(b)(6)

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

[redacted]

DATE: MAR 12 2014 OFFICE: CALIFORNIA SERVICE CENTER CW-1: [redacted]
APPEAL:

IN RE: Petitioner: [redacted]

Beneficiary:

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:

[redacted]

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.

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 The director's decision will be withdrawn. The matter will be remanded for further consideration and entry of a new decision.

The petitioner submitted a Petition for a CNMI-Only Nonimmigrant Transitional Worker (Form I-129CW) to the California Service Center on May 29, 2012. In the Form I-129CW visa petition, the petitioner describes itself as a travel agency and travel/tour operator established in 1992. In order to employ the beneficiary in what it designates as a tour guide position, the petitioner seeks to classify her as a CNMI-Only Nonimmigrant Transitional Worker (CW-1) pursuant to 48 U.S.C. § 1806(d).[1]

The director denied the petition on April 2, 2013, finding that the petitioner failed to establish that the beneficiary was lawfully present in the Commonwealth of the Northern Mariana Islands (CNMI) at the time the petition was filed.[2] Specifically, the director noted that a Form I-129CW petition (on behalf of the beneficiary had been filed by a different employer, and was pending at the time the instant petition was filed. The director stated that umbrella permit holders must have the first petition approved prior to filing a second petition. Counsel for the petitioner subsequently filed a timely appeal on April 30, 2013.

The record of proceeding before the AAO contains: (1) the petitioner's Form I-129CW and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the RFE; (4) the notice of decision; and (5) the Form I-290B and supporting materials. The AAO reviewed the record in its entirety before issuing its decision.

The regulation at 8 C.F.R. § 103.2(b)(19) states that the director will notify a petitioner in writing of a decision made on a benefit request. Further, 8 C.F.R. § 103.3(a)(1)(i) states that when denying a petition, the director shall explain in writing the specific reasons for denial. Upon review, the AAO finds that the director's decision does not provide a sufficient explanation for the conclusion that umbrella permit holders must have the first petition approved prior to filing a second petition.

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

> (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

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[1] The petition must be executed and filed in accordance with the form instructions and the instructions are incorporated into the regulations. 8 C.F.R. § 103.2(a)(1). The instructions for the Form I-129CW indicate that multiple beneficiaries who will seek admission in CW-1 classification may be included in the same petition provided they will, *inter alia*, all be requesting the same action in Part 2 of the Form I-129CW.

[2] The petitioner listed 14 beneficiaries in the Form I-129CW petition. The director approved the petition for five beneficiaries, and denied the petition for eight beneficiaries. The petitioner withdrew its request for CW classification on behalf of one of the beneficiaries.

(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").

The AAO now 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.

The regulatory provision at 8 C.F.R. § 212.2(w)(7) states the following with regard to a CW-1 nonimmigrant:

(7) Change of employers. A change of employment to a new employer inconsistent with paragraphs (w)(7)(i) and (ii) of this section will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act. A CW-1 nonimmigrant may change employers if:

(i) The prospective new employer files a petition to classify the alien as a CW-1 worker in accordance with paragraph (w)(5) of this section, and

(ii) An extension of the alien's stay is requested if necessary for the validity period of the petition.

(iii) A CW-1 may work for a prospective new employer after the prospective new employer files a Form I-129CW petition on the employee's behalf if:

(A) The prospective employer has filed a nonfrivolous petition for new employment before the date of expiration of the CW-1's authorized period of stay; and

(B) Subsequent to his or her lawful admission, the CW-1 has not been employed without authorization in the United States.

(iv) Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

(v) If a CW-1's employment has been terminated prior to the filing of a petition by a prospective new employer consistent with paragraphs (w)(7)(i) and (ii), the CW-1 will not be considered to be in violation of his or her CW-1 status during the 30-day period immediately following the date on which the CW-1's employment terminated if a nonfrivolous petition for new employment is filed consistent with this paragraph within that 3-day period and the CW-1 does not otherwise violate the terms and conditions of his or her status during that 30-day period.

The regulatory provision at 8 C.F.R. § 274.a12(b) addresses when an alien is authorized for employment with a specific employer:

> (23) A Commonwealth of the Northern Mariana Islands transitional worker (CW-1) pursuant to 8 CFR 214.2(w). An alien in this status may be employed only in the CNMI during the transition period, and only by the petitioner through whom the status was obtained, or as otherwise authorized by 8 CFR 214.2(w). An alien who is lawfully present in the CNMI (as defined by 8 CFR 214.2(w)(1)(v)) on or before November 27, 2011, is authorized to be employed in the CNMI, and is so employed in the CNMI by an employer properly filing an application under 8 CFR 214.2(w)(14)(ii) on or before such date for a grant of CW–1 status to its employee in the CNMI for the purpose of the alien continuing the employment, is authorized to continue such employment on or after November 27, 2011, until a decision is made on the application;[3] or
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> (24) An alien who is authorized to be employed in the Commonwealth of the Northern Mariana Islands for a period of up to 2 years following the transition program effective date, under section 6(e)(2) of Public Law 94–241, as added by section 702(a) of Public Law 110–229. Such alien is only authorized to continue in the same employment that he or she had on the transition program effective date as defined in 8 CFR 1.1 until the earlier of the date that is 2 years after the transition program effective date or the date of expiration of the alien's employment authorization, unless the alien had unrestricted employment authorization or was otherwise authorized as of the transition program effective date to change employers, in which case the alien may have such employment privileges as were authorized as of the transition program effective date for up to 2 years.

The director has not established that the applicable statutory and regulatory provisions support the conclusion that umbrella permit holders must have the first petition approved prior to filing a second petition. Thus, to properly analyze the issue of whether the beneficiary was lawfully present in the CNMI at the time the petition was filed (as well as any other issues that are material to the case), the petition will be remanded to the director for review and to contemplate the issuance of a new decision.

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).

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[3] The regulations make a distinction between an alien who has been granted CW-1 classification and an alien for whom a Form I-129CW for CW-1 classification is pending.

ORDER: The director's decision is withdrawn. The matter is remanded to the director for further action consistent with the above and entry of a new decision.