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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

DATE: JAN 23 2014 OFFICE: CALIFORNIA SERVICE CENTER CW-1: [REDACTED]
APPEAL: [REDACTED]

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Petition for a Commonwealth of the Northern Mariana Islands (CNMI) Only Nonimmigrant
Transitional Worker Classification Pursuant to 48 U.S.C. § 1806(d)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The service center director denied the nonimmigrant visa petition. The matter is now on appeal before the Administrative Appeals Office (AAO). The appeal will be dismissed. The petition will be denied.

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center on November 29, 2011. In the Form I-129CW visa petition, the petitioner describes itself as a business, established in 1997, that is engaged in "retail general merchandise, restaurant, whole sale and import/export."¹ In order to employ the beneficiary in what it designates as a waitress position, the petitioner seeks to classify her as a CNMI-Only Nonimmigrant Transitional Worker (CW-1) pursuant to 48 U.S.C. § 1806(d).

The director denied the petition on October 3, 2012. The petitioner subsequently filed a motion to reopen and motion to reconsider. After reviewing the submission, the director denied the petition on behalf of the beneficiary, finding that the petitioner failed to establish that the beneficiary was lawfully present in the CNMI at the time the petition was filed.² Counsel for the petitioner subsequently filed an appeal of the denial of the petition.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129CW and supporting documentation; (2) the director's Request for Evidence (RFE) dated March 19, 2012; (3) the petitioner's response to the RFE; (4) the notice of decision dated October 3, 2012; (5) the Form I-290B and supporting documentation for the motion to reopen and motion to reconsider; (6) the notice of decision dated January 18, 2013; and (7) the Form I-290B and supporting documentation for the appeal. The AAO reviewed the record in its entirety before issuing its decision.

For the reasons that will be discussed below, the AAO agrees with the director that the petitioner has not established that the beneficiary was lawfully present in the CNMI at the time the petition was filed. Accordingly, the director's decision will not be disturbed. The appeal will be dismissed. The petition will be denied.

In this matter, the petitioner filed the Form I-129CW on behalf of the beneficiary and other workers to serve as waitresses on a full-time basis. With the Form I-129CW, the petitioner provided documentation in support of the petition on behalf of the beneficiary, which included the following:

- An entry document showing that the beneficiary entered the CNMI on October 25, 2005 and was authorized to stay until October 4, 2006 pursuant to the issuance of a Section 706K Non-Resident Worker's Entry Permit.

¹ In the Form I-129CW visa petition, the petitioner indicated that it has six employees. The petitioner further stated that its gross annual income is approximately \$343,380 per year and that its net annual income is approximately \$20,000 per year.

² The AAO notes that the director approved the petition on behalf of two other workers on January 18, 2013.

- A CNMI Alien Registration Card for the beneficiary with a renewal date of September 24, 2011.
- A letter from [REDACTED] of [REDACTED], dated November 23, 2011. The AAO notes that there is no evidence in the record of proceeding to establish that Mr. [REDACTED] represents the petitioner in this matter. The record of proceeding does not contain a Form G-28, Notice of Entry of Appearance as Attorney or Accredited Representative, signed by the petitioner and Mr. [REDACTED]. No information was provided regarding Mr. [REDACTED] relationship to the petitioner and/or beneficiary (if any) and the source of his information. In the letter, Mr. [REDACTED] claims that it is his opinion that the beneficiary is eligible and should be granted CW-1 classification. In support of the letter, Mr. [REDACTED] submitted several documents, including the following:
 - A partially illegible document entitled "Permits for Overstayers." An individual named [REDACTED] is listed as No. [REDACTED]. This entry indicates that an appointment was scheduled for April 6, 2010 at 10:30 AM. The AAO notes that Mr. [REDACTED] did not provide supplemental information to verify that the listed individual is the beneficiary.
 - An excerpt from the Federal Register, Vol. 76, No. 173, "Commonwealth of the Northern Mariana Islands Transitional Worker Classification" dated September 7, 2011.
 - A copy of a written decision and order issued by the Executive Office for Immigration Review in the matter of [REDACTED]. The order is dated May 3, 2011. The AAO notes that [REDACTED] is not the beneficiary or an affected party in the instant matter.

The director found the initial evidence insufficient to establish eligibility for the benefit sought, and issued an RFE. The director outlined the evidence to be submitted. The petitioner responded to the RFE by submitting a copy of previously submitted umbrella permit for another beneficiary.

The director denied the petition on October 3, 2012. The petitioner subsequently filed a motion to reopen and motion to reconsider. After reviewing the submission, the director denied the petition on behalf of the beneficiary, finding that the petitioner failed to establish that the beneficiary was lawfully present in the CNMI at the time the petition was filed. Counsel for the petitioner subsequently filed an appeal of the denial of the petition.⁴

⁴ With the appeal, the petitioner and its counsel submitted additional evidence. With regard to the evidence submitted on appeal that was previously requested by the director's RFE, the AAO notes that this evidence is outside the scope of the appeal. The regulations indicate that the petitioner shall submit additional evidence as the director, in his or her discretion, may deem necessary in the adjudication of the petition. See 8 C.F.R. §§ 103.2(b)(8); 214.2(h)(9)(i). The purpose of the request for evidence is to elicit further information that clarifies whether eligibility for the benefit sought has been established, as of the time the petition is filed. See

The AAO reviewed the record of proceeding in its entirety, and finds that the petitioner has not provided sufficient evidence to establish that the beneficiary meets the requirements to be classified as a CW-1 nonimmigrant under the applicable statutory and regulatory provisions. Specifically, the AAO finds that the beneficiary was not lawfully present in the CNMI at the time the instant petition was filed.

The regulation at 8 C.F.R. § 214.2(w)(2) states, in pertinent part, the following with regard to classifying aliens as CW-1 nonimmigrants:

- (2) Eligible aliens. Subject to the numerical limitation, an alien may be classified as a CW-1 nonimmigrant if, during the transition period, the alien:
 - (i) Will enter or remain in the CNMI for the purpose of employment in the transition period in an occupational category that DHS has designated as requiring alien workers to supplement the resident workforce;
 - (ii) Is petitioned for by an employer;
 - (iii) Is not present in the United States, other than the CNMI;
 - (iv) If present in the CNMI, is lawfully present in the CNMI;
 - (v) Is not inadmissible to the United States as a nonimmigrant or has been granted a waiver of each applicable ground of inadmissibility; and
 - (vi) Is ineligible for status in a nonimmigrant worker classification under section 101(a)(15) of the Act.

The regulatory provision at 8 C.F.R. § 214.2(w)(1)(v) defines "lawfully present in the CNMI" as follows:

8 C.F.R. § 103.2(b)(1), (8), and (12). The failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14).

Where, as here, a petitioner has been put on notice of a deficiency in the evidence and has been given an opportunity to respond to that deficiency, the AAO will not accept evidence offered for the first time on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988); *see also Matter of Obaigbena*, 19 I&N Dec. 533 (BIA 1988). If the petitioner had wanted the submitted evidence to be considered, it should have submitted it with the initial petition or in response to the director's request for evidence. *Id.* The petitioner has not provided a valid reason for not previously submitting the evidence. Under the circumstances, the AAO need not consider the sufficiency of the evidence submitted for the first time on appeal. Nevertheless, the AAO reviewed this evidence submitted by the petitioner but, as will be discussed *infra*, it fails to establish eligibility for the benefit sought.

- (A) At the time the application for CW status is filed, is an alien lawfully present in the CNMI under 48 U.S.C. § 1806(e); or
- (B) Was lawfully admitted or paroled into the CNMI under the immigration laws on or after the transition program effective date, other than an alien admitted or paroled as a visitor for a business or pleasure (B-1 or B-2, under any visa-free travel provision or parole of certain visitors from Russia and the People's Republic of China), and remains in a lawful immigration status.

The AAO notes that the "transition period" is described at 48 U.S.C. § 1806(a):

- (2) Transition period
There shall be a transition period beginning on the transition program effective date and ending on December 31, 2014, except as provided in subsections (b) and (d), during which the Secretary of Homeland Security, in consultation with the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of the Interior, shall establish, administer, and enforce a transition program to regulate immigration to the Commonwealth, as provided in this section (hereafter referred to as the "transition program").

In this matter, there is no evidence that the beneficiary was admitted or paroled into the CNMI on or after the transition program effective date of November 28, 2009 pursuant to 8 C.F.R. § 214.2(w)(1)(v)(B). Based upon the record of proceeding, it appears that the beneficiary last entered the CNMI on October 25, 2005, prior to the transition program effective date. Thus, 8 C.F.R. § 214.2(w)(1)(v)(B) is not applicable in the instant matter.

To determine whether the beneficiary was lawfully present in the CNMI under 8 C.F.R. § 214.2(w)(1)(v)(A), the AAO turns to 48 U.S.C. § 1806(e), which states the following:

- (e) Persons lawfully admitted under the Commonwealth immigration law
- (1) Prohibition on removal
 - (A) In general
Subject to subparagraph (B), no alien who is lawfully present in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be removed from the United States on the grounds that such alien's presence in the Commonwealth is in violation of section 212(a)(6)(A) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(A)), until the earlier of the date –
 - (i) of the completion of the period of the alien's admission under the immigration laws of the Commonwealth; or

(ii) that is 2 years after the transition program effective date.

(B) Limitations

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

(2) Employment authorization

An alien who is lawfully present and authorized to be employed in the Commonwealth pursuant to the immigration laws of the Commonwealth on the transition program effective date shall be considered authorized by the Secretary of Homeland Security to be employed in the Commonwealth until the earlier of the date –

(A) of expiration of the alien's employment authorization under the immigration laws of the Commonwealth; or

(B) that is 2 years after the transition program effective date.

(3) Registration

The Secretary of Homeland Security may require any alien present in the Commonwealth on or after the transition period effective date to register with the Secretary in such a manner, and according to such schedule, as he may in his discretion require. Paragraphs (1) and (2) of this subsection shall not apply to any alien who fails to comply with such registration requirement. Notwithstanding any other law, the Government of the Commonwealth shall provide to the Secretary all Commonwealth immigration records or other information that the Secretary deems necessary to assist the implementation of this paragraph or other provisions of the Consolidated Natural Resources Act of 2008. Nothing in this paragraph shall modify or limit section 262 of the Immigration and Nationality Act (8 U.S.C. 1302) or other provision of the Immigration and Nationality Act [8 U.S.C. 1101 et seq.] relating to the registration of aliens.

(4) Removable aliens

Except as specifically provided in paragraph (1)(A) of this subsection, nothing in this subsection shall prohibit or limit the removal of any alien who is removable under the Immigration and Nationality Act.

(5) Prior orders of removal

The Secretary of Homeland Security may execute any administratively final order of exclusion, deportation or removal issued under authority of the immigration laws of the United States before, on, or after the transition period effective date, or under authority of the immigration laws of the Commonwealth before the transition period effective date, upon any subject of such order found in the Commonwealth on or after the transition period effective date, regardless whether the alien has previously been removed from the United States or the Commonwealth pursuant to such order.

Under 48 U.S.C. § 1806(e)(1), the emphasis of the relevant time period is the *earlier* of the date of the expiration of the alien's admission under the immigration laws of the Commonwealth or two years after the transition program effective date.

In a brief dated February 12, 2013 that was submitted with the appeal, counsel claims that the beneficiary was lawfully present in the CNMI when the petition was filed. Counsel references a notice issued by the CNMI Attorney General [REDACTED] and a written decision and order issued by an Executive Office for Immigration Review immigration judge in the matter of [REDACTED] (an individual who is not the beneficiary or an affected party in this matter). Additionally, the petitioner and its counsel submitted the following documentation:

- A document entitled "Notice Umbrella Permits Request for Waiver of Overstay Status November 26, 2009." The document was signed by [REDACTED] Attorney General, on November 25, 2009. The document refers to "the below-listed individuals" but the referenced list was not provided.
- A spreadsheet entitled "Condition Umbrella Permits for Overstayers." The AAO observes that the petitioner did not provide the entire document.
- A decision and order issued by an Executive Office for Immigration Review immigration judge in the matter of [REDACTED]. This document was previously submitted to USCIS by the petitioner.
- A statement by [REDACTED]. The document is dated February 28, 2011. In the statement, Mr. [REDACTED] indicates that he was the Director of the Division of Immigration, CNMI Office of the Attorney General by appointment and directly under the control of the Attorney General until November 27, 2009 at 11:59 p.m. Mr. [REDACTED] also claims that he was in "constant and direct contact with [REDACTED] CNMI Attorney General during the implementation and transition of immigration control from the CNMI to the US Department of Homeland Security in 2009."

Mr. [REDACTED] reports that on or about November 24, 2009, he accompanied Attorney General [REDACTED] Deputy Attorney General [REDACTED] and Assistant Attorney General for Immigration [REDACTED] to a meeting with the Federal Ombudsman, [REDACTED] regarding the issuance of umbrella permits for aliens that were not given umbrella permits by the CNMI Department of Labor and who had registered with the Federal Ombudsman. He further recalls that during the meeting, the Attorney General ordered to the Assistant Attorney General for Immigration "to draft language granting condition umbrella permits to aliens who had registered for such permits at the Federal Ombudsman's office." (Mr. [REDACTED] states that this list was later referred to as the "628 umbrella list.") According to Mr. [REDACTED] the Attorney General decided that this list would be published in newspapers of general circulation and posted at the Division of Immigration and elsewhere in the building.

Mr. [REDACTED] further reports that on November 25, 2009, the Attorney General transmitted the signed notice and listing of names and immigration identification number for the approximately 628 aliens registered at the Federal Ombudsman's office and a second signed notice which incorporated those aliens listed by the CNMI Department of Labor on November 23, 2009 as overstaying aliens.

Mr. [REDACTED] states that he posted the list and notices in prominent places in the building housing Immigration and the CNMI Department of Labor. Mr. [REDACTED] also states that he did not receive any further communication regarding the conditional permits until on or about December 1, 2009, when he was informed that the Office of the Attorney General would take no further action on the conditional umbrella permits in question. Further, Mr. [REDACTED] claims that he was not informed of any revocation of the Attorney General's grant of umbrella permits prior to November 27, 2009.

The AAO reviewed the record of proceeding, but finds that the submitted documents do not establish that the beneficiary was lawfully present in the CNMI when the petition was filed. That is, contrary to counsel's belief, the "notice" and the list did not provide lawful status for the beneficiary at the time of filing this petition. Specifically, the AAO observes that the notice states, in part, the following:

**NOTICE
UMBRELLA PERMITS
REQUEST FOR WAIVER OF OVERSTAYER STATUS
NOVEMBER 26, 2009**

Pursuant to the Attorney General's authority under Article III, Section 11 of the NMI Constitution, and 1 CMC § 2151 et seq., the Attorney General hereby grants

conditional umbrella permits to each of the below-listed individuals. Since individuals are classified as "overstayers" certain conditions apply. **Should an individual not comply with each and every condition listed below, this conditional umbrella permit shall be null and void.** [Emphasis added].

Each conditional umbrella permit is subject to renewal. **Renewals will be reviewed by members of the Attorney General's Investigative Unit (AGIU).** Renewal of each conditional umbrella permit depends on compliance with the following:

- (1) **Permit Fee payment.** Depending on the length of time out of status (i.e., "overstayers) permit fees must be paid in accordance with the below-listed schedule. Past permit fees are to be paid in full by the date of the overstayers appointment with the Attorney General Investigation Unit. The holder is to make payment at the Department of Finance and present a receipt to the reviewing investigator on the date of his or her appointment;

Number of Years Overstayed	Payment Schedule
0-5 Years	\$375
5-10 Years	\$750
10-15 Years	\$1,125
Over 15 Years	\$1,500

- (2) **Police clearance** obtained at the Commonwealth Superior Court;
- (3) Proof of a **valid passport** or proof that a passport application and all requisite documents have been submitted to the country of origin;
- (4) **Proof of employment** approved and verified by the Commonwealth Department of Labor on or before February 25, 2010; and
- (5) **Proof of any pending claims** that may justify the overstaying period(s).

Each overstayers has been scheduled to appear at the Office of the Attorney General Investigation Unit in Susupe, Saipan on a specified date for each individual. At the scheduled interview, the overstayers must provide the above documentation for review and consideration by an investigating officer, who will determine, based on the documentation, whether to review the umbrella permit.

Forfeiture of Conditional Umbrella Permit: Failure to provide the information listed above and/or failure to appear on the scheduled date/scheduled time and/or failure to comply with all other conditions associated with lawful status (e.g. Department of Labor regulations), shall result of forfeiture of the conditional umbrella permit.

The AAO finds that while counsel claims that the Attorney General granted a conditional umbrella

permit to the beneficiary through this notice, the notice states that "[s]ince individuals are classified as 'overstayers' certain conditions apply." Further, the notice specifically reports that "[s]hould an individual not comply with each and every condition listed . . . this conditional umbrella permit shall be null and void."

The term "null" is defined as "[h]aving no legal effect; without binding force; VOID. . . The phrase *null and void* is a common redundancy." See *Black's Law Dictionary* 1095 (7th Ed. 1999). The first definition of the term "void" is defined as "[o]f no legal effect; null." See *id* at 1568. Notably, the term "voidable" is defined as "[v]alid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties." *Id*.

Here, the notice specifically states that, "Should an individual not comply with each and every condition listed below, this conditional umbrella permit shall be null and void." It is important to note that the notice *does not state* that the umbrella permit was voidable, and thus valid until annulled. Rather, the document specifies that if an individual did not comply with the required conditions stated in the notice, the conditional umbrella permit would have no legal effect.

In this case, there is no evidence that the beneficiary complied with each and every condition outlined in the notice. For instance, there is no evidence to indicate that the beneficiary paid the required fee to the Department of Finance and obtained a receipt. Furthermore, the record of proceeding does not establish that the beneficiary obtained the necessary police clearance from the Commonwealth Superior Court. Additionally, the petitioner did not submit documentation indicating that the beneficiary possessed the required proof of employment approved and verified by the Commonwealth Department of Labor within the designated timeframe. There is a lack of evidence substantiating that the beneficiary obtained proof of any pending claims to justify remaining in the CNMI beyond the period of authorized stay. The petitioner has not provided any documentation to establish that the beneficiary met the conditions required for the conditional umbrella permit to have a legal effect. Accordingly, without further evidence, the conditional grant of the umbrella permit was "null and void" and thus, had no legal effect.

The notice states, "Failure to provide the information listed above *and/or* failure to appear on the scheduled date/scheduled time *and/or* failure to comply with all other conditions associated with lawful status (e.g. Department of Labor regulations), shall result of forfeiture of the conditional umbrella permit." (Emphasis added.) Again, the record of proceeding does not indicate that the beneficiary complied with the conditions set forth in the notice. Moreover, the documents do not indicate that the beneficiary appeared for the interview. Additionally, there is no indication that the beneficiary complied with all other conditions associated with lawful status.

The AAO also reviewed the affidavit by Mr. [REDACTED] stating that the grant of the conditional umbrella permits was not revoked by the Attorney General prior to the transition date. The AAO notes that the issue here is not whether the conditional umbrella permits were revoked. Rather, the issue is that the evidence does not indicate that the beneficiary met the conditions required by the notice, and

thus, the permit was "null and void" and, therefore, had no legal effect.⁵ Accordingly, the evidence provided does not establish that the beneficiary was lawfully present in the CNMI at the time the petition was filed.

Further, the record contains a copy of a written decision and order issued by an Executive Office for Immigration Review immigration judge in the matter of [REDACTED]. The order is dated May 3, 2011. The AAO reviewed the decision and notes that the petitioner has not established that the facts in the cited decision are analogous to the instant petition. More specifically, Mr. [REDACTED] was in removal proceedings before the Executive Office for Immigration Review, whereas the petitioner filed a Form I-129CW petition on behalf of the beneficiary for CW-1 classification. Furthermore, while the cited case refers to several exhibits, the petitioner in the instant case failed to include the exhibits with its submission. Thus, the record of proceeding does not establish whether the immigration judge reviewed the same documentation that has been presented in the instant case.

Additionally, while the immigration judge found that "the DHS' evidence when carefully considered, has less probative weight than [REDACTED] evidence," and "does not effectively rebut [REDACTED]'s evidence [the document dated November 25, 2009 from the CNMI Attorney General], which stated that he was granted an umbrella permit that is still in effect," the immigration judge did not discuss the implications that "[s]hould an individual not comply with each and every condition . . . [the] conditional umbrella permit shall be null and void."

Furthermore, the AAO notes that while 8 C.F.R. § 103.3(c) provides that precedent decisions of the Board of Immigration Appeals (BIA), Attorney General and the Secretary of Homeland Security are binding on all U.S. Citizenship and Immigration Services employees in the administration of the Act, unpublished decisions by those authorities are not similarly binding, let alone unpublished decisions of immigration judges rather than the BIA or the Attorney General. It is also important to note that when any person makes an application for a "visa or any other document required for entry, or makes an application for admission [. . .] the burden of proof shall be upon such person to establish that he is eligible" for such relief. 8 U.S.C. § 1361; *see also Matter of Treasure Craft of California*, 14 I. & N. Dec. 190 (Reg. Comm'r 1972).

Based upon a complete review of the record of proceeding, the AAO finds that the petitioner has not established that the beneficiary was legally present in the CNMI when the petition was filed. Thus, the petitioner has not established eligibility for the benefit sought.

⁵ An umbrella permit is "issued" when the holder of the permit appears in person, presents acceptable identification, and signs and dates the permit before an authorized official who also signs and dates the permit. The record of proceeding does not contain any evidence that a conditional umbrella permit or umbrella permit was ever issued to the beneficiary.

⁷ The decision indicates that [REDACTED] is a citizen of the Philippines in the CNMI. He was served with a Notice to Appear, charging him as removable under the Immigration and Nationality Act.

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NON-PRECEDENT DECISION

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In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed. The petition is denied.