IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

PASTOR A. BASIENTE, et al., Plaintiffs v. UNITED STATES OF AMERICA; ANDREW CUOMO, Secretary of Housing and Urban Development; and, NORTHERN MARIANAS HOUSING CORPORATION, Defendants	Civil Action No. 97-0013 ORDER DENYING MOTION TO FILE SECOND AMENDED COMPLAINT AND GRANTING MOTION TO DISMISS FIRST AMENDED COMPLAINT

THIS MATTER came before the court on Monday, March 1, 1999, for hearing of plaintiffs' motion to file a second amended complaint and defendant United States' motion to dismiss the first amended complaint and deny the motion for leave to file the second amended complaint on the ground that allowing amendment would be futile because plaintiffs still could not make out a viable cause of action. Plaintiffs appeared by and through their attorney, Jane Mack; defendant United States appeared

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by and through its attorneys, W. Scott Simpson and Assistant U.S. Attorney Gregory Baka; and, defendant Northern Marianas Housing Corporation appeared by and through its attorney, David A. Wiseman.

THE COURT, having considered the written and oral arguments of counsel, rules as follows:

The issue before the court is whether citizens of the Federated States of Micronesia and the Republic of Palau (hereinafter the "Freely-Associated States" or "FAS") are "aliens" for purposes of Section 214 of the Housing and Community Development Act of 1980, codified as amended at 42 U.S.C. § 1436a (1994). If they are "aliens" under the Act, they are not entitled to federally-subsidized housing while they reside in the Commonwealth and they have no cognizable claim for relief; if they are not deemed "aliens," they would be entitled to apply for such housing, even though they are concededly not United States citizens. Plaintiffs' argument has several components.

The United States Housing and Urban Development agency ("HUD") may not make federally-subsidized housing available to any alien unless the alien is a lawful resident of the United States and falls into one of six categories of immigrant aliens, identified by reference to their status under the Immigration and Naturalization Act. 42 U.S.C. 1436a(a). Plaintiffs concede that they do not fall within any of the six categories of immigrant aliens. Nevertheless, they argue that they are eligible to

receive housing benefits because they had been eligible for such benefits since at least 1978, when Congress allowed them the benefits as residents of the former Trust Territory of the Pacific Islands, a United Nations trust administered by the United States. In 1978, very few people living in the Trust Territory were United States citizens. Plaintiffs argue that even though Section 214 was amended in 1981 (and again in 1988 and 1996)[1] to create the six categories of eligible recipients, because Congress did not state categorically that former residents of the Trust Territory would no longer be eligible for the housing assistance they had previously been given during the existence of the Trust Territory, the court should infer that eligibility for the benefits was to continue unchanged. Plaintiffs assert this even though in the intervening years since 1981 the homelands of all non-U.S. citizen plaintiffs herein became independent nations, of which the non-U.S. citizen plaintiffs are now citizens. Fatal to this contention is the fact that two bills were introduced during the last Congress to add as a seventh category the right of FAS citizens to receive housing assistance. See 143 Cong. Rec. S5639, S5643 (daily ed. June 12, 1997); 151 Cong. Rec. S12879, S12884, S12978 (daily ed. Oct. 12, 1998). Neither bill passed before the adjournment of Congress. Had the federal law already been deemed to include FAS citizens among those eligible to receive housing benefits in the United States, as

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[1] Due to various actions by all three branches of government, the 1981 amendment to Section 214 did not actually become effective until 1995, when HUD's proposed regulations took effect.

plaintiffs argue, there would have been no need to attempt to amend Section 214 further to provide for their eligibility. The court must reject this argument as unpersuasive.

Nor does the court find that denial of federally-subsidized housing assistance to these non-U.S. citizens violate their right to equal protection under the law. To the extent that Section 214 treats FAS citizens differently than those in the six categories of non-U.S. citizens who are entitled to receive housing assistance, the court does not find such difference "wholly irrational," as it would have to do in order to rule in plaintiffs' favor. Mathews v. Diaz, 426 U.S. 67, 83, 96 S.Ct. 1883, 1893 (1976) (upholding statutory distinctions between classes of aliens as a valid function of the executive and legislative branches). The Supreme Court has "long recognized the preeminent role of the Federal Government with respect to the regulation of aliens[.]" Toll v. Moreno, 458 U.S. 1, 10, 102 S.Ct. 2977, 2982 (1982). Congress has made a decision as to which non-U.S. citizens will be eligible for housing assistance and the arguments advanced here have not persuaded the court that omission of plaintiffs and others similarly situated is "wholly irrational," particularly given the "scarce" housing assistance resources available, see H.R. Conf. Rep. No. 97-208 at 697, reprinted in 1981 U.S.C.C.A.N. 1010, 1056, and Congress' express intent that there shall be no adverse impact on the United States territories, possessions, or the State of Hawaii by virtue of the Compacts of Free Association. See 48 U.S.C. §§ 1904(e), 1933(g).

To the extent that U.S. citizen plaintiffs herein argue that Section 214 deprives them of their right to live with their FAS family members, the court finds that no such right is impinged: plaintiffs may live with whomever they choose, but there is no right to a federal subsidy to live with non-U.S. citizens who are not in one of the six categories of exempt aliens. See Harris v. McRae, 448 U.S. 297, 316-317, 100 S.Ct. 2671, 2688 (1980).

Non-U.S. citizen plaintiffs herein, by virtue of the Compacts of Free Association entered into between their sovereign home nations and the United States, do have rights that other non-U.S. citizens do not. They may "enter into, lawfully engage in occupations, and establish residence as... nonimmigrant[s] in the United States and its territories and possessions," although the Compacts do not confer a "right to establish the residence necessary for naturalization." See Compact of Free Association § 141(a), (b), (c), Pub. L. No. 99-239, 99 Stat. 1770 (1985), reprinted in 48 U.S.C. § 1901 note (hereinafter "FSM Compact"); Compact of Free Association § 141(a), (b), (c), Pub. L. No. 99-658, 100 Stat. 3672 (1986), reprinted in 48 U.S.C. § 1931 note (hereinafter "Palau Compact"). The Compacts give FAS citizens only "the rights and remedies under the laws of the United States enjoyed by any non-resident alien." See FSM Compact § 172(a); Palau Compact § 172(a). From a plain reading of the Compacts themselves, it seems undeniable that FAS citizens are aliens and, as such, they do not qualify for federally-subsidized housing while they reside in the

Commonwealth.

However, plaintiffs maintain that Commonwealth law and its definitions should govern, because the Commonwealth controls its own immigration by virtue of the Covenant[2] entered into with the United States. Using Commonwealth law and definitions, plaintiffs argue they are entitled to federally-subsidized housing benefits. Simply put, the court cannot accept an argument that premises the bestowal of federal benefits on an interpretation of local law, absent a clear expression of Congressional intent that it should do so. There is no such expression here.

Federal Rule of Civil Procedure 15(a) directs that leave to amend a pleading "shall be freely given when justice so requires." However, dismissal without leave to amend is proper if the complaint cannot be saved by amendment. See, e.g. Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1298 (9th Cir. 1998). For the reasons stated above, the court has concluded that plaintiffs' complaint cannot be saved by amendment. Accordingly, it appearing to the court that granting plaintiffs' motion to file a second amended complaint would be a useless act; NOW, THEREFORE,

IT IS ORDERED that plaintiffs' motion to file a second amended complaint be and hereby is DENIED, without leave to amend further, and defendant United

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[2] "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as amended at 48 U.S.C. § 1681 (1988)) (hereinafter "Covenant").

States' motion to dismiss the first amended complaint be and hereby is GRANTED.

There being nothing further before the court, the file shall be closed.

DATED this 4TH day of March, 1999.

Alex R Munson

ALEX R. MUNSON
Judge