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May 2010

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

DHS Should Conclude Negotiations and Finalize Regulations to Implement Federal Immigration Law

GAO-10-553

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Highlights

Highlights of GAO-10-553, a report to congressional committees

Why GAO Did This Study

In May 2008, the United States enacted the Consolidated Natural Resources Act (CNRA), amending the United States' Covenant with the Commonwealth of the Northern Mariana Islands (CNMI) to establish federal control of CNMI immigration in 2009, with several CNMI-specific provisions affecting foreign workers and investors during a transition. CNRA requires that GAO report on implementation of federal immigration law in the CNMI. This report describes the steps federal agencies have taken to (1) secure the border in the CNMI and (2) implement CNRA with regard to workers, visitors, and investors. GAO reviewed federal laws, regulations, and agency documents; met with U.S. and CNMI officials; and observed federal operations in the CNMI.

What GAO Recommends

To enable DHS to implement federal border control and immigration in the CNMI, GAO recommends that the Secretary of Homeland Security work with the heads of CBP, ICE, and USCIS to conclude negotiations with the CNMI government regarding access to CNMI airport space, access to detention facilities, and information about the status of aliens. DHS agreed with the recommendation. The CNMI government raised concerns about this report's scope and support for several findings. In response, GAO modified the report as appropriate.

View GAO-10-553 or key components.
For more information, contact David Gootnick at (202) 512-3149 or gootnickd@gao.gov.

What GAO Found

The Department of Homeland Security (DHS) components Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) have each taken steps to secure the border in the CNMI in accordance with CNRA. From November 28, 2009, to March 1, 2010, CBP processed 103,565 arriving travelers at CNMI airports (see photo below), and ICE processed 72 aliens for removal proceedings. In calendar year 2009, USCIS processed 515 CNMI applications for permanent U.S. residency and 50 CNMI applications for U.S. naturalization or citizenship. However, the DHS components face operational challenges and have been unable to negotiate solutions with the CNMI government. First, airport space available to CBP does not meet facility standards and CBP has not reached a long-term occupancy agreement with the CNMI. Second, ICE has not come to an agreement with the CNMI for access to detention space and as a result has transferred 3 of 30 aliens—convicted criminals under CNMI or U.S. law—to correctional facilities in Guam and Honolulu. Third, DHS efforts to gain direct access to the CNMI's immigration databases have been unsuccessful, hampering U.S. enforcement operations.

Saipan International Airport, CBP Primary Screening Area

Source: GAO.

DHS has begun to implement work permit and visa programs for foreign workers, visitors, and investors, but key regulations are not final and certain transition programs therefore remain unavailable. A lawsuit filed by the CNMI government challenging some provisions of the CNRA resulted in a court injunction delaying implementation of the CNMI-only transitional worker program until DHS considers public comments and issues a new rule. As a result this program is unavailable to employers as of May 1, 2010. DHS has established the Guam-CNMI visa waiver program. However, DHS did not include China and Russia, two countries that provide significant economic benefit to the CNMI. Currently, DHS allows nationals from these two countries into the CNMI temporarily without a visa under the DHS Secretary's parole authority. DHS is reconsidering whether to include these countries in the Guam-CNMI visa waiver program. Although DHS has proposed rules that apply temporary U.S. nonimmigrant treaty investor status to investors with CNMI foreign investor entry permits, the program is not yet available.

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Abbreviations

BMS	Border Management System
CBP	Customs and Border Protection
CEU	Compliance Enforcement Unit
CNMI	Commonwealth of the Northern Mariana Islands
CNRA	Consolidated Natural Resources Act
DHS	U.S. Department of Homeland Security
DOI	U.S. Department of the Interior
DOL	U.S. Department of Labor
ICE	U.S. Immigration and Customs Enforcement
ESTA	Electronic System for Travel Authorization
FBI	Federal Bureau of Investigation
LIDS	Labor Information Data System
LIIDS	Labor and Immigration Identification and Documentation System
State	U.S. Department of State
USCIS	U.S. Citizenship and Immigration Services
US-VISIT	U.S. Visitor and Immigrant Status Indicator Technology

GAO
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United States Government Accountability Office
Washington, DC 20548

May 7, 2010

The Honorable Jeff Bingaman
Chairman
The Honorable Lisa Murkowski
Ranking Member
Committee on Energy and Natural Resources
United States Senate

The Honorable Nick J. Rahall, II
Chairman
The Honorable Doc Hastings
Ranking Member
Committee on Natural Resources
House of Representatives

Under the terms of its 1976 Covenant with the United States,[1] the Commonwealth of the Northern Mariana Islands (CNMI) administered its own immigration systems from 1978 to 2009. The CNMI used its authority to admit substantial numbers of foreign workers[2] through a permit program for non-U.S. citizens (noncitizens) entering the CNMI. In 2005, these workers represented a majority of the CNMI labor force and outnumbered U.S. citizens in most industries, including tourism and garment manufacturing, which, until recently, was central to the CNMI's economy. The CNMI also admitted visitors[3] under its own entry permit

[1]Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Pub. L. No. 94-241, § 1, 90 Stat. 263 (Mar. 24, 1976), 48 U.S.C. § 1801, as amended).

[2]In this report, "foreign workers" refers to workers in the CNMI who are not U.S. citizens or U.S. lawful permanent residents. Other sources sometimes call these workers "nonresident workers," "guest workers," "noncitizen workers," "alien workers," or "nonimmigrant workers." "Foreign workers" does not refer to workers from the Freely Associated States—the Federated States of Micronesia, Republic of the Marshall Islands, and Republic of Palau—who are permitted to work in the United States, including the CNMI, under the Compacts of Free Association (48 U.S.C. § 1901 note, 1921 note, and 1931 note). In this report, foreign workers may include aliens who are immediate relatives of U.S. citizens or U.S. permanent residents; however, according to a CNMI government official, this use of the term differs from its usage under local CNMI law.

[3]In this report, "visitors" refers to tourists and other persons seeking to enter the CNMI for purposes besides work or investment.

program and entry permit waiver program and provided various types of admission to foreign investors.

In May 2008, the United States enacted the Consolidated Natural Resources Act of 2008 (CNRA),[4] amending the U.S.-CNMI Covenant to establish federal control of CNMI immigration in 2009. CNRA's stated intent is to ensure effective border control procedures and protect national and homeland security, while minimizing any potential adverse economic and fiscal effects of phasing out the CNMI's foreign worker permit program and maximizing the CNMI's potential for economic and business growth. CNRA establishes several CNMI-specific provisions affecting foreign workers and investors during a transition period that began on November 28, 2009, and ends in 2014.[5] CNRA also amends U.S. immigration law[6] to establish a joint visa waiver program for the CNMI and Guam by replacing an existing visa waiver program for Guam visitors.[7] During the transition period, the U.S. Secretary of Homeland Security, in consultation with the U.S. Secretaries of the Interior, Labor, and State and the U.S. Attorney General, has the responsibility to establish, administer, and enforce a transition program to regulate immigration in the CNMI.

[4]Pub. L. No. 110-229, Title VII, 122 Stat. 754, 853 (May 8, 2008). 48 U.S.C.§ 1806 note.

[5]CNRA established federal control of immigration on June 1, 2009, but granted the Secretary of Homeland Security the authority to delay the start of the transition period for up to 180 days, in consultation with the Secretaries of the Interior, Labor, and State, the Attorney General, and the CNMI Governor. The Secretary of Homeland Security elected to delay the transition period start from June 1, 2009, to November 28, 2009, when federal control of CNMI immigration extended U.S. immigration laws to the CNMI. The transition period ends on December 31, 2014, although certain provisions related to CNMI-only transitional workers may be extended by 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 CNMI. For more information about the transition period as called for in the then pending legislation, see GAO, *Commonwealth of the Northern Mariana Islands: Pending Legislation Would Apply U.S. Immigration Law to the CNMI with a Transition Period*, GAO-08-466 (Washington, D.C.: Mar. 28, 2008).

[6]The law includes the Immigration and Nationality Act and all laws, conventions, and treaties of the United States relating to the immigration, exclusion, deportation, expulsion, or removal of aliens. The act defines an alien as any person who is not a citizen or national of the United States. Any changes to U.S. immigration law subsequent to the legislation's enactment will also be applicable to the CNMI.

[7]The law includes a second provision related to Guam—an unincorporated U.S. territory south of the CNMI in the western Pacific—including the ability for certain categories of nonimmigrant workers to seek admission in the territory without being subject to numerical limitations in the law.

CNRA requires that we report on the implementation of federal immigration law in the CNMI and the implementation's impacts on the CNMI economy.[8] In February 2010, we reported on the status, since the establishment of federal immigration control, of several databases that the CNMI has used to record the permit status of certain aliens and to track the arrivals and departures of travelers.[9] As agreed with your offices, in this report we describe (1) the steps that have been taken to establish federal border control in the CNMI and (2) the status of efforts to implement CNRA programs with regard to workers, visitors, and investors. We further agreed to issue a subsequent report regarding any impact on the CNMI economy resulting from implementation of CNRA.

In preparing this report, we reviewed CNRA as well as regulations, standard operating procedures, budget documents, and other documents obtained from federal agencies. We visited Guam and the CNMI, where we met with officials from the U.S. Departments of Homeland Security (DHS), Labor (DOL), and the Interior (DOI). In Guam we met with the governor and representatives of the private sector. In the CNMI we observed immigration screening in Saipan and Rota and interviewed the CNMI Attorney General and officials from the CNMI Department of Labor, the Marianas Visitors Authority, the Workforce Investment Agency, and representatives of the private sector. Additionally, we met with officials from DHS, DOL, DOI, and the Department of State (State) in Washington, D.C. We conducted this performance audit from September 2009 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe

[8]We reported in August 2008 on factors that would affect the legislation's impact in the CNMI. GAO, *Commonwealth of the Northern Mariana Islands: Managing Potential Economic Impact of Applying U.S. Immigration Law Requires Coordinated Federal Decisions and Additional Data*, GAO-08-791 (Washington, D.C.: Aug. 4, 2008). Our August 2008 report focused particularly on the law's potential impact on the CNMI's labor market, including foreign workers; the tourism sector; and foreign investment. For additional information on the CNMI economy, see *American Samoa and Commonwealth of the Northern Mariana Islands: Wages, Employment, Employer Actions, Earnings, and Worker Views since Minimum Wage Increases Began*, GAO-10-333 (Washington, D.C.: Apr. 8, 2010). This report responds to a separate congressional mandate [(Pub. L. No. 111-5, §802 (Feb. 17, 2009)] regarding several aspects of the CNMI and American Samoa economies relative to the incremental application of the U.S. minimum wage.

[9]GAO, *Commonwealth of the Northern Mariana Islands: Immigration and Border Control Databases*, GAO-10-345R (Washington, D.C.: Feb. 16, 2010).

that the evidence obtained provides a reasonable basis for our findings and conclusions based on the audit objectives. (See app. I for a more detailed description of our methodology.)

Background

CNMI Political History

The CNMI comprises a group of 14 islands in the western Pacific Ocean, lying just north of Guam and 5,500 miles from the U.S. mainland. Most of the CNMI population—58,629 in 2007—resides on the island of Saipan, with additional residents on the islands of Tinian and Rota.[10] After World War II, the U.S. Congress approved the Trusteeship Agreement that made the United States responsible to the United Nations for the administration of the islands.[11] Later, the Northern Mariana Islands sought self-government while maintaining permanent ties to the United States.[12] In 1976, after almost 30 years as a trust territory, the District of the Mariana Islands entered into a Covenant with the United States establishing the island territory's status as a self-governing commonwealth in political union with the United States. The Covenant grants the CNMI the right of self-governance over internal affairs and grants the United States complete responsibility and authority for matters relating to foreign affairs and

[10]A 2005 population estimate reported 60,608 residents of Saipan; 2,829 residents of Tinian; and 2,490 residents of Rota. See Commonwealth of the Northern Mariana Islands, Department of Commerce, *Report on the 2005 Household, Income, and Expenditures Survey* (2008). The CNMI government estimates the 2009 population to be 52,000, with foreign workers accounting for 16,500 (59 percent) of the CNMI workforce of 28,000 persons.

[11]In 1947, the United Nations gave the United States authority to administer the Trust Territory of the Pacific Islands, which included the Northern Mariana Islands. The trusteeship over the Northern Mariana Islands was formally dissolved in 1986.

[12]Howard P. Willens and Deanne C. Siemer, *An Honorable Accord: The Covenant between the Northern Mariana Islands and the United States* (Honolulu, Hawaii: University of Hawaii Press, 2002).

defense affecting the CNMI.[13] The Covenant initially made many federal laws applicable to the CNMI, including laws that provide federal services and financial assistance programs.[14] The Covenant preserved the CNMI's exemption from certain federal laws that had previously been inapplicable to the Trust Territory of the Pacific Islands, including federal immigration laws and certain federal minimum wage provisions.[15] However, under the terms of the Covenant, the U.S. government has the right to apply federal law in these exempted areas without the consent of the CNMI government. The U.S. government enacted the recent federal immigration legislation under this authority.[16]

Primary U.S. Agencies Involved in Immigration and Border Control

U.S. Department of Homeland Security

Three DHS components—CBP, ICE, and USCIS—have responsibility for federal immigration and border control.[17]

[13]Under the Covenant, the U.S. government may enact legislation in accordance with its constitutional processes that will be applicable to the CNMI. To respect the CNMI's right of self-government under the Covenant, certain provisions of the Covenant may be modified only with the consent of both the federal government and the CNMI government. These provisions include those relating to the political relationship between the United States and the CNMI; the CNMI Constitution, citizenship, and nationality; the application of the U.S. Constitution to the CNMI; and the land ownership rights of CNMI citizens. Most other provisions of the CNMI Covenant may be modified by the federal government without the consent of the CNMI government, and local CNMI laws that were not inconsistent with federal laws or treaties of the United States when the Covenant was enacted remain in effect. In addition, international treaty obligations between the United States and other countries apply to the CNMI through the Covenant.

[14]The Covenant also made certain provisions of the Social Security Act, the Public Health Service Act, and the Micronesian Claims Act applicable to the CNMI.

[15]Prior to November 28, 2009, Section 506 of the Covenant applied certain provisions of the INA relating to citizenship and family-based permanent immigration to the CNMI. Certain other nonimmigrant provisions of the INA related to victims of human trafficking and other crimes also applied to the CNMI before the transition to federal immigration law. See 8 U.S.C. § 1101(a)(15)(T)-(U). In addition, the Covenant provided U.S. citizenship to legally qualified CNMI residents.

[16]Additionally, in 2007, the United States enacted legislation that incrementally applies the U.S. minimum wage to the CNMI by increasing the wage $.50 per hour each year until the minimum wage reaches the U.S. minimum wage.

[17]In addition, the Department of Justice Executive Office for Immigration Review conducts immigration court proceedings and administrative hearings.

- **Customs and Border Protection**. CBP is the lead federal agency charged with keeping terrorists, criminals, and inadmissible aliens out of the country while facilitating the flow of legitimate travel and commerce at the nation's borders.[18] Prior to international passengers' arrival in the United States, CBP officers are required to cross-check passenger information, which air and sea carriers submit electronically prior to departures from foreign ports, against law enforcement databases. On arrival, the passengers are subject to immigration inspections of visas, passports, and biometric data.[19] Generally, international passengers must present a U.S. passport, permanent resident card, foreign passport, or foreign passport containing a State-issued visa. Federal regulations require that international airports provide facilities for the inspection of aliens and provide office and other space for the sole use of federal officials working at the airport.[20]

- **Immigration and Customs Enforcement**. ICE is responsible for enforcing immigration laws within the United States, including, but not limited to, identifying, apprehending, detaining, and removing aliens who commit crimes and aliens who are unlawfully present in the United States. ICE's Office of Investigations investigates offenses, both criminal and administrative, such as human trafficking, human rights violations, human smuggling, narcotics, weapons, and other types of smuggling, and financial crimes.[21] ICE's Office of Detention and Removal Operations is the primary enforcement arm within ICE for the identification, apprehension, and removal of aliens unlawfully in the United States. The Office of Detention and Removal's priority is to detain aliens that pose a risk to the community and those that may abscond and not appear for their immigration hearing. Consequently, the office uses detention space to hold certain aliens while processing them for removal or until their scheduled hearing date. ICE acquires detention space by negotiating intergovernmental service

[18]CBP does not have customs authority in the CNMI.

[19]Biometric data may include digital fingerscans and photographs.

[20]8 C.F.R. § 234.4, 19 C.F.R. § 122.11(c).

[21]Within the United States, ICE has authority to investigate all immigration and customs violations. Because the CNMI operates its own customs authority, ICE Office of Investigation's authority is generally limited to those violations under the Immigration and Nationality Act. In addition to INA violations, the Office of Investigations can investigate violations related to bulk cash smuggling, intellectual property destined for the United States, cybercrime, and child pornography.

agreements with state and local detention facilities, using federal facilities, and contracting with private service contracting facilities.[22]

- **U.S. Citizenship and Immigration Services**. USCIS processes applications for immigration benefits—that is, the ability of aliens to live, and in some cases to work, in the United States permanently or temporarily or to apply for citizenship. Most applications for immigration benefits can be classified into three major categories: family-based, employment-based, and humanitarian-based. Family-based applications are filed by U.S. citizens or permanent resident aliens to establish their relationships to certain alien relatives, such as a spouse, parent, or minor child, who wish to immigrate to the United States. Employment-based applications include petitions filed by employers for aliens to enter the United States temporarily as nonimmigrant workers for temporary work or training or as immigrants for permanent work. USCIS reviews petitions for certain nonimmigrant workers against criteria such as whether the petition is accompanied by a certified determination from DOL, whether the employer is eligible to employ a nonimmigrant worker, whether the position is a specialty occupation, and whether the prospective nonimmigrant worker is qualified for the position. Humanitarian-based applications include applications for asylum or refugee status filed by aliens who fear persecution in their home countries. USCIS also processes applications for Temporary Protected Status by aliens affected by natural disasters or other temporary emergency conditions for employment authorization and applications for adjustment of status to lawful permanent residence by alien beneficiaries of family-or employment-based immigrant petitions who are lawfully present in the United States.

  In addition, the Secretary of Homeland Security has delegated to all DHS components certain immigration authorities, such as authority to grant parole—that is, official permission for an otherwise inadmissible alien to be physically present in the United States temporarily. For example, CBP can grant visitors entry into the United States under the Secretary's parole authority, and USCIS can issue advance parole to aliens in the United

[22]According to ICE officials, in an intergovernmental service agreement, ICE enters into a cooperative agreement with a state, territory, or political subdivision for the construction, renovation, or acquisition of equipment, supplies, or materials required to establish acceptable conditions of confinement and detention services. ICE may enter into such an agreement with any such unit of government guaranteeing to provide bed space for ICE detainees and to provide the clothing, medical care, food and drink, security, and other necessities specified in the ICE Detention Standards.

States who need to travel abroad and return and whose conditions of stay do not otherwise allow for readmission if they depart.[23]

DHS also operates the U.S. Visa Waiver Program. Under this program, foreign nationals from 36 countries may qualify for temporary entry to the United States with a valid passport from their own country.[24]

U.S. Department of Labor

DOL responsibilities under its labor certification programs include ensuring that U.S. workers are not adversely affected by the hiring of nonimmigrant and immigrant workers. Certain employers must attest to taking certain steps, depending on the particular labor certification program, such as notifying all employees of the intention to hire foreign workers and offering their foreign workers the same benefits as U.S. workers. For most labor certification programs, DOL certifies eligible foreign workers to work in the United States on a permanent or temporary basis if it determines that qualified U.S. workers are not available to perform the work and that the employment of the foreign worker will not adversely affect the wages and working conditions of U.S. workers similarly employed.

[23]*The Report to Congress: Use of the Attorney General's Parole Authority under the Immigration and Nationality Act Fiscal Years 1998-1999* specifies several categories of parole: advance parole, port of entry parole, deferred inspection parole, overseas parole, public interest parole, and humanitarian parole. Prior to the creation of DHS, the Attorney General had responsibility for enforcing immigration law.

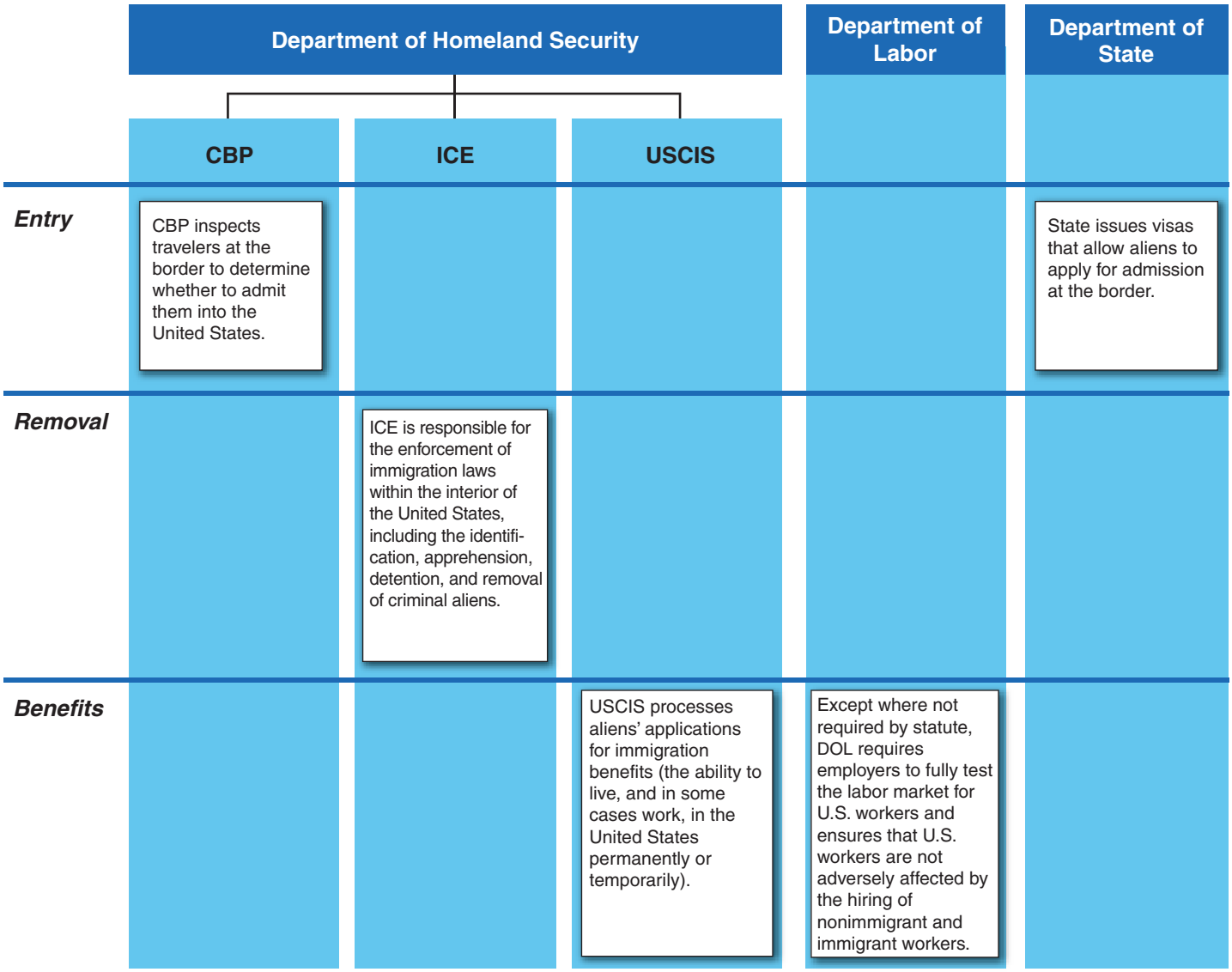
[24]The 36 countries participating in the U.S. Visa Waiver Program include Andorra, Australia, Austria, Belgium, Brunei, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovakia, Slovenia, South Korea, Spain, Sweden, Switzerland, and the United Kingdom. For more information, see GAO, *Visa Waiver Program: Actions Are Needed to Improve Management of the Expansion Process, and to Assess and Mitigate Program Risk*, GAO-08-967 (Washington, D.C.: Sept. 15, 2008).

U.S. Department of State

State has responsibility for issuing visas to foreign nationals who wish to come to the United States on a temporary or permanent basis. State's process for determining who will be issued or refused a visa comprises several steps, including documentation reviews, in-person interviews, collection of biometrics, and cross-referencing an applicant's name against a database that U.S. embassies or consulates (posts) use to access critical information for visa adjudication. Each stage of the visa process varies in length depending on a post's applicant pool and the number of visa applications that a post receives.

Figure 1 shows the responsibilities of the DHS components and of DOL and State related to U.S. immigration and border control.

Figure 1: Departments of Homeland Security, Labor, and State Responsibilities for Federal Immigration and Border Control



Source: GAO analyisis of Department of Homeland Security, Department of Labor, and Department of State documents.

U.S. Entry Visas

Under U.S. immigration law, noncitizens may apply for U.S. entry visas either as nonimmigrants or as immigrants intending to reside permanently. The nonimmigrant categories for temporary admission include workers who meet certain requirements, visitors for business or pleasure, and treaty investors, among others. The immigrant categories include

permanent immigrant investors, family-based, and various employment-based categories for admission to the United States as lawful permanent residents permitted to work in the United States.

Following are descriptions of the nonimmigrant categories for temporary admission.

- **Foreign workers**. U.S. immigration law provides for several types of visas for nonimmigrant workers and their families—H visas and certain others—and sets caps for two types of H visas, H-1B and H-2B.[25] In addition to providing for nonimmigrant visas, federal law provides for permanent employer-sponsored immigrant visas for individuals seeking to reside permanently in the United States.

- **Visitors**. Under federal law, visitors may come to the United States for business on a B-1 visa, for pleasure on a B-2 visa, or for business or pleasure on a combined B-1/B-2 visa. Visitors with B visas are normally admitted for a minimum of 6 months and a maximum of 1 year. Eligible nationals of the 36 countries included in the general U.S. Visa Waiver Program may stay for up to 90 days for business or pleasure in the United States without obtaining a nonimmigrant visa.[26]

- **Foreign investors**. Federal law allows foreign investors to enter the United States as nonimmigrants under treaty investor status with an E-2

[25]As a general rule, nonimmigrants temporarily admitted for an employment-based purpose are authorized to work only in the authorized position; lawful permanent residents and other immigrants may work for any employer. The H-1B category includes high-skill workers coming to the United States temporarily to perform in specialty occupations. The H-2 category includes H-2A visas for foreign workers providing temporary or seasonal agricultural labor services, as well as H-2B visas for other temporary workers who can perform short-term service or labor in a job for which unemployed U.S. workers cannot be found.

[26]Visitors from countries in the U.S. Visa Waiver Program must, among other requirements, possess a valid passport and a return-trip ticket; have been determined by DHS not to be a threat to the United States; and execute the proper immigration forms, including a completed and signed form I-94W. As of January 12, 2009, a valid Electronic System for Travel Authorization (ESTA) approval is required for all VWP travelers to the United States. ESTA is a free, internet-based, automated system used to determine the eligibility of visitors to travel to the United States under the U.S. Visa Waiver Program. See 8 C.F.R. Part 217.

visa.[27] Treaty investors must invest a substantial amount of capital in a bona fide enterprise in the United States, must be seeking entry solely to develop and direct the enterprise, and must intend to depart the United States when their treaty investor status ends.[28] Treaty investors must be nationals of a country with which the United States has a treaty of friendship, commerce, or navigation and must be entering the United States pursuant to the provisions of the treaty. Federal law also allows foreign investors to seek permanent immigrant visas (EB-5) for employment-creation purposes.[29]

CNRA Provisions Applying U.S. Immigration Law to the CNMI

CNRA applied federal immigration laws to the CNMI beginning on November 28, 2009, subject to a transition period that ends on December 31, 2014, and with key provisions affecting foreign workers, visitors, and foreign investors. CNRA includes several provisions that affect foreign workers and investors during the transition period but that may be extended indefinitely for foreign workers. During the transition period, the U.S. Secretary of Homeland Security, in consultation with the U.S. Secretaries of the Interior,[30] Labor, and State and the U.S. Attorney General, has the responsibility to establish, administer, and enforce a transition program to regulate immigration in the CNMI. Agencies must implement agreements with the other agencies to identify and assign their

[27]Currently, federal law allows E admission for up to a 2-year period of initial stay and allows investors to apply for renewal. Under federal regulations for E-2 visas, spouses or children may apply to join foreign investors under the E-2 visa, and spouses are authorized to work under an E-2 visa.

[28]Generally, the lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered a substantial amount of capital. In addition, for an E-2 visa, investment is defined as the placing of capital at commercial risk with the objective of generating a profit, and the investor must be in possession of and have total control over the capital being invested. The capital must be subject to loss if investment fortunes reverse, must be the investor's unsecured personal business capital or capital secured by personal assets, and must be irrevocably committed to the enterprise.

[29]Individuals seeking permanent immigrant visas must meet higher thresholds than do E-2 visa holders, including the general requirement to establish a business that creates at least 10 full-time jobs and an investment of at least $1 million, or $500,000 in a rural or high-unemployment area.

[30]The legislation requires the Secretary of the Interior to provide technical assistance to the CNMI to promote economic growth; to assist employers in recruiting, training, and hiring U.S. citizens and lawful permanent residents in the CNMI; and to develop CNMI job skills as needed. In providing the technical assistance, the federal government should consult with the CNMI government, local businesses, regional banks, and other CNMI economy experts.

respective duties for timely implementation of the transition program.[31] The agreements must address procedures to ensure that CNMI employers have access to adequate labor and that tourists, students, retirees, and other visitors have access to the CNMI without unnecessary obstacles. In addition, CNRA requires, among other things, that the CNMI government provide the Secretary of Homeland Security all CNMI immigration records, or other information that the Secretary deems necessary to help implement the transition program.

Following are descriptions of key CNRA provisions related to foreign workers, visitors, and foreign investors.[32]

Foreign workers. CNRA allows federal agencies to preserve access to foreign workers in the CNMI during the transition period, as well as any extensions of the CNMI-only permit program, but limits subsequent access to foreign workers to those generally available under U.S. immigration law. Key provisions regarding foreign workers in the CNMI include the following:

- During the transition period, existing CNMI-government-approved foreign workers lacking U.S. immigration status can continue to live and work in the CNMI for a limited time—2 years after the effective date of the transition program or when the CNMI-issued permit expires, whichever is earlier. However, CNMI employers hiring workers on or after the transition effective date must comply with U.S. employment authorization verification procedures.

- During the transition period and any extensions of the CNMI-only permit program, employers of workers not otherwise eligible for admission under federal law can apply for temporary CNMI-only nonimmigrant work permits. During this period, the Secretary of Homeland Security has the authority to determine the number, terms, and conditions of these permits, which must be reduced to zero by the end of the transition period and any extensions of the CNMI-only work permit program. This program may be

[31]Key rules and other aspects of the transition program require further development through regulation. In addition, federal agencies must determine how to implement and enforce the application of federal immigration law in the CNMI, including establishing offices, hiring staff, and implementing screening and enforcement systems.

[32]See GAO-08-791.

extended indefinitely beyond December 31, 2014, by the U.S. Secretary of Labor for up to 5 years at a time.

- During the transition period, employers in the CNMI and Guam can petition for foreign workers under the federal nonimmigrant H visa process, without limitation by the established numerical caps, for two types of H visas. This exemption from the visa caps expires when the transition period ends in 2014.[33]

- During and after the transition period, CNMI employers can petition for nonimmigrant worker visas generally available under U.S. law. During and after the transition period, CNMI employers can also petition for employment-based permanent immigration status for workers under the same procedures as other U.S. employers.

Visitors. CNRA amends U.S. immigration law to replace the existing Guam visa waiver program with a joint Guam-CNMI program, in addition to other changes.[34] Under the Guam-CNMI visa waiver program, eligible visitors from designated countries who travel for business or pleasure to Guam or the CNMI are exempt from the standard federal visa documentation requirements.[35] The Secretary of Homeland Security is to determine which countries and geographic areas will be included in the Guam-CNMI visa waiver program. Citizens of countries that do not qualify for entry under the Guam-CNMI visa waiver program or other U.S. visa waiver programs may apply for U.S. visitor visas valid for entry to any part of the United States, including Guam and the CNMI.

[33]The legislation provides the CNMI and Guam exemptions from the H visa caps only through the end of the initial transition period in 2014. See GAO-08-466. The subsequent report of the Senate Committee on Energy and Natural Resources on H.R. 3079 states that the committee intends that the H exemptions for the CNMI and Guam be extended along with any extension of the 5-year transition period. See S. Rep. 110-324, Northern Mariana Islands Covenant Implementation Act (Apr. 10, 2008).

[34]In replacing the Guam visa waiver program with the joint Guam-CNMI program, CNRA extended the period of admission from 15 to 45 days. Unlike the U.S. Visa Waiver Program, admittance under the Guam-CNMI visa waiver program does not require advance approval through ESTA.

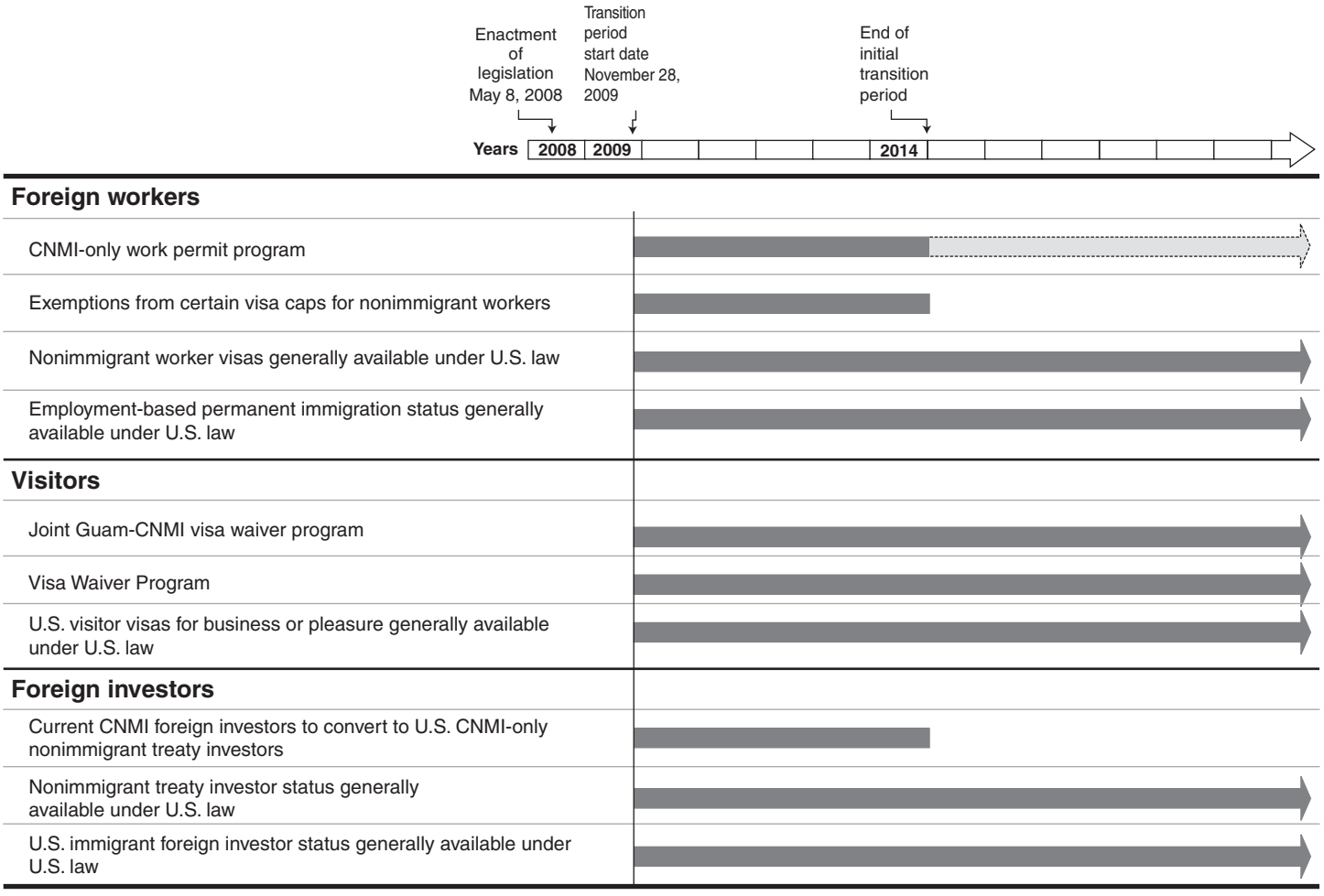
[35]The Guam-CNMI visa waiver program waives the visa requirement for certain nonimmigrants, allowing them visa-free travel privileges to Guam or the CNMI only, not other parts of the United States.

Foreign investors. CNRA establishes that foreign investors in the CNMI who meet certain requirements can convert from a CNMI long-term investor to U.S. CNMI-only nonimmigrant treaty investor status during the transition period. New foreign investors can apply for U.S. nonimmigrant treaty investor status and also can petition for U.S. permanent immigration status, which was previously unavailable in the CNMI. The Secretary of Homeland Security is to decide which CNMI foreign investor permit holders will receive status as U.S. nonimmigrant treaty investors during the transition period.

Figure 2 shows key federal immigration provisions related to foreign workers, visitors, and foreign investors.[36]

[36]Other key provisions of CNRA establish the position of a nonvoting CNMI delegate to the House of Representatives; require several studies on the legislation's implementation; transfer responsibility for refugee protection in the CNMI to the federal government; and relate to lawful permanent resident status. See GAO-08-466.

Figure 2: Key Provisions for Foreign Workers, Visitors, and Foreign Investors in Consolidated Natural Resources Act of 2008 and Other U.S. Immigration Provisions



Source: GAO analysis of P.L. 110-229 and current U.S. immigration law.

CNRA does not allow aliens present in the CNMI to apply for asylum until 2015.[37] In the interim, an alien present in the CNMI can request not to be removed based on a claim of protection from persecution or torture.[38]

CNMI Actions Related to Implementation of Federal Immigration Law

Since enactment of CNRA in 2008, the CNMI has taken several actions related to the implementation of federal immigration law.

CNMI Lawsuit

On September 12, 2008, the CNMI filed a lawsuit against the United States in the U.S. District Court for the District of Columbia to have specific provisions of Title VII of CNRA overturned on the grounds that it constituted unnecessary intrusion into the CNMI's local affairs, violating the terms of the CNMI Covenant and the U.S. Constitution.[39] The CNMI argued that provisions of CNRA violated the CNMI's right of local self-government guaranteed by the Covenant, denying it the right to regulate its local labor force and economy as well as depriving it of revenue, all without its consent. The CNMI argued that the Constitution limits the power of Congress to impose a regulatory regimen upon a state without giving the local government the opportunity to participate in the political

[37]U.S. immigration law provides that noncitizens who are in this country—regardless of whether they entered legally or illegally—may be granted humanitarian protection in the form of asylum if they demonstrate that they cannot return to their home country because they have a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

[38]Aliens in the CNMI may not apply for asylum during the transition period. However, aliens physically present in the CNMI are protected by the provisions of the 1967 Protocol Relating to the Status of Refugees, which generally prohibits removal of an alien to a country where he or she would likely be persecuted on account of race, religion, nationality, membership in a particular social group, or political opinion. Aliens are also protected by the provisions of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, which prohibits removal of an alien to a country where he or she would likely be tortured. International treaty obligations are implemented as a matter of federal law by withholding removal pursuant to INA § 241(b)(3), withholding removal under the Convention Against Torture pursuant to 8 C.F.R. § 208.16, and deferring removal under the Convention Against Torture pursuant to 8 C.F.R. § 208.17.

[39]See decision at Commonwealth of the Northern Mariana Islands v. United States, No. 08-1572 § (D.D.C. Nov. 25, 2009).

process that resulted in the legislation.[40] The United States, argued, in part, that the CNMI lacked standing to pursue its claims. The federal government further argued that even if the CNMI had standing, the commonwealth had failed to state a claim upon which relief could be granted, because the legislation applying immigration law to the CNMI was lawful. The U.S. District Court for the District of Columbia has issued several rulings in the lawsuit. On November 25, 2009, the court agreed with the United States that the provisions of CNRA extending U.S. immigration laws to the CNMI beginning on November 28, 2009, do not violate the U.S.-CNMI Covenant or the U.S. Constitution. The court dismissed the two counts of the CNMI's complaint alleging these violations.[41] The court granted a CNMI motion for a preliminary injunction prohibiting the implementation of DHS regulations to implement the transitional worker program.[42]

CNMI Protocol for Implementing CNRA

On September 15, 2009, the CNMI government issued "The Commonwealth's Protocol for Implementing P.L. 110-229," covering the use of CNMI facilities for U.S immigration purposes and U.S.-CNMI data exchange, among other topics.[43]

CNMI facilities. The protocol outlines the approach that the CNMI will take regarding certain aspects of the transition program, including those pertaining to facilities. Specifically, regarding airport facilities, the protocol describes an intent to work with CBP, taking account of the Commonwealth Port Authority's practical and financial limitations. The protocol explains that the CNMI was prepared to vacate its existing immigration space at the Saipan, Tinian, and Rota airports but does not intend to remove any existing lessee currently occupying space at the airport to accommodate CBP. The CNMI intends to provide facility space

[40]Public Law 110-229 created a nonvoting delegate seat in the U.S. House of Representatives for the CNMI. In January 2009, the CNMI elected its first representative to the United States Congress. The Delegate from the CNMI has many of the same congressional privileges as other representatives, including a vote in committee and when the House convenes as the Committee of the Whole, but cannot vote when the House convenes as the House of Representatives.

[41]670 F. Supp. 2d 65 (D.D.C. 2009).

[42]CNMI v. United States, No 08-1572, 2009 WL 4070877 (D.D.C. Nov. 25, 2009).

[43]The protocol was posted as a public service notice on the CNMI Department of Labor Web site (www.marianaslabor.net/pubntc.asp).

on terms to be negotiated. Regarding detention space in its prison, the CNMI noted that it was discussing this issue with ICE.

Data exchange. The CNMI protocol proposes to allow the U.S. government access to immigration-related data. The CNMI has used two databases, the Labor Information Data System (LIDS)[44] and the Border Management System (BMS), respectively, to record the permit status of certain aliens and to record the arrivals and departures of travelers. Specifically, the CNMI protocol envisions the following:

- DHS and the CNMI will engage in a two-way data exchange, with DHS providing flight entry data and the CNMI providing information from its immigration records (LIDS and BMS).
- The CNMI will provide access to CNMI immigration records that DHS formally requests via an appropriate document and within a reasonable time frame.
- The CNMI will consider privacy protections in making information available to the U.S. government.
- The CNMI expects to recover the cost of generating and producing any information requested by DHS.

CNMI Umbrella Permits

The CNMI issued temporary permits authorizing the holders to remain in the commonwealth after the federalization transition date, November 28, 2009, for a maximum of 2 years consistent with the terms of the permit. These "umbrella" permits also include provisions for extending, transferring, and seeking employment. Between October 15 and November 27, 2009, the CNMI Department of Labor, Department of Commerce, and Attorney General's office identified all aliens eligible to receive umbrella permits, which they issued if an alien appeared personally with adequate identification and signed the contractual agreement contained in the umbrella permit. Permits were issued to workers, students, and investors as well as to their immediate relatives.

[44]LIDS replaced the Labor and Immigration Identification and Documentation System (LIIDS), a database developed by the CNMI in 1995, using funded provided primarily by the U.S. Department of the Interior. For more information, see GAO-10-345R.

Since the injunction against DHS's regulations for the transitional worker program, a disagreement has arisen between the U.S. and CNMI governments regarding employment authorization for aliens who were authorized to be present by the CNMI government as of November 28, 2009, and were issued an umbrella permit. The U.S. government considers the employment authorization of aliens to be a matter of federal law, while the CNMI government maintains that it is a shared responsibility. As a result of the disagreement, the federal government and CNMI government have issued conflicting guidance. For example, according to USCIS, an employer in the commonwealth does not need the approval of the CNMI Department of Labor to hire a holder of a CNMI foreign worker permit (Foreign National Worker Permit).[45] In contrast, the CNMI government maintains that the approval of the local Department of Labor is required.

DHS Has Begun Implementing Border Control but Has Not Negotiated Solutions to Operational Challenges

DHS components CBP, ICE, and USCIS have each taken steps to secure the border in the CNMI in accordance with CNRA. In addition, DHS has taken several steps to facilitate the implementation of CNRA. However, lack of resolution of the components' negotiations with the CNMI government contributes to operational challenges. CBP operational space at the CNMI airports does not meet its facility standards for ports of entry, and DHS and the CNMI government have not executed long-term occupancy agreements that would allow DHS to upgrade the airport facilities. ICE efforts to acquire detention space at the CNMI local correctional facility also have been unsuccessful. As a result, as of March 2010, ICE has transferred only 3 of 30 aliens with prior criminal records to correctional facilities in Guam or Honolulu and released the other 27 on their own recognizance. Additionally, DHS has not succeeded in negotiating with the CNMI for direct access to CNMI immigration data, making it difficult for U.S. officials to verify the status of aliens in the CNMI and hampering enforcement operations.

[45]On April 21, 2010, USCIS announced that it will grant parole-in-place to eligible foreign nationals without umbrella permits whose CNMI work permits or CNMI investor permits expire before the CNMI-only transitional worker program and CNMI investor status are available.

DHS Has Taken Steps to Secure Border in the CNMI

CBP Has Begun Inspecting Arriving Travelers

Prior to beginning inspection of arriving travelers in the CNMI, CBP officials made numerous visits to the CNMI to determine resource requirements and prepare for implementation of federal border control. In June 2009, CBP officially notified the CNMI Port Authority of its border control facility space, configurational, infrastructure, and physical security requirements. In response, the CNMI Port Authority sent a letter stating that it was unable to meet CBP requirements owing to limited financial resources and expertise and asking CBP to initiate efforts to meet the facility requirements. According to CBP, it subsequently began preparations to reconfigure the facilities. CBP officials told us that the Commonwealth Port Authority gave information technology staff access to the Saipan and Rota airports to install secure wireless networks on November 23, 2009, pursuant to CBP's signing of right-of-entry agreements for the Saipan and Rota airports on that date. According to CBP, these agreements allowed it to prepare to begin operations in the airports by November 28, 2009, while the agency sought to negotiate permanent occupancy agreements. On November 28, 2009, 45 CBP officers moved into space previously occupied by the CNMI Department of Immigration at the Saipan airport and space previously occupied by the airport police at the Rota airport and began inspecting travelers' immigration status on entry into, and in some cases on exit from, the CNMI.[46]

In January 2010, we observed CBP officers at the Saipan airport following procedures consistent with those required at other U.S. international airports. For example, we watched CPB officers screen arriving visitors in the immigration inspection area. According to the CBP officials in Guam and the CNMI, prior to visitors' arrival in the CNMI, CBP officers screen 100 percent of the names that airlines submit electronically through a passenger information system, which the officers access through a database known as TECS.[47] At immigration booths, we observed CBP officers verifying arriving passengers' admissibility by scanning passports,

[46]CBP officers in the CNMI conduct departure control only for flights to other U.S. destinations, currently limited to Guam.

[47]Airlines and vessel operators submit pre-arrival and departure manifest data into the Advanced Passenger Information System. TECS, also known as the Traveler Enforcement Communication System, interfaces with that system and other databases used to screen arriving visitors.

reviewing other travel documents, and asking questions about the traveler's intent. We also observed CBP officers taking photos and fingerprints and enrolling travelers in an immigration database known as US-VISIT.[48] We further observed CBP officers escorting some travelers to a temporary secondary screening area, where officers asked additional questions to determine travelers' admissibility and subsequently admitted or denied travelers entry into the CNMI.[49]

In addition, we observed CBP officers interviewing Chinese and Russian visitors in the primary screening area[50] who were eligible for, and granted parole into, only the CNMI under the Secretary's parole authority.[51] Because China and Russia are not currently included in the U.S. or Guam-CNMI visa waiver programs, CBP inspectors complete several more administrative steps to parole Chinese and Russian visitors into the CNMI than are required to admit visitors from eligible countries.[52] According to the CBP shift supervisor, while a typical primary interview may take 2 to 3 minutes, an interview for parole may take 5 to 6 minutes.

From November 28, 2009, to March 1, 2010, CBP officers working at the Saipan and Rota airports processed 103,565 arriving travelers, granting parole to 11,760 (11 percent). Table 1 summarizes the number of arrivals

[48]US-VISIT is designed to collect, maintain, and share biometric data on selected aliens entering and exiting the United States at air, sea, and land ports of entry. See GAO-10-345R.

[49]CBP may deny entry if the traveler is deemed inadmissible for any reason, including traveling without sufficient travel documents or having a prior criminal history.

[50]At other U.S. airports, applications for parole are generally completed in the secondary inspection area because the parole process may require additional questions, verification in databases not immediately available in the primary inspection area, and manager approval. However, in the CNMI, owing to the lack of adequate space for secondary inspections, parole applications are completed in primary inspection booths.

[51]On October 21, 2009, the Secretary of Homeland Security announced to Congress and the Governors of the CNMI and Guam that she will exercise her discretionary authority to parole into the CNMI visitors for business or pleasure who are nationals of the Russian Federation and the People's Republic of China. Parole is determined on a case-by-case basis and all applicants for parole are subject to inspection and removal if determined to be inadmissible for reasons other than lack of visa.

[52]To grant parole to Chinese and Russian visitors in the CNMI, CBP officers complete the following administrative steps, among others: stamping the arrival form twice, writing the outbound flight number on the arrival form, stamping the individual's passport, writing "CNMI-Only" on the stamp, and dating the stamp 7 days after the departure date. In this report, "China" refers to the People's Republic of China and "Russia" refers to the Russian Federation.

processed by CBP officers at the Saipan and Rota airports from November 28, 2009, to March 1, 2010, including those admitted from primary and secondary screening areas, those granted parole, and those refused entry from the secondary screening area.

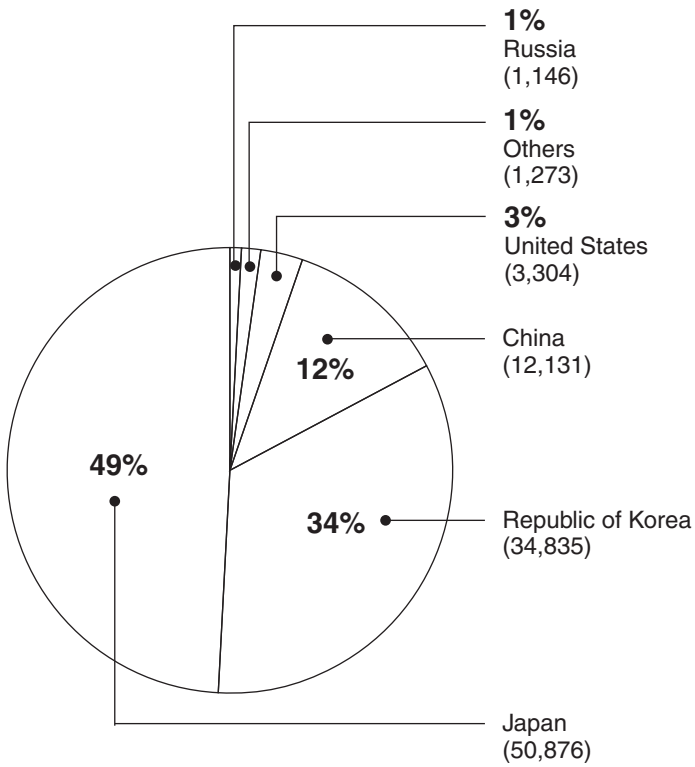
Table 1: CBP Processing of Arrivals in the CNMI, by Airport, November 28, 2009–March 1, 2010

	Saipan	Rota	Total
Admitted from primary	90,156	492	**90,648**
Granted parole	11,749	11	**11,760**
Admitted from secondary	1,103	27	**1,130**
Refused from secondary	27	0	**27**
Total arrivals	**103,035**	**530**	**103,565**

Source: GAO analysis of CBP and TECS data.

During this period, more than 80 percent of the arriving travelers came from Japan or South Korea (see fig. 3). Of the arriving travelers from China and Russia, 86 percent (10,398 of the 12,131) and 90 percent (1,027 of the 1,146), respectively, were paroled into the CNMI only, under DHS authority.

Figure 3: Numbers and Percentages of Arrivals in the CNMI by Citizenship, November 28, 2009–March 1, 2010



Source: GAO analysis of CBP data.

On March 28, 2010, CBP replaced the first group of officers temporarily assigned to the Saipan and Rota airports with a new group, according to CBP officials. On the basis of current flight schedules and estimated number of travelers, CBP has reduced from 45 to 30 the number of full-time officers required in Saipan and Rota. CBP posted announcements for entry-level and supervisory officer positions in the CNMI in November 2008 and April 2009 and received approximately 500 job applications from the CNMI community. Consistent with provisions of CNRA that require DHS, among other agencies, to recruit and hire staff for its operations from among qualified U.S. citizens and nationals residing in the CNMI, CBP hired seven local CNMI citizens, including two who had previously worked for the CNMI Department of Immigration, and three residents of

Guam.[53] According to CBP's Human Capital Office, permanent staff will start working at CNMI airports in July 2010.

ICE Has Begun Identifying, Detaining, and Removing Illegal Aliens

Since November 28, 2009, 10 ICE officials detailed to Saipan have provided outreach to the CNMI community, assessed local security risks, identified aliens in violation of U.S. immigration laws, and processed or detained aliens for removal proceedings. During the first month of operations in the CNMI, ICE officials met with local law enforcement officials and provided information at local events to educate the community on ICE's law enforcement role and responsibilities. ICE officials also established a point of contact in the CNMI Department of Labor and met with staff in the CNMI Attorney General's office.

To protect national security, public safety, and the integrity of the U.S. border in the CNMI, ICE assessed potential security risks that may lead to future criminal and civil enforcement in the commonwealth. First, ICE officials predicted that as CNMI labor permits expire, aliens ineligible for immigration benefits may file fraudulent immigration benefit applications. Second, ICE officials anticipate an increase in alien smuggling to Guam as aliens ineligible for immigration benefits try to reach Guam to apply for asylum. On January 5, 2010, ICE and the U.S. Coast Guard interdicted 24 Chinese nationals attempting to enter Guam illegally by boat.

ICE has also identified individuals who may be in violation of U.S. immigration laws and has begun processing some aliens for removal. From December 7, 2009, to March 1, 2010, ICE identified 264 aliens subject to possible removal from the CNMI—including 214 referrals from the CNMI Attorney General's office with pending CNMI deportation orders[54] and 49 referrals from the ICE Office of Investigations and the community—and requested immigration status information about these individuals from the CNMI Department of Labor.[55] As of March 1, 2010, ICE officials had processed 72 of the 264 aliens for removal proceedings, either for being

[53]CBP also transferred four CBP officers from other locations to fill permanent positions in the CNMI.

[54]With the implementation of the INA, the CNMI courts no longer have the authority to issue deportation orders.

[55]On March 10, 2010, the CNMI Department of Labor also provided ICE with 300 names of aliens designated by the CNMI government as overstays. An ICE official told us that ICE is in the process of reconciling the names of overstays with the names of the 264 aliens in possible violation of U.S. immigration laws.

present in the United States without inspection or parole[56] or for not possessing a required valid entry document.[57] Of these 72 aliens, 56 were convicted criminals under CNMI or U.S. law,[58] including 30 who had completed their sentences at the local correctional facility and had been released into the community under CNMI authority. ICE also had transferred 3 of these 30 aliens convicted of crimes under CNMI or U.S. law to correctional facilities in either Guam or Honolulu and had released the other 27 on their own recognizance.[59]

On March 9, 2010, ICE officials told us that they had not deported any of the 72 aliens being processed for removal but that 31 were scheduled for immigration hearings by the end of March 2010 and 9 had agreed to waive their right to a hearing and to be deported after completing their criminal sentences. According to ICE officials, immigration hearings take place during 1 week of every month, when a judge from the U.S. Department of Justice[60] Executive Office of Immigration Review travels to Saipan.[61]

USCIS Has Begun Adjusting Immigrants' and Nonimmigrants' Status

Prior to November 28, 2009, USCIS representatives visited the CNMI to establish contacts, prepare plans for outreach to the community on forthcoming federal regulations and the transition to federal control of immigration in the CNMI and identify issues to resolve subsequent to the transition. Key USCIS activities included the following.

- In March 2009, USCIS opened an Application Support Center in Saipan and stationed two full-time employees at the center to provide information services, interview residents currently eligible to apply for lawful permanent resident status or citizenship, and process requests requiring

[56]8 U.S.C. § 1182(a)(6)(A)(i).

[57]8 U.S.C. § 1182 (a)(7)(A)(i)(1).

[58]8 U.S.C. § 1182(a)(2)(A).

[59]According to an ICE official, the three individuals transferred did not file for asylum after arriving in Guam or Honolulu.

[60]We did not include the Department of Justice in our review, because the department has a limited role in implementing CNRA.

[61]Generally, the INA grants aliens the right to a hearing before an immigration judge to determine whether they will be allowed to remain in the country. However, certain aliens arriving in the United States and deemed inadmissible are subject to expedited removal and are not entitled to a hearing before an immigration judge. 8 C.F.R. § 1235.3(b).

biometric services. The center is also staffed by three contract employees who provide biometric collection services.

- In early December 2009, USCIS officials met with CNMI employers, business groups, representatives of community organizations, and the general public by conducting 13 town hall or public forum meetings on U.S. immigration law and procedures with a particular focus on completion of the Form I-9, Employment Eligibility Verification.[62] Topics discussed included (1) the process for CNMI nationals to apply for immigration benefits under U.S. law; (2) the process for U.S. citizens to file petitions for alien relatives; and (3) the requirements for aliens living in the CNMI to obtain the advance parole needed to travel abroad and return to the CNMI.[63]

- For calendar year 2009, USCIS processed 515 CNMI applications for permanent residency and 50 CNMI applications for naturalization or citizenship, more than doubling the number of interviews conducted for applications for residency or citizenship from calendar year 2008, according to data provided by USCIS officials.[64] By March 17, 2009, USCIS also received 1,353 advance parole requests and approved 1,123 of them. USCIS also granted 705 paroles-in-place for domestic travel and 24 group paroles.

DHS Has Taken Several Actions to Facilitate Implementation of CNRA

To facilitate implementation of CNRA in the CNMI, DHS led meetings with DOI, DOL, and State, the other departments charged with implementing CNRA; reported to Congress on the budget and personnel needed by the DHS components; and initiated outreach to the CNMI government.

[62]All U.S. employers must complete and retain Form I-9 for each individual they hire for employment in the United States. This includes citizens and noncitizens. On the form, the employer must examine the employment eligibility and identity documents an employee presents to determine whether the documents reasonably appear to be genuine and relate to the individual and record the document information on Form I-9. USCIS created an I-9 form specific to the CNMI.

[63]According to USCIS officials, advance parole is issued to aliens residing in the United States in other than lawful permanent resident status who have an unexpected need to travel and return and whose conditions of stay do not otherwise allow for readmission to the United States if they depart.

[64]By March 1, 2010, USCIS reported having processed 132 CNMI applications for permanent residency and 6 CNMI applications for naturalization or citizenship for calendar year 2010.

- **Led interdepartmental meetings**. From May 2008 through November 2009, DHS led, jointly with DOI, several interdepartmental meetings to discuss the implementation of CNRA, according to DHS, DOI, and DOL officials.[65] Discussion during the meetings focused on operational and legal issues related to implementation of federal immigration law in the CNMI and on developing an interdepartmental memorandum of understanding of the departments' respective duties. According to DHS and DOL officials, by the end of March 2010, the memorandum had been finalized but not yet signed by the departments' Secretaries' and was therefore not publicly available.[66]

- **Reported to Congress on needed budget and personnel**. In January 2009, DHS submitted a report to Congress, as required by CNRA, on current and planned federal personnel and resource requirements. The report estimated that $97 million was necessary to fulfill all DHS responsibilities in the CNMI for fiscal years 2009 and 2010. In June 2009, responding to questions for the record in conjunction with a May 2009 hearing on the implementation of CNRA, DHS presented a new estimate of $148.5 million and described a phased approach to distribute costs from fiscal years 2009 to 2011. As of April 2010, DHS had not yet specified the changes in resources required for administering immigration and travel laws for the CNMI and Guam, as directed by Congress in its fiscal year 2009 appropriation.[67]

- **Initiated outreach to CNMI government**. Although it has implemented CNRA primarily through its components, DHS has also initiated department-level outreach to the CNMI government. Prior to November 28, 2009, the DHS Office of Policy—charged with coordinating DHS components and working with other federal departments involved in implementing CNRA—contacted the CNMI government and led several intercomponent DHS visits to the commonwealth to meet with CNMI officials and gather information related to the DHS components' efforts to

[65]Representatives of the Department of Justice also participated in these meetings.

[66]Under CNRA, each department must implement agreements with the other departments to identify and assign their respective duties for timely implementation of the transition program. The agreements must address procedures to ensure that CNMI employers have access to adequate labor and that tourists, students, retirees, and other visitors have access to the CNMI without unnecessary obstacles. The agreements also may allocate funding among the respective agencies tasked with related responsibilities.

[67]H.R. Rep. No. 111-298, at 59 (2009) (Conf. Rep.).

establish federal border control in the CNMI. Additionally, in September 2009, the Secretary of DHS met with the Governor of the CNMI to discuss several aspects of CNRA implementation.

DHS Components Face Operational Challenges in the CNMI and Have Been Unable to Negotiate Solutions with the CNMI Government

CBP Has Not Yet Finalized Long-Term Occupancy Agreements with the CNMI Government for Required Airport Space

The space that the CNMI government has provided for CBP operations at the Saipan and Rota airports is inadequate to meet CBP's basic facility requirements, and the two parties have not yet concluded negotiations for long-term occupancy agreements that would allow CBP to begin upgrading the facilities.[68] The CBP Airport Technical Design Standards describes basic CBP facility requirements for international airports and reflects U.S. policy, procedures, and minimum development standards for the design and construction of CBP facilities at airports. These standards specify space requirements for CBP's primary, secondary, and administrative areas, among others, based on the size of the airport and the number of passengers processed per hour. In addition, U.S. law requires that airports designated as international airports must provide the U.S. government, without charge, adequate space for inspection and temporary detention of aliens as well as for offices.[69]

CBP has estimated that it will process between 800 and 1,400 passengers per hour at peak hours at the Saipan International Airport and has designated the airport as a low-volume and midsize airport, requiring at least 15,000 square feet for primary and secondary screening and other space. CBP currently occupies approximately 9,390 square feet of airport

[68]In technical comments on a draft of this report, CBP noted that although its right-of-entry agreements with the CNMI give the agency access to the airports, CBP must negotiate and finalize a long-term lease, or similar legal document, with the CNMI government before proceeding with facility configurations.

[69]8 C.F.R. § 234.4. Moreover, designation as an international airport may be withdrawn if proper facilities are not provided or maintained by the airport. International airports are also required to provide, without cost to the federal government, proper office and other space for the sole use of federal officials working at the airport. 19 C.F.R. § 122.11.

space previously used by CNMI Immigration. CBP's current configuration at the airport does not include holding cells that meet federal standards;[70] as a result, CBP lacks space to temporarily detain individuals who present a risk to public safety and to its officers. According to CBP officials, as of April 2010, CBP continued to seek access to approximately 7,200 additional square feet of space at the Saipan airport. CBP officials told us that they were considering three alternatives:

- reconfigure part of a 15,390 square-foot space as of January 2010, leased for storage by a tenant but, according to CBP, not in use;
- identify other space in the airport for reconfiguration, in close proximity to the current immigration processing area; or
- build an additional facility on airport land adjacent to CBP's immigration processing area at the Saipan airport.

As of April 2010, CBP and the Commonwealth Port Authority had not concluded negotiations regarding long-term occupancy agreements for space at the Saipan and Rota airports or resolved key differences.

CBP: In technical comments on a draft of this report, CBP stated that, given the CNMI's economic and financial conditions, the agency will initially fund any construction or reconfiguration required to bring CNMI existing airport facilities into compliance with CBP's operational requirements.[71] CBP also stated that it was working to define its space needs and to complete facility design plans. However, CBP said that it would not rent airport space that the CNMI is obligated to provide at no cost. CBP stated that it agreed with the CNMI regarding the need for discussion of identified options to meet CBP space needs and for negotiation of certain key points. As of May 2010, CBP officials reported that they had not requested that the DHS Office of Policy intervene in conversations with the CNMI government regarding long-term occupancy agreements for airport space.

[70]CBP facility standards require separate holding cells for men, women, and juveniles.

[71]In technical comments on a draft of this report, CBP said that it had allocated funds for reconfiguration of CNMI airport space in anticipation of finalizing long-term occupancy agreements with the CNMI government.

CNMI: According to CNMI officials, the Commonwealth Port Authority is aware that the airport space does not meet CBP operational requirements. However, the officials told us that the port authority is not in a financial position to provide space to CBP without charge, including space that is currently generating revenue from a tenant.[72] In January 2010, CNMI port authority officials told us that CPB had not consulted with them regarding any construction plans, which would require their approval. Additionally, in commenting on a draft of this report in April 2010, the CNMI said that CBP had not officially communicated a request regarding its space needs. The CNMI further commented that the commonwealth is not prepared to enter into negotiations with CBP unless it is assured that the request for space has been cleared at least at the assistant secretary level at DHS and that the department has received the necessary assurance from Congress that the funds necessary to fulfill CBP's space needs will be available.[73]

ICE Efforts to Negotiate for Detention Space in CNMI Correctional Facility Have Been Unsuccessful

ICE has been unable to conclude negotiations with the CNMI government to arrange access to detention space in the CNMI correctional facility. In March 2010, ICE estimated that it required 50 detention beds for its CNMI operations.[74] Under a 2007 intergovernmental service agreement between the U.S. Marshals Service and the CNMI Department of Corrections, the CNMI adult correctional facility in Saipan provides the U.S. government 25

[72]In its written comments regarding a draft of this report, the CNMI government stated that section 806(b) of the U.S.-CNMI Covenant imposes certain restraints on the ability of the federal government to acquire land for public purposes in the Commonwealth and expressly provides that "No interest in real property will be acquired unless duly authorized by the Congress of the United States and appropriations are available therefore." However, according to CBP, the agency is not seeking to acquire land in the CNMI.

[73]In addition, "The Commonwealth's Protocol for Implementing P.L. 110-229" outlines the approach that the CNMI will take regarding certain aspects of the transition program, including those pertaining to facilities. In technical comments on a draft of this report, CBP officials noted that the agency believes that the CNMI protocol conflicts with the CNMI's obligations pursuant to federal law to provide inspectional space and related office space at no cost to the government.

[74]According to ICE officials, the agency used CBP's original estimate of passenger arrivals in the CNMI to determine that it would need approximately 100 detention beds in Saipan for fiscal year 2010; however, based on current operations, ICE reduced its number of required beds to 50 beds for fiscal year 2011.

detention beds at a rate of $77 per bed per day.[75] As of September 2008, less than 30 percent of the facility's beds (134 of 513) were filled.

To obtain needed detention space, ICE proposed to either amend the 2007 U.S. Marshals Service agreement before it expired on April 1, 2010, or establish a new agreement with the CNMI government.[76] As of March 2010, after a year of negotiation, ICE had not finalized an agreement with the CNMI government owing to unresolved cost documentation issues, according to a senior ICE official.

- In March 2009, ICE officials initiated discussion with the CNMI government regarding needed detention space and requested that CNMI representatives complete a jail service cost statement.[77]
- In October 2009, representatives from the CNMI provided an incomplete jail service cost statement. The statement did not include capital construction costs, and CNMI representatives informed ICE officials that all estimates were preliminary and that the statement would require additional review.
- In November 2009, a CNMI official provided ICE with an e-mail containing top-level cost estimates, including capital and operating costs totaling approximately $107 per day.[78]
- In December 2009, ICE requested additional documentation for the construction costs, and the CNMI Attorney General provided a second jail service cost statement with a further breakdown of the CNMI rate of $107

[75]The agreement allows ICE and the Department of Justice's U.S. Marshals Service and Bureau of Prisons to house federal detainees with the CNMI Department of Corrections. ICE officials reported that as of March 1, 2010, the 25 beds provided for in the contract were filled, in part with the aliens that ICE arrested during their attempt to enter Guam on January 5, 2010.

[76]According to ICE officials, the agency would consider using the CNMI detention facility to detain aliens from other parts of the United States if the CNMI government and ICE could agree to a fair and reasonable daily rate. OMB Circular No. A-87, as amended May 10, 2004, sets forth the principles and standards for determining allowable costs for Federal agreements with state and local governments. A copy of OMB Circular A-87 can be obtained online at http://www.whitehouse.gov/omb/circulars/a087/a087-all.html.

[77]The jail service cost statement is used to establish the cost and effective start date of detention services.

[78]The CNMI reported that prison construction cost $125 million.

per day.[79] An ICE assessment of the CNMI statement deemed that the CNMI had miscalculated certain costs and, after recalculating these costs, proposed a bed rate of approximately $89 per day.[80]

- In January 2010, according to ICE officials, the CNMI acknowledged calculation errors but did not agree to a bed rate lower than $105.[81]

Since January 2010, negotiations between ICE and the CNMI regarding detention space have been on hold. According to the ICE contracting official, the CNMI has not provided any additional information supporting its $105 rate. Before contracting for beds, ICE requires documentation that establishes a fair and reasonable cost. According to the CNMI Attorney General, further documentation for the $105 rate is not necessary because the commonwealth is negotiating as an equal partner rather than as an applicant submitting cost proposals to DHS. ICE officials noted that although they had briefed the DHS Office of Policy on this operational challenge, ICE had remained responsible for the negotiations because of its expertise.[82] ICE officials also observed that the CNMI had rebuffed all ICE efforts to acquire detention space.

[79]The CNMI reduced the cost of prison construction from $125 million to $24 million.

[80]According to the ICE contracting official, ICE's assessment of the CNMI cost statement found several errors, the most significant being a clerical error that overstated the bed rate by $23.04 per day. Adjusting for this and several smaller errors, ICE recomputed a bed day rate of $89.61. We reviewed the documentation submitted by the CNMI to DHS and found several other misstated costs. First, personnel costs were increased by 7.65 percent to account for Social Security tax (Schedule B, Part I)—a federal program in which CNMI government workers do not participate. Second, the employer contribution to the CNMI government retirement program was reported as 36.7727 percent of the salary base (Schedule B, Part II), although CNMI Public Law 16-2 had reduced the government contribution to 11 percent in fiscal year 2008. The employer contribution to the CNMI retirement program is currently set at 20 percent in fiscal year 2010. Third, building depreciation for the acquisition cost of the prison in 2002 was not reduced to account for federal grants paying about $9.4 million of the total cost of $25.4 million to build the facility (Schedule G). Taking into account these additional misstated costs further reduces the calculated bed rate per day.

[81]The CNMI Attorney General provided option pricing that included $84 per day, covering space and utilities but no other services, or $105 per day for full detention services, including guards and medical care for detainees within the facility.

[82]Although officials at the DHS departmental level have been briefed on the detention space issues, ICE has been the negotiating party with the CNMI; DHS has not. Generally, these negotiations are handled at an ICE level since they require ICE expertise.

According to ICE officials, ICE prefers to detain aliens with prior criminal records while they await their immigration removal hearings, owing to possible flight risk and danger to the community. Given the current lack of needed detention space, ICE has identified three alternatives regarding detainees it seeks to remove from the CNMI while removal proceedings are under way:

1. **Issue orders of supervision**. Since November 28, 2009, ICE has released 43 detainees into the CNMI community, including 27 with prior criminal records, under orders of supervision. According to ICE officials, orders of supervision are appropriate for detainees who do not present a danger to the community or a possible flight risk.[83]

2. **Pay to transport detainees to other U.S. locations**. ICE can transport detainees to another detention facility, such as in Guam or Honolulu. Guam's correctional facility charges $77 per day.[84] As of March 1, 2010, ICE had paid approximately $5,000 to transport two detainees to Guam and one to Honolulu.[85]

3. **Pay CNMI's daily rate at Saipan correctional facility**. ICE may pay the CNMI's $105 daily rate for each detainee, if the CNMI provides appropriate documentation justifying its proposed rate.

In addition, because ICE has been unable to conclude its negotiations with the CNMI Department of Corrections, ICE cannot conduct immigration removal hearings for persons currently serving time in the CNMI corrections facility. As of March 1, 2010, ICE identified 26 CNMI prisoners serving criminal sentences in the local CNMI correctional facility for removal proceedings. In general, ICE attempts to conclude removal

[83]Federal law allows detainees to be released under orders of supervision if they satisfy certain criteria, including (1) travel documents are not available, (2) the detainee is nonviolent and likely to remain nonviolent if released, (3) does not pose a threat to the community, (4) is not likely to violate the conditions of release, and (5) does not pose a significant flight risk. 8 C.F.R. § 241.4(e).

[84]According to an analysis by ICE Office of Acquisitions, after approximately 26 days of detaining an alien in Guam at $77 per day rather than in the CNMI at $105 per day, the federal government would recoup the cost of transporting the alien to Guam and would save approximately $29 per day thereafter. However, if a detainee's removal can be processed in 26 days or less, keeping the detainee in the CNMI is more cost-efficient.

[85]Although federal law does not allow aliens in the CNMI to apply for asylum during the transition period, any detainees that ICE transports from the CNMI to Guam, Honolulu, or other U.S. locations can apply for asylum.

proceedings before inmates are released, in order to expedite removals and avoid additional detention costs, according to ICE officials. However, the CNMI Department of Corrections will not permit ICE to conduct immigration hearings at the facility unless ICE agrees to pay utility and access fees to establish video conferencing services in the CNMI prison. Officials with the CNMI correctional facility proposed a fee of $84 per day for utilities and to allow video conferencing hookups. According to an ICE official, ICE has agreements with other federal and state prisons in other U.S. locations to hold immigration hearings while inmates are incarcerated and has installed video-conferencing equipment, free of charge, to allow inmates to participate in their immigration proceedings while in custody.[86]

DHS Has Been Unable to Negotiate Direct Access to CNMI Immigration and Border Control Data to Support Ongoing Operations

As of April 1, 2010, DHS components lacked direct access to CNMI immigration and border control data contained in two CNMI databases, LIDS and BMS.[87] The CNMI government assigned a single point of contact in the CNMI Department of Labor to respond to CBP, ICE, and USCIS queries from the databases, most commonly for verification of an individual's immigration status.[88] However, DHS component officials have expressed concerns about the reliance on the CNMI point of contact and stressed that it is imperative for the department to have direct access to the CNMI data systems to perform the department's mission with maximum efficiency.

ICE officials expressed the following concerns regarding DHS's reliance on a single CNMI point of contact for requests for CNMI immigration data:

- ICE may lack information needed to support decisions regarding aliens' status or eligibility to remain in the CNMI. For example, ICE must rely on

[86]According to an ICE official, access to establish video-conferencing hookups is usually provided to ICE free of charge, because the technology is also available to correctional facility staff.

[87]The LIDS database is used to record the permit status of certain aliens who are required to have current work or equivalent permits in order to remain in the CNMI. BMS is an automated arrivals and departures database containing data from passports, visas, alerts, and permissions (extensions of stay, changes of status, or other modifications of entry conditions) as applicable for all persons entering the CNMI. See GAO-10-345R.

[88]According to several Federal Bureau of Investigation (FBI) agents and a previous CNMI Attorney General, from 2005 to 2007, a liaison from the CNMI Department of Labor worked within the FBI's Saipan office with direct access to LIIDS—the predecessor of LIDS—and BMS to assist the FBI with all ongoing investigations. In 2007, the liaison was released and no replacement was assigned. To access the databases, FBI agents must rely on the same CNMI individual as the rest of the U.S. government.

the CNMI point of contact for information to determine the status of a given individual with an umbrella permit.

- Relying on one CNMI point of contact to verify immigration status for individuals subject to ICE investigations could compromise security for ongoing operations.
- Because the CNMI point of contact is an indirect source, basing ICE detention and removal decisions on data provided by the point of contact could lead to those decisions' eventual reversal in court.
- Given that ICE operates 24 hours per day, 7 days per week, the CNMI point of contact cannot respond to all of ICE's needs in a timely manner.

USCIS officials also expressed concerns regarding lack of direct access to LIDS:

- Direct access to LIDS would allow USCIS to verify information provided by applicants for immigration benefits such as advance parole. For example, when an applicant for advance parole presents the required CNMI-issued entry permit or umbrella permit, direct access to LIDS would let USICS officials verify the authenticity of the permit.
- Direct access to the data will facilitate the processing of applications for CNMI-only work permits and for CNMI-only nonimmigrant treaty investor status.
- Direct access to CNMI immigration status information would assist USCIS in responding to interagency requests for immigration status verification through its SAVE program[89] and in implementing the E-Verify program in the CNMI.[90]

In February 2010, CNMI officials reported that the point of contact assigned to work with the U.S. government had promptly supplied information on individual cases to U.S. officials from immigration and border control databases. Moreover, a senior CNMI official stated that if

[89]SAVE is USCIS's intergovernmental initiative designed to aid benefit-granting agencies in determining an applicant's immigration status, thereby ensuring that only entitled applicants receive federal, state, or local public benefits and licenses.

[90]E-Verify is an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.

the point of contact is unable to respond to future DHS inquiries in a timely manner, CNMI officials would be willing to engage in additional discussions regarding more direct access to LIDS and BMS.

According to ICE officials, the CNMI responses to ICE inquiries have not been timely and have not always provided sufficient information. Documentation that ICE provided shows that from late December 2009 through March 2010, ICE's Office of Detention and Removal made 68 inquiries to CNMI's Department of Labor to determine aliens' immigration status. We examined ICE's record of these inquiries and found that CNMI response times ranged from 16 minutes to around 23 hours, averaging roughly 4 and a half hours. ICE officials reported that the responses contained first and last names and LIDS numbers but rarely included biographical or identifying information, such as date-of birth, nationality, or photographs, that could be used to further ICE investigations. An ICE official also told us that in late February 2010, he sent an inquiry regarding whether 214 aliens with pending deportation orders, referred to ICE by the CNMI Attorney General, had been granted valid work permits prior to November 28, 2009. According to ICE officials, by the end of March 2010, the CNMI Department of Labor had provided a blanket response that was insufficient to answer the inquiry.

DHS has communicated, at the department and component levels, with the CNMI government regarding access to CNMI immigration data.

- In a July 2008 letter to the Governor of the CNMI, the DHS Office of Policy requested information on the current CNMI system for recording and documenting the entry, exit, work authorization, and authorized conditions of individuals staying in the CNMI. DHS also requested any repositories of fingerprints, photographs, or other biometric information included in the system.

- On August 19, 2008, the office of the Governor of the CNMI responded to the DHS letter by providing an overview of the BMS system but stated that the CNMI does not maintain any repositories of fingerprints or other biometric information to share with DHS. According to a CNMI official, the commonwealth requested fingerprint scanners from DHS but did not receive them.

- During the September 2009 meeting between the Governor of the CNMI and the Secretary of DHS, the Governor proposed, through the CNMI protocol for implementing CNRA, providing restricted access to information contained in LIDS and BMS, for a fee and in exchange for airline flight entry data.

- On February 18, 2010, the Governor sent a letter to CBP indicating that he had been preliminarily advised that CBP would not share with the CNMI advanced passenger information provided by airlines and he reiterated the CNMI's request for this information.[91] The letter indicated that access to the airline flight data would facilitate CNMI efforts to prevent an increase in the number of aliens remaining in the commonwealth beyond their authorized stay.

- On March 31, 2010, CBP Office of Field Operations responded to the CNMI letter, denying the CNMI access to advanced passenger information provided by the airlines. The CBP letter stated that the CNMI's intended use of the data did not justify their release to CNMI authorities. The CBP letter further indicated that, given DHS's responsibility for removing aliens present in the CNMI beyond their authorized stay, it would be in the CNMI's and DHS's mutual interest for DHS to have access to CNMI immigration records or any other information that the Secretary deems necessary.[92]

  In March 2010, CNMI officials told us that the commonwealth would not provide DHS increased access to immigration and border control data because DHS was unwilling to share airline flight data. In written comments on a draft of this report, the CNMI government stated its intention to appeal to the Secretary of Homeland Security the DHS decision not to share these data.

[91]The CNMI's February 2010 letter stated that access to DHS's Advanced Passenger Information System would allow the CNMI customs officer to discontinue collecting from arriving travelers the passenger information to update BMS and noted that the Marianas Visitors Authority had found that many visitors had been inconvenienced by the delay associated with this effort. The letter further noted that the commonwealth maintains exit data in BMS because DHS lacks a digital exit control system that can provide immediate information regarding visitors who have departed. In the absence of access to the airline flight data, CNMI Customs Division officers have continued recording in BMS passport information from all arriving and departing passengers since the transition period began on November 28, 2009.

[92]The ICE Compliance Enforcement Unit (CEU) uses U.S. immigration systems to monitor students, tourists, and temporary workers present in the United States at any one time and to identify those that violate the status or overstay their visa. DHS's US-VISIT Program sends regular reports to ICE CEU on potential overstays, and ICE officials have reported to us in the past that they use these data regularly during investigations. According to an ICE official, to date, ICE CEU has not referred any individuals to ICE officials in Saipan for investigation. We have issued several prior reports regarding DHS capacity to identify overstaying visitors. For example, see GAO, *Homeland Security: Prospects For Biometric US-VISIT Exit Capability Remain Unclear*, GAO-07-1044T (Washington, D.C.: Jun. 28, 2007) and *Homeland Security: Key US-VISIT Initiatives at Varying Stages of Completion, but Integrated and Reliable Schedule Needed*, GAO-10-13 (Washington, D.C.: Nov. 19, 2009).

U.S. Agencies' Implementation of CNRA Programs for Workers, Visitors, and Investors Is Incomplete

U.S. agencies have begun to implement CNRA for workers, visitors, and investors, but key regulations are not final and, as a result, transition programs to preserve access to foreign workers and for investors are not yet available. In August 2008, we reported on key decisions that the agencies must make to implement the legislation. On November 25, 2009, the U.S. District Court for the District of Columbia issued a preliminary injunction prohibiting implementation of the DHS interim rule for the CNMI-only transitional worker program. As a result, although federal immigration laws now apply to the CNMI, the regulatory framework for the CNMI-only transitional work program is not yet in place and the permit program is not yet available. DHS has established the Guam-CNMI visa waiver program but did not include two countries, China and Russia, that the CNMI and Guam consider key to their tourist industries. According to DHS officials, a policy review is under way to determine whether the program should be revised to include these countries, and visitors from both nations meanwhile may enter the CNMI on the Secretary of Homeland Security's discretionary authority to grant parole on a case-by-case basis. The DHS rule for investors currently exists in a proposed form, and as a result, the regulatory framework for the CNMI-only investor status is not yet available.

U.S. Agencies Have Taken Steps to Create CNMI-Only Work Permit Program, but Program Is Not Yet Available

DHS Issued Interim Rule for CNMI-Only Work Permit Program, but Court Injunction Has Prevented Implementation

On October 27, 2009, DHS issued an interim rule comprising regulations to implement the CNMI-only work permit program for foreign workers not otherwise admissible under federal law that was established in CNRA.[93] These regulations address (1) the number of permits to be issued, (2) the

[93]DHS created a new transitional worker classification to implement the CNMI-only worker permit provision of the legislation. Commonwealth of Northern Mariana Islands Transitional Worker Classification, 74 Fed. Reg. 55094 (Oct. 27, 2009). DHS and the Department of Justice issued an interim final rule that amended several existing federal regulations, so that these regulations would be in conformity with the CNRA and would apply to persons arriving in or physically present in the CNMI. The rule amended regulations for asylum, alien classifications eligible for emloyment, documentation acceptable for employment eligibility verification, and adjustment of status of immediate relatives under the CNMI-Guam Visa Waiver Program, among other things. See Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands, 74 Fed. Reg. 55726 (Oct. 28, 2009).

way the permits will be distributed, (3) the terms and conditions for the permits, and (4) the fees for the permits. The rule was scheduled to take effect in its current form on November 27, 2009. In issuing the interim rule, DHS announced that it would accept comments in the development of the final rule but was not following notice-and-comment rulemaking procedures, asserting that it had good cause not to do so.

Table 2 shows the key decisions that CNRA calls for the Secretary of Homeland Security to make in implementing the CNMI-only work permit program.

Table 2: Key Federal Implementation Decisions by U.S. Secretary of Homeland Security Regarding CNMI-Only Foreign Work Permit Program

Key federal implementation decisions	Legislative requirements and authorizations
Determine the number of permits to provide under the CNMI-only work permit program.	Reduce annual allocation of CNMI-only permits to zero by the end of the transition period or any extensions of CNMI-only permit program.
Determine the way the permits are distributed. Determine the terms and conditions for the permits.	Attempt to promote the maximum use of U.S. citizens and, if needed, lawful permanent residents and citizens of the Freely Associated States, and to prevent adverse effects on the wages and working conditions of those workers.
Determine fees to charge employers and workers for CNMI-only work permits.	Set fees for the permits so as to recover the full cost of providing services, including administrative costs. Charge employers an annual supplemental fee of $150 per permit to fund CNMI vocational education.

Source: GAO analysis of P.L. 110-229, Consolidated Natural Resources Act of 2008, May 8, 2008.

DHS's interim rule establishes the following:

- **Number of permits**. DHS will grant up to 22,417 CNMI-only work permits between November 28, 2009, and September 30, 2010, based on the CNMI government's estimate of the maximum number of foreign workers in the commonwealth on May 8, 2008. The interim rule notes that DHS will

publish annually in the *Federal Register* its determination of the number of permits to be granted each year of the transition period.[94]

- **Distribution of permits**. Under the CNMI-only work permit program, employers must petition for nonimmigrant workers to obtain status, so that DHS can administer the work permit program in a manner consistent with other nonimmigrant categories for temporary admission, such as H-1B visas. Accordingly, DHS created the CW-1 status, which it deemed to be synonymous with the term "permit" referenced in the legislation. DHS will determine whether an occupational category requires alien workers to supplement the resident work force. The DHS interim rule does not exclude any specific occupations from the program. However, the rule notes concerns that three occupational categories—dancing (such as exotic dancing), domestic workers, and hospitality workers—are subject to exploitation and abuse, and it invites comments on whether DHS should exclude these occupations in a final rule.

- **Terms and conditions of the permit program**. Employers must attest to their eligibility to petition for a CNMI-only work permit, and foreign workers must meet qualifications for positions.[95] If a foreign worker is in the CNMI, the employer must attest that the worker is there lawfully. Additionally, the employer must attest that the position is nontemporary or nonseasonal and is in an occupational category as designated by the Secretary and that qualified U.S. workers are not available to fill the position.

[94]CNRA specifies that the CNMI-only permits will not be valid beyond the expiration date of the transition period and requires that the number of permits allocated be reduced on an annual basis to zero by the end of the transition period. However, the U.S. Secretary of Labor, in consultation with DHS, DOI, and the Governor of the CNMI, has the discretion to extend indefinitely the period for issuing the permits for up to 5 years at a time, based on the labor needs of legitimate businesses in the CNMI. See GAO-08-791.

[95]DHS's interim rule specifies that, to be eligible to petition for a CNMI-only work permit, an employer must be engaged in a legitimate business; consider all available United States workers for the position being filed by the CNMI-only work permit holder; offer terms and conditions of employment that are consistent with the nature of the occupation, activity, and industry in the CNMI; and comply with all federal and CNMI requirements relating to employment. The interim rule states that a business is not legitimate if it engages directly or indirectly in prostitution, trafficking in minors, or any other activity that is illegal under federal or CNMI law. In the interim rule, DHS notes that individual households employing individual domestic workers would not qualify as a business and that domestic workers would likely be employed through a legitimate business for placement in individual households.

- **Permit fee**. The fee for the CNMI-only work permit is $470. This fee includes an annual supplemental fee of $150 per worker per year to fund CNMI vocational education, with the remaining $320 charged per Petition for a Nonimmigrant Worker in the CNMI (I-29CW). To reduce costs, an employer may name more than one foreign worker on each petition, provided that the workers are in the same occupational category, for the same period of time, and in the same location.

In issuing the interim rule, DHS claimed that it qualified for an exemption from a requirement that federal agencies publish a notice of proposed rulemaking in the *Federal Register* and give the public 30 days to comment.[96] DHS raised several points to support its finding that it had good cause to dispense with the notice-and-comment period for the CNMI-only work permit rule. For example, DHS asserted that 18 months is a short time frame in which to review the CNMI's immigration system and develop the regulatory scheme necessary to transition the CNMI to the U.S. federal immigration system. DHS noted in the interim rule it would accept comments through November 27, 2009, and would consider those comments in developing a final rule. DHS stated that the interim rule would go into effect in its current form on November 27, 2009. The D.C. District Court found these arguments unpersuasive in its decision to issue a preliminary injunction for this rule.

DHS received numerous comments on the interim rule from the CNMI government, a private sector group, and interested businesses and individuals.[97] The CNMI government asserted that the rule was incomplete and would damage CNMI workers, employers, and community and commented that the rule violated procedural requirements for agency

[96]Administrative Procedure Act, P.L. 79-404, as amended, 5 U.S.C. § 553. Federal courts have determined that notice-and-comment provisions of the act are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review. After giving interested persons an opportunity to comment on the proposed rule, and after considering the public comments, the agency may then publish the final rule. Under the Administrative Procedure Act, an agency is authorized to forego notice and comment when an agency for "good cause" finds that those procedures are "impracticable, unnecessary, or contrary to the public interest." In these situations, the agency may issue an interim rule without providing an opportunity for notice and comment.

[97]In addition, the CNMI government proposed text for the rule that would implement the commonwealth's comments.

rulemaking. In addition, the Saipan Chamber of Commerce raised concerns regarding the economic impact of the regulations and made a proposal to make it easier for workers with the CNMI-only work permit to return from travel outside the commonwealth. (See text box.)

Comments from the CNMI Government and Private Sector on DHS Interim Rule for CNMI-Only Work Permit Program

CNMI Government

The CNMI government commented on the DHS interim rule stating that, in addition to disregarding the notice and comment provisions of the Administrative Procedure Act, the rule was deficient for the following reasons, among others:

- The interim rule fails to implement the transitional work program mandated by CNRA. It does not establish how permits are to be allocated among competing employers, and it does not establish a procedure for reducing the number of permits to zero by the end of the transition period.
- DHS failed to conduct a required economic impact analysis of the proposed rule.
- The interim rule will harm the Commonwealth's U.S. workers, foreign workers, employers, and community:
  - The regulations do not provide preferences for U.S. workers and require only that employers attest that qualified U.S. workers are not available to fill the position. Based on CNMI experience with such an "attestation" system, the CNMI Department of Labor believes it will invite widespread abuse and decrease the job opportunities available to U.S. workers.
  - The regulations would cause substantial harm to foreign workers in the CNMI by subjecting them to increased fees and abuses. For example, the CNMI Department of Labor finds that the federal system does not bar employers with records of prior labor abuse from hiring foreign workers and does not assure that employers have sufficient resources to pay wages.
  - The regulations hurt employers by defining "legitimate business" to exclude the direct employment of housekeepers or caregivers by households. The CNMI Department of Labor also notes the importance of male and female waiters, hosts, and entertainers to the tourist industry and states that prostitution and other forms of exploitation occur in the CNMI at a rate far lower than the U.S. national average.
  - The regulation will hurt the community by greatly increasing the number of illegal aliens, with no concomitant federal enforcement capability to remove them.

CNMI Private Sector

Comments from the Saipan Chamber of Commerce cite several concerns: the lack of a DHS schedule for allocating and reducing the number of worker permits and the possibility that DHS might restrict access to certain job categories for law enforcement purposes instead of directly targeting businesses that engage in illegal activity. Additionally, the chamber asks that multiple-entry visas be made available within the CNMI to workers who qualify for status under the interim rule. This would allow workers who travel abroad for a visit to return to the CNMI without undergoing the time-consuming and expensive federal visa process at a U.S. consulate.

Source: GAO analysis of comments on DHS interim rule.

Because of the injunction issued in response to the CNMI's amended lawsuit against the U.S. government, the CNMI-only foreign work permits are not yet available.[98] In its November 2, 2009, amendment to its ongoing lawsuit to overturn portions of CNRA, the CNMI filed a motion for preliminary injunction to prevent the operation of the DHS interim rule until a procedural violation is remedied. The CNMI argued that DHS had violated procedural requirements of the Administrative Procedure Act, which requires notice and the opportunity for public comment before regulations can go into effect. On November 25, 2009, the U.S. District Court for the District of Columbia issued an order prohibiting implementation of the interim rule, stating that DHS must consider public comments before issuing a final rule.[99] In granting the preliminary injunction, the court found, among other things, that DHS had had a lengthy period in which to develop regulations and had not demonstrated that it had used that time to complete implementation as efficiently as possible. The court also noted that the commonwealth's residents and government had meaningful concerns about the regulations. In response to this preliminary injunction, DHS reopened the comment period from December 9, 2010, until January 8, 2010. As of May 2010, DHS had not yet issued a final rule and, as a result, CNMI-only work permits are not available. DHS plans to issue a final rule for the CNMI-only work permit program in September 2010.

DOL Has Not Made Extension Decision for CNMI-Only Work Permit Program

DOL officials informed us that they had not yet obtained sufficient experiential data to make a decision to extend the CNMI-only work permit program. DOL officials further indicated that a determination to extend the transition period well in advance of the expiration of the transition period may raise concerns about the validity of the Secretary's determination, in light of the factors that CNRA authorizes the Secretary to consider in making the determination (see table 3). DOL officials also told us that they still lacked key data on which to base an extension decision.

[98]This court order only addresses the specific transitional worker program that was the subject of the interim rule and does not enjoin any provision of CNRA or other related regulations from taking effect.

[99]CNMI v. United States, No 08-1572, 2009 WL 4070877 (D.D.C. Nov. 25, 2009).

Table 3: Federal Implementation Decision by U.S. Secretary of Labor Regarding Extension of CNMI-only Work Permit Program

Key federal implementation decision	Legislative requirements and authorizations
Decide whether and when to extend the CNMI-only work permit program past 2014 (indefinitely, for up to 5 years at a time).	Base decision on the labor needs of legitimate businesses in the CNMI. May consider (1) workforce studies on the need for foreign workers, (2) the unemployment rate of U.S. citizen workers in the CNMI, and (3) the number of unemployed foreign workers in the CNMI, as well as other information related to foreign worker trends. Consult with U.S. Departments of Homeland Security, the Interior, and Defense and the Governor of the CNMI.

Source: GAO analysis of P.L. 110-229, Consolidated Natural Resources Act of 2008, May 8, 2008.

Note: The federal sources generally used to generate data on wages, occupations, and employment status for the United States, including the Current Population Survey and the Current Employment Statistics program, do not cover the CNMI.

DHS Has Implemented Guam-CNMI Visa Waiver Program but Is Reconsidering Inclusion of Certain Countries

On January 16, 2009, DHS issued an interim final rule for the Guam-CNMI joint visa waiver program, which is intended to allow visitors for business or pleasure to enter the CNMI and Guam without obtaining a nonimmigrant visa for a stay of no longer than 45 days. DHS's rule designates 12 countries or geographic areas, including Japan and South Korea,[100] as eligible for participation in the program but excludes several countries that had been part of the previous Guam visa waiver program.[101] DHS considered designating Russia and China as eligible for participation, because visitors from those countries provide significant economic benefits to the CNMI. However, because of political, security, and law enforcement concerns, including high nonimmigrant visa refusal rates, DHS deemed China and Russia as not eligible to participate in the program.

[100]Japan and Korea are the two largest tourism markets for the CNMI and Guam.

[101]DHS included Australia, Brunei, Hong Kong, Japan, Malaysia, Nauru, New Zealand, Papua New Guinea, Republic of Korea, Singapore, Taiwan, and the United Kingdom. DHS excluded Indonesia, the Solomon Islands, Vanuatu and Western Samoa from the CNMI-Guam visa waiver program.

Table 4 shows the key decision that, under CNRA, the Secretary of Homeland Security is to make regarding countries to be included in the Guam-CNMI visa waiver program.

Table 4: Key Federal Implementation Decision by U.S. Secretary of Homeland Security Regarding Guam-CNMI Visa Waiver Program

Key federal implementation decision	Legislative requirement and authorization
Determine countries to include in the Guam-CNMI visa waiver program, in consultation with the Department of State, DOI, and the Governors of the CNMI and Guam.	Shall include any country from which the CNMI has received a significant economic benefit from the number of visitors for pleasure for the prior year, unless the country's inclusion would pose a security threat. Governors of the CNMI and Guam may petition to have countries added.

Source: GAO analysis of P.L. 110-229, Consolidated Natural Resources Act of 2008, May 8, 2008.

In developing the Guam-CNMI visa waiver program, DHS officials consulted with representatives of the CNMI and Guam governments, both of which sought the inclusion of China and Russia in the program. In the regulations, DHS states that after additional layered security measures are in place, DHS will make a determination as to whether nationals of China and Russia can participate in the visa waiver program. These security measures may include, among others, electronic travel authorization to screen and approve potential visitors prior to arrival in Guam and the CNMI. In May 2009, DHS officials informed Congress that the department is reconsidering whether to include China and Russia in the Guam-CNMI visa waiver program. DHS plans to issue a final rule for the Guam-CNMI visa waiver program in November 2010.

Public comments on the proposed regulations from the Guam and CNMI governments and private sectors asked DHS to delay the Guam-CNMI visa waiver program implementation date, as allowed for in CNRA, from June 1, to November 28, 2009. The comments emphasized the economic significance of including China and Russia in the program. Guam officials argued that tourist arrivals in Guam from traditional markets were declining and that having access to China presented an important economic benefit. CNMI officials noted that the CNMI economy would be seriously damaged unless the CNMI retained access to the China and Russia tourism markets. (See text box.)

Comments from CNMI and Guam Governments and Organized Private Sector on Interim Final Rule for Guam-CNMI Visa Waiver Program

CNMI Government and Private Sector

CNMI government comments on the interim final rule stressed the serious economic losses that would occur if China and Russia visitors were excluded from the visa waiver program and sought a delay in the program's implementation until additional security measures are in place and DHS has amended the regulation to allow visitors from China and Russia under the program.

The Saipan Chamber of Commerce sought to delay the implementation of the rule and asked that DHS identify the specific additional layered security measures that would allow it to reconsider its exclusion of China and Russia from the visa waiver program. Further, the chamber commented that the economic analysis used by DHS was substantially flawed, including an underestimate of the declines in tourists coming to the CNMI under standard U.S. visa requirements.

Guam Governor and Private Sector

The Guam Governor's comments noted the economic benefit from the new provision allowing longer stays but identified the need to include visitors from China in the visa waiver program and the need for a formal mechanism to add countries to the program. The Governor supported the CNMI recommendation that implementation be delayed. The Guam Visitor Bureau also sought a delay in implementation so that additional layered security could be put in place, such that DHS could reach a determination to allow visitors from China and Russia.

Guam private sector groups emphasized the economic benefits to Guam if DHS were to include China in the program. The private sector groups also identified China as a future growth market that could offset declines in visitors from Japan.

Source: GAO analysis of comments to interim final rule

On October 21, 2009, the Secretary of Homeland Security announced to Congress and the Governors of the CNMI and Guam the decision to parole tourists from China and Russia into the CNMI on a case-by-case basis for a maximum of 45 days, in recognition of their significant economic benefit to the commonwealth. CBP issued procedures for administering the parole in a bulletin to members of its Carrier Liaison Program and internal guidance to staff. According to a State official, information regarding the decision to parole visitors did not reach Chinese officials working at the airports in that country and, as a result, the Chinese authorities suspended charter flight service between China and the CNMI between November 28, 2009, and December 18, 2009. According to CNMI officials, the suspension of charter flight service resulted in the loss of approximately $7.8 million in visitor revenue.

Proposed DHS Rule to Provide CNMI-Only Treaty Investor Status to Foreign Investors Is Not Yet Final

DHS has proposed a rule to allow a large proportion of holders of CNMI foreign investor permits to obtain U.S. CNMI-only nonimmigrant investor treaty status during the transition period.[102] Table 5 shows the decision, with its federal requirements and authorizations, that CNRA calls for the Secretary of Homeland Security to make regarding CNMI foreign investors.

Table 5: Key Federal Decisions by U.S. Secretary of Homeland Security Related to CNMI Foreign Investors

Key federal implementation decisions	Legislative requirements and authorizations
Determine which current CNMI foreign investors will be eligible to be "grandfathered" as U.S. E-2 treaty investors when the transition period begins.	May provide grandfathered status to those who were admitted to the CNMI in long-term investor status under CNMI immigration laws before the transition program start date, who maintain the investment(s) that formed the basis for such status, and who meet other requirements.
Decide the validity period for the grandfathered treaty investor status.	

Source: GAO analysis of P.L. 110-229, Consolidated Natural Resources Act of 2008, May 8, 2008.

- **Eligibility for CNMI-only treaty investor status**. In proposing to allow CNMI foreign investor permit holders to obtain U.S. CNMI-only nonimmigrant treaty investor status, DHS included three types of CNMI permits: the long-term business investor entry permit, the foreign investor entry permit, and the retiree investor entry permit. As we reported in 2008, long-term business entry permits accounted for a large proportion of CNMI foreign investor entry permits that were active and valid in July 2008.[103] According to the DHS proposed rule, eligibility criteria for CNMI-only nonimmigrant investor treaty status during the transition period include, among others, having been physically present in the CNMI for at least half the time since the investor obtained CNMI investor status. Additionally, investors must provide evidence of maintaining financial investments in the CNMI, with long-term business investors showing an improved investment of at least $150,000.

[102]E-2 nonimmigrant status for aliens in the CNMI with long-term investor status. 74 Fed. Reg. 46938 (Sep. 14, 2009).

[103]GAO-08-791.

- **Validity period for CNMI-only treaty investor status**. DHS proposed terminating the validity period for the CNMI-only nonimmigrant treaty investor status on December 31, 2014. Under the proposed rule, the status would terminate regardless of whether the temporary worker provisions are extended.

  DHS proposed the rule on September 14, 2009, and accepted comments until October 14, 2009. According to DHS's April 2010 Semiannual Regulatory Agenda, the department intends to issue a final rule for the investor program in July 2010. CNMI-only nonimmigrant treaty investor status will not be available until the final rule is issued with an effective date.

  DHS received several comments on the proposed rule from the CNMI government, Saipan Chamber of Commerce, and individuals (see text box).

Comments from CNMI Government and Organized Private Sector on Proposed DHS Rule for CNMI-only Nonimmigrant Investor Treaty Status

CNMI Government

In its comments on the proposed regulations, the CNMI government disagreed with DHS's conclusion that the CNMI-only investor status must end in 2014, stating that the status would instead be extended if the U.S. Secretary of Labor extends the transition period for the CNMI-only worker program. Further, the CNMI noted that the proposed regulations would exclude many current CNMI investors from qualifying for the E-2 CNMI investor status. For example, the CNMI reported that about 85 of 514 long-term business entry permit holders could not qualify if an investment level of $150,000 is required. CNMI also reported that 251 of the 514 permit holders were granted at a $50,000 required investment level and were "grandfathered" in 1997 when the minimum investment requirement was increased. Further, the CNMI noted that the requirement of continuous residence is unnecessarily restrictive and would operate to exclude some of the CNMI's current investors. For the period beyond the end of the transition period, the CNMI government projected that only 42 of 514 long-term business entry permit holders may be able to meet the minimum investment level to qualify for federal investor status.

CNMI Private Sector

The Saipan Chamber of Commerce also provided several comments on the proposed regulations:

- The transition period for investors would be extended if the U.S. Secretary of Labor extends the transition period for the CNMI worker program.
- DHS has the option to extend grandfathered treaty investor status beyond the end of the transition period and should take this step to benefit the economy.
- All holders of CNMI Long-Term Business Certificates should be grandfathered, as the proposed regulations would exclude those who had received CNMI permits with less than a $150,000 investment and those who are not nationals of nations with which the United States maintains a treaty of friendship, commerce, or navigation.
- Multiple-entry visas should be made available to E-2 CNMI investors within the CNMI, to allow investors who travel abroad to return to the CNMI without undergoing the time-consuming and expensive federal visa process at a U.S. consulate.

Source: GAO analysis of comment to proposed rule.

Conclusions

Responding to CNRA's extension of federal immigration law to the CNMI, DHS components have taken a number of steps since November 28, 2009, to ensure effective border control procedures in the commonwealth and to protect national and homeland security. In 2008 and 2009, DHS also initiated department-level outreach to the CNMI government to facilitate the components' implementation of CNRA. Additionally, DHS and other agencies have taken steps to implement CNRA provisions for workers, visitors, and investors, although the programs for workers and investors are not yet available to eligible individuals in the CNMI.

Despite the DHS components' progress in establishing federal border control in the CNMI, however, their inability to conclude negotiations with the CNMI government regarding access to airport space, detention facilities, and CNMI databases has resulted in continuing operational challenges. First, lacking occupancy agreements with the CNMI, CBP officers have continued to operate in CNMI airport space that does not meet the agency's facility standards. Second, lacking an agreement with the CNMI government regarding detention space, ICE has released a number of aliens with criminal records into the CNMI community under orders of supervision and has paid to transport several detainees to Guam and Hawaii. Third, lacking direct access to CNMI's immigration and border control databases, ICE officials have instead directed data requests to a single CNMI point of contact, limiting their ability to quickly verify the status of aliens and compromising the security of ongoing operations. Although the DHS components have made continued efforts to overcome these operational challenges without department-level intervention, in each case, their efforts have encountered obstacles. Negotiations with the CNMI government for long-term access to the CNMI airports have not been concluded, and key differences remain unresolved; meanwhile, negotiations for access to CNMI detention facilities and databases have reached impasse. Without department-level leadership, as well as strategic approaches and time frames for concluding its components' negotiations with the CNMI, DHS's prospects for resolving these issues is uncertain.

Recommendation for Executive Action

To enable DHS to carry out its statutory obligation to implement federal border control and immigration in the CNMI, we recommend that the Secretary of Homeland Security work with the heads of CBP, ICE, and USCIS to establish strategic approaches and time frames for concluding negotiations with the CNMI government to resolve the operational challenges related to access to CNMI airport space, detention facilities, and information about the status of aliens.

Agency Comments and Our Evaluation

We provided a draft of this report to officials in DHS, DOI, DOL, State, and the governments of the CNMI and Guam for review and comment. We received written comments from DHS, DOI, the CNMI government, and the Guam government, which are reprinted in appendixes II, III, IV, and V, respectively. We also received technical comments from DHS and DOL, which we incorporated as appropriate. State did not provide comments.

Following are summaries of the written comments from DHS, DOI, the CNMI government, and the Guam government and of our responses where appropriate.

- **DHS**. DHS agreed with our recommendation that the Secretary of Homeland Security work with the heads of CBP, ICE, and USCIS to establish strategic approaches and time frames for concluding negotiations with the CNMI to resolve the operational challenges related to CBP's access to airport space, ICE's contract negotiations regarding detention facilities, and the ability for DHS and its component agencies to obtain information about the status of aliens from databases under the control of the CNMI government.

- **DOI**. DOI stated that the report clearly sets out the problems of implementing the extension of U.S. immigration law to the CNMI and that the information contained in the report corresponds to the observations and analyses of the department's Office of Insular Affairs.

- **CNMI government**. The CNMI government raised concerns about the scope of our report and its support for several findings. The CNMI government expressed particular concern that we did not address certain issues that CNRA directed GAO to assess. As stated in the objectives of this report, we describe the steps taken by federal agencies to establish federal border control in the CNMI and the status of efforts to implement CNRA programs specific to the CNMI for workers, visitors, and investors. Recognizing that the regulations establishing the CNMI-only programs for workers and investors are not yet available, we reached agreement with the offices of the addressees of this report to examine the likely economic impact of federalization after regulations are in place. The CNMI also expressed concerns regarding the timeliness and content of federal agencies' regulations to implement the CNRA programs for workers, visitors, and investors and regarding DHS efforts to identify overstayers and remove aliens. In our report, we discuss the CNMI's concerns regarding each regulation. Additionally, the CNMI raised concerns regarding the adequacy of our evidence in some cases. In responding to CNMI's comments and after considering technical comments from DHS, we modified our discussion of CBP's effort to acquire operational

space at the Saipan airport. In addition, we added information from ICE tracking logs to our discussion of DHS's interest in obtaining direct access to the CNMI's immigration-related databases, and we clarified other sections as appropriate. (See app. IV for more details of our responses to the CNMI's comments.)

- **Guam government**. The government of Guam made several observations about the interim final rule for the Guam-CNMI visa waiver program. First, Guam stated that the DHS Secretary's decision to use her authority to parole tourists from China and Russia into the CNMI, but not to use her authority similarly for such tourists seeking to enter Guam, contravenes Congress's intent that a unified visa waiver program operate in Guam and the CNMI. Second, Guam stated that CNRA was designed to expand tourism to the islands and that China and Russia must be added to the Guam-CNMI Visa Waiver Program to achieve that result. Third, Guam concluded that the interim final rule makes the eligibility requirements for the Guam-CNMI program more stringent than those of the U.S. visa waiver program. The Governor's office asked for the immediate issuance of a final rule for the Guam-CNMI visa waiver program that is consistent with congressional intent, unifies the program, and provides both Guam and the CNMI with access to China's and Russia's tourist markets.

We are sending copies of this report to interested congressional committees. We also will provide copies of this report to the U.S. Secretaries of Homeland Security, the Interior, Labor, and State and to the Governors of Guam and the CNMI. In addition, the report will be available at no charge on the GAO Web site at http://www.gao.gov.

If you or your staffs have questions about this report, please contact me at (202) 512-3149 or gootnickd@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix VII.

David Gootnick Director,
International Affairs and Trade

Appendix I: Objective, Scope, and Methodology

In this report we describe (1) the steps that have been taken to establish federal border control in the Commonwealth of the Northern Mariana Islands (CNMI) and (2) the status of efforts to implement the Consolidated Natural Resources Act of 2008 (CNRA) provisions with regard to workers, visitors, and investors. We plan to issue a subsequent report regarding the impact of implementation of the CNRA on foreign workers, the tourism sector, and foreign investors in the CNMI.

In conducting our work, we reviewed legislation that applies U.S. immigration laws to the CNMI, namely, CNRA,[1] the U.S. Immigration and Nationality Act (INA), and related regulations.[2] To examine the relationship between the CNMI and the United States, we reviewed the CNMI-U.S. Covenant,[3] the lawsuit between the CNMI and the United States to overturn specific provisions of the CNRA, and the CNMI protocol for implementing U.S. immigration law.[4] We also reviewed related studies by GAO[5] and the Congressional Research Service.[6] We interviewed officials in Washington, D.C., from U.S. Department of Homeland Security (DHS) components Customs and Border Protection (CBP), U.S. Citizenship and Immigration Services (USCIS), and Immigration and Customs Enforcement (ICE), as well as officials from the U.S. Departments of the Interior (DOI), Labor (DOL), and State.

To describe the steps that have been taken to secure the border in the CNMI, we visited the commonwealth, where we interviewed officials in the CNMI Office of the Governor, Department of Labor, and the Marianas Visitors Authority. We also interviewed representatives of the CNMI private sector, including the Saipan Chamber of Commerce. In addition, we observed CBP operations at the Saipan and Rota airport facilities. We reviewed U.S. agreements with the CNMI regarding airport occupancy and

[1]Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, Title VII, 122 Stat. 754, 853 (May 8, 2008).

[2]8 U.S.C. §1101 et. seq.

[3]Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (Pub. L. No. 94-241, § 1, 90 Stat. 263 (Mar. 24, 1976) and 48 U.S.C. § 1801, as amended).

[4]The protocol was posted as a public service notice on the CNMI Department of Labor Web site (www.marianaslabor.net/pubntc.asp).

[5]GAO-08-466, GAO-08-791, and GAO-10-345R.

[6]CRS Report: 98-206, Appropriations for Fiscal Year 1999: Interior and Related Agencies.

detention space at the local correctional facility. In addition, we reviewed formal letters between DHS and the CNMI government, as well as the CNMI Department of Labor's 2008 and 2009 Annual Report to the Legislature. In general, to establish the reliability of the data that CBP uses to document arrivals, that ICE uses to document aliens, and that USCIS uses to document benefits in the CNMI, we systematically obtained information about the ways that the components collect and tabulate the data. When possible, we checked for consistency across data sources. Although the data provided by CBP, ICE, and USCIS have some limitations, we determined that the available data were adequate and sufficiently reliable for the purposes of our review. We did not include the U.S. Department of Justice in our review, because the department has a limited role in implementing CNRA. We also did not assess the validity of federal agencies' expected costs or operational needs in implementing the legislation. We did not review the extent to which U.S. laws were properly enforced.

To describe the steps that DHS has taken to implement the CNRA provisions with regard to workers, visitors, and investors, we reviewed comments provided by the CNMI and Guam governments and organized private sectors regarding federal regulations. Specifically, we reviewed DHS's interim rule for CNMI-only worker permits, the interim final rule for the Guam-CNMI visa waiver program, and the proposed rule for CNMI-only nonimmigrant treaty investor status. We also reviewed documents provided by agency officials that describe the operation of the parole authority used to allow Chinese and Russian nationals to visit the CNMI for pleasure on a case-by-case basis. We interviewed the Governor of Guam and representatives of the private sector regarding the differences between the Guam visa waiver program and the Guam-CNMI visa waiver program.

We conducted this performance audit from September 2009 to May 2010 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Comments from the Department of Homeland Security

U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

April 23, 2010

Mr. David Gootnick
Director
International Affairs and Trade
441 G Street, NW
U.S. Government Accountability Office
Washington, DC 20548

Dear Mr. Gootnick:

RE: Draft Report GAO-10-553, Commonwealth of the Northern Mariana Islands: DHS Needs to Conclude Negotiations with the CNMI and Finalize Regulations to Fully Implement Federal Immigration Law (Engagement 320711)

The Department of Homeland Security appreciates the opportunity to review and comment on the draft report referenced above. The Government Accountability Office (GAO) recommends that the Secretary of Homeland Security work with the heads of Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and the United States Citizenship and Immigration Services (USCIS) to establish strategic approaches and timeframes for concluding negotiations with the Commonwealth of the Northern Mariana Islands (CNMI) government to resolve the operational challenges related to CBP's access to CNMI airport space, ICE's contract negotiations regarding detention facilities, and the ability for DHS and its component agencies to obtain information about the status of aliens from databases under the control of the CNMI government.

The Department agrees with the recommendation and will continue to provide strategic guidance and assistance to CBP, ICE and USCIS as they work to resolve the challenges regarding airport space for immigration inspection services, access to detention facilities, and streamlining the access to information in CNMI databases.

Sincerely,

Michael M. Rhyland

for Jerald E. Levine
Director
Departmental GAO/OIG Liaison Office

Appendix III: Comments from the Department of the Interior

United States Department of the Interior

OFFICE OF INSULAR AFFAIRS
1849 C Street, NW
Washington, DC 20240

Deputy Assistant Secretary

APR 12 2010

Emil Friberg
Assistant Director
U.S. Government Accountability Office
441 G Street, NW
Washington, D.C. 20548

Dear Mr. Friberg:

Thank you for the opportunity to comment on the U.S. Government Accountability Office's Report Draft No. GAO-10-553 entitled, *COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS: DHS Needs to Conclude Negotiations with the CNMI and Finalize Regulations to Fully Implement Federal Immigration Law*. It is apparent from the Report Draft that GAO completed a thorough review of the efforts of the Department of Homeland Security to implement the *Consolidated Natural Resources Act of 2008*.

The Report Draft clearly sets out the problems of implementing fully the United States Congress' mandates for extension of the U.S. Immigration and Nationality Act to the CNMI. I note that the information contained in the Report Draft corresponds to the results of observations and analyses of the Office of Insular Affairs. Therefore, I have no suggested changes or additions to the Report Draft.

If you have any questions, please feel free to communicate with me directly at (202) 208-4736, or Pam Brown, Federal Ombudsman in the CNMI at (670) 322-8030.

Sincerely,

Nikolao Pula
Director of the Office of Insular Affairs

Appendix IV: Comments from the Government of the Commonwealth of the Northern Mariana Islands

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

Benigno R. Fitial
Governor

April 21, 2010

Eloy S. Inos
Lt. Governor

COMMENTS OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS REGARDING GAO REPORT NO. 10-553 CONCERNING THE IMPLEMENTATION OF THE CONSOLIDATED NATURAL RESOURCES ACT OF 2008

These Comments are submitted by the Commonwealth of the Northern Mariana Islands ("Commonwealth" or "CNMI") with respect to GAO Report 10-553 entitled "Commonwealth of the Northern Mariana Islands: DHS Needs to Conclude Negotiations with the CNMI and Finalize Regulations to Fully Implement Federal Immigration Laws."

The Government Accountability Office ("GAO") was directed to submit this report no later than May 8, 2010 – two years after the enactment of the Consolidated Natural Resources Act of 2008 ("CNRA") applying the federal immigration laws to the Commonwealth. Congress specifically requested that GAO include, at a minimum, its "assessment" on four critical aspects of the legislation: (1) "[a]n assessment of the implementation [of the law], including an assessment of the performance of Federal agencies and the Government of the Commonwealth in meeting congressional intent;" (2) "[a]n assessment of the short-term and long-term impacts of implementation [of the law] 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...."; (3) "[a]n assessment of the economic benefit of the investors "grandfathered" under [the law]...and the Commonwealth's ability to attract new investors after the date of enactment of this Act;" and (4) "[a]n assessment of the number of illegal aliens in the Commonwealth, including any Federal and Commonwealth effects to locate and repatriate them."

See comment 1.

GAO completely failed to address any of these very important issues. Instead, it engaged in an exercise of "describing" certain steps taken by the Department of Homeland Security ("DHS") in implementing the law. GAO promised a future report or reports "regarding any impact on the CNMI economy resulting from implementation of the CNRA" (p. 3) and "the impact of implementation of the CNRA on foreign workers, the tourism sector, and foreign investors in the CNMI." (p. 49) We believe that Congress – and the Commonwealth – deserved the critical "assessment' of these and other issues on the schedule mandated by Congress, not at some unspecified time in the future, so that Congress could fairly evaluate the extent to which the law

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Caller Box 10007 Saipan, MP 96950 Telephone: (670) 664-2200/2201 Facsimile: (670) 664-2211

was serving the objectives which motivated its enactment. GAO has harmed the Commonwealth by its refusal to comply with the law.

Having undertaken only to "describe" actions taken by the relevant federal agencies, GAO completely avoided any criticism of these agencies. As discussed in these Comments, the Commonwealth believes a more objective and informed report might well have concluded that the performance of DHS to date in implementing the law has been seriously defective and injurious to the Commonwealth. In particular:

- The Department's failure to promulgate the required regulations within the statutory timetable resulted in unnecessary injury to the Commonwealth's economy and residents.
- The Department's regulations fail to comply with the Congressional intent in many important respects and adversely affect the Commonwealth's ability to maintain access to its tourists and investors.
- The Department's refusal to cooperate with and support the Commonwealth's Border Management System ("BMS") has resulted in an increase in the number of illegal aliens in the CNMI since the federal immigration laws became effective on November 28, 2009.
- The Department's removal/deportation efforts have been insufficient to date and have resulted in the continued residence in the Commonwealth of hundreds of foreign workers who are not presently employed and are a substantial burden on the Commonwealth's limited public services.

See comment 2

GAO's timidity in addressing the performance of the Department of Homeland Security contrasts sharply with its enthusiasm for criticizing the Commonwealth with respect to three operational concerns identified by DHS –space needs at the Saipan Airport, the use of CNMI detention facilities by DHS, and access to certain data bases maintained by the Commonwealth. In each of these areas, GAO fails to comply with its own investigatory standard, which obligates the agency to "obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions." Rather than conduct a thorough and documented investigation, GAO relied on informal oral statements made by unidentified DHS officials, failed to seek documentation to support the facts, and elected not to seek appropriate responses from CNMI officials. The end result is clear: GAO accepts without challenge the facts provided by the DHS officials involved, holds the Commonwealth solely responsible for any disappointments experienced by DHS employees, and misses the opportunity to be useful by suggesting how some of these issues might be reasonably resolved. Curiously, GAO's only recommendation in this report is that these three issues be escalated to the Secretary's level at the Department of Homeland Security.

The Commonwealth respectfully suggests that this GAO report ignores the statutory directive authorizing the report, fails to meet its own internal investigatory standards, and displays a bias

against the Commonwealth – all of which are damaging to the relationship between the CNMI and the federal government.

Discussion

I. The Department's Failure to Promulgate the Required Regulations within the Statutory Timetable Resulted in Unnecessary Injury to the Commonwealth's Economy and Residents

In its August 2008 report (GAO-08-791) regarding the potential economic impact of implementing the CNRA, GAO stressed that the concerned federal agencies needed to work together, to consult regularly with respect to their different responsibilities under the law, and to prepare appropriate memoranda of agreement as to how best to implement the law. In addition, GAO concluded that it was impossible to assess the likely economic effects of the new law on the Commonwealth's economy because of the broad discretionary authority assigned by Congress to the implementing agencies, in particular the Department of Homeland Security and the Department of Labor. Accordingly, GAO two years ago concluded that it could usefully assist the agencies by identifying the substantive decisions that the agencies needed to embody in their regulations, in the absence of which it would be virtually impossible to implement the law.

See comment 3.

In its current draft report, GAO describes the respects in which the federal agencies have failed to comply with the law's requirements (and GAO's earlier exhortations) to develop a meaningful inter-agency approach to implementation of the law. It reports that an unspecified (and presumably very low) number of interdepartmental meetings were held by unspecified agencies from May 2008 through November 2009, but that the draft Memorandum of Understanding that was supposed to emerge from these discussions has not yet been finalized and signed by the various agencies and was therefore not available for GAO's review. (Report, p. 25) GAO has no criticism of this failure.

See comment 4.

With respect to the issuance of final regulations before the effective date of the law on November 28, 2009, the GAO report fails to comment on the fact that not one set of regulations in final form was issued by DHS before the effective date notwithstanding the 180-day deferral of the effective date of the law. The Visa Waiver Program for Guam and the CNMI was issued as an Interim Final Rule only, with vague suggestions by DHS (repeated without criticism in this draft report) that it is deliberating whether to amend the current rule. The proposed regulations regarding CNMI-only investor visas were not proposed until September 2009 and have not been issued in final form despite the closing of the comment period on October 14, 2009. The Department's proposed rules regarding transitional workers in the CNMI were published without compliance with the notice and comment provisions of the Administrative Procedures Act and were enjoined by a federal district court at the Commonwealth's request. The extended period for comment on these rules ended on January 8, 2010.

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See comment 5.

In light of GAO's earlier stress on the need for such implementing regulations, its current silence on the Department's failure to comply with the law's schedule is inexplicable and disappointing. GAO points out in a footnote (Report, p. 11) that "Key rules and other aspects of the transition program require further development through regulation." Later in the Report (p. 34), GAO comments that "key regulations are not final and, as a result, transition programs to preserve access of foreign workers and for investors are not yet available." GAO relies on the absence of final regulations to justify its decision not to "assess" the Department's efforts to implement the law as it had been directed to do by the statute.

See comment 6.

To the extent that GAO looked for some explanation for the delay in issuing these essential regulations, the Commonwealth's lawsuit provided a most convenient excuse. GAO carefully identifies most of DHS's excuses for bypassing the notice-and-comment period for the CNMI-only work permit rule (Report, pp. 37-38), but chooses to ignore the Court's decision rejecting these arguments. In the interest of fairness, the GAO report should include the Court's conclusions that DHS had ample time over the past 18 months to develop and issue these regulations, that it had made no showing of diligent efforts during the period to do so, that "the Commonwealth's residents and government have meaningful concerns about the Rule," and that "the damage done by DHS's violation of the APA cannot be fully cured by later remedial action." *Commonwealth of the Northern Mariana Islands v. United States of America, et al*, Civil Action No. 08-1572 (Opinion, November 25, 2009), pp. 10, 14, 15.

Quite apart from the substance of these regulations, the Department's delay in issuing them in final form has contributed to the increased uncertainty and instability in the Commonwealth's economy over the last year. Many current CNMI foreign investors have left the community and others face an uncertain future in light of proposed investor rules that fail to comply with the CNRA. The lack of a federal work-permitting program has contributed to uncertainty among employers and workers alike with respect to the status of foreign workers who have, or do not have, an umbrella permit from the CNMI Department of Labor. The lack of clear resolution to these issues is being exploited by some federal employees, who are encouraging foreign workers to violate local law during the two year period ending November 27, 2011. The Department's temporary use of parole authority with respect to enabling workers and others to leave the CNMI (and to return without a US visa) has added a new level of uncertainty and apprehension within the foreign worker community on which the CNMI economy so heavily depends.

See comment 7.

GAO is well aware of the depressed condition of the CNMI economy. It continues to ignore the McPhee/Conway report of November 2008 which provides the only professional economic assessment in recent years of the CNMI economy and the impact of federal immigration and minimum wage laws on that economy. The study concluded as follows:

> "As a result of the demise of the apparel industry and the expected decline of the visitor industry, the CNMI economy stands to lose approximately 44 percent of its real Gross Domestic Product, 60 percent of its jobs, and 45 percent of its real personal income by

2015, according to the 'federalization' scenario. Unequivocally, this is a depression of great magnitude. It is equivalent to turning back the clock for the CNMI economy to 1985." McPhee/Conway Report, p. 42.

In fact, the decline in the Commonwealth's economic situation has proceeded more rapidly than projected by this study. The CNMI has already lost 40 percent of its jobs and the revenues available for appropriation have fallen from over $240 million in fiscal 2005 to an estimated $137 million for fiscal 2010 and an estimated $132 million for fiscal 2011. With these figures in mind, the GAO might have been more forthright and constructive if it had seriously "assessed" the further economic consequences of the Department of Homeland Security's failure to produce its final regulations in a timely manner consistent with the Congressional intent.

See comment 8.

II. The Department's Regulations Fail to Comply with the Congressional Intent in Important Respects and Adversely Affect the Commonwealth's Ability to Maintain Access to its Tourists, Investors, and Customers

Visa Waiver Regulations: The Interim Final Rule issued on January 16, 2009, for the Guam-CNMI joint visa waiver program failed to comply with the Congressional intent in authorizing such a program. The authors of the act were well aware of the importance of tourism to the Commonwealth and Guam and the growing significance of tourists from China and Russia. Congress plainly stated in the CNRA that its purpose was to expand tourism – currently the only industry of significance within the CNMI. The Department's exclusion of China and Russia from the program reversed longstanding practice with respect to visa waiver programs, applied criteria not authorized by the CNRA that have never been used previously regarding a visa waiver program, and failed to acknowledge the law's intent to expand tourism with specific reference to those countries of "significant economic benefit" to Guam and the CNMI. The promulgation of the Interim Final Rule in this form, which replaces the previously existing Guam Visa Waiver program, has seriously prejudiced Guam's access to tourists by making inclusion in the new Guam-CNMI program more onerous than the mainland program – contrary to the previously widely accepted concept and practice of the previous Guam waiver program being a "broad application" of the mainland program. GAO made no comment in these regards and had no criticism of the Department's Interim Final Rule.

See comment 9.

The Department of Homeland Security has been "reviewing" this Interim Final Rule now for more than a year with respect to changing its position regarding the inclusion of China and Russia. If the GAO were in fact producing the report requested by Congress, it might well conclude that the Department's actions with respect to the Interim Final Rule were contrary to the Congressional intent and injurious to the Commonwealth's and Guam's tourism industries.

See comment 10.

The Secretary's October 2009 decision to utilize the Department's parole policy authority to admit tourists from China and Russia was welcomed in the Commonwealth as an effort to compensate for the exclusion of China and Russia from the Interim Final Rule. However, the

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delay in the announcement of the policy and the failure of Customs and Border Protection ("CBP") officials to implement the policy by the effective date of November 28, 2009, resulted in substantial economic damage to the Commonwealth. The CNMI Marianas Visitors Authority estimates that the 15-day delay in the implementation of the parole policy cost the CNMI $5.4 million and $2.4 million in lost revenue from China and Russia respectively. Since 73% of the charter seats are allocated to the Tinian Dynasty Hotel and Casino and the balance to Century Tours, the lost economic opportunity was felt most on the island of Tinian. The GAO had no comment on these failures or the adverse impact on the Commonwealth.

Continuation of the parole program in place of amendment of the Interim Final Rule to include China and Russia will not allow the CNMI to expand its tourism market, and is therefore not consistent with the Congressional intent underlying the CNRA. Implementation of this parole authority falls far short of the needs of the islands. In its present form, the parole authority is applicable only to the CNMI and therefore fails to implement the directive of the CNRA for a unified and harmonized Visa Waiver Program for the CNMI and Guam. In addition, exercise of parole authority with respect to such an important element of the Commonwealth's tourism business is necessarily viewed as a "stopgap" measure that at best seeks to preserve the status quo in the CNMI. But it does not provide the needed basis for the expansion of the tourism industry in both insular areas. The uncertainly as to its consistent application by CBP officials and investor perceptions have prevented tourism officials in Guam and the CNMI from attracting further investors in the area of airlift capacity, attractions, services, and accommodations. Investors in both Guam and the CNMI are prepared to commit to the development of Chinese and Russian tourists (our only growth opportunity markets) with the inclusion of these countries in the full Visa Waiver Program for both insular areas, but not under the current uncertainty and perceived temporary nature of parole authority.

In light of the importance of visiting tourists to the Commonwealth, we believe that CBP should be moving more quickly to hire experienced Commonwealth personnel and to assign permanent staff to the CNMI, rather than depend almost exclusively on TDY assignments. In addition, CBP needs to be more responsive to the complaints that have been received, and forwarded to them, with respect to the "unwelcoming attitude" of CBP officials assigned to Saipan. CBP has failed to respond in any way to these complaints. We understand that CBP conducted special training for their airport officers on the Mainland at the main ports of entry for visitors in order to encourage tourism in the United States. The CNMI recommends that such training is even more necessary in the Commonwealth.

CNMI-Only Investor Visa Regulations: The Department's proposed rules regarding CNMI-only investor visas fails to implement the relevant provisions of the CNRA. First, the rules reject the law's provisions to the effect that the three separate components of the transition program (relating to caps on H-visas, investor visas, and foreign worker permits) can all be extended if the Secretary of Labor exercises the discretion granted her by the law to extend the transition period beyond December 31, 2014. Second, the regulations impose a minimum investment of $150,000

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See comment 14.

on current CNMI investors eligible for "grandfathering" that is not authorized by the CNRA. Third, the Department's economic impact analysis of the proposed regulations fails to acknowledge the substantial adverse effects on the Commonwealth's economy and people that will result from the regulations. The GAO report fails to assess these shortcomings.

First: Although it normally eschews taking a position on any substantive issue described in its reports about the CNMI, GAO in its draft report (pp. 12, 45) has again endorsed the Department of Homeland Security's position to the effect that the extension of the transition period covers only the extension of the foreign worker permitting system and does not permit any extension of the CNMI-only investor visas authorized by the CNRA. Neither agency has ever made available a legal opinion in support of its interpretation; and DHS, after receiving a legal opinion from the Commonwealth, declined to respond or agree to a meeting at which the different legal views might be considered by the Department's senior officials. What is surprising is that GAO persists in this interpretation even after the Senate Energy Committee in April 2008 expressly rejected this DHS/GAO reading of the law. With respect to the waiver of the numerical caps on H-visas, the Committee report stated that "the Committee intends that this waiver of the numerical limitations for Guam and the CNMI is extended along with any extension of the five-year transition period." Two paragraphs later, the Committee report discusses the power of the Secretary of Labor to extend the transition period and points out: "It is important to note that the transition period covers several policies and programs and is not limited to the Commonwealth Only Transitional Workers Program. For example, the transitional program also covers the Guam/CNMI waiver on numerical limitations on the INA H-visa program." (Senate Report 110-224, 110 Cong.2d Sess., pp. 6-7) Even at this late date, GAO should at least acknowledge the conflicting legal interpretations and perhaps use its good offices to suggest that DHS and the CNMI should make every effort to reach agreement on this issue so as to avoid the litigation that will otherwise result.

Second: the proposed investor visa regulations impose a financial requirement on some current CNMI foreign investors that is not authorized by the CNRA. As the GAO report (p. 44) accurately summarizes, the CNRA authorizes grandfather status to a person with long-term investor status under former CNMI laws…who "maintains the investment or investments that formed the basis for such long-term investor status." By superimposing a requirement of $150,000 minimum investment, the proposed DHS regulations would deny the new CNMI-only investor status to an estimated 87 investors in the CNMI who originally qualified at the $50,000 level but were permitted to continue living and investing in the CNMI after the Commonwealth increased the minimum requirement to $150,000 in 1997. The CNRA does not authorize DHS to draw such distinctions among those investors otherwise qualified under CNMI law, and the GAO report should have "assessed" the Department's failure to implement the CNRA properly in this regard.

Third: the Department's examination of the likely economic effects of the proposed regulations in compliance with Executive Order 12866 and the Regulatory Flexibility Act falls short in very

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important respects. It fails to recognize that the Commonwealth has been in a serious economic depression over the past four years. It fails to assess accurately the likely impacts of the proposed regulations on the foreign businesses critical to a productive CNMI economy. In this draft report, as in its earlier reports on the Commonwealth, GAO conspicuously avoids any assessment of the impact that the CNRA has had on the CNMI economy or in critiquing any other agency's assessment. The Commonwealth recognizes that GAO may not have the appropriate tools (such as the input-output model used by Dr. Conway) for assessing the economy in a manner that would survive peer review and little practical experience in economic forecasting. In light of these shortcomings, the Commonwealth would have anticipated that, at the very least, GAO would have acknowledged the McPhee/Conway report's analysis of the CNMI economy based on the most relevant and current economic data, even if GAO elects to ignore its very dire conclusions regarding the economy's likely future course.

Transitional Foreign Worker Permitting Program: The draft GAO report (pp. 35-38) "describes" the proposed regulations issued by DHS with respect to the permitting system for foreign workers authorized by the CNRA. It states that the DHS rule addresses the following subjects: the number of work permits available, the distribution of permits, the terms and conditions of the permit program, and the permit fee. What GAO chooses to overlook is that the proposed regulations fail to specify any basis for "allocating" work permits among employers seeking to hire foreign workers and any methodology for reducing the number of work permits to zero by the end of the transition period on December 31, 2014, in the absence of an extension by the Secretary of Labor.

The relevant provisions of the CNRA require the Department of Homeland Security to address these two issues in its regulations. The law provides:

> "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 who would not otherwise be eligible for admission under the [INA]... The system shall provide for a reduction in the allocation of permits for such workers on an annual basis to zero, during a period not to extend beyond December 31, 2014, unless extended pursuant to paragraph 5 of this subsection." Section 6(d)(2).

As is commonly understood, the use of the mandatory "shall" does not allow DHS to use its discretion to pursue a different regulatory approach. This CNRA provision does not authorize the issuance of regulations in piecemeal form over time that address one aspect or another of the worker permitting system mandated by the law. It requires a single coherent (and defensible) system "for allocating and determining" all aspects of the proposed work permits and providing "for a reduction in the allocation of permits for such workers on an annual basis to zero."

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See comment 19.

GAO's refusal to even "describe" – much less "assess" -- these deficiencies in the proposed regulations is especially surprising in view of its discussion of these issues in its August 2008 report (GAO-08-791) with respect to the implementation of the CNRA in the Commonwealth. In that report (p. 24), GAO emphasized that the decisions to be made by DHS (and DOL) "in implementing the CNMI-only work permit program will largely determine the legislation's potential impact on the availability of foreign workers and, as a result, on the CNMI labor market and economy." According to this earlier GAO report (p. 26), two of the four "key federal implementation decisions" assigned by the law to the Department of Homeland Security were (1) to determine the way in which "the permits are distributed" and (2) to determine the "number of permits to provide" under the program so as to achieve the statutory goal of zero by the end of the transition period. Indeed, GAO back in 2008 discussed these two issues in some detail. It spent considerable effort to portray alternative mechanisms available to DHS in decreasing the yearly allocation of these work permits – for example, a linear reduction at a constant rate to zero, an increasing rate of reduction, or a slight decline until a sharp drop in the last month to zero. (Report, pp. 27-29) It also suggested four different methods that the Department might elect to use in deciding how to allocate permits among competing employers. (Report, pp. 29-30) But GAO in 2008 made clear that these were decisions which the Department was required to make under the law. Now GAO fails even to point out these obvious shortcomings in the Department's proposed worker permit regulations or to hold the agency accountable for ignoring prior GAO recommendations.

The Department's failure to comply with the law imposes additional burdens and uncertainty on the Commonwealth's citizens. As DHS recognizes, the CNMI economy is composed almost entirely of small businesses, many with less than five employees and only a handful with more than 50 employees. Without some clear indication of DHS's intentions with respect to the allocation and reduction of the available permits for foreign workers, all participants in the economy suffer. Investors, especially potential new investors, have no guarantees with respect to how their businesses will be treated by federal officials. Perhaps, for example, businesses which participate in some phase of the tourism industry will be favored over a more speculative project in another industry. Current employers need to make investment and other decisions looking into the future and, without some clear indication of their continued access to foreign workers, this planning becomes even more difficult and problematical. Individual foreign workers, whose fears have mounted in recent months, seek guidance about how they can continue to work, and live, in the Commonwealth if they cannot qualify for a standard INA visa. GAO's refusal to address the substantive issues raised by the Department's failure to comply with the law calls into question GAO's capacity and willingness to provide the professional and unbiased services anticipated by the CNRA.

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See comment 20.

See comment 21.

III. The GAO Report's Conclusions with respect to Certain "Operational Challenges" Facing DHS are not Supported by the Evidence

The GAO report (pp. 26-34) identifies three "operational challenges" facing DHS in implementing the provisions of the CNRA in the Commonwealth. The three subjects addressed are: (1) DHS requirements for space at the Saipan Airport; (2) DHS interest in using space at the Commonwealth's detention facilities; and (3) DHS interest in acquiring access to certain data bases developed and used by the CNMI. With respect to each of these issues, the GAO report misstates the relevant facts, relies on allegations from unnamed federal officials, and wrongly accuses the Commonwealth of refusing to negotiate in good faith. The GAO report does not meet the agency's internal requirement of obtaining "sufficient, appropriate evidence to provide a reasonable basis for [its] findings and conclusions."

Saipan Airport Space Requirements: Contrary to the GAO report, there have been no negotiations between the CBP and the Commonwealth with respect to space at the Saipan Airport since the signing and implementation of the Right of Entry ("ROE") agreements with respect to both the Saipan and Rota airports in November 2009. Therefore, the statement (p. 26) that "10 months of CBP negotiations with the CNMI government for additional airport space have been unsuccessful" is false. So also are the statements (p. 27) that as of March 1, 2009, such negotiations "remained at an impasse" and that CBP "continues to negotiate with the CNMI government for access to approximately 7,200 additional square feet of space at the Saipan airport."

These are the facts.

The CBP office in charge of leasing space for CBP operations is the Field Operations Facilities Program Management Office, Facilities Management & Engineering, Office of Administration, US CBP, based in Indianapolis, IN. This is the office that submitted proposed lease agreements to the CNMI in October 2009 and negotiated the ROE agreements regarding the Saipan and Rota airports in November 2009. This office is well aware that all such space issues are to be raised with the Commonwealth Ports Authority and the Governor's Special Counsel. The Contracting Officer assigned to this matter (Ms. Susan S. Hansen) agrees that there was no communication between her office and the CNMI until March 25, 2010, when she forwarded for consideration the same proposed leases for the two airports that had been sent in October 2009, which identify for possible CBP use certain space at the Saipan Commuter Terminal and 7,200 square feet of space on vacant land adjacent to the Saipan Main Terminal. Ms. Hansen suggested that these documents "would be a good starting point in our negotiations."

CBP has not presented to the Commonwealth a specific proposal for additional space at the Saipan Airport. During his visit to Saipan in October 2009, CBP Assistant Commissioner Winkowski expressed lack of any interest in space at the Commuter Terminal, the basement space currently rented by CPA to a private party, or the 7,200 feet of vacant land. Contrary to

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See comment 24.

the GAO report, CBP has not presented any of the specific requests set forth in the draft report (p. 27) to the responsible CNMI officials. It seems that the different offices within CBP have not consulted appropriately with the Indianapolis officials responsible for negotiating any leases designed to meet the agency's needs.

Until CBP makes a decision as to its space needs and communicates that request officially to the Commonwealth, there is nothing to negotiate about. The various alternatives presented by the Corp of Engineers, and summarized in the GAO report, are not the basis on which any decisions can be made by the Commonwealth. Furthermore, the CNMI is not prepared to enter into negotiations unless it is assured that the request for space has been cleared at least at the assistant secretary level at DHS and that the Department has received the necessary assurances from Congress that the funds necessary to fulfill CBP's space needs will be available. We note that the GAO observes in its draft report (p. 25) that "[a]s of April 2010, DHS had not yet specified the changes in resources required for administering immigration and travel laws for the CNMI and Guam, as directed by Congress in its fiscal year 2009 appropriation."

CNMI officials cannot responsibly give away public land to a federal agency without a specific and demonstrated need and the availability of federal funds to achieve the agency's objectives in seeking the land. Indeed, Section 806(b) of the Covenant imposes certain restraints on the ability of the federal government to acquire land for public purposes in the Commonwealth and expressly provides that "No interest in real property will be acquired unless duly authorized by the Congress of the United States and appropriations are available therefor."

Space in the CNMI's Detention Facilities: As the GAO report (pp. 28-31) indicates, CNMI and ICE officials have been negotiating for several months with respect to the use by ICE of detention space at the CNMI Correctional Facility. This facility was constructed at a cost of $24 million during the period when the Commonwealth's correctional programs and policies were subject to a Federal Consent Decree adopted in February 1999. The Commonwealth created a separate Department of Corrections and took other actions required by the Consent Decree, which has now been terminated. The new Correctional Facility was opened after multiple inspections – all of which found the Facility appropriate for housing federal detainees.

In part because of this history, the relationship with federal officials with respect to the use of the Facility has not been as professional and collegial as desired by Commonwealth officials. The 2007 intergovernmental service agreement between the U.S. Marshals Service and the CNMI Department of Corrections on occasion gave rise to threats by federal officials of contempt or criminal proceedings if CNMI officials did not accede to federal wishes.

The Commonwealth has urged that agreement is possible if both parties agree to negotiate in good faith as two equal parties. As pointed out by the GAO report (pp.30-31), ICE has options for dealing with detainees other than securing space at the Commonwealth's Correctional Facility. On the other hand, the Commonwealth has a Facility that is not fully utilized. Based on

recent discussions between federal officials and the CNMI Commissioner of Corrections, it appears possible that a negotiated rate between the current positions of the parties may be adopted as a compromise that resolves this operational concern. However, the burden of reaching an acceptable agreement is a shared burden of both parties, and the Commonwealth is not required for any rational reason now on the table to provide a more attractive proposal. The Commonwealth's very serious depression means that its government must avoid contracts that end up with the federal government paying less than a fair rate.

See comment 25.

Access to CNMI Data Bases: The GAO report (pp. 31-34) summarizes the complaints of unnamed DHS officials with respect to their inability to obtain direct access to CNMI immigration and border control data contained in two CNMI databases, BMS and LIDS. Several of the specific allegations simply are not true: for example, no CNMI official could have stated in March 2010 that DHS was unwilling to share airline flight data with the Commonwealth because the March 31, 2010, letter from CBP described in the report was not received in the Commonwealth until about April 10, 2010. More fundamentally, however, the GAO's discussion of the issues related to BMS and LIDS reflects a serious lack of understanding of the characteristics of both data bases and their limitations with respect to meeting the needs of CNMI and federal officials. It is important to distinguish between the BMS and the LIDS systems.

See comment 26.

The BMS System: As acknowledged by the GAO report (p. 31,n.78), "BMS is an automated arrivals and departures database containing data from passports, visas, alerts, and permissions (extensions of stay, changes of status, or other modifications of entry conditions) as applicable for all persons entering the CNMI." Its history and capabilities have been the subject of numerous communications between GAO and CNMI officials over the past two years. The system was obtained from an Australian supplier several years ago and was updated in 2008. It is used in several countries to provide reliable information regarding the entrance and exit of persons into the jurisdiction. In recent years the Commonwealth has substantially reduced the number of illegal aliens in the community by reliance on the data generated by the BMS system.

The Commonwealth has continued to implement the BMS program after the effective date of November 28, 2009. Contrary to the suggestion in Assistant Commissioner Winkowski's letter of March 31, 2010, the Commonwealth recognizes that the federal government (and not the CNMI) now exclusively controls the admission and removal of unauthorized aliens from the Commonwealth. However, the Commonwealth has an ongoing responsibility for enforcing its local labor laws which have not been preempted by the CNRA. This is especially necessary during the remainder of the period until November 27, 2011, during which the CNRA expressly recognizes the validity of permits issued by the Commonwealth under its laws before November 28, 2009. That is why the Commonwealth has continued to operate the BMS system since November 28, 2009, and why it requested the APIS data from the federal government in order to facilitate the collection and timely processing of the data and eliminate the need for collecting duplicative passport information from arriving travelers.

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See comment 27.

GAO is well aware that the Department of Homeland Security does not have an effective digital exit data system. Numerous reports by GAO and others have pointed this out and GAO's effort to ignore this reality (p. 34, n. 81) cannot evade the fundamental issue. GAO fails to acknowledge that DHS cannot, for example, identify any overstayer from among the tourists that they admitted for 90 days in December 2009 after they had taken over the immigration function. They do not know whether any or all of these persons departed the Commonwealth. For the Commonwealth, this is an unacceptable situation. The failings of the U.S. immigration data system have burdened the country with overstaying tourists and others for years, culminating in the enormous population of illegal aliens currently in the United States. The failings of the U.S. system will similarly burden the Commonwealth with illegal aliens. It was for that reason that the Commonwealth requested cooperation from CBP in sharing data so that the Commonwealth, using and sharing its BMS system with CBP, might identify overstayers promptly and refer them to DHS's enforcement component (ICE) for institution of removal proceedings. The CNMI intends to continue relying on its BMS system and will be submitting regular reports to ICE regarding overstayers in the Commonwealth who should be the subject of removal proceedings.

See comment 28.

The Department's refusal to supply the APIS data to the Commonwealth so that both agencies might more effectively deal with illegal aliens in the CNMI is unacceptable. The Commonwealth will appeal this decision to the Secretary of Homeland Security. The Commonwealth realizes that no federal official wishes to admit – and certainly not in public – that the CNMI government was (and is) capable of implementing a more effective system for controlling illegal aliens than the federal government possesses. A little less bureaucratic ego – and a little more common sense – should have led to a more affirmative response by Assistant Commissioner Winkowski. It is regrettable that here, too, GAO's approach to its assignment prevented it from commenting more constructively on this issue.

The LIDS System: Without any investigation or documentation, the GAO report appears to endorse several complaints voiced by unnamed DHS officials regarding the Commonwealth's management of its LIDS system. There seem to be three complaints: (1) federal officials need direct access to the system; (2) they do not wish to rely on a single CNMI point of contact; and (3) they have not received the requested information in a timely manner.

CNMI and ICE officials met in Saipan during the first week after the transition date of November 28, 2009, to discuss operational measures to ensure that ICE could verify the status of any alien in the Commonwealth. The CNMI officials discussed the Commonwealth-issued ID cards, which ICE welcomed, and the CNMI officials described how the ID card system would be continued by the Commonwealth. Picture ID cards are issued when a worker is employed (renewed or transferred) or when an alien registers (IRs, students, investors, et al.). CNMI and ICE officials also discussed how ICE would verify status. Because status is affected by many labor operations not reflected in the LIDS database (deficiencies pending, hearings scheduled, interim orders issued, motions for reconsideration pending, extension requests pending, Secretarial appeals pending, court appeals pending, etc), it was agreed that CNMI Labor would

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designate a single point of contact (the Chief of Labor Enforcement, Jeff Camacho, a veteran of 18 years in law enforcement), and ICE inquiries would be forwarded to him. He would check not only the LIDS database, but all other sources necessary to give a definitive answer as to status.

With respect to the first DHS/GAO complaint, direct access by ICE to LIDS would not provide ICE with the definitive information it needs. Because LIDS is not completely an online operation yet, it does not automatically receive all the information generated in the CNMI Department of Labor that can affect status. Access by ICE to Jeff Camacho's ability to connect with all Labor operations affecting status is critical. ICE has that access. If GAO personnel had checked with the operational people on the ground in Saipan, they would have learned this.

With respect to the second DHS/GAO complaint, the ICE officials during the initial discussions referred to above specifically requested a single point of contact so that multiple CNMI Labor officials would not know about their investigations. Jeff Camacho's credentials were presented to ICE in detail (18 years in law enforcement) and accepted. If ICE did not work with a single point of contact, then ICE would need to check with the Guest Worker Section, the Hearing Office, the Enforcement Section, and the Secretary's Office to determine status with certainty. Each of those offices would probably consult multiple people – all of whom would thereby become aware of the pending ICE investigation. Mr. Camacho knows which people to contact and, because he contacts them every day with respect to the Labor Department's internal investigations, they do not know that any particular inquiry is an ICE investigation. This explanation was readily available to GAO investigators if they had pursued the facts.

With respect to the third DHS/GAO complaint, GAO reports an oral statement by an unnamed ICE official to the effect that CNMI responses to ICE inquiries have not been timely. That is wrong. GAO did not examine any ICE records as to the time an inquiry was sent and the time the response was received. It did not examine CNMI Labor's records which show the time that each inquiry from ICE was received and the time that the response went out. (As of April 15, 2010, CNMI Labor records reflect 84 inquiries from ICE officials that were responded to promptly, within 24 hours or less, without any follow-up requests for additional information.) There are no documented complaints from ICE that CNMI officials were taking too long to respond. CNMI Labor has no record of any ICE request emanating from an after-hours operation. Calls to the ICE office at 5:05 PM go unanswered because the office is closed.

IV. The Department's Enforcement Efforts to Remove Illegal Aliens from the Commonwealth Have Been Insufficient and Will Increase the Number of Illegal Aliens in the CNMI

The GAO report fails to address critically one operational concern of great importance to the CNMI community – namely, the identification and removal from the Commonwealth of aliens who are no longer entitled to stay in the CNMI. Although ICE has been provided with detailed information regarding hundreds of "overstayers" in the Commonwealth, very few removal

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proceedings in fact have been initiated and as of March 26, 2010, the GAO report (p. 23) notes that not a single illegal alien has been deported by federal authorities. Unless DHS assigns more personnel and resources and changes its methods for the removal of illegal aliens from the Commonwealth, the national security interests which motivated the enactment of the CNRA cannot be achieved and the CNMI community will suffer accordingly.

Contrary to the GAO report (pp. 22-23), DHS enforcement officials have not proceeded expeditiously to remove illegal aliens from the CNMI. The GAO report comments on one group of 264 aliens referred to ICE, 215 by the Commonwealth and 49 by others. The unsubstantiated report that CNMI Labor had failed to provide necessary information about persons in this group is wrong. The 215 referrals were from the CNMI Attorney General's office with pending deportation orders, which meant that a CNMI Superior Court judge had already held an evidentiary hearing, found the individual deportable, and issued an order to that effect. There was no need to obtain any further immigration status information from the CNMI Department of Labor with respect to these individuals. Furthermore, the deportation orders issued by the Commonwealth can be enforced summarily by federal officials, because there has already been a due process hearing, and there is no reason why any of these 215 illegal aliens with outstanding deportation orders still remain in the Commonwealth. And ICE has received timely information from CNMI Labor with respect to those of the remaining 49 about whom ICE inquired.

The backlog of pending cases involving illegal aliens is going to expand rapidly over the next several months. As pointed out by the GAO report (p. 22, n.51), the CNMI Department of Labor on March 9, 2010, provided ICE with 364 additional names of aliens who have been designated by the CNMI as overstayers.[1] In addition, the CNMI Department of Labor on April 16, 2010, transmitted information to ICE with respect to an additional 1008 aliens who have fallen into illegal status in the Commonwealth.[2] The Commonwealth in the future will be submitting on a regular basis the names of those foreign workers, for example, who have had their permits revoked and therefore are subject to removal by federal authorities under the CNRA.

The resources and procedures used by ICE in processing removal cases are insufficient to deal with the number of illegal aliens in the Commonwealth. Although the number of illegals in the Commonwealth is insignificant by U.S. standards, every illegal poses a financial burden to the Commonwealth. ICE needs to increase its capacity to schedule and complete immigration hearings in order to make any significant impact on the growing backlog of cases. A single judge coming out to Saipan for one week every month cannot handle this volume of cases. Two alternatives are readily available: (1) ICE and the Department of Justice should use video-conferencing facilities in order to handle more cases; and (2) CNMI judges and lawyers

[1] This is the list published by the Attorney General of the CNMI in November 2009, updated to remove the names of those who ultimately received umbrella permits.

[2] This number includes those persons whose permits were revoked by the hearing office usually after temporary issue (62); overstayers for the first two quarters of 2009 (156); overstayers for 2008 (336); and overstayers for the years 2003-2007 (454).

experienced in the handling of deportation cases can be designated by the U.S. Department of Justice to assist ICE officials in the handling of these immigration hearings. Unless such steps are taken, it is virtually certain that the Commonwealth's backlog will simply be added to the estimated 228,421 pending immigration cases nationwide as of October 1, 2009, up 23% since the end of fiscal 2008. In Los Angeles, the office with responsibility for the CNMI, the average wait for a hearing in the federal immigration courts is 713 days, compared with the national average of 439 days. (Transactional Records Access Clearinghouse, University of Syracuse)

Officials of the Department of Homeland Security do not appreciate the importance of this issue to the people of the Commonwealth. ICE has a stated objective of initiating removal proceedings first and foremost against aliens who have engaged in criminal activity. We do not quarrel with this priority, although locating aliens who have served their sentences and are productively employed seems less useful than locating visitors who never intended to leave. But the Commonwealth requires a higher priority with respect to illegal aliens who no longer are entitled to live in the CNMI. The number of illegal aliens in the CNMI has increased since the effective date of the CNRA on November 28, 2009. These aliens are not entitled to work in the Commonwealth and either disappear into the underground economy, or take jobs that should be held by US citizens or legal foreign workers. They impose an enormous burden on the Commonwealth's public services – law enforcement, public health, and education – which the CNMI's depressed financial resources cannot support. The CNRA was enacted in large measure because of the conviction that federal control was necessary to deal with, among other issues, the number of illegal aliens in the CNMI. Sooner or later, GAO and Congress will have to address seriously whether in fact the implementation of the CNRA by the Department of Homeland Security has aggravated, rather than improved, the security situation in the Commonwealth.

Edward T. Buckingham
Attorney General
Commonwealth of the Northern Mariana Islands

Howard P. Willens
Governor's Special Legal Counsel

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The following are GAO's comments to the CNMI government's letter, dated April 21, 2010.

GAO Comments

1. The CNMI government states that we failed to address several issues, specified in CNRA, related to implementation of CNRA in the CNMI. As agreed with the offices of the congressional addressees of our report, the report's objectives were to describe the steps the federal government has taken to establish border control in the CNMI and the status of U.S. agencies' implementation of CNRA provisions with regard to workers, visitors, and investors. We agreed with the addressees that, because more complete federal regulations need to be in place prior to an assessment of their likely economic impact, we will examine the likely impact of federalization on the economy after federal regulations are finalized and subsequently issue a report. That report will also examine coordination among federal agencies in implementing the legislation after implementing regulations are finalized.
2. The CNMI government states that we did not follow our evidentiary standard and that we relied instead on informal oral statements made by unidentified DHS officials, failed to seek documentation to support the facts, and elected not to seek appropriate responses from CNMI officials. In response to the CNMI government's comments, we reviewed our methodology, analysis, and documentation. We maintain that we followed Generally Accepted Government Auditing Standards in conducting this engagement and that our findings represent a balanced summation of the facts. For example, in the course of this engagement, we heard testimony from DHS officials in formal interviews and sought extensive documentation including, but not limited to, agency correspondence, *Federal Register* notices of rulemaking, comments submitted in response to those notices of rulemaking, and documentation of agency procedures and standards. We also received information from CMNI officials, including the Attorney General of the CNMI; the Director of Foreign Relations, CNMI Department of Labor; and officials from the Commonwealth Ports Authority and Marianas Visitors Authority. Additionally, we sought and obtained comments from the CNMI government on a draft of this report. Further, we reviewed documentary evidence obtained from the CNMI, including annual reports submitted by the CNMI Department of Labor and the "Commonwealth's Protocol for the Implementation of P.L. 110-229."
3. See comment 1.

4. The CNMI government states that our report fails to comment on the fact that the DHS regulations were not issued in final form before the law's effective date. Our report states that key regulations are not final and that transition programs to preserve access to foreign workers and for investors are not yet available.
5. See comment 1. We did not comment on the substance of proposed regulations because they were not yet finalized. We plan to review the substance and effect of the regulations in our follow-on work.
6. The CNMI government suggests that our report should include a discussion of the U.S. District Court's conclusions that DHS had sufficient time to develop the rule for the CNMI-only work permit program while adhering to the Administrative Procedure Act's notice and comment provisions; that DHS provided no evidence that it had worked diligently; and that the commonwealth's government and residents had meaningful concerns about the rule. We modified the report to reflect the court's conclusions in these regards.
7. The CNMI government observes that our report does not include the findings of a November 2008 assessment of the CNMI economy produced by economic consultants. The cited assessment is not directly relevant to the scope of this report but is relevant to our continuing work on implementation of federal immigration in the CNMI. Our April 2010 report on minimum wage increases in American Samoa and the CNMI provides a summary of the referenced report findings with respect to increases in the minimum wage in the CNMI.[1]
8. See comment 1.
9. See comment 1.
10. See comment 1.
11. The CNMI government states that the delay in announcing the DHS Secretary's decision to parole nationals from China and the Russian Federation and in implementing the parole policy cost the CNMI $7.8 million in lost visitor revenue. CNMI officials informed us during a March 2010 meeting that the suspension in charter flight service from China cost approximately $10 million in lost visitor revenue. We modified the report to reflect the updated figures provided by the CNMI in its comments on a draft of this report.
12. See comment 1.

[1]GAO-10-333.

13. The CNMI government suggests that our report should acknowledge the conflicting legal interpretations regarding extension of the H cap exemptions for the CNMI and Guam along with any extension of the 5-year transition period. Two prior reports, issued in March and August 2008, respectively, reflect our interpretation of the legislation as allowing for an extension of the CNMI-only work permit program beyond the transition period at the discretion of the Secretary of Labor but not allowing for an extension beyond the transition period of other provisions of the transition program, including the exemptions from the numerical limitations on H visas.[2] In its comments on our March 2008 report, the CNMI also contended that the legislation allows the exemption from the numerical H visas to be extended beyond the end of the transition period (then 2013). In responding to those comments, we reported that the federal agencies implementing the legislation had the same interpretation. In our August 2008 report, we note that according to the Senate report, the Committee on Energy and Natural Resources intended that the H exemptions for the CNMI and Guam be extended along with any extension of the 5-year transition period. Our August 2008 report also notes that the CNMI agreed with the committee's interpretation and that the Department of the Interior, in its comments on a draft of that report, stated that it would ask DHS for a clarification of the provision. Our August 2008 report further notes that few CNMI foreign workers are likely to meet the requirements for the uncapped H visas. We have added a citation to this report to note this issue.
14. See comment 1.
15. See comment 1.
16. See comment 6. Recent GAO reports contain detailed information on the state of the CNMI economy.[3]
17. See comment 1.
18. See comment 1.
19. See comment 1.
20. See comment 2.
21. The CNMI government disagrees with our statement that negotiations between CBP and CNMI regarding space at the airports had been

[2]GAO-08-466 and GAO-08-791.

[3]For example, see GAO-08-791 and GAO-10-333.

under way for 10 months. On the basis of the CNMI's comments as well as DHS technical comments, we revised our description of DHS's effort to acquire space at the airports, focusing on the current lack of space rather than describing DHS's process for seeking space.

22. The CNMI government states that CBP has not presented any specific requests for airport space to the responsible CNMI official. We followed up with CBP officials to discuss this point. CBP officials stated that the agency was working to define its space requirements and that it agreed with the CNMI regarding the need for discussion of identified options. We modified the report as appropriate.

23. The CNMI government states that it is not prepared to enter into negotiations unless it is assured that the request for space has been cleared at least at the assistant secretary level at DHS and that the department has received the necessary assurances from Congress that the funds necessary to fulfill CBP's space needs will be available. We modified the report as appropriate.

24. The CNMI government notes that the CNMI cannot responsibly give away public lands to a federal agency without a specific and demonstrated need and the availability of federal funds to achieve the agency's objectives in seeking the land. The CNMI further observes that the Covenant imposes certain restraints on the ability of the federal government to acquire land for public purposes in the commonwealth. We modified the text in our report to convey more clearly that CBP is seeking an agreement with the CNMI to provide space for CBP operations but is not seeking to acquire land.

25. The CNMI government comments that no CNMI government official could have stated in March 2010 that DHS was unwilling to share airline flight data, because CBP's letter of March 31, 2010, was not received in the commonwealth until about April 10, 2010. We modified the text in our report to state that the CBP's letter reiterated information that DHS officials had previously provided to CNMI officials. We also modified the text in our report to state that the Governor of the CNMI's letter to the Secretary of Homeland Security on February 18, 2010, as well as the Governor's Special Legal Counsel in an interview in March 2010, said that DHS was unwilling to share airline flight data with the CNMI.

26. The CNMI government states that our discussion of the issues related to BMS and LIDS reflects a lack of understanding of the characteristics and limitations of both databases. In February 2010, we issued a report on the two databases that incorporated information from prior work

and relevant documents from the CNMI government, DHS, and DOI.[4] Our February 2010 report also incorporated technical comments that the CNMI provided on a draft of the report; however, the report notes that the CNMI did not provide certain requested information owing to insufficient staff resources. Subsequent to publication of the February 2010 report, the CNMI sent us additional technical commentary, which we incorporated in this report's descriptions of the databases.

27. The CNMI government observes that we have reported elsewhere that DHS does not have an effective digital exit control system. We have added references to several prior GAO reports that highlight our concerns regarding the capacity of DHS to identify overstaying visitors.

28. The CNMI government describes as unacceptable the CBP decision to not supply airline passenger data to the CNMI and states that it intends to appeal the CBP decision to the Secretary of Homeland Security. The report notes that CNRA requires, among other things, that the CNMI government provide DHS with all commonwealth immigration records. CNRA does not require DHS to share data with the CNMI and also does not preclude such data sharing. We modified the text of our report to reflect the CNMI's stated intention to appeal the CBP decision.

29. The CNMI government states that access to the CNMI point of contact gives ICE access to more definitive information than would direct access to LIDS, because LIDS is not yet completely an online operation. The CNMI adds that we would have learned this if we had spoken with operational personnel in Saipan. While conducting field work in Saipan in January we attempted to speak with the individual designated as ICE's point of contact; however, he said that he was not allowed to speak with us unless authorized by the CNMI Department of Labor. We sought interviews through the CNMI Department of Labor and were granted one interview with a senior official. Although that official agreed to provide answers to our questions regarding the LIDS system, we were later told that additional information could not be provided owing to insufficient staff resources.

30. The CNMI government states that we did not examine ICE's records of its transmission of inquiries to, and receipt of replies from, the CNMI. We examined one ICE unit's log of e-mail requests for CNMI immigration data, covering late December 2009 through March 2010, and found that CNMI response times ranged from 16 minutes to 23 hours and 19 minutes, averaging 4 hours and 24 minutes. The CNMI

[4]GAO-10-345R.

government also notes that its Department of Labor has no record of any ICE request emanating from an after-hours operation. ICE officials told us that they recognize that the CNMI official responsible for answering their inquiries works normal business hours and that they limit their inquiries to that time period. However, the ICE unit's log shows one inquiry sent at 10:54 PM and the CNMI response received in 16 minutes.

31. The CNMI government infers that our report claims that DHS has proceeded expeditiously to remove illegal aliens from the CNMI. The CNMI's inference is not accurate; our report neither states nor implies that DHS has proceeded expeditiously in this regard. Our report states that none of the 72 aliens being processed for removal has been deported and that federal immigration hearings take place during 1 week of every month.

Appendix V: Comments from the Government of Guam

Office of the Governor of Guam
P.O. Box 2950 Hagåtña, Guam 96932
TEL: (671) 472-8931 • FAX: (671) 477-4826 • EMAIL: governor@mail.gov.gu

Felix P. Camacho
Governor

Michael W. Cruz, M.D.
Lieutenant Governor

22 APR 2010

Emil Friberg
Assistant Director
International Affairs and Trade
U.S. Government Accountability Office
441 G Street NW
Washington DC 20548

Dear Mr. Friberg:

Hafa Adai! Thank you for giving the Office of the Governor of Guahan the opportunity to comment on the Government Accountability Office Report GAO-10-553: Commonwealth of the Northern Mariana Islands: DHS Needs to Conclude Negotiations with the CNMI and Finalize Regulations to Fully Implement Federal Immigration Law.

Full implementation of Public Law 110-229 or the Consolidated Natural Resources Act (CNRA) will result in increases to Guahan's key industry to $1.5 billion by 2013 within the framework of a favorable Visa Waiver Program (VWP).

Tourism expenditures currently represent $1.2 billion in our local economy or an estimated 40% of Guahan's Gross Island Product (GIP). Visitor spending alone accounts for 95% of this total. Based on historical trends, Japan (80%) and Korea (10%) today comprise 90% of the 1.2 million annual visitors to the island. These are mature markets that forecast to decline in the future due to their aging demographics and heightened regional competition from lower cost Asian resort destinations.

It was the intent of the U.S. Congress that there would be a unified Visa Waiver Program for Guam and the Commonwealth of the Northern Mariana Islands (CNMI). In January of 2009, the U.S. Department of Homeland Security (DHS) issued an Interim Final Rule on the VWP that was in complete contravention of Congressional Intent and has taken the islands backwards. In November 2009, the Secretary of the U.S. Department of Homeland Security granted parole authority to tourists from China and Russia seeking to enter the CNMI in advance of full implementation of Public Law 110-229.

The application of Parole Authority to the CNMI only is anything but unified. The CNRA was also designed to expand tourism to the islands. As noted many times, the addition of Hong Kong,

while appreciated, is not a significant enough market to impact the overall Tourism industry. China and Russia are required for this which is why they were deemed countries of "Significant Economic Benefit". Additionally, the expansion of tourism requires that these countries be added to the VWP. Parole Authority, by virtue of its discretionary application and it being perceived by investors as "temporary in nature" makes attracting investment in the area of accommodations, airlift, attractions and other key elements, very difficult.

Parole Authority has allowed the CNMI to maintain status quo, it has not allowed them to expand. In discussions GVB has had with many key potential investors in tourism, having access to China and Russia under Parole Authority is not nearly as attractive as VWP.

Also, the Guam CNMI Visa Waiver under the CNRA was set to replace the existing Guam Visa Waiver program. Several problems have emerged with this process. When the U.S. Congress created the Guam Visa Waiver program, it was noted at the time that the unique conditions prevalent in the islands justified a "broad application" of the visa waiver program. Therefore the Guam VWP has always listed countries that were not eligible to participate in the Mainland program. The regulatory requirement of a US visa refusal rate of 16.9% or below for countries to be eligible for the Guam program was a reflection of this "broad application". The Interim Final Rule (IFR) that established the eligibility requirements for the Guam-CNMI program completely omitted any reference to Visa refusal rates for eligibility - they were completely thrown out as a basis for inclusion and included eligibility requirements related to Humanitarian concerns that are not, nor have they ever been, part of the U.S. Visa Waiver program. Such inclusion in the new Guam-CNMI program makes the program more stringent than the U.S. Visa Waiver program.

It is the position of the Office of the Governor of Guahan that efforts must be undertaken immediately to issue a Final Rule on Visa Waiver that is consistent with Congressional Intent that unifies the program and provides both markets access to tourist markets that have the ability to expand our tourism business and have carryover benefits to the rest of the islands in the Northern Pacific including the Republic of the Marshall Islands, the Republic of Palau and the Federated States of Micronesia.

Sinseru yan Magåhet,

EULOGIO S. "SHAWN" GUMATAOTAO
Deputy Chief of Staff
Office of the Governor of Guahan

Appendix VI: GAO Contact and Staff Acknowledgments

GAO Contact

David Gootnick, (202) 512-3149 or gootnickd@gao.gov

Staff Acknowledgments

In addition to the person named above, Emil Friberg, Assistant Director; Michael P. Dino, Assistant Director; R. Gifford Howland; Julia A. Roberts; Ashley Alley; and Reid Lowe made key contributions to this report. Technical assistance was provided by Martin De Alteriis, Ben Bolitzer, Etana Finkler, Marissa Jones, and Eddie Uyekawa.

Related GAO Products

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