

**BILLING CODE 9111-97**

**DEPARTMENT OF HOMELAND SECURITY**

**8 CFR Parts 103, 214, 274a, and 299**

**CIS No. 2459-08; DHS Docket No. USCIS-2008-0038**

**RIN 1615-AB76**

**Commonwealth of the Northern Mariana Islands Transitional Worker Classification**

**AGENCY:** U.S. Citizenship and Immigration Services, DHS.

**ACTION:** Interim rule; solicitation of comments.

**SUMMARY:** The Department of Homeland Security (DHS) is creating a new, temporary, Commonwealth of the Northern Mariana Islands (CNMI)-only transitional worker classification (CW classification) in accordance with title VII of the Consolidated Natural Resources Act of 2008 (CNRA). The transitional worker program is intended to provide for an orderly transition from the CNMI permit system to the U.S. federal immigration system under the Immigration and Nationality Act (INA or Act). A CW transitional worker is an alien worker who is ineligible for another classification under the INA and who performs services or labor for an employer in the CNMI. The CNRA imposes a five-year transition period before the INA requirements become fully applicable in the CNMI. The new CW classification will be in effect for the duration of that transition period, unless extended by the Secretary of Labor. The rule also establishes employment authorization incident to CW status.

**DATES:** Effective date: This rule will be effective on [Insert date 30 days from date of publication in the FEDERAL REGISTER.]

Implementation date: Beginning at 12:01 a.m. (CNMI local time) on November 28, 2009, U.S. Citizenship and Immigration Services will begin operation of this program and

required compliance with this interim rule will begin. The existing CNMI permit program will be in effect through November 27, 2009.

Comment date: Written comments must be submitted on or before [Insert date 30 days from date of publication in the FEDERAL REGISTER].

Written comments on the Paperwork Reduction Act section of this rule must be submitted on or before [Insert date 60 days from the date of publication in the FEDERAL REGISTER].

**ADDRESSES:** You may submit comments, identified by DHS Docket No. USCIS-2008-0038 by one of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: You may submit comments directly to USCIS by e-mail at [rfs.regs@dhs.gov](mailto:rfs.regs@dhs.gov). Include DHS Docket No. USCIS-2008-0038 in the subject line of the message.
- Mail: Chief, Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529-2210. To ensure proper handling, please reference DHS Docket No. USCIS-2008-0038 on your correspondence. This mailing address may be used for paper, disk, or CD-ROM submissions.
- Hand Delivery/Courier: U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, NW., Suite 3008, Washington, DC 20529-2210. Contact Telephone Number is (202) 272-8377.

**FOR FURTHER INFORMATION CONTACT:** Paola Rodriguez Hale, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529-2060 telephone (202) 272-1505.

**SUPPLEMENTARY INFORMATION:**

**I. Public Participation.**

Interested persons are invited to participate in this rulemaking by submitting written data, views, or arguments on all aspects of this rule. DHS also invites comments that relate to the economic or federalism effects that might result from this rule. Comments that will provide the most assistance to DHS will reference a specific portion of the rule, explain the reason for any recommended change, and include data, information, or authority that support such recommended change.

**Instructions:** All submissions received must include the agency name and DHS Docket No. USCIS-2008-0038. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**Docket:** For access to the docket to read background documents or comments received go to <http://www.regulations.gov>. Submitted comments may also be inspected at the Regulatory Products Division, U.S. Citizenship and Immigration Services, Department of Homeland Security, 111 Massachusetts Avenue, N.W., Suite 3008, Washington, D.C. 20529-2210.

**II. Background.**

The Commonwealth of the Northern Mariana Islands (CNMI) is a U.S. territory located in the Western Pacific that has been subject to most U.S. laws for many years. The CNMI has administered its own immigration system under the terms of the 1976 Covenant with the United States. See A Joint Resolution to Approve the Covenant To Establish a Commonwealth of the

Northern Mariana Islands in Political Union with the United States of America (Covenant Act), Pub. L. No. 94-241, sec. 1, 90 Stat. 263, 48 U.S.C. 1801 note (1976). On May 8, 2008, former President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA). See Pub. L. No. 110-229, Title VII, 122 Stat. 754, 853 (2008). Title VII of the CNRA extends U.S. immigration laws to the CNMI. The intent of Congress in passing this legislation is to ensure effective border controls and properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI. See Section 701(a) of Public Law 110-229. Title VII of the CNRA includes provisions to phase-out the CNMI's nonresident contract worker program and phase in the U.S. federal immigration system in a manner that minimizes adverse economic and fiscal effects and maximizes the CNMI's potential for future economic and business growth. Id. (b). Congress also intends to provide the CNMI with as much flexibility as possible to maintain existing businesses and other revenue sources and develop new economic opportunities. Id.

Section 702 of the CNRA was scheduled to become effective approximately one year after the date of enactment, subject to certain transition provisions unique to the CNMI. On March 31, 2009, DHS announced that the Secretary of Homeland Security, in her discretion under the CNRA, had extended the effective date of the transition program from June 1, 2009 (the first day of the first full month commencing one year from the date of enactment of the CNRA) to November 28, 2009. The transition period concludes on December 31, 2014.

Since 1978, the CNMI has admitted a substantial number of foreign workers through an immigration system that provides a permit program for foreigners entering the CNMI, such as visitors, investors, and workers. Foreign workers under this program constitute a majority of the CNMI labor force. Such workers outnumber U.S. citizens and other local residents in most

industries central to the CNMI's economy. The transitional worker program implemented under this rule is intended to provide for an orderly transition for those workers from the CNMI permit system to the U.S. federal immigration system under the INA, and to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and as foreign workers obtain U.S. immigrant or nonimmigrant status.

Section 702(a) of the CNRA mandates that, during this transition period, the Secretary of Homeland Security must “establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits<sup>1</sup> to be issued to prospective employers” for the transitional workers and investors.<sup>2</sup> The statute provides that this system is for nonimmigrant workers “who would not otherwise be eligible for admission” under applicable provisions of the INA. Therefore, as discussed in section III below, nonimmigrant workers seeking CW status must demonstrate that they are ineligible for admission under another INA classification, such as an H-1B, H-2A or P-1 nonimmigrant. See 8 U.S.C. 1101.

Section 702(a) of the CNRA further states that transitional workers may apply to USCIS during the transition period for a change of status to another nonimmigrant classification or to adjust status to an immigrant classification in accordance with the INA. Following the end of the transition period, the transitional worker program will cease to exist and transitional workers must then adjust or change status to an immigrant or another nonimmigrant status under the INA if they want to remain legally in the CNMI. Otherwise, such transitional workers must depart the CNMI or they will become subject to removal.

The rule implementing this transitional worker program is explained below.

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<sup>1</sup> The CNRA refers to a system of permits. Note that we have retained this language when referencing the statute. However, in this context, the use of the term “permit” is synonymous with CW status and the latter term is used more extensively in this discussion.

<sup>2</sup> DHS will promulgate separate regulations addressing transitional measures for nonimmigrant investors in the CNMI.

### **III. Regulation Changes.**

This rule amends DHS regulations at 8 CFR 214.2 by providing a new paragraph (w). This new paragraph creates a new CNMI-only transitional worker classification for the duration of the transition period. Transitional workers will be classified using an admission code of CW-1 for principal transitional workers and CW-2 for dependents. Aliens who were previously admitted to the CNMI under the CNMI nonresident worker permit programs may be granted CW status by USCIS. To minimize adverse impact on the CNMI economy, the CW classification allows workers, who would not be eligible for any other lawful status under the INA, to enter or remain in the CNMI as a transitional worker during the transition period.<sup>3</sup> In this rule, DHS promulgates provisions governing CW-1 status in the section of the Code of Federal Regulations governing other INA nonimmigrant categories, and has incorporated standard elements from current nonimmigrant categories to maintain regulatory consistency, particularly with respect to petition processing procedures. This rule establishes eligibility criteria, limitations and parameters for the CW-1 nonimmigrant program as required by or consistent with an interpretation of the applicable provisions of section 702(a) of the CNRA, and prescribes procedural requirements for petitioners to follow. The specific areas that this rule implements and the rationale used by DHS are as follows:

#### **A. CNMI-Only Transitional Workers.**

As defined by the statute, a CNMI-only transitional worker is an alien worker who is ineligible for another classification under the INA during the transition period. Section 6(d)(1) or (2) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. This rule makes

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<sup>3</sup> On March 2, 2009, USCIS opened an Application Support Center (ASC) in Saipan that offers extended services, including the ability for individuals in the CNMI to schedule an INFOPASS appointment to speak with an immigration officer regarding non-immigrant or immigrant worker eligibility requirements under the INA. Additional information regarding such eligibility requirements can be accessed at <http://www.uscis.gov>.

aliens eligible for CW-1 status only if they are ineligible for nonimmigrant classification based upon employment activities described in section 101(a)(15) of the INA. Such nonimmigrant classifications may include, but are not limited to, a specialty occupation described in section 214(i) of the Act, temporary or seasonal agricultural work for which H-2A classification is available, and other temporary or seasonal employment for which H-2B classification is available. See 8 CFR 214.2(w)(2)(vi). DHS believes that this will help ensure that those who are eligible for employment-related nonimmigrant categories under the INA make use of those categories, especially the H categories, which are uncapped for employment in the CNMI during the transition period. As section 702(a) of the CNRA expressly allows transitional workers to change or adjust status under the INA, this provision is not meant to rigidly bar anyone admissible under the INA in any immigrant or other nonimmigrant category from obtaining CW-1 status. Section 6(d)(1) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. DHS envisions scenarios wherein certain professionals may not initially be eligible for H-1B status due to Federal licensing or other requirements, and believes that it is an appropriate use of the transitional worker program to allow such aliens time during the transition period to seek to satisfy such requirements. This rule does not exempt such aliens in occupations requiring licensure from complying with existing local licensure requirements. See 8 CFR 214.2(w)(6)(iii).

Section 702(a) further states that DHS shall set the conditions for admission to the CNMI for nonimmigrant workers. Section 6(d)(3) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. DHS is providing in this rule that, subject to numerical limitations, aliens may be classified as CW-1 nonimmigrants if, during the transition period, the alien: (1) will enter or remain in the CNMI for the purpose of employment during the transition period in an

occupational category designated by the Secretary as requiring alien workers to supplement the resident workforce; (2) has a petition submitted on his or her behalf by an employer; (3) is not present in the United States, other than the CNMI; (4) if present in the CNMI, is lawfully present in the CNMI; and (5) is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B)(i)(II) of the Act (not in possession of valid nonimmigrant visa). See 8 CFR 214.2(w)(2). In order to obtain CW status, the worker must either be lawfully present in the CNMI, or must be coming from abroad to the CNMI with a CW-1 visa properly issued by the U.S. Department of State. See 8 CFR 214.2(w)(2)(i).

DHS has determined that requiring lawful status in the CNMI as a prerequisite for CW-1 eligibility is the most efficient means to begin the congressionally-mandated drawdown of transitional workers to zero by the end of the transition period. Furthermore, to allow workers without lawful status in the CNMI to obtain CW-1 status would encourage noncompliance with CNMI immigration law during the period before the transition program effective date by removing the incentive for such workers with lawful status to maintain or reacquire such lawful status under CNMI law prior to the transition. In order to administer this program in a manner consistent with other employment-based INA nonimmigrant classifications, this rule requires that employers petition for aliens to obtain status. Additionally, this rule requires that aliens cannot be present in the United States other than the CNMI, which DHS believes is consistent with the statutorily-mandated geographic restriction of transitional workers to the CNMI. See Section 6(d)(3) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229; 8 CFR 214.2(w)(2). The transition program effective date is November 28, 2009. See Section 6(a)(1) and (3) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. The CW

classification will cease to exist at the end of the transition period, meaning that existing grants of CW status will automatically terminate, and no new grants of CW status will be made. See 8 CFR 214.2(w)(23). Because of the statutory restrictions on eligibility for the CW classification and to avoid the need to seek to change status or depart the CNMI at the end of the transition period, employers of nonresident workers should seek classification under another INA classification for which the workers may be eligible instead of petitioning for CW status. See Section 6(d)(2) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229.

B. Employers.

As required under section 702(a) of the CNRA, DHS will not consider a business legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or local CNMI law. Section 6(d)(5)(A) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229.

The CNRA provides that the determination of whether a business is legitimate will be made by the Secretary of Homeland Security in the Secretary's sole discretion. Section 6(d)(5)(A) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. This rule requires that eligible employers of CW transitional workers be engaged in legitimate business, and separates the definition of legitimate business into its component parts – legitimate and business. Accordingly, this rule defines legitimate business to mean “a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity.” See 8 CFR 214.2(w)(1)(v). The business must meet applicable legal requirements for doing business in the CNMI and will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. Id.

In addition to requiring eligible employers to be engaged in legitimate business, this rule further establishes that eligible employers must consider all available U.S. workers for positions being filled by CW-1 workers; offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the CNMI; and comply with all Federal and CNMI requirements relating to employment; including, but not limited to, nondiscrimination, occupational safety, and minimum wage requirements. See 8 CFR 214.2(w)(4). DHS created these parameters for eligible employers to comply with congressional intent that the CW category should “promote the maximum use of, and ... prevent adverse effects on wages and working conditions of, workers authorized to be employed in the United States.” Section 6(d)(2) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229.

Congress has directed that DHS allow CW workers to transfer among employers during the transition period. Section 6(d)(4) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. This rule establishes that an employer may request, and USCIS will permit, a transfer within an alien’s occupational category or another occupational category that the Secretary of Homeland Security has determined requires alien workers. See 8 CFR 214.2(w)(7).

The CNMI currently classifies occupations by reference to the nine occupational categories listed under the U.S. Department of Labor’s Dictionary of Occupational Titles (DOT). See 3 N. Mar. I. Code section 4412(k). This rule incorporates all occupational categories that are currently being utilized in the CNMI. See 8 CFR 214.2(w)(1)(viii).

The occupational categories in which nonresident workers may be needed include:

- Professional, technical, or management occupation;
- Clerical and sales occupation;
- Service occupation;

- Agricultural, fisheries, forestry, and related occupation;
- Processing occupation;
- Machine trade occupation;
- Benchwork occupation;
- Structural work occupation; and
- Miscellaneous occupation. Id.

The DOT provides examples of these occupations, including processing and benchwork occupations. See Employment and Training Administration, U. S. Department of Labor, *Dictionary of Occupational Titles* (4th ed. 1991) available at <http://www.oalj.dol.gov/libdot.htm>.

As the general meaning of processing and benchwork occupations is not clear from the title alone, additional explanation of these two particular occupational categories is provided. Processing occupations include occupations concerned with refining, mixing, compounding, chemically treating, heat treating, or similarly working with materials and products. Id. The DOT defines benchwork occupations as those concerned with the use of hand tools and bench machines to fit, grind, carve, mold, paint, sew, assemble, inspect, repair, and similarly work relatively small objects and materials, such as jewelry, phonographs, light bulbs, musical instruments, tires, footwear, pottery, and garments. Id. The work is usually performed at a set position in a mill, plant, or shop, at a bench, worktable, or conveyor. Id. All occupations must be for a legitimate business not engaging directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law.

DHS notes that household domestic workers are eligible for CW-1. However, DHS also notes that the definition of “legitimate business” may have a significant impact on domestic workers directly employed by individuals, as “business” is defined to mean “a real, active, and

operating commercial or entrepreneurial undertaking that produces goods or services for profit.” See 8 CFR 214.2(w)(1)(v). Individual households employing individual domestic workers would not appear to be a commercial or entrepreneurial undertaking, nor would the individual household be producing goods or services for profit. Therefore, it is anticipated that qualifying domestic workers likely would be employed through a “legitimate business” for placement in individual households.

The rule does not exclude any specific type of employment from the occupational categories permissible for CW-1 workers. However, there are three occupational categories – dancing, domestic workers, and hospitality workers – about which DHS has particular concern. DHS notes that women seeking employment as exotic dancers in the CNMI have been particularly prone to sexual exploitation and other abuse. See, e.g., Senate Hearing 110-50, Conditions in the Commonwealth of the Northern Mariana Islands (Feb. 8, 2007) (testimony of Lauri Bennett Ogumoro and Sister Mary Stella Mangona). In a discussion between DHS officials and advocates for exploited women in Saipan in July 2008, the advocates identified so-called “cultural dancing” as a common front occupation used to import women into the CNMI for the purposes of prostitution, in addition to the category of domestic work. Additionally, waitressing and other club and restaurant hospitality work also are known paths for exploitation and abuse. See, e.g., United States v. Liu, 538 F.3d 1078 (9th Cir. 2008). DHS is considering excluding some or all of these occupations from eligibility for CW status.

DHS also is concerned about the economic effects of blanket exclusions of all dancers, domestic workers or hospitality service workers. DHS emphasizes that, regardless of the occupational category, all employers must be engaged in legitimate business, which is defined to exclude employers that engage directly or indirectly in prostitution, trafficking in minors, or any

other activity that is illegal under Federal or CNMI law. DHS invites comments on the potential effect of excluding dancing from the list of eligible occupations. DHS also invites comments on whether DHS should exclude occupations, such as the hospitality industry, domestic service, or other occupations, to combat human trafficking and sexual exploitation.

C. The CNMI-Only Transitional Worker Allocation System.

Section 702(a) of the CNRA mandates that the Secretary of Homeland Security establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits to be issued to prospective employers for the transitional workers. Section 6(d) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. The Secretary may base the system on any reasonable method and criteria determined by the Secretary to promote the maximum use, and to prevent adverse effects on wages and working conditions, of U.S. citizens, lawful permanent residents, and lawfully admissible freely-associated state citizen labor. Id. The system must also provide for a reduction in the allocation of permits for such workers on an annual basis to zero during a period not to extend beyond December 31, 2014, unless extended by the Secretary of Labor. Id. This rule does not, for the reasons explained below, impose a specific annual reduction in allocation of permits, but does establish the numerical limitation to be utilized initially and its underlying methodologies for setting the numerical limitation throughout the transition period.

Under section 702(a) of the CNRA, between May 8, 2008 and the transition program effective date, the CNMI government must not increase the total number of alien workers present in the CNMI. Section 6(i)(1) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. Thus, the DHS-administered system, in its initial phase, will be based on the estimate from the CNMI government of the maximum number of nonresident workers in the CNMI as of May

8, 2008. That number is 22,417.<sup>4</sup> This rule defines the numerical limitation as the number of persons who may be granted CW-1 status and sets that number for the initial year at no higher than 22,417. See 8 CFR 214.2(w)(1)(vii). DHS will assess and reduce the number of grants of CW-1 status annually based, in part, on the economic conditions in the CNMI, consultation with the government of the CNMI and other Federal government agencies, and employment opportunities available for the resident workforce. Id. Grants of CW-1 status will be allocated based upon the availability of CW-1 permits and a showing of eligibility based upon the requirements outlined in this rule.

Specifically, 22,417 is a composite figure that includes aliens eligible for other INA categories, aliens with employment authorization for the first two years of the transition period under the “grandfather clause” provided by section 6(e)(2) of Public Law 94-241, as added by section 702(a) of Title VII of the CNRA, and CW-1 eligible aliens. Thus, while 22,417 could theoretically reflect the total number of CW-1 eligible aliens, setting 22,417 as the total number of CW-1 workers would artificially inflate the CW-1 eligible population by presuming that there are zero “grandfathered” or other INA workers. Therefore, this rule defines “numerical limitation” to be the maximum number of persons who may be granted CW-1 status, but for the reasons explained above, it is not expected that there will actually be 22,417 CW-1 eligible aliens to whom CW-1 status will be accorded. Id. DHS emphasizes that this provision is not intended to, and will not have the effect of, providing any cap on the access of CNMI employers to H and other nonimmigrant workers in the INA categories.

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<sup>4</sup> See Letter from Benigno Fitial, Governor of the Commonwealth of the Northern Mariana Islands, to Richard C. Barth, Assistant Secretary for Policy Development, and Stewart A. Baker, Assistant Secretary for Policy, Office of Policy, Department of Homeland Security (July 18, 2008) (Fitial letter)(available at [www.regulations.gov](http://www.regulations.gov) under DHS Docket No. USCIS-2008-0038).

The Governor of the CNMI has requested that DHS not reduce the number of foreign workers available to CNMI employers in the first two years of the transition program beyond the cap currently provided by section 6(i)(1) of the Covenant Act.<sup>5</sup> As required by section 702(a) of the CNRA, DHS considered the request of the Governor of the CNMI in creating this rule. However, in considering this request, DHS was also bound by the statutory language mandating a reduction of numbers on an annual basis. Section 6(d)(2) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229.

In light of these interests, this rule sets the maximum number of persons who may be granted CW-1 status for the first year of the transition period at 22,417. See 8 CFR 214.2(w)(1)(vii)(A). For the subsequent years of the transition period, the numerical limitation will be a number less than 22,417, as determined at the discretion of the Secretary. USCIS will publish the determination as a notice in the **Federal Register**. See 8 CFR 214.2(w)(1)(vii)(B). DHS believes that, given the lack of specific data available both on the foreign worker population, particularly with respect to eligibility for other INA categories and the number of “grandfathered” workers during the first two years of the transition period, as well as the uncertainty of future economic conditions in the CNMI, determining the CW-1 numerical limitation in this manner is prudent.

#### D. Petitioning Procedures.

This rule requires employers who seek to employ a CW-1 nonimmigrant worker to file a petition with USCIS requesting such status. See 8 CFR 214.2(w)(1)(ix). USCIS has determined that its Form I-129, Petition for a Nonimmigrant Worker, contains most of the information needed by USCIS to determine that a particular employer and its current and prospective employees are eligible as an employer and for CW-1 status, respectively. However, because the

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<sup>5</sup> See Final letter.

CW program is a temporary program, USCIS has decided to develop and use a separate Form I-129 called the I-129CW (“Petition for a Nonimmigrant Worker in the CNMI”), for CW petitions and will provide separate instructions for the application form for requesting CW transitional workers. The petition must be prepared in accordance with the form instructions and accompanied by the appropriate fee or a fee waiver request. USCIS will charge the current fee of \$320 for Form I-129 for the Form I-129CW because the adjudicative burden is expected to be identical. In addition to the petitioning fee required for submission of a Form I-129, section 702(a) of the CNRA requires employers to pay a supplemental CNMI education funding fee of \$150 per beneficiary per year. Section 6(b)(6) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. The supplementary CNMI education funding fee is mandatory and cannot be waived.

While fee waivers are not generally available in employment-based cases, due to the unique circumstances present in the CNMI, USCIS may waive the fee for the I-129CW in certain circumstances if the petitioner is able to show inability to pay. See 8 CFR 103.7(c)(5)(i). Due to the inherent inconsistency between sponsoring an alien for employment and being unable to pay the requisite fee for that sponsorship, USCIS expects that the situation when an employer would adequately demonstrate an inability to pay will be extremely limited. An estimate of the information collection requirements and a request for comments are included in the Paperwork Reduction Act section of this rule. An analysis of the fee impacts of this rule are included in the summary of the costs and benefits also provided below.

Form I-129CW will require an employer to provide the full name of the beneficiaries, as well as documentation or information that is sufficient to demonstrate that the worker-beneficiaries on the petition are eligible for CW-1 status based on the criteria in this rule. This

rule requires that the petitioner submit an attestation regarding the eligibility of both the employer and the beneficiary. See 8 CFR 214.2(w)(6)(ii). This rule requires that such an attestation certify that the petitioner meets the definition of an eligible employer, that the beneficiary is qualified for the position, and, if the beneficiary is present in the CNMI, that the beneficiary is in lawful CNMI status. Id. Finally, the rule requires a petitioner to attest that the position is nontemporary or nonseasonal, is in an occupational category as designated by the Secretary, and that qualified United States workers are not available to fill the position. Id. DHS believes that having an attestation is necessary to ensure eligibility of both the employer and of the beneficiary, and will obviate the need to affirmatively determine whether the applicant is eligible for status under every other conceivable INA category. Additionally, certain professions may require licensure in order to fully perform the duties of the occupation. In order to allow full and competent performance of such duties, this rule requires the petitioner to submit evidence of the beneficiary's licensure if the occupation requires a Commonwealth or local license. See 8 CFR 214.2(w)(6)(iii).

The rule allows a beneficiary to request, and obtain, a transfer to a new employer within an alien's occupational category or to another occupational category that the Secretary of Homeland Security has determined requires alien workers. See 8 CFR 214.2(w)(7). However, the rule requires that a petition for a change of employer must be filed by the new employer and an extension of the alien's stay must be requested if necessary for the validity period of the petition. Id. An alien who makes an unauthorized change of employment to a new employer has failed to maintain his or her status. Id. Further, the rule requires an employer to submit a new or amended petition for any material (i.e. – substantive) change in the terms and conditions of employment. See 8 CFR 214.2(w)(8). DHS believes that such requirements are consistent

with other nonimmigrant categories allowing change of employers and ensures that aliens are properly complying with the terms of their admission in CW status while not making transfer between employers impermissible.

The rule also allows petitioners to file for multiple beneficiaries. See 8 CFR 214.2(w)(9). The rule permits a petitioning employer to include more than one beneficiary in a CW-1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location. Id. However, the rule does not allow employers to petition for unnamed beneficiaries. At the time of filing, the petition must include the name of each intended beneficiary and other required information, as indicated in the form instructions. See 8 CFR 214.2(w)(10). DHS believes that allowing multiple beneficiaries will ease the potential burden on petitioners associated with submitting multiple individual petitions for multiple beneficiaries. Requiring that such beneficiaries be named will allow USCIS to verify, when necessary, prior lawful status of the beneficiaries in the CNMI, as this rule requires.

The rule includes safeguards for the beneficiary in case of early termination. See 8 CFR 214.2(w)(11). The rule requires that the petitioning employer pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission. Id. This requirement is consistent with current employment practices in the CNMI. This requirement also protects the Federal government from the potential costs of removing indigent aliens from the CNMI and is within DHS's discretion to impose requirements for temporary transitional worker status under title VII of the CNRA and more generally under section 214 of the INA.

The rule states that, after consideration of all the evidence submitted, USCIS will issue an approval of the petition on a Form I-797, Notice of Action, or in another form as USCIS may prescribe. See 8 CFR 214.2(w)(12). The rule requires that the approval notice include the classification and name of the beneficiary or beneficiaries and the petition's period of validity, and that a petition for more than one beneficiary may be approved in whole or in part. See 8 CFR 214.2(w)(12)(i). However, the rule requires that petitioners will not be able to file for a beneficiary earlier than six months before the date of actual need for the beneficiary's services. See 8 CFR 214.2(w)(12)(ii). The rule further provides that, although USCIS may in its discretion permit petitions to be filed prior to November 28, 2009, USCIS will not grant CW-1 status or authorize the admission of any alien to the CNMI prior to such date. Id.

The rule also states that although the beneficiary may be admitted to the CNMI up to ten days before the validity period begins and may remain no later than ten days after the validity period ends, the beneficiary will only be able to work during the validity period of the petition. See 8 CFR 214.2(w)(13). DHS believes that this validity period is consistent with other nonimmigrant categories and permits the necessary flexibility for travel and living arrangements to be made both before and after period of authorized employment. Finally, this rule requires that USCIS reject a petition once the numerical limitation of 22,417 has been reached, but that in such cases the petition and accompanying fee will be returned along with notice that the numerical limitation has been reached. See 8 CFR 214.2(w)(20). DHS believes that this will allow for reduction in CW workers in accordance with the numerical limitation. An alien in the CNMI whose CW status terminates, or who is not granted CW status at all, is not lawfully present and is subject to removal if he or she does not have another status under U.S. immigration law or other lawful basis to remain.

E. Obtaining CW Status.

Once the Form I-129CW petition is approved, the beneficiary will receive CW-1 status, and eligible family members may apply for CW-2 status for the spouse and dependents, as appropriate. See 8 CFR 214.2(w)(3). Dependents are spouses and minor children, as discussed more fully below in part G. Aliens who are abroad will need to apply for a CW-1 or CW-2 visa at a U.S. consulate. Aliens present in the CNMI must apply for status using Form I-129CW, and shall be required to provide biometrics along with an initial application for CW-1 or CW-2 status. See 8 CFR 214.2(w)(5) and (w)(15). When applicants apply overseas, USCIS will not require that the applicants provide biometrics along with Form I-129CW, although the Department of State may require biometrics at a U.S. consulate or embassy abroad as part of its routine visa processing procedures. Aliens present in the CNMI will not have previously supplied biometric information to the Federal government; therefore, because the federal government will not have conducted the attendant security checks on those aliens, USCIS will require aliens in the CNMI to provide biometrics. The applicable biometrics fee is \$80. A fee waiver is available based upon a showing of inability to pay for the Form I-129CW and/or biometrics fees. See 8 CFR 103.7(b)(1); 8 CFR 103.7(c)(5)(i). Status will be evidenced using Form I-94 or other appropriate documents.

F. Lawful Presence and Travel

The transitional worker program will be available to two groups of aliens in general: (1) those who are lawfully present in the CNMI; and (2) those who are abroad. The rule defines lawful presence as status under the CNMI immigration laws before the transition program effective date, or status under the “grandfather” provision of the CNRA or U.S. immigration

laws after the transition program effective date. See Section 6(e)(1) or (2) of Public Law 94-241, as added by sec. 702(a) of Title VII of the CNRA; 8 CFR 214.2(w)(1)(iv).

Short term visitors for business or pleasure, including individuals admitted with a Visitor Entry Permit (VEP) under CNMI law, will not be eligible to obtain CW classification, as such individuals are not part of the foreign workforce that is the subject of this rule. Once status is obtained, the CW-1 or CW-2 nonimmigrant may leave the CNMI and return, but must have the appropriate visa for readmission. See 8 CFR 214.2(w)(22)(ii). Such a visa requirement at the time of application for admission is consistent with current INA requirements. See INA sec. 212(a)(7)(B), 8 U.S.C. 1182(a)(7)(B). CW classification is valid only in the CNMI, and provides no basis for travel to any other part of the United States. See 8 CFR 214.2(w)(22)(i). An attempt to travel to any other part of the United States without documentation authorizing admission in another classification is a violation of the CW status that will render the alien removable. Id.

#### G. Spouse and Minor Children of CW Transitional Worker.

Section 702(a) of the CNRA, provides that spouses and minor children of an alien in CW-1 nonimmigrant status may be authorized for admission into the CNMI as accompanying or following to join the principal CW worker, and this rule implements that authority. See 8 CFR 214.2(w)(3). The rule adopts the INA's definition of "child" for immigration purposes other than naturalization in section 101(b), adding a requirement that the child be under eighteen years of age since the statute refers to "minor children" rather than "children." See Section 6(d)(6) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229; 8 CFR 214.2(w)(1)(vi). Generally, work authorization is not permitted for accompanying spouses and children of other classes of nonimmigrants as a result of their derivative status, and this rule similarly does not provide it. See 8 CFR 214.2(w)(22)(iii).

#### H. Consideration of Petitions and Applications.

A decision to grant or deny CW-1 or CW-2 status is discretionary and USCIS may deny petitions for failure to demonstrate eligibility or other good cause. Consistent with procedures for other nonimmigrant categories, petitioners may appeal denials of Form I-129CW to the USCIS Administrative Appeals Office on Form I-290B, as provided by 8 CFR 103.7(b). Denials of Form I-539, Application to Change or Extend Nonimmigrant Status, are not appealable. See 8 CFR 214.2(w)(21).

#### I. Change or Adjustment of Status.

Section 702(a) of the CNRA allows workers in the CW classification to change to another nonimmigrant status or to adjust to lawful permanent resident status throughout the transition period, if eligible. Section 6(d)(1) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. The rule provides that an alien may legitimately be present in, or come to, the CNMI for a temporary period as a CW-1 or CW-2 nonimmigrant and, at the same time, lawfully seek to become a permanent resident of the United States provided the alien intends to depart voluntarily at the end of the alien's authorized nonimmigrant stay. See 8 CFR 214.2(w)(19). For purposes of qualifying for CW-1 or CW-2 classification, the alien is not required to maintain a residence abroad, and dual immigrant and nonimmigrant intent is allowed. See 8 CFR 214.2(w)(19).

#### J. Period of Admission and Extensions of Stay.

A CW transitional worker will be admitted for an initial period of one year. See 8 CFR 214.2(w)(16). The spouse and children accompanying or following to join a CW transitional worker will be admitted for the same period that the principal alien is in valid CW transitional worker status, or in the case of a minor child, until the age of 18. See 8 CFR 214.2(w)(16).

Additionally, USCIS will grant extensions of CW status in one year increments until the end of the transition period. See 8 CFR 214.2(w)(17). Extensions of stay are subject to the numerical limitation and section 702(a) of the CNRA further requires that the number of permits be reduced on an annual basis. See 8 CFR 214.2(w)(1)(vii). A one-year validity period facilitates effective management of the number of permits issued at any given time. DHS welcomes comments on the CW-1 status validity period, its potential impacts on CNMI employers and foreign workers, and ways to mitigate these impacts while complying with the statute.

**K. Post-Transition Period.**

Unless extended by the Secretary of Labor, the CNMI-only transitional worker program will end on December 31, 2014. Section 6(a)(2) of Public Law 94-241, as added by sec. 702(a) of Public Law 110-229. After the end of the CNMI-only transitional worker program, the CW classification will cease to exist, as existing grants of status will automatically terminate and no new ones will be issued. See 8 CFR 214.2(w)(23).

**IV. Technical Changes.**

This rule amends the current provisions of 8 CFR 214.2 by adding paragraph (w) CNMI-Only Transitional Worker classification. See 8 CFR 214.2(w).

**V. Regulatory Requirements.**

**A. Administrative Procedure Act.**

The Administrative Procedure Act (APA) provides that an agency may dispense with notice and comment rulemaking procedures when an agency, for “good cause,” finds that those procedures are “impracticable, unnecessary, or contrary to the public interest.” See 5 U.S.C. 553(b)(B). For reasons discussed below, DHS finds that prepublication notice and comment for this rule would be impracticable, unnecessary, and contrary to the public interest.

Although Congress provided DHS with twelve months (now eighteen months under the extended transition date) to conduct and conclude the rulemaking actions necessary to implement the requirements of the CNRA, this timeframe is a relatively short timeframe to conduct a thorough review of the CNMI's immigration system and develop the complex regulatory scheme necessary to ensure a smooth transition of the CNMI to the U.S. federal immigration system and thus avoid potential adverse impacts on the CNMI economy and aliens currently residing lawfully in the CNMI. Further, in developing these regulations, DHS required sufficient time to engage in the necessary consultations with the CNMI government, Departments of State and Interior and other required stakeholders.

Under the APA, an agency is authorized to forego notice and comment in emergency situations, or where “the delay created by the notice and comment requirements would result in serious damage to important interests.” Woods Psychiatric Institute v. United States, 20 Cl. Ct. 324, 333 (Cl. Ct. 1990) aff'd 925 F.2d 1454 (Fed. Cir. 1991); also National Fed'n of Fed. Employees v. National Treasury Employees Union, 671 F.2d 607, 611 (D.C. Cir. 1982). “[W]hen there is a lack of specific and immediate guidance from the agency that would create confusion, economic harm, and disruption, not only to the participants of the program, who are forced to rely on antiquated standards, but would also extend to consumers in general, the good cause exception is a proper solution to ameliorate this expected harm.” Woods, 20 Cl. Ct. at 333. Under the CNRA, the transition will begin on November 28, 2009, even if regulations to guide the CNMI are not yet in place. Thus, the failure to have an effective interim regulation in place by the beginning of the transition period would serve only to harm the CNMI and aliens residing in the CNMI following the transition. This would have an adverse impact on the CNMI

economy in direct contrast to congressional intent under the CNRA and would be contrary to an important public interest.

Although DHS finds that good cause exists under 5 U.S.C. 553(b) to issue this rule as an interim rule, DHS nevertheless invites written comments on this interim rule and will consider those comments in the development of a final rule in this action.

#### **B. Executive Order 12866.**

This rulemaking is not considered “economically significant” under Executive Order 12866 because it will not result in an annual effect on the economy of \$100 million or more in any one year. However, because this rule raises novel policy issues, it is considered significant and has been reviewed by the Office of Management and Budget (OMB) under this Order. A summary of the economic impacts of this rule are presented below. For further details regarding this analysis, please refer to the complete Regulatory Assessment that has been placed in the public docket for this rulemaking.

In this analysis, we estimate the incremental costs to society, including both the CNMI and the United States, of the rule. Given the requisite reduction in the number of grants of CW status (to zero) by the end of the transition period, the most significant economic impact of the rule may result from a decrease in available foreign labor. However, we cannot reliably measure this impact for two primary reasons: 1) DHS has yet to develop a schedule for allocating and reducing the number of grants of CW status, and 2) economic models with which to estimate this impact are largely absent or cannot be developed, given the general lack of CNMI economic and production data and the changing conditions of the CNMI economy (due to changes in the two primary industries in the CNMI: garment manufacturing and tourism, newly imposed minimum wage requirements, and the CNMI government’s fiscal condition). Furthermore, whether the

U.S. Department of Labor (DOL) will exercise its authority to extend the transition period beyond 2014 is unknown at this time.

DHS notes that despite these limitations and for purposes of illustration only, the U.S. Government Accountability Office (GAO) in a recent report has simulated a range of possible impacts on the CNMI economy (i.e., Gross Domestic Product) given varying rates of reduction in the number of visas for foreign workers and decisions made by DOL with respect to extending the transition period (see GAO-08-791, August 2008). We do not make any attempt to recreate, modify, or substantiate the GAO analysis in this report.

As a result, we have calculated the estimable incremental direct costs resulting from changes in the fees imposed for the visas required by the rule. Because of the data limitations discussed above, we qualitatively discuss the incremental effect of these costs on overall production and government revenue in the CNMI.

The analysis focuses solely on impacts likely to be incurred during the transition period beginning November 28, 2009, and ending December 31, 2014. There are four key assumptions that shape the framework and methodology of our cost analysis:

1. The number of grants of CW status available during the transition period ending December 31, 2014, will remain constant at 22,417 visas per year. We make this assumption because 1) DHS and USCIS have not yet established a schedule for allocating and reducing the number of grants of CW status; and 2) DOL has not yet decided whether or not to extend the transition period beyond 2014. We again note that GAO report 08-791 contains more information regarding possible impacts on CNMI GDP given varying rates of reduction in the number of CW visas for foreign workers and DOL with respect to extending the transition period.

2. The starting cap of 22,417 grants of CW status is sufficient to accommodate the number of foreign workers likely to require such status in 2009. We estimate that approximately 14,543 foreign workers (13,543 in-status and 1,000 out-of-status who may be brought into lawful status under CNMI law) will be granted CW status in 2009. This number is based on the total number of foreign workers present in the CNMI as of August 2008 (19,083), as reported by the CNMI government, after subtracting out: the number of garment factory workers assumed to have returned to their home countries since that time (1,500); the number of foreign workers eligible for visa classifications under the INA (2,090); and the number of foreign workers ineligible for a grant of CW status (950 private domestic household workers and other ineligible workers).

3. The number of jobs currently held by foreign workers will not change during the transition period. We assume that the number of jobs currently held by foreign workers represents the future demand for foreign workers, or the number of jobs available for such workers. We make this assumption because CNMI's economic conditions are changing, and we lack the data to definitively predict the future state of the CNMI economy and its resulting impact on the labor market for foreign workers. We also do not know the rate at which resident workers would replace foreign workers.

4. The current number of out-of-status foreign workers is 1,000. The CNMI government estimates that 1,000 out-of-status foreign workers were present in the CNMI as of August 2008. The CNMI government's established cap of 22,417 CNMI foreign work permits is sufficient to allow employers to bring all of these workers into lawful status prior to the beginning of the transition period.

Collectively, these assumptions result in a scenario where no shortage of labor is anticipated. Therefore, this analysis focuses on estimating the change in costs associated with obtaining status for foreign workers from USCIS instead of from the CNMI government. However, it is also possible that annual reductions in the number of grants of CW status could result in a shortage of labor, adversely affecting the CNMI economy. As previously described, DHS will assess and reduce the number of grants of CW-1 status annually based, in part, on the economic conditions in the CNMI, consultation with the government of the CNMI and other Federal government agencies, and employment opportunities available for the resident workforce. Consequently, we are unable to determine conclusively at this time whether a shortage of labor will take place during the transition period.

These assumptions are uncertain. Depending on how DHS reduces the number of grants of CW status during the transition period, if the CNMI economy experiences a surge in the demand for the type of foreign labor that is ineligible for visa classifications under the INA and exceeds the CNMI status cap, or if the number of out-of-status foreign workers has been underestimated by the CNMI government, the rule could have negative impacts, perhaps significant, on the CNMI economy. The absence of a defined schedule for reducing the CW status cap, combined with the general lack of CNMI economic and production data and changing conditions of the CNMI economy, preclude a reliable analysis of alternative scenarios exploring these impacts in depth.

In our analysis, DHS first estimates the current and future baseline demand for foreign workers in the absence of the rule. In this baseline analysis, we consider the prevailing economic conditions of the CNMI to estimate the future demand for foreign workers and the total number of foreign work permits that would be issued under CNMI labor law absent the rule. Next, we

characterize the number and type of CW status grants and nonimmigrant worker visas available under the INA that would be issued as a result of the rule. We consider the number of affected businesses and foreign workers as well as the foreign workers' work and professional qualifications, eligibility based on employer or occupation, and current status in the CNMI. We then estimate the component costs that CNMI employers would incur to apply for and obtain the requisite work permits (baseline regulatory environment) and CW status for foreign workers (rule). We then combine this cost information with our estimates of the number of grants of CW status that would be issued to calculate the incremental direct costs of the rule. Finally, we discuss qualitatively the potential impact of changes in labor costs on the CNMI economy and the distributive effect of the rule on the revenues of the CNMI government.

We do not consider in our analysis separate costs to the CNMI or the U.S. Federal government to administer the current CNMI permit program and this rule, respectively. We assume that the fees associated with applying for and obtaining the requisite permits and visas account for the cost to each respective government of adjudicating petitions and providing the relevant documentation.

As of November 28, 2009, the beginning of the transition period and the implementation date for this regulation, we estimate that 17,583 foreign workers and 1,176 businesses in the CNMI will be subject to the rule. Based on the available data, we estimate that approximately 2,090 of these workers may qualify for a nonimmigrant work visa available under the INA, and at least 950 private domestic household and other ineligible workers will not be eligible for CW status, leaving 14,543 foreign workers eligible for CW status. In addition, we estimate that approximately 2,100 spouses and dependent children of foreign workers will apply for admission under a second CW status category.

We consider and evaluate the following four alternatives:

Alternative 1 (the chosen alternative): Only aliens lawfully present in the CNMI may qualify for CW status. An employer petitioner can name more than one worker or “beneficiary” on a single Form I-129CW petition if the beneficiaries will be working in the same eligible occupational category, for the same period of time, and in the same location. CW status is valid for a period of 1 year.

Alternative 2: Same as Alternative 1, but an employer petitioner can name only one eligible beneficiary on each petition.

Alternative 3: Same as Alternative 1, but CW status is valid for a period of 2 years.

Alternative 4: Same as Alternative 1, but aliens lawfully present as well as aliens unlawfully present in the CNMI as of the beginning of the transition period (November 28, 2009) may qualify for CW status.

We estimate the incremental costs on an annual basis over the same period of time as the transition period, beginning with the year 2010 (to simplify our cost analysis by estimating the incremental costs on a calendar year basis, we assume the transition period begins 1 month later on January 1, 2010) and ending with the year 2014, in the absence of any extension made by DOL. In addition, we estimate costs for the 20-month period prior to the onset of the transition period (May 8, 2008, to December 31, 2009) to account for the incremental costs of issuing CNMI work permits to those foreign workers who are currently out-of-status in the CNMI, thus allowing them to be eligible for CW status or INA visa classifications under Alternatives 1, 2, and 3 of the rule.

The incremental costs represent the change in the cost of obtaining the necessary CW status and INA visas under the rule from the baseline cost of obtaining foreign work permits

under the current CNMI system. We estimate that the baseline cost for issuing CNMI work permits to the 16,583 in-status foreign workers presently in the CNMI is about \$4.9 million annually. Table 1 summarizes the results of the regulatory analysis.

Table 1. Summary of Estimable Incremental Direct Costs of the Rule: Net Permit and Visa Costs Incurred by CNMI Employers (CNMI Businesses and CNMI Government), 2009 Dollars in Millions.

Alternative	Year						
	MAY '08 – DEC '09	2010	2011	2012	2013	2014	Total
Undiscounted							
Alternative 1	\$0.30	\$0.12	-\$3.4	-\$3.4	-\$2.6	-\$3.4	
Alternative 2	0.30	5.1	1.6	1.6	2.3	1.6	
Alternative 3	0.30	0.12	-4.6	-3.4	-3.8	-3.4	
Alternative 4	0	0.12	-3.4	-3.4	-2.6	-3.4	
3% Discount Rate							
Alternative 1	\$0.30	\$0.11	-\$3.2	-\$3.1	-\$2.3	-\$2.9	-\$11.2
Alternative 2	0.30	4.9	1.5	1.4	2.1	1.3	11.5
Alternative 3	0.30	0.11	-4.3	-3.1	-3.4	-2.9	-13.4
Alternative 4	0	0.11	-3.2	-3.1	-2.3	-2.9	-11.5
7% Discount Rate							
Alternative 1	\$0.30	\$0.11	-\$3.0	-\$2.8	-\$2.0	-\$2.4	-\$9.8
Alternative 2	0.30	4.7	1.4	1.3	1.8	1.1	10.6
Alternative 3	0.30	0.11	-4.0	-2.8	-2.9	-2.4	-11.8
Alternative 4	0	0.11	-3.0	-2.8	-2.0	-2.4	-10.1
Note: detail may not sum to total due to independent rounding. These costs do not include the CW educational fee and the H-1B visa American Competitiveness and Worker Improvement Act (ACWIA) fee because these fees represent transfer payments under Executive Order 12866 and are redistributed in the economy. Estimated costs for the period prior to the beginning of the transition period (May 2008 through December 2009) are assumed to be largely incurred in 2009; thus, these costs are not discounted to calculate their present value in 2009.							

The total present value costs of Alternatives 1, 3, and 4 are projected to range from -\$9.8 million to -\$13.4 million depending on the validity period of CW status (1 or 2 years), whether out-of-status aliens present in the CNMI are eligible for CW status, and the discount rate applied.

These negative values indicate that society will experience a net cost savings as a result of implementing one of these three alternatives instead of the baseline. These savings are attributable to the flexibility of allowing multiple beneficiaries to be included in a single Form I-129CW petition, which is in contrast to the current CNMI permit system that requires an application and fee paid for each employee. The additional costs for applying for and obtaining CW status for spouses and children and INA visas for certain qualified foreign workers do not outweigh the benefits of submitting a single petition for multiple beneficiaries seeking CW status. In comparison to the chosen alternative (Alternative 1), increasing the CW status validity period from 1 year to 2 years (Alternative 3) results in additional cost savings of about 20 percent. Additionally, allowing out-of-status workers eligibility for CW status (Alternative 4) results in additional cost savings of about 3 percent because CNMI employers would not necessarily need to bring out-of-status workers to an in-status condition (under CNMI law) prior to the beginning of the transition period.

The total present value costs of Alternative 2 are projected to range from \$10.6 million to \$11.5 million depending on the discount rate applied. These costs are substantially higher than the costs estimated for the other three alternatives. The positive values represent a net cost to society, which is expected given that this alternative requires a petition for each beneficiary.

The costs presented in Table 1 do not include the statutorily required fee of \$150 per beneficiary per year to fund vocational education programs in the CNMI. This fee is to be paid for each beneficiary seeking CW status. The costs also do not include the ACWIA fee required for H-1B visa applicants. Although these fees represent a cost to businesses or employer petitioners in the CNMI, we consider these fees as a transfer or redistribution of funds within the CNMI and U.S. economies and not as a component of the net costs of the rule to society. We

note that from the perspective of the employers, when these fees are included, Alternatives 1, 3, and 4 are a net overall cost rather than benefit.

Ideally, we would quantify and monetize the benefits of the regulation and compare them to the costs. The intended benefits of the rule include improvements in national and homeland security and protection of human rights. First, implementation of the rule assures that the admission of nonimmigrants to the CNMI is consistent with existing Federal laws and practices intended to secure and control the borders of the United States and its territories. Second, the rule would help protect foreign workers in the CNMI from abuses such as human trafficking and other illicit activity.

Due to limitations in data and the difficulty associated with quantifying national and homeland security improvements, we describe the intended benefits of the regulation qualitatively. Moreover, under the assumptions outlined previously, because three of the four alternatives analyzed, including the chosen alternative (Alternative 1), are projected to result in net cost savings to society, the rule may produce a net overall quantifiable benefit to society. Assuming that the fees collected by the CNMI government in the baseline and by USCIS under each regulatory alternative equal the costs to the CNMI and U.S. Federal governments of administering their respective programs, the results of our analysis imply that the U.S. Federal government can more cost-effectively administer the program while also providing improved security benefits.

Notwithstanding the inestimable potential broader impacts of this regulation on the CNMI economy that would result if the availability of foreign labor is affected, the results of our analysis on the incremental societal costs of the associated visa or status fees indicate that Alternative 1 provides the most favorable combination of cost and stringency. While Alternative

2 might be considered more stringent because it requires a petition for each beneficiary, the costs are substantially higher than the other three alternatives. Alternative 3 is expected to achieve more cost savings than Alternative 1, but the 1-year status validity period under Alternative 1 facilitates USCIS's effective management of the number of grants of CW status issued at any given time and the statutory reduction on an annual basis to zero by the end of the transition period. Alternative 4 is also expected to achieve more cost savings than Alternative 1, but is considered less stringent because DHS has determined that requiring lawful status in the CNMI as a prerequisite for CW eligibility is the most efficient means to begin the Congressionally mandated drawdown of transitional workers to zero by the end of the transition period. Furthermore, to allow out-of-status workers in the CNMI to obtain CW status would encourage noncompliance with CNMI immigration law during the timeframe before the transition period effective date by removing the incentive for such workers with lawful status to maintain or reacquire such lawful status under CNMI law prior to the transition.

DHS and USCIS welcome comments on this analysis and the regulatory alternatives considered.

### **C. Impacts to Small Entities.**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 – 612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), requires Federal agencies to consider the potential impact of regulations on small businesses, small governmental jurisdictions, and small organizations during the development of their rules. When an agency invokes the good cause exception under the Administrative Procedure Act (APA) to make changes effective through an interim final rule, the RFA does not require an agency to prepare a regulatory flexibility analysis. This rule makes changes for which notice and comment

are not necessary, and, accordingly, DHS is not required to prepare a regulatory flexibility analysis.

However, DHS and USCIS have considered the impacts of this interim rule on small entities in the CNMI. A summary of the analysis is presented below. For further details regarding this analysis, please refer to the complete Regulatory Assessment that has been placed in the public docket for this rulemaking.

(1) Why action by the agency is being considered: USCIS is promulgating this regulation in response to legislation by Congress imposing Federal immigration law on the CNMI. Congressional intent in enacting this legislation is “to ensure that effective border control procedures are implemented and observed, and that national security and homeland security issues are properly addressed.” Please refer to Section II above for further detail.

(2) The objectives of, and legal basis for, the rule: On May 8, 2008, President George W. Bush signed the CNRA into law, Public Law 110-229 (CNRA). Title VII, Subtitle A of the CNRA calls for the extension of U.S. immigration laws to the CNMI, with special provisions to allow for the orderly phasing-out of CNMI’s nonresident contract worker program and the orderly phasing-in of Federal responsibilities over immigration in the CNMI. Congress directs USCIS to minimize the “potential adverse economic and fiscal effects of phasing-out” CNMI’s nonresident contract worker program and maximizing CNMI’s “potential for future economic and business growth.” The objective of the CNMI-only transitional worker program is to provide for an orderly transition from the existing CNMI foreign worker permit system to the U.S. immigration system and to mitigate potential harm to the CNMI economy as employers adjust their hiring practices and foreign workers obtain nonimmigrant and immigrant visa classifications available under the INA. Please refer to Section II above for further detail.

(3) The type and number of small entities to which the rule will apply: We assume all businesses in the CNMI employ foreign workers, except those businesses with no paid employees. The data on businesses by size show that over 80 percent of businesses in the CNMI have between 1 and 19 employees. We estimate there are approximately 1,000 businesses with 1 to 19 employees in the CNMI. The 2007 economic census of the CNMI shows that businesses with 10 to 19 employees had average revenues of just over \$1 million that year (smaller businesses had even lower average revenues). According to the Small Business Administration's "Table of Small Business Size Standards Matched to North American Industry Classification System Codes," other than in crop production, businesses in the vast majority of industries are considered small if they have annual revenues less than \$7 million or fewer than 50 employees. In many industries, the threshold is higher. In addition, an unknown portion of the approximately 177 businesses with 20 or more employees are likely to be small according to the SBA size standards.

The CNMI government also employs foreign workers. A small governmental jurisdiction is a government representing fewer than 50,000 constituents. Under this definition, the CNMI government is not considered small, as the population of the CNMI is approximately 66,000.

Information on non-profit organizations in the CNMI is largely non-existent or incomplete. USCIS believes, however, that like virtually all entities in the CNMI, these organizations likely employ foreign workers and would likely be considered small and would be affected by this rule.

(4) Reporting, recordkeeping and other compliance requirements:

The forms required by this rule are expected to be submitted on paper by employers. In our analysis, we assume employees in the job category "Management of companies and

enterprises” will be completing and filing these forms, which require basic administrative and recordkeeping skills. The skills required to complete the new I-129CW form are essentially the same as the skills required to complete the necessary paperwork under the current CNMI permit program.

As described in the previous section on Executive Order 12866, DHS and USCIS considered four regulatory alternatives.

Alternative 1 (the chosen alternative): Only aliens lawfully present in the CNMI may qualify for CW status. An employer petitioner can name more than one worker or “beneficiary” on a single Form I-129CW petition if the beneficiaries will be working in the same eligible occupational category, for the same period of time, and in the same location. CW status is valid for a period of 1 year.

Alternative 2: Same as Alternative 1, but an employer petitioner can name only one eligible beneficiary on each petition.

Alternative 3: Same as Alternative 1, but CW status is valid for a period of 2 years.

Alternative 4: Same as Alternative 1, but aliens lawfully present as well as aliens unlawfully present in the CNMI as of the beginning of the transition period (November 28, 2009) may qualify for CW status.

Note that in the analysis in the previous section, fees associated with CW status were considered intra-economy transfers and were thus not considered in the estimation of net costs or net benefits to society. In this analysis of small entities, however, these status fees and the \$150 educational fee are considered explicitly because the fees are a direct cost a small entity will incur and a business’s annual revenue and ability to hire workers will be directly impacted by these fees.

As estimated previously, businesses may experience costs in 2008 and 2009 to bring out-of-status workers into lawful CNMI status prior to the onset of the transition period (November 28, 2009) in order to avoid having to replace those workers. In 2010, businesses will obtain visas issued under the INA for eligible workers, and they will obtain CW status for the remaining eligible workers as well as their spouses and children. For the purposes of the cost analysis, we assume the INA-eligible workers will all qualify for H-1B visas (while this group may qualify for other INA classifications, we use the cost to petition for an H-1B visa because the costs for these visas are higher than for the other classifications that foreign workers may be eligible for). The H-1B visas will be renewed in 2013, while CW status will be renewed annually or biennially, depending on the regulatory alternative. Table 2 presents the annual estimable incremental costs (i.e., the costs of CW status and INA visas minus the costs of CNMI permits had the rule not come into effect) for businesses of complying with the rule under the chosen alternative, Alternative 1.

Table 2. Distribution of Net Permit and Visa Costs by Business Size, Alternative 1—Chosen Alternative (undiscounted, \$M, 2009)

Business size (employees)	May '08–Dec '09	2010	2011	2012	2013	2014
No paid employees	\$0	\$0	\$0	\$0	\$0	\$0
1 to 4	0.02	0.41	0.03	0.03	0.18	0.02
5 to 9	0.04	0.45	-0.13	-0.14	0.09	-0.15
10 to 19	0.07	0.79	-0.24	-0.24	0.16	-0.26
20 or more	0.17	2.4	-0.86	-0.88	0.80	-0.93
All businesses	\$0.30	\$4.1	-\$1.2	-\$1.2	\$1.2	-\$1.3

Note: Net permit and visa costs include the CW education fee and H-1B visa ACWIA fee.

The costs of Alternative 1, as experienced by businesses, are the highest in the first year of the transition period, when businesses obtain initial INA-eligible visas for their employees in addition to CW status and providing biometrics. In most years businesses will collectively save money compared to the baseline, as the CW status, including the education fee, are less

expensive than the CNMI permits on a per-worker basis, largely because multiple beneficiaries may be included on a single I-129CW petition. However, the smallest businesses, those employing 1 to 4 workers, may experience positive costs in each year.

Alternative 2 requires businesses to file separate I-129CW petitions for each of their foreign workers (multiple beneficiaries are not permitted on a single petition). These costs, distributed by business size, are shown in Table 3.

Table 3. Distribution of Net Permit and Visa Costs by Business Size, Alternative 2  
(undiscounted, \$M, 2009)

Business size (employees)	May '08–Dec '09	2010	2011	2012	2013	2014
No paid employees	\$0	\$0	\$0	\$0	\$0	\$0
1 to 4	0.02	0.69	0.31	0.31	0.46	0.30
5 to 9	0.04	1.1	0.48	0.47	0.70	0.46
10 to 19	0.07	1.9	0.84	0.83	1.2	0.81
20 or more	0.17	5.4	2.1	2.1	3.8	2.1
All businesses	\$0.30	\$9.0	\$3.8	\$3.7	\$6.2	\$3.6

Note: Net permit and visa costs include the CW education fee and H-1B visa ACWIA fee.

The incremental costs of Alternative 2 are positive in every year, as the transitional worker program is more expensive than the CNMI permit process in the baseline in this case. Once again, businesses face the highest costs in 2010 due to the added expense of obtaining INA visas and providing biometrics.

Under Alternative 3, CW status is valid for two years. This analysis calculates costs as if businesses will be required to pay the education fee for those two years at the same time (i.e., businesses will pay the \$320 I-129CW filing fee along with \$300 for two years education fee at one time). The costs of visas under existing INA classifications remain the same. The costs of Alternative 3 are shown in Table 4.

Table 4. Distribution of Net Permit and Visa Costs by Business Size, Alternative 3  
(undiscounted, \$M, 2009)

Business size (employees)	May '08–Dec '09	2010	2011	2012	2013	2014
No paid employees	\$0	\$0	\$0	\$0	\$0	\$0
1 to 4	0.02	0.59	-0.37	0.20	-0.22	0.02
5 to 9	0.04	0.72	-0.57	0.12	-0.34	-0.15
10 to 19	0.07	1.3	-1.0	0.21	-0.60	-0.26
20 or more	0.17	3.7	-2.6	0.28	-0.84	-0.93
All businesses	\$0.30	\$6.2	-\$4.5	\$0.8	-\$2.0	-\$1.3

Note: Net permit and visa costs include the CW education fee and H-1B visa ACWIA fee.

Businesses experience positive costs in the years in which they pay CW status costs as well as payment of two years of education fees. In the alternate years, businesses save money by not obtaining CNMI permits for their workers. The net effect of these costs in comparison to Alternative 1 is a slight savings for businesses, as they spend half as much on I-129CW filing fees under that alternative.

Alternative 4 presents the same cost components and timing as Alternative 1 with one exception: Because out-of-status workers will be eligible for CW status, businesses have no incentive to bring those workers into status (under CNMI law) prior to the onset of the transition period. Therefore, the annual costs after the beginning of the transition period (for our cost analysis, we assume January 1, 2010), for the two alternatives are the same; only the costs in 2008 and 2009 differ. The costs for Alternative 4 are listed in Table 5.

Table 5. Distribution of Net Permit and Visa Costs by Business Size, Alternative 4 (undiscounted, \$M, 2009)

Business size (employees)	May '08–Dec '09	2010	2011	2012	2013	2014
No paid employees	\$0	\$0	\$0	\$0	\$0	\$0
1 to 4	0	0.41	0.03	0.03	0.18	0.02
5 to 9	0	0.45	-0.13	-0.13	0.09	-0.15
10 to 19	0	0.79	-0.24	-0.24	0.16	-0.26
20 or more	0	2.4	-0.86	-0.86	0.80	-0.93
All businesses	\$0	\$4.1	-\$1.2	-\$1.2	\$1.2	-\$1.3

Note: Net permit and visa costs include the CW education fee and H-1B visa ACWIA fee.

Under all four alternatives, businesses experience the highest net positive costs in the first year of the transition period. Therefore, we will compare these 2010 costs to the annual revenues and payrolls for businesses of each size category. Table 6 lists the number of businesses in each size category along with the average payroll and average revenue of businesses in those size categories in 2010 dollars.

Table 6. Average Payroll and Revenue of Businesses

Business size (employees)	Businesses	Average Payroll (\$M)	Average Revenue (\$M)
No paid employees	61	\$0	\$0.096
1 to 4	476	0.034	0.17
5 to 9	244	0.096	0.66
10 to 19	210	0.17	1.0
20 or more	200	1.0	4.8
All businesses	1,191	\$0.23	\$1.2

Average payrolls range from \$34,000 per business (1 to 4 employees) to \$1.0 million per business (20 or more employees). Average revenue also scales with the size of the business, from \$96,000 for sole proprietorships to \$4.8 million for businesses with 20 or more employees. For comparison, Table 7 presents the per-business incremental costs of each alternative and the ratio of these costs to the average payroll and revenue.

Table 7. Estimated 2010 Permit and Visa Costs Per Business as a Percentage of Payroll and Revenue

Business size (employees)	Cost/Business (\$)	% Payroll	% Revenue
Alternative 1			
No paid employees	\$0	0%	0%
1 to 4	869	2.6	0.52
5 to 9	1,832	1.9	0.28
10 to 19	3,750	2.2	0.37
20 or more	12,230	1.3	0.26
All businesses (average)	\$3,438	1.5%	0.29%
Alternative 2			
No paid employees	\$0	0%	0%
1 to 4	1,451	4.3	0.86

5 to 9	4,313	4.5	0.66
10 to 19	8,881	5.2	0.87
20 or more	27,203	2.8	0.57
All businesses (average)	\$7,598	3.3%	0.64%
Alternative 3			
No paid employees	\$0	0%	0%
1 to 4	1,241	3.7	0.74
5 to 9	2,938	3.0	0.45
10 to 19	6,028	3.5	0.59
20 or more	18,291	1.9	0.38
All businesses (average)	\$5,232	2.3%	0.44%
Alternative 4			
No paid employees	\$0	0%	0%
1 to 4	869	2.6	0.52
5 to 9	1,832	1.9	0.28
10 to 19	3,750	2.2	0.37
20 or more	12,230	1.3	0.26
All businesses (average)	\$3,438	1.5%	0.29%
Note: Net permit and visa costs include the CW status education fee and H-1B visa ACWIA fee.			

Under all four alternatives, the additional costs imposed by the rule in 2010 represent less than 0.9 percent of annual revenues. Compared to payroll, however, the impacts are about 5 to 7 times higher. Under Alternative 1 (the chosen alternative) businesses of all sizes experience increased labor costs of 1.3 to 2.6 percent on average, depending on the size of the business. Considering that the payroll costs presented in Table 6 do not include benefits, the actual percentage increase in labor costs for 2010 are actually smaller than reported in the exhibit. In light of these results, it does not appear that the change from CNMI permits to USCIS status represents a large impact on small businesses.

The analysis to this point has focused on the impact of replacing the CNMI foreign worker permits with INA visas and the CW status. This change does not appear to have a large economic impact on small businesses. However, the rule also establishes the intent of USCIS to reduce the number of grants of CW status on an annual basis to zero at the conclusion of the transition period, unless the transition period is extended by the U.S. Department of Labor.

Reducing the number of grants of CW status may have a larger impact. In addition the ineligibility of certain workers (e.g., domestic household workers employed directly by private residents) may have a notable economic impact.

(5) Federal rules that may duplicate, overlap or conflict with the interim rule: In 1976, the CNMI negotiated political union with the United States, agreeing to the Covenant to Establish a Commonwealth of the Northern Mariana Islands (CNMI) in Political Union with the United States. Under the Covenant, United States citizenship was conferred on legally qualified CNMI residents, and Federal law generally applies to the CNMI, with the exception of the income tax system, and until recently, the Federal minimum wage and immigration laws. This rule, when finalized, supersedes existing CNMI immigration law.

(6) Significant alternatives to the interim rule that accomplish the stated objectives of applicable statutes and that minimize any economic impact to small entities: As described above, USCIS evaluated four regulatory alternatives to consider changes in the admission and filing requirements, including those that minimize the incremental cost burden to CNMI employers and businesses, including small entities. To address Congress' requirement that USCIS minimize "potential adverse economic and fiscal effects of phasing-out" CNMI's nonresident contract worker program, the rule allows for multiple beneficiaries per Form I-129CW, which, as shown above, represents a cost savings over the baseline and relative to Alternative 2, where a separate Form I-129CW is required for each worker. USCIS had considered alternatives that exempt small entities from this rule; however, such alternatives would not achieve the security objective of the CNRA, which is to establish Federal responsibility over immigration throughout the CNMI, and during the transition period, provide all eligible foreign workers a temporary status to continue work in the CNMI. While USCIS

cannot exempt small entities from the requirements of the rule and meet the statutory objectives of the CNRA, USCIS may grant waivers from the Form I-129CW and biometric fees on a case-by-case basis for those applicants showing an inability to pay, which has the potential to minimize the impact of the rule on small entities.

In addition, we emphasize that it is the reduction in the number of grants of CW status that will have a potentially large impact on small entities; however, the interim rule does not prescribe a schedule for allocating CW status throughout the transition period.

In summary, because the rule affects all businesses employing foreign workers, it likely affects a notable number of small entities in every industry. Based on this analysis, USCIS does not believe the requirement that businesses obtain CW status or INA visas will have a large impact on a per-business basis because it will coincide with the end of the CNMI permit program. However, the impact of the reduction in grants of available status (and thus foreign workers) is less certain. DHS and USCIS welcome comments on this analysis.

#### **D. Unfunded Mandates Reform Act of 1995.**

Title II of the Unfunded Mandate Reform Act of 1995 (UMRA) requires agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector if the rule will result in expenditures exceeding \$100 million (adjusted for inflation) in any one year. We estimate that this rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year. Please refer to the section above on Executive Order 12866 for further details on the potential economic impacts of this rule.

#### **E. Executive Order 13132.**

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

**F. Executive Order 12988 Civil Justice Reform.**

This rule meets the applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

**G. Paperwork Reduction Act (PRA).**

Under the Paperwork Reduction Act of 1995, Public Law 104-13, 109 Stat. 163 (1995), all Departments are required to submit to OMB, for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. The collections of information encompassed within this rule have been submitted to the OMB for review in accordance with the Paperwork Reduction Act of 1995, 44 U.S.C. 3507. An agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

USCIS is requiring a new form, Form I-129CW, to collect the information required for an employer to petition for CW status on behalf of one or more beneficiaries. Since this is an interim rule, this information collection has been submitted and approved by OMB under the emergency review and clearance procedures covered under the PRA. During the first 60 days, USCIS is requesting comments on this information collection until [Insert date 60 days from date of publication in the FEDERAL REGISTER]. When submitting comments on this information collection, your comments should address one or more of the following four points.

- (1) Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- (2) Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- (3) Enhance the quality, utility, and clarity of the information to be collected; and
- (4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

**Overview of this information collection:**

- a. Type of information collection: New information collection.
- b. Abstract: This collection is necessary to determine whether a petitioner and beneficiary meet the eligibility criteria, limitations and parameters for the CW-1 nonimmigrant program as required by or consistent with an interpretation of the applicable provisions of section 702(a) of the CNRA.
- c. Title of Form/Collection: Petition for a Nonimmigrant Worker in the CNMI.
- d. Agency form number, if any, and the applicable component of the Department of Homeland Security sponsoring the collection: Form I-129CW; U.S. Citizenship and Immigration Services.
- e. Affected public who will be asked or required to respond: Individuals and businesses.
- f. An estimate of the total number of respondents: 1,178 respondents.

g. Number of Responses per Respondent: 1.34. Responses per respondent reflect the assumption that most petitioners will have to file only one I-129CW, but some petitioners will have to file multiple forms. On average, this equals 1.34 responses per respondent.

h. Total Annual Responses: 1,580

i. Hours per Response: 3.0 hours per response.

j. Total Annual Reporting Burden: 4,740

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden may be submitted to The Department of Homeland Security, USCIS, Chief, Regulatory Products Division, Clearance Office, 111 Massachusetts Avenue, Washington, DC 20529-2210.

Besides the creation of the new Form I-129CW, the information collection requirements contained in this rule have been cleared by OMB under the provisions of the Paperwork Reduction Act. 44 U.S.C. Chapter 35; 5 CFR 1320.

In addition, termination of the current CNMI worker program will result in employers petitioning for those employees under another visa under the INA. Termination of the CNMI worker program will increase the number of respondents submitting Form I-129, Petition for a Nonimmigrant Worker, OMB Control Number 1615-0009, and Form I-539, Application to Extend/Change Nonimmigrant Status, OMB Control Number 1615-0003. Accordingly, DHS submitted Form OMB 83-C, Correction Worksheet, to OMB to increase the number of respondents submitting Form I-129 and Form I-539.

## **List of Subjects**

8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of Information, Privacy, Reporting and record-keeping requirements, Surety bonds.

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign Officials, Health Professions, Reporting and recordkeeping requirements, Students.

8 CFR Part 274a

Administrative practice and procedure, Aliens, Employment, Penalties, Reporting and recordkeeping requirements.

8 CFR Part 299

Immigration, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

**PART 103—POWERS AND DUTIES; AVAILABILITY OF RECORDS**

1. The authority citation for part 103 continues to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 et seq.), E.O. 12356, 47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.7 is amended by

- a. Adding the entry “I-129CW” in proper alpha/numeric sequence, in paragraph (b)(1); and
- b. Revising paragraph (c)(5)(i).

The revisions and additions read as follows:

**§ 103.7 Fees.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

\* \* \* \* \*

Form I-129CW. For an employer to petition for CW status on behalf of one or more beneficiaries—\$320 plus a supplemental CNMI education funding fee of \$150 per beneficiary per year. The CNMI education funding fee cannot be waived.

\* \* \* \* \*

(c) \* \* \*

(5) \* \* \*

(i) Biometrics; Form I-90; Form I-129CW; Form I-751; Form I-765; Form I-817; I-929; Form N-300; Form N-336; Form N-400; Form N-470; Form N-565; Form N-600; Form N-600K; and Form I-290B and motions filed with U.S. Citizenship and Immigration Services relating to the specified forms in this paragraph (c); and

\* \* \* \* \*

## **PART 214—NONIMMIGRANT CLASSES**

3. The authority citation for part 214 is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Public Law 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; Title VII of Public Law 110-229; 8 CFR part 2.

4. Section 214.2 is amended by adding paragraph (w) to read as follows:

**§ 214.2 Special requirements for admission, extension, and maintenance of status.**

\* \* \* \* \*

(w) CNMI-Only Transitional Worker (CW-1)

(1) Definitions. The following definitions apply to petitions for CW status for employment in the Commonwealth of the Northern Mariana Islands (the CNMI or the Commonwealth) filed under this section:

(i) Doing business means the regular, systematic, and continuous provision of goods or services by an employer as defined in this paragraph and does not include the mere presence of an agent or office of the employer in the CNMI.

(ii) Employer means a person, firm, corporation, contractor, or other association, or organization which:

(A) Engages a person to work within the CNMI; and

(B) Has or will have an employer-employee relationship with the CW-1 nonimmigrant being petitioned for.

(iii) Employer-employee relationship means that the employer may hire, pay, fire, supervise, or otherwise control the work of the employee.

(iv) Lawfully present in the CNMI means that the alien has lawfully been admitted to the CNMI under the immigration laws of the Commonwealth in a category other than short term visitor for pleasure or business (240(c), 703(A), 703(B), or 704(B) under CNMI classifications).

With respect to any application for transitional worker status filed or adjudicated after the transition program effective date, lawfully present in the CNMI means that the alien:

(A) Is an alien described in section 6(e)(1) or (2) of Public Law 94-241, as added by section 702(a) of Public Law 110-229, other than an alien described in section 6(e)(1) who was

admitted to the CNMI as a short term visitor for pleasure or business (240(c), 703(A), 703(B), or 704(B) under CNMI classifications); or

(B) Was lawfully admitted to the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted as a visitor for business or pleasure (B-1 or B-2 or under any visa-free travel provision).

(v) Legitimate business means a real, active, and operating commercial or entrepreneurial undertaking which produces services or goods for profit, or is a governmental, charitable or other validly recognized nonprofit entity. The business must meet applicable legal requirements for doing business in the CNMI. A business will not be considered legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under Federal or CNMI law. The Secretary will determine whether a business is legitimate.

(vi) Minor child means a child as defined in section 101(b)(1) of the Act who is under the age of eighteen years.

(vii) Numerical limitation means the maximum number of persons who may be granted CW-1 status in a given fiscal year or other period as determined by the Secretary, as follows:

(A) For the period beginning on November 28, 2009 and ending on September 30, 2010, the numerical limitation is 22,417.

(B) For each fiscal year beginning on October 1, 2010 until the end of the transition period, the numerical limitation shall be a number less than 22,417 that is determined by the Secretary and published via Notice in the Federal Register. The numerical limitation for any fiscal year shall be less than the number for the previous fiscal year, and shall be a number

reasonably calculated in the Secretary's discretion to reduce the number of CW-1 nonimmigrants to zero by the end of the transition period.

(C) The Secretary may adjust the numerical limitation for a fiscal year or other period in her discretion at any time via Notice in the Federal Register, as long as such adjustment is consistent with paragraph (w)(1)(vii)(B) of this section.

(viii) Occupational category means those employment activities that the Secretary of Homeland Security has determined require alien workers to supplement the resident workforce and includes:

- (A) Professional, technical, or management occupation;
- (B) Clerical and sales occupations;
- (C) Service occupations;
- (D) Agricultural, fisheries, forestry, and related occupations;
- (E) Processing occupations;
- (F) Machine trade occupations;
- (G) Benchwork occupations;
- (H) Structural work occupations; and
- (I) Miscellaneous occupations.

(ix) Petition means USCIS Form I-129CW, Petition for a Nonimmigrant Worker in the CNMI, a successor form, or other form, any supplemental information requested by USCIS, and additional evidence as prescribed by USCIS.

(x) Transition period means the period beginning on the transition program effective date and ending on December 31, 2014, unless the CNMI-only transitional worker program is extended by the Secretary of Labor.

(xi) Transition program effective date means November 28, 2009.

(xii) United States worker means a national of the United States, an alien lawfully admitted for permanent residence, or a national of the Federated States of Micronesia, the Republic of the Marshall Islands, or the Republic of Palau who is eligible for nonimmigrant admission and is employment-authorized under the Compacts of Free Association between the United States and those nations.

(2) Eligible aliens. Subject to the numerical limitation, an alien may be classified as a CW-1 nonimmigrant if, during the transition period, the alien:

(i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category as designated by the Secretary as requiring alien workers to supplement the resident workforce;

(ii) Is petitioned for by an employer;

(iii) Is not present in the United States, other than the CNMI;

(iv) If present in the CNMI, is lawfully present in the CNMI;

(v) Is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B)(i)(II) of the Act (not in possession of nonimmigrant visa); and

(vi) Is ineligible for status in a nonimmigrant worker classification under section 101(a)(15) of the Act, including but not limited to, section 101(a)(15)(H) of the Act.

(3) Derivative beneficiaries – CW-2 nonimmigrant classification. The spouse or minor child of a CW-1 nonimmigrant may accompany or follow the alien as a CW-2 nonimmigrant if the alien:

(i) Is not present in the United States, other than the CNMI;

(ii) If present in the CNMI, is lawfully present in the CNMI; and

(iii) Is not inadmissible to the United States as a nonimmigrant, except for an alien present in the CNMI who is described in section 212(a)(7)(B) of the Act (not in possession of nonimmigrant visa).

(4) Eligible employers. To be eligible to petition for a CW-1 nonimmigrant worker, an employer must:

(i) Be engaged in legitimate business;

(ii) Consider all available United States workers for the positions being filled by the CW-1 worker;

(iii) Offer terms and conditions of employment which are consistent with the nature of the occupation, activity, and industry in the CNMI; and

(iv) Comply with all Federal and Commonwealth requirements relating to employment, including but not limited to nondiscrimination, occupational safety, and minimum wage requirements.

(5) Petition requirements. An employer who seeks to classify an alien as a CW-1 worker must file a petition with USCIS and pay the requisite petition fee plus the CNMI education fee of \$150 per beneficiary per year. If the beneficiary will perform services for more than one employer, each employer must file a separate petition with USCIS.

(6) Accompanying evidence. A petition must be accompanied by:

(i) Evidence demonstrating the petitioner meets the definition of eligible employer in this section.

(ii) An attestation by the petitioner certified as true and accurate by an appropriate official of the petitioner, of the following:

- (A) Qualified United States workers are not available to fill the position;
- (B) The employer is doing business as defined in 8 CFR 214.2(w)(1)(i);
- (C) The employer is a legitimate business as defined in 8 CFR 214.2(w)(1)(v);
- (D) The beneficiary meets the qualifications for the position;
- (E) The beneficiary, if present in the CNMI, is lawfully present in the CNMI;
- (F) The position is not temporary or seasonal employment, and the petitioner does not reasonably believe it to qualify for any other nonimmigrant worker classification; and
- (G) The position falls within the list of occupational categories designated by the Secretary.

(iii) Evidence of licensure if an occupation requires a Commonwealth or local license for an individual to fully perform the duties of the occupation. Categories of valid licensure for CW-1 classification are:

(A) Licensure. An alien seeking CW-1 classification in that occupation must have that license prior to approval of the petition to be found qualified to enter the CNMI and immediately engage in employment in the occupation.

(B) Temporary licensure. If a temporary license is available and allowed for the occupation with a temporary license, USCIS may grant the petition at its discretion after considering the duties performed, the degree of supervision received, and any limitations placed on the alien by the employer and/or pursuant to the temporary license.

(C) Duties without licensure. If the CNMI allows an individual to fully practice the occupation that usually requires a license without a license under the supervision of licensed senior or supervisory personnel in that occupation, USCIS may grant CW-1 status at its discretion after considering the duties performed, the degree of supervision received, and any

limitations placed on the alien if the facts demonstrate that the alien under supervision could fully perform the duties of the occupation.

(7) Change of employers. An unauthorized change of employment to a new employer will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. A CW-1 nonimmigrant may change employers if:

(i) The prospective new employer files a petition requesting the CW-1, and  
(ii) An extension of the alien's stay is requested if necessary for the validity period of the petition.

(8) Amended or new petition. If there are any material changes in the terms and conditions of employment, the petitioner must file an amended or new petition to reflect the changes.

(9) Multiple beneficiaries. A petitioning employer may include more than one beneficiary in a CW-1 petition if the beneficiaries will be working in the same occupational category, for the same period of time, and in the same location.

(10) Named beneficiaries. The petition must include the name of the beneficiary and other required information, as indicated in the form instructions, at the time of filing. Unnamed beneficiaries will not be permitted.

(11) Early termination. The petitioning employer must pay the reasonable cost of return transportation of the alien to the alien's last place of foreign residence if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission.

(12) Approval. USCIS will consider all the evidence submitted and such other evidence required in the form instructions to adjudicate the petition. USCIS will notify the petitioner of

the approval of the petition on Form I-797, Notice of Action, or in another form as USCIS may prescribe:

(i) The approval notice will include the classification and name of the beneficiary or beneficiaries and the petition's period of validity. A petition for more than one beneficiary may be approved in whole or in part.

(ii) The petition may not be filed or approved earlier than six months before the date of actual need for the beneficiary's services. USCIS may in its discretion permit petitions to be filed and take other actions under this paragraph prior to the transition program effective date, but in no case will USCIS grant CW-1 status or authorize the admission of any alien to the CNMI prior to such date.

(13) Petition validity. A beneficiary will be admitted to the CNMI for the validity period of the petition, plus up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition. No petition shall authorize admission as a CW-1 nonimmigrant before the transition period effective date.

(14) Where to apply. The beneficiary, eligible spouse and minor children may:

(i) Upon petition approval, apply for a visa at a U.S. consulate authorizing admission in CW-1 or CW-2 status, as appropriate, at a port of entry in the CNMI on or after the transition program effective date; or

(ii) If present in the CNMI, apply for classification as a CW-1 or CW-2 nonimmigrant by filing Form I-129CW (or such alternative form as USCIS may designate) with USCIS. An alien applying for CW-1 or CW-2 status is eligible for a waiver of the fee for Form I-129CW based upon inability to pay as provided by 8 CFR 103.7(c)(1).

(15) Biometrics. USCIS shall require a beneficiary initially applying for CW-1 or CW-2 status to submit biometric information if the beneficiary is present in the CNMI. A beneficiary present in the CNMI must pay or obtain a waiver of the biometric service fee described in 8 CFR 103.7(b)(1).

(16) Period of admission. (i) A CW-1 nonimmigrant will be admitted for an initial period of one year. A CW-2 spouse will be admitted for the same period as the principal alien. A CW-2 minor child will be admitted for the same period as the principal alien, but such admission shall not extend beyond the child's 18th birthday.

(ii) The temporary departure from the CNMI of the CW-1 nonimmigrant will not affect the derivative status of the CW-2 spouse and minor children, provided the familial relationship continues to exist and the principal remains eligible for admission as a CW-1 nonimmigrant.

(17) Extension of visa petition validity and extension of stay. (i) The petitioner may request an extension of an employee's CW-1 nonimmigrant status by filing a new petition and accompanying evidence as described in 8 CFR 214.2(w)(6)(ii).

(ii) A request for a petition extension may be filed only if the validity of the original petition has not expired.

(iii) Extensions of CW-1 status may be granted for periods of 1 year until the end of the transition period, subject to the numerical limitation.

(iv) To qualify for an extension of stay, the petitioner must demonstrate that the beneficiary or beneficiaries:

- (A) Continuously maintained the terms and conditions of CW-1 status; and
- (B) Remains admissible to the United States; and
- (C) Remains eligible for CW-1 classification.

(v) The derivative CW-2 nonimmigrant may file an application for extension of nonimmigrant stay on Form I-539 (or such alternative form as USCIS may designate) in accordance with the form instructions. The CW-2 status extension may not be approved until approval of the CW-1 extension petition.

(18) Change or adjustment of status. A CW-1 or CW-2 nonimmigrant can apply to change nonimmigrant status under section 248 of the Act or apply for adjustment of status under section 245 of the Act, if otherwise eligible. During the transition period, CW-1 or CW-2 nonimmigrants may be petitioned for or may apply for any nonimmigrant or immigrant visa classification for which they may qualify.

(19) Effect of filing an application for or approval of a permanent labor certification, preference petition, or filing of an application for adjustment of status on CW-1 or CW-2 classification. An alien may legitimately come to the CNMI for a temporary period as a CW-1 or CW-2 nonimmigrant and, at the same time, lawfully seek to become a lawful permanent resident of the United States provided he or she intends to depart the CNMI voluntarily at the end of the period of authorized stay. The filing of an application for or approval of a permanent labor certification or an immigrant visa preference petition, the filing of an application for adjustment of status, or the lack of residence abroad will not be the basis for denying:

- (i) A CW-1 petition filed on behalf of the alien;
- (ii) A request to extend a CW-1 status pursuant to a petition previously filed on behalf of the alien; or
- (iii) An application for admission as a CW-1 or CW-2 nonimmigrant.

(20) Rejection. USCIS may reject an employer's petition for new or extended CW-1 status if the numerical limitation has been met. In that case, the petition and accompanying fee

will be rejected and returned with the notice that numbers are unavailable for the particular nonimmigrant classification. The beneficiary's application for admission based upon an approved petition will not be rejected based upon the numerical limitation.

(21) Denial. The ultimate decision to grant or deny CW-1 or CW-2 status is a discretionary determination, and the petition or the application may be denied for failure of the petitioner or the applicant to demonstrate eligibility or for other good cause. The denial of a CW-1 petition may be appealed to the USCIS Administrative Appeals Office. The denial of a Form I-539 application may not be appealed.

(22) Terms and conditions of CW Nonimmigrant status. (i) Geographical limitations. CW-1 and CW-2 statuses are only applicable in the CNMI. Entry, employment and residence in the rest of the United States (including Guam) require the appropriate visa or visa waiver eligibility. An alien with CW-1 or CW-2 status who enters or attempts to enter, travels or attempts to travel to any other part of the United States without the appropriate visa or visa waiver eligibility, or who violates conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated CW-1 or CW-2 status.

(ii) Re-entry. An alien with CW-1 or CW-2 status who departs the CNMI will require a CW-1 or CW-2 or other appropriate visa to be re-admitted to the CNMI.

(iii) Employment authorization. An alien with CW-1 nonimmigrant status is only authorized employment in the CNMI for the petitioning employer. An alien with CW-2 status is not authorized to be employed.

(23) Expiration of transition period. CW-1 status expires at the end of the transition period. CW-2 nonimmigrant status expires when the related CW-1 status expires or on a CW-2

minor child's 18th birthday, if sooner, or if the alien violates his or her status. No alien will be eligible for admission to the CNMI in CW-1 or CW-2 status, and no CW-1 or CW-2 visa will be valid for travel to the CNMI, after the transition period.

**PART 274a—CONTROL OF EMPLOYMENT OF ALIENS**

5. The authority citation for part 274a continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 8 CFR part 2.

6. Section 274a.12 is amended by adding and reserving paragraph (b)(22), and adding paragraph (b)(23), to read as follows:

**§ 274a.12 Classes of aliens authorized to accept employment.**

\* \* \* \* \*

(b) \* \* \*

(23) A Commonwealth of the Northern Mariana Islands transitional worker (CW-1) pursuant to 8 CFR 214.2(w). An alien in this status may be employed only in the CNMI during the transition period and only by the petitioner through whom the status was obtained.

\* \* \* \* \*

**PART 299—IMMIGRATION FORMS**

7. The authority citation for part 299 continues to read as follows:

**Authority:** 8 U.S.C. 1101, 1103; 8 CFR part 2.

8. Section 299.1 is amended in the table by adding Form "I-129CW" to the list of prescribed forms in proper alpha/numeric sequence, to read as follows:

**§ 299.1 Prescribed forms.**

\* \* \* \* \*

Form No.	Edition Date	Title
* * * * *		
I-129CW	10-22-09	Petition for a CNMI-Only Nonimmigrant Transitional Worker.
* * * * *		

9. Section 299.5 is amended in the table by adding the Form “I-129CW” in proper alpha/numeric sequence, to read as follows:

**§ 299.5 Display of control number.**

\* \* \* \* \*

Form No.	Form Title	Currently Assigned OMB Control No.
* * * * *		
I-129CW	Petition for a CNMI-Only Nonimmigrant Transitional Worker	1615-0111
* * * * *		

\_\_\_\_\_  
**Janet Napolitano,**

Secretary.

[FR Doc. 2009-25808 Filed 10/26/2009 at 8:45 am; Publication Date: 10/27/2009]