STATEMENT
OF
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BEFORE THE
HOUSE COMMITTEE ON NATURAL RESOURCES
SUBCOMMITTEE ON INSULAR AFFAIRS, OCEANS AND WILDLIFE

REGARDING
IMPLEMENTATION OF PUBLIC LAW 110-229
TO THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AND GUAM

May 19, 2009

Madam Chairman and members of the Committee, thank you for the opportunity to testify on the implementation of Public Law 110-229 to the Commonwealth of the Northern Mariana Islands (CNMI) and Guam. I come before you today as a private citizen. However, as you know, I served until January 2008 as Deputy Assistant Secretary of the Interior for Insular Affairs. In that capacity I was the Federal official responsible for generally administering, on behalf of the Secretary of the Interior, the Federal Government's relationship with the CNMI and Guam. I also served as the President's Special Representative for consultations with the CNMI pursuant to Section 702 and 902 of the U.S.-CNMI Covenant, and as Co-Chairman of the Federal Interagency Task Force on the Guam Military Buildup.

As Deputy Assistant Secretary of the Interior, I supervised the preparation of the original draft of the legislation that would eventually become Title VII, Subtitle A of Public Law 110-229, which deals with immigration, security and labor issues in the CNMI and Guam. I will refer to Title VII, Subtitle A as the "Marianas Immigration Legislation". I testified on behalf of the Bush Administration on two occasions before this Committee and on two occasions before the Senate on CNMI labor and immigration issues. I was very actively involved in the development of the Marianas Immigration Legislation.

The Bush Administration eventually came to the conclusion, for reasons that I need not belabor again here, that we could not support continued CNMI control over immigration. We recognized, however, that applying the Federal immigration law to the CNMI in a blind and abrupt fashion would be ruinous to the economic and social fabric of the CNMI. We therefore fashioned a policy of "Flexible Federalization", whereby the CNMI would be granted immigration flexibility offered to no other U.S. jurisdiction under the Immigration and Nationality Act. Examples of such flexibility included establishing a CNMI-only transitional guest worker program that could be extended indefinitely as necessary; exempting the CNMI from national caps on H visas; allowing holders of

CNMI investor visas to transition to Federal treaty investor visas, even for investors from non-treaty countries; creating a special visa waiver program for the CNMI, with the ability to include countries not eligible for the national visa waiver program; and allowing new categories of CNMI-only non-immigrant visas to be created. As the Marianas Immigration Legislation worked its way through Congress, most of these provisions would eventually be made applicable to Guam as well.

The Marianas Immigration Legislation was developed during a period when the CNMI's economy was in steep decline. The largest pillar of the CNMI economy at the time, the garment industry, was on its way out, and the only other major pillar of the economy, tourism, had been dropping precipitously. It was clear that the CNMI's economy, which has depended heavily on guest workers, was too fragile to go "cold turkey" with a strict application of Federal immigration law. The Bush Administration consistently made it clear that CNMI immigration should be federalized in a manner that minimized the damage to the CNMI economy and maximized the potential for future economic growth. I believe that this principle was endorsed by both parties through the overwhelming bipartisan support that the Marianas Immigration Legislation ultimately received.

I visited the Northern Mariana Islands again two weeks ago. As I saw with my own eyes, the economic decline that was already in full swing when we were drafting the Marianas Immigration Legislation in 2007 has continued to the present day. People are leaving in droves, the garment industry is completely gone, vacant hotels and commercial properties blight the islands, and businesses of all types are closing. As we prepare for the implementation of the Marianas Immigration Legislation, we are at a critical point in the CNMI's history. If the Marianas Immigration Legislation is implemented in accordance with the stated intent of Congress, the CNMI will have a chance to rebuild its economy into one that is stronger, more sustainable and more just than ever before. If not, then an economic and humanitarian disaster is likely to occur. Jobs will continue to disappear. Health and safety will be jeopardized by the government's inability to provide essential services. Families will be uprooted. Families will be separated. The islands will become depopulated with the continued exodus not only of guest workers, but of indigenous Chamorros and Carolinians as well.

This worst case scenario has already started to unfold. If these trends are not reversed, then "Flexible Federalization" will have become an empty slogan and a broken promise. The Federal Government has three choices. First, it can tolerate the intolerable conditions that I have just described, accepting the damage to our conscience and prestige. Second, it can force taxpayers to pay for a costly bailout, recognizing that such a bailout would likely morph into permanent dependence because it would not give the CNMI the tools to develop a viable economy. Third, it could implement Flexible Federalization in the way that Congress intended, and ensure that the people of the CNMI do have the tools to support themselves.

With this background in mind, I will now offer suggestions for the implementation of the Marianas Immigration Legislation. Some of these suggestions will require legislative action.

First, the express intent of Congress must be taken seriously. Congress has clearly stated its intent "to minimize, to the greatest extent practicable, potential adverse economic and fiscal effects of phasing out the Commonwealth's nonresident contract worker program and to maximize the Commonwealth's potential for future economic and business growth by encouraging diversification and growth of the economy of the Commonwealth in accordance with fundamental values underlying Federal immigration policy."

Congress has further stated its intent as follows: "In recognition of the Commonwealth's unique economic circumstances, history, and geographical location, it is the intent of Congress that the Commonwealth be given as much flexibility as possible in maintaining existing businesses and other revenue sources, and developing new economic opportunities, consistent with the mandates of this subtitle. This subtitle…should be implemented whenever possible to expand tourism and economic development in the Commonwealth…."

These were not intended to be empty words. These words were intended to guide every action taken by the Executive Branch to implement the Marianas Immigration Legislation, and hence to protect the people of the CNMI from the great harm that would almost surely result if the law were not implemented with careful attention to their unique and precarious situation. Congress should hold the Executive Branch accountable to this language, and require the Executive Branch to demonstrate how every action that it takes or fails to take to implement the Marianas Immigration Legislation is consistent with the letter and spirit of Congress' clearly stated intent.

Second, it should be recognized that the law establishes a strong presumption in favor of including China and Russia in the Marianas visa waiver program, and that this presumption can only be defeated by following the standards set forth in the statute. The statute provides that the visa waiver regulations should include in the program "any country from which the Commonwealth has received a significant economic benefit from the number of visitors for pleasure within the one-year period preceding the date of enactment of the Consolidated Natural Resources Act of 2008, unless the Secretary of Homeland Security determines that such country's inclusion on such list would represent a threat to the welfare, safety, or security of the United States or its territories." China and Russia clearly meet the test to presumptively be included on the initial visa waiver list. In order to keep China and Russia off the initial list, the Secretary of Homeland Security would have to determine, reasonably and in good faith, that their inclusion would represent a threat to the welfare, safety, or security of the United States or its territories. Congress should hold the Secretary of Homeland Security to this standard, as well as to the previously stated intent of Congress that "the Commonwealth be given as much flexibility as possible in maintaining existing businesses and other revenue sources" and that the statute "should be implemented whenever possible to expand tourism and economic development in the Commonwealth." The statute gives the Department of Homeland Security plenty of special tools to ensure that China and Russia can be included on the list without threatening the welfare, safety or security of the United States or its territories. For example, the Department could impose special

bonding requirements of the type that have worked so well to ensure that Chinese tourists to the CNMI return home. In order to be consistent with the intent of Congress, the Secretary of Homeland Security must make every effort to enable China and Russia to be included in the program, including using all tools at her disposal to mitigate any threat that might otherwise be posed by including these countries.

It is not permissible under this statute to keep China or Russia off the list simply because they do things from time to time that we find objectionable. Including Russia on the list, for example, would not in any way suggest that we condone Russia's military actions in Georgia, any more than the continued presence of our Embassy in Moscow suggests that we condone such military actions. A clever bureaucrat could concoct a reason as to why Russia's recent actions in Georgia suggest that it would threaten our welfare, safety and security to allow Russian tourists to continue to visit Saipan without a visa. That would, however, just be a concoction, and Congress would hopefully recognize that as an attempt to circumvent the requirements of the law.

It would make no sense to retaliate against China or Russia for any purpose by keeping them off the Marianas visa waiver list. That would not in any way punish China or Russia, whose tourists could spend their money in foreign countries rather than in our own U.S. territories. It would punish the CNMI and Guam, which would be counterproductive and quite contrary to the intent of Congress.

The CNMI especially cannot afford to lose the jobs and revenue that are provided by Chinese and Russian tourists. Tinian's economy would be absolutely devastated by the loss of Chinese tourists.

We must remember that the Marianas visa waiver program is a special program. The standards applicable to the national visa waiver program should not be applied to the Marianas visa waiver program. To do so would violate the letter and the spirit of the Marianas Immigration Legislation. If we were simply going to apply to the Marianas the same standards that we apply to the rest of the country, then there would have been no reason to create a separate program. Congress did create a separate program because it recognized that the Mariana islands necessarily have a disproportionate dependence on foreign tourism, and that the remote location of these small islands allows us to be much more flexible with visa waivers than we can afford to be with the rest of the country.

Third, the CNMI should be permanently exempted from caps on H visas; Guam should be exempted from such caps at least for long enough to ensure that it has the labor required for the military and civilian infrastructure planned for the coming years. Please keep in mind that H visas are supposed to be used only when qualified U.S. workers are not available.

The CNMI is reeling from the loss of its top industry, and there is nothing on the horizon to take its place. It will not be easy for the CNMI to attract an industry to replace the jobs and public revenues that the garment industry once provided. The CNMI is a small island community with a limited local talent pool. Its infrastructure is very poor. It is

remote and burdened with high transportation costs for people and goods, especially now that it is no longer exporting garments. Airline and shipping service to the CNMI is limited. The CNMI is resource poor. It regularly gets hit with typhoons and other destructive storms.

Many of the disadvantages that the CNMI faces in attracting new industry are permanent. The Marianas Immigration Legislation provides the CNMI with some temporary competitive advantages in immigration, but it does not make sense to try to offset permanent disadvantages with temporary advantages.

A permanent H cap exemption could give the CNMI a competitive advantage that might help it bridge at least some of the substantial gap between its standard of living and that of even the poorest of the 50 states. It could use such an exemption to attract software engineers, research scientists, professors, doctors and others who could form the basis of a 21st Century economy to replace the 19th Century economy from which the CNMI is just now emerging. This would be a cost-effective way to help the CNMI to help itself, rather than promoting dependence on Federal grants.

Guam is in a different position. Its long term economic prospects are bolstered by the planned military investment in the island, but it must rely upon the H cap exemption to provide much of the labor needed to implement that investment. According to the Government Accountability Office, the H cap exemption for both Guam and the CNMI will expire on December 31, 2014 and cannot be extended under current law. That will likely result in the military's labor supply being cut off before the buildup is finished. Cutting off necessary labor in the middle of a crucial military project would simply not be acceptable. Congress will have no choice but to amend the H cap exemption provision of the Marianas Immigration Legislation. The question is how.

I previously explained why the CNMI should receive a permanent exemption from caps on H visas. At the very least, the CNMI H cap extension should be capable of being extended as long as it is providing a significant economic benefit to the CNMI. The Guam H cap exemption should also, at the very least, be capable of being extended for as long as it is necessary for Guam.

If Congress is not willing to make the H cap exemptions permanent, it should allow them to continue for as long a possible. In that vein, Congress should direct the Department of Homeland Security to allow normal extensions of the validity period for each H petition to extend beyond the cap exemption period. Note that an approved H-1B petition for specialty occupations is generally valid for three years, and can normally be extended for three additional years without being subject to the cap. If the H cap exemption is set to expire on December 31, 2014, an H-1B petition approved prior to that date should generally be valid for three years, and should generally be renewable for three additional years without being subject to the cap. This should be true even if the total validity period of six years would extend beyond December 31, 2014, and indeed even if the initial three-year validity period expires after that date. In either case, the beneficiary of a cap-exempted H-1B petition should generally receive six consecutive years of validity as

long as he or she complies with applicable law. This would allow the CNMI and Guam to maximize their benefit from the H cap exemption in the event that Congress does not see fit to make it permanent. I should disclose here that I am representing a client that is seeking to have the Marianas Immigration Legislation interpreted to allow this. Such an interpretation is, in my view, the correct interpretation of the statute in light of the Congressional intent "that the Commonwealth be given as much flexibility as possible in…developing new economic opportunities."

Fourth, we should recognize that it would be counterproductive to rapidly reduce the number of guest workers in the CNMI. The statute provides for the transitional guest worker program to be phased out by the end of 2014, but it can be extended indefinitely in increments of up to five years. The Senate Committee on Energy and Natural Resources has already acknowledged in report language that at least one five-year extension will likely be necessary. I note that there is nothing to prevent the Secretary of Labor from making that determination today, rather than waiting until the end of the five-year period. An early extension would certainly help to alleviate the uncertainty that businesses and workers in the CNMI currently have to deal with. Better yet, Congress should acknowledge reality and extend the initial phase-out deadline to ten years. The worst approach would be for the Executive Branch to adopt an arbitrarily linear five-year phase-out schedule, only to have the Secretary of Labor determine at the last minute that the CNMI continues to need workers who would by then have already been sent home. The best approach, short of Congress extending the initial transition period to ten years, would be for the Secretary of Labor to determine as soon as possible that a five-year extension of the transition period is necessary, and in any event for the phase-out schedule to not significantly reduce the number of guest workers until the Secretary of Labor determines, on the basis of proper analysis, that such a reduction is warranted.

Fifth, we should make sure that the Marianas Immigration Legislation does not break up families. The statute will likely have to be amended in order to prevent many long-term residents of the CNMI from losing their status, including spouses of citizens of the freely associated states, persons to whom the CNMI granted permanent residence and their spouses, widows and widowers of U.S. citizens, and those remaining so-called "Stateless Children" who were born before the U.S.-CNMI Covenant legislation was signed into Federal law. I would encourage Congress to consult with immigration attorneys in the CNMI who could provide details on how the Marianas Immigration Legislation would have to be amended to avoid splitting up the families of long-term CNMI residents.

Sixth, we must do right by the long-term guest workers who have become an integral part of CNMI society. A number of guest workers have devoted most of their working lives to the CNMI. Many are raising children in the CNMI, and their children are U.S. citizens. These workers were invited to come to the CNMI because they were needed, they came and have stayed legally, and they have contributed much to the community. The value of their work skills has been confirmed again and again the by the repeated renewal of their employment contracts. A worker who loses his job because of the current economic downturn faces the prospect of having to return to the low-wage economy of his original homeland, uprooting his American children from the only home

that they have ever known. Such a worker would, under current law, have no right to remain in the CNMI and no right to travel to the rest of the U.S. These workers have already proven their value to a small corner of this country, and America would benefit if this small number of people could share their talents with the rest of the country. They would be a benefit, not a burden, to any community in America. The CNMI, meanwhile, will continue to benefit from the contributions of those who stay on out of commitment to the CNMI, not because the law restricts their options. Congress should make legal guest workers who have lived in the CNMI for at least five years eligible to apply, on a one-time basis, for lawful permanent residence in the U.S.

Congress may, in the not-too-distant future, again consider comprehensive immigration reform. If Congress is going to entertain proposals to grant a pathway to citizenship for people who entered this country illegally, it should at least offer permanent residence to long-term CNMI workers who entered this country legally. Conversely, there is no reason to wait for comprehensive immigration reform in order to address the status of CNMI guest workers. Their situation is unique, and granting them status would not set precedents that would prejudice any subsequent debate on national immigration reform. I am aware that the statute provides a mechanism to address this issue next year, but it is in no one's interest to continue this needless limbo. It is never too early to do the right thing.

I would note that making long-term workers eligible for green cards would be the best way to stabilize the CNMI's workforce, short of returning to the system that Congress was determined to eradicate through its passage of the Marianas Immigration Legislation. Although many guest workers would likely leave the CNMI, many others, especially of the most valued workers, could be persuaded to stay and hence mitigate the turnover and instability that businesses would otherwise face under the Marianas Immigration Legislation. Those workers who do leave can be replaced by local workers, citizens of the freely associated states, U.S. workers and, to the extent necessary, by temporary guest workers on transitional visas or regular U.S. visas.

Can the United States of America, a nation of over 300 million strong, absorb a few thousand guest workers who have contributed so much to an American community? I don't want to put words in the mouth of our new President, Madam Chairman, but I believe that he, along with reasonable and fair-minded people across the country, would answer that question with a resounding "Yes we can!"

Finally, let me point out the obvious: The Marianas Immigration Legislation is far from perfect, but it is a creative, flexible and unique statute. It must be implemented with a matching creativity and flexibility, and a profound appreciation for the unique circumstances that make it so imperative that we get this right. Every single resident of Guam and, especially, the CNMI, will be profoundly affected by the manner in which this statute is implemented. The Chamorros and Carolinians indigenous to these islands want a strong economy so that they can raise their children in their own homeland. The business community wants a business environment that will enable businesses to survive and continue to provide employment for the community. The guest workers want to keep

their jobs so that they will not have to uproot their families. All of these constituencies must have a seat at the table at which their fate will be decided. You will find that these groups have sharp but reasonable differences of opinion on some issues, but everyone agrees on the absolute urgency of fixing the economy. The Federal Government must ensure that the people of the Marianas can keep the tools to do that.

Si Yu'us Ma'ase and Olomwaay.