November 16, 1973

MEMORANDUM FOR MR. WILLENS

SUBJECT: Memo on Immigration Laws

Attached is my draft memorandum for the MPSC on Immigration laws. From my standpoint, without having heard your comments, I view this draft as a final one, except for a careful cite check and a very light edit. However, I expect that you might want to make some changes. Some specific issues for you are:

-- Is the "Summary and Conclusions" section what you want?

-- Note especially my conclusions and the text (pp. 28-31) about those persons in the Marianas who are not made citizens or nationals when the islands become a commonwealth. Okay?

-- Should we leave in my final section (III, pp. 31-36) or do you want to drop it altogether? I thought it was helpful background for the Commission, but it is not directly on the point of immigration laws.

-- Do you want all these appendices? (I have other materials which I was going to give to just you and Jay.)

I will wait to go final (i.e., on cream bond paper and carefully proofread) until I hear from you. (I am also seeking Jay's comments.) The cite check will be finished by

Saturday morning, and I have left myself free on Saturday and all Sunday for such revisions as you need. (If you don't find me in the office, feel free to call me at home. 337-3495.) Although it depends on the time and amount of your comments, I think we can start typing final first thing on Monday or, if necessary, before that.

Barry

cc: Jay Lapin

MEMORANDUM FOR THE MARIANAS POLITICAL STATUS COMMISSION

Subject: Immigration Laws for the Mariana Islands

Pursuant to the Joint Communique of June 4, 1973, we have undertaken for the Commission an analysis of immigration laws for the Mariana Islands, focusing on what might be specified in the status agreement with the United States. Our research involved not only a careful reading of the immigration laws, regulations, and cases, but also discussions with experts in the Immigration and Naturalization Service and the Department of Labor.

This memorandum addresses the basic issues underlying immigration laws, and does not attempt to draft specific provisions. Because of their importance, the issues which receive special treatment here are: (1) the choice for the Marianas between having its own immigration system or being covered by the Immigration and Nationality Act; (2) the admission of alien workers; and, (3) the treatment of aliens in the Marianas who will not become U.S. citizens or nationals when the Marianas becomes a commonwealth. There is also a brief section regarding the constitutional limitations on local laws which indirectly affect immigration or otherwise discriminate against aliens.

Summary and Conclusions

What the applicable immigration laws for the Marianas will be in its new political status is a question of considerable importance. Given the islands' relatively small population, any large influx of aliens, other than tourists, into the Marianas could well threaten the very culture and stability of the islands. The best guarantee of immigration policies consistent with the special needs of the Marianas will be immigration laws which allow the Marianas people as much local control as possible. This should be the explicit starting point for the negotiations.

I. The Alternative Systems

Since the U.S. Congress possesses the exclusive right under the Constitution to regulate immigration, the Marianas essentially have only two alternatives for an immigration system. First, with the express approval of Congress, the Marianas could develop its own immigration system. This has occurred in American Samoa. However, establishing a special immigration system for the Marianas would create severe administrative and legal problems and very likely would be unacceptable to the U.S. Congress.

The second alternative is to be covered by the U.S. Immigration and Nationality Act, which presently covers all 50 states, Puerto Rico, and all the territories, except

American Samoa. Because of the difficulties of developing a special immigration system for the Marianas and because of the substantial voice which the Marianas could expect to obtain (as discussed below) in deciding immigration policies under the Act, we recommend that the Marianas agree to be covered by the Immigration and Nationality Act. However, the Marianas should insist on certain provisions to insure its active role in the decision process. All but one of the provisions are now enjoyed by at least Guam and often by the States and other territories.

The Act allows aliens to enter the United States in three ways, as: (1) Immigrant aliens; (2) Nonimmigrant aliens; and (3) Parolees. Immigrant aliens are basically those aliens who have been granted the privilege of residing permanently in the United States. The category of immigrant aliens who will probably be of most concern to the Marianas are the alien workers, and almost all of these can only enter if they obtain a "labor certification" from the Secretary of Labor. This involves a two-part test -- that there be a "shortage" of the type of workers sought and that importation of aliens would not "adversely affect" the labor market. Like Guam, Puerto Rico, and the 50 states, the Marianas employment service, run by the Marianas Government, should have the right to comment on applications for labor certifications. Moreover, the local Marianas employment service should not hesitate to seek geographic exceptions when appropriate.

Nonimmigrant aliens are basically those who enter the United States with permission to stay temporarily. This group includes a number of categories -- e.g., tourists. Of special importance to the Marianas are "temporary" workers. The Attorney General uses the labor certification process for these workers on a consultative basis. All local employment agencies, except Guam, now comment through the Secretary of Labor. Like Guam, the Marianas should insist that its local office have the right to send its labor certifications directly to the Attorney General's Immigration and Naturalization Service, thereby making sure its recommendations are heard.

On two other categories of nonimmigrant aliens -- the treaty trader or substantial investor, and the intercompany transferee -- the Marianas should undertake factual investigations in Guam to determine whether these categories allow undesirably large numbers of aliens to enter. If there is this possibility, the Marianas (possibly in conjunction with Guam) might well find it necessary to insist that the U.S. Government provide more protection against abuse of these categories. Some specific remedies are suggested later. (See p. ___.)

Parolees are those aliens who enter the United States at the discretion of the Attorney General, usually to work on military projects. Given the U.S. military's plans to build

and operate a large base in the Marianas, the Marianas should insist, like only Guam does now, that its local employment agency should have through the labor certification process a substantial voice in the number and type of workers who will be admitted as parolees.

II. Persons in the Marianas Not Made U.S. Citizens or Nationals

Although the terms of the citizenship/nationality proposal has yet to be negotiated, there presumably will be some persons in the Marianas when it becomes a commonwealth who do not become U.S. citizens or nationals. What should happen to these people? Final resolution of this issue will have to await final decision on the terms of the citizenship/nationality arrangement and, as discussed later, will require some fact-finding. However, it is possible to make some tentative recommendations now.

First, TTPI citizens in the Marianas who will not be made U.S. citizens or nationals at the time it becomes a commonwealth should be made immigrant aliens. These people are now entitled to reside lawfully in the Marianas and it does not seem appropriate to take this right away. (The immigrant alien status allows these people to begin the process of becoming citizens.)

Second, non-TTPI citizens who have the TTPI's permission to remain in the Marianas as permanent residents

should, for the same reasons as the TTPI citizens discussed above, be allowed to remain in the Marianas as immigrant aliens.

Third, with the exception of tourists or short-term business visitors, non-TTPI citizens who have the TTPI's permission to remain in the Marianas only on a temporary basis should probably be granted across-the-board status as nonimmigrant aliens. However, it might be necessary to work out each case individually. Further study is needed here. (See pp. ___.)

III. Legality of Local Laws Regarding Aliens

Not only would the Marianas as a commonwealth be unable to regulate immigration directly without the express approval of Congress, but even local laws which indirectly encroach on the congressional power to control immigration or which otherwise discriminate against aliens face serious constitutional questions. Accordingly, the Marianas Government should attempt to maximize its role in the making of U.S. immigration policies, rather than expect to develop local legislation which might discourage aliens.

Discussion

I. The Alternative Systems

The U.S. Congress possesses the exclusive right to regulate immigration. Without the express approval of Congress, local laws--~~be they~~ whether by states, commonwealths or territories--attempting to regulate immigration cannot stand.[1/] As will be discussed further, even local laws which indirectly encroach on this power to control immigration or which otherwise discriminate against aliens face serious constitutional questions.[2/] Within this consitutional framework, the Mariana Islands essentially have two basic alternatives for an immigration system: (1) to develop its own immigration system

~~First,~~ with the express approval of Congress the ~~Marianas could develop its own immigration system. This has occurred~~ has been done in American Samoa; or (2) to

~~Second,~~ the ~~Marianas could~~ be covered by the U.S. Immigration and Nationality Act of 1952, as amended.[3/] ~~This Act~~ which applies presently ~~covers~~ all 50 states, Puerto Rico, and ~~all~~ the

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1/ U.S. Const. art. I, § 8, cl. 4; Fong Yue Ting v. United States, 149 U.S. 698 (1893); Purdy & Fitzpatrick v. State, 71 Cal. 2d 566 (1969).

2/ E.g., Truax v. Raich, 239 U.S. 33 (1915). See discussion at pp. _____.

3/ 8 U.S.C. §§ 1101-1503 (1970). The Act was extensively revised in 1965. The most relevant portions (§§ 1101-85) are at Attachment B.

territories, other than ~~except~~ American Samoa.[1] ~~As will be shown later, the local governments do have a substantial voice in the administration of this law.~~

A. ~~Its Own System~~ The Samoan Precedent, Establishment of Agents of Samoa

The Marianas might develop its own immigration system, presumably with the goal of sharply limiting immigration. An analogy here is American Samoa which is not covered by the Immigration and Nationality Act.

In consultation with the American Samoan legislature, the Governor of Samoa, appointed by the U.S. Secretary of Interior, has developed a special, restrictive immigration system. With few exceptions, aliens or U.S. citizens entering American Samoa must receive the permission of the Governor or his agent; this includes tourists and businessmen who enter the territory to transact business. No one is allowed to remain in American Samoa for any period unless he can demonstrate that he has visible means of support.[2] How much the immigration practices differ between aliens and U.S. citizens is unclear; in any case, even some U.S. citizens have been refused entry and others have been told to leave.[3]

1/ The Trust Territory is not included in the definition of "United States" in the Act. 8 U.S.C. § 1101(a)(38). The Act would thus have to be amended to include the Marianas.

2/ Code of American Samoa, Title XXIV c. 24.01.

3/ Telephone inverview with Mr. C. Brewster Chapman, Assistant Solicitor, Department of the Interior, in Washington, D.C., May 2, 1973.

In spite of the example of American Samoa, establishing a special immigration system for the Marianas would create severe administrative and legal problems and very likely would be unacceptable to the U.S. Congress. As for the administrative and legal difficulties, a number of factors--including geography and apparently the desires of the Marianas people--should insure that the Marianas will continue its present trend toward becoming an important commercial and travel center in the Pacific. Consequently, any immigration system would have to be a well-considered, comprehensive one providing for many different situations. Drafting and implementing such a system would take considerable effort.

Moreover, aliens who wanted to visit the Marianas would want to know the laws in advance and whether their visit would be allowed. Businessmen often might need to know this on short notice. Consequently, there would be a requirement to inform aliens in their own countries. The Marianas could not support such an information system. And, relying on the U.S. embassies and consular offices around the world would often be unsatisfactory since the people staffing these offices would not be well-informed about the unique Marianas rules. 1/

1/ Even in Washington, D.C., it is very difficult to obtain details on the immigration system in American Samoa.

There would be additional administrative-legal problems in trying to minimize the differences between the general U.S. immigration laws and the unique Marianas case. For example, would aliens admitted as residents to the Marianas have to go through a separate process of also being admitted as resident immigrants in the United States so that they could later apply for U.S. citizenship? ~~Would aliens admitted in any capacity to the Marianas have to go through a separate process to travel to the rest of the United States?~~

There would be a major legal problem in insuring that Congress had clearly delegated to the Marianas the power to control immigration. Without such delegation, the Marianas system would be unconstitutional. 1/ If the Marianas wanted to change their immigration laws, there would arise the nagging issue of whether the Marianas would have to go back to Congress to obtain new approval.

All the above assumes that Congress will allow the Marianas to have its own immigration system. This seems highly unlikely. American Samoa, an unincorporated, unorganized territory, is hardly a persuasive precedent when Puerto Rico, the Virgin Islands, and Guam are all covered by the Immigration and Nationality Act. Moreover, the administrative and

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1/ See fn. 1, page ____, supra.

legal problems listed above would serve further to discourage Congress from granting any special exception. Even if Congress agreed to allow the Marianas to have its own immigration system, Congress would view this as a considerable concession, making it less likely that other requests from the Marianas would be approved.

B. The Immigration and Nationality Act

From the standpoint of the entire United States, the Immigration and Nationality Act is fairly restrictive. It allows about 380,000 immigrants a year into the entire country[1/] and has many provisions establishing criteria and preferences for these immigrants. It also has numerous provisions regarding nonimmigrant aliens--i.e., those coming to the United States 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 threat to the islands' cultural integrity and stability.

As a result, it is necessary to look more carefully at the Act and how it operates. The following analysis

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1/ In 1972, 385,000 immigrant aliens were admitted into the United States. Immigration and Naturalization Service, 1972 Annual Report, p. 23.

considers both the admissions criteria, especially for alien workers, and the role of the local governments.

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

Aliens can enter the United States essentially in three ways, as: (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 Act has three categories of

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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).

immigrant aliens. "Immediate relatives" are the minor children, spouse, and parents[1/] of a U.S. citizen; these are admitted without numerical limitation. (As will be discussed later, this category is important when considering what will happen to aliens residing in the Marianas who do not become U.S. citizens or nationals upon implementation of the status agreement.) "Special immigrants" cover a number of diverse categories; the main category is for immigrants born in any independent foreign country of the Western Hemisphere or the Canal Zone, of whom 120,000 per year may be admitted. The third category includes the alien natives of countries other than the independent foreign countries of the Western Hemisphere and the Canal Zone.[2/]

Since the Marianas are not likely to have many aliens seeking to immigrate from the Western Hemisphere, its chief area of interest is the third category. The entry of those in this group is limited to a total of 170,000 for any fiscal year, and to a limit of 20,000 for the natives of any one country. These aliens are admitted under an

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1/ In the case of parents, the citizen must be at least 21 years of age.

2/ For a brief explanation of the categories and U.S. immigration law in general, see the pamphlet by the Immigration and Naturalization Service, United States Immigration Laws (1972). (Attachment A.)

elaborate system of six preferences[1/] and other criteria.[2/]

As for "other criteria," there are various criteria such as literacy, good moral character, and non-subversive views which generally are required of all immigrant aliens. As for the preference system, the top five preferences include those persons who are close relatives of U.S. citizens or permanent resident aliens, or who are members of the professions or have exceptional ability in the sciences or arts. Up to 84% of the 170,000 annual total, or 108,800 immigrants, can come from these preference categories. Presumably there would be no disproportionate number of aliens from these categories settling in the Marianas. Moreover, the familial ties or special abilities of these people would probably make them welcome residents.

The immigrant aliens who are probably of greatest concern to the Marianas are sixth preference immigrants and nonpreference immigrants. 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

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1/ Id.; 8 U.S.C. § 1153(a).

2/ E.g., 8 U.S.C. § 1182.

in the United States."[1] Non-preference immigrants are those who do not fit in any of the preference categories.[2]

(Incidentally, since there is a yearly ceiling of 20,000 on immigrant aliens born in any particular foreign country, the immigration from any one country can be taken up by people in the higher preference categories. As matters stand now, the Philippines has so many applicants in the first, second, and third preferences that no Filipinos from the other preferences are admitted as immigrant aliens.[3] This situation is expected to continue for some time with the Philippines.[4] However, Japanese and Koreans can enter today as sixth preference and non-preference aliens.[5])

1/ 8 U.S.C. § 1153(a)(6).

2/ 8 U.S.C. § 1153(a)(8).

3/ Bureau of Security and Consular Affairs, Department of State, Availability of Immigrant Visa Numbers for November 1973, Vol. II, No. 70, p. 2.

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 I].

5/ Bureau of Security and Consular Affairs, supra.

The admission of sixth preference or non-preference immigrants requires, with only a few minor exceptions, 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 affect" 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 of Labor 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 or not experiencing labor shortages in the

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1/ 8 U.S.C. § 1153(a)(8).

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 to include the entire United States. This is because it is assumed that U.S. workers have some mobility and because, 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, though infrequent.[3]

These local employment services, though largely financed by the U.S. Department of Labor which establishes certain standards for them, are under the jurisdiction of

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1/ E.g., 29 C.F.R. § 60 (1973). (The Federal Regulations are at Attachment C.) 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/ [Cites?] Telephone interviews with Mr. John J. Sheeran, Immigration Certification Office, Department of Labor, in Washington, D.C., May 3, 1973 and November 15, 1973 [hereinafter cited as Sheeran Interview I and Sheeran Interview II].

and operated by the particular State, commonwealth or territory.[1/] Guam, the Virgin Islands,[2/] and Puerto Rico all have their own employment services.

Second, the Secretary of Labor establishes the procedure for certifying immigrant aliens who fit in one of the occupations where he has deemed there is a shortage or where he has made no determination. Here, 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 office which 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 the local recommendation in most cases.[3/]

1/ Id.

2/ However, as discussed later, the Department of Labor has created its own employment office in the Virgin Island, thereby reducing the role of the territory's office. Id.

3/ Id.

From the standpoint of the Marianas in its new status, the Secretary's schedule of jobs for which there is assumed to be a shortage of workers should present little danger of allowing a flood of immigrants. The schedule traditionally is a very limited one, mainly including medical and religious personnel.[1/] Moreover, the Marianas might be able to gain a geographic exception or can challenge the individual applications.

As for the Secretary's schedule listing occupations where the Secretary has found no shortages of workers, the list is quite extensive, including many menial jobs.[2/] The danger here might well be that the Marianas actually would want to allow some aliens in for these jobs. In such a case, the Marianas might seek a geographic exception, arguing that the Marianas are distant from the mainland labor supply and that alien workers are necessary.[3/] Additionally,

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1/ 29 C.F.R. § 60.7. (Attachment C.)

2/ Id.

3/ However, the Guam and Hawaii labor markets would also have to be considered.

denials of individual applications can be appealed, even through the courts. However, probably the easier way from the Marianas standpoint would be to seek to get the desired aliens admitted as nonimmigrant aliens (discussed below).

As for occupations not on the schedule, it would seem that the local office would have a major voice here in determining the disposition of the applications given the Marianas isolation from the mainland labor market. Again, however, the easier and preferred route might be through admitting nonimmigrant aliens.

2. Nonimmigrant Aliens

Large numbers of aliens enter the United States each year with permission to stay temporarily.[1/] 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 of the most concern for the Marianas is the so-called "H-2" group of skilled and unskilled workers. This includes: "[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

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1/ Nonimmigrant aliens can apply to be aliens admitted for permanent residence, and thereby begin the process of becoming U.S. citizens. Functionally, this is the same as switching to immigrant alien status. 8 U.S.C. § 1255.

2/ See 8 U.S.C. § 1101(a)(15).

or labor, if unemployed persons capable of performing such services or labor cannot be found in this country. . . ."[1/] [Emphasis 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 positions in hotels do not because they are continuing jobs.

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/] However, the labor certification is not a condition precedent to the Attorney General's decision; rather, the Attorney General is only required to consult, although he (through the INS) almost always accepts the decision on certification.[4/] Hence, the local employment services are involved as with immigrant aliens.

1/ the label is from the particular subsection of the statute. 8 U.S.C. § 1101(a)(15)(H)(ii). During fiscal year 1972, there were 39,300 of these workers admitted to the United States. Immigration and Naturalization Service, 1972 Annual Report, p. 59.

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 I.

3/ 8 C.F.R. § 214.2(h)(3)(i).

4/ McCarthy Interview I. Compare 8 U.S.C. § 1182(a)(14) with 8 U.S.C. § 1184(c).

Both Guam and the Virgin Islands, however, have unique roles. The Guam Employment Service makes its own certification on nonimmigrant aliens and reports directly to the INS, rather than through the Department of Labor.[1/] The net effect of this is 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 move from job to job. Both moves improved the bargaining position of all workers in the Virgin Islands relative to employers.[2/] 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.

1/ Id.

2/ Sheeran Interview I.

Except for the Virgin Islands case, the treatment of H-2 workers suggests that, as with immigrant workers, the local agencies have considerable voice. From the Marianas' standpoint, the Guam procedure of certification by the local agency directly to the INS would seem to provide sufficient local voice in the decision process.

There are, however, two other categories of non-immigrant aliens which might allow substantial numbers of aliens into the Marianas, and without any consultation with the local authorities.

The first category includes aliens who are "treaty traders" or substantial investors. An alien businessman (and his employees) who is trading to effectuate the purposes of some treaty of commerce can enter the United States:

> "(i) solely to carry on substantial trade, principally between the United States and the foreign state of which he is a national; or (ii) 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." 1/

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

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1/ 8 U.S.C. § 1101(a)(15)(E).

in Guam. One knowledgeable person thought that there were indications of this provision being abused to bring in not only supervisory employees, but workers below management level.[1/]

The second category is that of the intracompany transferee. 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."[2/] Again, the Japanese hotel company could bring in aliens under this provision.[3/]

In both of these categories, the local employment service has nothing to say about the inflow of aliens. There is no labor certification procedure. In the first case--the treaty trader or substantial investor--the local agency is not consulted at all. Rather, the U.S. consul's office in the particular foreign country handles the visa application

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1/ Sheeran Interview I. During fiscal year 1972, there were 27,350 of these individuals admitted to the United States. INS, 1972 Annual Report, p. 52.

2/ 8 U.S.C. § 1101(a)(15)(L).

3/ In fiscal year 1972, a total of 6,100 intracompany transferees were admitted into the United States. INS, 1972 Annual Report.

and even the INS hears nothing until the alien presents himself for admission with a visa at a U.S. border.[1/] In the case of the intracorporate transfer, the INS hears in advance because of the requirement of a petition, but the local agency is not informed.[2/]

From the standpoint of the Marianas, these two categories are a cause of concern. Given reports that the categories might be abused in Guam, there seems good reason for the Marianas to undertake factual investigations in Guam. The Marianas (possibly in conjunction with Guam) might well find it necessary to insist that the U.S. Government provide more protection against undesired large numbers of aliens entering the Marianas (and Guam) under these categories. If so, further study is needed as to the appropriate solution. The regulations regarding definitions and application procedures might be changed. A form of consultation with the local employment service might be developed. And, if necessary, the law might even be amended to narrow the categories.[3/]

1/ Interview with Mr. Charles McCarthy, supra, November 15, 1973 [hereinafter cited as McCarthy II].

2/ 8 C.F.R. § 214.2(e).

3/ 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"[1/] 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."

This provision was used to admit many alien workers into Guam, especially Filipinos during the Vietnam buildup 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

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1/ I.e., allow to enter.

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 by contractors for the U.S. military and military related agencies. The use of parolees in Guam and elsewhere has tapered off somewhat, but a substantial number of parolees are still in Guam[2] and the statutory provision remains.

Because of protests in Guam, the Attorney General agreed to a major limitation on his parole powers. Specifically, labor certification (which, as discussed earlier, involves the local employment service) is now required for parolees into Guam.[3]

Given the U.S. military's plans to build and operate a large base in the Marianas and the scarcity of local labor, the military will have to rely at least in part on parolees from the Philippines and elsewhere for workers. However, the Marianas can reasonably insist, like Guam, that

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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 at Attachment D.)

2/ At the end of September 1973, there were in Guam 2320 parolees from the Philippines, 20 from the Pacific Islands, and 270 from the Trust Territory. McCarthy Interview II.

3/ McCarthy I; Guam Department of Labor, "Administrative Policy for Alien Employment Certification for Temporary Alien Workers and Department of Defense Direct Hires" (revised Jan. 15, 1973). As with nonimmigrant aliens, the Attorney General (effectively the INS) is apparently only required to "consult" with Guam, but reversals are reportedly rare.

through the labor certification process it be allowed a substantial voice in the number and type of workers who will be admitted as parolees.

II. Persons in the Marianas Not Made U.S. Citizens or Nationals

Although the terms of the arrangement have yet to be negotiated, at least some of the residents of the Marianas will become U.S. citizens or nationals when the Marianas becomes a commonwealth. However, there presumably will be other persons who will not be made U.S. citizens or nationals. The question is what to do with them.

Final resolution of this issue will have to await final decision on the terms of the citizenship/nationality arrangement and, as discussed below, will also require some fact-finding about just who will be the persons who are not made citizens or nationals. However, it is useful to consider now the "other persons" issue and even to make some tentative recommendations.

There will essentially be three categories of these "other persons." First, there will be some TTPI citizens who will not be made U.S. citizens or nationals because they have not fulfilled the residency requirements in the Marianas. However, up until the time of the start of the commonwealth, these people will have been entitled to reside lawfully in the Marianas. It does not seem appropriate to take this right

from them because of the inception of the commonwealth. Rather, these people should be allowed to remain in the Marianas as immigrant aliens.[1]

This could be accomplished simply by Congress passing a law which conferred the status of immigrant aliens on them. (The entry of populated land areas into the United States in the past has usually been accompanied by laws conferring citizenship or other status on the inhabitants.[2]) As immigrant aliens, these people can begin the process, if desired, of becoming U.S. citizens.[3]

Second, there will be non-TTPI citizens (who are also not U.S. citizens) who have the TTPI's permission to remain as permanent residents in the TTPI.[4] Like the TTPI citizens, these people should not lose their lawful right to remain in the Marianas and should be allowed to become U.S. immigrant aliens.

Third, there will be non-TTPI citizens (who are also not U.S. citizens) who only have the TTPI's permission to remain on a temporary basis in the Marianas. This is the most difficult

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1/ As noted earlier, travel and work restrictions are not imposed on immigrant aliens so these people could move freely to the rest of the United States.

2/ E.g., 48 U.S.C. §§ 733-733a (Puerto Rico).

3/ These requirements include among other things five years of residence in the United States as an alien admitted for permanent residence. 8 U.S.C. § 1427.

4/ See 53 T.T.C. § 53(3). There is a question whether "permanent residents" should include only those admitted as permanent residents or also those persons admitted for over one year. Fact-finding is required here as with the third category, discussed below.

case since these people will be in the Marianas under varying individual arrangements. Some further fact-finding is necessary here to determine how many of these people there are now in the Marianas and under what terms they are there. Estimates for the time when the Marianas becomes a commonwealth would then be required.

Allowing the people in the third category to remain only one or a few years in the Marianas would not create any heavy burdens on the Marianas and would be consistent with the terms of these persons' initial entry. A simple solution for the third category would be to grant all of the persons in it, except for tourists or short-term business visitors,[1/] the status of nonimmigrant aliens in the Marianas.[2/] This status could be granted for one year with the right to renew for an additional one or two years under certain conditions. (After that, the regular U.S. immigration rules would apply.[3/]) This approach avoids the administrative problem of trying to determine whether and how the various individuals might qualify under the variety of

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1/ Tourists and short-term business visitors should be asked to qualify under the reasonably liberal U.S. requirements for the same categories. There is no reason to allow these people to become nonimmigrant aliens.

2/ As noted before, there can be employment and travel restrictions placed on nonimmigrant aliens.

3/ As noted earlier, nonimmigrant aliens can apply to be aliens admitted for permanent residence, and thereby begin the process of becoming U.S. citizens. Functionally, this is the same as switching to immigrant alien status. 8 U.S.C. § 1255.

categories for nonimmigrant aliens in the U.S. immigration law. Moreover, it avoids the troublesome case where someone who might have qualified under the strict TTPI rules somehow fails to qualify under the elaborate U.S. standards.

If the fact-finding determines, however, that such a simple approach for the third category might lead to abuses, then it might be appropriate to develop a more detailed arrangement or even to consider each case on an individual basis in light of the existing U.S. laws on nonimmigrant aliens.

In pursuing solutions, it should be remembered that the minor children, spouse, and parents of a U.S. citizen 1/ are allowed to become immigrant aliens, regardless of numerical limitations. In addition, other close relatives of U.S. citizens receive high preferences to be admitted as immigrant aliens. As a result, even if only one member of a family unit qualifies to become a U.S. citizen when the Marianas becomes a commonwealth, most of his close relatives will be allowed to stay in the Marianas. As immigrant aliens, they are able to start becoming U.S. citizens if they so desire.

III. Legality of Local Laws Regarding Aliens

Not only would the Marianas as a commonwealth be unable to regulate immigration directly without the express approval

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1/ In the case of parents, the citizen must be at least 21 years of age.

of Congress, but even local laws which indirectly encroach on the congressional power to control immigration or which otherwise discriminate against aliens face serious constitutional questions. The general rule for immigrant aliens is that they 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 process.[1/] They are protected in most cases from governmental discrimination in employment opportunities and working conditions, and are likely to

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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].

have increasing protection even against discrimination by private employers.[1/] The clear trend of the law is toward invalidating distinctions between citizens and immigrant aliens.

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 and skill, or be forced to leave the country. However, when it comes to state and territorial laws, it appears that the same general rule applies as with immigrant aliens that they are entitled to treatment parallel that of U.S. citizens.[2/]

1/ For example, the Equal Employment Opportunity Commission issued a guideline stating that discrimination against aliens constituted "national origin" discrimination under Title VII. 29 C.F.R. § 1606.1(d)(1972). (Title VII sought to eliminate employment discrimination based on race, color, religion, sex, and national origin.) However, in Espinoza v. Farah Manufacturing Co., 462 F.2d 1331 (1972), the Court of Appeals for the Fifth Circuit held that Title VII did not cover discrimination based on citizenship. The Supreme Court granted certiorari on this case and recently heard oral arguments.

See Guerra v. Manchester Terminal, 2 CCH Empl. Prac. Guide ¶ 7874 (S.D. Tex., May 26, 1972)(§ 1981 applies to private employer's discrimination against an alien).

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

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.' . . . ."1/

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

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

A second constitutional rationale has accorded aliens the prctections of the fifth and fourteenth amendment

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1/ 71 Cal. 2d 566, ___ (1969).

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 most frequently used today and usually involves stricter standards than the due process clause.[2/] Because of the desire to limit land alienation in the Marianas, it is not yet clear whether and how the equal protection clause will apply in the Marianas.

A fourth rationale is that aliens must be accorded the rights of free association and travel under the first and fourteenth amendments.[3/] However, these would apply to the Marianas only through the due process clause.

While not all the rationales would apply necessarily or in full force 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 governmental discrimination which might substantially hamper aliens from entering and staying in the Marianas. Consequently, the new

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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., Sugarman v. Dougall, 41 U.S.L.W. 5138, ___ U.S. ___, (June 25, 1973) (state civil service law limiting certain positions to U.S. citizens ruled unconstitutional); Takahasi v. Fish and Game Commission, 334 U.S. 410 (1948); Purdy & Fitzpatrick v. State, supra.

3/ [Cites.]

Marianas government would be better advised to attempt to maximize its voice in the decision-making process on U.S. immigration policies, rather than to expect to develop local legislation which might discourage aliens.

WILMER, CUTLER & PICKERING

November 1973

Attachments

A. Immigration and Naturalization Service, United States Immigration Laws (1972).

B. 8 U.S.C. §§ 1101-85 (1970).

C. 8 C.F.R. § 214 (1973); 29 C.F.R. § 60.

D. Agreement with the Philippines Relating to the Recruitment and Employment of Philippine Citizens . . . (1968).