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MEMORANDUM FOR MR. WILLENS

SUBJECT: U.S. Law on Alien Workers and immigration in General

This memorandum briefly examines the present U.S. law regarding alien workers and immigration in general. The focus is on how this law would affect the Marianas as a territory or Commonwealth of the United States. Some tentative conclusions are provided at the end of major sections.

Congress possesses the exclusive right to regulate immigration and naturalization.[1/] As will be discussed further below, local laws which substantially encroach upon the exercise of this power cannot stand.[2/] Within this Constitutional framework, the Marianas essentially have two alternatives for an immigration system.

First, if Congress permits, the Marianas might try to develop its own system as has occurred with American Samoa.

1/ Art. I, Sec. 8, cl. 4 says: "To establish a Uniform Rule of Naturalization." Fong Yue Ting v. United States, 149 U.S. 698 (1893).

2/ Truax v. Raich, 293 U.S. 33 (1915).

Second, the Marianas could be covered by the Immigration and Nationality Act, a situation which could permit some local flexibility.

I. Its Own System

The Marianas might want to develop its own immigration system, presumably with the goal of limiting immigration sharply. A useful analogy here is American Samoa which, unlike the United States and the rest of its possessions, is not covered by the Immigration and Nationality Act of 1952, as amended (especially in 1965).[1/]

In consultation with the American Samoan legislature, the Governor, appointed by the U.S. Secretary of Interior, has developed a special, restrictive immigration system. I have not determined exactly how the system operates. However, one knowledgeable source reports that anyone who is entering American Samoa for other than a short tourist visit must receive the permission of the Governor or his agent. This includes businessmen who enter the territory to transact business. No one is allowed to remain in American Samoa for any period unless they can demonstrate that they have visible means of support. Whether the rules differ between aliens and U.S. citizens is unclear. However, some U.S. citizens have been

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1/ Most of the Act is located at 8 U.S.C. §§ 1101-1503 (1970).

refused entry and others have been told to leave.[1/]

The legality of the system has never been effectively challenged, though there are serious Constitutional questions about interferring with a U.S. citizen's right to travel, etc. The Samoan Government has sidestepped the few suits which have been attempted by virtue of the difficulty of suing it in the federal courts.[2/] (American Samoa does not have a U.S. District Court and obtaining jurisdiction over the Samoan Government in federal courts located elsewhere is difficult.)

Regardless of the views of the Marianas, it seems unlikely that the U.S. Government would be willing to allow the Marianas to establish its own immigration system if the islands wanted a political status more similar to Guam or Puerto Rico than American Samoa. This would seem especially likely if a U.S. District Court were created in the Marianas.

II. The Immigration and Nationality Act

The Immigration and Nationality Act provides the statutory framework for U.S. immigration policy everywhere but American Samoa.[3/] From a national standpoint, the Act is fairly restrictive. It allows only 170,000 immigrants a year into the United States and has many provisions establishing criteria

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1/ Telephone interview with Mr. C. Brewster Chapman, Associate Solicitor, Department of the Interior, in Washington, D.C., May 2, 1973.

2/ Id.

3/ The Trust Territory is not included in the Act. The Act would thus have to be amended to include the Marianas.

and preferences for these immigrants. It also has numerous provisions regarding nonimmigrant aliens -- i.e., those coming to the U.S. for nominally temporary periods. However, from the standpoint of the Marianas with only about 13,000 inhabitants at present, even a few thousand aliens (other than tourists) each year might well be considered an undesirable "flood."

As a result, it is necessary to look more carefully at the Act and how it operates. This examination is best organized into two parts: (a) the admissions process and the decision-making role of the local government (i.e., States and territories); and (b) the legality of local laws regarding issues such as employment opportunities and working conditions.

A. The Admissions Process and the Role of the Local Government in the Decision-Making

Although the Federal Government possesses the exclusive right to regulate immigration and naturalization, the system is now so structured that local governments have a role in the decision-making process whereby most of the non-tourist aliens which the Marianas would be concerned about -- e.g., skilled and unskilled workers -- are admitted to the United States. However, the local governments only have a voice, not the power of decision, in this process and there are a few less important categories for admission where local governments have very little or no voice.

Aliens can enter the United States essentially in three ways: (1) Immigrant aliens; (2) Nonimmigrant aliens; and (3) Parolees.

1. Immigrant Aliens

Immigrant aliens are essentially those aliens who have been granted the privilege of residing permanently in the United States.[1/] The maximum of 170,000 immigrant aliens allowed to enter the United States each year are admitted under an elaborate system of six preferences[2/] and other criteria.[3/] For instance, first preference (up to 20 percent of the total) is given to unmarried sons or daughters of U.S. citizens.[4/] However, apparently a mentally retarded son or daughter would be excluded.[5/]

1/ The Act actually defines immigrant aliens by process of exclusion -- i.e., defining which aliens are not immigrant aliens but nonimmigrant aliens. 8 U.S.C. § 1101(a)(15).

2/ 8 U.S.C. § 1153.

3/ E.g., 8 U.S.C. § 1182.

4/ 8 U.S.C. § 1153(a)(1).

5/ 8 U.S.C. § 1182(a)(1).

The immigrant aliens who would probably be of greatest concern to the Marianas because of their eligibility and numbers would be sixth preference immigrants and non-preference immigrants.[1/] Sixth preference immigrants are those who ". . . are capable of performing specified skilled or unskilled labor, not of a temporary or seasonal nature, for which a shortage of employable and willing persons exists in the United States."[2/] Non-preference immigrants are those who do not fit in any of the preference categories.[3/]

(Incidentally, there is a limit of 20,000 on immigrant aliens who can enter the United States each year from any country. As matters stand now, the Philippines has so many applicants in the first, second, and third preferences that no other Filipinos are admitted to the United States, thus preventing any Filipinos from entering as sixth preference or non-preference immigrants. However, Japanese and Koreans can enter today as sixth preference and non-preference aliens.[4/])

1/ It should be remembered, however, that there are the other categories, most of which do not require the "labor certification" discussed below.

2/ 8 U.S.C. § 1153(a)(6).

3/ 8 U.S.C. § 1153(a)(8).

4/ Telephone interview with Mr. Charles McCarthy, Travel Control Section, Immigration and Naturalization Service, in Washington, D.C., May 1, 1973 [hereinafter cited as McCarthy Interview].

The admission of sixth preference or non-preference immigrants usually requires what is called a "labor certification."[1/] This is obtained by a prospective employer and involves a two-part requirement -- that there be a "shortage" of the type of workers sought and that importation of aliens would not "adversely effect" the labor market. The test is defined in 8 U.S.C. § 1182(a)(14):

> "Aliens seeking to enter the United States, for the purpose of performing skilled or unskilled labor, [shall be excluded] unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission to the United States and at the place to which the alien is destined to perform such skilled or unskilled labor, and (B) the employment of such aliens will not adversely affect the wages and working conditions of the workers in the United States similarly employed." [Emphasis added.]

The statute gives the Secretary the final decision-making responsibility. He exercises this responsibility primarily in two ways. First, he publishes from time to time schedules of determinations that certain occupations are experiencing

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1/ 8 U.S.C. § 1153(a)(8).

or not experiencing labor shortages in the United States.[1/] For example, the Secretary has determined that there is not a shortage of hotel clerks and busboys, but that there is a shortage of nurses.[2/] In making these determinations, the geographic area (i.e., the "place" of the statute) is usually defined broadly since it is assumed that U.S. workers have some mobility. Also, once an alien is admitted as an immigrant, he can quit the job and move elsewhere. However, the Department of Labor apparently consults with the local employment services to help piece together the national picture and also to see if there is cause for a geographical exception. Such exceptions are possible.[3/]

These local employment services, though largely financed by the U.S. Department of Labor, are run by the particular State or the territory.[4/] For example, Guam, the Virgin Islands, and Puerto Rico all have their own employment services.

Second, the Secretary of Labor provides for the method of certifying immigrant aliens who fit in one of the

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1/ E.g., 29 C.F.R. § 60 (1972). The Secretary's predeterminations can be appealed through Department of Labor channels (Id. at § 60.2(b)) and is also subject to judicial review. Ozbirman v. Regional Manpower Admin., U.S. Dept. of Labor, 335 F. Supp. 467 (1971).

2/ Id. at § 60.7.

3/ Telephone interview with Mr. John J. Sheeran, Immigration Certification Office, Department of Labor, in Washington, D.C., May 3, 1973 [hereinafter cited as Sheeran Interview].

4/ Id.

occupations where he has deemed there is a shortage or where he has made no determination. In either case, the present administrative practice provides the local government with a considerable voice in the decision. The employer makes his application for certification to the local employment service. This agency can comment extensively and make recommendations. Moreover, the state-wide or territory-wide employment service can comment. As the Secretary's delegate, the Regional Manpower Administrator for the U.S. Department of Labor makes the actual certification decision, but he reportedly follows in most cases the local recommendation.[1/]

2. Nonimmigrant Aliens

Large numbers of aliens enter the United States each year with permission to stay temporarily. This group includes tourists, diplomatic personnel from other countries, representatives of foreign media, and a host of other categories.[2/]

The category of these nonimmigrant aliens which would likely be most numerous in the Marianas is the so-called "H-2" group of skilled and unskilled workers. This includes

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1/ Id.

2/ See 8 U.S.C. § 1101(a)(15).

"[A]n alien having a residence in a foreign country which he has no intention of abandoning . . . (ii) who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such services or labor cannot be found in this country . . . ."[1/] [Emphases added.]

The statute uses "temporary" twice. First, the person's planned visit must be temporary; the Immigration and Naturalization Service (INS) interprets this to mean that the initial approval can only be for a year or less.[2/] Second, the planned job should be temporary; for example, while construction jobs meet this test, service jobs in hotels do not.

By regulation the INS has required that the H-2 workers meet the labor certification tests, discussed earlier, of shortage and no adverse effect.[3/] Hence, the local employment services are usually involved as with immigrant aliens.

Both Guam and the Virgin Islands, however, have unique roles. For unknown reasons, the Guam Employment Service makes its own certification and reports directly to the INS, rather than through the Department of Labor.[4/] The net effect of this

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1/ The label is from the particular subsection of the statute. 8 U.S.C. § 1101(a)(15)(H)(ii).

2/ The initial permission to stay is limited to one year or less, though it may be extended up to a total stay of three years. McCarthy Interview.

3/ 8 C.F.R. § 214.2(h)(3)(i)(1973).

4/ Id.

is apparently to increase the influence of the Guam agency.

The Department of Labor established its own employment agency in the Virgin Islands in order to make the certification directly and without consultation with the Virgin Islands' agency. This occurred after the V.I. service had continued to recommend the certification of large numbers of alien workers for the H-2 category at the then existing wage rates. The wages then were low relative to the cost of living and further certification meant they would stay low. The Department of Labor intervened and froze the certification at existing levels and allowed the H-2 workers more freedom to more from job to job. Both moves improved the bargaining position of all workers in the Virgin Islands relative to employers.[1/] Without debating the benefits of these moves, it does reflect the power of the Department of Labor not only to ignore the recommendations of local authorities, but also to intervene directly.

Except for the Virgin Islands case, the treatment of H-2 workers suggests that, as with immigrant workers, the local agencies have considerable voice. However, there are at least two other categories of nonimmigrant aliens which might allow substantial numbers of aliens into the Marianas,

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1/ Sheeran Interview.

and without any substantial consultation with the local authorities.

The first category includes alien employees of a "treaty trader." A businessman who is trading to effectuate the purposes of some treaty of commerce can import alien workers so long as it is "solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national."[1/]

Second, there is the "substantial investor" who may import alien workers "solely to develop and direct the operations of an enterprise in which he has invested, or of an enterprise in which he is actively in the process of investing, a substantial amount of capital."[2/] Hence, in this case, Japanese investors who build hotels can bring in Japanese supervisory and managerial personnel. Apparently, the Japanese now do much of this in Guam. One fairly knowledgeable person thought that there were indications of this provision being abused to bring in workers below management levels.[3/]

In both of the above categories, the local agency has little to say about the inflow of aliens. The INS does have

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1/ 8 U.S.C. § 1101(a)(15)(E)(i).

2/ 8 U.S.C. § 1101(a)(15)(E)(ii).

3/ Sheeran Interview.

regulations[1] which try to restrict the number of aliens under these exceptions, but their effectiveness as the Guam case illustrates[2] is uncertain. (Incidentally, in all the categories of nonimmigrant alien noted above, the alien can bring along his spouse and minor children.)

3. Parolees

The Immigration and Nationality Act has one broad loophole. Regardless of any other provisions of the Act, the Attorney General is authorized to "parole"[3] aliens temporarily into the United States for national emergency reasons or other important public policy reasons. 8 U.S.C. § 1182(d)(5) provides:

> "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent [sic] reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

1/ E.g., 8 C.F.R. § 214.2, (1973).

2/ A small number of nonimmigrant aliens might enter the Marianas and stay for long periods under other categories. For instance, an alien who has worked for one year for a foreign company may enter the United States to continue working for the company or its subsidiary in a capacity that is "managerial, executive, or involves specialized knowledge." 8 U.S.C. § 1101(a)(15)(L). Again, the Japanese hotel company could bring in aliens under these provisions.

3/ I.e., allow to enter.

This provision has been used to admit many alien workers into Guam, especially Filipinos during the Vietnam build-up with all its related military construction. This led to a formal executive agreement in 1968 between the United States and the Philippines regarding recruitment of Filipino workers for work in Guam and other areas of the Pacific and Southeast Asia.[1/] The area, defined as west of 180° longitude, includes the Marianas. Under the agreement, the basic employment terms are established for Filipino workers recruited by the U.S. military and contractors for the U.S. military and military related agencies.

The use of parolees in Guam and elsewhere has tapered off recently, but the statutory provision remains. Because of protests in Guam, the Attorney General agreed reportedly to a major limitation on his parole powers.

1/ Agreement with the Philippines Relating to the Recruitment and Employment of Philippine Citizens By the United States Military Forces and Contractors of Military and Civilian Agencies of the United States Government in Certain Areas of the Pacific and Southeast Asia, December 28, 1968, [1968] 6 U.S.T. 7560, T.I.A.S. No. 6598. A copy is attached.

Specifically, labor certification (which, as discussed earlier, involves the local employment service) is now required for parolees into Guam.[1/]

4. Recommendations

Since the U.S. Government is not likely to allow the Marianas to have its own immigration system, the Marianas should seek to maximize its influence on the admission of aliens under the Immigration and Nationality Act. The special provisions now allowed Guam and possibly some new arrangements should be part of the Marianas proposals. One can tentatively make a few recommendations. However, we need to pinpoint better the key provisions of the Act and to understand better the mechanics of the system.

a. Immigrant aliens. As with all the States and territories (other than American Samoa), the Marianas should

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1/ Telephone conversation with Mr. Charles McCarthy, Immigration and Naturalization Service, in Washington, D.C., May 3, 1973. No supporting Federal Regulation could be found.

Another source said that there were special provisions for the importation of persons from the Philippines and Trust Territory into Guam specifically to work under contract in disaster/reconstruction programs authorized by the Guam Rehabilitation Act of 1963. W. Johnson, Facts About Doing Business in Guam, Guam Economic Development Authority 15 (1969). However, the Act says nothing about this and no special Executive Orders were located. 77 Stat. 302 (1963), amended 82 Stat. 863 (1968). (A copy is attached. Incidentally, the Act applies only to Guam and not to the Marianas.)

insure that its own employment service is the first step in determining whether to provide labor certification to sixth preference and non-preference immigrants. This role should be interpreted as broadly as possible in the negotiations. The Marianas might even try to formalize the procedures by statute.

b. Nonimmigrant aliens. The Marianas should also seek a role in the labor certification of H-2 workers. Like Guam, the Marianas should have the recommendation of the local employment service go directly to the Attorney General rather than through the Secretary of Labor. 1/

For some categories of nonimmigrant aliens other than H-2 workers, the Marianas should seek a voice in the decision process. Something akin to a labor certification procedure might be devised whereby a local agency is involved in deciding whether admission is appropriate. This proposal would constitute a substantial departure from the present system and needs to be studied further.

1/ Direct labor certification to the Attorney General is only practicable, without major amendment to the Act, in the case of nonimmigrant aliens. The statute only requires that the Attorney General consult with the Secretary of Labor for nonimmigrant aliens. 8 U.S.C. § 1184. For immigrant aliens, the statute specifically requires that the Secretary of Labor or his delegate do the certification. 8 U.S.C. § 1182(a)(15).

c. Parolees. Reportedly like the present Guam case, the Marianas should obtain the commitment of the Attorney General to follow labor certification procedures before admitting parolee workers under 8 U.S.C. § 1182(d)(5).

B. Legality of Local Laws Regarding Employment Opportunities and Working Conditions

Besides seeking a substantial voice in the operation of the Immigration and Nationality Act, the Marianas Government might try to pass local legislation discriminating against aliens other than tourists in favor of U.S. citizens.[1/]

The general rule is that immigrant aliens have the rights, duties and obligations which parallel those of U.S. citizens. Like citizens, they may use the courts and own property, and they are subject to military service, taxes, and service of

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1/ It is assumed here that the Marianas inhabitants will become U.S. citizens. Even if they do not, much of the following analysis would still be applicable.

Also, the question of discrimination in favor of U.S. citizens who are also citizens of the Marianas versus other U.S. citizens is not discussed here. This issue has been addressed in earlier memoranda, especially with regard to possible restrictions on land holding.

process.[1] They are protected in most cases from discrimination in employment opportunities and working conditions. However, though the guidelines of the Equal Employment Opportunity Commission extend Title VII protection against employment discrimination to aliens,[2] there has been at least one case to the contrary.[3] In spite of this ambiguity, the clear trend of the law is toward invalidating any citizen-immigrant alien distinctions.

Nonimmigrant aliens are allowed into the country on more restrictive terms under the Immigration and Nationality Act. For example, as noted earlier, their stay is only temporary and they may be required to continue with a particular employer

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1/ E.g., 42 U.S.C. § 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

See the cases cited in Note, Aliens and the Civil Service: A Closed Door, 61 Geo. L.J. 207, 212 (1972) [hereinafter cited as Geo. L.J. Note].

2/ The EEOC issued a guideline stating that citizenship discrimination constituted "national origin" discrimination. 29 C.F.R. § 1606.1(d)(1972). (Title VII sought to eliminate employment discrimination based on race, color, religion, sex, and national origin.)

3/ Espinoza v. Farah Manufacturing Co., 462 F.2d 1331 (5th Cir. 1972), appeal pending.

and skill, or be forced to leave the country. However, when it comes to State and territorial laws, as with immigrant aliens, it appears that the same general rule applies of being entitled to treatment parallel that of U.S. citizens. 1/

At least four Constitutional theories have been used to protect aliens from local discriminatory legislation. First, some cases have rested in whole or in part on the theory that Congress possesses the exclusive right to regulate immigration and naturalization. Consequently, local laws which substantially encroach upon the exercise of this power cannot stand. As Judge Tobriner of the California Supreme Court wrote in Purdy & Fitzpatrick v. State:

> "Courts have invalidated three types of state laws as infringements upon the competence of Congress to act in this area: (1) A state may not attempt to regulate or control immigration as such . . . . (2) A state law which burdens the general congressional power to admit aliens cannot be upheld . . . . (3) When the Congress has enacted a comprehensive scheme for the regulation of a particular aspect of immigration and naturalization, a state law may not stand 'as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' . . . ." 2/

1/ E.g., the language of 42 U.S.C. § 1981, cited supra, refers to "all persons with the jurisdiction of the United States."

2/ 71 Cal. 2d 566, ___ (1969).

In this case the California Court struck down a state statute which prohibited the employment of aliens on public works.

A similar rationale would seem to apply to legislation passed by a territory or Commonwealth since it likewise treads in this area where Congress has exclusive jurisdication.

A second Constitutional rationale has accorded aliens the protections of the fifth and fourteenth amendment due process clauses.[1/] The doctrine of incorporation would make due process applicable to the Marianas.

A third rationale is the fourteenth amendment equal protection clause. This is frequently used and usually involves stricter standards than the due process clause.[2/] As discussed in earlier memoranda, equal protection does not automatically apply to the Marianas.

A fourth rationale is that aliens must be accorded the rights of free association and travel under the first and fourteenth amendments. However, these would apply to the Marianas only through the due process clause.

1/ E.g., Galvan v. Press, 347 U.S. 522, 530 rehearing denied, 348 U.S. 852 (1954)(alien is person under due process clause). See Geo. L.J. Note, p. 213.

2/ E.g., Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566 (1969).

While not all the rationales apply necessarily to the Marianas, the first rationale (exclusive right of Congress) and the second (due process) would seem sufficient to call into question most forms of local discrimination which might significantly hamper aliens from entering and staying in the Marianas. Consequently, use of local legislation to discourage aliens (other than tourists) could provide only very limited assistance. However, we might still research further to determine which local legislation or actions might be permitted.

BEC