



COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

THE COMMONWEALTH'S PROTOCOL FOR IMPLEMENTATION OF P.L. 110-229

September 15, 2009

MEMORANDUM FOR THE GOVERNOR

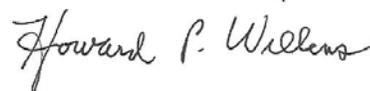
Pursuant to your instructions, the Attorney General and I have undertaken to prepare the Commonwealth to implement PL 110-229 as of the currently-planned effective date of November 28, 2009. The Attorney General has assembled a public-private task force to ensure that operational concerns are addressed. With the assistance of the task force members, I have prepared the attached draft of the Commonwealth's Protocol for Implementation of PL 110-229. This Protocol considers the language of PL 110-229 in the context of Commonwealth law and provides guidance, to the extent possible, as to how the two may be meshed in an orderly and constructive manner.

Commonwealth planning for implementation has been underway since May 8, 2008 when PL 110-229 was enacted. At your direction, the CNMI Labor Department implemented emergency regulations at that time to put in place the mandated cap on the number of aliens in the Commonwealth and since the date of enactment, the Commonwealth has been in full compliance with that requirement. Similarly, with respect to other aspects of PL 110-229, we intend to be in full compliance from the November 28, 2009 effective date. We have amended our regulations over the past months to allow full advantage to the Commonwealth of any flexibility in the provisions of PL 110-229, but inevitably questions of interpretation arise. To the extent possible, this guidance document provides the Commonwealth's interpretation of the law, and our implementation plans have been set out accordingly.

The current version of the Protocol is intended to collect our policies for reference by all concerned in both the public and private sectors in the Commonwealth and by the responsible federal agencies. The Protocol is divided into three principal sections dealing broadly with people, processes, and property so that we have a coherent overview of the subject from the Commonwealth's point of view. The Protocol covers the period prior to November 28, 2009 and a 90- day period thereafter. We have prioritized our tasks so that matters more usefully taken up with the federal agencies after November 28, 2009 are identified and set aside for consideration then. If the Commonwealth's legal challenge to portions of PL 110-229 prevails, we will adjust the Protocol accordingly.

If you concur with this general approach, I will put this Protocol on various websites and invite public comment so that we may continue to improve our policies and procedures as we go along. We anticipate productive discussions with the federal agencies about the implementation of PL 110-229 and expect that this Protocol will encourage and facilitate such discussions. We will keep you fully informed.

Respectfully submitted,



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THE COMMONWEALTH'S PROTOCOL
FOR IMPLEMENTATION OF P.L. 110-229

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THE COMMONWEALTH'S PROTOCOL FOR IMPLEMENTATION OF P.L. 110-229

Public Law 110-229 is scheduled to take effect on November 28, 2009. Both the Commonwealth and the federal government have responsibilities under the law to implement its provisions aimed at the federalization of immigration functions within the Commonwealth. The schedule could change, and the problems of implementation could be affected by such a change, but the Commonwealth must determine its policies, procedures, and practices and inform the public to the maximum extent possible.

Governor's Guidance: The Protocol should: (1) implement the transition smoothly with as little disruption and uncertainty as possible; (2) to the fullest extent possible, keep families together and treat affected persons fairly; (3) minimize adverse consequences to the recovery of the Commonwealth's economy.

Attorney General's Guidance: The implementation of the Protocol and the transition within the Commonwealth should provide for: (1) effective government coordination; (2) public knowledge and cooperation; (3) coordination with the US Department of Homeland Security, the US Department of Labor, and the US Department of the Interior; and (4) aid to and coordination with existing Division of Immigration employees.

Basic Ground Rules: The Protocol is a public document that anticipates and seeks to resolve as many issues related to the transition as practicable. As additional issues are identified and solutions found, the Protocol may be amended accordingly. The time period covered by the Protocol is the pre-transition period and a 90-day post-transition period bracketing the current transition date of PL 110-229. Some issues must be resolved before the transition date and other issues may best be postponed for resolution or further discussion between the Commonwealth and federal officials after November 28, 2009. The Protocol notes, as necessary, areas where uncertainty as to federal control currently exists because of the Commonwealth's challenge to certain provisions of PL 110-229 in federal court; but the Protocol does not address implementation under the different outcomes resulting from this litigation. The implementation of the Protocol is the responsibility of Cabinet agencies assisted by a public-private cooperative Task Force chaired by the Attorney General.

Overview: The Protocol covers issues related to people, processes, and property that arise out of the transition. The issues related to people are primarily the effects the transition will have on the Commonwealth's government employees who have in the past performed functions to be taken over by federal employees and the effects the transition will have on aliens holding Commonwealth-issued permits to reside in the Commonwealth. The issues related to processes have to do with the Commonwealth's operation of its labor, customs, quarantine, foreign investor, and foreign student functions. Any federal use of Commonwealth government-owned property raises issues of fair compensation and coordination. The success of the transition will in large part be a product of cooperation between federal and Commonwealth officials on issues of common interest. This Protocol sets out the Commonwealth's approach to that end.

PART I: PEOPLE AND COMMONWEALTH-GRANTED STATUS

PL 110-229 affects all Commonwealth residents in one way or another. This Protocol addresses its impact on two groups who are most immediately affected: displaced government employees and aliens who currently hold (or once held) Commonwealth-granted status.¹ The overall adverse economic impact on the Commonwealth is enormous.²

A. Government employees

Two categories of CNMI government employees are affected by the implementation of PL 110-229: the employees of the Immigration Division and the employees of the Labor Department. The employees of Customs and Quarantine are not affected. PL 110-229 federalized immigration, but it did not federalize Customs or Quarantine.³ The interaction between the federal and CNMI employees dealing with arriving persons and goods is dealt with in Part II of this Protocol.

1. Immigration Division employees

The immigration laws with respect to entry and removal now enforced by the employees of the CNMI Immigration Division will be preempted by federal law on November 28. Thereafter, the Commonwealth will dismantle its Immigration Division.⁴ PL 110-229 made an effort at a policy statement to the effect that CNMI immigration employees should be absorbed in CBP staffing.

¹ In varied ways and to different extents, transition matters could be affected by the Commonwealth's legal challenge to the implementation of certain provisions of PL 110-229. *Commonwealth of the Northern Mariana Islands v. United States*, United States District Court for the District of Columbia, 08-CV-01572 (PLF). The Commonwealth seeks a preliminary injunction against preemption of Commonwealth labor law (but not immigration law). The statute does not define with clarity the distinction between immigration and labor provisions nor does the statute provide that any specific Commonwealth law is preempted. The Protocol has been developed on a base line of full implementation of PL 110-229 because that is the easiest platform for planning. The Protocol notes where the Commonwealth's legal challenge, if successful, would protect against federal action.

² McPhee, Malcolm and Richard Conway, *Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands*, study funded by the U.S. Department of the Interior, October 2008. "Under the federalization scenario, the CNMI economy stands to lose approximately . . . 60 percent of its jobs, and 45 percent of its real personal income. Unequivocally, this is a depression of great magnitude." Summary, p. ix.

³ This is the same result as occurred in Guam, where federal employees inspect the documentation presented by persons arriving and departing, but Guam government employees inspect baggage and other incoming goods, and Guam government employees deal with quarantined persons and products.

⁴ See Part II(D) below.

PL 110-229 provides, §702(f)(1)(A)((2) : “To the maximum extent practicable and consistent with the satisfactory performance of assigned duties under applicable law, the Attorney General, Secretary of Homeland Security, and Secretary of Labor shall recruit and hire personnel from among qualified United States citizens and national applicants residing in the Commonwealth to serve as staff in carrying out operations described in paragraph (1).

It appears that DHS Customs and Border Protection hired not a single U.S. citizen from the local population in the CNMI in the 18 months since enactment of PL 110-229.⁵ It has not relaxed its age standard in order to accommodate experienced Commonwealth immigration employees over the age of 37; and it has used standardized tests to measure the value that a prospective employee from the CNMI Immigration Division might bring to the performance of the functions performed by Customs and Border Protection at the ports of entry regardless of the practical on-the-job experience of that employee. These two requirements have effectively excluded Immigration Division employees from employment with CBP.⁶

This leaves the Commonwealth with the entire burden of the assisting these Immigration Division employees in seeking new employment. The Commonwealth is using the following measures:

Priority for vacancies in other government agencies

The CNMI Legislature recently enacted legislation to provide for preference for Immigration Division employees in filling vacancies in the government.⁷ To secure efficient implementation of this preference, the Acting Director of the Immigration Division will provide to the Director of the Office of Personnel Management by October 1, 2009 a list of the e-mail addresses of employees who may need jobs, and notices of each government vacancy that arises thereafter will be e-mailed to those on the list until February 28, 2010.

Labor Department referrals

The Acting Director of the Immigration Division will solicit from each employee who may need a job an outline of the kinds of private sector jobs for which the employee may be qualified and interested and will provide that information together with a list of e-mail addresses to the Director of Employment Services of the CNMI Department of Labor by

⁵ The USCIS contractor operating the offices on Beach Rd. reports hiring at least one local U.S. citizen

⁶ The Attorney General’s Investigative Unit absorbed the Immigration Division investigators who perform functions analogous to the federal Immigration and Customs Enforcement (ICE) personnel who will take over immigration (but not customs) enforcement at the transition. For this reason, there are no immediate employment problems in this area.

⁷ PL 16-31.

October 1, 2009. The Director of Employment Services will assign a staff member to review on-line job vacancy postings regularly advise Immigration Division employees of employment opportunities until February 28, 2010. The Department of Labor will also provide office space in its Afetna Square building headquarters for displaced Immigration Division personnel to work after November 27, 2009 depending on assignments from the Attorney General and funding for these slots until the end of the calendar year.

Technical Assistance

Public Law 110-229 provides for technical assistance, “including assistance in recruiting, training, and hiring of workers, to assist employers in the Commonwealth in securing employees first from among United States citizens and nationals resident in the Commonwealth.” See Section 702(e)(1)(B). However, this is a completely unfunded mandate, and the Department of the Interior has very limited technical assistance funding available. The CNMI Department of Labor will submit an application for funding from the U.S. Department of Labor to provide each Immigration Division employee who desires retraining with two years of financial support plus training costs.

Outsourcing of services by DHS

With respect to CBP functions (but not USCIS processing functions), a proposal for outsourcing certain port of entry jobs to a private CNMI contractor has been prepared for discussion with CBP in Washington. The private contractor would employ current Immigration Division employees and provide these employees to supplement CBP personnel assigned to the Commonwealth. The contractor personnel would work under the supervision of CBP on-site supervisors.

2. Labor Department employees⁸

In the short term following the November 28, 2009 transition, the Commonwealth intends to use the current Labor Department work force in dealing with the problems of employing U.S. citizens to the maximum extent possible in available jobs, a function which is not affected by PL 110-229, and managing aspects of the outstanding Commonwealth permits, which PL 110-229 requires be respected for up to two years.⁹ The Commonwealth will make all possible efforts to ensure that current Labor Department employees will not be displaced. Current employees will be retrained to the extent necessary.¹⁰

⁸ See footnote 1.

⁹ See discussion in Part I(B).

¹⁰ See discussion in Part II(E).

B. Aliens with Commonwealth-granted status¹¹

PL 110-229 provides specifically that lawful permits issued to persons who wish to remain in the Commonwealth after November 27, 2009 will be respected for the duration of the permit but not to exceed two years.¹²

Section 702(e) PERSONS LAWFULLY ADMITTED UNDER THE COMMONWEALTH IMMIGRATION LAW.— (1) PROHIBITION ON REMOVAL.—“(A) IN GENERAL.—Subject to subparagraph (B),¹³ no alien who is lawfully present in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be removed from the United States on the grounds that such alien’s presence in the Commonwealth is in violation of section 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C.1182(a)(6)(A)), until the earlier of the date—“(i) of the completion of the period of the alien’s admission under the immigration laws of the Commonwealth; or “(ii) that is 2 years after the transition program effective date.

Over the past six months, the Commonwealth has amended its immigration, labor, and commerce regulations in various ways to take advantage of the two-year period allowed under PL 110-229.¹⁴

In order to achieve the basic goals of the Protocol set out in the Governor’s guidance, the target outcome in this area of concern is to have –

- ✓ in place by November 27, 2009 the necessary documentation for
- ✓ as many persons who require status to remain in the Commonwealth after November 27; and

¹¹ See footnote 1.

¹² Persons with a U.S.-granted status, such as LPR (green-card) holders or H-visa holders, are not affected by the implementation of PL 110-229.

¹³ Subparagraph B is a reference to persons admitted by the Commonwealth in violation of the cap on alien workers imposed by Section 702(i), which provides: REQUIRED ACTIONS PRIOR TO TRANSITION PROGRAM EFFECTIVE DATE.—During the period beginning on the date of enactment of this Act and ending on the transition program effective date described in section 6 of Public Law 94–241 (as added by subsection (a)), the Government of the Commonwealth shall— (1) not permit an increase in the total number of alien workers who are present in the Commonwealth as of the date of enactment of this Act.

¹⁴ Note that Section 6(e)(1) is a general prohibition on removal and covers all CNMI-issued permits. Section 6(e)(2) is a permission to be employed and covers “an alien lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth.” The CNMI Immigration Regulations provide for employment in connection with regular and long-term business permits, investor permits, retiree permits, and student permits as well as government employment and private sector employment permits.

- ✓ who are now present in the Commonwealth under a status granted by the Commonwealth; and
- ✓ who have during their stay in the Commonwealth abided by Commonwealth law
- ✓ so that each such person may maintain, renew, or gain status to remain in the Commonwealth for the period they desire within the limitations imposed by PL 110-229

This part of the Protocol establishes the policies and procedures to make this happen. It examines each category of persons who currently hold Commonwealth-granted status (or who are resident in the Commonwealth and need to have Commonwealth-granted status by the transition date) and determines how that status will be maintained, renewed, or gained as necessary to have two full years in protected Commonwealth-granted status after November 27.

PL 110-229, §702(a) (Section 6(e)(1)(B), effectively makes invalid any CNMI-issued permit held by a person who entered the Commonwealth in violation of the cap on the number of alien workers that came into effect at the signing of the Act.¹⁵ However, the Commonwealth has been in compliance with the cap at all times and has published monthly data documenting that compliance each month on the Labor Department's website.

For convenience, the listing of categories follows current CNMI immigration categories and adds at the end of the list other categories made necessary by the transition to federal immigration law.

240A: Regular Term Business Entry:¹⁶ The Department of Commerce and the Immigration Division will continue to issue regular term business entry permits and extensions in the normal course until November 27, 2009 extending a maximum of 90 days beyond November 27, 2009. The current Department of Commerce form will be used along with the I-101 form. The deadline for applications, including requests for extensions, is October 23, 2009. A regular-term permit for a first-time applicant will be effective for six months after November 27, unless the permit holder elects an earlier date, and extensions for 90 days may be added to whatever period is available on the initial permit. The U.S. has issued proposed regulations under which some of the holders of CNMI-issued business permits may switch to U.S.-issued foreign investor permits at any time during or after the period in which CNMI-issued business permits are in effect.

¹⁵ This provision is as follows: "LIMITATIONS.—Nothing in this subsection shall be construed to prevent or limit the removal under subparagraph 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)) of such an alien at any time, if the alien entered the Commonwealth after the date of enactment of the Consolidated Natural Resources Act of 2008, and the Secretary of Homeland Security has determined that the Government of the Commonwealth has violated section 702(i) of the Consolidated Natural Resources Act of 2008."

¹⁶ The Regular-Term Business Entry Permit allows the holder to stay in the Commonwealth for one visit of not more than a ninety (90) day stay or multiple visits totaling not more than one hundred twenty (120) days within one twelve (12) month period. The applicant must be present in the Commonwealth to apply for the permit and must present a certificate of eligibility for a business entry permit issued by the Department of Commerce. Immigration Regulations §§ 5-40.3-240(a).

240B: Government employment:¹⁷ The Immigration Division will issue two-year permits as of November 27, 2009 to every alien who is a government employee and for whom the Office of Personnel Management certifies a need for a two-year permit. The Director of OPM will provide to the Director of the Immigration Division a list of alien government employees eligible for two-year permits by October 16, 2009. Immigration Form I-101 is used for this category of applicants. The permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240C: Tourist: The Immigration Division will continue to issue visitor entry permits and extensions in the normal course until November 27, 2009. All physical entries by tourists to the Commonwealth on Commonwealth-issued permits will have to occur prior to November 28, 2009. No entry on Commonwealth-issued permits will be allowed after that date. The total period of a tourist entry permit is 30 days and the total allowable extension is 60 days. Thus, tourists who entered the Commonwealth on Commonwealth-issued permits are unlikely to remain in the Commonwealth beyond the end of January 2010.

240D: Immediate relatives, U.S. sponsor: The Immigration Division will grant immediate relative status to aliens who meet the definition of immediate relative¹⁸ and will grant two-year permits,¹⁹ effective as of November 27, 2009, to immediate relatives who submit adequate information on Form 240D-1 (immediate relative, U.S. citizen sponsor), Form 240D-2 (immediate relative, deceased U.S. citizen sponsor), or Form 240D-3 (immediate relative, victim of domestic violence, no sponsor).²⁰ Each immediate relative of a U.S. sponsor will be given an information sheet with respect to the requirements and procedures for obtaining a green card. The target date for all applications is not later than

¹⁷ See footnote 1.

¹⁸ "Immediate relative" means a legally recognized spouse, and a child under the age of twenty-one (21) years, whether natural or adopted before the age of eighteen (18) years, and a stepchild if the marriage that created the stepchild relationship took place before the child's eighteenth birthday, and, in the case of a citizen, the parents, whether natural or adoptive of the citizen, provided that no alien shall derive immediate relative status from a child who is under the age of twenty-one (21) years. Immigration Regulations § 5-40.0-201(n). For purposes of the transition, common law marriages will be recognized under certain circumstances.

¹⁹ Immigration Regulations § 5-40.3-230. Applications for a two-year permit will be accepted, at the discretion of the Director, for entry permit class 240(d) immediate relatives of citizens, U.S. nationals, and permanent residents, 240(g) and 240(o) foreign investors, 240(h) foreign students; and 240(k) foreign workers upon the Director's finding that a two-year permit is in the interests of the Commonwealth. The Director shall make available automatic two-year permits for permanent residents (as defined in § 5-40.0-201(x)), and for the immediate relatives of deceased citizens, U.S. nationals, and permanent residents should permitting be needed or required for any reason.

²⁰ The Division may refuse to allow a person to be a sponsor of an alien applying in an entry class as an immediate relative if the sponsor fails to demonstrate income over the immediately preceding four months at the prevailing federally-mandated minimum wage in the Commonwealth. The Director may waive this income requirement in the interests of the Commonwealth. Immigration Regulations, § 5-40.3-220(e).

November 2, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240E: Immediate relatives, alien sponsor:²¹ The Immigration Division will grant immediate relative status to aliens who submit adequate information on Form 240E-1 (certificate), Form 240E-2 (declaration), Form 240E-3 (victim of domestic violence), or Form 240E-4 (IR of CNMI permanent resident) and will grant two-year permits, effective as of November 27, 2009 (except in the case of an FAS alien sponsor in which case the permit shall be for one year). The target date for all applications is not later than November 2, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240F: Diplomat: The Immigration Division will not issue further permits to diplomats after October 2, 2009. Immigration form I-101 is used for this category of applicants. All those in this category who wish to enter or renew will need to apply to the U.S. after November 27.

240G: Foreign investor: The Department of Commerce and the Immigration Division will continue to issue foreign investor entry permits until November 27, 2009 extending a maximum of two years beyond November 27, 2009. The current Commerce Department form will be used along with form I-101. The deadline for applications is October 23, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date. The U.S. has issued proposed regulations under which some of the holders of CNMI-issued foreign investor permits may switch to U.S.-issued foreign investor permits at any time during or after the initial two-year period when CNMI-issued foreign investor permits are in effect.

240H: Foreign student: The Department of Commerce and the Immigration Division will continue to issue foreign student entry permits until November 27, 2009 extending a maximum of two years beyond November 27, 2009. The current Department of Commerce form will be used along with the I-101 form. The deadline for applications is October 23, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240I: Foreign press: The Division of Immigration will not issue further permits to foreign press after October 2, 2009. Immigration form I-101 is used for applicants in this category. All those in this category will need to apply to the U.S. after November 27, 2009.

240J: Distinguished merit: The Division of Immigration will not issue further permits to those of distinguished merit after October 2, 2009. Immigration form I-101 is used for applicants in this category. All those in this category will need to apply to the U.S. after November 27, 2009.

²¹ See footnote 1. For purposes of the transition, common law marriages will be recognized under certain circumstances.

240K: Private sector employment:²² The Department of Labor will issue two-year permits in connection with new, transfer, or renewal applications from employers filed no later than November 15, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date. Labor Department forms in these regards are on the Department's website, www.marianaslabor.net.

240L: Minister: The Immigration Division will not issue further permits to ministers or their immediate relatives after October 2, 2009. Immigration form I-101 is used for applicants in this category. All those in this category will need to apply to the U.S. after November 27, 2009.

240M: Missionary: The Immigration Division has not issued any permits to missionaries since October 2, 2008. Some three-year permits previously issued in this category will remain active after November 27, 2009, and all new and annual renewal applicants, and their immediate relatives, will need to apply to the U.S. after November 27, 2009.

240N: Long-term business entry: The Department of Commerce and the Immigration Division will continue to issue long-term business entry permits until November 27, 2009 extending a maximum of two years beyond November 27, 2009. The current Department of Commerce form will be used along with the I-101 form. The deadline for applications is October 23, 2009 and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date. The U.S. has issued proposed regulations under which some of the holders of CNMI-issued business permits may switch to U.S.-issued foreign investor permits at any time during or after the initial two-year period when CNMI-issued business permits are in effect.

240O: Retiree investor: The Department of Commerce and the Immigration Division will continue to issue retiree investor entry permits until November 27, 2009 extending a maximum of two years beyond November 27, 2009. The current Department of Commerce form will be used along with the I-101 form. The deadline for applications is October 23, 2009. The U.S. has issued regulations under which some of the holders of CNMI-issued retiree investor permits may switch to U.S.-issued foreign investor permits at any time during or after the initial two-year period when CNMI-issued retiree investor permits are in effect.

240P: Temporary Work Entry Permit: Temporary Work Entry Permits are issued to victims, witnesses, refugees, parties in cases pending in Commonwealth agencies or courts, and CNMI permanent residents. After October 1, 2009, the Immigration Division will issue a two-year permit to aliens who submit adequate information on Form 240P-1 (victim of crime), 240P-2 (government witness), 240P-3 (refugee), 240P-4 (party to agency or court case), or 240P-5 (CNMI permanent resident). This permit is issued on a conditional basis; the holder may satisfy (or continue to satisfy) a condition and use the permit for up to two years, or the holder may at some point fail to satisfy a condition and the permit will terminate. The permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

²² See footnote 1.

Those holding current 240P permits arising out of federal proceedings will not be eligible for a CNMI-issued permit and will need to apply to the federal authorities after November 27, 2009. Their existing 240P permit will be revoked as of November 27, 2009.

240Q: Comity Entry Permit: The Immigration Division will not issue further comity entry permits after October 2, 2009. Immigration form 101 is used by applicants in this category. All those in this category will need to apply to the U.S. after November 27.

240R: Treaty Entry Permit: The Immigration Division will not issue further treaty entry permits after October 2, 2009. Immigration form 101 is used by applicants in this category. All those in this category will need to apply to the U.S. after November 27.

240S: Medical Entry Permit: The Immigration Division will not issue further medical entry permits after October 2, 2009. Immigration form 101 is used by applicants in this category. All those in this category will need to apply to the U.S. after November 27.

240T: FAS passport holders: FAS passport holders may enter the Commonwealth pursuant to the terms of the Compacts of Free Association. No entry permit is required.

240U: Employees on temporary assignment: The Immigration Division will issue a temporary assignment entry permit to an alien who is employed by a foreign corporate entity that has an affiliate in the Commonwealth for up to 180 days after November 27, 2009. Immigration form 101 is used by applicants in this category. The deadline for applications is October 16, 2009, and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240V: Employees on short term assignment: The Immigration Division will issue a short term entry permit to a qualified alien who seeks to enter the Commonwealth for a period of less than twenty-one (21) days, with an available extension for an additional ten (10) days, for employment in artistic, cultural, educational, or scientific presentations, performances, professional sports events, or professional studies, with a maximum period of thirty (30) days after November 27. Immigration form 101 is used by applicants in this category. The deadline for applications is October 16, 2009, and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

240W: Passengers in transit: Through November 27, 2009, an alien in immediate and continuous transit through the Commonwealth may remain in the Commonwealth for as long as is required to meet a connecting flight. An alien in continuous transit may not be allowed outside of the airport facility while waiting for the connecting flight. No permit is required.

240X Crew members in transit: Through November 27, 2009, an alien who is serving as crew in any capacity required for normal operation and service on board a vessel (other than a fishing vessel having its home or an operating base in the Commonwealth) or aircraft, who intends to land temporarily and solely in pursuant of the calling as a crew and to depart from the Commonwealth with the vessel or

aircraft on which he arrived or some other vessel or aircraft, may remain in the Commonwealth until the time of scheduled departure. No permit is required

240Y: Professionals seeking employment: The Immigration Division will grant an entry permit for up to 90 days beyond November 27, 2009 for an alien who is a professional, such as a doctor, engineer, or teacher, who seeks to enter the Commonwealth for purposes of interviewing for or otherwise qualifying for employment in the alien's field of expertise. Immigration form 101 is used by applicants in this category. The deadline for applications is October 16, 2009, and the permit will become effective on November 27, 2009 unless the permit holder elects an earlier date.

Other categories:

1. Holder of DoL-issued TWA:²³ A Temporary Work Authorization is issued by the Labor Department to an employer who wishes to employ an alien who holds a Memorandum to Seek Work because of the pendency of a case before a court or administrative agency. A TWA is the temporary functional equivalent of an approved employment contract and requires posting of a bond. TWA permissions are granted for a six month period. Aliens employed by employers holding TWA permission arising out of Commonwealth agency and court cases are working during "the period of the alien's admission under the immigration laws of the Commonwealth" under PL 110-229 and will be allowed to obtain temporary 240P-4 permits before November 27, 2009 that carry the same conditions as 240K permits would carry if a 240K permit was issued for this particular employment. When the TWA expires according to its terms or because the court or agency case has ended, the 240P-4 permit also expires unless the court or agency order allows it to remain in effect for all or part of the full two-year period permitted under PL 110-229. TWAs issued with respect to federal agency or court cases will terminate on November 27, 2009.
2. Holder of DoL-issued Memoranda to Seek Work:²⁴ A Memorandum issued by the Labor Department allows a party to an agency or court case to seek work and, if the holder of a memorandum locates a willing employer, the employer may obtain a TWA to employ the worker while a case is pending. All Memoranda to Seek Work expire on November 27, 2009. Aliens holding Memoranda may convert this credential to a 240P permit, upon timely application, before November 27. Parties to Commonwealth agency or court cases will be issued 240P permits on the same terms as they held Memoranda – that is, they are allowed to seek work while their case is pending. If an alien holding a 240P-4 permit (that originated with a Memorandum) finds approved work, the 240P-4 permit remains in effect for all or part of the full two-year period permitted under PL 110-229. Upon final adjudication of a court or agency case, if the holder of the permit is not employed, the 240P-4 permit expires automatically.

²³ See footnote 1.

²⁴ See footnote 1.

Parties to federal agency or court cases will not be issued 240P-4 permits and must apply to federal authorities.

3. Holder of DoL-issued Extension of Time to Transfer: An extension of time to transfer issued by the Labor Department allows an alien who was admitted to the Commonwealth in the immigration category 240K (formerly 706K) to seek work and, if the holder of an extension locates a willing employer, an employer may employ the alien under standard contract terms for the duration of the permit for which fees are paid. All extensions of time to transfer expire on November 27, 2009. A DoL-issued Extension may be converted to a 240P-4E permit, upon timely application, before November 27. A 240P-4E permit that originated with an Extension is subject to revocation if the holder has not found work within six months of issuance or is unemployed for more than 90 days at any time thereafter.
4. CNMI Permanent Residents: The Immigration Division will issue two-year permits to those who qualify as CNMI Permanent Residents and submit adequate information on Form 240P-5: CNMI Permanent Resident.²⁵ Immigration Regulations § 5-40.0-201 (q) provides: “Permanent resident” means an alien who is legally residing in the Commonwealth as a permanent resident pursuant to a grant of that status by operation of Commonwealth law prior to April 1981, or by operation of United States law. Citizens of the Freely Associated States are not permanent residents of the Commonwealth. The target date to apply is November 2, 2009. The permit will be effective as of November 27, 2009.
5. Immediate relative, CNMI Permanent Resident sponsor: The Immigration Division will issue a two year permit to an immediate relative of a CNMI permanent resident who submits adequate information on Form 240E-4: Immediate Relative, CNMI Permanent Resident Sponsor provided by the Immigration Division. The target date to apply is not later than November 2, 2009. The permit will be effective as of November 27, 2009.
6. Alien adopted child: An alien who is an adopted child is included in the definition of “immediate relative” under the CNMI immigration regulations and is eligible for immediate relative status. Adopted children include those for whom a Petition for Adoption has been filed but is awaiting a final order. This will take at least a year because of the one-year residency requirement.
7. Alien step-child: An alien who is a step-child is included in the definition of “immediate relative” under CNMI immigration regulations and is eligible for immediate relative status. “Step-child” is also a qualifying relationship under U.S. immigration law. So long as the marriage creating the relationship took place before the child turned 18, a step-child is eligible to apply for a green card.

²⁵ Immigration Regulations § 5-40.3-230.

8. Alien parent of U.S. citizens: An alien who is the parent of a U.S. citizen is included in the definition of immediate relative in both CNMI and U.S. systems.
9. Immediate relative of deceased U.S. citizen sponsor: Persons in this category have only two years to apply for LPR (green card) status after the U.S. citizen sponsor dies. In the Commonwealth's case, this should be two years after the transition date because, under Commonwealth law, these aliens were granted a perpetually renewable immediate relative status, so long as they did not remarry, and had no need to apply for any U.S. -based status. However acceptance of this proposal will require discussions with USCIS. The Commonwealth will issue a two-year permit to aliens in this category so that they have time to work out their status with USCIS. Form 240D-2 is used for this category of applicant. The target date to apply is not later than November 2, 2009.
10. Immediate relative of deceased CNMI permanent resident sponsor: The widow or widower of a CNMI permanent resident is eligible for the same status as if the CNMI permanent resident were still alive. Form 240E-5 is used for this category of applicant. The target date to apply is not later than November 2, 2009.
11. Violence Against Women victims: Consistent with U.S. law (the Violence Against Women Act), the Immigration Division will grant to physically or psychologically abused spouses and former spouses of citizens and aliens and others covered by the Act²⁶ a two-year permit as an immediate relative without sponsorship by the allegedly abusing spouse, at the discretion of the Director, upon presentation of a completed Form 240D-3 (citizen spouse, child, or parent) or 240E-3 (alien spouse, child, or parent) accompanied by the required reliable documentation sufficient to establish the alleged abuse.²⁷ The target date to apply is not later than November 2, 2009.
12. Pending marriages: Until November 27, 2009, the officials in the Governor's office and the Mayors' offices charged with issuing marriage licenses will issue the necessary documents required for marriages involving aliens without delay when the identity and capacity to marry requirements are met.²⁸ Status determinations, if any, will be made by the Immigration Division

²⁶ VAWA allows the following to self-petition (no U.S. sponsor) for a green card: (1) abused spouses of U.S. citizens or green card holders; (2) spouses of U.S. citizens or green card holders whose children have been abused by the U.S. citizen or green card holder; (3) an abused "intended" spouse (when the immigrant enters into marriage in good faith but it then turns out that the U.S. citizen or green card holder is married to someone else; (4) abused children of U.S. citizens or green card holders; (5) abused parents of U.S. citizens or green card holders who qualify as immediate relatives.

²⁷ Immigration Regulations § 5-40.3-230.

²⁸ 8 CMC §1202(b) provides: "To obtain a license to marry, the parties shall file with the Governor or mayor an application in writing setting forth as to each party his or her full name, age, citizenship, residence, occupation, if any, whether previously married and the manner of dissolution of any prior marriage or marriages. If the

or by USCIS. Any marriage licensing office may call the Immigration Division (until November 27) or USCIS (after November 27) for assistance in this regard.

C. Public Notice and Awareness Campaign²⁹

A key aspect of the effect on individual persons within the Commonwealth is an effective public notice and awareness campaign so that accurate information is disseminated effectively to those who need it in order to make decisions about status.

Print media : Notices from the Immigration Division publicizing the deadlines for applications will appear each Wednesday in the English, Chinese, and Korean print media from September 23, 2009 through November 2, 2009. Notices from the Labor Department publicizing deadlines and options for applications will appear each Monday in the English, Chinese, and Korean print media from September 21 through November 2, 2009. Notices from the Commerce Department will appear on the same general schedule through October 23.

Websites: Notices publicizing the Immigration and Labor deadlines will be posted on the home page of the Labor website by September 23, 2009 and will remain until November 15, 2009.

Radio and TV media: Public service announcements in English, Tagalog, Chinese, and Korean will be prepared by October 1, 2010 for radio and TV broadcasts.

Postings: Large print posters will be maintained at the Labor Department, the Immigration Division, the Commerce Department, and the main Executive Office Building on and after October 1, 2009 with respect to deadlines and procedures.

Handouts and e-mail: Where practicable, affected persons will be notified by handouts and e-mail.

Information booth: An information booth, staffed by volunteers, will be set up on the 2nd floor of the Afetna Square building where the Labor Department and Immigration Division processing offices are located. Information will be provided with respect to status opportunities and how to fill out forms.

statements in the application are satisfactory and it appears that the parties are free to marry, the Governor or mayor shall issue to the parties a license to marry.”

²⁹ See footnote 1.

PART II: COMMONWEALTH GOVERNMENTAL PROCESSES

The provisions of PL 110-229 are imprecise as to the way that the U.S. authorities are to interact with the Commonwealth authorities and DHS has not yet shared its views on most of the issues discussed in this Protocol. This Part examines these governmental process issues from the Commonwealth's viewpoint. The overall effect of PL 110-229 on the Commonwealth's revenues and other aspects of its economy is a deepening and lengthening of the economic depression from which the Commonwealth has been suffering since 2005.³⁰

A. The preemption of Commonwealth law³¹

The provision of PL 110-229 with respect to preemption of Commonwealth law is somewhat opaque. More effective drafting might have specified the provisions of Commonwealth law that were intended to be preempted by federal law.

Section 702(a) (Section 6(f)) of PL 110-229 provides: EFFECT ON OTHER LAWS.—The provisions of this section and of the immigration laws, as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17)), shall, on the transition program effective date, supersede and replace all laws, provisions, or programs of the Commonwealth relating to the admission of aliens and the removal of aliens from the Commonwealth.

The Commonwealth laws about which preemption questions could be raised include the following:

Section	Heading
Title 1, Div 2, Part 1, Ch 1	Organization of the Executive Branch
Title 1, Div 2, Part 1, Ch 3	Establishment of Dept of Labor & Immigration
Title I, Div 2, Part 1, Ch 9	Dept. of Commerce and Labor
Title 1, Div 2, Part 1, Ch 10	Dept of Public Safety and Immigration
Title 1, Div 2, Part 1, Ch 15	Immigration functions transferred
Title 1, Div 2, Part 1, Ch 16	Dept. of Corrections functions
Title 1, Div 8, Part 2, Ch 6	Employee Benefits
Title 2, Div 1, Ch 1, Art. 1	Natural Resources
Title 3, Div 3, Part 2, Ch 3	Social Security

³⁰ McPhee, Malcolm and Richard Conway, *Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands*, study funded by the U.S. Department of the Interior, October 2008. "Under the federalization scenario, the CNMI economy stands to lose approximately 44 percent of its real Gross Domestic Product . . . by 2015. Unequivocally, this is a depression of great magnitude." Summary, p. ix.

³¹ See footnote 1.

Title 3, Div 4, Ch 1	Interim citizenship status, Certificates of Identity
Title 3, Div 4, Ch 3	Commonwealth Entry and Deportation Act
Title 3, Div 4, Ch 8	Preclearance Certification Act

Title 3, Div 4, Ch 4	Nonresident Worker's Act
Title 3, Div 4, Ch 5	Limited Immunity for illegal aliens
Title 3, Div 4, Ch 6	Moratorium on Nonresident Alien Worker Hiring
Title 3, Div 4, Ch 7	Nonresident Worker Relief Act
Title 3, Div __, Ch __	Commonwealth Employment Act of 2007
Title 4, Div 5, Ch 7	Garment manufacturing
Title 4, Div 9, Ch 2	Commonwealth Minimum Wage and Hour Act
Title 4, Div 9, Ch 5	Resident Worker Fair Compensation Act
Title 4, Div 1, Ch 4	Excise tax and User fees
Title 4, Div 5, Ch 1	Consumer protection, aliens
Title 4, Div 5, Ch 6	Business licenses, aliens
Title 4, Div 5, Ch 9	Regulation of foreign investment
Title 4, Div 5, Ch 10	Foreign retiree investment
Title 6, Div 1, Part 1, Ch 5	Crimes, confiscating passports
Title 6, Div 3, Ch 3	Crimes, falsifying immigration documents
Title 4, Div 2, Ch 1	Expediting immigration for tourists

The legal analysis as to preemption requires an examination of each section of these laws to determine whether it attempts to deal with “admission” or “removal.” The Commonwealth’s section-by-section listing of the provisions it will maintain are unaffected by PL 110-229 and the sections that are likely to be regarded as preempted will be set out in Appendix A to this Protocol, if necessary and useful, after approval by the Attorney General.

B. Commonwealth control over Commonwealth-issued permits³²

The Commonwealth will control the terms of Commonwealth-issued permits that were issued prior to November 28, 2009 and that remain in effect after the transition date. The Commonwealth will exercise certain program and law enforcement functions after the transition date with respect to its general government powers through the CNMI Labor Department.

C. Adjudication functions

Inevitably, some disputes will remain in the adjudication process on November 27, 2009. Due to the provision of PL 110-229 that preempts Commonwealth law, some aspects of Commonwealth law

³² See footnote 1.

may cease to exist on November 28, 2009. The effects of this disappearance of governing law will be handled in dispute resolution as follows. The coordination process between CNMI and federal authorities with respect to pending cases will be on the agenda for the post transition-date consultations.³³

1. Immigration cases

On November 28, there ceases to be any Commonwealth law “relating to” the admission and removal of aliens. The effect of preemption on existing immigration cases is likely to be as follows:

Cases pending in the CNMI Superior and Supreme Courts

As of September 1, 2009, there are 215 immigration cases (not including routine criminal cases in which deportation is a possible penalty) pending in Commonwealth Superior Court and fewer than 10 immigration cases pending in Commonwealth Supreme Court.

Cases involving challenges to Commonwealth court deportation orders remain judgments of these courts subject to review and modification by these courts. This could occur, for example, by decision of the Commonwealth Supreme Court in reviewing a lower court order or by the granting of a motion filed in the lower court for relief from judgment. However, the Commonwealth courts would not have jurisdiction to grant a stay of execution of a deportation order because that would purport to limit federal authority.

Cases involving only the prospective admission and removal of aliens will become moot, as the Commonwealth courts no longer have Commonwealth laws on admission and removal of aliens which can be enforced. The CNMI Attorney General will turn the files on those cases over to federal authorities on November 28, 2009. Persons in custody on immigration charges will be turned over to the custody of ICE officials.

Cases involving the qualification of aliens for CNMI-issued permits will continue and will not become moot. Aliens with cases pending before Commonwealth courts may apply, within the time period for application, for 240P permits³⁴ so the remedy with respect to qualifications for CNMI-issued permits will be a modification or revocation, as necessary, of the terms of the alien’s 240P permit.

Cases involving unpaid wages or other damage claims under contracts entered into and performed under Commonwealth law existing at the time the cause of action arose will not be affected.

Cases on appeal to the AG

³³ See Part IV(A).

³⁴ See Part I(B).

As of November 28, 2009, the CNMI Attorney General will not accept appeals with respect to the admission and removal of aliens. These matters will be referred to federal authorities. Files on pending appeals before the Attorney General will be delivered to USCIS officials on November 28, 2009.

Cases involving the qualification of aliens for CNMI-issued permits will continue.

Cases before the Director

As of November 28, 2009, the Commonwealth will not maintain the position of Director of Immigration.

2. **Labor cases**³⁵

Prior to the transition date, the CNMI Department of Labor has responsibility for adjudicating cases involving five subjects: (1) The denial of approval of a proposed employment contract (either new, renewal, or transfer); (2) Claims by employers or workers under existing or former employment contracts; (3) The refusal of a bonding company to pay a worker who has prevailed on a contract claim; (4) Requests for extensions of time to transfer to a new employer; (5) The failure of an employer or employee to comply with CNMI labor law or Departmental regulations which may result in the cancellation of an approved contract or permit, fines, debarment, or repatriation.

When ordered by a hearing officer or requested by a worker, the Department arranges for voluntary repatriation by invoking the standard contract clause that requires employers to pay for repatriation tickets to point of origin. The Department does not deport anyone. Under the current system, aliens who are ordered repatriated and refuse to leave the Commonwealth are reported to the Immigration Division. As of November 28, 2009 the Department will report those who refuse repatriation to federal authorities. The effect of preemption on existing cases is as follows:

Cases pending in the CNMI Superior and Supreme Courts³⁶

As of September 1, 2009 there are 72 labor cases pending before the Superior Court and no labor cases pending before the Supreme Court.

³⁵ See footnote 1.

³⁶ In addition, as of September 1, 2009, six cases currently pending in CNMI federal district court involve claims of federally-protected rights with respect to labor matters, and seven cases pending before the EEOC involve the same kind of issues. These cases may also include claims, principally contract and tort, based on Commonwealth law. There claims arising out of CNMI labor matters pending in the U.S. Court of Claims, but there are no Commonwealth cases currently pending before U.S. Labor or the National Labor Relations Board.

Cases or portions of cases involving deportation orders will become moot as the Commonwealth will lose the authority to remove any alien. The Attorney General will refer those cases to federal authorities for deportation.

The Commonwealth will maintain that cases involving employment contracts applied for or in force prior to November 28, 2009 and violations of Commonwealth law or Department regulations will remain available for adjudication.

Cases on appeal before the Secretary of Labor

As of September 1, 2009, there are 11 labor appeals pending before the Secretary of Labor.

Cases or portions of cases involving repatriation orders will remain with the Secretary as the Commonwealth may enforce employment contracts entered into prior to the transition date. If an alien refuses voluntary repatriation, the matter will be turned over to federal authorities for deportation.

The Commonwealth will maintain that cases involving employment contracts applied for or in force prior to November 28, 2009 and violations of Commonwealth law or Department regulations will remain for adjudication.

Cases pending before the Administrative Hearing Office

As of September 1, 2009, there are 65 labor cases and 81 bond claims pending before the Administrative Hearing Office. In addition, there are fluctuating numbers of short term agency cases, objections, denials, and requests for extensions of time to transfer on the docket. The Administrative Hearing Office will continue its adjudication functions. Instead of referring involuntary repatriation matters to the CNMI Immigration Division, they will be referred to federal authorities.

Cases pending before the Director of Labor

The Commonwealth will maintain that the Director of Labor is empowered to continue to issue rulings on applications that were in process on November 27, 2009.

D. Windup of the Immigration Division

The Immigration Division reports to the Attorney General and has administrative offices co-located with the Labor Department in the Afetna Square building in San Antonio, as well as operational space at the Commonwealth airports and seaports.

1. Personnel

As of midnight on November 27, 2009, all CNMI Immigration Division employees stationed at the Saipan airport and seaport will report to the Immigration Division offices at the Afetna Square building. Additional space adjacent to existing Immigration Division offices will be made available by the Labor Department. Immigration Division employees in Rota and Tinian will report to the Labor Department offices on those islands. The Attorney General, OPM, and the responsible Civil Service and Retirement officials will issue the necessary personnel guidance by November 1, 2009.

2. Files

Prior to the close of business on November 27, 2009, all Immigration Division papers and files will be transferred from the Saipan airport and seaport to the Afetna Square building. Files more than two years old will be shredded or disposed of in a secure way in order to minimize very expensive storage and maintenance costs. Files two years old or less, all permanent regulation and correspondence files, and other permanent files will be stored at the Afetna Square building in storage areas designated by the Manager of the Administrative Services Section, Department of Labor.

3. Office equipment and telecommunications

On or before November 27, 2009, all furniture and equipment belonging to the Immigration Division will be moved to the Customs staff areas at the airports, or (in Saipan) to the Afetna Square building.

4. Office space and work areas

The Immigration Division's office spaces at the airports and seaports will be turned over to CBP broom-clean and empty by 12:01 a.m. on November 28, 2009. No alterations or dismantling of current internal structures will be undertaken by the Commonwealth.

E. Continuation of the Labor Department³⁷

The Labor Department now has five main operational areas: Secretary of Labor and admin services (7) employees; Labor Division – processing and enforcement (22 employees), Employment Services (10 employees), Information Services (3 employees), and the Administrative Hearing Office (4 employees). The Department of Labor organization and functions may change as follows after November 27 :

³⁷ See footnote 1.

The Labor Department will continue to perform these functions:

- ✓ Providing services to U.S. citizens seeking employment
- ✓ Maintaining the DoL website
- ✓ Adjudicating disputes
- ✓ Collecting supporting documentation (e.g. health certificates, police clearances) for permits applied for prior to November 28
- ✓ Issuing replacement permit cards for lost or stolen cards
- ✓ Collecting information from employers who employ foreign workers under CNMI-granted permits to provide the Labor Department with the same information as previously required
- ✓ Requiring the posting of job vacancy announcements so long as workers holding CNMI-granted permits are employed
- ✓ Monitoring the employment of foreign workers and enforcing the terms of employment contracts with foreign workers
- ✓ Maintaining the BMS database for Customs use
- ✓ Maintaining the LIDS database for Labor use

The Labor Department may continue to perform these functions:

- ✓ Receiving and assessing applications for employment of foreign workers from off-island.
- ✓ Receiving and assessing applications for employment of foreign workers from on-island not submitted prior to November 28, 2009.

The Guam Labor Department's Alien Labor Processing and Certification Division performs these functions in connection with federally-issued H-2 visas under a grant of authority to the Governor of Guam. The Commonwealth Labor Department should perform the same functions under the same grant of authority to the Governor of the Commonwealth.³⁸

F. Customs and Quarantine

The customs and quarantine functions now performed by the Commonwealth will remain with the Commonwealth.

1. Customs

The Customs staff, which reports to the Secretary of Finance, will remain in place. No customs jobs or functions are affected by the transition.

³⁸ See Part IV(C).

The Customs staff will continue to occupy all of the space and offices that they now occupy at each of the airports and seaports. No changes in the flow of passengers to the Customs area will be made. No changes in files, equipment, or facilities will be made.

The Customs staff will continue to use the Border Management System for assistance in detection of customs violations. The incoming and outgoing passenger manifests now available through the CNMI Immigration Division should continue to be available to the BMS system under CBP control of the Immigration function in order to allow the Customs officers to continue to do their work efficiently and effectively. Passenger data help with profiling drug traffickers and smugglers, identifying travelers with outstanding CNMI tax liabilities, and isolating other customs targets.

Interaction between federal CBP personnel and Commonwealth Customs and Quarantine personnel will be handled in coordination meetings. See discussion in Part IV(A).

2. Quarantine

The Quarantine staff, which reports to the Secretary of Land and Natural Resources, will remain in place. No quarantine jobs or functions are affected by the transition.

The Quarantine staff will continue to occupy all of the space and offices that they now occupy at each of the airports and seaports. No changes in files, equipment, or facilities will be made.

Interaction between federal CBP personnel and Commonwealth Customs and Quarantine personnel will be handled in coordination meetings. See discussion in Part IV(A).

G. Commerce Department

The Commerce Department will continue to review and approve applications for foreign students to study at Commonwealth educational institutions after November 27, 2009 as a part of its responsibilities for building and overseeing the small private education industry in the Commonwealth.

The Commerce Department will also continue to review and oversee requirements with respect to foreign business permit holders and foreign investor permit holders in connection with its responsibilities for promotion of foreign investment and regulation of businesses within the Commonwealth.

PART III: COMMONWEALTH GOVERNMENT-OWNED PROPERTY

One of the legal requirements applicable to the situation arises from Section 806 of the Covenant. The Covenant anticipated that the United States might want to use Commonwealth facilities and limited the exercise of U.S . powers in this regard.

Section 806(a) of the Covenant provides: "The United States will continue to recognize and respect the scarcity and special importance of land in the Northern Mariana Islands. If the United States must acquire any interest in real property not transferred to it under this Covenant, it will follow the policy of seeking to acquire only the minimum area necessary to accomplish the public purpose for which the real property is required, of seeking only the minimum interest in real property necessary to support such public purpose, acquiring title only if the public purpose cannot be accomplished if a lesser interest is obtained, and of seeking first to satisfy its requirement by acquiring an interest in public rather than private real property."

Section 806(b) of the Covenant provides: "The United States may, **upon prior written notice to the Government of the Northern Mariana Islands**, acquire for public purposes in accordance with federal laws and procedures any interest in real property in the Northern Mariana Islands by purchase, lease, exchange, gift or otherwise under such terms and conditions as may be negotiated by the parties. **The United States will in all cases attempt to acquire any interest in real property for public purposes by voluntary means under this Subsection before exercising the right of eminent domain. No interest in real property will be acquired unless duly authorized by the Congress of the United States and appropriations are available therefor.**"

The Covenant provisions provide an additional context to the situation in the Commonwealth that DHS may not have faced before in dealing with insular areas.

A. Federal use of Commonwealth-owned facilities

There have been preliminary discussions regarding the federal government's interests in acquiring property at the various CNMI ports of entry on Saipan, Tinian, and Rota and at the Commonwealth prison on Saipan.

1. Airport facilities

In its initial request to the Commonwealth Ports Authority (CPA) dated June 16, 2009, the San Francisco Field Office of the DHS Customs and Border Protection (CBP) advised that the pertinent US laws and regulations require that CPA and the international airlines serving the airport be responsible for providing the needed space for immigration processing at each location in the CNMI used by the federal government, including adequate inspectional and administrative space as well as an employee parking, "all at no cost to CBP."

CPA responded promptly to this letter, expressing its willingness to work with CBP but pointing out the practical and financial limitations that had to be taken into account. In particular, Executive Director Camacho advised that about 15,000 square feet of the space desired by CBP was leased to Duty Free Shops and that the lease could not be terminated without providing comparable space to DFS and meeting their reasonable financial demands. In addition, he pointed out that CPA was in a very vulnerable financial situation due to the decline in the economy and tourist traffic over the last few years and could not afford to lose the income coming to the agency under the DFS lease.

The Commonwealth is pursuing this matter with federal officials in an effort to resolve the important legal, practical and financial issues involved with the CBP requests for space.

The Commonwealth plans to vacate its immigration (but not its customs or quarantine) space at the three airports, and that space will be available to CBP on terms to be negotiated. The Commonwealth does not plan to displace any existing lessee occupying any space at any of the airports to make room for CBP. Other DHS entities will need to be housed elsewhere, as airport space is at a premium. USCIS and its outsourced contractor personnel are already housed in privately-owned office space on Beach Road in Garapan.

2. Detention facilities

Another Department of Homeland Security component, Immigration and Customs Enforcement (ICE), is currently engaged in discussions with the CNMI Department of Correction and the Office of the Governor regarding ICE's interest in obtaining correctional facilities for use in dealing with persons violating the US immigration laws.

B. Federal use of Commonwealth-owned equipment and telecommunications

The Commonwealth does not plan to provide any Commonwealth-owned equipment or telecommunications for use by DHS entities.

C. Federal use of Commonwealth-owned data

The Commonwealth has need of federally-generated data from the flight manifests and vessel manifests of craft landing in Saipan, Rota, and Tinian in order to carry out its customs functions. See Section II(F)(1) above. The Commonwealth is particularly concerned that it continue to have exit data on an immediate basis as some reports indicate that CBP does not have that capability in the U.S. mainland ports.

PL 110-229 reflects a potential need of federal officials for data that the Commonwealth has obtained.

Public Law 110-229, §702 (a) (Section 6(e)(3)), provides: “Notwithstanding any other law, the Government of the Commonwealth shall provide to the Secretary all Commonwealth immigration records or other information that the Secretary deems necessary to assist the implementation of this paragraph or other provisions of the Consolidated Natural Resources Act of 2008.”

The Commonwealth envisions a two-way data exchange. The DHS agencies will provide the Commonwealth with the entry data it needs, which are provided by carriers at no cost to the federal government, and will ensure the collection and transmission of exit data. The Commonwealth will make available information from its immigration records under normal privacy protections when formally requested by an appropriate document, within a reasonable time frame. The Commonwealth will recover the cost of generating and producing any information provided to any federal agency prior to delivery of the records or data. The Immigration Division and the Labor Department will determine the recoverable costs associated with any records or data requested by the Secretary of Homeland Security or any other federal agency. This will be a part of a two-way exchange in which the Commonwealth gets the data it needs from CBP and ICE.

PART IV: POST TRANSITION-DATE REQUIREMENTS

The need for consultation and coordination between units of the Commonwealth Government and agencies of the U.S. Government will continue after the transition date. This section outlines the principal areas in which that consultation and coordination will be needed.

A. Organized and efficient consultation mechanisms

The Commonwealth is a very small jurisdiction and its concerns have had relatively little attention from DHS since May 8, 2009 when PL 110-229 was enacted. However, DHS operations under PL 110-229 can have a very substantial adverse impact on the economy of the Commonwealth and the ability of the Commonwealth to climb out of its current economic depression. The Commonwealth urgently needs a consultation mechanism, in Washington and in Saipan, under which it can raise its concerns and get answers. We expect that the responsible federal officials would also benefit from such a facility.

The Commonwealth proposes a Washington-based Consultative Program under which designated senior CBP, ICE and USCIS officials would meet with the Governor's representatives at 2 p.m. on the first Tuesday of every month to discuss policy decisions and areas where DHS decisions raise serious problems for the Commonwealth or when federal officials are seeking revision in CNMI policies or procedures.³⁹

The Commonwealth also proposes a Saipan-based Coordination Group under which designated senior CBP, ICE and USCIS officials resident in the Commonwealth would meet at 9:00 a.m. on the first and third Thursdays of each month to discuss local implementation issues.

These meetings would be held on DHS premises and would be open to participants approved by either DHS or the Commonwealth.

The anticipated adverse economic impact on the Commonwealth from the federalization legislation is so crippling⁴⁰ that every effort should be made to coordinate federal and Commonwealth government activities to minimize these effects.

³⁹ See e.g. Section II(C) above.

⁴⁰ McPhee, Malcolm and Richard Conway, *Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands*, study funded by the U.S. Department of the Interior, October 2008. "The policy of federalization, which raises the minimum wage and restricts use of foreign labor, will exacerbate the current economic problems in the CNMI as shown by the above projections. By hindering the growth of the visitor industry, it will deepen and prolong the depression caused by the loss of the apparel industry. Federalization will also preclude significant economic growth in the long run." P. 37.

B. Travel restrictions

Aliens who hold CNMI-issued permits are entitled to remain in the Commonwealth under those permits for up to two years after the transition date. USCIS officials have announced that these persons will be prevented from returning to the Commonwealth if they leave the Commonwealth for medical, family, business, or other reasons. That is unnecessary, highly damaging to the Commonwealth and its citizens, and unacceptable from the Commonwealth's point of view. DHS has authority to waive these restrictions and should do so. Anyone who holds a CNMI-issued permit or a federally-issued CNMI-only permit is not a threat to U.S. national security and should be allowed to continue employment if they leave the CNMI and return during the term of the permit.

The USCIS position is that a visa is a travel document issued to an alien and constitutes permission to enter the United States. To enter the United States, unless a person is a holder of a U.S. passport, every person needs a visa issued by the Department of State. U.S.-issued visas have restrictions on time (the expiration date) and activities (for example, some categories of visas do not allow the holder of the visa to work in the U.S.). A visa is entirely separate from any work permit that the alien may hold with respect to his or her presence in a state or territory.

As of November 28, 2009, USCIS has announced it will honor CNMI-issued entry permits in only two respects: holders of these permits cannot be removed (deported) from the U.S. for the duration of the permit or two years, whichever is shorter; and holders of these permits that allow employment can be employed in the Commonwealth for the duration of the permit or two years, whichever is shorter. However, if an alien who has valid status to remain in the Commonwealth exits to travel to another country, he or she must obtain a U.S. visa in order to return. This means applying for a visa at a consulate located in the alien's home country and obtaining a U.S. visa issued by the Department of State.

Implementing this policy will burden the Commonwealth's economy. Some CNMI-permit holders who are citizens of visa-waiver countries, such as Japan and Korea, will be able to return to the CNMI as tourists, a status for which they do not need visas, but according to USCIS they will be unable to resume their status as investors, workers, or students.

USCIS advises that there will be special CNMI-only visas created by the Department of State for workers, students, investors, and others holding CNMI-issued permits or federally-issued CNMI-only permits and that consular processing of these special visas will be done quickly and efficiently. And CBP advises that for those who must exit for emergency purposes, there will be a parole process to allow them to re-enter temporarily without a visa.

These special credentials are burdensome and entirely unnecessary. Persons who have been admitted to the Commonwealth and exit temporarily cannot re-enter any part of the U.S. except the Commonwealth using their Commonwealth-issued permits. The system of using Commonwealth-

issued credentials for re-entry has worked very well for 30 years. There has never been an adverse incident caused by re-entry. Travel to a U.S. consulate to obtain a visa, especially in China and Russia, is very expensive. Consulates do not exist in every city or even in every province. All consulates require advance appointments and refuse to deal with anyone who does not have an appointment. No extra useful protection is afforded by insisting on these visits to consulates.

C. Entry and employment permits

Federally-issued CNMI-only employment permits are not an immediate large-scale problem because the Commonwealth will issue two-year permits, effective as of November 27, 2009, to aliens and their employers who apply within the deadlines established by the Immigration Division and the Labor Department. The Commonwealth will administer those permits until they expire in November 2011 or earlier, according to their terms. However, the transition to federal CNMI-only permits will begin immediately as persons present in the CNMI (who do not have CNMI-issued permits as of the transition date or whose CNMI-issued permits do not extend for the full available two-year period) apply. This section deals with those issues.

1. Issuance of federal CNMI-only foreign investor visas

CNMI Immigration Regulations include employment rights in the permits of regular-term business persons, long-term business persons, foreign investors, and retiree investors. For that reason, these persons are covered by the provision of PL 110-229 that extends permission to remain employed in the Commonwealth after the transition date without any federally-issued permit.

Public Law 110-229, Section 702(a) (Section 6 (e)(2) provides: EMPLOYMENT AUTHORIZATION.—An alien who is lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of the date— “(A) of expiration of the alien’s employment authorization under the immigration laws of the Commonwealth; or “(B) that is 2 years after the transition program effective date.

Such persons may elect to pursue federally-issued CNMI-only investor visas during the period while their CNMI-issued permits are still valid as federally-issued visas will permit travel in and out of the Commonwealth.

PL 110-229, §702(a) (Section 6(c)) provides: NONIMMIGRANT INVESTOR VISAS.— (1) IN GENERAL.—Notwithstanding the treaty requirements in section 101(a)(15)(E) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(E)), during the transition period, the Secretary of Homeland Security may, upon the application of an alien, classify an alien as a CNMI-only nonimmigrant under section 101(a)(15)(E)(ii) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(E)(ii)) if the alien— “(A) has been admitted to the Commonwealth in longterm investor status under the immigration laws of the Commonwealth before the transition program effective date; (B) has continuously maintained residence in the Commonwealth under long-term investor status; “(C) is otherwise admissible; and “(D) maintains the investment or investments that formed the basis for such long-term investor status. “(2) REQUIREMENT FOR REGULATIONS.—Not later than 60 days before the transition program effective date, the Secretary of Homeland Security shall publish regulations in the Federal Register to implement this subsection.

USCIS did not issue regulations implementing Section 6(c) until nine business days before the statutory deadline and has afforded only thirty days for comment. This hampers the CNMI business community from exploring fully the possible problems that the federal draft presents, and certainly restricts the thoroughness of the federal review of CNMI comments. Any remaining problems caused by this long-delayed issuance of these regulations will be dealt with in this Protocol as a part of the post transition-date process.

3. Issuance of regular federal H-visas

PL 110-229 allows the use of H-visas in the Commonwealth without regard to the numerical cap that applies elsewhere in the U.S.

PL 110-229, §702(a) (Section 6(b)) provides: NUMERICAL LIMITATIONS FOR NONIMMIGRANT WORKERS.— An alien, if otherwise qualified, may seek admission to Guam or to the Commonwealth during the transition program as a nonimmigrant worker under section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) without counting against the numerical limitations set forth in section 214(g) of such Act (8 U.S.C. 1184(g)). This subsection does not apply to any employment to be performed outside of Guam or the Commonwealth.

Federally issued H-visas are relatively less important in addressing the Commonwealth’s labor needs for reasons that were laid out in great detail in the Congressional hearings on the legislative proposals that became PL 110-229. The H-visas are too limited in scope to provide the kind of labor that the Commonwealth needs, particularly that necessary to sustain its tourist industry. However, some employers in the Commonwealth may be able to take advantage of the availability of H-visas to sponsor employees.

In this regard, the Governor of the CNMI should be authorized to exercise all of the functions now exercised by the Governor of Guam with respect to the employment of H-2 workers in Guam. Rota and Tinian should be regarded as separate labor markets.

4. Issuance of federal CNMI-only private sector employment permits

The Commonwealth anticipates that many employers of alien workers will provide for two-year CNMI-issued permits for their workers extending from November 2009 through November 2011.⁴¹ For that reason, the issuance of federal CNMI-only private sector employment permits is not expected to be an immediate problem.

PL 110-229, §702(a) (Section 6(d)(2)) provides: SPECIAL PROVISION TO ENSURE ADEQUATE EMPLOYMENT; COMMONWEALTH ONLY TRANSITIONAL WORKERS.—An alien who is seeking to enter the Commonwealth as a nonimmigrant worker may be admitted to perform work during the transition period subject to the following requirements: “(1) Such an alien shall be treated as a nonimmigrant described in section 101(a)(15) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)), including the ability to apply, if otherwise eligible, for a change of nonimmigrant classification under section 248 of such Act (8 U.S.C. 1258) or adjustment of status under this section and section 245 of such Act (8 U.S.C. 1255). (2) The Secretary of Homeland Security shall establish, administer, and enforce a system for allocating and determining the number, terms, and conditions of permits to be issued to prospective employers for each such nonimmigrant worker described in this subsection who would not otherwise be eligible for admission under the Immigration and Nationality Act (8 U.S.C. 1101 et seq.).

The Commonwealth recommends that this system, when implemented, be run in the same general way as the certifying process for temporary labor certifications operates in Guam and the Governor of the Commonwealth should be able to use the same process as the Governor of Guam uses with respect to the employment of temporary workers in Guam.

The federal system, when implemented, should honor CNMI-approved employment and every employer who then employs foreign workers should receive permits for each of the then-employed foreign workers. Only in this way can irreversible damage to the Commonwealth’s economy be avoided. In addition, the Commonwealth expects that federal authorities will honor and enforce the Commonwealth’s barred list. The Commonwealth bars employers who violate Commonwealth law from employing foreign workers either for a period of months or years or permanently. Employers who have been barred by the Commonwealth should not be

⁴¹ See Part I(B).

granted permits by federal authorities. To do so would undermine Commonwealth law enforcement and endanger the Commonwealth's labor system.

5. Establishing the process for converting CNMI-issued credentials for immediate relatives to federally-issued permits

At the transition date, Immediate relatives and others who do not work will hold CNMI-issued permits that extend for up to two years from the transition date. These persons cannot be removed by the U.S. authorities during the period that their CNMI-issued permit remains valid (up to a maximum of two years). Therefore, most immediate relatives and others in an indeterminate status will have some time to sort out their federal status. One particularly numerous and important group includes the aliens who are immediate relatives of alien workers. PL 110-229 acknowledges this group but provides no specifics as to how they are to be treated.

PL 110-229, §702(a) (Section 6(d)(6)), provides: The Secretary of Homeland Security may authorize the admission of a spouse or minor child accompanying or following to join a worker admitted pursuant to this subsection.

The Commonwealth recommends that, at the same time those covered by CNMI-issued permits are converted to federally-issued CNMI-only permits, all qualified immediate relatives be converted.

6. Qualification of foreign students and CNMI educational institutions under U.S. law

Foreign students who hold CNMI-issued permits cannot be removed during the two-year period following the transition date if the foreign student has obtained the maximum-length two year permit prior to the transition date.⁴² However, CNMI private schools rely on the capability to admit new foreign students each year, so the qualification of foreign students and the schools they attend is an important concern.

The Commonwealth requests that in January 2010, the appropriate federal officials conduct an in-depth briefing in Saipan for the Department of Commerce, which regulates foreign students and private schools, and for the private schools on Saipan that serve foreign students.

7. Implementation of the registration requirement so as to maintain eligibility

Public Law 110-229 provides for an optional registration process covering aliens present in the Commonwealth as of the transition date. The Commonwealth recommends that USCIS not

⁴² See Part I(B).

implement this section. Registration will not serve any useful function and is likely to draw serious legal challenges by lawyers representing foreign workers.

PL 110-229, §702(a) (Section 6(e)(3)) provides: “(3) REGISTRATION.—The Secretary of Homeland Security may require any alien present in the Commonwealth on or after the transition period effective date to register with the Secretary in such a manner, and according to such schedule, as he may in his discretion require. Paragraphs (1) and (2) of this subsection shall not apply to any alien who fails to comply with such registration requirement.

If implemented, the registration process should be conducted so as to maintain eligibility to the maximum extent possible and to take account of the lack of English-language capability for some who are eligible under Commonwealth-issued permits. Simply scheduling appointments and putting the burden on aliens to show up is not a fair way to proceed. The process should be preceded by an effective public awareness campaign and as implemented should avoid, to the maximum extent possible, infringements on constitutional rights.

D. Financial assistance

PL 110-229 imposes a very substantial burden on the Commonwealth’s economy which will slow or prevent its recovery from the depression-conditions now prevailing in the Commonwealth.⁴³ This makes U.S. government financial assistance of prime importance.

1. Repeal of the cover-over limitations in PL 110-229

PL 110-229 unaccountably takes away from the Commonwealth cover-over revenues that are paid to the governments of every other insular area to which the U.S. immigration laws apply.⁴⁴ This punitive provision should be repealed. The alternatives offered to the Commonwealth, under provisions for education funding and an unfunded mandate for technical assistance, are not in any way adequate substitutes for the cover-over funds that would otherwise be available under the Covenant.

2. Collection and prompt remittance of fees due the Commonwealth

⁴³ See generally, McPhee, Malcolm and Richard Conway, *Economic Impact of Federal Laws on the Commonwealth of the Northern Mariana Islands*, study funded by the U.S. Department of the Interior, October 2008. This study is the most detailed assessment of the Commonwealth’s economy available to date and includes more relevant data than any other study.

⁴⁴ PL 110-229, §702(g)(1)(C): Public Law 94-241 is amended as follows: (C) In section 703(b) of the covenant set forth in section 1, by striking “quarantine, passport, immigration and naturalization” and substituting “quarantine and passport”.

PL 110-229 makes available to the Commonwealth a fee of \$150.00 for each employer permit issued by federal authorities during the transition period. Because during the first two years after the transition date, the permits for most employers will have been issued prior to the transition date by the Commonwealth government and will remain in force for up to two years, this provision is likely to come into effect only gradually.

PL 100-229, Section 702(a) (Section 6 (a)(6)) provides: “(6) CERTAIN EDUCATION FUNDING.—In addition to fees charged pursuant to section 286(m) of the Immigration and Nationality Act (8 U.S.C. 1356(m)) to recover the full costs of providing adjudication services, the Secretary of Homeland Security shall charge an annual supplemental fee of \$150 per nonimmigrant worker to each prospective employer who is issued a permit under subsection (d) of this section during the transition period. Such supplemental fee shall be paid into the Treasury of the Commonwealth government for the purpose of funding ongoing vocational educational curricula and program development by Commonwealth educational entities.

As USCIS begins to issue employer permits, it should make provision for payment of the \$150 fee by the employer directly to the Commonwealth. There is no need for any collection by federal authorities with the attendant delay and uncertainty that would cause.

2. Implementation of the technical assistance program

The technical assistance program that is a part of PL 110-229 is, at present, an entirely unfunded mandate. The Interior Department has very limited technical assistance funds and most of the available funding is programmed for other purposes. However, technical assistance for each of the purposes outlined in the law will be requested by the Commonwealth.

Public Law 110-229, §702(g) provides: (e) TECHNICAL ASSISTANCE PROGRAM.—
(1) IN GENERAL.—The Secretary of the Interior, in consultation with the Governor of the Commonwealth, the Secretary of Labor, and the Secretary of Commerce, and as provided in the Interagency Agreements required to be negotiated under section 6(a)(4) . . . shall provide— (A) technical assistance and other support to the Commonwealth to identify opportunities for, and encourage diversification and growth of, the economy of the Commonwealth; (B) technical assistance, including assistance in recruiting, training, and hiring of workers, to assist employers in the Commonwealth in securing employees first from among United States citizens and nationals resident in the Commonwealth and if an adequate number of such workers are not available, from among legal permanent residents, including lawfully admissible citizens of the freely associated states; and (C) technical assistance, including assistance to identify types of jobs needed, identify skills needed to fulfill such jobs, and assistance to Commonwealth educational entities to develop curricula for such job skills to include training teachers and students for such skills.

The timing and best use of this technical assistance should be the subject of a conference, in Saipan, in February 2010 involving Commonwealth officials and representatives of the Secretary of the Interior, the Secretary of Labor, and the Secretary of Commerce.

E. Federal operations

Public Law 110-229 affects certain other federal operations that should be coordinated after the transition date. This section collects the Commonwealth's position on those operations.

1. Operation of the asylum program

The Commonwealth is required to operate the asylum program only up to the transition date.⁴⁵ Public Law 13-61, which authorizes participation in the nonrefoulement protection program, is based on the Commonwealth's immigration authority. When any aspect of the Commonwealth's immigration authority is preempted by federal law, the entire nonrefoulement protection program becomes the responsibility of the appropriate federal agency, and the Commonwealth is no longer involved in this program.

The Commonwealth will not provide any asylum services after the transition date, and the Governor will recommend to the Commonwealth Legislature that PL 13-61 be repealed entirely. As of September 1, 2009, there are very few pending asylum cases. Cases arising before November 28, 2009 will be held and turned over to USCIS without action by the Commonwealth. All files and records with respect to the asylum program, as administered by the Commonwealth, will be delivered to USCIS in the Commonwealth by the CNMI Attorney General on or before the transition date.

⁴⁵ Public Law 110-229, §702(i)(2) provides: (i) REQUIRED ACTIONS PRIOR TO TRANSITION PROGRAM EFFECTIVE DATE.—During the period beginning on the date of enactment of this Act and ending on the transition program effective date described in section 6 of Public Law 94-241 (as added by subsection (a)), the Government of the Commonwealth shall— (2) administer its nonrefoulement protection program— (A) according to the terms and procedures set forth in the Memorandum of Agreement entered into between the Commonwealth of the Northern Mariana Islands and the United States Department of Interior, Office of Insular Affairs, executed on September 12, 2003 (which terms and procedures, including but not limited to funding by the Secretary of the Interior and performance by the Secretary of Homeland Security of the duties of "Protection Consultant" to the Commonwealth, shall have effect on and after the date of enactment of this Act), as well as CNMI Public Law 13-61 and the Immigration Regulations Establishing a Procedural Mechanism for Persons Requesting Protection from Refoulement; and (B) so as not to remove or otherwise effect the involuntary return of any alien whom the Protection Consultant has determined to be eligible for protection from persecution or torture.

After the transition date and during the transition period, the asylum process does not apply to aliens present in the Commonwealth

Public Law 110-229, §702(a) (Section 6(a)(7)), provides: (7) ASYLUM.—Section 208 of the Immigration and Nationality Act (8 U.S.C. 1158) shall not apply during the transition period to persons physically present in the Commonwealth or arriving in the Commonwealth (whether or not at a designated port of arrival), including persons brought to the Commonwealth after having been interdicted in international or United States waters.

Asylum cases that arise after November 27 and during the transition period will be treated in the “territorial” manner – that is, the asylum-seeker is not within the United States. The only difference will be that federal officials will do the processing. However, after the transition period, aliens will have much greater access to the asylum process. This can cause serious financial burdens to a small jurisdiction such as the Commonwealth and, for that reason, the Commonwealth expects the United States to fund all asylum activities (without any funding participation from the Commonwealth) and to provide funds promptly to meet any documented financial burdens on the Commonwealth from the federal conduct of the federal asylum program in the Commonwealth.

2. Cooperative law enforcement with respect to deportations

Cooperative law enforcement efforts will be required to secure the departure from the Commonwealth of aliens who refuse repatriation when ordered by the Commonwealth courts or the Labor Department’s Administrative Hearing Office

In 2007, the Commonwealth began a sustained effort to repatriate unemployed garment workers voluntarily. As a part of that effort, all open labor cases from 2007 and prior years were adjudicated so that pending cases was no longer a reason for unemployed workers to remain in the Commonwealth. The Commonwealth also developed a cooperative administrative process between the CNMI Labor Department and the CNMI Division of Immigration over the past three years. The CNMI Labor Department uses entry and exit records with respect to those who hold private sector employment permits to identify aliens who have overstayed their permits and are out of status.

A draft overstayer list is compiled each calendar quarter and published in English and Chinese language newspapers in Saipan. Those on the list are invited to report to the Labor Department, within a 30-day period, with any records or reasons why they should be removed from the list. After the end of the 30-day period, the quarterly overstayer list is certified by the Deputy Secretary to the Director of the Division of Immigration. Once a list is certified, the Immigration Division is the only entity that can deal with the status of a person on the list. The Labor Department will no longer accept any applications, complaints, or other documents from such

persons. Records with respect to foreign workers from 2002 through the present have been used in this project. Prior to 2002, different computer software was used and examining those records would necessitate expenditures for converting the digital records to usable form. The Labor Department's budget limitations prevented that investment from being made in FY2008 and FY2009.

The repatriation of unemployed garment workers was successful and is largely completed. From a population of more than 30,000 workers overall five years ago, the Commonwealth now has less than 15,000 workers overall, most of whom work in the tourism industry. Almost all of those departures were voluntary. Overstayer lists are an accurate reflection of the out-of-status population on Saipan, Rota, and Tinian. That population numbered about 900 in early 2008, after most of the garment workers had been repatriated, and has been declining as aliens either regain proper status or voluntarily repatriate. In addition, the Attorney General's Investigative Unit officers apprehend overstayers.

The Commonwealth law enforcement authorities will continue their efforts to locate overstayers after the transition date. The Commonwealth expects that ICE will focus on locating and deporting overstayers who have been identified on the Commonwealth's overstayer lists. Those who have not complied with Commonwealth law should not be permitted to remain.

- ✓ The Commonwealth also proposes three technical assistance grants with respect to overstayers. The first grant would enable the Commonwealth's data experts to retrieve and review files with respect to tourists who have entered over the past five years. Because of the large volume of tourist entries, this analysis was not included in the budget for the overstayer list project. The Commonwealth has historically had relatively little problem with overstayers among tourists, but as federalization approached, that situation may have changed.⁴⁶
- ✓ The second grant would enable the Commonwealth to examine all other categories of aliens who have entered the Commonwealth (other than foreign workers and tourists) since 2002 for the same purpose.
- ✓ The third grant would provide the resources to examine Commonwealth digital data back to 1985 when the foreign worker program began to locate overstayers who may have been long underground. The computer software used prior to 2002 was substantially different from the current software and is now only available through expert data services.

⁴⁶ Many aliens believe, based on statements from officials who have visited Saipan, that federalization means that all aliens present in the Commonwealth will ultimately get green cards permitting them to go to the mainland.

When the ICE TDY personnel finally arrive in the Commonwealth, it would be useful to have a series of briefings, after the transition date, on law enforcement cooperative efforts. Among the topics that can be addressed is the application of Public Law 110-229, Section 6(g).

PL 110-229, §702(a)(Section 6(g) provides: ACCRUAL OF TIME FOR PURPOSES OF SECTION 212(A)(9)(B) OF THE IMMIGRATION AND NATIONALITY ACT.—No time that an alien is present in the Commonwealth in violation of the immigration laws of the Commonwealth shall be counted for purposes of inadmissibility under section 212(a)(9)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(9)(B)).

3. Implementation of Interagency Agreements (no deadline)

Effective interagency cooperation is vital to the Commonwealth's ability to ameliorate to some extent the adverse effects of PL 110-229 on the Commonwealth's economy. The interagency agreements contemplated by PL 110-229 should be in place as of the transition date. As of September 1, 2009, there appeared to be no such agreements "designed to ensure timely and proper implementation" of the law before November 28, 2009.

PL 110-229, Section 702(a), (Section 6(a)(5)) provides: INTERAGENCY AGREEMENTS.—The Secretary of Homeland Security, the Secretary of State, the Secretary of Labor, and the Secretary of the Interior shall negotiate and implement agreements among their agencies to identify and assign their respective duties so as to ensure timely and proper implementation of the provisions of this section. The agreements should address, at a minimum, procedures to ensure that Commonwealth employers have access to adequate labor, and that tourists, students, retirees, and other visitors have access to the Commonwealth without unnecessary delay or impediment. The agreements may also allocate funding between the respective agencies tasked with various responsibilities under this section

After the transition date, the Commonwealth should be given a seat at the "interagency table" so that it can participate in deliberations about funding and implementation of the transition program.

4. Plan development by the Secretaries of Homeland Security, Labor, and Interior (no deadline)

Public Law 110-229 offers the Commonwealth a planning process under which coordinated activity will take place to support the Commonwealth's economy.

Public Law 110-229, §702(e)(2) provides: CONSULTATION.—In providing such technical assistance under paragraph (1), the Secretaries shall— (A) consult with the Government of the Commonwealth, local businesses, regional banks, educational institutions, and other experts in the economy of the Commonwealth; and (B) assist in the development and implementation of a process to identify opportunities for and encourage diversification and growth of the economy of the Commonwealth and to identify and encourage opportunities to meet the labor needs of the Commonwealth.

The Commonwealth requests that this plan be in place by March 2010 in order to allow orderly planning in the Commonwealth for the Commonwealth's 2011 budget.

F. Commonwealth operations

1. Prepare clean-up bill for CNMI Legislature amending laws to accommodate federalization

The Attorney General's Task Force on implementation of PL 110-229 will prepare a clean-up bill for submission to the Commonwealth Legislature in January 2010 to amend and repeal laws as necessary to accommodate federalization.

2. Prepare amended immigration, labor, and commerce regulations to accommodate federalization

The Attorney General's Task Force will prepare amended immigration, labor, and commerce regulations as soon as the Legislature has completed its action on the proposed clean-up bill.

G. Reports

The statutory plan relies on a number of reports to inform all parts of the governmental apparatus as to important guidelines and goalposts.

1. Report of the Secretary of Homeland Security on Resource Requirements, not later than January 2009

A basic component of the implementation process is a detailed report by the Secretary of Homeland Security on the resources that DHS intends to devote to the tasks in the Commonwealth assigned to it by the law.

Public Law 110-229, §702(h)(5) provides: REPORT ON FEDERAL PERSONNEL AND RESOURCE REQUIREMENTS.—Not later than 180 days after the date of enactment of this Act, the Secretary of Homeland Security, after consulting with the Secretary of the Interior and other departments and agencies as may be deemed necessary, shall submit a report to the Committee on Natural Resources, the Committee on Homeland Security, and the Committee on the Judiciary of the House of Representatives, and to the Committee on Energy and Natural Resources, the Committee on Homeland Security and Governmental Affairs, and the Committee on the Judiciary of the Senate, on the current and planned levels of Transportation Security Administration, United States Customs and Border Protection, United States Immigration and Customs Enforcement, United States Citizenship and Immigration Services, and United States Coast Guard personnel and resources necessary for fulfilling mission requirements on Guam and the Commonwealth in a manner comparable to the level provided at other similar ports of entry in the United States. In fulfilling this reporting requirement, the Secretary shall consider and anticipate the increased requirements due to the proposed realignment of military forces on Guam and in the Commonwealth and growth in the tourism sector.

Thus far, the only report on this subject is the January 2009 report to the House Natural Resources Committee which does not satisfy the statutory requirement. The answers, recently received, to Congressional questions submitted in June, provide supplemental information responsive to statutory provisions. However these DHS answers indicate that DHS will not be in a position to fulfill its mission requirements “In a manner comparable to the level provided at other similar ports of entry in the United States” until the end of 2011. The Commonwealth does not believe that such a deferred implementation of PL 110-229 is consistent with the legislative intent or the national security of the United States.

2. Submission and consideration of the Governor’s comments on the federally-issued CNMI-only employment permits (no deadline)

Section 706(d)(2) authorizes the system of federally-issued CNMI-only employment permits. The statute requires, in fairness, that the Governor have an opportunity to comment on these regulations prior to the time any regulations are issued for public comment.

PL 110-229, §702(a) (Section 6(d)(2)) provides: In adopting and enforcing this system, the Secretary shall also consider, in good faith and not later than 30 days after receipt by the Secretary, any comments and advice submitted by the Governor of the Commonwealth.

There is no statutory deadline by which these regulations must be issued, and DHS has not yet issued any such guidance. The Commonwealth suggests issuance of a tentative draft of regulations for the Governor’s comment no later than year-end 2009.

3. Report of the Secretary of the Interior, not later than May 2010

The report of the Secretary of the Interior due in May 2010 is widely thought by foreign workers to be the key to any improved status such as green cards permitting their entry into mainland U.S. However, the status topic is optional, and the Secretary is not required to address it.

Public Law 110-229, §702(a) (Section 6(h)), provides: REPORT ON NONRESIDENT GUESTWORKER POPULATION.— The Secretary of the Interior, in consultation with the Secretary of Homeland Security, and the Governor of the Commonwealth, shall report to the Congress not later than 2 years after the date of enactment of the Consolidated Natural Resources Act of 2008. The report shall include— “(1) the number of aliens residing in the Commonwealth; “(2) a description of the legal status (under Federal law) of such aliens; “(3) the number of years each alien has been residing in the Commonwealth; “(4) the current and future requirements of the Commonwealth economy for an alien workforce; and “(5) such recommendations to the Congress, as the Secretary may deem appropriate, related to whether or not the Congress should consider permitting lawfully admitted guest workers lawfully residing in the Commonwealth on such enactment date to apply for long-term status under the immigration and nationality laws of the United States.

Importantly, this report requires data that the Census Bureau does not yet have. Although the Census Bureau uses samples and surveys to provide data as specified in PL 110-229 to all states and many cities, it does not provide that data to the Commonwealth. The Commonwealth itself has no statistically reliable population data and no financial resources for collecting such data. For that reason, if the Census Bureau does not provide estimates based on its well-established sampling techniques, funding will have to be found to support the generation of these data.

4. GAO Report to Congress, not later than May 2010

The GAO report to Congress will require data from the Census Bureau and perhaps some specialized collection of data. Planning ahead to acquire this data in a timely way will be critical to the utility of the report.

Public Law 110-229, §702(h)(3) provides: GAO REPORT.—The Government Accountability Office shall submit a report to the Congress not later than 2 years after the date of enactment of this Act, to include, at a minimum, the following items: (A) An assessment of the implementation of this subtitle and the amendments made by this subtitle, including an assessment of the performance of Federal agencies and the Government of the Commonwealth in meeting congressional intent. (B) An assessment of the short-term and long-term impacts of implementation of this subtitle and the amendments made by this subtitle on the economy of the Commonwealth, including its ability to obtain workers to supplement its resident workforce and to maintain access to its tourists and customers, and any effect on compliance with United States treaty obligations mandating nonrefoulement for refugees. (C) An assessment of the economic benefit of the investors “grandfathered” under subsection (c) of section 6 . . . and the Commonwealth’s ability to attract new investors after the date of enactment of this Act. (D) An assessment of the number of illegal aliens in the Commonwealth, including any Federal and Commonwealth efforts to locate and repatriate them.

Any specialized data required to be provided by the Commonwealth can be made available only with technical assistance funds.

5. Governor’s Report to the President, November 2010

The Commonwealth will seek technical assistance funding to update existing assessments with respect to the state of the Commonwealth’s economy so that it may submit a comprehensive annual report to the President.

Public Law 110-229, §702(h)(4) provides: REPORTS BY THE LOCAL GOVERNMENT.—The Governor of the Commonwealth may submit an annual report to the President on the implementation of this subtitle, and the amendments made by this subtitle, with recommendations for future changes. The President shall forward the Governor’s report to the Congress with any Administration comment after an appropriate period of time for internal review, provided that nothing in this paragraph shall be construed to require the President to provide any legislative recommendation to the Congress.

6. Department of the Interior (President’s) Report to Congress, not later than March 1, 2011

The required report to Congress will require data from the Census Bureau and perhaps some specialized collection of data. Planning ahead to acquire this data in a timely way will be critical to the utility of the report.

PL 110-229, §702(h)(1-2) provides: REPORTS TO CONGRESS.— (1) IN GENERAL.—Not later than March 1 of the first year that is at least 2 full years after the date of enactment of this subtitle, and annually thereafter, the President shall submit to the Committee on Energy and Natural Resources and the Committee on the Judiciary of the Senate and the Committee on Natural Resources and the Committee on the Judiciary of the House of Representatives a report that evaluates the overall effect of the transition program established under section 6 . . . and the Immigration and Nationality Act (8 U.S.C. 1101 et seq.) on the Commonwealth. (2) CONTENTS.— In addition to other topics otherwise required to be included under this subtitle or the amendments made by this subtitle, each report submitted under paragraph (1) shall include a description of the efforts that have been undertaken during the period covered by the report to diversify and strengthen the local economy of the Commonwealth, including efforts to promote the Commonwealth as a tourist destination. The report by the President shall include an estimate for the numbers of nonimmigrant workers described under section 101(a)(15)(H) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(H)) necessary to avoid adverse economic effects in Guam and the Commonwealth.

Any specialized data required to be provided by the Commonwealth can be made available only with technical assistance funds.

7. Secretary of Labor’s Report, November 2011

PL 110-229 provides for an assessment by the Secretary of Labor with respect to the Commonwealth’s labor needs in conjunction with a possible extension of the transition period. During the efforts to enact PL 110-229 over the Commonwealth’s serious and sustained objections, proponents of the law consistently referred to the possibility, indeed probability, that the five-year transition period would be extended if Commonwealth labor needs could not be met through standard federal H visas. The transition period had been 9 years in the drafts of the bill that were considered by both the House and the Senate until the very last minute when a change was made, without any consultation with the Commonwealth, to lower the transition period to five years. Thus, the report of the Secretary of Labor is of key importance in mitigating the serious adverse effects of PL 110-229 on the Commonwealth’s economy.

PL 110-229, §702(a) (Section 6(d)(5)(A)), provides: Not later than 180 days prior to the expiration of the transition period, or any extension thereof, the Secretary of Labor, in consultation with the Secretary of Homeland Security, the Secretary of Defense, the Secretary of the Interior, and the Governor of the Commonwealth, shall ascertain the current and anticipated labor needs of the Commonwealth and determine whether an extension of up to 5 years of the provisions of this subsection is necessary to ensure an adequate number of workers will be available for legitimate businesses in the Commonwealth.

The Commonwealth requests that the Secretary of Labor’s report be available no later than November 2011. The law provides that the report is due no later than May 28, 2013, but that

schedule is entirely impractical from the point of view of rescuing the Commonwealth's economy from the uncertainty and accompanying adverse effects engendered by the unreasonably short five-year transition period.

In addition, the Commonwealth points out that PL 110-229 repeatedly uses the term "legitimate businesses" in connection with the assessment of the needed labor force. This is a particularly discriminatory provision as concerns women in the workforce. Many women cannot work at full-time jobs without domestic help for child care and elder care. Households are not "businesses," so the assessment of the labor force needs, if conducted strictly in conformity with the law, would exclude the need for workers to provide child care and elder care. The Commonwealth requests that all of the labor needs of the Commonwealth's economy be assessed fairly.

8. Secretary of Homeland Security Report on Asylum, not later than November 2012

Asylum-related matters have been a very minor activity in the Commonwealth since the enactment of Public Law 13-61, which authorizes participation in the nonrefoulement protection program. It is not anticipated that this will change under federal administration during the transition period. PL 100-229 has a general reporting requirement prior to the end of the transition period with respect to any increase in asylum activity anticipated as a result of increased access to the asylum program by aliens.

Public Law 110-229, §702(a) (Section 6(b)), provides in part: Not later than 3 years following the transition program effective date, the Secretary of Homeland Security shall issue a report to the Committee on Energy and Natural Resources and the Committee on the Judiciary of the Senate and the Committee on Natural Resources and the Committee on the Judiciary of the House of Representatives projecting the number of asylum claims the Secretary anticipates following the termination of the transition period, the efforts the Secretary has made to ensure appropriate interdiction efforts, provide for appropriate treatment of asylum seekers, and prepare to accept and adjudicate asylum claims in the Commonwealth.

The Commonwealth requests that the Secretary's report assess in detail the anticipated costs to the Commonwealth, provide for comment on the draft report by the Commonwealth, and estimate the funding needed to ensure that the Commonwealth incurs no financial burden as a result of the change in asylum provisions at the end of the transition period.

APPENDIX A

[TO BE ADDED]