COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Benigno R. Fitial
Governor

Eloy S. Inos
Lieutenant Governor

TESTIMONY OF GOVERNOR BENIGNO R. FITIAL
BEFORE THE SUBCOMMITTEE ON
FISHERIES, WILDLIFE, OCEANS AND INSULAR AFFAIRS
July 14, 2011

The Subcommittee has invited me to testify on the federalization law, Title VII of the CNRA (Public Law 110-22) and to comment on H.R. 1466. I appreciate the opportunity to do so.

Twice during 2010 I appeared before this Subcommittee to comment on the federalization law—on May 18, 2010 and September 16, 2010. Nothing has changed for the better since then. To some extent I have been tempted simply to resubmit my earlier testimony regarding the federal government's failure to honor Congressional intent and to implement the detailed provisions of the law in a timely, orderly, and constructive fashion.

These were the major points which I made twice to the Subcommittee in 2010:

- Failure to grant visa waivers: The Department of Homeland Security's Interim Rule regarding the proposed Guam-CNMI joint visa waiver program did not comply with Congressional intent and is preventing the Commonwealth from its potential of significantly increasing visitors from China and Russia.

- Failure to deport illegal aliens: The Department's Immigration and Customs Enforcement unit does not have an effective program in place to identify and remove illegal aliens in the Commonwealth.

- Failure to monitor exits of tourists: The Department's Customs and Border Protection unit does not have an effective exit control method capable of preventing an increase in the number of illegal aliens in the Commonwealth.

- Failure to provide Congress with useful reports: The Government Accountability Office and the Department of the Interior have failed to provide the Congress with the kind of objective, useful reports assessing the implementation of the federalization law in a way that would assist this Subcommittee.

One year later – and more than three years after the law was enacted – the situation continues to deteriorate and the Commonwealth suffers as a result. The uncertainty created by this law has created an unacceptable limbo situation that has severely hampered new investment and has created morale problems throughout our community. Many businesses have already lost their investments and others are expected to close if this situation is not rectified. Very few businesses have begun the process of applying for U.S. employment-based visas for their staffs due to the high cost and uncertainty in the regulations.

This year I have made extensive personal efforts to try to improve this situation. I have met with officials with responsibilities for implementing the law in the three DHS components (USCIS, ICE and CBP), the Interior Department, and the U.S. Labor Department. I can report some progress based on these discussions.

In my meeting with Director Mayorkas of USCIS, we reviewed important aspects of the proposed rules for the issuance of temporary work permits for aliens currently in the Commonwealth. He and his staff have listened carefully to our concerns about a large number of practical aspects of the work permit program. I believe that we in the Commonwealth and USCIS will have both the capability, and a cooperative spirit, to deal with the late roll-out of the worker regulations. The delay in issuing these rules in final form has resulted, in part, from our joint staff consultations about the program, and the USCIS efforts to address our concerns. I am persuaded that the new program will better meet the needs of the CNMI and its U.S. citizens as well as the alien labor force.

I have also broken the impasse with ICE about that agency's desired use of the Commonwealth's correctional facility. On the assumption that a partnership sometimes needs to start with one side giving more than another, I agreed to accept the ICE proposal of a relatively low per-diem rate for use of the facility. A few days before this agreement was to take effect, the Commonwealth learned of a 60% reduction in the level of ICE detainees to be authorized. Not only would this have a significant, negative fiscal impact on the CNMI, it would also mean lowered capacity to review and remove illegals from the Commonwealth. Nonetheless, we went forward to implement the agreement.

However, the overall situation remains extraordinarily harmful to the Commonwealth. It is time for the Subcommittee to consider the overall implementation of PL 110-229 and its impact on the 30,000 United States citizens living in the Commonwealth. Based on what we have experienced over the past three years, this law is being implemented to reshape—and substantially hurt – the Commonwealth's economy and community. In particular, the implementation of this unnecessarily complicated law operates to reduce the political authority of the Commonwealth's local government in ways that would not be tolerated in the counties and States on the Mainland. By doing so, it harms the indigenous elements in the CNMI population – namely, the Chamorro and Carolinian people – who gave up their land and sovereignty in

return for U.S. citizenship and the opportunity to enjoy the political freedoms and economic opportunities available to all U.S. citizens.

We have no objection to federal control of immigration if it is done efficiently and effectively as Congress intended. What has happened instead is that Title VII of PL 110-229 has brought to the Commonwealth all of the very serious immigration problems that exist on the Mainland. We have many illegal aliens who are not being deported – although one of the clearly stated goals of the federalization law was to reduce alien workers who could not obtain a standard federal visa to zero within a few years. Some of these illegal aliens are employed illegally and take jobs away from U.S. citizens. Others are unemployed and survive on government benefits that provide an incentive not to leave the Commonwealth. Particularly since federal authority came into effect, the Commonwealth has had an increased inflow of tourists and others who entered on a temporary basis but remain illegally in the CNMI hoping for access to amnesty that will provide a green card. The burden on CNMI taxpayers related to illegal and unemployed aliens is heavy.

With a population of more than 300 million people, the 50 States of the United States can absorb the economic and social costs of these immigration failures – although there appears to be a growing awareness across our country that serious immigration reform is necessary. But the Commonwealth has only 30,000 U.S. citizens, with about 16,000 of them being registered voters. Our small community is enormously burdened by these failures, which have complicated the Commonwealth's efforts to address its continued economic decline.

When it enacted Title VII, Congress promised the Commonwealth a balance between benefits and burdens in connection with this so-called immigration reform. All of the burdens we warned about have certainly come to pass, in even worse levels than we predicted. However, we have received absolutely none of the benefits that the drafters of the bill promised.

To be specific:

1. <u>No visa waivers:</u> The bill provides for a visa waiver program with respect to Russia and China, two very important markets for us. The visa waiver program has been blocked. We understand that the Department of Homeland Security has twice examined possible national security implications of a visa waiver program for the Commonwealth and Guam and has found none. The Department of Defense and the Department of the Interior have no objection. We understand that the Department of State has refused, on policy grounds, to implement what has been mandated by Congress. Our tourist industry – the principal economic basis for our economy – has been seriously hurt. While we appreciate the efforts of Secretary Napolitano to give us a temporary parole system, such a system simply does not allow for necessary continued investments in growing these markets due to the fact that the program can be halted without notice.

2. No technical assistance: The bill mandates technical assistance from four federal agencies -- Labor, DHS, Commerce, and Interior. Three years later, Labor, DHS, and Commerce have given us nothing under PL 110-229 and have denied our very modest requests for grants. Interior has no funding for technical assistance specifically with respect to PL 110-229, but has allocated to the CNMI some of the technical assistance funds which we would otherwise receive under regular insular area programs.

3. No effective immigration enforcement: The bill promises effective immigration enforcement. We are given no official statistics by ICE, but immigration lawyers report that ICE has deported fewer than 100 aliens in three years. At that rate, ICE will not clear the books of illegal aliens in the Commonwealth for many decades. ICE also refuses to fund a very low-cost software-based effort to identify illegal aliens who arrived prior to 1996.

4. Poor performance at the border: The CBP agents who man the border in the CNMI are all temporary assignees. We have constant complaints that they are rude, arrogant, and slow in processing arriving tourists. Tourism is our lifeblood. An unwelcoming atmosphere at the border is unacceptable. In addition, CBP has prevented the Commonwealth from maintaining its exit database that compared entry data to exit data and was very effective in identifying overstaying tourists. CBP has no exit database that can provide current information on overstayers. As a result, it appears that we have an increasing number of aliens in overstayer status and no way to identify them. CBP refuses to acknowledge its responsibility for these problems and has insisted on applying the same ineffective program in the Commonwealth that it does in the Mainland, although a more effective CNMI program has demonstrated its utility and is available.

5. No funding to substitute for coverover: The bill takes away a major funding source, the coverover to the Commonwealth from immigration and naturalization fees paid to the United States, which is available to other territories. We are given only a very small fee from work permits – about one quarter to one-eighth of our prior funding – in return when the regulations are finally issued. To date, we have received no funding from this source.

6. No consultation: The bill provides that we will be consulted before reports are submitted to Congress. That has not happened. Executive Branch reports are submitted before we have ever had a chance to even see a draft. I should note that the GAO routinely allows us to review a draft, but this is not the case with the Department of the Interior or the Department of State.

I could go on at great length about how the burdens have multiplied and the benefits have never materialized. However, it has been my experience that these oversight hearings with a

piecemeal approach are not a forum in which meaningful change can occur. This Committee cannot get ICE to deport more than a relatively few illegal aliens each year or get CBP to stop being rude to visitors who enter the Commonwealth, or get Labor or Commerce to provide the technical assistance we were promised, or get additional funds for Interior. We are working hard on these problems within the Executive Branch, but the Commonwealth is very small and our problems are easy for federal bureaucrats to ignore. Only if this Subcommittee is willing to underwrite a serious, system-wide reform of the implementation of PL 110-229, and amendment of its provisions that do not work, will the Commonwealth see any progress.

****

Now I would like to address HR 1466. I oppose this bill and urge that it not be acted on by this Subcommittee.

Many of the difficulties encountered in the implementation of Title VII result from the fact that it was drafted by persons without any expertise in immigration law or understanding of the Commonwealth's economy. It is our view that HR 1466, and other bills dealing with immigration in the insular areas, should be handled by the appropriate subcommittee of the House Judiciary Committee. I know that other bills are being considered there that may have some potential applicability to the Commonwealth, especially federal laws that endorse the authority of the States to deal with the employment of illegal aliens by employers. For example, I am impressed by the bill introduced by Representative Lamar Smith with respect to a national program to deter the employment of illegal aliens.[1]

I believe that Congressman Sablan proposed this bill without the demographic information necessary to assess its impact on the Commonwealth. That is not his fault. The U.S. Labor Department and the U.S. Department of Commerce do not provide the Commonwealth with the full range of data services routinely available to States and counties in the Mainland. We have recently been told that we will not even have the preliminary results of the 2010 census until 2012.[2]

I did not see a draft of HR 1466 before it was introduced, and I understand that experts on alien labor in the Commonwealth also were not consulted. After HR 1466 was introduced, I requested a detailed analysis of its likely social and economic impact. We understand that the

[1] Six States have now passed legislation to deal with some aspects of this problem. Most recently, Louisiana on July 7, 2011, enacted two laws dealing with the usage of the federal E-Verify Program. One law requires all state and local contractors to use E-Verify; and the other requires private businesses to verify the legal status of their new hires by providing employers that use it a safe harbor against sanctions.

[2] Some of the information currently being provided by the U.S. Census Bureau with respect to the CNMI appears to be projections based on unidentified assumptions. For example, its listing for the Northern Mariana Islands contained in its International Programs Division shows a population of 48,000 for mid-year 2010, 46,000 for mid-year 2011, and 45,000 for mid-year 2012. If these figures are correct, then there are fewer U.S. citizens in the CNMI currently than reflected in the text.

numbers involved in HR 1466 will strike some Members of Congress as very small, compared to the U.S. immigration numbers. Some may assume the effect would also be minor. That is wrong. We have only 30,000 U.S. citizens living in the islands that make up the Commonwealth and about 16,000 registered voters who are predominantly of Carolinian and Chamorro ancestry. We are like a very small county in one of the 50 States.

We now estimate that there were approximately 23,000 aliens (including illegals) residing in the Commonwealth at the end of 2008. Unlike our U.S. citizen population, most of these aliens are adults. Most of these aliens, but perhaps not all, were present in the CNMI on May 8, 2008, the date of enactment of the federalization law, and therefore would meet one of the requirements of HR 1466 to gain the bill's preferred status for parents of U.S. citizen children. Because of CBP's failure to maintain an exit database that can rapidly identify overstayers, we do not know how many of these aliens are still in the Commonwealth. We believe that nearly all are still present. At present, more than half of them are unemployed, due to the serious economic recession that has caused a 45 % decrease in the Commonwealth's GDP over the past several years.[3] A recent GAO report estimates that employment in the CNMI has dropped an unprecedented 35% from 2006 to 2009.[4]

The Commonwealth began admitting alien workers in numbers in 1985 as the garment and tourism industries began to grow simultaneously. Many of these workers were from the Philippines and China, most were female, and most were relatively young. Many gave birth in the Commonwealth, and these children were U.S. citizens by virtue of the Commonwealth's status as a territory of the United States. As the federal presence in the Commonwealth grew during the 1990's, some federal officials repeatedly suggested that the alien parents of U.S. citizen children were entitled to special status – although that certainly is not the case under U.S. immigration law. Not surprisingly, the births of children to aliens increased.

When the Commonwealth controlled its own immigration, we admitted alien workers on a temporary basis while they remained employed, and unemployed aliens were repatriated. When the garment manufacturers closed down because of changes in WTO rules, the Commonwealth repatriated over 16,000 alien workers beginning in 2005. After the federalization law was enacted in 2008, some federal officials promised a path to US citizenship for aliens who had U.S. citizen children or who had lived in the Commonwealth for several years. This gave aliens a strong incentive to stay in the CNMI rather than return home.

Beginning in 2006, U.S. citizen children of aliens reached age 21 in increasing numbers and began petitioning for green card status for their alien parents. This occurred under the

[3] Our estimate of the unemployed includes those who may be employed illegally and therefore do not show up in our jobs surveys.

[4] American Samoa and Commonwealth of the Northern Mariana Islands: Employment, Earnings, and Status of Key Industries Since Minimum Wage Increases Began, GAO-11-427, June 2011, Government Accountability Office.

normal U.S. immigration processes, which are available to all qualified aliens – and which we think should apply to the Commonwealth in the same way as in the States. There is no need for a special citizenship provision applied only to the Commonwealth. When the Judiciary Committee considers immigration reform for the U.S., the Commonwealth will be a part of that reform. We do not want or need an amnesty bill now.

HR 1466 creates four categories of new U.S. citizens. I want to focus on the fourth category which covers alien parents of minor U.S. citizen children.[5] This category is, by Commonwealth standards, very large.

Here's what will happen under HR 1466:

1. Large scale amnesty for aliens: HR 1466 is essentially a large-scale amnesty bill. It provides a direct route to citizenship that would create an estimated 11,000 new U.S. citizens in the Commonwealth within the next 10 years – virtually all of whom are adults and would be voters.[6] This would occur at a time when the current U.S. citizen population of Chamorro and Carolinian ancestry is estimated to decline. Our severe economic recession has caused some of these citizens to move to the Mainland just to earn enough to support their families. The social disruption from arbitrarily creating citizens in this large proportion cannot be overstated. I do not believe that turning this large population of alien temporary workers into citizen voters would be tolerated in any county or State in the United States.

2. Permanent CNMI-only residence: Under HR 1466, these aliens are granted permanent residence in the Commonwealth *for all time.* They are protected from deportation until their minor child reaches age 21 and can petition for a grant of a green card for the parent leading to U.S. citizenship. That is a significant distortion of the U.S. immigration system. Allowing these aliens to remain in the Commonwealth – even if they *do not*

[5] The first category consists of aliens who were born in the Commonwealth between 1974 and 1978 and who did not get U.S. citizenship under a prior court decree covering this group. We estimate there are about 200 persons in this group.

The second category consists of aliens who were granted permanent resident status by the CNMI government prior to 1981. We estimate there are 82 persons in this group.

The third category consists of aliens who are the spouses and children of people in groups 1 and 2. We know of only 102 persons in this group, but there may be a few more.

[6] Our estimates in this regard are based on data with respect to live births and fertility rates, public and private school enrollments, ages and genders of aliens in the Commonwealth, umbrella permits, utilization of nutritional assistance programs, U.S. census estimates and projections, U.S. immigration laws and regulations, and other related data. LIDS data are not relevant for these purposes as those data record work assignments. Because the federal authorities do not collect data in the Commonwealth that is readily available for all states and most counties, we must rely on estimates. We anticipate that these estimates are on the low side.

petition for adjustment of status to be able to enter the Mainland U.S. – is a long-term burden on the Commonwealth that occurs nowhere else in the U.S.

3. Non-custodial parents included: A parent who provided no support whatsoever to the minor U.S. citizen child or never lived in a household with the minor child is qualified to remain in the Commonwealth. HR 1466 only requires a parent's name on a birth certificate – not any evidence of a meaningful parental relationship.

4. Unemployed and unemployable parents included: A parent who is unemployed will qualify to remain in the Commonwealth forever. The CNMI will have to foot the bill for supporting them because, under HR 1466, they are not allowed to travel to the U.S. The direct and indirect costs to the CNMI government each year for unemployed aliens remaining in the Commonwealth is high and a particular burden on CNMI taxpayers.

5. Parents with no means of support included: A parent who has no means of support whatsoever will qualify. The bill attempts to get rid of the requirement for U.S. green cards of a sponsor willing and able to undertake the responsibility to pay support in the amount of at least $18,000 a year (at present levels) should the alien not be able to support himself or herself.[7] This means that aliens with no visible means of support would qualify to remain in the Commonwealth or to become U.S. citizens. This is not allowed anywhere else in the U.S.

6. Parents with a history of illegal employment included: A parent who works illegally in the underground economy, and harms the Commonwealth in the process, is eligible. This kind of broad amnesty encourages illegal employment as there is no deportation penalty. It also undermines employment opportunities for U.S. citizens. Although HR 1466 does not address the issue, it appears that this new status would also be available to persons who entered the CNMI before or after November 28, 2009, and became an illegal overstayer in violation of the INA, notwithstanding the general rule that illegal entrants and immigration violators are not allowed to be admitted into the United States.

7. Parents who have left the Commonwealth included: A parent who left the Commonwealth after November 2009 and has not returned to the Commonwealth will qualify if he or she returns by the date of enactment of HR 1466. The promise of U.S. citizenship is likely to attract a substantial number of re-entrants. This will aggravate the Commonwealth's current problem with unemployed aliens.

8. Parents of children raised elsewhere included: A child who was born in the Commonwealth but was sent by his or her parent to live in China or the Philippines – and

[7] See section D(iii)(II).

who remains with relatives in the Philippines or China for his or her entire childhood to age 21 – can still protect his or her parents, enabling them to remain in the Commonwealth more or less permanently for the prospect of better employment or welfare benefits.

9. APA protections stripped away: H.R. 1466 strips away the protections of the federal Administrative Procedures Act by permitting the Department of Homeland Security to promulgate implementing regulations without the customary requirement of issuing them in proposed form and providing for a period within which the affected parties may comment. Are we incapable of learning from experience? We had to go to federal court in November 2009 to order to require DHS to comply with the provisions of the APA with respect to its proposed transitional worker permits. I see no reason for including this exception in this law.

10. A definition of "immediate relative" rejected by the Commonwealth legislature determines the eligible class: The bill refers to a definition of "immediate relative" that was in the Commonwealth Code prior to May 2008.[8] That definition was struck from the Commonwealth Code by our Legislature. We have found that, under well-accepted drafting rules, cross references to definitions in other legislation may be appropriate in very limited cases.[9] This is not one of those cases. A cross-reference to legislation that was repealed prior to the time of the legislation containing the cross-reference is particularly unacceptable. Among other flaws, it masks the true intent of the bill to those who are not lawyers or skilled legislative researchers.

11. Prior problems of adoption fraud are revived: The old now-repealed definition of "immediate relative" refers to adopted children who are adopted prior to age 21. This led to significant problems with adoption fraud in the Commonwealth – children who were adopted for the purpose of conveying status for immigration purposes. H.R. 1466 allows an alien parent who has more than one U.S. citizen child the leeway to consent to an adoption of one of the children for the purposes of eligibility under HR 1466. If this happened to any significant extent, as it has before, this would increase the number of eligible parents.

Let me be clear. It is the U.S. citizens in the Commonwealth who gave up their land and their sovereignty to become a part of the United States. The U.S. citizens in the Commonwealth

[8] This is the reference to Title 3, Section 4303, which was deleted from the Commonwealth Code by P.L. 17-1. It no longer exists.

[9] See, for example, the following: Office of the Legislative Counsel, U.S. Senate, Legislative Drafting Manual (1997); Lawrence E. Filson, The Legislative Drafter's Desk Reference (Congressional Quarterly, Inc., 1992); Donald Hirsch, Drafting Federal Law, 2d Edition (U.S. Government Printing Office, 1989).

have a right not to have their community and culture be so radically changed in this fashion -- unless they decide to do so through their own democratic institutions.

We treated guest workers well over the years, and we continue to do so. Some critics have cited poor working conditions. We corrected those long ago. Some cited an estimated $6.1 million in back pay owed to guest workers over the 25 years since 1985. That estimate was wrong. The total turned out, after investigation, to be far lower. All claims of back pay have been adjudicated; and only a relative few cases remain in our courts. Other critics have pointed to alleged human trafficking violations. Human trafficking is a federal crime and the only fair measure is convictions in federal cases – not allegations or rumors. Federal convictions over the past 10 years have been very, very few. Our record over the years is the equal to, and we think better than, anywhere aliens are employed in large numbers in the United States. And we understand why aliens in the Commonwealth want to stay. They have freedoms, are treated well, and have employment opportunities and social benefits.

I have a proposal for an H-5 visa within the regular U.S. immigration system, and the CNMI Senate has a proposal for a non-citizenship status somewhat akin to the status of Freely Associated State residents in the Commonwealth. Both of these proposals are in the supplementary materials to be provided to the Committee. Both of these proposals are far better alternatives for the people of the Commonwealth than HR 1466.