign workers must abide by all rules set forth in the Code of Federal Regulations. USCIS has conducted extensive outreach to explain the complexities of U.S. immigration law to the community, private sector employers, and CNMI governmental officials, including numerous meetings and information sessions in Saipan, Tinian and Rota with stakeholder groups and the general public, as well as posting informational materials on the USCIS Web site on a variety of CNMI-related topics. Among other things, in October 2009, USCIS conducted outreach on DHS regulations initially implementing the CNRA. In December 2009, USCIS again conducted outreach to employers and the public, focusing on employment eligibility verification (Form I–9) requirements. In January 2011, DHS conducted outreach on Saipan for the December 20, 2010 final rule, E–2 Nonimmigrant Status for Aliens in the Commonwealth of the Northern Mariana Islands With Long-Term Investor Status, with community based organizations, CNMI government representatives and local business leaders. USCIS plans to conduct similar outreach efforts for this final rule. In addition to CNMI-specific materials, USCIS also provides helpful explanations of U.S. immigration law on its Web site and provides a dedicated employer information telephone line. Thus DHS believes that it has taken reasonable and substantial action to mitigate any adverse impacts that implementation of the CNRA and the CW classification may entail with respect to availability of information.

5. Labor Law

Five out of 61 commenters expressed concerns regarding the rule's effect on labor laws and the CNMI permitting system. One of these commenters stated that the rule violates the contract workers' rights. Four of the commenters stated that the rule sets up a labor permitting system that fails to address the many issues that have plagued the CNMI nonimmigrant guest workers by eliminating all of the existing labor protections under the previous CNMI immigration system. They added that the rule subjects foreign workers to abuses that currently affect the H–2 visa program and assert that such past abuses were eliminated from the CNMI program. Two of these commenters believe that, given such progress under CNMI law, DHS should support and not seek to eliminate the Commonwealth's guest worker program. The commenters argued that the interim rule failed to provide a reasonable mechanism to facilitate any cooperation between the two systems or any practical means for Commonwealth enforcement of its labor laws in connection with the Federal system.

The CNRA requires the discontinuation of the CNMI's previous immigration system. As required by the CNRA, this final rule creates a new transitional worker classification and recognizes CNMI-issued work permits during the first two years of the transition period. *See* new 8 CFR 214.2(w)(1)(v). Foreign workers granted work authorization from the CNMI government will continue to be work authorized under U.S. immigration law for the duration of the permit's validity or up to two years after the transition program effective date, whichever is shorter. *See* 48 U.S.C. 1806(e)(2). This employment authorization under Federal immigration law affects only the basic privilege to work in the CNMI. Employers in the CNMI remain responsible for complying with other applicable requirements of law, such as wage and hour and occupational safety requirements. DHS assumes that the Commonwealth will continue to enforce its local labor laws to the extent that they are not preempted by Federal immigration law. Nevertheless, DHS cannot accept the commenters' suggestion to replicate or rely on the authorities and processes of the CNMI with respect to work authorization of aliens for establishing and administering the CW classification. Though these commenters indicate that the pre-November 28, 2009 system was a preferable immigration and labor policy to federalization, Congress eliminated that system and required that DHS implement federal immigration law in the CNMI. *See* section 701(a) of the CNRA, 48 U.S.C. 1806 note. Perpetuating CNMI authorities, even if it were lawful to do so under the CNRA, would be contrary to the letter and spirit of the CNRA that Federal transition programs and authority be established as promptly as possible in the CNMI. *Id.*

This final rule incorporates CNMI labor law protections in its description of an eligible employer. *See* new 8 CFR 214.2(w)(4). The rule provides that, in order to be eligible to petition for a transitional worker, an employer must offer terms and conditions of employment consistent with the nature of the occupation or industry in the CNMI. *Id.* It also provides that employers must comply with all U.S. Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage. *Id.* The reference to Commonwealth requirements is intended only to include those aspects of Commonwealth law that are not immigration law. CNMI law relating to employment authorization of aliens is immigration law that has been superseded by the CNRA.

DHS understands the concern of commenters about the possible revival of past worker abuses that occurred in the CNMI. Like workers in other parts of the United States, all employees who work in the CNMI are protected by a variety of Federal civil rights, labor, and workplace safety laws that are enforced by the U.S. Department of Justice (U.S. DOJ) and the U.S. Department of Labor (U.S. DOL).

6. Adverse Effects

Two commenters suggested revising the rule to minimize the serious adverse effect and increased burdens. The commenters did not address any specific actions to take or what effects needed mitigation. DHS therefore has not changed the rule in response to this comment. The interim final rule was drafted consistent with expressed Congressional intent to minimize the potential adverse economic and fiscal effects of the federalization of the CNMI's immigration program. DHS is aware that the CNMI is experiencing a severe economic downturn during the current decline in the world economy. DHS formulated this rule to be as inclusive as it reasonably could within the parameters of the statute. Moreover, DHS has made additional changes in the final rule to that end. This final rule provides for an initial grant of CW–1 transitional worker status or CW–2 dependent status in the CNMI without having to travel abroad to obtain a nonimmigrant visa, for need-based waivers of the filing fee for dependent family members seeking CW–2 status in the CNMI, and, as discussed in more detail below, for a limited travel exception, where appropriate, to the otherwise applicable bar on travel elsewhere in the United States by aliens in CW status, for Philippine nationals who hold CW status and travel between the CNMI and the Philippines directly through Guam. Thus, DHS believes that it has minimized adverse effects and burdens caused by this rule.

7. DOI Report

Five commenters offered suggestions regarding the Department of the Interior's (DOI) Report on the Alien Worker Population in the Commonwealth of the Northern Mariana Islands (the ''DOI Report'').[6] They

[6] *See Secretary of the Interior, Report on the Alien Worker Population in the CNMI* (April 2010),

suggested that the Report to Congress should contain a joint recommendation (from DOI, DHS and the CNMI Governor) to allow guest workers to apply for enhanced status. One of these commenters stated such recommendations to improve immigration status for long-term alien workers can be addressed during the transition period but no later than the April 2010 report. The commenter was concerned that neither Federal agencies nor the CNMI governor reached a decision.

The DOI Report was released in April 2010. DHS continues to work together with other Federal agencies to coordinate the implementation of the CNRA provisions in the Commonwealth. Such coordination extended to the statutorily mandated reports to Congress and any recommendations contained therein.

C. Specific Comments

The specific comments are organized by subject area and addressed below.

1. CNMI-Only Transitional Workers: CW Eligibility Requirements

Twenty-six commenters expressed concern or offered suggestions regarding the rule's eligibility requirements.

(a) Foreign Workers in the CNMI

Five out of 26 commenters suggested that transitional worker status should be limited to guest workers present in the CNMI and should not be available to those abroad. Two of these commenters suggested that the rule intends to admit new foreign workers to the Commonwealth without regard to economic impact or regulatory effect on the Commonwealth. The commenters suggested that the likely effect will be to encourage the entry of very low-wage, unskilled workers, who would displace experienced on-island foreign workers, resulting in unemployment and incentives to fall into illegal status.

Eighteen of 26 commenters suggested that the transitional worker program provide a hiring preference for foreign workers currently in the CNMI. Three of these commenters suggested that DHS place a numerical limitation on transitional workers coming from abroad in order to provide foreign workers in the CNMI with the hiring preference. Six of these commenters suggested that DHS conduct a registration, as mentioned in the CNRA, of alien workers present in the CNMI to ensure that any jobs that need to be performed by the alien workforce would first be offered to on-island workers. Another commenter suggested that DHS conduct a registration to determine the number of guest workers in the CNMI and their corresponding job categories. The commenter wrote that the data on the available workforce may deter employers from hiring abroad. One commenter suggested a hiring preference for Filipino foreign workers in the CNMI. Another suggested that the transitional worker program provide a hiring preference for guest workers present in the CNMI for over 5 years.

The transitional worker program will be available to two groups of aliens in general: (1) Those who are present in the CNMI and (2) those who are abroad. *See* new 8 CFR 214.2(w)(2). In the CNRA, Congress expressed its intent that the transitional worker program provide for an orderly transition from the CNMI permit system to the U.S. Federal system while minimizing potential adverse economic and fiscal effects. *See* 48 U.S.C. 1806 note. Consistent with that intent, this rule does not limit access to workers already present in the CNMI. It provides CNMI employers with the ability and flexibility to maintain their existing foreign workers for current business needs. It also preserves employer access to new workers in order to accommodate new economic opportunities. *See* new 8 CFR 214.2(w)(2).

While information on guest workers and their current job categories may be helpful, DHS does not plan to limit the availability of transitional workers to guest workers currently on the islands. The CNRA requires that the allocation of transitional worker visas be reduced to zero by the end of the transition period, but it does not limit eligibility for the visa to foreign workers in the CNMI. *See* 48 U.S.C. 1806(d)(2). DHS believes that limiting CW–1 issuance to foreign workers already present in the CNMI or to Filipino foreign workers in the CNMI, would run counter to the CNRA's requirement to mitigate harm to the Commonwealth's economy. This rule provides access to foreign workers abroad to preserve the CNMI's ability to meet future demands for labor. DHS, in consultation with other Federal agencies, will consider registration as it continues to evaluate the CNMI's economic needs. Accordingly, no changes were made to the final rule as a result of these comments.

(b) Ineligibility for Another INA Classification

Three commenters expressed concern regarding the rule's requirement that the transitional worker classification be limited to nonimmigrant workers who would not otherwise be eligible for another INA classification. Two of these commenters argued that such a requirement is a misinterpretation of the law and will deprive the Commonwealth of skilled workers. The commenters stated that the CNRA's intent is to preserve a choice: Workers may choose either transitional worker status or another nonimmigrant status. All three commenters were concerned that certain aliens eligible for an INA-based status may only be eligible for transitional worker status because employers would be unable to petition for other INA classifications due to financial difficulties. The commenters stated that they would be unable to meet the income requirements for other INA classifications.

DHS disagrees with these comments. The CNRA requires that the transitional worker classification be used only for foreign workers ''who would not otherwise be eligible for admission under the [INA].'' 48 U.S.C. 1806(d)(2). This final rule states that guest workers eligible for other INA classifications at the time of a petition for CW status must apply for such status. *See* new 8 CFR 214.2(w)(2)(vi). This requirement stems directly from the CNRA requirement. *See* 48 U.S.C. 1806(d)(2). CNMI employers may use the CW classification during the five-year transition period while workers and employers seek to satisfy requirements, such as any necessary professional licenses or educational degrees, for other employment-based status under the INA. DHS is implementing this provision in as flexible a manner as possible. For example, this rule requires only an attestation that the employer does not reasonably believe the position to qualify for another INA nonimmigrant worker classification, as opposed to requiring the employer to petition for other INA classifications before seeking CW status. *See* new 8 CFR 214.2(w)(6)(ii)(G).

2. Employers

Fourteen commenters offered suggestions, or opposed the rule's requirements, for employers and the proposed exclusion of certain occupational categories.

(a) Terms, Conditions of Employment, and Transfers

Two commenters stated that the rule's provision with respect to terms and conditions of employment and transfers will likely lead to abuses. The commenters stated that the DHS rule requires only that an employer ''[o]ffer terms and conditions of employment

available at http:/www.doi.gov/oia/reports/042810_FINAL_CNMI_Report_pdf.

which are consistent with the nature of the petitioner's business and the nature of the occupation, activity, and industry in the CNMI.'' *See* 8 CFR 214.2(w)(4)(iii). They added that employers are not required to attest that they have met this condition. Another commenter suggested that all of the Commonwealth's requirements protecting workers could be undone by contracts that comply fully with the DHS requirement. The commenter then suggested that the DHS rule cannot ''prevent adverse effects on wages and working conditions'' as required by 48 U.S.C. 1806(d)(2). The commenter added that the DHS interim rule provides no protection for a nonimmigrant resident alien who is the subject of a petition that is denied, perhaps due to the negligence of an employer. The commenter further stated that the rule would be more restrictive than the Commonwealth system for transfers.

DHS agrees with the comments that the rule would be strengthened by further incorporating the terms and conditions of an employment requirement into the attestation requirement for employers. DHS has added a requirement that the employer attest that it will comply with the requirements for an eligible employer, which include offering appropriate terms and conditions for the intended CW–1 employment. *See* new 8 CFR 214.2(w)(6)(ii)(D). With respect to the comments expressing a preference for the Commonwealth's requirements protecting workers, a previous discussion in this preamble addressed this subject and explained why DHS cannot adopt these comments. Many of these comments deal with employment, labor, and safety laws that exceed the scope of this rule. By making the procedures for employers as clear and transparent as reasonably possible in order to implement the transitional worker provisions of the CNRA, including promulgation of a specific form for this petition (the I–129CW Form), the final rule provides protections to workers from employer negligence or error. However, it must be understood that these CNRA provisions are employer-based, and have been implemented accordingly. The employer, not the employee, files the petition, and it is the employer's discretionary choice whether or not to do so. This rule provides no steps for employees to take in order to keep their status in the CNMI. *See* new 8 CFR 214.2(w)(5). Thus no additional changes are made in response to these comments.

(b) Blanket Exclusion of Certain Occupational Categories

The interim final rule did not exclude any occupational categories from eligibility for CW workers, but DHS indicated that it was considering excluding dancing, domestic workers, and hospitality workers based upon human trafficking concerns, and specifically invited comment on this subject. Six out of 14 commenters opposed a potential final rule excluding certain occupational categories in order to combat human trafficking and sexual exploitation. These commenters stated that prohibiting a particular occupation will not effectively combat human trafficking. Some argued that the rule hurts the CNMI's successful efforts to stop trafficking under its 2007 reform law. Others stated that the exclusion of the proposed categories will not help deter the worker exploitation problem because exploitation occurs in a wide range of occupational categories and a foreign worker can technically enter any of those occupational categories. The commenters added that a blanket exclusion of any occupational category or legitimate business that supports the CNMI economy runs counter to the CNRA's stated purpose of providing flexibility to maintain existing businesses and expanding tourism and economic development in the CNMI. They also argued that the CNRA does not provide statutory authority for the blanket exclusion and that a blanket exclusion is inappropriate and will cause further economic harm.

Two other commenters added that the exclusion of occupations that serve the tourist industry is not justified and will cause substantial harm. They stated that the proposed exclusion is based on a concern regarding abuse against women and, as such, is discriminatory because it is not gender neutral. The commenters noted that such restrictions are unnecessary because prostitution is a crime under CNMI law.

Commenters suggested that DHS offer protection from exploitation through a system of employment regulation combined with enforcement of the laws intended to protect guest workers regardless of occupational category. The commenters suggested that DHS conduct site visits and that any exclusion or employer debarment be based on a specific finding indicating that a particular business is violating a law, not based on evidence of past abuses. The commenters argued that the rule's requirement that employers must be engaged in legitimate business is not the appropriate regulatory means to address the DHS concern.

DHS agrees that exploitation can occur in any occupational category. The proposed exclusions were supported by the findings of a GAO report and Congressional hearings, which indicated that the excluded occupational categories have been prone to widespread abuse. U.S. Gov't Accountability Office, GAO–08–791, *Commonwealth of the Northern Mariana Islands, Managing Potential Impact of Applying U.S. Immigration Law requires Coordinated Federal Decisions and Additional Data* (2008); *see, e.g.*, *Conditions in the Commonwealth of the Northern Mariana Islands: Hearing before the S. Comm. on Energy and Natural Resources,* 110th Cong. 50 (2007) (testimony of Lauri Bennett Ogumoro and Sister Mary Stella Mangona) (*2007 Senate Hearing*). In addition, DHS notes that the proposed exclusion of certain tourist industry workers was gender neutral and would be applied in a gender neutral manner. Nevertheless, DHS agrees that a blanket exclusion of certain occupations may negatively impact the CNMI's economy. This final rule does not include a blanket exclusion of any specific occupational category, but consistent with the CNRA's requirement for business employers, retains the requirement that all employers must be engaged in a legitimate business. *See* 48 U.S.C. 1806(d)(5)(A); new 8 CFR 214.2(w)(4).

(c) Exclusion of Domestic Workers

Five commenters suggested that the rule should allow domestic workers as transitional workers. One of these commenters disagreed with the requirement that only businesses will be allowed to petition for domestic workers as CW workers. That commenter also argued that individual households should be allowed to employ domestic workers directly and the renewal of the contracts should be based on the proper tax filings of the workers.

Two additional commenters argued that the definition of a ''legitimate business'' cannot be used to bar households from employing caregivers. The commenters argued that the determination as to ''legitimate business'' only relates to the task of determining whether an adequate number of workers are available. As such, they stated that domestic workers are currently entitled to work until the transition period ends. The commenters further stated that DHS may not ''disqualify an entire business on the basis of 'illegal' activity, except on the basis of conviction of a crime, and may not impute the crime of an officer to the entire business without due process.''

They additionally asserted that since DHS seeks to disqualify a business if it engages ''directly or indirectly in any activity that is illegal under Federal or CNMI law,'' the regulations should be clear that only a conviction of a crime can be the basis for this disqualification.

The CNRA transitional worker provisions were intended to address the needs of legitimate businesses. *See* 48 U.S.C. 1806(d)(5)(A). DHS believes that the rule's provision regarding legitimate businesses accords with the CNRA and is lawful and appropriate. While the rule does not prohibit domestic workers from obtaining CW status, for their protection and for the legitimacy of the petition process, the rule reasonably requires that domestic workers be channeled through an established, legitimate business operation. *See* new 8 CFR 214.2(w)(4). The commenters who wrote that domestic workers are currently entitled to work until the transition period ends are incorrect. Workers authorized by the CNMI before November 28, 2009 are authorized to work for up to two years or the date of expiration of their CNMI-issued permit, whichever occurs first—not for the entire transition period. With regard to the comment suggesting the level of criminal activity or proof that should render a petitioning employer ineligible, the CNRA does not require a conviction for the direct or indirect illegal activity provision to be applied. Therefore, DHS has retained that provision unchanged in the final rule.

For the purposes of the transitional worker program, the final rule states that a legitimate business is a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit or is a governmental, charitable or other validly recognized nonprofit entity and meets applicable legal requirements for doing business in the CNMI. *See* new 8 CFR 214.2(w)(1)(vi). The rule is also consistent with the definition of ''doing business'' in other classifications under the INA. *See* 8 CFR 204.5(j)(2). As such, the final rule states that a petitioner is ''doing business'' if engaged in the regular, systematic, and continuous provision of goods or services. *See* new 8 CFR 214.2(w)(1)(ii). An individual employing a household worker is not engaged in the systematic provision of goods or services and is not ''doing business'' for the purpose of the transitional worker program. No change was made as a result of this comment.

Additionally, a stated purpose of the CNRA is to combat human trafficking and other widespread abuse. *See* 48 U.S.C. 1806 note. Congressional hearings held prior to passage of the CNRA focused on the issue of domestic workers in the CNMI. *See, e.g., 2007 Senate Hearing.* Congress was provided with evidence that directly employed domestic workers have been subject to widespread abuse and have been victims of human trafficking. *Id.* Allowing only domestic service companies to file for CW workers is consistent with the decision to not exclude any specific occupational categories and to consider petitions by legitimate businesses on a case by case basis. Therefore, domestic workers will be afforded the same sorts of employment protections as other CW workers in the CNMI, whose employer petitioners must be legitimate businesses under the terms of this final rule. Accordingly, DHS will not change the final rule and will limit filings for CW domestic workers to domestic service companies.

It is important to note that a household worker may still be eligible for transitional worker status if a business petitions for the worker. The occupational category itself is potentially eligible for the transitional worker status. DHS is only limiting such filings for CW workers to domestic service companies operating as legitimate businesses. Therefore, it is possible that domestic workers qualify for transitional worker status through employment by a business which places domestic workers in individual households.

One commenter suggested that domestic workers should be offered permanent immigration status. As previously discussed, the CNRA only authorizes DHS to create a nonimmigrant classification to ensure adequate employment in the Commonwealth during the transition period. *See* 48 U.S.C. 1806(d). There is no authority under the CNRA for DHS to establish an immigrant classification. Thus no change is made in the final rule. The CW classification is a temporary classification, available only during the transition period, to provide a guest worker with lawful nonimmigrant status.

3. CNMI-Only Transitional Worker Allocation System

Thirty commenters offered suggestions for, or opposed, the transitional worker allocation system.

(a) Allocation of Transitional Worker Classifications

Three commenters stated that DHS did not implement a transitional work permit system as required by the CNRA. They stated that DHS was required to establish and enforce a transitional work permit system in the CNMI that provided the criteria for allocating transitional workers to employers or industries during the transition period. *See* 48 U.S.C. 1806(d)(2). Specifically, two of these commenters argued that there were no allocation criteria. One commenter stated that the rule did not describe a system or criteria for allocating how the permits are to be divided among employers. This commenter argued that DHS will be required to allocate permits among CNMI employers whose collective demand for foreign workers is greater than the available number of permits during the following year. The commenter added that reliance on the H visa system is not a substitution for establishing the system required by the CNRA. The second commenter further argued that an annual determination is not an adequate substitute for such a process. A third commenter noted that any system will have to offer careful consideration to the economies of all three islands to avoid the harm that may result from the allocation of all slots to one island such as Saipan.

The CNRA requires the Secretary of Homeland Security to establish a permit system for prospective employers based on any reasonable method. *See* 48 U.S.C. 1806(d)(2). DHS interprets this mandate to allow it to establish a classification within its existing system, which it has done. The Federal immigration system requires employers to submit petitions for their employees. This final rule incorporates standard elements of the Federal immigration system, including the DHS petitioning and classification process, and thus it is consistent with current law, reasonable, and consistent with the intent of the CNRA.

Additionally, the CNRA requires an annual reduction in the number of permits and total elimination of the CW classification by the end of the transition period. *Id.* The CNRA does not dictate how this will occur. As indicated in the interim rule, DHS will publish a **Federal Register** notice announcing the annual numerical limitation. DHS believes that the number of workers provided in the first years in this rule, coupled with the **Federal Register** notice, will be sufficient notice and guidance to implement the required CW classification drawdown.

(b) Numerical Limitation by **Federal Register** Notice

One commenter stated that the CNRA does not authorize the issuance of regulations in piecemeal form over time that address various aspects of the work

permitting system but rather requires one single document. The commenter also opposed the issuance of a **Federal Register** notice related to the numerical limitation. Another commenter suggested that DHS apply a periodic reduction in foreign workers without providing notice or comment.

As noted above, the CNRA provides that DHS may base the system on any reasonable method. *Id.* DHS determined that it is reasonable to base the transitional worker classification on the current nonimmigrant system. As such, this rule promulgates provisions governing the transitional worker classification and incorporates standard elements from current nonimmigrant categories to maintain regulatory consistency.

The CNRA also mandated that DHS provide the Commonwealth with flexibility to maintain existing businesses and develop new economic opportunities yet required an annual reduction in the number of permits and total elimination of the CW classification by the end of the transition period. *See* section 701(b) of the CNRA, 48 U.S.C. 1806 note; 48 U.S.C. 1806(d)(2). Consistent with this mandate, DHS has determined that it is appropriate to publish the CW annual numerical limitation rather than provide a permit reduction plan in this final rule due to the uncertainty of the CNMI's future workforce needs and economic conditions. The Secretary of Homeland Security has determined, in her discretion, that the annual numerical limitation will be published in a future **Federal Register** notice. *See* new 8 CFR 214.2(w)(1)(viii)(D). DHS believes that this method will maximize the Commonwealth's potential for future economic and business growth by providing a flexible mechanism for the continued use of alien workers during the phasing-in of Federal immigration law. DHS also believes that a **Federal Register** notice will provide sufficient public notice of the annual numerical limitation in accordance with the regulations established by this rule. However, as further discussed below, DHS has provided in this final rule the numerical limitation not just until September 30, 2010, as was provided in the interim final rule, but through the end of fiscal year 2012 on September 30, 2012. Given uncertainty about demand for the program, it would not be prudent to try to set numbers for time periods on or after October 1, 2012 at this time. The 22,417 and 22,416 workers provided for the first two years of the CW program in this rule, coupled with the **Federal Register** notice, will be sufficient information to implement the required CW classification drawdown. DHS will need to make the announcement in a timely fashion from the time of the decision to the issuance of the notice providing the new CW classification numerical limit. As such, DHS believes that a **Federal Register** notice is the most appropriate method to use to issue the necessary information.

(c) Total Number of Foreign Workers in the Work Force

One commenter suggested that DHS adopt the CNMI's proposed revision of the interim rule with regard to assessing the total alien work force and total work force. The same commenter took issue with the figures DHS used to project the number of CW grants of status. The commenter stated that the DHS estimate of 13,543 foreign workers in-status and 1,000 workers out-of-status who may be brought into lawful status under CNMI law was incorrect. The commenter stated that DHS incorrectly estimated the number of immediate relatives of foreign workers who may be eligible for CW–2 status. The commenter further stated that DHS's 2010 projections were also incorrect because most workers will be working under CNMI-issued permits and most employers will be employing workers under existing CNMI-approved contracts. As such, these workers would not need to enter the Federal immigration system for at least two years.

DHS disagrees with the commenter and believes that its estimate of the number of foreign workers is reasonable. The final rule sets forth the maximum number of persons who may be granted transitional worker status based on the CNMI government estimate of the nonresident workers as of May 8, 2008, the date of enactment of the CNRA. The 22,417 number was the total number of foreign workers working in the Commonwealth, according to the CNMI government, on that date.[7] In addition to the CNMI estimate,[8] DHS used data compiled by GAO and other credible resources in the development of this rule. *See, e.g.,* GAO–08–791, August 2008. DHS agrees with the commenter that the CNRA does not require that an employer petition for an INA benefit. Instead, employers have the option to retain the CNMI benefits during the grandfathered period or petition for INA benefits. As such, the number of CW petitions filed is directly connected to individual business decisions made by each CNMI employer's business needs. Therefore, the estimate is affected by a variety of factors that are not within DHS control. Thus, DHS has not adopted this commenter's suggestions in the final rule.

The interim final rule set a numerical limitation for the first year of the transition period (November 28, 2009 through September 30, 2010) at 22,417, with the limitation for fiscal year 2011 (beginning October 1, 2010) and subsequent fiscal years to be published via subsequent Notice in the **Federal Register**. Given the mootness at this time of transitional worker numbers for the period before October 1, 2010, the need for employers to have current usable information about the number of CW workers available for fiscal year 2011 and the expected expiration of a large number of ''umbrella permits'' in late 2011, this final rule updates the limitation to set the maximum number of CW–1 visas for fiscal year 2011 at 22,417. *See* new 8 CFR 214.2(w)(1)(viii)(A). In order to provide additional information and certainty to CNMI employers, the final rule also establishes the limitation for fiscal year 2012 (beginning October 1, 2011). New 8 CFR 214.2(w)(1)(viii)(B). As required by the CNRA, the number is reduced for fiscal year 2012, compared to fiscal year 2011; however, the reduction is only by one visa, in order to effectively maintain a steady level of available visas for the first two years of the CW program and accommodate potential demand caused by the expiration en masse of umbrella permits early in fiscal year 2012. Thus, 22,417 is the maximum number of CW–1 visas for fiscal year 2011, and 22,416 will be the maximum CW–1 visas available in fiscal year 2012. *See* new 8 CFR 214.2(w)(1)(viii). DHS does not expect the full number of available visas to be used, especially the fiscal year 2011 allocation, given the effective date of the final rule within that fiscal year and the continuing validity of umbrella permits. Nevertheless, setting the maximum this high will easily meet the projected CW visas needed by employers to transition umbrella permit holders to CW–1 status, regardless of the actual number of workers currently present on the island. Consistent with other classifications, if the numerical limitation is not reached for a specified fiscal year, the unused numbers do not carry over to the next fiscal year. This clarification in the final rule is necessary because (unlike the interim final rule) the final rule establishes the numerical limitation for more than one

[7] *See* Letter from Benigno Fitial, Governor of CNMI, to Richard C. Barth, Assistant Sec'y for Policy Dev., and Stewart A. Baker, Assistant Sec'y for Policy, Office of Policy, DHS (July 18, 2008) (Fitial letter), *available at http://www.regulations.gov* under DHS Docket No. USCIS–2008–0038.

[8] *See* Fitial letter.

fiscal year. While the umbrella permits do not expire until November 27, 2011, employers should apply well in advance of that date to ensure that their petitions are adjudicated and CW status granted before November 27, 2011. Although an employer cannot petition more than six months before the employment is to begin, an employer who needs the services of a worker with an umbrella permit need not wait until six months before the expiration to apply for CW status to replace the umbrella permit. The six-month time frame is based upon when the employer needs the worker, not when the worker's current immigration status expires. *See* new 8 CFR 214.2(w)(12)(ii).

(d) Reduction of Transitional Workers

Four commenters stated that DHS did not implement the statutory requirement that DHS establish and enforce a transitional work permit system in the CNMI that provides for a reduction in the number of transitional workers to zero by December 31, 2014. They stated that the rule only established a numerical cap. Without a reduction plan, employers cannot operate their businesses and plan for future access to foreign labor. Similarly, two commenters requested clarification on DHS' intent to draw down foreign workers to zero by the end of the transition period. One of these commenters also argued that the rule did not identify any criteria or methodology that will be used to reduce the number of permits on an annual basis. Specifically, the commenter disagreed with the DHS assertion that a permit reduction plan was not established due to a lack of specific data on the foreign worker population and due to the uncertainty of the CNMI's future economic conditions. The commenter stated that the DHS claim that specific data was unavailable was later impeached when DHS offered very specific figures regarding the number of foreign workers in the CNMI and suggested that DHS should have chosen an alternative set forth in the 2008 GAO report. Those alternatives set forth a range of possible outcomes in terms of impact on the Commonwealth's economy.

As discussed above, the final rule sets forth the maximum number of workers who may be granted transitional worker status during fiscal years 2011 and 2012. *See* new 8 CFR 214.2(w)(1)(viii). DHS based this number on the CNMI government estimate of the nonresident workers as of May 8, 2008, the enactment date of the CNRA.[9] DHS believes that it is prudent to consider this estimate as a baseline for the maximum number of possible transitional workers in the CNMI.

DHS did not establish a methodology for reducing the number of transitional workers, ultimately to zero by the end of the transition period. DHS believes that any methodology will require flexibility to adjust to the future needs of the CNMI economy. A methodology or formula set forth in a regulation does not provide such flexibility. Additionally, the CNRA only requires that DHS reduce the number of transitional workers on an annual basis. *See* 48 U.S.C. 1806(d)(2). It does not mandate an actual specific reduction. The final rule retains the interim rule's provision that the number of transitional workers will be reduced by at least one transitional worker per year. *See* new 8 CFR 214.2(w)(1)(viii)(C). As described above, this rule provides that the number of transitional workers will be reduced by one CW worker in fiscal year 2012 compared to the previous year, setting the maximum number of CW–1 visas at 22,416. This approach will ensure that there is a fully adequate supply of CW visas that encourages transition from the umbrella permit system to CW status for needed workers during fiscal years 2011 and 2012. *See* new 8 CFR 214.2(w)(1)(viii). For the years following fiscal year 2012, DHS will assess the CNMI's workforce needs on a yearly basis. *See* new 8 CFR 214.2(w)(1)(viii)(C).

(e) Reduction Plan Suggestions: Limiting Access to Foreign Workers

Two commenters suggested that transitional worker status should be limited to foreign workers present in the CNMI only, as opposed to any workers abroad sought to be imported under the transitional worker program. One of these commenters argued that the shortage of jobs in the Commonwealth makes it unnecessary for employers to go abroad for additional employees. One commenter suggested that such a limitation will help curb the incidents of human trafficking and help in the mandated reduction of transitional workers. Another commenter argued that allowing workers to come to the CNMI conflicts with the statutory goal of phasing-out all contract workers. The commenter added that the goal to ultimately phase-out contract workers would be furthered by preventing hiring from abroad and providing transitional worker status only to the current foreign work force in the CNMI.

While the CNRA requires that the allocation of transitional worker classifications be reduced to zero by the end of the transition period, it does not limit eligibility for the visa to foreign workers in the CNMI on or before the transition program effective date. *See* 48 U.S.C. 1806(d)(2). Instead, the CNRA establishes a transitional worker program for ''aliens seeking to enter the Commonwealth as a nonimmigrant worker.'' *See* 48 U.S.C. 1806(d). DHS believes that aliens seeking to enter the Commonwealth must include individuals that are not currently in the CNMI. Accordingly, DHS did not limit eligibility for CW–1 status to foreign workers already present in the CNMI because that would have placed strict limits on CNMI employers seeking to hire foreign workers. Similarly, DHS did not adopt either in the interim or final rule an opposite construction—that section 1806(d) means that only workers seeking to enter the CNMI from abroad, rather than any workers already present and working, may obtain transitional worker status—which is arguably a more supportable construction than the commenters' suggestions that the transitional program should include no workers coming from abroad. Such limits would run counter to congressional intent that DHS seek to minimize, to the greatest extent practicable, the potential adverse economic and fiscal effects of phasing-out the Commonwealth's system and to maximize the Commonwealth's potential for future economic and business growth by providing a mechanism for the continued use of alien workers. Therefore, the suggestions of the commenters on this subject were not adopted. This rule provides access to foreign workers abroad, as well as to those already present, to preserve the CNMI's ability to meet the demands of its economy. *See* new 8 CFR 214.2(w)(2).

(f) Reduction Plan Suggestions: Granting Lawful Permanent Residence

Eleven commenters suggested that DHS grant lawful permanent resident status, or some other immigration status, to guest workers. The commenters indicated that such a measure would stabilize the work force and help reduce the number of transitional workers to zero by the end of the transition period as required by the CNRA. One of these commenters suggested that DHS allow self-petitioning and make the CNMI-only classification a permanent status.

As previously mentioned, the CNRA does not authorize DHS to create a permanent CNMI classification. *See* 48 U.S.C. 1806(d). Lawful permanent resident status is available to a CW worker, though; thus, a CW worker may adjust to lawful permanent resident

[9] *See* Fitial letter.

status throughout the transition period, if eligible through an immigrant petition or application under the INA. *Id.* Since the commenters' suggestion cannot be adopted, no changes were made to the final rule as a result of these comments.

(g) Reduction Plan Suggestions: Assessing Labor Needs

Two commenters expressed concern about the need to assess the CNMI labor needs and use those needs to craft any reduction plan. One of these commenters suggested that DHS accurately assess the CNMI's total labor needs in order to avert a collapse of its economy. The commenter asserted that guest workers are most essential to the economy because other residents of the CNMI are reluctant to take the jobs that foreign workers will accept. The commenters also suggested that phasing out the transitional workers by 2014 may result in a chaotic situation for the CNMI's economy.

DHS understands that the CNMI economy has been based on a workforce made up mainly of workers from other countries. To address this concern, Congress included a provision in the CNRA that allows for an extension of the transitional worker classification for up to five years upon a finding that the CNMI's labor needs are not fulfilled with INA classifications or domestic sources. *See* 48 U.S.C. 1806(d)(5). Under the CNRA, the Secretary of the U.S. Department of Labor will ascertain the current and anticipated labor needs of the Commonwealth and determine whether an extension of the Transitional Worker Program is necessary to ensure an adequate number of workers are available for legitimate businesses in the CNMI. *Id.*

The second commenter stated that the rule ignores the current labor needs of the CNMI and creates uncertainty with respect to the availability of an adequate labor force. The commenter emphasized that it is extremely important to establish how DHS will phase out transitional workers because the reduced labor pool directly affects the CNMI's Gross Domestic Product. As previously mentioned, DHS did not provide a reduction in an attempt to provide the CNMI economy with the flexibility to grow or constrict its workforce according to market forces. Still, according to data on the number of foreign workers currently in the CNMI, the maximum number allowable under this rule appears to be quite adequate to meet the needs of CNMI businesses. Therefore, no changes to the final rule were made as a result of these comments.

(h) Reduction Plan Suggestions: No Reduction for the First Two Years

Two commenters suggested that the CNMI-issued permits and CNMI-approved employer contracts should be the foundation for the first two years of the transition period. These commenters further suggested no reduction in the number of foreign workers allowed legally in the CNMI should occur during those two years. The commenters suggested that the DHS rule state specifically that all CNMI-issued permits and contracts in force prior to the transition date on November 28, 2009, remain completely outside the Federal system until November 27, 2011, two years after the transition date.

DHS notes that the CNRA contains a grandfather provision, which grants work authorization to aliens in the CNMI with valid CNMI-issued work permits. See 48 U.S.C. 1806(e)(2). Work authorization is valid for the length of the work permit or until two years after the start of the transition period, whichever is shorter. *Id.* DHS does not agree with the commenter that all CNMI-issued permits and contracts in force prior to the transition period should be deemed completely outside the Federal system. It is true that to the extent workers have ''grandfathered'' work authorization (particularly those with ''umbrella permits''), their employers do not need to file CW nonimmigrant petitions on behalf of such workers to continue to employ them (so long as the grandfathered work authorization remains valid). However, the grandfather provision is itself a provision of Federal law (the CNRA). In response to concerns about permit allocation during the first two years of transition, however, DHS has (as described above) adjusted the rule to provide that a maximum annual number of 22,417 CW workers will be available in fiscal year 2011 (beginning October 1, 2010), and 22,416 in fiscal year 2012. See new 8 CFR 214.2(w)(1)(viii). This approach will help ensure that an adequate number of CW permits are available to CNMI employers during the time of necessary transition from grandfathered CNMI status to a Federal status before November 27, 2011, when umbrella permits will expire. Besides extending the 22,417 limitation from the first year of the transition period to fiscal year 2011 and reducing the maximum number of foreign workers by only one worker for fiscal year 2012, no changes are made to the final rule to address this comment.

(i) Reduction Plan Suggestions: No Reduction Pending U.S. DOL Determination on the Extension of the Transition Period

Two commenters suggested the rule include a plan under which DHS would collaborate with the U.S. Secretary of Labor to make the necessary assessment with respect to a five-year extension of the transition period no later than November 2011. The commenters also suggested that no reductions in the Commonwealth's workforce be made until the Secretary of Labor issues a determination on the extension.

Under the CNRA, only the Secretary of Labor has the authority to extend the transitional worker provisions of the transition period up to an additional five years. See 48 U.S.C. 1806(d)(5). DHS will continue to consult with U.S. DOL on all CNMI transition policies and issues; however, the requirements in the CNRA for extending the transition period are sufficient to address the issue. DHS does not believe that it is necessary, or appropriate, to include a deadline in this rule for U.S. DOL to make a determination on extending the transition period. Therefore, no changes are made as a result of these comments.

4. Petitioning Procedures

Fifty-six commenters expressed concern or offered suggestions regarding the rule's petitioning requirements.

(a) Grandfathering of CNMI Contract Workers

Eighteen commenters suggested that DHS issue an automatic conversion of all valid CNMI entry permit holders to transitional worker status. Some of these commenters opined that an automatic conversion into CW status, for one or two years, would help facilitate travel.

The commenters' suggestions to automatically convert valid CNMI entry permit holders into transitional worker status cannot be adopted. The CNRA requires DHS to recognize valid CNMI immigration status (and prohibits removal of such aliens for being present in the CNMI without admission or parole) until the expiration of such status up to a maximum of two years after the transition date. *See* 48 U.S.C. 1806(e)(1). The CNRA also requires that DHS recognize employment authorization until the expiration of such status up to a maximum of two years after the transition date. *See* 48 U.S.C. 1806(e)(2). Accordingly, DHS will recognize all CNMI permits within the stated timeframe.

DHS cannot automatically convert all permit holders to transitional worker status because the CNRA also requires

DHS to set conditions for admission under the transition program. *See* 48 U.S.C. 1806(d)(2). It directs that workers cannot be granted nonimmigrant classification or a visa under the transition program unless the permit requirements established have been met. *Id.* This provision does not authorize an automatic conversion of CNMI permits to transitional worker status. Consistent with other employment-based nonimmigrant classifications, DHS requires an employer to file a petition, Form I–129CW, for a CW–1 nonimmigrant worker in order to determine eligibility and set parameters for the program. *See* new 8 CFR 214.2(w)(5). This petitioning process is necessary to grant such status under the INA, as required by the CNRA. The CNRA requires the system for allocating ''permits to be issued to prospective employers * * *.'' *See* 48 U.S.C. 1806(d)(2). DHS believes that it would be inconsistent with this provision to grant CW status without an employer requesting it for a worker.

DHS will recognize permits as required by the CNRA. Otherwise, DHS will issue CW status in one-year increments in order to properly administer the allocation and annual reduction mandated by the CNRA. *See* new 8 CFR 214.2(w)(16). As discussed above, DHS cannot automatically convert CNMI permit holders to CW status. However, DHS has responded to the concerns of these commenters by providing in this final rule that lawfully present, work authorized aliens (including those with ''umbrella permits'') who are employed in the CNMI, and whose employers file petitions on or before the November 27, 2011 expiration date of CNMI permits seeking to continue to employ the aliens in CW–1 status via an application for a grant of status in the CNMI, will be authorized to continue in their employment after November 27, 2011. This authorized employment will continue until DHS makes a decision on the application. *See* new 8 CFR 274a.12(b)(23). This provision will prevent potential widespread loss of work authorization on November 27, 2011 by employees whose employers have filed CW petitions on their behalf before that date that are pending adjudication and the consequent potential disruptive effect on the CNMI economy.

DHS has made this accommodation in the final rule to address the unique circumstances in the CNMI, including the lack of familiarity in the CNMI with Federal immigration processes and statuses relative to other U.S. jurisdictions because Federal immigration law has only applied since November 28, 2009 and most aliens in the CNMI remain and work in the Commonwealth under umbrella permits or other authorization issued by the CNMI government before that date; the expiration of those permits on November 27, 2011; the adverse economic situation in the CNMI; and the legislative direction in the CNRA to seek to minimize adverse effects of the federalization of immigration authority.

Under new 8 CFR 274a.12(b)(23), the continuing work authorization will continue until DHS makes a decision on the application seeking CW status in the CNMI; that is, until either the application is granted and CW status provided to the alien worker, or until it is denied. Denial of an application for grant of CW status in the CNMI may not be appealed. *See* 8 CFR 214.2(w)(21).

This continuing work authorization provision applies only to aliens in the CNMI seeking CW–1 nonimmigrant status. It does not provide work authorization to any spouses or children seeking CW–2 nonimmigrant status, even if they are work authorized in the CNMI on or before November 27, 2011, as the CW–2 status sought does not itself provide any work authorization. If spouses or children wish to be work authorized in CW status, an employer must petition for them as a CW–1 principal. In that case the continuing work authorization would apply to them to the same extent as to other aliens applying for CW–1 status.

The continuing work authorization pending adjudication provided by this provision is not a grant of CW nonimmigrant or other lawful immigration status; CW status is only provided if and when a favorable decision is made on the application. The final rule does, however, make a conforming clarification to the definition of ''lawfully present in the CNMI''. *See* new 8 CFR 214.2(w)(1)(v)(A). Under new 8 CFR 214.2(w)(2)(iv), an alien in the CNMI must be lawfully present in the CNMI in order to be eligible for CW status. The final rule clarifies that in the case of aliens who are within their ''grandfathered'' period of stay before November 27, 2011, lawful presence is determined as of the date the application for CW status is filed (whether the application is the Form I–129CW application for CW–1 status for the principal, or the Form I–539 application for CW–2 status for a spouse or minor child). Therefore, the petition, and CW status for the alien may be granted after November 27, 2011. This accommodation does not alter the statutory expiration of the grandfather provision under 48 U.S.C. 1806(e)(1)(A). After November 27, 2011, aliens previously covered by the grandfather provision who are inadmissible under section 212(a)(6)(A) of the INA (8 U.S.C. 1182(a)(6)(A)) may be removed regardless of whether they are the beneficiary of a pending petition, and all other INA grounds of removal remain applicable.

(b) Petition Fees

Thirteen commenters suggested that DHS should automatically convert all valid CNMI permits to transitional worker status to avoid the economic impact caused by the duplication of fees. Two commenters suggested that DHS not charge employers any additional fees to obtain transitional worker status for their renewed contract workers. One commenter requested that DHS not impose fees for employers as they will retaliate against the employees for the fees. Two commenters stated that DHS has no authority to require aliens to pay for filling out a form, to pay for providing biometric data, or to pay any other fee of any kind. These commenters also said that the rule's increased fees will cause substantial harm to the foreign workers currently in the Commonwealth.

The CNRA requires DHS to establish, administer and enforce a CNMI transitional worker system under the INA. As discussed above, DHS does not interpret the CNRA simply to permit automatic conversion of CNMI statuses to transitional worker status without an individual employer petition and adjudication of the employer's and worker's eligibility. *See* 48 U.S.C. 1806(d)(3). DHS has general authority to recover the full costs of immigration services it provides by collecting fees. *See* INA sec. 286(m), 8 U.S.C. 1356(m). The CNRA specifically references this authority with respect to the CW program, adding that DHS should collect an annual supplemental fee of $150 per worker for CNMI educational purposes. *See* 48 U.S.C. 1806(a)(6). DHS understands that petition fees are a major concern for both employers and employees. Nevertheless, USCIS must collect fees to fund the services that it provides and the expenses incurred for processing CW petitions. Employers also expressed concern about the payment of additional fees to petition for their current workforce. While no changes have been made to the rule as a result of these comments, DHS notes that this rule allows employers to request a waiver of the petition fee and the biometrics fee if they cannot afford them. While fee waivers generally are not available in employment-based

cases, DHS has decided to treat the CNMI with more flexibility in this regard; thus, this rule authorizes waiver of the fee in cases where the need is demonstrated. *See* new 8 CFR 103.7(c)(3)(iii). There will continue to be no allowance for waiver of fees for other employment-based nonimmigrant petitions.

(c) Beneficiary Fees

One commenter expressed a concern regarding the guest worker's ability to pay the fees for a transitional worker petition. The commenter explained that the guest worker's earning capacity is based on the Commonwealth's minimum wage, which is far below the U.S. minimum wage, and this makes the petition fees unreasonable for the workers. DHS understands this concern and reminds guest workers that the petitioning employer will pay the applicable petition fees. The employee is only responsible for paying the biometrics fee both at the time of the initial grant of status, and as requested by USCIS for renewals or extensions of status. An employer may pay the biometrics fees and the CW–2 fees for their employees, but that is not required. The biometrics services fee will be collected to cover the costs of the background check and identify verification whether or not the previous biometrics are stored and reused or if the employee or derivative beneficiary must appear again at the Application Support Center (ASC) for their collection. Nevertheless, the biometrics fee may be waived upon proof of inability to pay on a case-by-case basis. *See* 8 CFR 103.7(c)(3)(i). DHS is also clarifying in the final rule that, consistent with USCIS policy on collection of biometrics, the biometric fee is not required for beneficiaries who are under the age of 14, or who have attained the age of 79. *See* new 8 CFR 214.2(w)(15).

As with the fee for petitions for nonimmigrant workers, the fee for the Application to Extend/Change Nonimmigrant Status is generally not eligible for a waiver. However, DHS has clarified in this final rule that it has authority to waive the Form I–539 fee based on inability to pay in the case of an alien seeking CW–2 derivative nonimmigrant status as the spouse or child in the CNMI of a CW–1 worker, as the interim final rule referred only to the Form I–129CW in its reference to fee waiver for aliens applying for CW–2 status. *See* new 8 CFR 103.7(c)(3)(iii). DHS has also revised the fee and fee waiver provisions to correct the form name for the Petition for a CNMI–Only Nonimmigrant Transitional Worker and conform technically to the format of 8 CFR 103.7, as reorganized in the DHS final rule, U.S. Citizenship and Immigration Services Fee Schedule, 75 FR 58962 (Sept. 24, 2010). Currently, the fee for a Form I–129CW employer petition for a CW worker is $325, plus the supplemental CNMI education funding fee of $150 per beneficiary per year. 8 CFR 103.7(b)(1)(i)(J).

(d) Petition Requirements

One commenter stated that petitioners should be required to pay petition fees and minimum wage for their employees. Another commenter stated that the rule imposes severe limitations on the ability to freely transfer jobs and hire from the existing labor pool.

DHS agrees with the commenter regarding payment of petition fees and wages. Consistent with other INA classifications, CNMI CW classification petitioners must pay petition fees unless eligible for and granted a fee waiver. *See* new 8 CFR 214.2(w)(5). As with all employment-based classifications, employers must abide by the local employment laws governing the State or Commonwealth. The interim final rule and this final rule provide that an employer is eligible to petition for a transitional worker, if among other requirements, it complies with Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements. *See* 74 FR 55110; new 8 CFR 214.2(w)(4)(iv). In response to the comment regarding minimum wages, this final rule also requires the petitioning employer to attest that the employer is an eligible employer and will continue to comply with the requirements for an eligible employer until such time as the employer no longer employs the worker. *See* new 8 CFR 214.2(w)(6)(ii)(D). The final rule strengthens the terms of the attestation that the employer must sign with respect to its compliance with the required terms and conditions of employment and compliance with applicable laws. *See* new 8 CFR 214.2(w)(6)(ii).

DHS disagrees with the second commenter's assertion that this rule imposes severe limitations on the ability to freely transfer jobs. This final rule incorporates standard elements of the Federal immigration system, including the requirement that an employer petition for an employee. There is nothing to prevent that employee from transferring freely to another job upon filing of a petition for their services by a new employer. *See* new 8 CFR 214.2(w)(5) and (w)(7).

However, in light of this commenter's concern, DHS believes it is important to include additional flexibility for a CW–1 worker seeking to transfer to a new employer. The CNRA mandates that an alien ''shall be permitted to transfer between employers in the Commonwealth during the period of such alien's authorized stay therein, without permission of the employee's current or prior employer, within the alien's occupational category or another occupational category the Secretary of Homeland Security has found requires alien workers to supplement the resident workforce.'' *See* 48 U.S.C. 1806(d)(4). This final rule includes a mechanism, within the existing federal system, for a CW–1 to freely transfer employers as envisioned by the CNRA without approval from prior or current employer. *See* new 8 CFR 214.2(w)(7).

DHS is able to address the general concern regarding transfer of employment by clarifying that a foreign national with CW–1 status may work for a prospective new employer after the prospective new employer files a Form I–129CW petition on the employee's behalf. *See* new 8 CFR 214.2(w)(7). Such work may begin only if a nonfrivolous Form I–129CW for new employment was filed before the date of expiration of the CW–1's authorized period of stay and subsequent to the CW–1's lawful admission, and the CW–1 has not been employed without authorization in the United States since admission. *See* new 8 CFR 214.2(w)(7)(iii). If these conditions are met, then employment authorization shall continue for such alien until the new petition is adjudicated. *See* new 8 CFR 214.2(w)(7)(iv). However, if the new petition is denied, the work authorization will also cease. *Id.* This benefit of new employment upon filing of a petition (if all aforementioned requirements are met) is a benefit that relates only to this specific class of nonimmigrants in light of the unique provisions of and congressional intent expressed in the CNRA.

DHS emphasizes that this provision for change of employer does not intend to authorize extended continued presence in the CNMI for the purpose of seeking employment after termination of CW–1 employment. In general, a CW–1 worker loses CW–1 status upon any violation of CW–1 status (including termination of the qualifying CW–1 employment), and a loss of CW status ends the period of authorized stay at that time. *See* new 8 CFR 214.2(w)(23). A CW petition cannot be filed for an alien in the CNMI who is not in lawful status, including a petition by a new employer, which must be filed before

the date of expiration of authorized period of stay. *See* new 8 CFR 214.2(w)(2)(iv) and (w)(7)(iii)(A). However, DHS believes that it is appropriate to provide a limited period of time after the termination of employment for workers to obtain new qualifying employment. Therefore, in response to the comments and the unique conditions in the CNMI, and consistent with the direction in the CNRA that DHS provide for transfer between employers (*see* 48 U.S.C. 1806(d)(4)), the final rule provides that when a status violation results solely from termination of CW–1 employment, the CW–1 status will expire 30 days after the date of termination, rather than on that date itself, as long as a new employer files a nonfrivolous petition within that 30-day period and the alien does not otherwise violate the terms and conditions of his or her status. *See* new 8 CFR 214.2(w)(7)(v) and (w)(23). Thus, the alien will still be lawfully present in the CNMI for the purpose of employer eligibility to file a CW–1 petition during that 30-day period, and the employee will be able to begin work pending petition adjudication as provided by new 8 CFR 214.2(w)(7). The employer will still need to comply with all petition requirements, including attesting that no qualified U.S. worker is available to fill the position. If the employer is not able to petition for the worker within the 30-day period after termination, the employer is not foreclosed from petitioning for that alien; however, the alien would need to leave the CNMI before a petition could be filed, and would be able to return to begin the employment only after petition approval and issuance of a CW–1 visa by a consulate. Additionally, if the CW worker cannot find an employer to petition on his or her behalf during the 30-day period after the worker's CW–1 employment was terminated, then the alien would be out of status as of the date the CW–1 employment was terminated.

By allowing employer petitions for change of employment at any time during the CW–1 alien's current employment, and providing a limited opportunity for an employer to petition for an alien in the CNMI after termination of employment, DHS believes that it is providing opportunities that will improve the ability of employers to respond to economic conditions in the CNMI and reduce unnecessary travel costs to obtain visas abroad and other burdens on workers, without enabling unemployed former CW–1 workers to remain long-term in the CNMI for the purpose of seeking new employment.

DHS has made a conforming change to the CW–1 employment authorization provision, since in a change of employer situation the CW–1 employment will not necessarily be ''only [for] the petitioner through whom the status was obtained.'' *See* new 8 CFR 274a.12(b)(23). The provision adds a cross-reference to the scope of employment as authorized by 8 CFR 214.2(w), in order also to cover changes of employer within the scope of the final rule. *Id.*

DHS disagrees with the commenter's assertion that this rule imposes severe limitations on the ability to hire from the existing labor pool. This rule provides the flexibility for employers to petition for employees from within the CNMI or from abroad. *See* new 8 CFR 214.2(w)(2)(i). It also retains the requirement that the employee in the CNMI be lawfully present. *See* new 8 CFR 214.2(w)(2)(iv). This provision should provide broad access to the existing labor pool in the CNMI and a preference to the current CNMI permit holders. Those provisions should serve to advance the goal of providing a smooth transition between the CNMI and federally-based statuses.

Two additional commenters stated that the employer attestation requirement will invite widespread abuse, will actually decrease the job opportunities available to U.S. workers, and will remove any means for enforcing workforce participation requirements designed to maximize those jobs for U.S. workers.

DHS disagrees with the commenters. DHS has effectively instituted similar attestations in other employment-based categories such as those for temporary agricultural workers (H–2A visas) and temporary nonagricultural workers (H–2B visas). We think the attestation issued with this rule will serve to effectively enforce the necessary requirements and prevent fraud and abuse within the immigration system. Coordinated efforts between agencies within and outside DHS ensure the protection of U.S. citizen and lawful permanent resident workers. Additionally, CNMI employers will be able to reasonably convert their foreign worker dominated workforce to a work force of U.S. citizens or lawful permanent residents by phasing out the use of the transitional worker classification by the end of the transition period. DHS will work with other Federal agencies to review the CNMI's workforce requirements and Federal law compliance. Therefore, this rule retains the provision on employer attestations from the interim final rule. In addition, DHS has strengthened the attestation requirements with respect to terms and conditions of employment. *See* new 8 CFR 214.2(w)(6)(ii).

One commenter supported the requirement that the petitioning employer pay the alien's reasonable cost of return transportation to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission. The commenter added that this requirement was deleted from the CNMI Government's umbrella permit system.

Two other commenters stated that the repatriation clause was very limited and will place the burden on foreign workers to pay their own way back home. These commenters suggested that the Commonwealth's system is superior to that in the interim final rule. That system required the final employer of record to pay for a return ticket when the worker became unemployed for any reason. The CNMI also required the posting of a bond to help ensure that this obligation would be met.

While DHS understands these concerns, DHS does not believe it necessary to modify or make the repatriation provision in the final rule more stringent. The interim final rule required employers to pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the authorized admission. *See* new 8 CFR 214.2(w)(11). If the complete terms of the contract are met, the employee may have to find his or her own transportation home. This requirement is consistent with other nonimmigrant visa categories. DHS believes that administration of a bond posting requirement would add unnecessary complexity and expense for CW petitioners. The requirement in this rule provides sufficient safeguards for a beneficiary's safe return home in case of early termination. Thus, no changes are made as a result of this comment.

(e) Employer as Petitioner

Four commenters expressed concern that the rule only empowers the employer to petition for guest workers. Two of these commenters stated that employees should be able to apply for their own status. They suggested that the petition requirement should only be imposed on individuals who have not resided in the CNMI for a minimum number of years. Another commenter stated that the employer's petition

requirement may help perpetuate an employer's abuse against a foreign worker. The commenter argued that an employee might not report abuse for fear that the employer will not file a petition for the employee. Another commenter requested clarification on the process for replacing a transitional worker once the worker leaves employment.

DHS has not adopted the commenters' suggestion that employees be allowed to self-petition. The purpose behind employment-based visa programs is to ensure an adequate number of qualified employees to effectively operate the businesses. Such programs permit U.S. employers to hire foreign workers on a temporary or permanent basis to fill jobs essential to the U.S. economy. *See* 20 CFR part 655. Employment-based visas are not intended to allow individuals to petition for the opportunity to seek employment in the United States irrespective of an available employer. Thus, consistent with other employment-based nonimmigrant classifications, DHS will require employers to file a petition for all CW–1 workers. *See* new 8 CFR 214.2(w)(5). This requirement will allow DHS to conduct the review necessary to determine eligibility and that the parameters set for the program are followed. This final rule requires that employers submit evidence showing the legitimacy of their business, their recruitment practices, the terms and conditions of employment offered, and their compliance with Federal and Commonwealth law. *See* new 8 CFR 214.2(w)(6). DHS believes that these parameters are necessary to comply with congressional intent that the CW category ''promote the maximum use of, prevent adverse effect on wages and working conditions of, workers authorized to be employed in the United States * * *.'' *See* 48 U.S.C. 1806(d)(2). This employer-focused petitioning process will ensure that CW status follows U.S. immigration law as required by the CNRA. Therefore, this final rule requires employers to file a petition for all CW–1 nonimmigrant workers, both for initial status and renewal. *See* new 8 CFR 214.2(w)(5) and (w)(17).

There are various Federal laws enforced by the U.S. Departments of Justice and Labor, and other agencies that prohibit workplace discrimination and regulate issues such as wages, benefits, safety, and health care. Those protections also apply to foreign workers in the United States. U.S. citizens may report employer abuses to the appropriate state and Federal agencies for enforcement action. Thus, no changes have been made to the final rule as a result of these comments.

(f) Multiple Beneficiaries

One commenter stated that DHS should allow employers to petition for multiple beneficiaries regardless of occupational category, as long as the beneficiaries are already in the CNMI. The commenter stated that this process would help employers transfer all the CNMI permit holders to an INA status and, in turn, result in a more orderly transition and phasing-out of the CNMI's nonresident contract worker program. Another commenter also suggested a multiple beneficiary process.

DHS encourages all CNMI permit holders to convert to a Federal immigration status as soon as possible. That is the intent of the final rule's provisions allowing multiple beneficiaries on the same CW petition if the beneficiaries will be performing the same service, for the same period of time, and in the same location. *See* new 8 CFR 214.2(w)(9). Unfortunately, DHS can not adopt the commenter's suggestion to allow employers to petition for multiple beneficiaries regardless of occupational category. DHS can only streamline the petitioning process for multiple beneficiaries in such cases when the beneficiaries share the same occupational category, validity period, and location. Because of differing adjudication and evidentiary requirements, DHS can not efficiently adjudicate petitions for multiple beneficiaries on one form where these elements are not identical. Therefore, the final rule was not changed as a result of these comments.

(g) Multiple Employers

Two commenters stated that the rule's provision that allows employment by more than one employer is not a viable way to control subcontracting and may lead to large-scale fraud as previously experienced in the CNMI. DHS understands this concern regarding a foreign worker's ability to work for more than one employer. However, Congress clearly expressed its intent that the transition to the INA be eased as much as possible and included provision for the continued use of alien workers. *See* 48 U.S.C. 1806 note. As such, this final rule permits a beneficiary to work for more than one employer as long as each employer files a separate Form I–129CW petition with DHS. *See* new 8 CFR 214.2(w)(5). Biometrics and other security checks will be used to confirm identity and status in order to help prevent any fraud resulting from this provision. Therefore, no changes are necessary or made in the final rule as a result of this comment.

(h) Validity Period

Two commenters opposed the validity period of the CW classification provided in the interim rule. They stated that limiting workers to only ten days in the CNMI after their employment is completed is unrealistically short and unfair to those with pending disputes or skills that can be used in the CNMI. As a result of this limited validity period, nonimmigrant resident aliens can be deported even if they have a claim pending against an employer. The commenters further asserted that this result is contrary to opinions issued by the CNMI federal district court which require both an extension of stay in the Commonwealth to prosecute claims and temporary work opportunities while awaiting the completion of the case or claim.

The commenters did not cite specific cases, but DHS is aware of decisions from the CNMI courts relating to the removal of aliens with pending labor cases and of case law from the U.S. District Court for the Northern Mariana Islands relating to the employment privileges of aliens under former CNMI immigration law. *See, e.g., Office of Att'y Gen.* v. *Paran,* 1994 WL 725954 (N. Mar. I. 1994); *Office of Att'y Gen.* v. *Rivera,* 1993 WL 307651 (N. Mar. I. 1993); *cf. Tran* v. *CNMI,* 780 F. Supp. 709 (D.N.M.I. 1991) (no right of alien employment in CNMI under U.S. Constitution). DHS notes that case law applying former CNMI law to the removal of aliens is not applicable to Federal immigration law. Pending labor cases before CNMI authorities may involve claims for unpaid wages or other labor law issues, but no longer involve the authority to provide or revoke work authorization, as those are now matters of Federal immigration law.

Another DHS component, U.S. Immigration and Customs Enforcement (ICE), has the authority to institute removal proceedings for unauthorized aliens. DHS respects the importance of labor claims, and ICE may exercise its prosecutorial discretion as appropriate when considering the possible removal of aliens who are pursuing such claims. As with other employment-based statuses under U.S. immigration law, court actions and removal proceedings are independent of what regulations may provide regarding the validity of CW status. It is not necessary to spell out in regulations the effects of such claims on a nonimmigrant's status.

This final rule retains the substance of the interim final rule's provision stating

that the beneficiary may be admitted to the CNMI up to ten days before the validity period begins and may remain no later than ten days after the validity period ends. This validity period is consistent with other nonimmigrant categories (*see* 8 CFR 214.2(h)(13)(i)(A), pertaining to H nonimmigrants), and DHS believes it permits the necessary flexibility for travel and living arrangements to be made both before and after a period of authorized employment. However, further review of the provision in light of the comment has led to some technical reorganization in the final rule in order to state the relevant time periods more consistently and clearly. A petition is valid for admission to the CNMI in CW status during its validity period, and up to ten days before the start of the validity period. *See* new 8 CFR 214.2(w)(16). Admission to the CNMI and authorized employment in CW status is for the petition validity period, not to exceed one year. *See* new 8 CFR 214.2(w)(13). CW status expires ten days after the end of the petition's validity period. *See* new 8 CFR 214.2(w)(23).

(i) Filing Location

Two commenters suggested that transitional worker petitions be processed at the Saipan Application Support Center instead of the California Service Center. Petitions not typically requiring an interview as part of the adjudication process, including employment-based petitions such as CW petitions, are normally processed at USCIS Service Centers. USCIS has found this to be the most efficient and cost-effective approach. Due to the CNMI's geographic location, DHS has determined that CW petitions will be processed by the California Service Center (CSC) in Laguna Niguel, California. Such centralization ensures that one specialized unit processes all the CNMI filings in order to ensure more consistent adjudications. The comment has not been adopted.

(j) Paper-Based System

Two commenters criticized the rule's reliance on a paper-based system and categorized it as wasteful and time consuming. DHS agrees that direct, electronic or online interactions and information transmittal is the most efficient method to use when possible. DHS uses electronic procedures whenever that option is available. Nevertheless, for most filings, a combination of electronic and paper-based filing must still be utilized. DHS continues to strive for efficiency and the transformation of its systems; however, DHS is not able to accept this petition via electronic filing at this time. Nonetheless, this rule does not mandate a paper-based system and a transition to electronic submission could be effectuated when that becomes a viable option.

5. Obtaining CW Status

Three commenters offered suggestions or requested clarification on the process for conferring transitional worker status to individuals currently in the CNMI.

(a) Obtaining CW Status in the CNMI

Two commenters pointed out that the rule does not specifically indicate how CNMI permit holders will be able to obtain a Federal immigration status while in the CNMI. The commenters noted that these aliens have not been admitted by a U.S. immigration officer and thus are not technically eligible to change their status under current regulations. The commenters proposed an amendment to 8 CFR part 248 to provide DHS with the authority to change their CNMI status to Federal immigration status. They stated that this change would alleviate the need for all aliens to depart the CNMI in order to obtain the CW–1 status abroad through the consular process. One of the commenters also proposed an amendment to 8 CFR part 245 to provide DHS with the authority to adjust the CNMI status of such aliens to immigrant categories under the INA.

As noted, all aliens present in the CNMI on the transition date (other than U.S. lawful permanent residents) became present in the United States without admission or parole by operation of law. *See* 48 U.S.C. 1806(d)(1), (2). DHS acknowledges that the interim rule did not specifically state the DHS authority to grant a federally-based immigration status. The INA authorizes USCIS to change an alien's status from one nonimmigrant status to another, but there is no provision specifically providing for a grant of nonimmigrant status to an alien present in the United States who is not already in a nonimmigrant status. *See* INA sec. 248, 8 U.S.C. 1258. As the commenter points out, the primary impediment to direct grants of nonimmigrant status to aliens present in the CNMI is inadmissibility under section 212(a)(6)(A)(i) of the INA for presence in the United States without admission or parole. This ground of inadmissibility may be overcome, however, through exercise of waiver authority under section 212(d)(3)(A)(ii) of the INA. *See* INA sec. 212(d)(3)(A)(ii), 8 U.S.C. 1182(d)(3)(A)(ii).

The **SUPPLEMENTARY INFORMATION** to the interim rule discussed the fact that CW status could be granted directly to aliens present in the CNMI, unlike aliens abroad seeking that status who first must be issued an CW nonimmigrant visa by the Department of State at a consular post abroad and thereafter seek admission in CW status. *See* 74 FR 55099. The regulatory language, however, was not explicit about how that would be done consistent with the requirement that the alien be admissible to the United States. Thus, in order to give additional assurance and direction on this point to the affected public and to USCIS adjudicators, the final rule clarifies that a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the INA may be granted to an eligible alien seeking an initial grant of CW status from DHS while in the CNMI. *See* new 8 CFR 214.2(w)(24). Such aliens will necessarily lack a CW nonimmigrant visa issued by the Department of State, and are thus inadmissible under section 212(a)(7)(B)(i)(II) of the INA; they also by definition will (unless changing to CW status from another nonimmigrant status under the INA, or the recipient of a DHS grant of parole) be aliens present in the United States without admission or parole, and thus inadmissible under section 212(a)(6)(A) of the INA. Therefore, the rule allows for a waiver of those two grounds of inadmissibility for aliens with appropriate documentation.

This waiver provision is based upon the specific language in section 212(d)(3)(A)(ii) that in the case of an alien ''in possession of appropriate documents'' who is seeking admission as a nonimmigrant, most grounds of inadmissibility may be discretionarily waived. *See* INA sec. 212(d)(3)(A)(ii), 8 U.S.C. 1182(d)(3)(A)(ii). In the unique situation of the CNMI and considering the broad discretion provided to DHS in the CNRA to set the terms and conditions of the transitional worker program for aliens not otherwise eligible for admission under the INA, and the stated goal of the CNRA to mitigate potential adverse consequences of transition to the extent possible, DHS considers that the ''appropriate documentation'' requirement for the waiver may be met by aliens who possess documentation that they are lawfully present in the CNMI, as defined in new 8 CFR 214.2(w)(1)(v) (see further discussion below on lawful presence).

In the case of spouses and children present in the CNMI who are seeking a derivative grant of CW–2 nonimmigrant status based upon a principal CW–1 approved petition, to satisfy the ''appropriate documents'' requirement

for a section 212(d)(3)(A)(ii) waiver of inadmissibility under INA sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(II) as described in 8 CFR 214.2(w)(24), the applicant must also possess documentation that he or she is lawfully present in the CNMI. *See* new 8 CFR 214.2(w)(1)(v).

Therefore, the final rule clarifies that DHS may, without additional application or fee, grant a section 212(d)(3)(A)(ii) waiver to an alien approved for an initial grant of CW–1 transitional worker status or CW–2 dependent status in the CNMI and in possession of appropriate documents. *See* new 8 CFR 214.2(w)(24). It provides that appropriate documentation for purposes of granting this waiver to aliens in the CNMI includes a valid, unexpired passport and other documentary evidence that the alien is lawfully present as defined by the rule, such as a CNMI-issued ''umbrella permit'' or a DHS-issued Form I–94. *Id.* Evidence that the alien possesses this documentation may accompany the employer's petition that includes the employer's attestation as to the alien's lawful presence; may in the case of a derivative spouse or minor child accompany the Form I–539 application for derivative status; or may be provided in such other manner as USCIS may designate. *Id.* Based upon this waiver, an alien lawfully present in the CNMI will be eligible for a grant of CW–1 or CW–2 status in the CNMI without first obtaining a CW visa abroad, provided that the applicant is otherwise admissible and eligible for CW status.

DHS also has revised 8 CFR 214.2(w)(14) to describe more clearly how beneficiaries of approved employer petitions and their dependents (spouses and minor children) may obtain CW status. Principal beneficiaries and their dependents outside the CNMI will be instructed to apply for a visa. For principal beneficiaries within the CNMI, the petition itself (including the biometrics provided under new 8 CFR 214.2(w)(15)) also serves as the application for CW–1 status. Dependents present in the CNMI may apply for CW–2 dependent status on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status may not be approved until the CW–1 petition is approved. A spouse or child applying for CW–2 status on Form I–539 is eligible to apply for a waiver of the fee based upon inability to pay as provided by 8 CFR 103.7(c). *See* new 8 CFR 214.2 (w)(14). Currently, the fee for a Form I–539 is $290, and the biometrics fee is $85 (unless the alien is under the age of 14 or is at least 79 years of age). *See* 8 CFR 103.7(b)(1)(i)(C); 8 CFR 103.7(b)(1)(i)(X); new 8 CFR 214.2(w)(15).

The final rule also makes conforming changes to the description of eligible principal and derivative aliens with respect to inadmissibility, to confirm that the alien must not be inadmissible, except to the extent that any applicable ground of inadmissibility is overcome with the appropriate waiver. *See* new 8 CFR 214.2(w)(2)(v) and 214.2(w)(3)(iii).

(b) Biometric Fee for Obtaining Status

One commenter requested clarification on the biometric fee requirement and the availability of a fee waiver. Aliens present in the CNMI generally will not have previously supplied biometric information to the Federal government. As a result, the Federal government will not have conducted the necessary background checks required for most immigration benefits under the immigration laws of the United States. DHS will require applicants for CW status to provide biometrics. *See* new 8 CFR 214.2(w)(15). Without biometrics, a CW petition cannot be approved. This requirement will ensure that CW status is not granted to anyone who is inadmissible and not granted a waiver of such ground of inadmissibility. *See* INA sec. 212(a), 8 U.S.C. 1182(a). A fee waiver is available based upon a showing of inability to pay the Form I–129CW and/or biometrics fees. *See* 8 CFR 103.7(c)(3)(i); new 8 CFR 103.7(c)(3)(iii).

6. Lawful Presence and Travel

Seventy-nine commenters expressed concern about, or offered suggestions regarding, the rule's lawful presence and travel requirements.

(a) Lawful Presence

DHS received five comments regarding the rule's lawful presence requirement. One commenter suggested that transitional worker status should be afforded to all alien workers with legal CNMI status. Four commenters expressed concern regarding the requirement that an employer petition for a guest worker while she or he is in lawful CNMI status. Three of these commenters stated that this requirement will negatively impact guest workers with expiring or expired umbrella permits who do not have a sponsoring employer. In order to alleviate this problem, one commenter suggested that DHS allow all umbrella permit holders to self-petition when a sponsoring employer is not available. Another stated that the requirement does not take into account the need for new foreign workers necessary to support new projects.

DHS is aware of the interest of employers in the CNMI to bring in new hires. The interim rule accordingly provided that the CW classification would be available to aliens coming from abroad. *See* 74 FR at 55096; 74 FR at 55109 (new 8 CFR 214.2(w)(2)). Additionally, DHS is aware of the public's concern regarding the lawful presence requirement and how the requirement affects the ability to obtain new hires from within the CNMI. In the interim rule, DHS posited that requiring lawful presence was the most efficient means to begin the congressionally-mandated reduction in the number of transitional workers to zero by the end of the transition period. *Id.* Furthermore, DHS believed that allowing workers without lawful status in the CNMI to obtain CW–1 status would encourage noncompliance with CNMI immigration law before the transition program effective date by removing the incentive for workers with lawful status to maintain or reacquire such lawful status under CNMI law prior to the transition. *Id.*

The interim rule's intent to encourage legal compliance before the transition program effective date is now moot, as that date has passed. Nonetheless, DHS has decided to maintain a lawful presence requirement to remove the incentive for a person to enter the CNMI illegally or overstay his or her visa or status expiration date to seek employment in the CNMI through the CW program. *See* new 8 CFR 214.2(w)(2)(iv). The worker must either be lawfully present under the grandfather provision applicable until November 27, 2011, or have been admitted or paroled by DHS on or after the transition program effective date other than for a short visit for business or pleasure. *See* 48 U.S.C. 1806(e)(1), (2); new 8 CFR 214.2(w)(1)(v). This lawful presence requirement will smooth the transition between these statuses. The final rule removes language relating to lawful presence requirements for CW petitions filed before the transition program effective date since that date has already passed, updates the reference to lawful presence under 48 U.S.C. 1806(e) to reflect statutory codification of this CNRA provision, clarifies reference to visitors for business or pleasure to specifically include (as ineligible for CW status) aliens from the People's Republic of China or the Russian Federation paroled as visitors into the CNMI, and clarifies that the alien must still be within the period of admission or parole referred to in the definition. *See* new 8 CFR

214.2(w)(1)(v). However, as previously discussed in section 4(a) of Part IV of this Supplementary Information, DHS has revised the definition of ''lawful presence'' in this final rule to clarify that in the case of aliens lawfully present under the grandfather provision, lawful presence is determined as of the petition filing date. This accommodation ensures that applications for CW status filed before November 27, 2011 for aliens lawfully present in the CNMI may be adjudicated and granted after that date.

DHS is unable to adopt the commenter's suggestion that DHS allow all umbrella permit holders to self-petition when a sponsoring employer is not available. The CNRA requires that DHS establish a system for allocating ''permits to be issued to prospective employers * * *.'' *See* 48 U.S.C. 1806(d)(2). Allowing for a grant of CW status without a petitioning employer would be contrary to that provision. As such, DHS retains the requirement for an employer to file a petition for a CW–1 nonimmigrant worker. *See* new 8 CFR 214.2(w)(5). This petitioning process is necessary to grant such status under the INA, as required by the CNRA.

(b) Umbrella Permits

Six commenters out of 79 expressed concern regarding the umbrella permit issued by the CNMI government and its effect during the transition period. Five commenters expressed concern regarding the validity of the umbrella permit under U.S. immigration law. One commenter stated that the DHS recognition of the umbrella permit should be accompanied by provisions that address an employer's responsibility for a former foreign worker with an expired CNMI labor contract. Another commenter expressed concern that the rule did not contain a mechanism to ensure that U.S. workers are not displaced by the foreign worker pool created through the recognition by DHS of the CNMI umbrella permit. The commenter suggested that foreign workers with a valid CNMI work permit be allowed to remain in the CNMI until November 2011 without additional limitations, even if they are not employed. A sixth commenter suggested that DHS provide aliens with pending cases before the CNMI Department of Labor with work authorization.

DHS fully considered these comments regarding the validity of the umbrella permits, how they relate to unemployed workers, the protection of U.S. workers, and how they relate the objectives of the CNRA. DHS believes that the existence of umbrella permits does not frustrate implementation of the CNRA or other U.S. immigration laws in the CNMI or present problems with the implementation of the transitional worker program. As provided in the CNRA and this rule, work authorization is allowed with a valid CNMI immigration status until such status expires, or for two years after the transition date. *See* 48 U.S.C. 1806(e). DHS has decided that umbrella permits issued by the CNMI government are valid as evidence of authorized stay and work authorization. This decision should assuage the commenter's concerns as to their continued validity.

DHS cannot make amendments to the rule in response to commenters' suggested methods for dealing with individuals with work permits but no employment (due to, for example, an expired contract or a labor dispute). The transitional worker program provides the ''number, terms, and conditions of permits to be issued to prospective employers for each such nonimmigrant worker,'' and was not intended to protect residents with CNMI permits but no employment. *See* 48 U.S.C. 1806(d)(2). This rule does not prohibit someone currently with legal status (lawful presence) but no employment from receiving CW status if an employer petitions for him or her. Thus no change is necessary as a result of this suggestion.

As for the comment suggesting additional provisions to ensure that U.S. workers are not displaced by CNMI umbrella permit holders, no changes to the regulation have been made. The number of available U.S. workers relative to aliens will be considered when deciding on the level of transitional workers that may be required in each successive year of the transition period. Such consideration will address whether sufficient U.S. workers are available to meet the labor needs of the CNMI. USCIS has issued information that clarifies regulations and policies and their application in the CNMI.[10] That document provides additional information on the legal treatment of umbrella permits.

(c) Travel Restrictions

Fifteen out of 79 commenters stated that the inability of DHS to offer concrete options for guest workers has led to a fear of traveling abroad due to the uncertainty of re-entry into the CNMI. Five of these commenters expressed concern regarding the rule's visa requirement to re-enter the CNMI after travel abroad given what they characterized as the probability of visa denial by the U.S. Embassy. Some commenters suggested that DHS issue the transitional worker status without a travel restriction.

DHS is aware of the public's concern regarding the burden of obtaining a visa to re-enter the CNMI. The CNRA provides for the creation of a geographically limited nonimmigrant classification and expressly states that such classification ''shall not be valid for admission to the United States * * * except admission to the Commonwealth.'' *See* 48 U.S.C. 1806(d)(3). DHS must follow those statutory restrictions for the CW classification.

As previously noted, the transitional worker does not require a CW visa to legally remain and work in the CNMI. This final rule clarifies that such status may be granted to the beneficiary directly in the CNMI. *See* new 8 CFR 214.2(w)(14). The CNRA intended the transitional worker program to be a mechanism for transitioning the current alien workforce in the CNMI to an INA classification first, then, if not eligible for an INA-based classification, to a transitional worker under this rule until such classification could be attained. Although the CNRA states that the transitional worker program was intended for aliens seeking to enter the Commonwealth (48 U.S.C. 1806(d)), DHS does not interpret that language to require that transitional workers under this program only be outside the CNMI. The CNRA also provides that DHS will set the conditions for admission and authorize the issuance of nonimmigrant visas for aliens who will be permitted to engage in employment pursuant to the transition program. *See* 48 U.S.C. 1806(d)(3). To interpret those provisions together to require departure prior to the grant of status and return to the CNMI would be unreasonable in light of the intent of Congress in passing the CNRA to ''maximize the Commonwealth's potential for future economic and business growth'' in the CNMI. *See* 48 U.S.C. 1806 note. Therefore, as previously discussed, this final rule clarifies the authority and process by which applicants who are already within the CNMI may be determined to be admissible to the United States and granted CW status without requiring that they first depart the CNMI in order to obtain a visa. An alien in the CNMI who is eligible for a grant of CW status will not have to make a trip abroad

[10] *See* USCIS, Questions & Answers: Employment Authorization and Verification in the Commonwealth of the Northern Mariana Islands (CNMI) (Mar. 12, 2010), available at *http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=362178850345721 0VgnVCM100000082ca60aRCRD&vgnextchannel=14cb86c5b741f110VgnVCM1000004718190aRCRD.*

solely for the purpose of obtaining a visa. If DHS approves a CW petition for such alien, the CW worker will receive an approval notice with an attached Form I–94, Arrival-Departure Record, which serves as evidence of lawful immigration status.

While the I–94 is evidence of lawful immigration status, Federal regulations require that a nonimmigrant return the I–94 departure record to U.S. officials upon exiting the United States. *See* 8 CFR 231.2. Therefore, if the CW worker travels abroad, he or she will need to relinquish the I–94 upon departure. The CW worker will then possess only the USCIS Form I–797, Notice of Approval, as evidence of his or her CW status. The alien will need to present that document to a U.S. embassy abroad in order to obtain a CW visa. Upon return to the CNMI from foreign travel and an application for admission, he or she will receive a new Form I–94. As with most other aliens with INA-based nonimmigrant statuses, a CW–1 nonimmigrant will need a visa to be admitted to the CNMI upon return from foreign travel. *See* new 8 CFR 214.2(w)(22). DHS is maintaining the visa requirement for CW nonimmigrants who leave the CNMI and seek to return. A primary purpose of the CNRA is ''to ensure that effective border control procedures are implemented and observed, and that national security and homeland security issues are properly addressed.'' *See* CNRA sec. 701(a), 48 U.S.C.A. 1806 note. The visa issuance process is an important aspect of effective border control. Therefore, DHS does not consider it appropriate as a matter of travel security and immigration policy to waive visa-related grounds of inadmissibility for CW nonimmigrants who leave the CNMI and seek to return.

However, as discussed further below, DHS is providing in this final rule an exception to limitations on travel to Guam in CW status that will permit nationals of the Philippines to transit Guam when travelling to or from the Philippines. Those CW nonimmigrants may travel to the Philippines through Guam without violating their CW status. CW nonimmigrants still must obtain a visa to return from the Philippines through Guam to the CNMI, but may apply to CBP upon arrival in Guam for a discretionary exercise of parole authority to enable their onward travel and admission to the CNMI in CW status. DHS hopes that this will alleviate to some degree travel problems arising from the general limitation of CW status to the CNMI.

(d) Travel With CW Status

Eleven commenters stated that transitional worker status holders should be permitted to leave and re-enter the CNMI on CW status alone, without first obtaining U.S. visas in their countries of origin. DHS notes that there is a distinct difference between a visa and a status. All nonimmigrants [11] must have a visa, issued by DOS, in order to apply for admission to the United States. While CW status will be issued by DHS, such status only sets the parameters for the transitional worker's authorized stay within the Commonwealth. However, all nonimmigrants must have a visa, issued by the Department of State, in order to request permission to apply for admission to the United States. Therefore, a CW worker must obtain a visa before returning to the CNMI after foreign travel and no changes are made as a result of these comments.

Fourteen commenters suggested that an automatic CW–1 visa should accompany the issuance of CW–1 nonimmigrant status in order to give nonimmigrant workers and their dependents the freedom to exit and re-enter in the CNMI without unnecessary delay and uncertainty on re-admittance. DHS notes again that there is a distinct difference between a visa and a status. DOS issues a visa at a U.S. Embassy or consulate office abroad. A visa, placed in the alien's passport, allows an alien to travel to a port of entry and request permission to enter the United States. While having a visa does not guarantee entry to the United States, it does indicate that a consular officer has determined that the alien is eligible to seek entry for the specific purpose covered by that visa.

DHS is responsible for all admissions into the United States. If admissible, DHS admits an alien and grants his or her status in the United States. The specified status controls the period of stay and conditions of such stay. In most cases, DHS grants status at the port of entry. For CW workers, DHS may exercise its discretionary waiver authority to allow beneficiaries of a CW petition in the CNMI to seek a grant of transitional worker status without requiring that they depart the Commonwealth. *See* new 8 CFR 214.2(w)(14)(ii) and new 8 CFR 214.2(w)(24). The grant of such status is within DHS's purview. Visa issuance is handled by DOS. As such, an automatic CW–1 visa cannot accompany the issuance of CW–1 nonimmigrant status because DHS does not issue visas. Nor does DHS consider it appropriate as a matter of travel security and immigration policy to waive visa-based grounds of inadmissibility for those CW nonimmigrants who travel abroad. Thus no change is made as a result of these comments.

(e) Travel With the CNMI Permit

Eleven commenters suggested that DHS should allow travel and re-entry on current CNMI permits. The commenters stated that the grandfather provision [12] allows the CNMI foreign workers to work and stay in the CNMI as long as their permits are valid. The previous CNMI permit system allowed foreign workers to travel outside the CNMI and return on a valid CNMI entry permit. As such, the commenters argue that any recognition of the permit should include the ability to leave and re-enter the CNMI on the CNMI permit. In the alternative, the commenters request that DHS use parole or a visa waiver to allow travel on the CNMI permit. Although these comments are not directly relevant to the final rule, which pertains to the specific CW nonimmigrant status rather than to ''grandfathered'' aliens, DHS is able to respond to the comments by providing information about its current policies with respect to travel on CNMI permits.

Consistent with the CNRA, DHS is recognizing valid CNMI immigration status and work authorization until the expiration of such status up to a maximum of two years after the transition date. *See* 48 U.S.C. 1806(e). As previously discussed, additional regulations regarding treatment of the CNMI work permit with regard to exit and re-entry to the CNMI are outside the scope of the CW classification and this rule. The CNRA does not permit travel on the CNMI permit. *See* 48 U.S.C. 1806(d)(3). Nevertheless, to alleviate concern about the inability to travel on the CNMI permit, DHS may use its parole authority under the INA for significant public benefit and/or humanitarian grounds, to facilitate travel when necessary. *See* INA sec. 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A).

[11] Except those covered by visa waiver programs for temporary visitors for business or pleasure or specific statutory or regulatory provisions authorizing such travel.

[12] The CNRA contains two provisions (commonly referred to as the ''grandfather provisions'') related to the continuation of presence and work authorization in the CNMI after the transition effective date. The CNRA requires DHS to recognize valid CNMI immigration status (and prohibits removal of such aliens for being present in the CNMI without admission or parole) until the expiration of such status up to a maximum of two years after the transition date. 48 U.S.C. 1806(e)(1). The CNRA also requires that DHS recognize employment authorization until the expiration of such status up to a maximum of two years after the transition date. 48 U.S.C. 1806(e)(2).

DHS has established two separate parole procedures for CNMI permit holders to facilitate their travel to the rest of the United States or abroad. Under the parole procedure for domestic travel, CNMI permit holders must submit a written parole request (and documentation) to the USCIS Application Support Center (ASC) in Saipan, before departing the CNMI.[13] Approval of the parole request will allow bearers to travel within the United States and maintain the validity of their CNMI permits.

Under the parole procedures for foreign travel, CNMI permit holders must obtain advance parole before departing the CNMI, if they are not lawful permanent residents or do not have an appropriate U.S. visa.[14] Advance parole represents permission to seek admission into the United States, in this instance the CNMI, or be paroled into the CNMI after traveling outside the United States. Advance parole does not provide any status within the United States while traveling abroad and may be revoked at any time. However, advance parole in this context will allow individuals lawfully living and working in the CNMI during the period ending November 27, 2011, to continue to do so when they return from foreign travel, if paroled into the CNMI by CBP. Aliens may request advance parole by filing an Application for Travel Document (Form I–131) with fee to the Guam office in accordance with the form instructions. Aliens with urgent travel plans (within 72 hours) may make an InfoPass appointment at the Saipan ASC and submit Form I–131 with the necessary supporting documentation in person. Without a grant of advance parole or other travel documentation that is acceptable under U.S. immigration law, such aliens may not seek to be admitted into the CNMI. These parole procedures should alleviate some of the commenters' concerns about the inability of CNMI permit holders to travel.

[13] *See* USCIS, Update: USCIS Announces Parole Procedures for Travel within the U.S.A. (Dec. 16, 2009), *available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=6a71f4668d895210VgnVCM100000082ca60aRCRD&vgnextchannel=14cb86c5b741f110VgnVCM1000004718190aRCRD.*

[14] *See* USCIS, Update: USCIS Announces Advance Parole Procedures for the CNMI (Dec. 16, 2009), *available at http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=44c2f4668d895210VgnVCM100000082ca60aRCRD&vgnextchannel=14cb86c5b741f110VgnVCM1000004718190aRCRD.*

(f) Work-Related Travel to Guam and the Rest of the United States

Three commenters stated that the rule's travel restriction prevents them from working in Guam or the U.S. mainland. One of these commenters stated that the rule had the unintended consequence of also prohibiting work-related travel to Guam or the U.S. mainland. This commenter suggested an automatic authorization of the beneficiary's work-related travel and ability to work in Guam or on the U.S. mainland.

While DHS understands this concern, the CNRA expressly limits the transitional worker visa to admission to the CNMI only. *See* 48 U.S.C. 1806(d)(3). The statute provides for the creation of a geographically-limited nonimmigrant classification and expressly states that such classification will not be valid for admission to or employment in the United States, except the Commonwealth. *Id.* This rule is limited to the CNMI by the CNRA and it cannot provide more than prescribed by that law. The purpose of CW classification is to allow CNMI employers to utilize foreign workers during the transition period. The transition period also enables employers to make long-range plans as to their staffing needs and their eligibility under other, unrestricted INA classifications. Employment of aliens in Guam is governed by the INA and is not affected by this rule.

(g) Travel to Guam and the Rest of the United States

Two commenters expressed concern that travel and re-entry on the CNMI permit is not allowed to and from Guam or the U.S. mainland. One commenter was specifically concerned about the inability to re-enter the CNMI on the permit or a B1/B2 visa after travel to Guam or the U.S. mainland. Another commenter requested clarification on whether DHS will allow long-term alien workers to travel freely to the U.S. mainland for further education, training, or medical purposes after the transition period.

While these comments appeared to be specifically directed at travel with the CNMI permits previously issued by the CNMI government and valid for CNMI work authorization until November 27, 2011, which is a subject this final rule does not address, DHS notes that CNMI permit holders may apply for travel documents using the procedures for obtaining parole approval as mentioned above. *See* 8 CFR 223.2. Parole will allow permit holders to travel within the United States and maintain the validity of their CNMI permits. CNMI permit holders may no longer use the Visa Waiver Program (VWP) or a B visa (tourist or business) for domestic travel. The ''B'' nonimmigrant status is intended solely for individuals residing outside the United States who are making a short visit to the United States for business or pleasure and not for the purpose of employment or study. As the CNMI is now within the United States for purposes of U.S. immigration law, B status is inappropriate for anyone residing, working, or studying in the CNMI, unless that person establishes that he or she has a foreign residence which he or she has no intention to abandon.

Even if the specific comments focused on current documentation rather than travel with the new CW nonimmigrant status, the concern also applies to that travel and DHS has considered it further in light of the interim final rule's general prohibition on travel in CW status elsewhere in the United States. DHS has responded in this final rule to concerns about inability to travel to Guam by providing a specific, limited exception to the general provision in the interim final rule (which is retained in the final rule) that a CW alien who travels, or attempts to travel to another part of the United States will put himself or herself out of status. *See* new 8 CFR 214.2(w)(22).

While some foreign workers, particularly those from Japan and South Korea, may board a direct flight from the CNMI to their countries of nationality, Philippine nationals, in particular, may not, based on current flight routes, easily travel to or return from their country of nationality without transiting through Guam. Their only other options are to travel through Japan or South Korea. Compared to the short commuter air flight between Saipan and Guam and the three and one-half hour nonstop flight from Guam to Manila, an itinerary from Saipan to Manila through Japan typically would require a three hour and forty-five minute flight from Saipan to Tokyo, connecting to a five-hour flight from Tokyo to Manila. Itineraries through Seoul, Korea are no shorter. Although airline pricing is of course not necessarily directly reflective of distance, and airline schedules and pricing are subject to frequent change, as a general matter DHS understands that foreclosing the option of travel between the CNMI and the Philippines through Guam in CW status is likely to add significant time and expense to this travel in many cases. Providing some accommodation for this need will help ameliorate potential negative effects of the CNRA, including (but not

necessarily limited to) economic burden on CW workers and their families, and some possible reduced appeal of the CW program to employers and workers otherwise.

Before the transition period, these foreign workers were able to apply for and be granted visitor visas to transit Guam or, in medical emergencies, received authorization to travel through Guam. The CNMI is now part of the United States under the INA and foreign workers residing in the CNMI can no longer use a nonimmigrant visitor visa to transit through Guam to a foreign destination, as the ''B'' category for nonimmigrant visitors for business or pleasure requires that the alien have a foreign residence.

After careful consideration, DHS has determined to exercise its authority under section 212(d)(7) and 214(a)(1) of the INA (8 U.S.C. 1182(d)(7) and 1184(a)(1)) to enable aliens who are CW status holders who are Philippine nationals to maintain their status and depart the CNMI en route to the Philippines, and return to the CNMI from the Philippines through Guam, as long as the travel is on a direct Guam transit itinerary, without violating that status while in Guam or the CNMI. *See* new 8 CFR 214.2(w)(22)(iii). Although such travel will not violate CW status, the availability of such travel is subject to all other grounds of inadmissibility and inspection at the port of entry. A direct Guam transit itinerary must be from the CNMI to Guam to a Philippine port or from a Philippine port to Guam to the CNMI and involve no more than an 8 hour scheduled flight stopover or connection between flights in Guam, without leaving the Guam airport. *Id.* Although such travel will be subject to all other requirements of admissibility at a port of entry, it will not violate the conditions of the CW status. *Id.*

If arriving from the Philippines, the alien may be paroled upon arrival in Guam if the immigration officer determines that such parole is appropriate, including examining whether the alien would be admissible to the CNMI. *Id.* Upon a determination by an immigration officer that a favorable exercise of discretionary parole authority is warranted, the CW nonimmigrant will be paroled into Guam and be required to remain at the Guam Airport while awaiting onward travel to the CNMI. *Id.* Prior to departure from Guam for the CNMI, an immigration officer may conduct a preinspection, pursuant to 8 CFR 235.5(a), to determine admissibility in CW status in the CNMI. Alternatively, the CW nonimmigrant will depart Guam and proceed for inspection upon arrival in the CNMI. To the extent that admission is appropriate, the alien will be admitted into the appropriate CW status as provided for by 8 CFR 235.5(a). It is important to note that the final rule's provision for direct transit through Guam for Filipinos in CW status does not waive visa requirements for admission in CW status upon returning from the Philippines. A CW nonimmigrant will not violate CW status by transiting Guam in these circumstances, but will need a visa to return to the CNMI (either directly or through Guam) to resume CW status. *Id.* DHS believes these changes address in significant part the commenters' suggestions to reduce the travel restrictions placed on CW workers.

DHS has limited the travel exception permitting CW aliens to transit through the Guam airport to nationals of the Philippines—in addition to the particular reasons of relative travel convenience discussed above—because focusing on Philippine nationals addresses what is by far the largest national group of foreign workers in the CNMI. As described in the DOI Report at 11 Table 1–B, the number of permits issued by the CNMI to alien workers in 2008 by nationality was: Philippines, 15,769; China, 4,569; South Korea, 729; Thailand, 574; Bangladesh, 333; and others, 598. While the pattern of CW application and issuance likely will not track this pattern exactly, DHS believes that a substantial majority of likely CW nonimmigrants also will be nationals of the Philippines. It also has been USCIS's experience to date during the transition period that the vast majority of applications for advance parole for travel purposes from aliens in the CNMI have come from Philippine nationals.

(h) Visa Waiver in Lieu of Visa Requirement

Eight commenters suggested that DHS issue a visa waiver in lieu of requiring a visa. Seven of these commenters suggested that DHS waive the visa requirement for guest workers in the same manner in which nationals of Russia and China were provided with a waiver. Another suggested that DHS issue a visa waiver for those with a valid reason for leaving and returning to the CNMI.

DHS does not exercise visa waiver authority to allow admission into the CNMI without a visa for nationals of the People's Republic of China (PRC) and the Russian Federation (Russia). Rather, DHS may, in its discretion on a case by case basis, exercise parole authority to allow eligible nationals of the PRC and Russia to enter the CNMI temporarily. *See* INA sec. 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A). This use of parole authority for short-term visitors is inapplicable to aliens seeking to be admitted in a nonimmigrant status, such as transitional worker status. As previously discussed, DHS has considered the potential applicability of waivers of nonimmigrant visa requirements and use of parole authority in this context, and the travel security and immigration policy issues surrounding the decision to provide any such waivers to aliens in CW status who choose to leave the CNMI and seek to return. DHS has decided that travel of CW workers must be monitored and controlled in a more systematic fashion than a program for short-term visitors. The visa issuance procedures required in this rule provide the necessary level of documentation and review to address such concerns. DHS has not made any changes to the final rule as a result of these comments.

(i) Re-Entry Permit or Parole in Lieu of Visa Requirement

Eight commenters suggested that DHS issue a re-entry permit or advance parole. Specifically, four commenters suggested that DHS allow CW status holders, who must depart for emergent reasons, to apply for a re-entry permit at the Saipan office. One suggested that DHS issue a visa waiver for any foreign worker who wishes to travel with a CNMI Entry Permit as long as they notify the Saipan office in advance about their travel. Another suggested that DHS should allow CW status holders to travel and re-enter the CNMI upon presentation of the CNMI Entry Permit, evidence of CW–1/CW–2 status, and evidence that they notified the USCIS Saipan office of their intention to leave and re-enter the CNMI. Another two commenters suggested that DHS use its parole authority to allow workers to enter and exit the Commonwealth during the term of the CW status.

A re-entry permit is not an appropriate means for CW status holders to request re-entry after a trip abroad. A re-entry permit is a travel document issued to lawful permanent residents and conditional residents to re-enter the U.S. after travel of one year or more abroad. *See* 8 CFR 223.1(a). With respect to parole, parole of aliens seeking to resume CW status is legally incompatible with CW status.[15] Aliens paroled into the United States are affirmatively authorized to remain in

[15] The INA provides DHS with discretion to parole an individual into the United States temporarily under certain conditions for urgent humanitarian reasons or significant public benefit on a case-by-case basis. INA sec. 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A).

the United States, but do not have nonimmigrant status, and remain applicants for admission. In other words, if DHS paroled a CW alien into the CNMI, that alien would not be a CW alien. Such parole is not to be used to circumvent the visa issuance process. All CW nonimmigrants must have a CW visa to be readmitted in CW status. *See* new 8 CFR 214.2(w)(22). This visa will allow them to apply for admission to resume their CW status and the work authorization incident to that status. Such a visa requirement at the time of admission is consistent with current INA requirements. *See* INA sec. 212(a)(7)(B), 8 U.S.C. 1182(a)(7)(B). DHS has not made any changes to the final rule as a result of these comments.

(j) Change of Status in Lieu of Visa Requirement

Two commenters suggested that USCIS process a ''change of status'' in the CNMI in order to alleviate concerns regarding the rule's visa requirement. Commenters suggested that all CNMI guest workers who are in lawful status and lawfully authorized to work should be able to apply for a ''change of status'' using a Form that is similar to USCIS Form I–539.

DHS is aware of the public's concern regarding the burden of obtaining a visa to re-enter the CNMI. A transitional worker does not require a CW visa to legally remain and work in the CNMI. As previously discussed, this final rule clarifies that such status may be granted to the beneficiary in the CNMI. *See* new 8 CFR 214.2(w)(14)(ii) and new 8 CFR 214.2(w)(24). If DHS approves the CW petition and the grant of CW nonimmigrant status, the CW worker will receive an approval notice with an attached Form I–94, Arrival-Departure Record, which serves as evidence of lawful immigration status.

However, as with other nonimmigrant statuses under the Act, this in-country grant of status does not permit the status holder to reenter after foreign travel. Moreover, while the I–94 is evidence of lawful immigration status, Federal law requires that a nonimmigrant return the I–94 departure record to U.S. officials upon exiting the United States. Therefore, if the CW worker wants to travel abroad, he or she will not have evidence of the status and will need to obtain a CW visa at a U.S. Embassy or consulate abroad in order to apply for re-admission and receive a new I–94. As with other INA categories, a CW nonimmigrant will need a visa to be admitted to the CNMI upon return from foreign travel. *See* new 8 CFR 214.2(w)(22). The CNRA does not provide for return travel without such a visa. *See* 48 U.S.C. 1806(d)(3).

(k) Visa Issuance

Four commenters expressed concern regarding visa issuance abroad and offered suggestions regarding alternative procedures for such issuance. Specifically, two commenters suggested that DHS issue the visa in the United States through an agency to be set-up by DHS. Another suggested that a multiple entry CW visa should be made available within the CNMI to individuals who qualify for CW status. This commenter argued that it is contrary to stated intent of the CNRA for DHS to require CW–1 nonimmigrants to undergo the Federal visa process in a foreign country in order to return to the CNMI. Alternatively, the commenter suggested that an expedited process be established at foreign consular offices for transitional worker nonimmigrants to obtain multiple-entry visas. Another commenter requested clarification regarding whether a CW visa can be obtained within the CNMI and on the effect of such a visa refusal.

Visa issuance is a function of DOS. Thus any changes in visa issuance policies are beyond the scope of this DHS rule. However, DHS has been informed that DOS plans to issue multiple-entry CW visas, which should ease some of the commenters' concerns.

7. Reconsideration of Denied Petitions

Two commenters opposed the rule because it does not contain a fact dispute resolution mechanism. These commenters stated that while employers and employees may appeal denials as to the issuance of permits to the USCIS Administrative Appeals Office, the process is notoriously slow, bureaucratic, and expensive. The commenters also stated that appeals at higher levels are equally inaccessible for foreign workers of modest means. The commenters suggested that foreign workers have no way to pursue claims with respect to unpaid wages and overtime or other violations of the terms and conditions of employment other than bringing a contract action in court.

First, DHS notes that this rule includes an administrative appeal process which is consistent with other nonimmigrant classifications under the INA. The rule provides that the decision to grant or deny a petition for CW–1 status may be appealed to the USCIS Administrative Appeals Office, but denial of an application for change or extension of status filed under this section may not be appealed. *See* new 8 CFR 214.2(w)(21). The USCIS denial of a CW petition is not reviewable in removal proceedings before the Executive Office for Immigration Review. Consistent with Federal immigration law, this rule provides no appeal or conflict resolution procedure for the beneficiary of a visa petition, in this case, the alien worker. *See* 8 CFR 103.3(a)(1)(iii)(B), 8 CFR 1103.3(a)(1)(iii)(B). The CNRA requires DHS to ''establish, administer, and enforce a system for * * * permits to be issued to prospective employers'' not employees. *See* 48 U.S.C. 1806(d)(2). Thus the right to petition for a CW worker rests with employers in need of workers, and it is the employer who has standing to appeal the denial. Further, intended beneficiaries have no appeal rights. *See* 8 CFR 103.3(a)(1)(iii)(B) (affected party does not include the beneficiary of a visa petition). DHS believes that this appeal process adequately addresses the needs of the CW program, complies with the CNRA, and no alternative procedure is necessary. Thus no changes are made to the final rule as a result of these comments.

8. Change or Adjustment of Status

One commenter requested clarification on a CW holder's ability to change status into another INA classification such as an H classification. DHS notes that, during the transition period, CW workers will be able to change or adjust to another immigration status under the INA if eligible. *See* new 8 CFR 214.2(w)(18).

9. Period of Admission and Extension of Stay

Three commenters expressed concerns or offered suggestions regarding the period of admission and extension of stay for transitional workers. One commenter suggested that transitional worker status be valid for either one or two years.

CW status cannot be issued in two-year increments because the CNRA requires an annual reduction in the number of transitional workers. *See* 48 U.S.C. 1806(d)(2). DHS will issue CW status in one-year increments in order to properly administer the allocation and annual reduction mandated by the CNRA. *See* new 8 CFR 214.2(w)(16).

Two additional commenters stated that the rule allows employers to extend their contracts with foreign workers for the entire transition period. According to the commenters, this fact will exclude U.S. workers from jobs for five years. DHS disagrees with the commenters. While an employer may request extensions for foreign workers it currently employs, the employer must justify a continued need for the workers

and verify that the requirements of the regulations have been met. *See* new 8 CFR 214.2(w)(17). In addition, the reduction in the number of allocated worker permits as required under the CNRA will ensure that U.S. citizens and lawful permanent residents have access to job opportunities in the CNMI. No changes have been made to the final rule as a result of these comments.

10. Transition Period

Eleven commenters expressed concern or offered suggestions regarding the rule's transition period.

(a) During the Transition Period

Five commenters stated that there is a continued need for foreign workers to fill the jobs that the locals will not take. They contend that, as a result, the transitional worker classification will need to be in effect beyond the transition period. One of these commenters suggested that the transition period be extended beyond 2014 as long as employers are willing to renew the employment.

The CNRA authorizes DHS to create a nonimmigrant classification to ensure adequate employment in the Commonwealth during the transition period. *See* 48 U.S.C. 1806(d)(2). As such, the transitional worker classification is a temporary classification, available only during the transition period, to provide a foreign national worker with a lawful nonimmigrant status. *Id.* During the transition period, workers should seek to obtain skills, professional licenses, or educational degrees necessary to qualify for other employment-based status under the INA. The CNRA does not allow DHS to extend CW status beyond the transition period. *See* 48 U.S.C. 1806(d)(2). Thus, DHS is unable to adopt the suggestion to extend the transition period beyond 2014. The CW classification provision of the transition period may only be extended by the Secretary of the U.S. Department of Labor upon a determination that current and anticipated labor needs justify extending the transitional worker program to ensure adequate employment in the CNMI. *See* 48 U.S.C. 1806(d)(5). DHS has added additional language to the definition of ''transition period'' to further confirm that if the U.S. Secretary of Labor extends the transitional worker program, references to transition period in the final rule will include the length of any such extension. See new 8 CFR 214.2(w)(1)(xi).

(b) Post-Transition Period

Five commenters requested clarification on how transitional workers could transition out of CW status if ineligible for an INA-based status. One commenter suggested that transitional workers with U.S. citizen children should be provided additional immigration options when the transition period expires in order to ensure family unity. Another commenter suggested that DHS implement a post-transition mechanism to bring new replacement workers as market conditions change.

In order to position themselves to transition out of CW status if ineligible for another INA status, workers should use the transition period to satisfy requirements, such as any necessary professional licenses or educational degrees, in order to obtain other employment-based status under the INA. The CNRA does not provide for a mechanism to offer any other immigration relief once the transition period expires. *See* 48 U.S.C. 1806(d)(2)(5).

An additional commenter suggested that the transitional worker classification should terminate when the CNMI labor permit expires. This rule provides for transitional worker visas for foreign workers in the CNMI for the entire transition period. *See* new 8 CFR 214.2(w)(23). That period is not relevant to the expiration of CNMI labor permits. When the transition period ends, such workers need to obtain another INA status to legally remain in the CNMI or they will be subject to removal. *Id.* No changes have been made to the regulation as a result of these comments.

V. Other Changes

The final rule modifies the interim final rule's reference to appeals of denials of CW–1 petitions. *See* new 8 CFR 214.2(w)(21). Rather than refer solely to the ''USCIS Administrative Appeals Office'' (AAO), the provision now refers to the AAO ''or any successor body.'' This change is not substantive, but provides flexibility in case of a future USCIS administrative reorganization or the renaming of an office with respect to administrative appeals. DHS has found that overly specific references to particular officials or offices in regulations can lead either to unnecessary future conforming rulemakings, or obsolete regulations, if and when names and responsibilities are reorganized or otherwise modified.

VI. Regulatory Analyses

A. Executive Order 12866 and Executive Order 13563

This rulemaking is not considered ''economically significant'' under Executive Order 12866, as supplemented by Executive Order 13563, because it will not result in an annual effect on the economy of $100 million or more in any one year. However, because this rule raises novel policy issues, it is considered significant and has been reviewed by the Office of Management and Budget (OMB) under this Order. A summary of the economic impacts of this rule are presented below. For further details regarding this analysis, please refer to the complete Regulatory Assessment and Final Regulatory Flexibility Analysis that has been placed in the public docket for this rulemaking.

1. Public Comments Received on the Interim Final Rule That Address the Regulatory Assessment

DHS invited the public to comment on any potential economic impacts of this rule and the data and methodologies employed in conducting the Regulatory Assessment. We received approximately 25 comments on the Regulatory Assessment. These comments are addressed below.

One commenter stated that the interim final rule is deficient because DHS failed to conduct an economic impact analysis of the regulation as required by Executive Order 12866 and the Regulatory Flexibility Act of 1980.

DHS prepared a regulatory assessment in support of the interim final rule, titled ''Regulatory Assessment for the Interim Final Rule: Commonwealth of the Northern Mariana Islands (CNMI) Transitional Worker Classification,'' prepared by Industrial Economics, Incorporated, and dated May 22, 2009. The regulatory assessment was summarized in the preamble to the interim final rule and made available for public comment. Chapter 6 of that report provided all the information required for an Initial Regulatory Flexibility Analysis (IRFA) under the Regulatory Flexibility Act of 1980 (RFA). The analysis has been updated based on new information received during the public comment period, and DHS has prepared a Final Regulatory Flexibility Analysis (FRFA) per the RFA. The complete updated report and FRFA are part of the administrative record for this final rule and can be found in the public docket for this rulemaking.

One commenter stated that by failing to define a specific plan for allocating

permits among employers and reducing the overall number of permits to zero by the end of the transition period, DHS imposes additional burdens and uncertainty on the CNMI. Current employers, and existing and new investors, have no guarantees with respect to how their businesses will be treated by Federal officials or whether certain industries will be favored over others.

DHS agrees that costs associated with regulatory uncertainty may occur. However, estimation of these costs in the Regulatory Assessment is not possible at this time. Several factors prevent any estimation of economy-wide impacts resulting from this rule, including: (1) The highly uncertain future demand for foreign workers given the demise of the garment industry, newly imposed minimum wage requirements, and challenges faced by the tourism industry and (2) the fact that economic data and models with which to estimate impacts to the broader economy are largely absent or difficult to develop given the general lack of CNMI economic and production data and the changing conditions of the CNMI economy. Furthermore, DHS believes that maintaining flexibility with respect to the allocation system allows the Department to respond more quickly to changing economic conditions and demand for labor in the CNMI.

One commenter stated that DHS cannot justify its refusal to estimate the broader economic impacts of the rule based on its refusal to develop a schedule for allocating and reducing the number of grants of CW status. By giving the Secretary discretion each year to set the number of available grants of status for the next year, the commenter stated that DHS can avoid forever any economic impact analysis.

While the absence of a defined schedule prohibits the assessment of economic impacts, it is not the only factor preventing such analysis. Decisions by the U.S. Department of Labor (U.S. DOL) regarding whether to extend the CW classification, when combined with decisions by DHS, could significantly affect the number of grants of CW status available during the transition period. The economic analysis cannot predict the timing or outcome of U.S. DOL's decisions. As stated previously, economic analysis is further hampered by significant uncertainty regarding future demand for foreign workers and economic data and models with which to estimate impacts to the broader economy are largely absent or difficult to develop given the general lack of CNMI economic and production data and the changing conditions of the CNMI economy.

One commenter stated that DHS did not make enough use of a report issued by the U.S. Government Accountability Office (GAO) titled, ''Commonwealth of the Northern Mariana Islands: Managing Potential Economic Impact of Applying U.S. Immigration Law Requires Coordinated Federal Decisions and Additional Data'' (GAO–08–791, August 2008). In this report, GAO illustrates the potential effects of changes in the availability of foreign labor on the gross domestic product (GDP) of the CNMI. Its model relies on a study published in 2005 that found, under certain assumptions, that a 10 percent reduction in the number of all workers might be expected to cause a 7 percent decline in GDP. The commenter stated that DHS refused to recognize this fundamental economic rule and made no more than a passing reference to GAO's study.

DHS disagrees with the commenter. Both the May 2009 Regulatory Assessment and the Regulatory Assessment for this final rule provide a detailed summary and discussion of GAO's analysis (see Appendix A of both reports). In its report, GAO also states that its simulations of the impact of reduced workforce on GDP are intended to illustrate a range of potential impacts. The simulations do not account for other changes in the CNMI over the coming years, and, therefore, should not be considered predictive of future Gross Domestic Product (GDP). GAO stresses that, without knowing the future demand for foreign workers, the impact of joint DHS and U.S. DOL decisions regarding the size of the transitional workforce cannot be predicted.[16]

Two commenters noted that, in the development of the interim final rule, DHS failed to consider the report titled ''Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands.'' [17] Specifically, the commenters stated that this report provides the best possible prediction of future economic conditions in the CNMI as well as the economic impact of reducing the foreign worker population.

DHS has carefully reviewed this report, but is unable to use any information from the report in the Regulatory Assessment for this final rule (*see* Appendix B of the Regulatory Assessment for a detailed discussion of the report's data, methodology, and conclusions). The report appears to be oriented primarily towards members of Congress, who have the ability to amend minimum wage and immigration laws. However, several limitations of this report prevent us from incorporating the results into the Regulatory Assessment.

When preparing benefit-cost analyses of proposed regulations, Federal agencies must measure the impact of each regulatory alternative against a baseline, defined as ''the best assessment of the way the world would look absent the proposed action'' (*see* OMB Circular A–4, 2003, p. 15). In this case, the action under consideration is the replacement of the CNMI work permit system with a Federal system that includes the granting of CW status and the issuance of INA visas. The impacts of this action should be measured relative to a scenario that projects the likely demand for foreign workers, given the pre-existing demise of the garment industry, the struggles of the tourism industry (visitor arrivals have generally decreased since 2004 and are roughly 45 percent of their peak in 1996), and the imposition of the minimum wage. The baseline demand for foreign workers in the CNMI is impossible to predict given all the other factors affecting the island economy.

The GAO report (GAO–08–791, August 2008) highlights the importance of comparing the impacts of the regulation to an accurate baseline scenario. The report states ''* * * continuing declines in the garment industry, challenges to the tourism industry, and the scheduled increases in the minimum wage may reduce the demand for foreign workers, lessening any potential adverse impact of the legislation on the economy'' (pp. 24–25). For example, if the baseline demand for foreign workers does not exceed the number of available grants of CW status, the impact of the rule will be zero or negligible. If demand is higher than the number of available grants of CW status, cost would be positive, but the magnitude will depend on the size of the gap between worker demand and availability.

McPhee *et al.* (2008) do not provide new or improved information regarding the likely future demand for foreign workers. Rather, the two scenarios modeled by the authors should be

[16] *See* GAO, Commonwealth of the Northern Mariana Islands: Managing Economic Impact of Applying U.S. Immigration Law Requires Coordinated Federal Decisions and Additional Data, No. GAO–08–791 (August 2008) at pp. 36–40, available at *http://www.gao.gov/new.items/d08791.pdf.*

[17] *See* McPhee, Malcolm and Richard Conway, Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands, study funded by the U.S. Department of the Interior (October 2008) available at *http://www.doi.gov/oia/reports/reportsCNMI/EconomicImpact_Oct2008.pdf.*

viewed as demonstrating the sensitivity of the economy to the number of foreign workers employed without comment on likely future demand for these workers. In the scenario where CNMI employers have access to as many foreign workers as needed, the authors assume demand is driven by the doubling of the number of CNMI visitors by 2015. This increase in tourism is an assumption, rather than a prediction based on existing data.

The authors' alternative scenario designed to demonstrate the effect of Federal actions in the CNMI implicitly assumes that the only restriction on the future growth of the visitor industry is the amount of available foreign labor, without consideration of the other economic events influencing the growth of this sector. This scenario also combines the effects of Federal oversight of immigration and implementation of the Federal minimum wage, adding to the difficulty of isolating the effect of just this immigration rule.

As a result of these limitations, we cannot incorporate the results of McPhee *et al.* (2008) directly into our regulatory assessment. The assertion that the CNRA will preclude any meaningful recovery by the CNMI, as argued by the authors, is also difficult to confirm without better information about the feasibility of expansion of the tourist or other, new industries on the islands. Repealing the law, the solution recommended by McPhee *et al.,* is beyond the scope of DHS authority.

In the interim final rule and the supporting Regulatory Assessment, DHS argued that the economic models and data necessary to estimate the impacts of the rule are not available. Two commenters asserted that this statement is incorrect and reference McPhee *et al.* (2008) as providing the necessary information.

As noted previously, the results of McPhee *et al.* (2008) cannot be incorporated directly into the Regulatory Assessment for this final rule. The major limitations of the study are that it does not provide new information or data allowing for predictions of the likely future demand for foreign workers in the CNMI and it includes the potential impacts of events well outside the scope of this rulemaking (minimum wage increases). The potential for and magnitude of adverse impacts resulting from this final rule are highly sensitive to future demand for foreign workers. Furthermore, even if the use or development of other economic models were feasible, the problem of defining future baseline demand would not be resolved.

In addition, assuming that the likely baseline demand for foreign workers could be projected, this final rule presents unique challenges with regard to defining the types of costs that should be assessed and choosing the appropriate tools for the assessment. OMB's Circular A–4 directs Federal agencies to estimate the costs of a regulation to society in terms of the ''opportunity costs.'' Generally, opportunity costs are measured as changes in producer and consumer surpluses. In addition, best practices suggest that where the distributional effects are significant, they should also be discussed. Distributional effects might be measured in terms of changes in production (*e.g.,* GDP), expenditures, or employment. In the Regulatory Assessment for this final rule, we attempt to report both net costs to society as a whole, as well as the disproportionate effects on the CNMI economy and discuss limitations preventing us from quantifying such costs.

Where a regulation has the potential to affect a large number of sectors, computable general equilibrium models are employed to capture the interactions among markets, measured as changes in surpluses, GDP, or employment. No such computable general equilibrium model of the CNMI economy exists and the data used to construct such models are incomplete for the CNMI. For example, GAO (GAO–08–791, August 2008) was unable to identify recent estimates of CNMI's GDP for use in its simulations (p. 84). U.S. DOL notes, ''CNMI does not yet have in place macroeconomic data collection and accounting systems technology capable of generating information on total output and its components on a monthly or quarterly basis. As a result, there is no way to provide objective measures of productive capacity, capacity utilization, employment, wages or unemployment rates * * * Among the factors that make * * * data gathering and analysis work challenging is that the CNMI * * * is not included in the U.S. Census Bureau's American Community Survey (ACS) or other surveys that generate current detailed data on the 50 states and most areas of populations of 65,000 or more. Nor is the CNMI included in surveys that generate current data on industries, production and household income and expenditures.'' (U.S. DOL, Impact of Increased Minimum Wages on the Economies of American Samoa and the Commonwealth of the Northern Mariana Islands, prepared by the Office of the Assistant Secretary for Policy 35–36 (January 2008)).

In their report, McPhee *et al.* present numerous tables of data on employment, population, visitors, wages and salaries, personal income, GDP, business gross revenue, general fund revenue, bank loans, residential telephone lines, auto sales, and residential building permits for a variety of time periods and intervals depending on the data type. Additional tables of economic data are provided in Appendix A of the McPhee *et al.* report. The report text suggests that the authors compared the multiplier relationships derived from the 1995 input-output table to economic data collected from surveys or other sources to verify the stability of the multipliers through time. However, we are unclear about the methods and data used to conduct these checks, in part because none of the tables presented in the report include source information. We had difficulty discerning which presentations of historical information are based on actual data collected by government sources in the relevant year, versus information calculated or derived by the authors using population or general employment information and their 1995 input-output tables.

A separate letter from the co-author of the report to the CNMI government responds to concerns DHS expressed about the quality of the data used in the McPhee *et al.* report (this letter was included as Appendix B of the comment submitted by the CNMI Office of the Governor, ''Comments on the Interim Final Rule entitled 'Commonwealth of the Northern Mariana Islands Transitional Worker Classification,' '' DHS Docket No. USCIS–2008–0038–0091, November 17, 2009). This letter clarifies that ''most of the data used in the study are shown in Appendix A of the [McPhee *et al.*] report. To the extent possible, the information was drawn from published sources. For example, estimates of Gross Domestic Product and personal income came from the CNMI income and products accounts (Marc Rubin, ''Annual Nominal and Constant Dollar Estimates of Gross Domestic Product in the Commonwealth of the Northern Mariana Islands, 2000–2005,'' 2007). Other major sources of information included the population census (U.S. Bureau of the Census), the household survey (U.S. Bureau of the Census), the economic census (U.S. Bureau of the Census), economic indicators (CNMI Department of Commerce), W–2 returns and wages (CNMI Department of Finance), and government employment (CNMI Department of Finance)'' (p. 1).

Regarding employment data, the letter states, ''[t]here was no single publication that produced the required employment data. Consequently, I had to make employment estimates [for four categories—apparel, hotels, other industries, and government] by reconciling information from five different sources: the economic census, W–2 reports, the census of population and housing, the household, income, and expenditures survey, and various industry and government tabulations'' (p. 2). Other variables, such as population, are extrapolated for years where no data are available.

From this comment, it appears that certain conclusions in the report regarding the size and composition of the CNMI economy between 2004 and 2007 are based on estimates derived from the input-output model rather than retrospective data collected through surveys or other means. The authors state that their results for this period are roughly consistent with data published through the second quarter of 2008 by the CNMI Department of Commerce. Those data include W–2 returns, business gross revenue, general fund revenue, imports, bank loans, residential telephone lines, and auto sales. Thus, we conclude that this co-author of the McPhee *et al.* (2008) report encountered data limitations similar to those described by GAO and U.S. DOL and attempts to overcome them by combining limited available data with the multipliers developed in 1995. Given this conclusion, and in combination with the problem of forecasting baseline demand, and the problem with the study including impacts from events outside the scope of this rule (the increase in minimum wage), we did not attempt to recreate the model developed in McPhee *et al.*

One commenter stated that in its proposed regulation addressing foreign investor visas in the CNMI, DHS favorably cited a 1999 study by the Northern Marianas College that applies the same input-output model used as the basis for the work by McPhee *et al.* (2008).

Comments regarding other DHS rules, such as the Notice of Proposed Rulemaking for the E–2 Nonimmigrant Status for Aliens in the Commonwealth of the Northern Mariana Islands with Long-term Investor Status, are outside the scope of this rulemaking. However, it is important to note that the E–2 rule cited historical information provided in the Northern Marianas College study regarding the economic expansion that occurred between 1980 and 1995. We have no reason to believe that the historical information is inaccurate. Of concern for this final rule is whether the model, which relies on information collected in 1995, is descriptive of the future CNMI economy, and whether data exist for making predictions about the impact of the rule on the future economy. As noted in a previous response, McPhee *et al.* provide no new evidence regarding the probable future demand for foreign workers. Their analysis demonstrates the sensitivity of the CNMI economy to the size of its labor force, assuming certain 1995 conditions still stand, without consideration of other factors encouraging or discouraging economic growth and the need for foreign labor.

One commenter argued that several statements and tables in the section of the preamble of the interim final rule summarizing the results of the Regulatory Assessment were incorrect because DHS did not factor in the issuance of CNMI's umbrella permits. Specifically, (1) The size of the cap in 2009 is no longer relevant because foreign workers with umbrella permits will be able to stay in the CNMI without CW status until November 28, 2011, (2) efforts to bring out-of-status workers into compliance with CNMI law prior to November 28, 2009, are incorrectly described, and (3) businesses are unlikely to experience cost savings under the Federal program in 2009 and 2010 because most have already paid CNMI fees for 2-year CNMI-approved employment contracts.

DHS agrees and has revised the Regulatory Assessment to reflect that employers and employees will start applying for status in 2011 in anticipation of the expiration of their umbrella permits on November 27, 2011. The size of the cap in 2009 and assumed costs of efforts to achieve legal status for out-of-status workers prior to November 28, 2009, are no longer relevant to our economic analysis. The final part of this comment seems to reflect a misunderstanding of our comparison of each regulatory alternative to a baseline scenario, defined as the way the world would look absent the regulation. Absent the CNRA, CNMI employers would pay to renew CNMI work permits each year. In the Regulatory Assessment, DHS analyzes the economic impact of employers not having to obtain any new permits or status for workers in 2010 as a result of the umbrella permits and the costs of obtaining CW status in 2011 in anticipation of the expiration of the umbrella permits. Businesses would experience cost savings relative to the baseline in 2010 because no costs are incurred under the final rule. These cost savings are estimated to be $5.2 million. The costs of obtaining CW status or INA visas for in-status workers in 2011, net of fees that would have been paid to obtain CNMI work permits, is $3.2 million. Over the 2-year period, the net savings is $2.0 million. We note in the analysis, however, that to the extent employers took the unusual step of paying 2 years of CNMI work permit fees in 2009, some of these cost savings may not be realized. We think this circumstance is unlikely in most cases because reported revenues for the CNMI Department of Labor (CNMI DOL) in 2009 ($5.4 million) are less than we would have anticipated in that year ($5.6 million including domestic household workers) absent implementation of the CNRA.

Two commenters stated that the interim final rule and supporting Regulatory Assessment do not take into account more recent data regarding the number of foreign workers in the CNMI provided by the CNMI government to DHS in 2009. These data were provided by Governor Fitial as a follow-up to his July 18, 2008, letter.

Regrettably, DHS has no record of such follow-up information provided by Governor Fitial or the government of the CNMI. However, the final rule and Regulatory Assessment incorporated the results of a count of foreign workers in the CNMI conducted by the DOI in December 2009 (U.S. Department of the Interior, The Secretary of the Interior, A Report on the Alien Worker Population in the Commonwealth of the Northern Mariana Islands, Washington, DC, March 2010; referred to as the DOI 2010 Report to Congress).

One commenter stated that the CNMI Department of Commerce Report on the 2005 CNMI Household, Income, and Expenditures Survey (HIES) from April 2008, a source for some of the data for the economic analysis accompanying the final regulation, is incomplete and out-of-date. The commenter believed that DHS should rely instead on the 2002 and 2007 economic census of business reports.

DHS partially agrees. Our economic analysis relies on both the 2005 HIES and the U.S. Census Bureau's 2007 economic census of the CNMI (released in 2009), and we supplemented these sources with newer data provided in the DOI 2010 Report to Congress. We rely on the U.S. Census Bureau's report for the number and size distribution of business establishments on the CNMI. The DOI report provides the most current counts of in-status and out-of-status workers in the CNMI. The DOI report also provides information about each worker's occupation, but not in sufficient detail to identify workers

employed in private households or managerial or specialty occupations. This detail is necessary for determining the number of foreign workers eligible for CW status or visas currently available under the INA, and the 2005 HIES provides the most recent available data to make that determination. DHS notes that the economic consultants hired by the CNMI government (Malcolm D. McPhee & Associates and Dick Conway) also cite the 2005 HIES in their analysis completed in 2008.

One commenter stated that the DHS prediction that 2,090 foreign workers will be eligible for traditional INA visa classifications is incorrect. This comment stated that random samples analyzed by the CNMI DOL suggest only 300 workers will be eligible.

In the Regulatory Assessment for this final rule, DHS estimates that approximately 1,909 foreign workers will be eligible for traditional INA visas. This estimate is based on an extensive effort to ''crosswalk'' CNMI's work permit categories with comparable INA visa categories (the details of which can be found in Chapter 4 and Appendix C of the 2010 Regulatory Assessment, available in the docket for this rulemaking). The reduction from 2,090 to 1,909 results from the overall decrease in the foreign worker population documented in the DOI 2010 Report to Congress. DHS continues to use a higher estimate for three reasons.

First, the documented number of CNMI government employees, religious workers, and diplomatic and consular staff who will be eligible for an existing classification under the INA is 236 workers, close to the estimate provided by the commenter even before adding in eligible skilled and managerial workers in the private sector. Therefore, we believe the estimate of 300 is too low.

Second, a review of the worker occupations reported in the DOI count suggests that at least 1,540 workers may be eligible. This review is imprecise. While we are able to easily identify diplomats, doctors, dentists, pharmacists, or other highly specialized occupations, we cannot determine whether some individuals in other job categories hold eligible managerial positions (*e.g.,* 288 individuals report their occupations as ''supervisor''). Therefore, while our assessment of the DOI data gives us confidence that an estimate of 300 eligible individuals is too low, we continue to rely on our crosswalk and information from the 2005 HIES that specifically identifies the number of foreign workers employed in ''managerial and professional specialty'' positions.

Finally, the commenter did not provide any supporting data or documentation describing the CNMI DOL sampling procedure or methods for evaluating INA visa eligibility. Thus, we are unable to determine whether the sample is representative of the foreign worker population or their understanding of the criteria for eligibility is consistent with INA regulations.

One commenter stated that DHS has no statutory basis for making household or other workers ineligible for CW status. Furthermore, the commenter stated that the number of household workers estimated by DHS (950) is incorrect.

As previously mentioned, the CNRA authorizes DHS to set conditions for the admission of transitional workers. *See* 48 U.S.C. 1806(d)(3). The CNRA also mandates that such provisions must address the needs of legitimate businesses. *See* 48 U.S.C. 1806(d)(5)(A). As such, this rule does not include a blanket exclusion of any specific occupational category from the CW status. The rule only requires that beneficiaries be petitioned by a legitimate business which produces services or goods. DHS believes that the rule's provision regarding legitimate businesses is entirely lawful and appropriate.

The commenter provided no information correcting the estimate of 950 household workers, nor did the commenter explain if the figure is over- or understated. The DOI 2010 Report to Congress identifies the number of foreign workers employed as ''houseworkers'' (1,415 holding 706D, 706K, and 706P CNMI work permits); however, the report does not differentiate between workers employed by legitimate businesses, like hotels or maid service companies, and private households. Therefore, DHS relies on the best, publicly-available data provided by the CNMI DOL in its 2005 HIES.

Two commenters stated that our estimate of approximately 2,100 spouses and dependent children of foreign workers is too high because it includes other categories of non-working foreign residents (*e.g.,* immediate relatives of U.S. citizens, alien investors, alien business permit holders, alien retirees, alien students, and alien diplomats).

Unfortunately, the commenter did not provide better data. However, we were able to revise this estimate to 1,557 based on the number of respondents in the DOI 2010 Report to Congress who currently hold 706E permits.

The Regulatory Assessment for the interim final rule estimated compliance costs occurring between May 2008 and December 2009 as employers obtain CW work permits for out-of-status foreign workers. One commenter stated that no direct costs were incurred during this period because the rule had not gone into effect, and employers who are found to employ out-of-status workers are barred from employing foreign workers in the future.

The costs during that time period (May 2008 and December 2009) reflect actions DHS assumed the regulated community would take in anticipation of the rule. Specifically, we assumed employers would incur costs to obtain CNMI work permits for out-of-status workers to ensure those employees would be eligible for CW status after November 28, 2009. However, based on CNMI's issuance of umbrella permits and efforts to deport out-of-status workers prior to November 28, 2009, and the fact that employers have a disincentive to making the CNMI DOL aware of their out-of-status workers, DHS agrees with the commenter that this assumption is no longer valid. These costs have been removed from the Regulatory Assessment for this final rule.

One commenter stated that the number of out-of-status foreign workers is now 650, which is lower than the 1,000 estimated in the report.

The Regulatory Assessment for this final rule incorporates a newer estimate of 183 out-of-status foreign workers obtained from the DOI 2010 Report to Congress.

One commenter disagreed with the DHS statement that one benefit of the rule will be to protect foreign workers from abuses such as human trafficking and other illicit activity.

The CNRA's stated purposes include ensuring effective border control and addressing national security and homeland security concerns, as well as protecting workers from the potential for abuse and exploitation. Section 701(a) of the CNRA. There is evidence that directly-employed workers have been subject to widespread abuse and have been victims of human trafficking. *See, e.g.,* Senate Hearing 110–50, Conditions in the Commonwealth of the Northern Mariana Islands (Feb. 8, 2007) (testimony of Lauri Bennett Ogumoro and Sister Mary Stella Mangona). DHS believes that the CNRA transitional worker provisions were intended to address the needs of legitimate businesses and to combat such abuses. As such, this final rule limits eligibility to petition for a CW worker to a legitimate business that is an operating or commercial undertaking that produces services or goods for profit

and meets applicable legal requirements for doing business in the CNMI. DHS believes that this provision regarding legitimate businesses will combat such abuse by providing workers protection from such direct employment.

In the preamble to the interim final rule, DHS stated that it can more cost-effectively administer the immigration program while also providing improved security benefits. One commenter responded that this statement is untrue, arguing that the CNMI system provides better security because, unlike the United States, it collects exit information on a timely basis. The commenter also stated that the U.S. system is not more cost-effective because it does not consider the negative economic impacts of limiting access to foreign workers.

DHS disagrees with the commenter. This final rule contains provisions to ensure that the admission of nonimmigrants to the CNMI is consistent with existing Federal laws and practices that are intended to secure and control the borders of the United States and its territories. The DHS statement on cost-effectiveness refers only to a comparison of the fees paid to the CNMI government to permit foreign workers (old system) relative to fees paid to the U.S. government under the final rule (new system) for the same workers. Because employers may include more than one worker on a single petition, total present value fees paid by employers to the U.S. government under the preferred alternative are less than they would have paid to the CNMI government over the time period of this analysis.

One commenter stated that the current population of the CNMI is 52,000, rather than 66,000 as specified in the section examining economic impacts to small entities.

DHS appreciates this new information and has used it in the section examining economic impacts to small entities (*see* Final Regulatory Flexibility Analysis below). We note, however, that this new information does not change our conclusion that the CNMI does not meet the definition of a small government under the Regulatory Flexibility Act.

One commenter stated that the assertion in the section examining economic impacts to small entities that data on non-profit organizations do not exist is incorrect, arguing that the CNMI maintains information on the number of such organizations with employees.

Regrettably, the commenter did not provide a reference or citation for such information. DHS has clarified in the Final Regulatory Flexibility Analysis that our source for the business size data that we rely on for our estimate of the number of small businesses in the CNMI does not explicitly break out non-profit organizations.

One commenter stated that the DHS calculation of the incremental direct costs of the interim final rule is based on faulty assumptions and reaches flawed and useless conclusions. The commenter argued the following: first, assuming that the number of available grants of CW status will remain constant through the time frame for the analysis is incorrect because DHS is required to reduce the number annually. Second, the number of individuals requesting status in 2009 is incorrect because the number of foreign workers in the CNMI has declined since the development of the Regulatory Assessment. Third, assuming the number of jobs currently held by foreign workers represents the future demand for such workers is incorrect because the CNMI is currently in a serious economic depression (in past years, the number of foreign workers has been much higher). Finally, the assumption that there are 1,000 out-of-status workers is incorrect because the CNMI DOL estimates that the figure had fallen to 600 as of August 2008.

This comment refers to the DHS estimate of the incremental administrative costs of the rule. Incremental costs are the difference between the cost of obtaining a CNMI work permit under the former legal system and the cost of obtaining CW status or an INA visa after the regulation takes effect. Our assumption that the maximum number of grants of CW status is available was intended to estimate the maximum potential administrative costs resulting from the rule. As the analysis reveals, the final rule is anticipated to result in cost savings because employers may name more than one employee on a petition; conversely, separate petitions and fees were required for each employee under the CNMI system. Thus, assuming future growth in the number of foreign workers during the transition period up to the cap on grants of CW status would only increase the cost savings, or benefits, attributable to the final rule. DHS has updated the analysis to include revised estimates of the number of workers present in the CNMI at the start of the transition period based on data collected in December 2009 by the U.S. Department of the Interior on in-status and out-of-status workers.

One commenter stated that excluding the $150 fee per beneficiary to fund vocational education programs in the CNMI and the $1,000 American Competitiveness and Worker Improvement Act (ACWIA) training fee accompanying H–1B visas from the calculation of the net administrative cost to society is not appropriate and would not be endorsed by professional economists.

In its guidance to Federal agencies describing best practices for preparing economic analyses required by Executive Order 12866, OMB includes a section discussing the difference between costs and transfer payments. It states, ''Benefit and cost estimates should reflect real resource use. Transfer payments are monetary payments from one group to another that do not affect total resources available to society * * * *You should not include transfers in the estimates of the benefits and costs of a regulation* [emphasis added]. Instead, address them in a separate discussion of the regulation's distributional effects'' (OMB, Circular A–4, 2003, p. 38). Taxes and fees are the classic example of transfer payments, where revenues collected from citizens are redeployed to government programs providing benefits to the population. We have followed OMB's guidance precisely, providing estimates of real resource losses that omit the training fees, which take money from employers to fund public vocational programs. We do, however, include these training fees in our discussion of the distributional impacts of the final rule on individual CNMI employers in the Final Regulatory Flexibility Analysis.

2. Summary of the Regulatory Assessment

In this analysis, we consider the incremental costs and benefits to society, in both the CNMI and the United States, of the final rule. Given the requisite reduction in the number of potential grants of CW status (to zero) by the end of the transition period or by the end of any extensions to the program, the most significant economic impact of the rule may result from a decrease in available foreign labor. However, we cannot measure the social costs of this drawdown for several reasons. First, DHS has yet to develop a schedule for allocating and reducing the number of potential grants of CW status, and the likelihood that the U.S. Department of Labor will exercise its authority to extend the transition period beyond 2014 is unknown. The combined effect of these two decisions on the size of the transitional worker population during the transition period is significant, ranging from minimal reduction in this population to removal of nearly all such workers by the end of 2014. Furthermore, future demand for foreign workers in the CNMI is highly uncertain

given the demise of the garment industry, newly imposed minimum wage requirements, and challenges faced by the tourism industry. Finally, economic data and models with which to estimate impacts to the broader economy are largely absent or difficult to develop given the general lack of CNMI economic and production data and the changing conditions of the CNMI economy.

In this analysis, we calculate the incremental administrative costs (*i.e.,* direct compliance costs) resulting from changes in the fees imposed for the CW status grants and INA visas required by the final rule. Our analysis assumes essentially no reduction in the number of potential grants of CW status throughout the transition period and assumes the highest possible number of grants of CW status will be issued each year (*i.e.,* USCIS will issue as many CW status grants as needed to meet the estimated demand for foreign workers). Because of data limitations, we qualitatively discuss the incremental effect of these costs on overall production, expenditures, and government revenue in the CNMI. Our analysis focuses solely on economic impacts likely to be incurred while the rule is in effect. For this analysis, we assume this is the beginning of 2011 until the end of the transition period on December 31, 2014). We make five key assumptions:

(1) CNMI businesses will wait until 2011 to apply for grants of CW status or INA visas in anticipation of the expiration of permits issued by the CNMI DOL (known as ''umbrella'' permits). In 2009, the CNMI DOL issued umbrella permits to foreign workers, thus authorizing their continued presence and employment in the CNMI until November 27, 2011. DHS will recognize these permits as granting employment authorization to transitional workers during this period.

(2) The number of grants of CW status available during the transition period ending December 31, 2014, will remain essentially constant at 22,417 visas per year. We make this assumption because DHS and U.S. DOL have not yet: (1) Established a system and schedule for allocating and reducing the number of grants of CW status and (2) decided whether or not to extend the transition period beyond 2014.

(3) The starting cap of 22,417 grants of CW status is sufficient to accommodate the number of foreign workers likely to require such status in 2011. We estimate that approximately 13,216 in-status workers will be granted CW status in 2011. This number is based on the total number of foreign workers present in the CNMI as of December 31, 2009 (16,258), as reported by the DOI, after subtracting the number of foreign workers likely to be eligible for visa classifications under the INA (1,909), the number of foreign workers ineligible for a grant of CW status (950 private domestic household workers), and the estimated number of out-of-status workers (183). We assume that the 183 out-of-status workers are gainfully employed in the CNMI and will be replaced with new foreign workers who can legally obtain CW status. As a result, a total of 13,399 foreign workers are potentially eligible for CW status.

(4) The number of jobs currently held by foreign workers will not change during the transition period. We assume that the number of jobs currently held by foreign workers represents the future demand for foreign workers through 2014, or the number of jobs available for such workers. We make this assumption because the CNMI's economic conditions are changing, and we lack the data to predict the future state of the CNMI economy and its resulting impact on the labor market for foreign workers. We also do not know the rate at which resident workers would replace foreign workers.

(5) The current number of out-of-status foreign workers is 183, as estimated by DOI as of December 31, 2009.

Collectively, these assumptions result in a scenario where no shortage of labor is anticipated. Therefore, this analysis focuses on estimating the change in administrative costs associated with obtaining status for foreign workers from USCIS as opposed to from the CNMI government. We also qualitatively consider the effect of this difference in administrative cost on labor prices and related impacts to economy-wide production. The distributional impact on CNMI government revenues is also discussed.

These assumptions are uncertain. Depending on how DHS reduces the number of grants of CW status during the transition period, the rule could have negative impacts, perhaps significant, on the CNMI if the CNMI economy experiences a surge in the demand for the type of foreign labor that is ineligible for visa classifications under the INA and exceeds the CNMI status cap (22,417), or if the number of out-of-status foreign workers has been greatly underestimated by DOI. The absence of a defined system and schedule for reducing the CW status cap, combined with the general lack of CNMI economic and production data and changing conditions of the CNMI economy, preclude a quantitative analysis of alternative scenarios exploring these impacts in depth.

In our analysis, we first estimate the current and future baseline demand for foreign workers in the absence of the final rule. In this baseline analysis, we consider the prevailing economic conditions in the CNMI to estimate the future demand for foreign workers and the total number of foreign work permits that would be issued under CNMI labor law absent the final rule. Next, we characterize the number and type of CW status grants and nonimmigrant worker visas available under the INA that would be issued as a result of the final rule. We consider the number of affected businesses and foreign workers as well as the foreign workers' jobs and professional qualifications, eligibility based on employer or occupation, and current immigration status in the CNMI. We then estimate the component costs that CNMI employers would incur to apply for and obtain the requisite CNMI work permits (baseline regulatory environment) and CW status grants and INA visas for foreign workers (final rule). We combine this cost information with our estimates of the number of visas that would be issued to calculate the incremental administrative costs of the rule. Finally, we discuss qualitatively the potential impact of changes in labor costs on the CNMI economy and the distributive effect of the rule on the revenues of the CNMI government.

We estimate that 16,258 foreign workers and 1,176 businesses in the CNMI will be subject to the final rule. Based on the available data, we estimate that approximately 1,909 of these workers may qualify for a nonimmigrant work visa available under the INA, at least 950 private domestic household workers will not be eligible for CW status, and 183 out-of-status workers will be replaced with new foreign workers who can legally obtain CW status. This calculation leaves 13,399 foreign workers potentially eligible for CW status. In addition, we estimate that approximately 1,557 spouses and dependent children of foreign workers will apply for admission under a second CW status category.

In accordance with Executive Order 12866, we consider and evaluate the following four alternatives:

Alternative 1 (the chosen alternative): Aliens, if present in the CNMI, then lawfully present, may qualify for CW status. An employer petitioner can name more than one worker, or ''beneficiary,'' on a single Form I–129CW petition if the beneficiaries will be working in the same eligible occupational category, for

the same period of time, and in the same location. The CW status is valid for a period of 1 year.

Alternative 2: Same as Alternative 1, except an employer petitioner can name only one eligible beneficiary on each petition.

Alternative 3: Same as Alternative 1, except CW status is valid for a period of 2 years.

Alternative 4: Same as Alternative 1, except aliens lawfully present as well as aliens who are out of status in the CNMI as of the beginning of the transition period (November 28, 2009) may qualify for CW status.

We estimate the incremental costs on an annual basis over the same period of time as the transition period, beginning with the year 2011 (to simplify our cost analysis by estimating the incremental costs on a calendar basis) and ending with the year 2014, in the absence of any extension made by U.S. DOL.

The incremental costs represent the change in the cost of obtaining the necessary CW status and INA visas under the final rule from the baseline cost of obtaining foreign work permits under the CNMI system. We estimate that the baseline cost for issuing CNMI work permits to the 16,075 in-status foreign workers presently in the CNMI is about $5.6 million annually. Table 1 summarizes the results of the Regulatory Assessment. The negative values in Table 1 estimated for Alternatives 1, 3, and 4 indicate that society will experience a net *cost savings* as a result of implementing one of these alternatives instead of continuing the baseline condition (the CNMI permit system).

TABLE 1—SUMMARY OF THE INCREMENTAL ADMINISTRATIVE COSTS OF THE RULE, UNDISCOUNTED AND DISCOUNTED

[2010 $Ms]

Alternative	2011	2012	2013	2014	Total
Undiscounted:					
1	−$0.85	−$2.7	−$2.8	−$1.8	
2	3.8	1.9	1.9	2.8	
3	−0.85	−5.2	−2.8	−4.3	
4	−1.2	−2.7	−2.8	−1.8	
3% discount rate:					
1	−0.82	−2.6	−2.5	−1.6	−7.5
2	3.6	1.8	1.7	2.5	9.6
3	−0.82	−4.9	−2.5	−3.8	−12.0
4	−1.2	−2.6	−2.5	−1.6	−7.9
7% discount rate:					
1	−0.79	−2.4	−2.2	−1.4	−6.8
2	3.5	1.6	1.5	2.1	8.7
3	−0.79	−4.6	−2.2	−3.3	−10.9
4	−1.1	−2.4	−2.2	−1.4	−7.1

The total present value costs are projected to range from −$12 million to $9.6 million depending on the validity period of CW status (1 or 2 years), whether the estimated 183 out-of-status aliens present in the CNMI are eligible for CW status, and the discount rate applied. Savings achieved under Alternatives 1, 3, and 4 are attributable to the flexibility of allowing multiple beneficiaries to be included in a single Form I–129CW petition, which is in contrast to the CNMI permit system that required an application and fee paid for each employee. The additional costs of applying for and obtaining CW status for spouses and children and INA visas for certain qualified foreign workers do not outweigh the benefits of submitting a single petition for multiple beneficiaries seeking CW status. In comparison to the chosen alternative (Alternative 1), increasing the CW status validity period from 1 year to 2 years (Alternative 3) results in additional cost savings of about 60 percent. Allowing out-of-status workers eligibility for CW status (Alternative 4) would result in cost savings of 4 to 5 percent relative to Alternative 1 because CNMI employers will not have to pay to recruit new or replacement workers from overseas.

The total present value costs of Alternative 2 are projected to range from $8.7 million to $9.6 million depending on the discount rate applied. These costs are substantially higher than the costs estimated for the other three alternatives. The positive values represent a net cost to society, which are expected given that this alternative requires a petition for each beneficiary.

Because Table 1 presents *net impacts* to society, it does not include the statutory fee of $150 per beneficiary per year to fund vocational education programs in the CNMI. This fee is to be paid for each beneficiary seeking CW status. The costs also do not include the American Competitiveness and Worker Improvement Act (ACWIA) fee required for H–1B visa applicants. Although these fees represent a cost to businesses or employer petitioners in the CNMI, these fees are a transfer or redistribution of funds within the CNMI and U.S. economies and are not a component of the net impacts of the final rule to society. We note that from the perspective of the employers, when these fees are included, Alternatives 1 (chosen alternative), 3, and 4 continue to result in cost savings over the baseline.

Ideally, we would quantify and monetize the benefits of the regulation and compare them to the costs. The intended benefits of the rule include improvements in national and homeland security and protection of human rights. Implementation of the rule assures that the admission of nonimmigrants to the CNMI is consistent with existing Federal laws and practices intended to secure and control the borders of the United States and its territories. Additionally, the rule would help protect foreign workers in the CNMI from abuses such as human trafficking and other illicit activity.

Due to limitations in data and the difficulty associated with quantifying national and homeland security

improvements, we have described the intended benefits of the regulation qualitatively. Moreover, because three of the four alternatives analyzed, including the chosen alternative (Alternative 1), are projected to result in net cost savings to society, the rule may produce a net overall benefit to society.

Notwithstanding the potentially broader impacts of this regulation on the CNMI economy that would ensue if the availability of foreign labor is affected, the results of our analysis on the incremental societal costs of the associated visa fees indicate that Alternative 1 provides the most favorable combination of cost and stringency. While Alternative 2 might be considered more stringent because it requires a petition for each beneficiary, the costs are substantially higher than the other three alternatives. Alternative 3 is expected to achieve more cost savings than Alternative 1, but the 1-year status validity period under Alternative 1 facilitates USCIS's effective management of the number of potential grants of CW status issued at any given time and DHS's determination regarding the statutory reduction of the number of annual CW status grants to zero by the end of the transition period. Alternative 4 may provide less security because out-of-status workers would be eligible for CW status.

We qualitatively discuss the distributive effect of the final rule on the revenues of the CNMI government. Absent the rule, we estimate that the CNMI government would have collected approximately $5.6 million annually in fees associated with the issuance of permits for foreign workers. Because it will no longer be responsible for administering this permit program, the CNMI government staff resources devoted to this function, and funded by these permit fees, will be available for other government business. As recently as 2008, the CNMI government operated at a deficit; the government's total expenditures in that year of $329.3 million exceeded revenues by approximately $48.1 million. However, the CNMI government may collect revenue under CNMI Public Law No. 17–1, enacted in March 2010, which requires all foreign workers to apply to the CNMI DOL for an identification card and pay associated fees (specifics unknown as of the writing of this analysis). Given the current state of the economy and holding all other factors constant, the effect of removing the burden of CNMI's immigration functions on the government's fiscal condition is uncertain. CNMI government jobs associated with administering the current permit program may be lost, increasing unemployment within the CNMI citizen population.

B. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis

Under the requirements of the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, agencies must consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. A small entity may be a small business (defined as any independently owned and operated business not dominant in its field that qualifies as a small business per the Small Business Act); a small not-for-profit organization; or a small governmental jurisdiction (locality with fewer than 50,000 people).

The types of entities subject to the rule's requirements include all businesses employing foreign workers in the CNMI. As an insular area, the CNMI government does not meet the RFA's definition of a small government, which includes only ''governments of *cities, counties, towns, townships, villages, school districts, or special districts with a population of less than 50,000''* (emphasis added). If the results of a ''screening analysis'' indicate that a rule may significantly impact a substantial number of small businesses, DHS is required to conduct an Initial Regulatory Flexibility Analysis (IRFA) to further assess these impacts. In this case, all information required for a screening analysis and an IRFA was provided in the ''Regulatory Assessment for the Interim Final Rule'' dated May 22, 2009. This document was summarized in the preamble of the interim final rule and was made available for public comment. Because DHS did not certify that this rule will not have a significant economic impact on a substantial number of small entities, it has prepared a Final Regulatory Flexibility Analysis (FRFA).

The RFA requires DHS to ''describe the impact *of the proposed rule* on small entities'' in an Initial Regulatory Flexibility Analysis. 5 U.S.C. 603(a) (emphasis added). The Act also states that a Final Regulatory Flexibility Analysis ''shall contain * * * a description of the projected reporting, recordkeeping and other compliance requirements *of the rule*.'' 5 U.S.C. 604(a)(4) (emphasis added). As DHS has explained, this final rule does not prescribe a schedule for allocating CW status throughout the transition period and the Secretary of the U.S. Department of Labor may choose to extend the transition period. Consequently, DHS has estimated the incremental administrative costs (*i.e., direct compliance costs*) resulting from changes in the fees imposed for the CW status grants and INA visas required by the final rule.

The results of this FRFA are summarized below.

1. A Succinct Statement of the Need for, and Objectives of, the Rule

On May 8, 2008, the President signed the CNRA into law. Congress' intent in enacting this legislation is ''to ensure that effective border control procedures are implemented and observed, and that national security and homeland security issues are properly addressed.'' Title VII, Subtitle A of the CNRA calls for the extension of U.S. immigration laws to the CNMI, with special provisions to allow for the orderly phasing-out of CNMI's nonresident contract worker program and the orderly phasing-in of Federal responsibilities over immigration in the CNMI.

The objective of the CNMI-only CW status program is to provide for an orderly transition from the existing CNMI foreign worker permit system to the U.S. immigration system. It is also intended to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and foreign workers obtain nonimmigrant and immigrant visa classifications available under the INA. Please refer to previous sections of this preamble for further details.

2. A Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made in the Proposed Rule as a Result of Such Comments

One commenter to the interim final rule stated that DHS and USCIS did not conduct a regulatory impact analysis or a small business analysis and were thus not in compliance with the law; however, this commenter was mistaken. A regulatory assessment, which included a chapter on impact to small entities (with all the elements of an IRFA), was placed in the public docket with the interim final rule and was made available for public comment. DHS did not make changes to the rule based on any comments to the IRFA.

3. A Description and an Estimate of the Number of Small Entities to Which the Rule Will Apply or an Explanation of Why no Such Estimate is Available

To measure the economic impact experienced by entities, we compare the per-business estimated costs of the

regulations to the annual revenues and annual payroll of affected businesses. We note that we were unable to find revenue information on small not-for-profit organizations located in the CNMI. Thus, the following analysis focuses on small businesses, which were included in the 2007 economic census of the CNMI.

We assume all businesses in the CNMI employ foreign workers, except those businesses with no paid employees. The data on businesses by size show that over 80 percent of businesses in the CNMI have between 1 and 19 employees. The 2007 economic census of the CNMI shows that businesses with 10 to 19 employees had average revenues of just over $1 million that year (smaller businesses had even lower average revenues). According to the SBA's ''Table of Small Business Size Standards Matched to North American Industry Classification System Codes,'' other than in crop production, businesses in the vast majority of industries are considered small if they have revenues less than $7 million or fewer than 50 employees. In many industries the threshold is higher. Thus, in its screening analysis, DHS concludes that a substantial number of small entities will be affected by this rule.

For the sake of brevity, we present the economic impacts to small entities for Alternative 1, the chosen alternative, here. For estimated impacts to small entities for all alternatives, please refer to the Regulatory Assessment and Final Regulatory Flexibility Analysis that is available in the docket for this rulemaking.

Businesses will experience costs beginning in 2011 to obtain visas issued under the INA for eligible workers, and they will obtain CW status for the remaining workers. We assume the INA-eligible workers will all qualify for H–1B visas. The H–1B visas will be renewed in 2014, while CW status will be renewed annually. Table 2 lists the annual administrative costs (*i.e.,* the costs of CW status and INA visas minus the costs of CNMI permits had the rule not come into effect) for businesses of complying with the rule under Alternative 1 (chosen alternative).

TABLE 2—DISTRIBUTION OF NET PERMIT AND VISA COSTS BY BUSINESS SIZE, ALTERNATIVE 1

[Undiscounted 2010 $Ms]

Business size	2011	2012	2013	2014
No paid employees	$0	$0	$0	$0
1 to 4 employees	0.27	0.02	0.02	0.18
5 to 9 employees	0.23	−0.15	−0.16	0.08
10 to 19 employees	0.40	−0.27	−0.29	0.14
20 or more employees	1.45	−0.94	−0.98	0.76
All businesses	2.3	−1.3	−1.4	1.2

Note: Net permit and visa costs include the CW status educational fee and H–1B visa ACWIA fee.

Businesses experience the highest net positive costs in 2011. Therefore, we compare these costs to the annual revenues and payrolls for businesses of each size category based on U.S. Census data for 2007 (released in 2009). Table 3 lists the number of businesses in each size category along with the average payroll and average revenue of businesses in those size categories in 2011 dollars.

TABLE 3—AVERAGE PAYROLL AND REVENUE OF BUSINESSES

Business size	Businesses	Average payroll ($M)	Average revenue ($M)
No paid employees	61	$0.02	$0.10
1 to 4 employees	476	0.03	0.17
5 to 9 employees	244	0.10	0.68
10 to 19 employees	210	0.18	1.1
20 or more employees	200	1.0	4.9
All businesses	1,191	0.24	1.2

Average payrolls range from $30,000 per business (one to four employees) to $1.0 million per business (20 or more employees). Average revenue also scales with the size of the business, from $100,000 for sole proprietorships to $4.9 million for businesses with 20 or more employees. Table 4 presents the per-business incremental costs for Alternative 4 and the ratio of these costs to the average payroll and revenue.

TABLE 4—ESTIMATED 2010 PERMIT AND VISA COSTS PER BUSINESS AS A PERCENTAGE OF PAYROLL AND REVENUE

[Alternative 1, Chosen Alternative]

Business size	Cost per business ($)	% Payroll	% Revenue
No paid employees	$0	0	0
1 to 4 employees	570	1.6	0.33
5 to 9 employees	929	0.9	0.14
10 to 19 employees	1,891	1.1	0.18
20 or more employees	7,243	0.7	0.15
All businesses	1,968	0.8	0.16

Under Alternative 1, the additional costs imposed by the rule in 2011 represent 0.33 percent or less of annual revenues. Compared to payroll, however, the impacts are about 5 to 6 times higher. Under Alternative 1, businesses of all sizes experience increased labor costs of about 1 percent on average, depending on their size. Considering that the payroll costs presented in Table 4 do not include benefits, the actual percentage increase in labor costs for 2011 is smaller than reported in the table.

The analysis to this point has focused on the impact of replacing the CNMI foreign worker visas with INA visas and CW status. In addition, the ineligibility of certain workers (*e.g.,* domestic household workers employed directly by private residents) may have a negative, although likely indirect effect. For the reasons described above in the section on Executive Order 12866, we are unable to quantify these potential effects.

4. A Description of the Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Rule, Including an Estimate of the Classes of Small Entities That Will Be Subject to the Requirement and the Types of Professional Skills Necessary for Preparation of the Report or Record

The forms required by this rule are expected to be submitted on paper by employers. In our analysis, we assume employees in the job category ''Management of companies and enterprises'' will complete and file these forms, which require basic administrative and record-keeping skills. The skills required to complete Form I–129 and supplements (filed for other nonimmigrant workers), or the new Form I–129CW (filed for CNMI transitional workers), are essentially the same as the skills required to complete the necessary paperwork under the CNMI permit system. Additionally, the spouse or minor child of a CW–1 nonimmigrant who wishes to accompany or follow the alien as a CW–2 nonimmigrant will have to complete Form I–539, Application to Extend/Change Status. Professional skills are not required for the preparation of this form.

5. A Description of the Steps the Agency has Taken to Minimize the Significant Adverse Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each of the Other Significant Alternatives to the Rule Considered by the Agency Was Rejected

DHS did not identify any significant alternatives to the rule that specifically address small entities while also meeting the requirements of the CNRA. We evaluated four regulatory alternatives to consider changes in the admission and filing requirements, including those that minimize the incremental cost burden to CNMI employers and businesses, including small entities.

Alternative 1 (chosen alternative) provides the most favorable combination of cost and stringency. While Alternative 2 might be considered more stringent because it requires a petition for each beneficiary, the costs are substantially higher than the other three alternatives. Alternative 3 is expected to achieve more cost savings than Alternative 1, but the 1-year status validity period under Alternative 1 facilitates DHS's effective management of the number of potential grants of CW status issued at any given time and the statutory reduction on an annual basis to zero by the end of the transition period. Alternative 1 may provide more security because DHS would require lawful status in the CNMI as a prerequisite for CW eligibility.

In addition, we emphasize that it is the reduction in the number of available grants of CW status that will have a potentially substantial impact on small entities; however, the rule does not prescribe a schedule for allocating CW status throughout the transition period. DHS believes any methodology for allocating CW status will require flexibility to adjust to the prospering or declining needs of the CNMI economy. A methodology or formula set forth in a regulation does not provide such flexibility.

6. Conclusion

In summary, because the rule affects all businesses employing foreign workers, it likely affects a large number of small entities in every industry. Based on the analysis in the preceding sections, we do not believe the requirement that businesses obtain CW status or INA visas will have a substantial impact on a per-business basis because it will coincide with the end of the more expensive CNMI permit system. However, DHS did not certify this rule as not having a significant economic impact on a substantial number of small entities and has instead prepared a FRFA.

C. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) requires agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector if the rule will result in expenditures exceeding $100 million (adjusted for inflation) in any one year. We estimate that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year. The CNRA will cause some changes for the CNMI government since they will no longer be implementing their own immigration, foreign worker, and border security program. However, the costs of administering that program will no longer be incurred by the CNMI government. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995. Please refer to the section above on Executive Order 12866 for further details on the potential economic impacts of this rule.

D. Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

E. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

F. Paperwork Reduction Act (PRA)

The Paperwork Reduction Act of 1995 requires all Departments to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. 44 U.S.C. 3501 *et seq.;* 5 CFR part 1320. The information collection requirements contained in this rule, Form I–129CW, Petition for CNMI-Only Nonimmigrant

Transitional Worker, and Form I–539, Application to Extend/Change Nonimmigrant Status, have been previously approved for use by OMB under the Paperwork Reduction Act (PRA). The OMB control numbers for these collections are 1615–0111 and 1615–0003, respectively.

The termination of the CNMI permit program will result in employers petitioning for status under the INA for those employees. Termination of the CNMI worker program will increase the number of respondents submitting Form I–129, Petition for a Nonimmigrant Worker, OMB Control Number 1615–0009, and Form I–539. This increase is already included in the OMB inventory and no further action is required. However, DHS will be making non-substantive changes to the instructions to the Form I–129CW. Accordingly, DHS submitted Form OMB 83–C, Correction Worksheet, to OMB to reflect these non-substantive changes.

List of Subjects

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Privacy, Reporting and recordkeeping requirements, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, the interim rule amending 8 CFR parts 103, 214, 274a, and 299, which was published in the **Federal Register** at 74 FR 55094 on October 27, 2009, is adopted as final with the following changes:

PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS

■ 1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 48 U.S.C. 1806; Pub. L. 107–296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*), E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

■ 2. Section 103.7 is amended by revising paragraphs (b)(1)(i)(J) and (c)(3)(iii) to read as follows:

§ 103.7 Fees.

* * * * *

(b) * * *

(1) * * *

(i) * * *

(J) Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I–129CW). * * *

* * * * *

(c) * * *

(3) * * *

(iii) A Petition for a CNMI-Only Nonimmigrant Transitional Worker, or an Application to Extend/Change Nonimmigrant Status only in the case of an alien applying for CW–2 nonimmigrant status,

* * * * *

PART 214—NONIMMIGRANT CLASSES

■ 3. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301–1305, and 1372; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Pub. L. 106–386, 114 Stat. 1477–1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

■ 4. Section 214.2 is amended by revising paragraph (w) to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(w) *CNMI-Only Transitional Worker (CW–1).* (1) *Definitions.* The following definitions apply to petitions for and maintenance of CW status in the Commonwealth of the Northern Mariana Islands (the CNMI or the Commonwealth):

(i) *Direct Guam transit* means travel from the CNMI to the Philippines by an alien in CW status, or from the Philippines to the CNMI by an alien with a valid CW visa, on a direct itinerary involving a flight stopover or connection in Guam (and no other place) within 8 hours of arrival in Guam, without the alien leaving the Guam airport.

(ii) *Doing business* means the regular, systematic, and continuous provision of goods or services by an employer as defined in this paragraph and does not include the mere presence of an agent or office of the employer in the CNMI.

(iii) *Employer* means a person, firm, corporation, contractor, or other association, or organization which:

(A) Engages a person to work within the CNMI; and

(B) Has or will have an employer-employee relationship with the CW–1 nonimmigrant being petitioned for.

(iv) *Employer-employee relationship* means that the employer will hire, pay, fire, supervise, and control the work of the employee.

(v) *Lawfully present in the CNMI* means that the alien:

(A) At the time the application for CW status is filed, is an alien lawfully present in the CNMI under 48 U.S.C. 1806(e); or

(B) Was lawfully admitted or paroled into the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted or paroled as a visitor for business or pleasure (B–1 or B–2, under any visa-free travel provision or parole of certain visitors from Russia and the People's Republic of China), and remains in a lawful immigration status.

(vi) *Legitimate business* means a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity. The business must meet applicable legal requirements for doing business in the CNMI. A business will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. DHS will determine whether a business is legitimate.

(vii) *Minor child* means a child as defined in section 101(b)(1) of the Act who is under 18 years of age.

(viii) *Numerical limitation* means the maximum number of persons who may be granted CW–1 status in a given fiscal year or other period as determined by DHS, as follows:

(A) For fiscal year 2011, the numerical limitation is 22,417 per fiscal year.

(B) For fiscal year 2012, the numerical limitation is 22,416 per fiscal year.

(C) For each fiscal year beginning on October 1, 2012 until the end of the transition period, the numerical limitation will be a number less than 22,416 that is determined by DHS and published via Notice in the **Federal Register**. The numerical limitation for any fiscal year will be less than the number for the previous fiscal year, and will be a number reasonably calculated in DHS's discretion to reduce the number of CW–1 nonimmigrants to zero by the end of the transition period.

(D) DHS may adjust the numerical limitation for a fiscal year or other period in its discretion at any time via Notice in the **Federal Register**, as long as such adjustment is consistent with paragraph (w)(1)(viii)(C) of this section.

(E) If the numerical limitation is not reached for a specified fiscal year, unused numbers do not carry over to the next fiscal year.

(ix) *Occupational category* means those employment activities that DHS has determined require alien workers to supplement the resident workforce and includes:

(A) Professional, technical, or management occupations;

(B) Clerical and sales occupations;

(C) Service occupations;

(D) Agricultural, fisheries, forestry, and related occupations;

(E) Processing occupations;

(F) Machine trade occupations;

(G) Benchwork occupations;

(H) Structural work occupations; and

(I) Miscellaneous occupations.

(x) *Petition* means USCIS Form I–129CW, Petition for a CNMI-Only Nonimmigrant Transitional Worker, a successor form, other form, or electronic equivalent, any supplemental information requested by USCIS, and additional evidence as may be prescribed or requested by USCIS.

(xi) *Transition period* means the period beginning on the transition program effective date and ending on December 31, 2014, unless the CNMI-only transitional worker program is extended by the Secretary of Labor, in which case the transition period will end for purposes of the CW transitional worker program on the date designated by the Secretary of Labor.

(xii) *United States worker* means a national of the United States, an alien lawfully admitted for permanent residence, or a national of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

(2) *Eligible aliens.* Subject to the numerical limitation, an alien may be classified as a CW–1 nonimmigrant if, during the transition period, the alien:

(i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category that DHS has designated as requiring alien workers to supplement the resident workforce;

(ii) Is petitioned for by an employer;

(iii) Is not present in the United States, other than the CNMI;

(iv) If present in the CNMI, is lawfully present in the CNMI;

(v) Is not inadmissible to the United States as a nonimmigrant or has been granted a waiver of each applicable ground of inadmissibility; and

(vi) Is ineligible for status in a nonimmigrant worker classification under section 101(a)(15) of the Act.

(3) *Derivative beneficiaries—CW–2 nonimmigrant classification.* The spouse or minor child of a CW–1 nonimmigrant may accompany or follow the alien as a CW–2 nonimmigrant if the alien:

(i) Is not present in the United States, other than the CNMI;

(ii) If present in the CNMI, is lawfully present in the CNMI; and

(iii) Is not inadmissible to the United States as a nonimmigrant or has been granted a waiver of each applicable ground of inadmissibility.

(4) *Eligible employers.* To be eligible to petition for a CW–1 nonimmigrant worker, an employer must:

(i) Be engaged in legitimate business;

(ii) Consider all available United States workers for the position being filled by the CW–1 worker;

(iii) Offer terms and conditions of employment which are consistent with the nature of the petitioner's business and the nature of the occupation, activity, and industry in the CNMI; and

(iv) Comply with all Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements.

(5) *Petition requirements.* An employer who seeks to classify an alien as a CW–1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education fee of $150 per beneficiary per year. An employer filing a petition is eligible to apply for a waiver of the fee based upon inability to pay as provided by 8 CFR 103.7(c). If the beneficiary will perform services for more than one employer, each employer must file a separate petition with fees with USCIS.

(6) *Appropriate documents.* Documentary evidence establishing eligibility for CW status is required. A petition must be accompanied by:

(i) Evidence demonstrating the petitioner meets the definition of eligible employer in this section;

(ii) An attestation by the petitioner certified as true and accurate by an appropriate official of the petitioner, of the following:

(A) No qualified United States worker is available to fill the position;

(B) The employer is doing business as defined in paragraph (w)(1)(ii) of this section;

(C) The employer is a legitimate business as defined in paragraph (w)(1)(vi) of this section;

(D) The employer is an eligible employer as described in paragraph (w)(4) of this section and will continue to comply with the requirements for an eligible employer until such time as the employer no longer employs the CW–1 nonimmigrant worker;

(E) The beneficiary meets the qualifications for the position;

(F) The beneficiary, if present in the CNMI, is lawfully present in the CNMI;

(G) The position is not temporary or seasonal employment, and the petitioner does not reasonably believe it to qualify for any other nonimmigrant worker classification; and

(H) The position falls within the list of occupational categories designated by DHS.

(iii) Evidence of licensure if an occupation requires a Commonwealth or local license for an individual to fully perform the duties of the occupation. Categories of valid licensure for CW–1 classification are:

(A) *Licensure.* An alien seeking CW–1 classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the CNMI and immediately engage in employment in the occupation.

(B) *Temporary licensure.* If a temporary license is available and allowed for the occupation with a temporary license, USCIS may grant the petition at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien by the employer and/or pursuant to the temporary license.

(C) *Duties without licensure.* If the CNMI allows an individual to fully practice the occupation that usually requires a license without a license under the supervision of licensed senior or supervisory personnel in that occupation, USCIS may grant CW–1 status at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien if the facts demonstrate that the alien under supervision could fully perform the duties of the occupation.

(7) *Change of employers.* A change of employment to a new employer inconsistent with paragraphs (w)(7)(i) and (ii) of this section will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. A CW–1 nonimmigrant may change employers if:

(i) The prospective new employer files a petition to classify the alien as a

CW–1 worker in accordance with paragraph (w)(5) of this section, and

(ii) An extension of the alien's stay is requested if necessary for the validity period of the petition.

(iii) A CW–1 may work for a prospective new employer after the prospective new employer files a Form I–129CW petition on the employee's behalf if:

(A) The prospective employer has filed a nonfrivolous petition for new employment before the date of expiration of the CW–1's authorized period of stay; and

(B) Subsequent to his or her lawful admission, the CW–1 has not been employed without authorization in the United States.

(iv) Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(v) If a CW–1's employment has been terminated prior to the filing of a petition by a prospective new employer consistent with paragraphs (w)(7)(i) and (ii), the CW–1 will not be considered to be in violation of his or her CW–1 status during the 30-day period immediately following the date on which the CW–1's employment terminated if a nonfrivolous petition for new employment is filed consistent with this paragraph within that 30-day period and the CW–1 does not otherwise violate the terms and conditions of his or her status during that 30-day period.

(8) *Amended or new petition.* If there are any material changes in the terms and conditions of employment, the petitioner must file an amended or new petition to reflect the changes.

(9) *Multiple beneficiaries.* A petitioning employer may include more than one beneficiary in a CW–1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

(10) *Named beneficiaries.* The petition must include the name of the beneficiary and other required information, as indicated in the form instructions, at the time of filing. Unnamed beneficiaries will not be permitted.

(11) *Early termination.* The petitioning employer must pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission.

(12) *Approval.* USCIS will consider all the evidence submitted and such other evidence required in the form instructions to adjudicate the petition. USCIS will notify the petitioner of the approval of the petition on Form I–797, Notice of Action, or in another form as USCIS may prescribe:

(i) The approval notice will include the classification and name of the beneficiary or beneficiaries and the petition's period of validity. A petition for more than one beneficiary may be approved in whole or in part.

(ii) The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services.

(13) *Petition validity.* An approved petition will be valid for a period of up to one year.

(14) *How to apply for CW–1 or CW–2 status.* (i) Upon approval of the petition, a beneficiary, his or her eligible spouse, and or his or her minor child(ren) outside the CNMI will be informed in the approval notice of where they may apply for a visa authorizing admission in CW–1 or CW–2 status.

(ii) If the beneficiary is present in the CNMI, the petition also serves as the application for a grant of status as a CW–1.

(iii) If the eligible spouse and/or minor child(ren) are present in the CNMI, the spouse or child(ren) may apply for CW–2 dependent status on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status may not be approved until approval of the CW–1 petition. A spouse or child applying for CW–2 status on Form I–539 is eligible to apply for a waiver of the fee based upon inability to pay as provided by 8 CFR 103.7(c).

(15) *Biometrics and other information.* The beneficiary of a CW–1 petition or the spouse or child applying for a grant or, extension of CW–2 status, or a change of status to CW–2 status, must submit biometric information as requested by USCIS. For a Form I–129CW petition where the beneficiary is present in the CNMI, the employer must submit the biometric service fee described in 8 CFR 103.7(b)(1) with the petition for each beneficiary for which CW–1 status is being requested or request a fee waiver for any biometric services provided, including but not limited to reuse of previously provided biometric information for background checks. For a Form I–539 application where the applicant is present in the CNMI, the applicant must submit a biometric service fee for each CW–2 nonimmigrant on the application with the application or obtain a waiver of the biometric service fee described in 8 CFR 103.7(b)(1) for any biometric services provided, including but not limited to reuse of previously provided biometric information for background checks. A biometric service fee is not required for beneficiaries under the age of 14, or who are at least 79 years of age.

(16) *Period of admission.* (i) A CW–1 nonimmigrant will be admitted for the period of petition validity, plus up to 10 days before the validity period begins and 10 days after the validity period ends. The CW–1 nonimmigrant may not work except during the validity period of the petition. A CW–2 spouse will be admitted for the same period as the principal alien. A CW–2 minor child will be admitted for the same period as the principal alien, but such admission will not extend beyond the child's 18th birthday.

(ii) The temporary departure from the CNMI of the CW–1 nonimmigrant will not affect the derivative status of the CW–2 spouse and minor children, provided the familial relationship continues to exist and the principal remains eligible for admission as a CW–1 nonimmigrant.

(17) *Extension of petition validity and extension of stay.* (i) The petitioner may request an extension of an employee's CW–1 nonimmigrant status by filing a new petition.

(ii) A request for a petition extension may be filed only if the validity of the original petition has not expired.

(iii) Extensions of CW–1 status may be granted for a period of up to 1 year until the end of the transition period, subject to the numerical limitation.

(iv) To qualify for an extension of stay, the petitioner must demonstrate that the beneficiary or beneficiaries:

(A) Continuously maintained the terms and conditions of CW–1 status;

(B) Remains admissible to the United States; and

(C) Remains eligible for CW–1 classification.

(v) The derivative CW–2 nonimmigrant may file an application for extension of nonimmigrant stay on Form I–539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW–2 status extension may not be approved until approval of the CW–1 extension petition.

(18) *Change or adjustment of status.* A CW–1 or CW–2 nonimmigrant can apply to change nonimmigrant status under section 248 of the Act or apply for adjustment of status under section 245 of the Act, if otherwise eligible. During the transition period, CW–1 or CW–2 nonimmigrants may be the beneficiary of a petition for or may apply for any nonimmigrant or immigrant visa

classification for which they may qualify.

(19) *Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on CW–1 or CW–2 classification.* An alien may be granted, be admitted in and maintain lawful CW–1 or CW–2 nonimmigrant status while, at the same time, lawfully seeking to become a lawful permanent resident of the United States, provided he or she intends to depart the CNMI voluntarily at the end of the period of authorized stay. The filing of an application for or approval of a permanent labor certification or an immigrant visa preference petition, the filing of an application for adjustment of status, or the lack of residence abroad will not be the basis for denying:

(i) A CW–1 petition filed on behalf of the alien;

(ii) A request to extend a CW–1 status pursuant to a petition previously filed on behalf of the alien;

(iii) An application for CW–2 classification filed by an alien;

(iv) A request to extend CW–2 status pursuant to the extension of a related CW–1 alien's extension; or

(v) An application for admission as a CW–1 or CW–2 nonimmigrant.

(20) *Rejection.* USCIS may reject an employer's petition for new or extended CW–1 status if the numerical limitation has been met. In that case, the petition and accompanying fee will be rejected and returned with the notice that numbers are unavailable for the CW nonimmigrant classification. The beneficiary's application for admission based upon an approved petition will not be rejected based upon the numerical limitation.

(21) *Denial.* The ultimate decision to grant or deny CW–1 or CW–2 classification or status is a discretionary determination, and the petition or the application may be denied for failure of the petitioner or the applicant to demonstrate eligibility or for other good cause. The denial of a petition to classify an alien as a CW–1 may be appealed to the USCIS Administrative Appeals Office or any successor body. The denial of a grant of CW–1 or CW–2 status within the CNMI, or of an application for change or extension of status filed under this section, may not be appealed.

(22) *Terms and conditions of CW Nonimmigrant status.* (i) *Geographical limitations.* CW–1 and CW–2 statuses are only applicable in the CNMI. Entry, employment and residence in the rest of the United States (including Guam) require the appropriate visa or visa waiver. Except as provided in paragraph (w)(22)(iii) of this section, an alien with CW–1 or CW–2 status who enters or attempts to enter, or travels or attempts to travel to any other part of the United States without an appropriate visa or visa waiver, or who violates conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated CW–1 or CW–2 status.

(ii) *Re-entry.* An alien with CW–1 or CW–2 status who travels abroad from the CNMI will require a CW–1 or CW–2 or other appropriate visa to be re-admitted to the CNMI.

(iii) *Direct Guam transit.*

(A) *Travel from the CNMI to the Philippines.* An alien with CW–1 or CW–2 status who is a national of the Philippines may travel to the Philippines via a direct Guam transit without being deemed to violate that status.

(B) *Travel from the Philippines to the CNMI.* An alien who is a national of the Philippines may travel to the CNMI via a direct Guam transit under the following conditions: If an immigration officer determines that the alien warrants a discretionary exercise of parole authority, the alien may be paroled into Guam via direct Guam transit to undergo preinspection outbound from Guam for admission to the CNMI pursuant to 8 CFR 235.5(a) or to proceed for inspection upon arrival in the CNMI. During any such preinspection, the alien will be admitted in CW–1 or CW–2 status if the immigration officer in Guam determines that the alien is admissible to the CNMI. A condition of the admission is that the alien must complete the direct Guam transit. DHS, in its discretion, may exempt such alien from the provisions of 8 CFR 235.5(a) relating to separation and boarding of passengers after inspection.

(iv) *Employment authorization.* An alien with CW–1 nonimmigrant status is only authorized employment in the CNMI for the petitioning employer. An alien with CW–2 status is not authorized to be employed.

(23) *Expiration of status.* CW–1 status expires when the alien violates his or her CW–1 status (or in the case of a CW–1 status violation caused solely by termination of the alien's employment, at the end of the 30 day period described in section 214.2(w)(7)(v)), 10 days after the end of the petition's validity period, or at the end of the transitional worker program, whichever is earlier. CW–2 nonimmigrant status expires when the status of the related CW–1 alien expires, on a CW–2 minor child's 18th birthday, when the alien violates his or her status, or at the end of the transitional worker program, whichever is earlier. No alien will be eligible for admission to the CNMI in CW–1 or CW–2 status, and no CW–1 or CW–2 visa will be valid for travel to the CNMI, after the transitional worker program ends.

(24) *Waivers of inadmissibility for applicants lawfully present in the CNMI.* An applicant for CW–1 or CW–2 nonimmigrant status, who is otherwise eligible for such status and otherwise admissible to the United States, and who possesses appropriate documents demonstrating that the applicant is lawfully present in the CNMI, may be granted a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the Act, including the grounds of inadmissibility described in sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(II) of the Act, as a matter of discretion for the purpose of granting the CW–1 or CW–2 nonimmigrant status. Such waiver may be granted without additional form or fee. Appropriate documents required for such a waiver include a valid unexpired passport and other documentary evidence demonstrating that the applicant is lawfully present in the CNMI, such as an ''umbrella permit'' or a DHS-issued Form I–94. Evidence that the applicant possesses appropriate documents may be provided by an employer to accompany a petition, by an eligible spouse or minor child to accompany the Form I–539 (or such alternative form as USCIS may designate), or in such other manner as USCIS may designate.

PART 274a—CONTROL OF EMPLOYMENT OF ALIENS

■ 5. The authority citation for part 274a continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

■ 6. Section 274a.12 is amended by revising paragraph (b)(23) to read as follows:

§ 274a.12 Classes of alien authorized to accept employment.

* * * * *

(b) * * *

(23) A Commonwealth of the Northern Mariana Islands transitional worker (CW–1) pursuant to 8 CFR 214.2(w). An alien in this status may be employed only in the CNMI during the transition period, and only by the petitioner through whom the status was obtained, or as otherwise authorized by 8 CFR 214.2(w). An alien who is lawfully present in the CNMI (as defined by 8 CFR 214.2(w)(1)(v)) on or before November 27, 2011, is authorized

to be employed in the CNMI, and is so employed in the CNMI by an employer properly filing an application under 8 CFR 214.2(w)(14)(ii) on or before such date for a grant of CW–1 status to its employee in the CNMI for the purpose of the alien continuing the employment, is authorized to continue such employment on or after November 27, 2011, until a decision is made on the application; or

* * * * *

Janet Napolitano,

Secretary.

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