

notice of disqualification to his or her supervisor and the DAEO upon determining that he will not participate in the matter.

(c) Disqualification from matters affecting prospective employers. An FLRA employee who is required, in accordance with 5 CFR 2635.604(a), to disqualify himself or herself from participation in a particular matter to which he has been assigned shall, notwithstanding the guidance in 5 CFR 2635.604(b) and (c), provide written notice of disqualification to his or her supervisor and the DAEO upon determining that he will not participate in the matter.

(d) Withdrawal of notification. An FLRA employee may withdraw written notice under paragraphs (a), (b), or (c) of this section upon deciding that disqualification from participation in the matter is no longer required. A withdrawal of notification shall be in writing and provided to the employee's supervisor and the DAEO.

Dated: December 10, 2010.

**Carol Waller Pope,**

*Chairman, Federal Labor Relations Authority.*

Approved on this date: December 13, 2010.

**Robert I. Cusick,**

*Director, Office of Government Ethics.*

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## DEPARTMENT OF HOMELAND SECURITY

### 8 CFR Parts 103, 214, and 274a

[CIS No. 2758-08; DHS Docket No. USCIS-2008-0035]

RIN 1615-AB75

#### E-2 Nonimmigrant Status for Aliens in the Commonwealth of the Northern Mariana Islands With Long-Term Investor Status

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

**ACTION:** Final rule.

**SUMMARY:** This final rule amends Department of Homeland Security (DHS) regulations governing E-2 nonimmigrant treaty investors to establish procedures for classifying long-term investors in the Commonwealth of the Northern Mariana Islands (CNMI) as E-2 nonimmigrants. This final rule implements the CNMI nonimmigrant investor visa provisions of the Consolidated Natural Resources Act of 2008 extending the immigration laws of the United States to the CNMI.

**DATES:** This rule is effective January 19, 2011.

**FOR FURTHER INFORMATION CONTACT:** Steven W. Viger, Office of Policy & Strategy, U.S. Citizenship and Immigration Services, Department of Homeland Security, 20 Massachusetts Avenue, NW., 2nd Floor, Washington, DC 20529-2140, telephone (202) 272-1470.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

The Commonwealth of the Northern Mariana Islands (CNMI) is a U.S. territory located in the western Pacific that has been subject to most U.S. laws for many years. However, the CNMI has administered its own immigration system under the terms of its 1976 covenant with the United States. See A Joint Resolution to Approve the Covenant To Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America (the Covenant Act), Public Law 94-241, sec. 1, 90 Stat. 263, 48 U.S.C. 1801 note (1976). On May 8, 2008, President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110-229, 122 Stat. 754 (2008). Title VII of the CNRA extends U.S. immigration laws to the CNMI with transition provisions unique to the CNMI. See 48 U.S.C. 1806; 48 U.S.C.A. 1806 note. The stated purpose of the CNRA is to ensure effective border control procedures, to properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI (phasing-out the CNMI's nonresident contract worker program while minimizing to the greatest extent practicable the potential adverse economic and fiscal effects of that phase-out), to maximize the CNMI's potential for future economic and business growth, and to assure workers are protected from the potential for abuse and exploitation. See sec. 701 of the CNRA, 48 U.S.C.A. 1806 note.

Since 1978, the CNMI has admitted a substantial number of foreign workers from China, the Philippines, and other countries through an immigration system that provides a permit program for foreigners entering the CNMI, such as visitors, investors, and workers. In fact, foreign workers under this system represent a majority of the CNMI labor force. Such workers outnumber U.S. citizens and other local residents in private sector employment in the CNMI. Currently, the CNMI faces serious economic challenges, including the total collapse of the territory's \$1 billion a year garment industry and a substantial

decline in its tourism industry.<sup>1</sup> The result has been a decrease in the CNMI government budget from \$217,964,866 in 2005 to \$132,565,000 in 2011.

Title VII of the CNRA was to become effective approximately one year after the date of enactment, subject to certain transition provisions unique to the CNMI. On March 31, 2009, DHS announced that the Secretary of Homeland Security, in her discretion under the CNRA, had extended the effective date of the transition program from June 1, 2009 (the first day of the first full month commencing one year from the date of enactment of the CNRA) to November 28, 2009. DHS Press Release, "DHS Delays the Transition to Full Application of U.S. Immigration Laws in the Commonwealth of the Northern Mariana Islands" (Mar. 31, 2009), [http://www.dhs.gov/ynews/releases/pr\\_1238533954343.shtm](http://www.dhs.gov/ynews/releases/pr_1238533954343.shtm). The transition period concludes on December 31, 2014. The law also contains several CNMI-specific provisions affecting foreign workers and investors during the transition period. These temporary provisions are intended to provide for an orderly transition from the CNMI permit system to the Immigration and Nationality Act (INA) and to mitigate potential harm to the CNMI economy before these foreign workers and investors are required to obtain U.S. immigrant or nonimmigrant status. See sec. 701 of the CNRA, 48 U.S.C.A. 1806 note; 48 U.S.C. 1806(c), (d).

Among the CNMI-specific provisions applicable during the transition period is a provision authorizing the Secretary of Homeland Security to classify an alien foreign investor in the CNMI as a CNMI-only "E-2" nonimmigrant investor under section 101(a)(15)(E)(ii) of the INA, 8 U.S.C. 1101(a)(15)(E)(ii). 48 U.S.C. 1806(c). This status is provided upon application of the alien, notwithstanding the treaty requirements otherwise applicable. *Id.* Eligible investors are those who:

- Were admitted to the CNMI in long-term investor status under CNMI immigration law before the transition program effective date;
- Have continuously maintained residence in the CNMI under long-term investor status;

<sup>1</sup> 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, DC: Mar. 2008); GAO, *U.S. Insular Areas: Economic, Fiscal, and Accountability Challenges*, GAO-07-119 (Washington, DC: Dec. 12, 2006); and GAO, *Commonwealth of the Northern Mariana Islands: Serious Economic, Fiscal, and Accountability Challenges*, GAO-07-746T (Washington, DC: Apr. 19, 2007).

- Are otherwise admissible to the United States under the INA; and
- Maintain the investment(s) that formed the basis for the CNMI long-term investor status. *Id.*

## II. Proposed Rule

In accordance with the CNRA, on September 14, 2009, DHS proposed the requirements and procedures for foreign investors in the CNMI to obtain nonimmigrant status within the E-2 treaty investor classification (“E-2 CNMI Investors”). See 74 FR 46938. DHS provided a 30-day comment period in the proposed rule, which ended on October 14, 2009. The comments received during the comment period are discussed below.

The proposed rule preamble described the CNMI’s immigration programs for investors that existed before November 28, 2009. *Id.* at 46939. The proposed rule also described the current United States E-2 treaty investor nonimmigrant status. *Id.* at 46940; see INA sec. 101(a)(15)(E)(ii), 8 U.S.C. 1101(a)(15)(E)(ii); 8 CFR 214.2(e). DHS proposed the procedures for foreign investors in the CNMI to obtain nonimmigrant status within the E-2 treaty investor classification, including the criteria that must be met and the evidence that must be submitted in order to be eligible for E-2 CNMI Investor nonimmigrant status. See 74 FR 46938, 46949 (Sept. 14, 2009).

As stated in the proposed rule, the E-2 CNMI Investor program is intended to provide a smooth transition for existing CNMI investors and to mitigate potential adverse consequences to the CNMI economy if the current investments could not otherwise be maintained as a basis for immigration status during the transition period. At the end of the transition period, the E-2 CNMI Investor classification will cease to exist. E-2 CNMI Investors and qualifying spouses and children must qualify for and obtain a new immigrant or nonimmigrant status under the INA in order to remain in the CNMI or to enter the CNMI after a departure.

## III. Final Rule

This rule provides the procedures to obtain status as an E-2 CNMI Investor. The final rule adopts most of the regulations set forth in the proposed rule. The rationale for the proposed rule and the reasoning provided in its preamble remain valid with respect to these regulatory amendments, and DHS adopts such reasoning in support of the promulgation of this final rule. DHS has modified some of the proposed provisions for the final rule in response to the public comments received on the

proposed rule. These changes are explained in detail in the summary of comments and DHS responses below and are briefly summarized as follows:

1. The proposed rule provided that a CNMI Long-Term Business Entry Permit holder with a CNMI Long-Term Business Certificate would be eligible for a period of two years on the basis of the alien’s minimum \$150,000 investment. The final rule reduces the minimum investment to \$50,000. New 8 CFR 214.2(e)(23)(iii)(A)(2).

2. The final rule provides a two-year application period after the effective date of the final rule. See new 8 CFR 214.2(e)(23)(v). The proposed rule had proposed that applicants be required to apply for E-2 CNMI Investor status within two years of the beginning of the transition period. This change is one of a number of updating changes to reflect the fact that the transition program effective date is now in the past. Other such changes include: Changing references to the transition program effective date and to CNMI-issued immigration statuses to the past tense, as those statuses no longer are in effect after that date; changing the reference date to CNMI laws in effect from May 8, 2008 (CNRA date of enactment) to November 27, 2009 (day before transition program effective date); and removing the definition of “transition program effective date” from new 8 CFR 214.2(e)(23)(ii) as that definition is now in the general definitions section of the immigration regulations at 8 CFR 1.1(bb). See new 8 CFR 214.2(e)(23)(v).

3. The final rule adds the phrase “or any successor body” to the provision describing where a denial may be appealed. The proposed rule had proposed that denied petitions may be appealed to the USCIS Administrative Appeals Office. See new 8 CFR 214.2(e)(23)(ix).

4. The final rule clarifies the authority and process by which applicants in the CNMI can be granted E-2 CNMI Investor status in the CNMI without having to travel abroad to obtain a nonimmigrant visa. See new 8 CFR 214.2(e)(23)(xvi).

5. The final rule adds the term “continuous” to clarify the period of absence that would break continuity of residence under the definition of “continuously maintained residence in the CNMI.” See new 8 CFR 214.2(e)(23)(ii)(D).

6. The final rule makes technical changes to the fee waiver provisions, in order to conform the rule to the reorganized format of 8 CFR 103.7 provided in the DHS final rule, “U.S. Citizenship and Immigration Services Fee Schedule,” 75 FR 58962 (September

24, 2010). See new 8 CFR 103.7(c)(3)(xix).

## IV. Comments Received on the Proposed Rule

During the 30-day comment period, DHS received 13 comments from a variety of individuals and organizations, including the CNMI Governor’s Office, the Saipan Chamber of Commerce, a former Senator of the CNMI, a Member of Congress, and other interested organizations and individuals.

DHS considered the comments received and all other materials contained in the docket in preparing this final rule. The final rule does not address comments that were beyond the scope of the proposed rule, including those seeking changes to United States statutes, changes to regulations or petitions outside the scope of the proposed rule, or changes to the procedures of other DHS components or agencies.

All comments and other docket material may be reviewed at the Federal Docket Management System (FDMS) at <http://www.regulations.gov>, docket number USCIS-2008-0035.

### A. Summary of Comments

Of the 13 comments USCIS received, two comments supported the proposals in the rule as a whole and welcomed DHS’s efforts to minimize, to the greatest extent practicable, potential adverse economic and fiscal effects of federalization and to maximize the CNMI’s potential for future economic and business growth.

Most commenters expressed concerns over specific provisions in the proposed rule, such as: The requirement to obtain a visa to re-enter the CNMI; the minimum investment of \$150,000 for Long-Term Business Investors; and the continuous residence requirement. Several commenters wrote that certain investors would be ineligible for the E-2 CNMI Investor visa, that the rule will cause severe economic harm to the CNMI economy, and that DHS is incorrect in its interpretation of the effect of an extension of the transition period.

### B. Comments

The specific comments are organized by subject matter and addressed below.

#### 1. Visa Requirement (Travel and Reentry)

Two commenters disagreed with the proposed requirement that investors must obtain a visa to re-enter the CNMI. Commenters stated that obtaining a visa is an expensive and time-consuming process. DHS is aware of the public’s

concerns regarding the cost and time involved in obtaining a U.S. visa. However, visa fees and visa processing times are managed by the Department of State (DOS). After careful consideration, DHS is maintaining the visa requirement for investors who are abroad and seek to be admitted to the CNMI. A primary purpose of the CNRA is "to ensure that effective border control procedures are implemented and observed, and that national security and homeland security issues are properly addressed." CNRA sec. 701(a), 48 U.S.C.A. 1806 note. The visa process is an important aspect of effective border control. Therefore, DHS does not consider it appropriate as a matter of travel security and immigration policy to waive visa-based grounds of inadmissibility for those E-2 CNMI Investors who travel abroad and wish to return to the CNMI.

However, DHS is able to address to a significant extent the general concern reflected in the comments about visas and travel costs by clarifying in the final rule the authority and process by which applicants who are already within the CNMI may be determined to be admissible to the United States and granted E-2 CNMI Investor status. For CNMI investors, DHS is providing beneficiaries of an E-2 CNMI petition in the CNMI with a grant of E-2 CNMI Investor status without requiring that they depart the CNMI in order to obtain a visa. In other words, an alien in the CNMI who is eligible for E-2 status will not have to make a trip abroad solely for the purpose of obtaining a visa, but if the alien is otherwise abroad, he or she will have to obtain a visa in order to travel to the CNMI.

DHS notes that there is a distinct difference between a visa and a status. DOS issues a visa at a U.S. Embassy or consulate office abroad. A visa, placed in the alien's passport, allows an alien to travel to a port of entry and apply for admission to the United States in a particular status. While having a visa does not guarantee admission to the United States, it does indicate that a consular officer has determined that the alien is eligible to apply for admission for a specific purpose.

DHS is responsible for all admissions into the United States. If an alien seeking admission to the United States is admissible, DHS admits the alien and grants his or her status in the United States. The specified status controls the period of stay and conditions of such stay. In most cases, DHS grants status at the port of entry. As previously indicated, DHS is providing beneficiaries of an E-2 CNMI petition in the CNMI with a grant of E-2 CNMI

Investor status without requiring that they depart the CNMI. The grant of such status is within DHS' purview. Visa issuance is handled by DOS.

## 2. Visa Issuance

One commenter stated that the Department of State should issue visas in the CNMI and allow dependents to be exempt from applying in person for their E-2 CNMI Investor visas. Another commenter wrote that the E-2 CNMI Investor visa should allow for multiple entries.

DHS cannot address these particular suggestions in this rule. Visa issuance is a function of the Department of State, and thus beyond the scope of this DHS rule. In any case, DHS believes that the concerns about visa issuance and the need for multiple-entry visas are adequately addressed by the waiver provision discussed below.

The Supplementary Information to the proposed rule discussed the fact that E-2 CNMI Investor status could be granted directly to aliens present in the CNMI, unlike aliens abroad seeking that status who first must be issued an E-2 CNMI Investor nonimmigrant visa by the Department of State at a consular post abroad and thereafter seek admission in E-2 CNMI Investor status. See 74 FR 46940; proposed 8 CFR 214.2(e)(23)(vii). The proposed regulatory language, however, was not explicit about how that would be done consistent with the requirement that the alien be admissible to the United States. Thus, in order to give additional assurance and direction on this point to the affected public and to USCIS adjudicators, the final rule clarifies that a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the INA may be granted to an eligible alien seeking an initial grant of E-2 CNMI Investor status from DHS while in the CNMI. See new 8 CFR 214.2(e)(23)(xvi). Such aliens will necessarily lack an E-2 CNMI Investor nonimmigrant visa issued by the Department of State, and are thus inadmissible under section 212(a)(7)(B)(i)(II) of the INA; they also by definition will (unless changing to E-2 CNMI Investor status from another nonimmigrant status under the INA) be aliens present in the United States without admission or parole, and thus inadmissible under section 212(a)(6)(A) of the INA. Therefore, the rule allows for a waiver of those two grounds of inadmissibility for aliens with appropriate documentation.

This waiver provision is based upon the specific language in section 212(d)(3)(A)(ii) that in the case of an alien "in possession of appropriate documents" who is seeking admission

as a nonimmigrant, most grounds of inadmissibility may be discretionarily waived. INA sec. 212(d)(3)(A)(ii), 8 U.S.C. 1182(d)(3)(A)(ii). In the unique situation of the CNMI, considering the express application of the nonimmigrant investor visa provision of the CNRA to aliens lawfully present in the CNMI in a non-INA status and without a previous reason to have needed to obtain a U.S. nonimmigrant visa from the Department of State, and mindful that the stated goal of the CNRA is to mitigate potential adverse consequences of transition to the extent possible, DHS concludes that the "appropriate documentation" requirement for the waiver may be met by aliens who meet the documentary requirements for petition approval described in new 8 CFR 214.2(e)(23)(vi). Those requirements include, but are not limited to, evidence of prior admission in CNMI investor status. As a conforming change, new 8 CFR 214.2(e)(23)(vi) has been titled "Appropriate documents" instead of the previous "Accompanying evidence," and a valid unexpired passport is required as necessary evidence. *Id.*

In the case of spouses and children present in the CNMI who are seeking a derivative grant of E-2 Investor nonimmigrant status based upon a principal investor's approved petition, to satisfy the "appropriate documents" requirement for a section 212(d)(3)(A)(ii) waiver of inadmissibility under INA sections 212(a)(6)(A)(i) and 212(a)(7)(B)(i)(II), the applicant must present (1) a valid unexpired foreign passport and (2) evidence that the spouse or child is lawfully present in the CNMI under section 1806(e) of title 48, U.S. Code (the so-called "grandfather provision" applicable until not later than November 27, 2011 to aliens issued "umbrella permits" or other authorization by the CNMI government prior to November 28, 2009). Such evidence may include evidence of a grant of parole by USCIS or a grant of parole by DHS pursuant to a grant of advance parole by USCIS under DHS policy in furtherance of the grandfather provision (in other words, parole granted to aliens residing in the CNMI as of November 28, 2009, rather than parole granted to arriving aliens for other reasons). See new 8 CFR 214.2(e)(23)(xvi). The intended beneficiaries of this discretionary waiver are spouses and children lawfully residing in the CNMI under the grandfather provision. The reference to parole documents is included in the final rule because of uncertainty about what type of CNMI documentation may

be in the possession of these aliens, since they are not themselves investors and may not have “umbrella permits” or other CNMI-issued work authorization documents. Furthermore, USCIS has used parole and advance parole broadly with respect to lawfully present aliens in the CNMI since the transition date for humanitarian reasons, and thus DHS parole documents may be the best way to identify some members of the “grandfather” provision group.

### 3. Eligible Long-Term CNMI Investors

Six comments opposed or offered suggestions on the proposed list of CNMI investor categories that would be eligible for the E-2 CNMI Investor visa.

#### (a) High Level Managers

One commenter stated that the proposed regulation omits high level managers from the eligible categories of CNMI long-term investors. The commenter also stated that these managers may not be eligible for L visas. If granted upon petition by an employer, the L-1A Intracompany Transferee Executive or Manager nonimmigrant classification enables a U.S. employer to transfer an eligible executive or manager from one of its affiliated foreign offices to one of its offices in the United States. INA sec. 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L); 8 CFR 214.2(l). The commenter suggested that high level managers be eligible for E-2 CNMI Investor status.

The final rule includes all CNMI investors who meet the long-term investor requirement under the CNRA. See new 8 CFR 214.2(e)(23)(iii). If a high-level manager is also an investor eligible for E-2 CNMI Investor status, the individual may obtain that status, but the final rule does not provide E-2 CNMI Investor status to employees who are not the actual investors in the approved investment. The final rule cannot go beyond the statute, which specifically provides that CNMI E-2 Investor status is limited to those investors described in 48 U.S.C. 1806(c), and therefore the comment cannot be adopted. High level managers likely are ineligible for long-term investor status because they are not the actual investors. Although high level managers may be ineligible for the E-2 CNMI Investor visa, they may be eligible for either an H-1B or a transitional worker visa. Thus no change is made in the final rule in response to this comment.

#### (b) Ineligible CNMI Investors

One commenter wrote that hundreds of investors would be left out under the proposed regulation. The comment did not identify which types of investors

would not be included in the proposed regulation. Certain categories used by the CNMI, including the short-term business entry permit, the long-term business entry permit, and the 2-Year Japanese Retiree classification, are not eligible for E-2 CNMI Investor status because these categories do not relate to long-term investors, as required by the CNRA. Based upon a review of CNMI investor classifications, DHS has included all long-term CNMI investors, including retiree investors, in the list of investors eligible for the E-2 CNMI Investor classification. See new 8 CFR 214.2(e)(23)(iii).

#### (c) Grandfathering Long-Term CNMI Investors

One commenter suggested that DHS “grandfather” long-term permit holders for a period of four years without adding new enforcement criteria in order to avoid economic disruption. While grandfathering long-term CNMI permit holders arguably could lessen economic disruption, grandfathering is not an option under the CNRA. Section 702(c) of the CNRA provides for a CNMI investor classification with specific eligibility requirements, to be provided only “upon the application of an alien.” 48 U.S.C. 1806(c)(1). In accordance with the eligibility requirements under the CNRA, the E-2 CNMI Investor visa is available to all CNMI investors with valid long-term investor permits. The final rule has been drafted to minimize the potential adverse economic and fiscal effects by applying standards similar to those used by the CNMI government in approving long-term investors in the CNMI. Thus DHS is not adopting this comment.

#### (d) Minimum Investment for Long-Term Business Investors

Three commenters wrote that the \$150,000 minimum investment requirement for Long-Term Business Investors will exclude investors who were granted Long-Term Business Certificates by the CNMI at a lower investment minimum of \$50,000. In response to these comments, and in view of the fact that the CNMI government has previously granted Long-Term Business Certificates with a minimum investment of \$50,000, the final rule has been amended to include those investors who were granted long-term business certificates with a minimum investment of \$50,000, as long as they continued to hold that status on the transition program effective date. DHS decided to reduce the general minimum investment requirement rather than creating a separate eligible investor category in

order to minimize any potential confusion in the adjudication process. See new 8 CFR 214.2(e)(23)(iii)(A).

This modification of the proposed rule furthers the goal of DHS to minimize the potential adverse economic and fiscal effects of this rulemaking on the CNMI by including all CNMI long-term investor classifications. It is consistent with the CNRA’s references to aliens previously admitted to the CNMI in long-term investor status as eligible for the E-2 CNMI Investor nonimmigrant program.

### 4. Continuous Residence

One commenter wrote that what the commenter described as the six-month residence requirement will be unnecessarily rigorous for those investors who do not reside in the CNMI, proposing instead to reduce the requirement to two months. Another commenter wrote that the residence requirement should apply at the start of the transition period.

The rule does not in fact specifically require six months of residency; rather, the investor is required to have resided in the CNMI since he or she was lawfully admitted as a long-term investor (which, given the passage of time since the last date that such an admission could have taken place under the former CNMI immigration laws—November 27, 2009—is necessarily longer than six months), and to have been present in the CNMI for half the time that he or she has resided in the CNMI. A continuous absence of six months or more may be considered to break the continuity of residence. New 8 CFR 214.2(e)(23)(ii)(D). DHS therefore interprets the comment to raise in general a concern about required residence time, and to request a reduction in the residence time to two months. DHS understands the concern but is unable to agree with the suggestion to reduce the residency requirement to two months or otherwise to modify it substantively. The CNRA requires that the investor have “continuously maintained residence in the Commonwealth under long-term investor status.” Therefore, by definition, the status is unavailable to those who do not reside in the CNMI. While reasonable absence is not incompatible with maintaining residence, DHS does not believe that the lengths of absence suggested by the commenter, amounting essentially to absentee investment, are consistent with the statute. DHS has made a technical amendment to further clarify that the reference to an absence of six months or more as breaking the continuity of

residence means a “continuous” absence of six months or more.

In response to the commenter who wrote that the residence requirement should apply at the start of the transition period (*i.e.*, that DHS should not consider whether the investor resided in the CNMI during the period of status under CNMI law prior to the transition program effective date), DHS does not believe that such a change is consistent with the CNRA’s requirement that the alien have “continuously maintained residence in the Commonwealth under long-term investor status.” 48 U.S.C. 1806(c)(1)(B). By definition, long-term investor status was a status provided prior to the transition program effective date under the laws of the CNMI formerly in effect. *Id.* In the proposed rule, DHS provided as liberal a construction of the CNRA’s residence requirements as it reasonably could do under the statute, including permitting substantial periods of absence from the CNMI not to terminate continuous residence. *See* new 8 CFR 214.2(e)(23)(ii)(D). For these reasons, DHS made no changes in response to this comment, other than the technical clarification identified above.

#### 5. Economic Impact

Some commenters stated that the rule would have a significant negative impact on the CNMI economy. More specifically, these commenters objected that the analysis “substantially understated” the adverse effects of the rule and imposed an “exit requirement” upon investors at the end of the transition period.

DHS disagrees with the commenters’ assertion that this rule represents either an “adverse” economic impact or an “exit requirement.” The commenters may be conflating the economic impact of the CNRA’s imposition of the immigration laws of the U.S. on the CNMI with the actual economic impact of this rule. When measuring the costs of a regulation, USCIS must measure these costs against a baseline. Per guidance from OMB Circular A–4, the baseline should be the best assessment of the way the world would look absent the proposed action. Without this rule in place, foreign investors who cannot qualify for status under the immigration laws of the U.S. would be required by the CNRA to leave the CNMI no later than Nov. 27, 2011. With this rule in place, foreign investors who cannot qualify for status under the immigration laws of the U.S. are allowed to stay until December 31, 2014. Consequently, this rule allows certain foreign investors to remain in the CNMI several years beyond when they would be able to stay

without this rule in place. In this manner, this rule provides a significant economic benefit to the CNMI, and comments expressing concern over the economic impacts of this rule are misplaced.

One commenter wrote that DHS incorrectly determined that the proposed regulation does not constitute a major rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). The commenter believes that this rule should be considered a major rule and therefore subject to disapproval by both Houses of the U.S. Congress and the President of the United States.

DHS does not agree with the commenter. The commenter is apparently citing SBREFA’s Congressional Review Act, 5 U.S.C. 801 (CRA). The CRA delays implementation, and provides a mechanism for congressional disapproval, of regulations designated as “major rules” by the Administrator of the Office of Management and Budget. Such a designation is made where OMB finds the rule has resulted in or is likely to result in (a) an annual effect on the economy of \$100,000,000 or more; (b) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (c) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign based enterprises in domestic and export markets. *See* 5 U.S.C. 804(2). OMB has not determined that this rule is a major rule and, therefore, the CRA does not apply.

One commenter argued that DHS utilized outdated data which led to an understated economic impact on foreign-owned businesses.

As mentioned in the analysis, precise data for the CNMI are difficult to obtain. The 2005 CNMI Household, Income, and Expenditures Survey data, used in the initial analysis, have been updated with the most current publicly-available data from the 2007 Economic Census of Island Areas in the final analysis. The analysis required by the Regulatory Flexibility Act need not produce statistical certainty; the law requires that DHS “demonstrate a ‘reasonable, good-faith effort’ to fulfill [the RFA’s] requirements.” *Ranchers Cattlemen Action Legal Fund v. U.S. Dep’t of Agric.*, 415 F.3d 1078, 1101 (9th Cir. 2005); *see also Associated Fisheries of Maine v. Daley*, 127 F.3d 104, 114–15 (1st Cir. 1997). Also, when conducting a Regulatory Flexibility Analysis, the

RFA requires consideration only of the direct costs of a regulation on a small entity that is required to comply with the regulation. *Mid-Tex Electric Coop. v. FERC*, 773 F.2d 327, 340–43 (DC Cir. 1985) (holding indirect impact of a regulation on small entities that do business with or are otherwise dependent on the regulated entities is not considered in RFA analyses); *see also Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 869 (DC Cir. 2001) (observing that, in passing the RFA, “Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy”).

#### 6. End of Transition Period

Two comments opposed the termination of the E–2 CNMI Investor classification at the end of the transition period.

##### (a) Extension of Transition Period

One commenter objected to the DHS interpretation of the CNRA that any extension of the transition period by the Secretary of Labor will only extend the transitional worker visa and not the CNMI-only investor visa. DHS disagrees with the commenter. The CNRA specifically authorizes the Secretary of Labor only to extend “the provisions of this subsection” beyond December 31, 2014. *See* 48 U.S.C. 1806(d)(5)(A). “This subsection” is subsection (d), which solely addresses the transitional worker program. *Id.* The CNRA does not provide authority to extend subsection 1806(c), the nonimmigrant investor program, past the end of the transition period. *Id.*

##### (b) Expiration of E–2 CNMI Investor Classification

One commenter wrote that CNMI investors will be required to apply for a standard U.S. investor visa in order to remain in the CNMI after the transition period has ended. DHS appreciates the concern but is constrained by the CNRA. Although the Secretary of Labor has the authority to extend the initial 5-year transition period with respect to the transitional worker program, the E–2 CNMI Investor provision cannot be extended, as discussed above. The transition period will end on December 31, 2014. *See* new 8 CFR 214.2(e)(23)(xiv). Investors who seek to remain in the CNMI must apply and be approved for another immigrant or nonimmigrant status on or before December 31, 2014. DHS is aware that some CNMI investors may not qualify for another immigration classification at the end of the transition period;

however, DHS does not have authority to extend the E-2 CNMI Investor classification beyond its statutory limits.

## V. Other Changes

Since DHS issued the proposed rule before the transition program effective date, DHS has made a number of other minor changes to the final rule as a result of the timing of the rule. These include:

### A. Changes of Tense and Other Timing Matters

The proposed rule was written and issued before the transition program effective date. The fact that the final rule is issued after that date requires some wording changes. In particular, as immigration statuses are now a matter of Federal rather than CNMI law, including the Federal "grandfathered" status provided for up to two years past the transition program effective date to aliens based on their status under CNMI immigration law as of that date (*see* 48 U.S.C. 1806(e)), references in the proposed rule that could have been read to imply that CNMI immigration law statuses would continue as such after the transition program effective date have been modified accordingly. *See* new 8 CFR 214.2(e)(23)(i)(A) (changing references to admission under CNMI law and status as of transition date to the past tense); new 8 CFR 214.2(e)(23)(i)(B) (removing reference to continuous residence "under such long-term investor status"). These changes are technical rather than substantive, as the applicant for CNMI E-2 Investor status must still show that he or she has continuously resided in the CNMI since admission by the CNMI as a long-term investor, that he or she had long-term investor status as of the transition program effective date, and that he or she has maintained the investment(s) that formed the basis for that status, as provided by the proposed and the final rule. *See* new 8 CFR 214.2(e)(23)(i)(A), (B), (D); 8 CFR 214.2(e)(23)(ii)(D).

DHS has also modified the reference to investor classifications under CNMI law in new 8 CFR 214.2(e)(23)(iii). The proposed rule referred to CNMI law as in effect on May 8, 2008, the date of the CNRA's enactment. As explained in the Supplementary Information to the proposed rule, the reason for that date was to provide a practicable baseline to the rulemaking. In other words, the proposed rule was drafted in such a way so as to take into account the possibility that the CNMI government could modify its long-term investor classifications under the authority to enact immigration law for the CNMI that it possessed prior to November 28, 2009.

Such an action could have had substantial effects on the rulemaking and the public's ability to provide useful comments on it. However, the CNMI government did not modify its long-term investor classifications. Therefore it is appropriate as a non-substantive technical change to conform date references in the final rule to the transition of immigration authority on November 27, 2009 (the last day of CNMI immigration authority) rather than May 8, 2008.

DHS has also removed the definition of "transition program effective date" that the proposed rule had provided as proposed new 8 CFR 214.2(e)(23)(ii)(G). This definition would have been redundant with the definition of transition program effective date in 8 CFR 1.1(bb) that was provided by the DHS Interim Final Rule, Application of Immigration Regulations to the Commonwealth of the Northern Mariana Islands, published on October 28, 2009, 74 FR 55726. The transition program effective date in this definition is November 28, 2009, the same as had been stated in the proposed rule on the E-2 CNMI Investor program. That definition applies to all USCIS programs in the CNMI.

### B. Reference to Administrative Appeals Office

The final rule modifies the proposed rule's reference to appeals of denials of applications for E-2 CNMI Investor status. *See* new 8 CFR 214.2(e)(23)(ix). Rather than refer solely to the "USCIS Administrative Appeals Office" (AAO), the provision now refers to the AAO "or any successor body." This change is not substantive, but provides flexibility in case of a future USCIS administrative reorganization or the renaming of an office with respect to administrative appeals. DHS has found that overly specific references to particular officials or offices in regulations can lead either to unnecessary future conforming rulemakings, or obsolete regulations, if and when names and responsibilities are reorganized or otherwise modified.

### C. Information Needed for Background Check

The final rule includes the proposed rule's specific authorization to collect biometric information from applicants for E-2 CNMI Investor status, with the applicant paying the biometric services fee. *See* new 8 CFR 214.2(e)(23)(viii). The final rule clarifies that biometric services include reuse of previously provided biometric information (typically in an extension of status scenario), consistent with USCIS's current practice. *Id.*

### D. Fee Waiver Provisions

The final rule makes technical revisions in order to conform the rule to the reorganized format of 8 CFR 103.7 provided in the DHS final rule, "U.S. Citizenship and Immigration Services Fee Schedule," 75 FR 58962 (Sept. 24, 2010). *See* new 8 CFR 103.7(c)(3)(xix). The final rule also clarifies that the authority to waive fees applies to Forms I-539 filed by derivative spouses and children, as well as to Forms I-129 filed by principal applicants. The proposed and final fee rules provided generally for need-based application fee waivers for any applicant for E-2 CNMI Investor status in new 8 CFR 214.23(e)(xv), but the conforming reference in 8 CFR 103.7(c) did not refer specifically to the I-539 as well as the Form I-129.

## VI. Regulatory Requirements

### A. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule, with its impact limited to addressing eligible aliens currently in one of the CNMI long-term investor classifications, will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based companies to compete with foreign-based companies in domestic and export markets.

### B. Executive Order 12866

This rule is a significant regulatory action under Executive Order 12866, section 3(f)(1), Regulatory Planning and Review. Accordingly, the Office of Management and Budget has reviewed this rule.

In accordance with Executive Order 12866, USCIS is required to prepare an assessment of the benefits and costs anticipated to occur as a result of this regulatory action and to provide the assessment to the Executive Office of the President, Office of Management and Budget, Office of Information and Regulatory Affairs. The analysis below is the DHS Economic Analysis as required by the Executive Order.

#### 1. Public Comments on the Estimated Costs and Benefits of the Proposed Rule

DHS invited the public to comment on the extent of any potential economic impact of this rule on small entities, the scope of these costs, or more accurate means for defining these costs. As a result, DHS received a number of

comments related to the regulatory analysis performed for the proposed rule which is addressed above in the preamble of this rule.

(1) *Background.*

The CNMI lies north of Guam, between the Philippines and Japan. S. Rep. No. 110–324, at 2 (2008). The United States captured the islands of the CNMI in World War II and they became a district of the U.S.-administered United Nations Trust Territory of the Pacific Islands. *Id.* Under the Covenant through which the CNMI joined the United States in 1976, the CNMI was exempted from most provisions of U.S. immigration laws and allowed to control its own immigration; however, the Covenant gave the U.S. Congress the authority to modify that arrangement through Federal legislation. *Id.*

The United States enacted the CNRA, amending the level of control the CNMI would have over its immigration system to more closely harmonize it with the laws and procedures applicable to other U.S. jurisdictions, particularly those designed to ensure that border control, worker protections, national security, and homeland security issues are properly addressed. See CNRA section 701, 48 U.S.C. 1801 note.

(2) *Changes made by this rule.*

In order to reduce the opportunity for fraud and to improve homeland security, this rule requires foreign investors who wish to reside in the CNMI to reapply every two years using USCIS Form I–129, Petition for a Nonimmigrant Worker. Requiring renewal every two years will help USCIS make sure the investor has maintained eligibility and provided updated biometrics. The CNRA generally extends Federal control of immigration in the CNMI to address national security and homeland security issues, and the requirement for renewal within this period is consistent with current practice for non-CNMI E–2 treaty investor nonimmigrants. See CNRA section 701 (48 U.S.C. 1801 note).

However, USCIS is aware of and sensitive to the potential economic impact of new Federal immigration requirements on the CNMI economy, and this rule's requirements have been developed with that in mind. According to an economic study performed by the Northern Marianas College, employment grew in the CNMI by 12.7 percent annually between 1980 and 1995, because of expansion of the garment and tourism sectors.<sup>2</sup> During that time, the

garment and tourism industries accounted for 85 percent of the CNMI economy.<sup>3</sup> Recently, economic conditions have changed dramatically for these two CNMI industries. As a result of changes in World Trade Organization agreements, the apparel industry in the CNMI was faced with greater international competition. Ultimately, this led to a decline in the value of CNMI textile exports to the United States, from \$1.1 billion in 1998 to \$317 million in 2007.<sup>4</sup> The number of licensed apparel manufacturers dropped from 34 to six in 2008.<sup>5</sup> The remaining three garment factories closed or suspended their operations in early 2009.<sup>6</sup>

The CNMI tourism industry also has been in decline in recent years. The terrorist attacks on the United States on September 11, 2001; the Severe Acute Respiratory Syndrome (SARS) epidemic which began in Asia in 2003 and led to the death of 774 people worldwide; the downturn in many Asian economies; changes in airline service; and other concerns have reduced the number of tourists traveling to the CNMI from 736,117 in 1996 to 389,345 in 2007.<sup>7</sup> Because of the decline of the CNMI economy, USCIS has sought to minimize the potentially negative effects of implementing the CNRA, while recognizing that Federal oversight of CNMI immigration is necessary to reduce fraud, assure worker protections, and ensure U.S. homeland security.

(3) *Alternatives considered.*

USCIS considered a narrow construction for implementation of the CNMI-only nonimmigrant investor visa as required by section (6)(c) of the Covenant Act, as added by section 702 of the CNRA. Possible constructions analyzed included limiting which investor-based categories under current CNMI law would be permitted to become CNMI E–2 Investors. Specifically, DHS discussed options wherein only CNMI perpetual foreign investors would be permitted, as well as options wherein only long-term business permit holders or a combination of only perpetual foreign

investors and long-term business permit holders would be permitted. However, in light of the potential adverse economic impact of such limitations and the goal of limiting adverse economic impact on the CNMI, these narrower options were not chosen. USCIS chose the broadest interpretation possible, whereby long-term business permit holders, foreign investors and retiree investors (other than investors under a short term program not judged to qualify under the CNRA) would be eligible for CNMI E–2 Investor status, because such an interpretation is most in keeping with the mandate to limit adverse economic impact.

(4) *The total cost of this regulation to investors.*

(a) *Fees.*

This regulation will require all foreign investors wishing to remain in the CNMI to reapply for investor registration every two years using USCIS Form I–129, Petition for a Nonimmigrant Worker. The current application fee for this form is \$325. Additionally, this rule will require CNMI investors to provide their biometrics and imposes a biometrics fee, currently \$85. Thus, the total current fees for each initial and biennial registration are \$410 (\$325 + \$85). Fee waivers for inability to pay are available.

(b) *Paperwork burden.*

It takes approximately 2.75 hours to complete Form I–129, according to the instructions to the form. Since most of the respondents under this rule will be business investors, their average hourly costs will be much higher than the average hourly costs of the average salaried worker. Thus, for the purpose of this analysis, USCIS based hourly costs on the average hourly salary for “chief executives” from the Department of Labor’s May 2008 National Occupational Employment and Wage Estimates to determine the cost associated with the hours necessary to complete the Form I–129. The hourly wage for chief executives is \$77.13. If we multiply \$77.13 by 1.4 to account for fringe benefits, the hourly cost is \$107.98. Multiplying \$107.98 by the 2.75 hours required to fill out the I–129 results in paperwork burden cost per form of \$296.95 (rounded up to \$297). However, because of generally lower wage levels in the CNMI and because some CNMI investors are retirees, this is a maximum cost estimate and the likely actual cost to investors is expected to be lower.

Additionally, if a foreign investor wishes to bring along his or her family they will have to complete Form I–539, Application to Extend/Change Status.

<sup>3</sup> *Id.*

<sup>4</sup> CNMI Comprehensive Economic Development Strategic Plan 2009–2014. CNMI CEDS Commission Updated 1/29/09.

<sup>5</sup> *Id.*

<sup>6</sup> See Walt F. J. Goodridge, *The Last Garment Factory is Closing*, Saipan Tribune (Jan. 14, 2009) (available at <http://www.saipantribune.com/newsstory.aspx?cat=3&newsID=86872>).

<sup>7</sup> GAO, *Commonwealth of the Northern Mariana Islands: Managing Economic Impact of Applying U.S. Immigration Law Requires Coordinated Federal Decisions and Additional Data*, No. GAO–08–791 (Aug. 4, 2008) (2008 GAO Rep.), available at <http://www.gao.gov/new.items/d08791.pdf>.

<sup>2</sup> Northern Marianas College, Business Development Center, *An Economic Study of the Commonwealth of the Northern Mariana Islands* (Saipan, MP: Northern Marianas College 1999).

The current application fee for this form is \$290 and this form takes approximately 45 minutes to complete according to the form instructions. If the foreign investor fills out this form himself, the paperwork cost to complete this form is  $\$107.98 \times .75$ , or \$80.99 (rounded up to \$81) per investor.

(c) *Cost incurred per foreign investor.*

Adding the estimated paperwork burden cost for completing Form I-129 of \$297 to the \$410 current application and biometrics fees, the total cost incurred for each CNMI foreign investor to submit the I-129 as required under this rule every two years is \$707. Since re-registration is only required every other year, annualized costs to foreign investors are \$354 (\$707/2).

In addition, the \$81 paperwork cost of completing the I-539 plus the \$290 application fee equals a total of \$371. In this case, Form I-539 is being used to grant initial status and to extend status every two years. This results in an annualized cost of \$186 (\$371/2) for foreign investors to complete and submit Form I-539 every two years for their family.

In addition, spouses and children who wish to receive the same status as their foreign investor spouse or parent may be required to provide biometrics at a current fee of \$85 per person.

According to a recent GAO report, the average family in the Northern Mariana Islands includes two children.<sup>8</sup>

However, biometrics are only required for children between the ages of 14 and 21. Therefore, for purposes of analysis, we assume that each foreign investor's family will be required to provide biometric fees for one spouse and only one child for an additional cost of \$170. This will be required only every other year for an average annualized fee of \$85 (\$170/2). Adding this fee to the above paperwork costs and fees will lead to an annualized cost per investor family of \$625 (\$354 + \$186 + \$85).

The above annual estimates represent the costs incurred by those investors with a spouse and one child between the ages of 14 and 21. For those investors with a spouse and more than one child between the age of 14 and 21, these estimates may be too low. For those investors, particularly those who are retired, these estimates may be too high. Lack of data on foreign investors prevents us from further refining our estimates.

Under the CNMI government's former immigration authority, foreign investors were charged \$1,000 every two years or \$500 per year by the CNMI government. CNMI fee setting methodology is

unknown to USCIS. For this analysis, it is assumed that the CNMI fees resembled U.S. Government agency service and user fees in that they were set at the amount necessary to recover costs in accordance with Office of Management and Budget guidance, and were not intended to generate a profit. Thus, while fees collected by the CNMI for the foreign investor program will no longer be collected by the CNMI Government, the cost of administering that program will not be incurred, resulting in a neutral financial effect. To the extent that the CNMI government used such fees to raise revenue, such excess will be lost as a result of this rule.

This final rule replaces the \$1,000 fee formerly charged every two years by the CNMI government under the legal authority it possessed prior to the transition program effective date. Therefore, this rule will raise the foreign investor's annualized direct cost by \$125 (\$625-\$500), through the end of the transition period in 2014.<sup>9</sup> USCIS did not estimate the paperwork burden associated with completing the requisite CNMI application forms. Consequently, the \$125 annualized direct cost for foreign investors is most likely overstated.

Additionally, this rule provides that spouses of foreign investors are eligible to apply for employment authorization documents. This accommodation is a significant qualitative benefit for an investor's spouse who needs or wants to work while living in the CNMI. If the spouse chooses to take advantage of this benefit, he or she must file a Form I-765, Application for Employment Authorization, which requires a current fee of \$380 and 3.42 hours to complete. Since the occupation of these spouses is unknown, we use fully burdened minimum wage of \$10.15 to estimate the opportunity cost of completing the form at \$34.71.<sup>10</sup> DHS is unable to accurately estimate the number of investors who have spouses that will request employment authorization, although some CNMI E-2 spouses are likely to take advantage of this opportunity.

(5) *Number of filings expected.*

USCIS projects that most foreign investors plan to re-register their status, although a small number of foreign

investors may be found ineligible. For the purpose of this analysis, we assume that all current investors will choose to re-register. USCIS does not believe the relatively low additional annualized cost of \$125 to foreign investors will cause foreign investors not to re-register.

In 2006-2007, there were 448 long-term business entry permit holders and 30 foreign investor entry permit holders and retiree investor permit holders, totaling 478, or approximately 500 foreign registered investors.<sup>11</sup> In its recent report, the GAO estimates that the number of active and valid long-term business and perpetual foreign investor entry permits totaled 506 in 2008. In another measure, the GAO suggests that 448 businesses were associated with long-term business entry permits and additional 56 perpetual foreign entry permits were associated with 30 businesses. This analysis assumes that 500 foreign investors would be affected because of the constantly changing economic environment in CNMI. The annualized costs and fees throughout the transition period, as discussed above, would be an additional \$125 per investor for a total annualized direct cost of \$62,500 ( $\$125 \times 500$ ) for all CNMI foreign investors.

Foreign investors who travel to and from the CNMI will now be required to have visas. USCIS, however, is not requiring foreign investors who travel to the United States to have visas in this rule, as that requirement will exist irrespective of this rule. Thus the cost to obtain a visa is not a cost of this rule but rather the cost of the CNRA, and the application of Federal immigration laws in the CNMI.

(6) *The cost to the Federal Government.*

There are no additional costs to the Federal Government, because USCIS is generally a fee funded agency. USCIS will recoup its costs through the collection of Form I-129 and Form I-539 fees.

(7) *Effects after 2014.*

(a) *The CNRA and this rule.*

The CNRA was intended to ensure effective border control procedures and to properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI, and to maximize the CNMI's potential for future economic and business growth under U.S. immigration law. This rule establishes temporary regulatory provisions to transition the CNMI to U.S. immigration law and to mitigate harm to the CNMI economy before investors in the CNMI are required to obtain U.S. immigrant or

<sup>9</sup>This estimate considers the added time burden costs of the new USCIS paperwork but includes no similar cost savings from eliminating the paperwork burden associated with the CNMI's current program. Thus actual costs savings are likely to be greater than estimated here.

<sup>10</sup>Minimum wage totals  $\$7.25/\text{hour} \times 1.4$  (burdened rate) =  $\$10.15/\text{hour}$ . See <http://www.dol.gov/whd/flsa/index.htm>.  $\$10.15/\text{hour} \times 3.42 \text{ hours} = \$34.71$ .

<sup>11</sup>2008 GAO Rep., *supra* note 7.

<sup>8</sup>2008 GAO Rep., *supra* note 7.



nonimmigrant visa classifications. The CNMI investor program established by this rule will last until the end of the transition program, December 31, 2014, by which time the CNMI E-2 Investor must apply and be approved for another immigrant or nonimmigrant status under the INA. It is assumed that the data provided by the CNMI and other interested parties, gathered by Congress, and considered in development and passage of the CNRA showed significant differences in the nonimmigrant visa programs under the INA and the visa and certificate programs offered by the CNMI. Current foreign workers and investors in the CNMI would mostly not be eligible for a status under the INA, or else legislation of a transition period and temporary mitigating regulations as proposed under this rule would be unnecessary. Thus, while one stated goal of the CNRA is the economic and business growth of the CNMI, by providing a mitigating transition program, the legislation implies that goal will require at least through 2014 to be achieved. This rule will operate during that time.

(b) Effect on investors.

This rule links investment levels to those required for CNMI status for a long-term business investor at \$50,000; a perpetual foreign investor at \$100,000, in an aggregate approved investment in excess of \$2,000,000, or a minimum of \$250,000 in a single investment; and, a retiree investor at \$100,000 in Saipan, \$75,000 in Tinian or Rota, or \$150,000 elsewhere in the CNMI. To qualify as a U.S. E-2 treaty investor with nonimmigrant status, the applicant 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 the treaty investor status ends. In addition, the treaty investor must be a national 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 treaty provisions.

There is no accurate way for USCIS to estimate for what other visa or nonimmigrant status the 500 foreign registered investors may qualify. However, a review of the CNMI eligibility criteria and anecdotal evidence indicates that many of them would not meet the minimum financial investment necessary to be eligible for U.S. E-2 status currently. Further, the retiree investor permit holders do not qualify as U.S. E-2 Investors in their current status, notwithstanding that they may have access to or be able to acquire enough capital to invest and

qualify. Finally, according to the GAO Report, about 18 percent of foreign investors in the CNMI are from countries with which the United States does not have a treaty of friendship, commerce, or navigation.<sup>12</sup> Thus of the 500 foreign registered investors in the CNMI, many of them will need to spend the transition period making themselves eligible for another status under the INA. Anecdotal evidence indicates that at least a few of the affected investors from countries without treaties of friendship, commerce or navigation with the United States may be eligible for L-1A executive or managerial visas; thus the possibility exists that some of these investors may be able to stay in the CNMI in another status after the end of the transition program on December 31, 2014.<sup>13</sup>

(c) Effect on the CNMI economy of the CNRA.

USCIS has not analyzed the precise effect of increased or decreased investments in the CNMI caused by the CNRA. Nevertheless, as indicated before, the differences between the CNMI foreign investor programs before the CNRA took effect and those available afterward under the INA are certain to change the mix of foreign investors eligible for a new status and maintaining a presence in the CNMI after the end of the transition program on December 31, 2014. An immigrant investor program, or immigration through investment, seeks to promote economic growth through increased export sales, improved regional productivity, creation of new jobs, and increased domestic capital investment. The presumption is that the investment opportunity coupled with the opportunity to live in the country offering the program offers advantages, or at least appears to offer advantages, to the investor over investments and residence in his or her country of origin. Assuming that these goals are generally achieved, withdrawal of the alien's investment without substitution of a substantially similar investment would, at the least, end what positive results had been started, and, at the worst, have the reverse effect and retard growth, sales, productivity, jobs, and investment. Thus, if a substantial number of the 500 foreign investors in the CNMI are required by the CNRA to leave, and their investments are not maintained or replaced by another equal or greater investment, then it will likely have a negative impact on the CNMI

economy. This rule is intended to mitigate that impact.

(8) *Benefits.*

CNMI administration of an immigration system outside U.S. immigration law led to visa system abuses in the CNMI. Sen. Rep. No. 110-324, at 3 (2008). Given this abuse, there are concerns not only for the well being of foreign employees working in the CNMI, but also for the potential abuse of the visa system by those seeking to illegally emigrate from the CNMI to Guam or elsewhere in the United States. *Id.* at 3-5. This reduces the integrity of the U.S. immigration system by increasing the ease by which aliens may unlawfully enter the United States through the CNMI. Federal oversight and regulation of CNMI foreign investors should help reduce abuse by foreign investors in the CNMI and the opportunity for aliens to exploit the CNMI as an entry point into the United States. *Id.* at 2, 4-5. The Federal Government's assumption of responsibility for immigration enforcement in the CNMI reduces the opportunity for abuse of the CNMI immigration regime for illegal access to the United States.

(9) *Conclusion.*

This rule responds to a Congressional mandate that requires the Federal Government to assume responsibility for all immigration to the CNMI by foreign investors, whether temporary or permanent and to implement the special E-2 investor provisions of the CNRA in the CNMI. This rule will implement this mandate and thus contribute to U.S. homeland security. USCIS concludes that the alternative chosen for this rule represents the most cost-effective means of implementing its Congressional mandate while having the least possible negative impact on the CNMI economy.

*C. Regulatory Flexibility Act—Final Regulatory Flexibility Analysis*

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104-121, requires Federal agencies to consider the impact of their regulatory proposals on small entities whenever an agency must publish a notice of proposed rulemaking. Recently, new data concerning the CNMI were made available by the U.S. Census Bureau. DHS also examined a recent U.S. Department of the Interior (DOI) report; however the data in that report did not apply to this analysis. DHS did incorporate some of the overall

<sup>12</sup> 2008 GAO Rep., *supra* note 7.

<sup>13</sup> See INA section 101(a)(15)(L), 8 U.S.C. 1101(a)(15)(L); 8 CFR 214.2(l).

DOI conclusions later in this analysis.<sup>14</sup> Accordingly, DHS has updated this analysis to reflect the most recent information. In the Initial Regulatory Flexibility Analysis (IRFA), DHS primarily utilized data from the 2005 CNMI Household, Income, and Expenditures Survey (HIES) to analyze the impacts on small entities. Since 2005, the CNMI economy has experienced significant changes; new data from the 2007 Economic Census of Island Areas show important differences in the labor force and business establishments.<sup>15</sup>

1. Objectives of, and Legal Basis for, the Final Rule

On May 8, 2008, President Bush signed into law the Consolidated Natural Resources Act of 2008 (CNRA), Public Law 110–229. Title VII of the CNRA extends U.S. immigration laws to the CNMI with transition provisions unique to the CNMI. The stated purpose of the CNRA is to ensure effective border control procedures, to properly address national security and homeland security concerns by extending U.S. immigration law to the CNMI, and to

maximize the CNMI’s potential for future economic and business growth. 48 U.S.C. 1801 note.

The law also contains several CNMI-specific provisions affecting foreign workers and investors during the transition period. 48 U.S.C. 1806(b), (c). This rule establishes procedures for foreign investors in the CNMI to obtain nonimmigrant status within the E–2 treaty investor classification, in accordance with the CNRA. Additionally, this rule is intended to provide a smooth transition for existing CNMI investors and to mitigate potential adverse consequences of the CNRA to the CNMI.

2. Significant Issues Raised by Public Comments in Response to the IRFA

DHS received a number of comments relating to the economic analysis. These comments have been addressed in section IV(B)(5) (Economic Impact), above.

3. Description and Estimate of the Number of Small Entities to Which the Rule Will Apply

a. Regulated entities.

This rule will directly affect foreign investors in the CNMI. As previously stated, foreign investors in the past could apply for the following CNMI entry permits: Foreign investor permits, long-term business permits, and retiree investor permits. These investors are small business owners and this rule does not regulate small nonprofits or small governmental jurisdictions.

b. Number of small entities to which the final rule will apply.

This analysis is most concerned with the number of business establishments owned by foreign investors, the number of workers they employ, and the revenue levels of those entities. This analysis is based on data from the 2007 Economic Census of Island Areas as we believe they are the best data publicly available.<sup>16</sup>

According to the 2007 Economic Census of Island Areas, there were 1,191 business establishments in the CNMI, and 365 of these establishments were owned by foreign investors.<sup>17</sup> Table 1 outlines the pertinent statistics on these foreign-owned businesses.

TABLE 1—FOREIGN-OWNED BUSINESSES IN THE CNMI

Industry name (NAICS)	# Est.	# Emp.	Avg emp.	Avg sales/receipts	SBA guideline
Total CNMI (all sectors & est.)	1191	22,622	19	\$1,078,243	
Total Foreign-owned Est	365	9,663	26	1,149,214	
<b>Foreign-owned by sector</b>					
Construction (23)	17	165	10	379,941	\$7 to \$33 million.
Manufacturing (31–33)	23	3,121	136	2,831,696	500–1,500 employees.
Wholesale (42)	18	168	9	1,104,444	100 employees.
Retail (44–45)	77	785	10	660,727	\$7 to \$29 million.
Real Estate (53)	29	103	4	178,517	\$7 to \$25.5 million.
Prof Services (54)	16	88	6	169,063	\$4.5 to \$27 million.
Admin/Support Services (56)	23	245	11	414,043	\$4.5 to \$35.5 million.
Educational Services (61)	28	83	3	76,500	\$7 to \$35.5 million.
Arts & Entertain (71)	20	268	13	482,850	\$7 million.
Accomm. & Food Services (72)	68	2,661	39	1,367,735	\$7 to \$20.5 million.
Other Services (81)	25	256	10	259,280	\$7 to \$25 million.

Table 1 illustrates the fact that all foreign-owned businesses in the CNMI are small entities by comparing the average number of employees per establishment or the average receipts/sales/revenue per establishment to the size guidelines outlined by the Small Business Administration.

It is important to note that the manufacturing numbers reported in Table 1 are certainly changed today. The 2007 data indicated that the apparel sector of the manufacturing industry in the CNMI accounted for 42% of the entire manufacturing industry. Now that apparel manufacturing in the CNMI has ceased operations, we estimate that 10

foreign-owned apparel manufacturing establishments have ceased operations and this results in a decrease of about 1,311 employees.<sup>18</sup> One promising development in the CNMI was highlighted by a recent Department of the Interior study that reported a number of the industries listed above are now forecasting employment growth

<sup>14</sup> U.S. Department of the Interior, The Secretary of the Interior, *A Report on the Alien Worker Population in the Commonwealth of the Northern Mariana Islands*, Washington, DC, April 2010, available at [http://www.doi.gov/oia/reports/042810\\_FINAL\\_CNMI\\_Report.pdf](http://www.doi.gov/oia/reports/042810_FINAL_CNMI_Report.pdf).

<sup>15</sup> The 2007 Economic Census of Island Areas was released by the Census Bureau on September 1,

2009. The 2007 Economic Census results for the CNMI are available at [http://factfinder.census.gov/servlet/FindEconDatasetsServlet?\\_caller=geoselect&\\_ts=291885681264](http://factfinder.census.gov/servlet/FindEconDatasetsServlet?_caller=geoselect&_ts=291885681264).

<sup>16</sup> The 2007 Economic Census data for the CNMI is available at [http://factfinder.census.gov/servlet/FindEconDatasetsServlet?\\_caller=geoselect&\\_ts=291885681264](http://factfinder.census.gov/servlet/FindEconDatasetsServlet?_caller=geoselect&_ts=291885681264).

<sup>17</sup> This number is smaller than the 500 long-term permit holders identified by the GAO report referenced earlier. This likely is due to data reporting restrictions of the Census Bureau.

<sup>18</sup> 23 est. × 42% = 9.66 fewer establishments and 3,121 employees × 42% = 1,311 fewer employees.

by 2014.<sup>19</sup> As of 2007, the foreign-owned small businesses that will be impacted by this rule employed about 43% of workers in the CNMI. This segment certainly represents a substantial number of employers and business establishments in the CNMI.

#### 4. Reporting, Recordkeeping and Other Compliance Requirements

##### a. *Significance of Impact.*

As discussed above, the average petitioner will be required to incur annualized fee and paperwork burden costs of \$625 (\$354 for investors + \$186 for family members' I-539 + \$85 for biometrics), and the CNMI government will not charge its \$1,000 fee every two years. Therefore, at most this rule will raise the foreign investor's annualized costs by \$125 (\$625 – \$500) each year of the transition. The increased annualized cost for each investor due to this rule represents less than 0.01087% of average annual receipts in the CNMI for foreign owned establishments (see Table 1 for average sales/receipt information).<sup>20</sup> Therefore, USCIS believes that this additional fee and paperwork burden should have little to no impact on the decision of foreign investors to remain in the CNMI.

##### b. *Paperwork Reduction Act—new reporting requirement.*

Foreign investors who wish to reside in the CNMI will have to apply in the first year and reapply every two years using USCIS Form I-129, Petition for a Nonimmigrant Worker. This is a new requirement within the meaning of the Paperwork Reduction Act. As stated above, Form I-129 results in paperwork burden cost per form of \$297. Additionally, a foreign investor who brings along his or her family will have to complete Form I-539, Application to Extend/Change Status. The paperwork cost to complete this form is \$81. If the spouse of a foreign investor chooses to seek employment, he or she must file a Form I-765, Application for Employment Authorization, which has a paperwork burden estimated at \$35.47 for the spouses taking advantage of this option. This rule does not require professional skills for the preparation of reports or records.

#### 5. Steps Taken To Minimize Significant Adverse Economic Impacts on Small Entities

Throughout the development of the rule, DHS attempted to gather information regarding the economic impact of the rule's requirements on foreign investors. DHS considered limiting the categories of investors under previous CNMI law who would be permitted to become CNMI E-2 Investors. However, in light of the goal of limiting adverse economic impact on the CNMI, USCIS chose the broadest interpretation possible, whereby long-term business permit holders, foreign investors and retiree investors (other than investors under a short term program not judged to qualify under the CNRA) would be eligible for CNMI E-2 Investor status, because such an interpretation is most in keeping with the mandate to limit adverse economic impact.

Since all of the entities directly affected by this rule are small, this rule provides no different requirements or any exemption from coverage of the rule based on entity size. It should be noted, however, that small entities may request a waiver of their fees under this rule, if they do not have the ability to pay.

Commenters recommended a few alternatives to the proposed rule. These include: Extension of transition period; elimination of the \$150,000 minimum investment requirement; and change in the definition of continuous residence.

##### (a) *Extension of Transition Period:*

One commenter objected to the DHS interpretation of the CNRA that any extension of the transition period by the Secretary of Labor will only extend the transitional worker visa and not the CNMI-only investor visa. As previously discussed, the commenter's interpretation of the CNRA is incorrect. Therefore, DHS is unable to adopt this alternative approach.

##### (b) *Minimum Investment for Long-Term Business Investors:*

Three commenters wrote that the \$150,000 minimum investment requirement for Long-Term Business Investors will exclude investors who were granted Long-Term Business Certificates by the CNMI at a lower investment minimum of \$50,000. As previously discussed, DHS found that these comments had merit. The final rule therefore has been amended to include those investors who were granted long-term business certificates with a minimum investment of \$50,000, as long as they continued to hold that status on the transition program effective date and are otherwise eligible.

This modification of the proposed rule furthers the goal of DHS and the

intent of Congress to minimize potential adverse economic and fiscal effects of the CNRA on the CNMI and small entities by including all CNMI long-term investor classifications.

##### (c) *Continuous Residence:*

One commenter wrote that the proposed rule's residence requirement will be unnecessarily rigorous for those investors who do not reside in the CNMI and proposed reducing the requirement to two months. Another commenter wrote that the residence requirement should apply at the start of the transition period. As previously discussed, DHS does not believe that adopting these suggestions would be consistent with the CNRA's continuous residence requirement.

#### D. Executive Order 13132

Executive Order 13132 requires each Federal agency to develop a process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have Federalism implications." The phrase "policies that have Federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." USCIS has considered the Federalism implications of this rule under the Executive Order.

Executive Order 13132 is based upon the role and authorities of "States" under the U.S. Constitution. The CNMI is not a "State" as defined by section 1(b) of Executive Order 13132 to include "the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States." Therefore, USCIS has determined that no actions are required under Executive Order 13132. USCIS has, however, solicited the input of the CNMI government and other CNMI stakeholders on issues relating to treatment of investors under Public Law 110-229.

#### E. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a regulatory action. The information collection requirements contained in this rule, Form I-129, Form I-539, and Form I-765, have been previously approved for use by OMB. The OMB

<sup>19</sup> U.S. Department of the Interior, *A Report on the Alien Worker Population in the Commonwealth of the Northern Mariana Islands*, Wash., DC (Apr. 2010), available at [http://www.doi.gov/oia/reports/042810\\_FINAL\\_CNMI\\_Report.pdf](http://www.doi.gov/oia/reports/042810_FINAL_CNMI_Report.pdf).

<sup>20</sup>  $\$125/\$1,149,214$  (average annual receipts/revenue of foreign-owned establishments) = 0.01087%.

control numbers for these collections are 1615-0009, 1615-0003, and 1615-0040 respectively. The evidentiary requirements contained in this rule at 8 CFR 214.2(e)(23)(vi) are not new requirements and are currently contained on the instructions to Form I-129. Accordingly, these evidentiary requirements will not add to the burden for completing Form I-129 and Supplement E.

This final rule requires minor changes to:

- Form I-539, Application to Extend/Change Nonimmigrant Status (OMB Control No. 1615-0003) and
- Form I-129, Petition for Nonimmigrant Worker (OMB Control No. 1615-0009).

Accordingly, USCIS has prepared OMB 83-Cs (correction worksheets) for both these forms to reflect non-substantive changes, and has submitted them to OMB with this final rule.

It is estimated that there will be a slight increase in the number of filings of Form I-129 (due to the new requirement to have foreign investors who wish to reside in the CNMI submit Form I-129) and Form I-539. However, the current OMB-approved annual burden hours are sufficient to encompass the filings added as a result of this rule.

### List of Subjects

#### 8 CFR Part 103

Administrative practice and procedure, Authority delegations (Government agencies), Freedom of information, Immigration, Privacy, Reporting and recordkeeping requirements, Surety bonds.

#### 8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Foreign officials, Health professions, Reporting and recordkeeping requirements, Students.

#### 8 CFR Part 274a

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

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

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

- 1. The authority citation for part 103 is revised to read as follows:

**Authority:** 5 U.S.C. 301, 552, 552a; 8 U.S.C. 1101, 1103, 1304, 1356; 31 U.S.C. 9701; 48 U.S.C. 1806; Public Law 107-296, 116 Stat. 2135 (6 U.S.C. 1 *et seq.*), E.O. 12356,

47 FR 14874, 15557, 3 CFR, 1982 Comp., p. 166; 8 CFR part 2.

- 2. Section 103.7 is amended by:

- a. Removing the word “and” at the end of paragraph (c)(3)(xvii);
- b. Removing the “.” at the end of paragraph (c)(3)(xviii) and adding a “ , and” in its place; and by
- c. Adding a new paragraph (c)(3)(xix) to read as follows:

#### § 103.7 Fees.

\* \* \* \* \*

(c) \* \* \*

(3) \* \* \*

(xix) Petition for Nonimmigrant Worker (Form I-129) or Application to Extend/Change Nonimmigrant Status (Form I-539), only in the case of an alien applying for E-2 CNMI Investor nonimmigrant status under 8 CFR 214.2(e)(23).

\* \* \* \* \*

### PART 214—NONIMMIGRANT CLASSES

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

**Authority:** 8 U.S.C. 1101, 1102, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282, 1301-1305 and 1372; sec. 643, Pub. L. 104-208, 110 Stat. 3009-708; Public Law 106-386, 114 Stat. 1477-1480; section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901 note, and 1931 note, respectively; 48 U.S.C. 1806; 8 CFR part 2.

- 2. Section 214.2 is amended by adding a new paragraph (e)(23) to read as follows:

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

\* \* \* \* \*

(e) \* \* \*

(23) *Special procedures for classifying foreign investors in the Commonwealth of the Northern Mariana Islands (CNMI) as E-2 nonimmigrant treaty investors under title VII of the Consolidated Natural Resources Act of 2008 (Pub. L. 110-229), 48 U.S.C. 1806.*

(i) *E-2 CNMI Investor eligibility.* During the period ending on January 18, 2013, an alien may, upon application to the Secretary of Homeland Security, be classified as a CNMI-only nonimmigrant treaty investor (E-2 CNMI Investor) under section 101(a)(15)(E)(ii) of the Act if the alien:

(A) Was lawfully admitted to the CNMI in long-term investor status under the immigration laws of the CNMI before the transition program effective date and had that status on the transition program effective date;

(B) Has continuously maintained residence in the CNMI;

(C) Is otherwise admissible to the United States; and

(D) Maintains the investment or investments that formed the basis for such long-term investment status.

(ii) *Definitions.* For purposes of paragraph (e)(23) of this section, the following definitions apply:

(A) *Approved investment or residence* means an investment or residence approved by the CNMI government.

(B) *Approval letter* means a letter issued by the CNMI government certifying the acceptance of an approved investment subject to the minimum investment criteria and standards provided in 4 N. Mar. I. Code section 5941 *et seq.* (long-term business certificate), 4 N. Mar. I. Code section 5951 *et seq.* (foreign investor certificate), and 4 N. Mar. I. Code section 50101 *et seq.* (foreign retiree investment certificate).

(C) *Certificate* means a certificate or certification issued by the CNMI government to an applicant whose application has been approved by the CNMI government.

(D) *Continuously maintained residence in the CNMI* means that the alien has maintained his or her residence within the CNMI since being lawfully admitted as a long-term investor and has been physically present therein for periods totaling at least half of that time. Absence from the CNMI for any continuous period of more than six months but less than one year after such lawful admission shall break the continuity of such residence, unless the subject alien establishes to the satisfaction of DHS that he or she did not in fact abandon residence in the CNMI during such period. Absence from the CNMI for any period of one year or more during the period for which continuous residence is required shall break the continuity of such residence.

(E) *Public organization* means a CNMI public corporation or an agency of the CNMI government.

(F) *Transition period* means the period beginning on the transition program effective date and ending on December 31, 2014.

(iii) *Long-term investor status.* Long-term investor status under the immigration laws of the CNMI includes only the following investor classifications under CNMI immigration laws as in effect on or before November 27, 2009:

(A) *Long-term business investor.* An alien who has an approved investment of at least \$50,000 in the CNMI, as evidenced by a Long-Term Business Certificate.

(B) *Foreign investor.* An alien in the CNMI who has invested either a minimum of \$100,000 in an aggregate approved investment in excess of \$2,000,000, or a minimum of \$250,000 in a single approved investment, as evidenced by a Foreign Investment Certificate.

(C) *Retiree investor.* An alien in the CNMI who:

(1) Is over the age of 55 years and has invested a minimum of \$100,000 in an approved residence on Saipan or \$75,000 in an approved residence on Tinian or Rota, as evidenced by a Foreign Retiree Investment Certification; or

(2) Is over the age of 55 years and has invested a minimum of \$150,000 in an approved residence to live in the CNMI, as evidenced by a Foreign Retiree Investment Certificate.

(iv) *Maintaining investments.* An alien in long-term investor status under the immigration laws of the CNMI is maintaining his or her investments if that alien investor is in compliance with the terms upon which the investor certificate was issued.

(v) *Filing procedures.* An alien seeking classification under E-2 CNMI Investor nonimmigrant status must file an application for E-2 CNMI investor nonimmigrant status, along with accompanying evidence, with USCIS in accordance with the form instructions before January 18, 2013. An application filed after the filing date deadline will be rejected.

(vi) *Appropriate documents.* Documentary evidence establishing eligibility for E-2 CNMI nonimmigrant investor status is required.

(A) Required evidence of admission includes a valid unexpired foreign passport and a properly endorsed CNMI admission document (*e.g.*, entry permit or certificate) reflecting lawful admission to the CNMI in long-term business investor, foreign investor, or retiree foreign investor status.

(B) Required evidence of long-term investor status includes:

(1) An unexpired Long-Term Business Certificate, in the case of an alien in long-term business investor status.

(2) An unexpired Foreign Investment Certificate, in the case of an alien in foreign investor status.

(3) A Foreign Retiree Investment Certification or a Foreign Retiree Investment Certificate, in the case of an alien in retiree investor status.

(C) Required evidence that the long-term investor is maintaining his or her investment includes all of the following, as applicable:

(1) An approval letter issued by the CNMI government.

(2) Evidence that capital has been invested, including bank statements showing amounts deposited in CNMI business accounts, invoices, receipts or contracts for assets purchased, stock purchase transaction records, loan or other borrowing agreements, land leases, financial statements, business gross tax receipts, or any other agreements supporting the application.

(3) Evidence that the applicant has invested at least the minimum amount required, including evidence of assets which have been purchased for use in the enterprise, evidence of property transferred from abroad for use in the enterprise, evidence of monies transferred or committed to be transferred to the new or existing enterprise in exchange for shares of stock, any loan or mortgage, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the applicant.

(4) A comprehensive business plan for new enterprises.

(5) Articles of incorporation, by-laws, partnership agreements, joint venture agreements, corporate minutes and annual reports, affidavits, declarations, or certifications of paid-in capital.

(6) Current business licenses.

(7) Foreign business registration records, recent tax returns of any kind, evidence of other sources of capital.

(8) A listing of all resident and nonresident employees.

(9) A listing of all holders of business certificates for the business establishment.

(10) A listing of all corporations in which the applicant has a controlling interest.

(11) In the case of a holder of a certificate of foreign investment, copies of annual reports of investment activities in the CNMI containing sufficient information to determine whether the certificate holder is under continuing compliance with the standards of issuance, accompanied by annual financial audit reports performed by an independent certified public accountant.

(12) In the case of an applicant who is a retiree investor, evidence that he or she has an interest in property in the CNMI (*e.g.*, lease agreement), evidence of the value of the property interest (*e.g.*, an appraisal regarding the value of the property), and, as applicable, evidence of the value of the improvements on the property (*e.g.*, receipts or invoices of the costs of construction, the amount paid for a preexisting structure, or an appraisal of improvements).

(vii) *Physical presence in the CNMI.* Physical presence in the CNMI at the time of filing or during the pendency of

the application is not required, but an application may not be filed by, or E-2 CNMI Investor status granted to, any alien present in U.S. territory other than in the CNMI. If an alien with CNMI long-term investor status departs the CNMI on or after the transition program effective date but before being granted E-2 CNMI Investor status, he or she may not be re-admitted to the CNMI without a visa or appropriate inadmissibility waiver under the U.S. immigration laws. If USCIS grants E-2 CNMI Investor nonimmigrant classification to an alien who is not physically present in the CNMI at the time of the grant, such alien must obtain an E-2 CNMI Investor nonimmigrant visa at a consular office abroad in order to seek admission to the CNMI in E-2 CNMI Investor status.

(viii) *Information for background checks.* USCIS may require an applicant for E-2 CNMI Investor status, including but not limited to any applicant for derivative status as a spouse or child, to submit biometric information. An applicant present in the CNMI must pay or obtain a waiver of the biometric services fee described in 8 CFR 103.7(b) for any biometric services provided, including but not limited to reuse of previously provided biometric information for background checks.

(ix) *Denial.* A grant of E-2 CNMI Investor status is a discretionary determination, and the application may be denied for failure of the applicant to demonstrate eligibility or for other good cause. Denial of the application may be appealed to the USCIS Administrative Appeals Office or any successor body.

(x) *Spouse and children of an E-2 CNMI Investor.*

(A) *Classification.* The spouse and children of an E-2 CNMI Investor accompanying or following-to-join the principal alien, if otherwise admissible, may receive the same classification as the principal alien. The nationality of a spouse or child of an E-2 CNMI investor is not material to the classification of the spouse or child.

(B) *Employment authorization.* The spouse of an E-2 CNMI Investor lawfully admitted in the CNMI in E-2 CNMI Investor nonimmigrant status, other than the spouse of an E-2 CNMI investor who obtained such status based upon a Foreign Retiree Investment Certificate, is eligible to apply for employment authorization under 8 CFR 274a.12(c)(12) while in E-2 CNMI Investor nonimmigrant status. Employment authorization acquired under this paragraph is limited to employment in the CNMI only.

(xi) *Terms and conditions of E-2 CNMI Investor nonimmigrant status.*

(A) *Nonimmigrant status.* E-2 CNMI Investor nonimmigrant status and any derivative status are only applicable in the CNMI. Entry, employment, and residence in the rest of the United States (including Guam) require the appropriate visa or visa waiver eligibility. An E-2 CNMI Investor who enters, attempts to enter or attempts to travel to any other part of the United States without the appropriate visa or visa waiver eligibility, or who violates conditions of nonimmigrant stay applicable to any such authorized status in any other part of the United States, will be deemed to have violated the terms and conditions of his or her E-2 CNMI Investor status. An E-2 CNMI Investor who departs the CNMI will require an E-2 CNMI investor visa for readmission to the CNMI as an E-2 CNMI Investor.

(B) *Employment authorization.* An alien with E-2 CNMI Investor nonimmigrant status is only employment authorized in the CNMI for the enterprise that is the basis for his or her CNMI Foreign Investment Certificate or Long-Term Business Certificate, to the extent that such Certificate authorized such activity. An alien with E-2 CNMI Investor nonimmigrant status based upon a Foreign Retiree Investor Certificate is not employment authorized.

(C) *Changes in E-2 CNMI investor nonimmigrant status.* If there are any substantive changes to an alien's compliance with the terms and conditions of qualification for E-2 CNMI Investor nonimmigrant status, the alien must file a new application for E-2 CNMI Investor nonimmigrant status, in accordance with the appropriate form instructions to request an extension of stay in the United States. Prior approval is not required if corporate changes occur that do not affect a previously approved employment relationship, or are otherwise non-substantive.

(D) *Unauthorized change of employment.* An unauthorized change of employment to a new employer will constitute a failure to maintain status within the meaning of section 237(a)(1)(C)(i) of the Act.

(E) *Periods of admission.* (1) An E-2 CNMI Investor may be admitted for an initial period of not more than two years.

(2) The spouse and children accompanying or following-to-join an E-2 CNMI Investor may be admitted for the period during which the principal alien is in valid E-2 CNMI Investor nonimmigrant status. The temporary departure from the United States of the principal E-2 CNMI Investor shall not affect the derivative status of the

dependent spouse and children, provided the familial relationship continues to exist and the principal alien remains eligible for admission as an E-2 CNMI Investor.

(xii) *Extensions of stay.* Requests for extensions of E-2 CNMI Investor nonimmigrant status may be granted in increments of not more than two years, until the end of the transition period. To request an extension of stay, an E-2 CNMI Investor must file with USCIS an application for extension of stay, with required accompanying documents, in accordance with the appropriate form instructions. To qualify for an extension of E-2 CNMI Investor nonimmigrant status, each alien must demonstrate:

(A) Continuous maintenance of the terms and conditions of E-2 CNMI Investor nonimmigrant status;

(B) Physical presence in the CNMI at the time of filing the application for extension of stay; and

(C) That he or she did not leave during the pendency of the application.

(xiii) *Change of status.* An alien lawfully admitted to the United States in another valid nonimmigrant status who is continuing to maintain that status may apply to change nonimmigrant status to E-2 CNMI Investor in accordance with paragraph (e)(21) of this section, if otherwise eligible, including but not limited to having been in CNMI long-term investor status on the transition date and within the period provided by paragraph (e)(23)(v) of this section.

(xiv) *Expiration of initial transition period.* Upon expiration of the initial transition period, the E-2 CNMI Investor nonimmigrant status will automatically terminate.

(xv) *Fee waiver.* An alien applying for E-2 CNMI Investor nonimmigrant status is eligible for a waiver of the required fee for an application based upon inability to pay as provided by 8 CFR 103.7(c)(1).

(xvi) *Waiver of inadmissibility for applicants present in the CNMI.* An applicant for E-2 CNMI Investor nonimmigrant status, who is otherwise eligible for such status and otherwise admissible to the United States, and who has provided all appropriate documents as described in paragraph (e)(23)(vi) of this section, may be granted a waiver of inadmissibility under section 212(d)(3)(A)(ii) of the Act, including the grounds of inadmissibility described in sections 212(a)(6)(A)(i) (to the extent such grounds arise solely because of the alien's presence in the CNMI on November 28, 2009) and 212(a)(7)(B)(i)(II) of the Act, for the purpose of granting the E-2 CNMI Investor nonimmigrant status. Such

waiver may be granted without additional form or fee required. In the case of an application by a spouse or child as described in paragraph (e)(23)(x) of this section who is present in the CNMI, the appropriate documents required for such waiver are a valid unexpired passport and evidence that the spouse or child is lawfully present in the CNMI under section 1806(e) of title 48, U.S. Code (which may include evidence of a grant of parole by USCIS or by the Department of Homeland Security pursuant to a grant of advance parole by USCIS in furtherance of section 1806(e) of title 48, U.S. Code).

\* \* \* \* \*

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

■ 3. The authority citation for part 274a is revised to read as follows:

**Authority:** 8 U.S.C. 1101, 1103, 1324a; 48 U.S.C. 1806; 8 CFR part 2.

■ 4. Section 274a.12 is amended by:

■ a. Adding a new paragraph (b)(22); and by

■ b. Adding a new paragraph (c)(12) to read as follows:

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

\* \* \* \* \*

(b) \* \* \*

(22) An alien in E-2 CNMI Investor nonimmigrant status pursuant to 8 CFR 214.2(e)(23). An alien in this status may be employed only by the qualifying company through which the alien attained the status. An alien in E-2 CNMI Investor nonimmigrant status may be employed only in the Commonwealth of the Northern Mariana Islands for a qualifying entity. An alien who attained E-2 CNMI Investor nonimmigrant status based upon a Foreign Retiree Investment Certificate or Certification is not employment-authorized. Employment authorization does not extend to the dependents of the principal investor (also designated E-2 CNMI Investor nonimmigrants) other than those specified in paragraph (c)(12) of this section;

\* \* \* \* \*

(c) \* \* \*

(12) An alien spouse of a long-term investor in the Commonwealth of the Northern Mariana Islands (E-2 CNMI Investor) other than an E-2 CNMI investor who obtained such status based upon a Foreign Retiree Investment Certificate, pursuant to 8 CFR 214.2(e)(23). An alien spouse of an

E-2 CNMI Investor is eligible for employment in the CNMI only;

\* \* \* \* \*

Janet Napolitano,

Secretary.

[FR Doc. 2010-31652 Filed 12-17-10; 8:45 am]

BILLING CODE 9111-97-P

## DEPARTMENT OF THE TREASURY

### Office of the Comptroller of the Currency

#### 12 CFR Part 25

[Docket ID OCC-2010-0021]

RIN 1557-AD34

## FEDERAL RESERVE SYSTEM

#### 12 CFR Part 228

[Docket No. R-1387]

RIN 7100-AD50

## FEDERAL DEPOSIT INSURANCE CORPORATION

#### 12 CFR Part 345

RIN 3064-AD60

## DEPARTMENT OF THE TREASURY

### Office of Thrift Supervision

#### 12 CFR Part 563e

[Docket ID OTS-2010-0031]

RIN 1550-AC42

### Community Reinvestment Act Regulations

**AGENCIES:** Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System (Board); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS).

**ACTION:** Joint final rule.

**SUMMARY:** The OCC, the Board, the FDIC, and the OTS (collectively, “the agencies”) are adopting revisions to our rules implementing the Community Reinvestment Act (CRA). The agencies are revising the term “community development” to include loans, investments, and services by financial institutions that support, enable, or facilitate projects or activities that meet the “eligible uses” criteria described in Section 2301(c) of the Housing and Economic Recovery Act of 2008 (HERA), as amended, and are conducted in designated target areas identified in plans approved by the United States

Department of Housing and Urban Development (HUD) under the Neighborhood Stabilization Program (NSP). The final rule provides favorable CRA consideration of such activities that, pursuant to the requirements of the program, benefit low-, moderate-, and middle-income individuals and geographies in NSP target areas designated as “areas of greatest need.” Covered activities are considered both within an institution’s assessment area(s) and outside of its assessment area(s), as long as the institution has adequately addressed the community development needs of its assessment area(s). Favorable consideration under the revised rule will be available until no later than two years after the last date appropriated funds for the program are required to be spent by the grantees. The agencies will provide reasonable advance notice to institutions in the **Federal Register** regarding termination of the rule once a date certain has been identified.

**DATES:** *Effective Date:* This joint final rule is effective January 19, 2011.

**FOR FURTHER INFORMATION CONTACT:**

*OCC:* Michael S. Bylsma, Director, or Margaret Hesse, Special Counsel, Community and Consumer Law Division, (202) 874-5750; or Greg Nagel or Brian Borkowicz, National Bank Examiners, Compliance Policy, (202) 874-4428; *Office of the Comptroller of the Currency,* 250 E Street, SW., Washington, DC 20219.

*Board:* Paul J. Robin, Manager, Reserve Bank Oversight and Policy, (202) 452-3140; or Jamie Z. Goodson, Attorney, (202) 452-3667; *Division of Consumer and Community Affairs,* Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

*FDIC:* Janet Gordon, Senior Policy Analyst, Division of Supervision and Consumer Protection, (202) 898-3850 or Richard Schwartz, Counsel, Legal Division, (202) 898-7424; *Federal Deposit Insurance Corporation,* 550 17th Street, NW., Washington, DC 20429.

*OTS:* Stephanie M. Caputo, Senior Compliance Program Analyst, Compliance and Consumer Protection, (202) 906-6549; or Richard Bennett, Senior Compliance Counsel, Regulations and Legislation Division, (202) 906-7409; *Office of Thrift Supervision,* 1700 G Street, NW., Washington, DC 20552.

**SUPPLEMENTARY INFORMATION:**

**Background**

The Community Reinvestment Act (CRA) requires the Federal banking and

thrift regulatory agencies to assess the record of each insured depository institution in helping to meet the credit needs of its entire community, including low- and moderate-income neighborhoods, consistent with the safe and sound operation of the institution, and to take that record into account when the agency evaluates an application by the institution for a deposit facility.<sup>1</sup> The agencies have promulgated substantially similar regulations to implement the requirements of the CRA.<sup>2</sup>

There is a pressing need to provide housing-related assistance to stabilize communities affected by high levels of foreclosures. High levels of foreclosures have devastated communities and are projected to continue into 2012 and beyond with damaging spillover effects for low- and moderate-income census tracts, as well as middle-income census tracts, affected by high levels of loan delinquencies and foreclosures. Among the many consequences of high levels of foreclosures are growing inventories of vacant foreclosed properties and institution “other real estate owned” (OREO) properties, depreciating home values, declining property tax bases, and destabilization of communities directly affected by high levels of foreclosures and of adjacent and surrounding neighborhoods.

*Neighborhood Stabilization Program (NSP)*

Congress recognized the need to provide emergency assistance to address these problems with the establishment of the Neighborhood Stabilization Program (NSP) through Division B, Title III, of the Housing and Economic Recovery Act of 2008 (HERA), Public Law 110-289 (2008). Under HERA, emergency funds (“NSP1”) totaling nearly \$4 billion for the redevelopment of abandoned and foreclosed properties were distributed to States and localities with the greatest need for such funds according to a formula based on the number and percentage of home foreclosures, the number and percentage of homes financed by a subprime mortgage-related loan, and the number and percentage of homes in default or delinquency in each State or unit of general local government. Under NSP1, each of the 50 States and Puerto Rico received a minimum award of \$19.6 million and 254 local areas received

<sup>1</sup> 12 U.S.C. 2903.

<sup>2</sup> See 12 CFR parts 25, 228, 345, and 563e.