



December 14, 2010

PM-602-0012

## Policy Memorandum

**SUBJECT:** Waivers of Inadmissibility and Grants of Status for Certain Aliens Seeking Nonimmigrant Status in the Commonwealth of the Northern Mariana Islands (CNMI); Addition to the *Adjudicator's Field Manual* (AFM) Chapter 36.4 (AFM Update AD 11-12)

### **Purpose**

This Policy Memorandum (PM) provides guidance on grants of status for certain aliens seeking nonimmigrant status in the Commonwealth of the Northern Mariana Islands (CNMI). This PM is effective immediately.

### **Scope**

Unless specifically exempted herein, this PM applies to and binds all USCIS employees who adjudicate petitions and applications for nonimmigrant status.

### **Authority**

Public Law 110-229, Title VII, 122 Stat. 754, 853 (2008); 48 U.S.C. § 1806.

### **Background**

The Consolidated Natural Resources Act of 2008 (CNRA)<sup>1</sup> amended the 1976 Covenant between the CNMI and the United States<sup>2</sup> to extend, subject to some limitations, the immigration laws of the United States to the CNMI beginning on November 28, 2009 (“transition date”). Under the CNRA, the definition of the United States in section 101(a)(38) of the Immigration and Nationality Act (INA) now includes the CNMI.

On November 28, 2009 most aliens present in the CNMI became present in the United States by operation of the law, without admission or parole. Congress, however, directed that those aliens are not removable under section 212(a)(6)(A) of the INA for the first two years of the transition period if they were in a lawful immigration status granted by the CNMI government before the start of the transition period.<sup>3</sup> In addition, aliens who are “lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of... (A) the expiration of the

<sup>1</sup> Pub. L. No. 110-229, 122 Stat. 754, codified in part at 48 U.S.C. § 1806

<sup>2</sup> Pub. L. No. 94-241, § 1, 90 Stat. 263, 48 U.S.C. § 1801 note

<sup>3</sup> 48 U.S.C. § 1806(e)(1)

alien's employment authorization under the immigration laws of the Commonwealth or (B)...2 years after the transition program effective date.”<sup>4</sup>

As envisioned and encouraged by the CNRA, many of those aliens may seek H, L, or other nonimmigrant status under federal immigration law. Although section 248 of the INA generally authorizes USCIS to change an alien's status from one nonimmigrant classification to another, 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 or deemed by law to be in a nonimmigrant classification. Beneficiaries of H and other nonimmigrant petitions adjudicated by USCIS who do not have the ability to change status under section 248 may obtain the new status through consular processing abroad and admission at a port of entry by U.S. Customs and Border Protection (CBP).

### **Policy**

In light of the unique legal situation of the CNMI, an alien who was in a valid CNMI immigration status as of the beginning of the transition period may be granted a nonimmigrant status under the INA during the transition period directly by USCIS if the alien is otherwise eligible for the nonimmigrant classification and is granted the necessary waiver(s) of inadmissibility. The primary impediment to the direct grant of nonimmigrant status to aliens present in the CNMI is inadmissibility under section 212(a)(6)(A)(i) for presence in the United States without admission or parole, and under section 212(a)(7)(B)(i)(II) for lack of a nonimmigrant visa. These grounds may be overcome through the exercise of waiver authority under section 212(d)(3)(A)(ii) of the INA. Section 212(d)(3)(A)(ii) provides waiver authority in cases of aliens applying for nonimmigrant status who are “in possession of appropriate documents.” Given the unique situation of the CNMI and Congress's recognition and de facto extension of these aliens' lawful CNMI immigration status, *see* CNRA § 702, 48 U.S.C. § 1806(e), “appropriate documents” for this purpose can include a valid, unexpired passport and other documentary evidence of lawful presence in the CNMI, as further described below.<sup>5</sup> These documents include certain CNMI-issued evidence of lawful status during the first two years of the transition period, and in certain cases, DHS parole documentation issued to aliens who are lawfully present under the unique provisions of the CNRA for humanitarian reasons, but who may not have appropriate CNMI-issued documents.

This PM provides guidance on the appropriate exercise of this authority with respect to aliens in the CNMI seeking nonimmigrant status under federal immigration laws. Allowing for the grant of nonimmigrant status to eligible aliens who are physically present in the CNMI will help encourage these aliens and their employers to seek an appropriate, federal immigration status for

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<sup>4</sup> 48 U.S.C. § 1806(e)(2)

<sup>5</sup> Ordinarily, a § 212(d)(3)(A) waiver is unavailable to an alien who is not in possession of entry documents and has not been granted a waiver of that requirement under INA § 212(d)(4) or one of the visa waiver provisions, *see* INA §§ 217 (general), 212(l) (Guam-CNMI). *See* 8 CFR 212.4(b); 9 FAM 40.301 note 2; CBP Inspectors Field Manual § 17.5(d)(2).

themselves and their employees. This PM is consistent with congressional intent to promote as rapid and smooth a transition as possible from former CNMI statuses to federally based statuses.

The AFM is updated accordingly.

## **Implementation**

### **AFM Update, Chapter 36.4**

1. Chapter 36.4 is added as follows:

#### **36.4 Waivers of Inadmissibility and Grants of Status for Certain Aliens Seeking Nonimmigrant Status in the Commonwealth of the Northern Mariana Islands (CNMI)**

##### **Policy**

USCIS officers may exercise the Secretary's authority under section 212(d)(3)(A)(ii) of the INA<sup>6</sup> to grant a waiver of inadmissibility to aliens present in the CNMI for inadmissibility that arises only under sections 212(a)(6)(A) and 212(a)(7)(B) of the INA. The prospective nonimmigrant must meet the following criteria in order for the waiver to be granted:

- Be lawfully present in the CNMI under a grant of parole by USCIS; a grant of parole by CBP pursuant to an advance parole by USCIS; or otherwise under the "grandfather provision" of the CNRA (48 U.S.C. § 1806(e)(1) or (2)) providing for continued lawful presence and work authorization (if applicable) for up to two years after Nov. 27, 2009.
- Have appropriate documents in the form of a valid unexpired passport and other evidence (such as a CNMI government-issued "umbrella permit" or other permit in the case of the grandfather provision, or a DHS-issued Form I-94 pursuant to a grant of parole) that the alien meets the lawful presence requirements for the waiver described above.

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<sup>6</sup> 212(d)(3)(A)(ii) provides-

"(3)(A) Except as provided in this subsection, an alien... (ii) who is inadmissible under subsection (a) (other than paragraphs (3)(A)(i)(I), (3)(A)(ii), (3)(A)(iii), (3)(C), and clauses (i) and (ii) of paragraph (3)(E) of such subsection), but who is in possession of appropriate documents or is granted a waiver thereof and is seeking admission, may be admitted into the United States temporarily as a nonimmigrant in the discretion of the [Secretary of Homeland Security]. The [Secretary] shall prescribe conditions, including exaction of such bonds as may be necessary, to control and regulate the admission and return of inadmissible aliens applying for temporary admission under this paragraph."

- File an application for nonimmigrant status or have a petition for nonimmigrant status filed on his or her behalf by an employer, seeking a nonimmigrant classification other than B.
- Meet all of the other statutory and regulatory criteria for the intended nonimmigrant visa classification (such as L, H, F, or P).
- Have successfully completed all appropriate USCIS security checks.
- Meet his or her burden of proving admissibility other than for the specific grounds of inadmissibility for which a waiver is available under this policy.
- Demonstrate that he or she otherwise merits a favorable exercise of discretion.

Accordingly, upon approval of a petition or application for nonimmigrant status where the beneficiary meets the requirements stated above, including those who may have been granted parole in place by USCIS District 26, USCIS will admit the beneficiary, if not otherwise inadmissible, by granting the status sought and issuing a Form I-94 that provides evidence of admission.

A dependent's I-539 and grant of status may not be approved until the principal's I-129 and grant of status is approved. Both a principal and dependent are subject to the same conditions stated above

### **Implementation**

Officers should be guided by this policy in adjudicating petitions and applications for nonimmigrant status submitted by employers or aliens where the alien is present in the CNMI.

### **USCIS Operations**

The petitioning employer or alien beneficiary must file either an I-129 petition or I-539 application with USCIS for a grant of nonimmigrant status under federal immigration laws. Such filings will still be subject to all other initial or change of status filing requirements as well as biometrics identification under the INA and current operating procedures. Derivative beneficiaries will also file I-539 applications as following-to-join or accompanying family members.

No specific form or fee is required in order to request a waiver of inadmissibility under this policy. In cases where the alien is determined on a case-by-case basis to be eligible for the waiver under this policy, the waiver should be granted without the need for the alien specifically to request it. Grant of a waiver under this policy does not

preclude an alien from applying for the appropriate visa abroad if the alien desires the visa in order to facilitate travel.

Waivers of the nonimmigrant visa requirement granted under this policy are one-time waivers so that aliens will not need to travel abroad unnecessarily in order to obtain nonimmigrant status. Those waivers do not serve to waive lack of a visa in the case of aliens who travel abroad and seek to return to the CNMI.

2. The AFM Transmittal Memoranda table is updated as follows:

AD 11-12 12/14/2010	Chapter 36.4	Adds Chapter 36.4, Waivers of Inadmissibility and Grants of Status for Certain Aliens Seeking Nonimmigrant Status in the Commonwealth of the Northern Mariana Islands (CNMI).
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**Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

**Contact Information**

Questions or suggestions regarding this PM should be addressed through appropriate channels to the Field Operations Directorate or Service Center Operations Directorate.