IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN MARIANA ISLANDS

PASTOR A. BASIENTE, et al., Plaintiffs v. DANIEL GLICKMAN, Secretary, U.S. DEPARTMENT OF AGRICULTURE, et al., Defendants	Civil Action No. 98-0005 ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the court on cross-motions for summary judgment. The parties submitted on the briefs. Appearing for plaintiffs is their attorney, Jay H. Sorensen; appearing for United States defendants are Adam Issenberg and Thomas W. Millet, Civil Division, U.S. Department of Justice, and Assistant U.S. Attorney Gregory Baka; and, appearing for Commonwealth of the Northern Mariana Islands ("CNMI") defendants is Assistant Attorney General David Lochabay.

The question before the court is whether citizens of the Federated States of Micronesia ("FSM"), an independent nation, who are legally residing in the Commonwealth as nonimmigrants by virtue of the Compact of Free Association[1], continue to be entitled to the benefits of the 100%-federally funded Nutritional Assistance Program ("NAP"), despite the decision of the CNMI government to decline the offer of the U.S. Secretary of Agriculture to waive or modify the requirements of the program so as to renew the extension of that program to plaintiffs, making them again eligible to receive federal NAP benefits.

THE COURT, having considered the submissions of the parties, makes[2] the

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[1] Compacts of Free Association: Federated States of Micronesia and Republic of Palau, Act. Jan. 14, 1986, P.L. 99-239, Title II, § 201, 99 Stat. 1900; Oct. 22, 1986, P.L. 99-514, § 2, 100 Stat. 2095; Act Nov. 14, 1986, P.L. 99-658, Title I, § 103, 100 Stat. 3675, *reprinted at* Title 48 U.S.C. § 1901 *note.*

[2] The district court is not required to make findings of fact and conclusions of law on a motion for summary judgment, but such findings and conclusions are helpful to the reviewing court. *See e.g.* Underwager v. Channel 9 Australia, 69 F.3d 361, 366 n.4 (9th Cir. 1995) *citing* Gaines v. Haughton, 645 F.2d 761, 768 n.13 (9th Cir. 1981), *cert. denied,* 454 U.S. 1145, 102 S.Ct. 1006 (1982). Of course, "findings of fact" on a summary judgment are not findings in the strict sense that the trial judge has weighed the evidence and resolved disputed factual issues; rather, they perform the narrow function of pinpointing for the reviewing court those facts which are undisputed and indicate the basis for summary judgment. All Hawaii Tours, Corp. v. Polynesian Cultural Center, 116 F.R.D. 645 (D.Haw. 1987), *reversed on other grounds,* 855 F.2d 860 (9th Cir. 1988).

following findings of fact[3] and conclusions of law:

Findings of Fact

The following facts[4] are relevant and undisputed by the parties.

Plaintiffs are citizens of the Federated States of Micronesia and residents of the CNMI.

Defendants Governor Tenorio, Secretary Tebuteb, and Administrator Kintol are residents of the CNMI.

Defendant Glickman is the Secretary of the United States Department of Agriculture ("USDA"); defendant Watkins is an Undersecretary at the USDA. The USDA administers the federal food stamp program and other nutrition programs.

On August 22, 1996, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996[5] ("PRWORA") took effect. The law substantially altered federal welfare programs. Of particular importance here are those provisions that rendered aliens ineligible for certain welfare programs, 8 U.S.C. § 1611(a), and the exceptions to ineligibility contained in the law for "qualified aliens," 8 U.S.C. §

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[3] To the extent that a finding of fact may be deemed a conclusion of law, or a conclusion of law be deemed a finding of fact, it shall be so considered.

[4] All stipulations of fact entered into by the parties and filed with the court on June 7, 1999, are fully incorporated into this decision.

[5] H.R. 3734, P.L. 104-193, 110 Stat. 2105, *codified at* 8 U.S.C. § 1601 et seq.

1641(b), "Definitions," (1)-(7). Plaintiffs here do not fit into any of the definitions of those deemed "qualifying aliens" under § 1641(b).

From at least the late 1970s and continuing into the very early 1980s, aliens could obtain permanent resident status in the Northern Mariana Islands.[6] With the enactment of P.L. 2-17 (effective April 23, 1981), the previous statute was repealed[7] and no alien has been able to achieve permanent resident status in the Northern Mariana Islands since 1981.

Plaintiffs are citizens of the Federated States of Micronesia. As such, under Article IV of the Compact of Free Association entered into between the United States and the FSM, each of them "may enter into, lawfully engage in occupations, and establish residence as a nonimmigrant in the United States and its territories and possessions" without regard to Immigration and Nationality Act, 8 U.S.C. § 1182(a), subsections (14), (20), and (26). Although FSM citizens may establish residence as nonimmigrants in the United States and its territories and possessions, the "right of

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[6] The Commonwealth controls its own immigration. *See* "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").

[7] *See* 3 N.Mar.I. Code § 4201.

such persons to establish habitual residence[8] in a territory or possession of the United States may...be subjected to nondiscriminatory limitations provided for...in those statutes or regulations of the territory or possession concerned which are authorized by the laws of the United States." Compact of Free Association, Art. IV, "Immigration," § 141(b), *reprinted at* 48 U.S.C. § 1901 *note.* And, although § 141(a) does not confer on a citizen of the FSM the right to establish the residence necessary for naturalization under the Immigration and Naturalization Act, 8 U.S.C. §§ 1101 *et seq.*, the section "shall not prevent a citizen of the...Federated States of Micronesia from otherwise acquiring such rights or lawful permanent resident alien status in the United States." Compact of Free Association, § 141(c).

A seemingly unusual situation has resulted: FSM citizens living in a State or any other territory or possession of the United States may still be able to establish permanent resident status (and thereafter qualify for federal welfare programs), but FSM citizens living in the Commonwealth have been unable to acquire such status since the 1981 change in CNMI law.

However, federal law provided (and provides) an exception to the PRWORA prohibition against persons not holding permanent resident or other qualifying alien

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[8] "Habitual residence" is defined in part as meaning "a place of general abode or a principal, actual dwelling place of a continuing or lasting nature[.]" Compact of Free Association, Art. VI, "Definition of Terms," § 461(g), *reprinted at* 48 U.S.C. § 1901 *note.*

status from obtaining the federal welfare benefits otherwise restricted to the classes of aliens defined in the PRWORA. This exception is found in 48 U.S.C. § 1469d, which existed prior to enactment of the PRWORA and which was unaffected by its passage.

Section 1469d(c) provides that the Secretary of the U.S. Department of Agriculture may extend to territories and possessions programs administered by the USDA, such as the Nutrition Assistance Program at issue here The section confers upon the Secretary the power "notwithstanding any other provision of law" to "waive or modify" the statutory requirements of USDA programs so as to extend them to territories, providing only that the Secretary "deems it necessary in order to adapt the programs to the needs" of the particular territory in question. *Id.* Prior to doing so, however, the Secretary, not less than sixty days before the contemplated extension of a program, must notify the U.S. House of Representatives committees on Agriculture and Natural Resources, and the U.S. Senate committees on Agriculture, Nutrition, and Forestry of his proposed action, together with an explanation of why the proposed action is necessary and the anticipated benefits to the territory occasioned by the waiver or modification. *Id.*

Until January 1, 1998, these FSM plaintiffs, all of whom were and are residing legally in the Commonwealth by virtue of the Compact of Free Association, were eligible for NAP. NAP is funded entirely by the USDA, but operated and managed by the Commonwealth pursuant to a statutorily-mandated memorandum of

understanding between the two governments. The memorandum has been reviewed and renewed each year since the inception of the program in the CNMI. However, after the adoption of emergency regulations (which were not supplied to the court but which the parties neither challenged nor supported in their memoranda) by the Commonwealth government in late 1997, plaintiffs were denied NAP benefits after January 1, 1998.

On March 6, 1998, the Secretary of the U.S. Department of Agriculture sent letters to the chairmen of the Senate and House committees identified above. The relevant text of those letters is as follows:

> The Department of Agriculture (USDA) operates capped block grant nutrition assistance programs (NAP) in the Commonwealth of the Northern Mariana Islands (CNMI) and American Samoa totaling $10.4 million for fiscal year 1998. Extension of these programs to these territories was initially authorized by Public Law 96-697, which was signed into law December 24, 1990. Section 601(c) of this law (48 U.S.C. 1469d(c)) authorizes the Secretary of Agriculture to waive or modify any statutory requirements relating to the provision of assistance to these two territories. In order to exercise this authority, USDA is required to notify specific Congressional Committees of proposed action under this authority at least 60 days prior to the waiving or modification of any statutory requirement. * * * This letter constitutes notification that USDA intends to exercise its waiver authority under the applicable provisions of 48 U.S.C. § 1469d(c). An identical letter of notification is being sent to each Committee.
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> Citizens of the Federated States of Micronesia...have entered the CNMI over the past [illegible] years and established habitual residence. The individuals are considered [illegible] admitted for permanent residence under CNMI's immigration laws. A significant number of citizens of the independent nation of Western Samoa are related by

blood to American Samoans, have lived in American Samoa for decades and are, likewise, considered lawfully admitted for permanent residence under American Samoa's immigration laws. Both of these groups have previously received nutrition assistance under the individual territories' block granted NAP prior to implementation of [PRWORA], which was signed into law August 22, 1996. As explained [illegible] these individuals are now considered ineligible for NAP benefits under [illegible] PRWORA. Application of these provisions rendered ineligible between [illegible] and one-third of all those receiving NAP benefits in CNMI and American Samoa.

Section 401 of PRWORA provides that, with certain exceptions, an alien who is not a qualified alien is not eligible for any Federal public benefit, including food assistance. This makes all non-qualified aliens in CNMI...ineligible for NAP benefits. Section 403 provides that qualified aliens, including those who are lawfully admitted for permanent residence under the Immigration and Nationality Act (INA), who enter the United States on or after August 22, 1996, are not eligible for any Federal means-tested public benefit for a period of 5 years beginning on the date of their entry into the United States with a status within the meaning of the term "qualified alien." The CNMI...NAP deliver[s] "means-tested public benefits" to program recipients. Section 431 defines the term "qualified alien" according to provisions of the INA which, except in limited circumstances inapplicable here, do not currently apply in the CNMI[.] Each of these territories administers its own immigration and naturalization laws.

Because the INA does not currently apply in either CNMI or American Samoa, the application of the foregoing PRWORA provisions to these two jurisdictions is unclear and complex. Additionally, there are groups of people in these areas which would be considered lawfully admitted for permanent residence and, consequently, eligible for program benefits under the INA. However, because the INA does not apply in these areas, these people do not have the opportunity to obtain the status of "qualified alien" under the provision of sections 401, 403, and 431 of PRWORA and become eligible for these benefits.

Because both CNMI and American Samoa would like the authority to continue to provide NAP benefits to the same categories of

individuals they have provided benefits to prior to PRWORA, USDA believes [illegible] waiver is appropriate and necessary in order to adapt the programs to the needs of the respective territory as specified in 48 U.S.C. 1469d(c). Therefore, in accordance with 48 U.S.C. 1469d(c), we are advising that USDA intends to waive the provisions of sections 401, 403, and 431 of the PRWORA, as they refer to the INA and apply to the NAPs currently operated by the CNMI and America Samoa. The provisions will be waived to the extent necessary to permit the substitution of the territories' immigration laws or other policies in place of certain provisions of the INA as mentioned in these PRWORA provisions. For example, under section 431(b)(1) of PRWORA, individuals who are "lawfully admitted for permanent residence" under the INA are "qualified aliens." Under USDA's waiver, CNMI and American Samoa could substitute their immigration laws for the INA so that individuals who are lawfully admitted for permanent residence under the territories immigration laws would be considered "qualified aliens" and eligible for NAP benefits.

The waiver will not result in an increase in funding levels for the territories (or any reduction of PRWORA savings) since the block grants are capped, and the waiver will only restore eligibility to individuals who had previously participated in the NAP under the same funding levels.

Please contact Susan Carr [illegible], Deputy Administrator of the Food Stamp Program of the Food and Nutrition Service, if you have any question about this waiver.

On May 15, 1998, Allen Ng, Regional Administrator, Western Region, USDA, wrote to Commonwealth Governor Pedro P. Tenorio, stating:

The Commonwealth of the Northern Mariana Islands (CNMI) and the United States share a unique relationship. Because of the nature of this relationship, Congress has empowered the Secretary of Agriculture to waive or modify provisions of law "when he deems it necessary in order to adapt programs administered by the Department of Agriculture to the needs of the respective territory," as provided in 48 U.S.C. 1469d(c). On March 6, 1998, the Secretary notified Congress of his intention to modify the operation of the Personal Responsibility and

Work Opportunity Reconciliation Act of 1996 (PRWORA). The 60 day statutory waiting period set forth in 48 U.S.C. 1469d(c) expired on May 5, 1998. Consequently, this letter serves as announcement to CNMI that the United States Department of Agriculture (USDA) now has the authority to waive and modify the provisions of PRWORA as needed to allow legal aliens residing within CNMI to participate in the Nutrition Assistance Program (NAP).

The scope of any waiver is limited by: (1) the funds available under the NAP block grant; (2) the requirement that any alien made eligible must have been eligible for NAP benefits before the effective date of PRWORA; and (3) other applicable statutory provisions (other than those of PRWORA). If you wish to restore eligibility to currently ineligible aliens, please submit proposed modifications to the existing NAP Memorandum of Understanding identifying which legal aliens CNMI intends to make eligible for NAP benefits. Such proposed modifications should be submitted to the Western Regional Office of the Food and Nutrition Service as soon as possible so that we may review them in a timely manner. Should CNMI decide to reestablish the eligibility of some, or all, legal aliens, USDA will determine whether the proposed modifications fit within the limitations discussed above.

Please note that nothing in a potential waiver would affect an alien's entitlement for residency, naturalization, or other immigration status under law. Additionally, a waiver would not entitle an alien to any other benefits for which the alien would otherwise be ineligible.

On June 11, 1998, Governor Tenorio responded by letter to Mr. Ng:

Thank you for your recent letter advising that the...USDA now has the authority to waive the provisions of...PRWORA of 1996, as amended, to allow aliens legally residing in the CNMI to participate in the Nutrition Assistance Program (NAP). As we understand it, the scope of any potential waiver is limited by the funds available under the existing NAP block grant and the requirement that any alien made eligible now must have been eligible for NAP benefits before June 22, 1996. For the reasons that follow, we are reluctant to accept the USDA waiver at this time.

Non-immigrants under the Compact of Free Association between the United States and the Federated States of Micronesia (Compact) are not legally entitled to receive food stamps or nutrition assistance benefits. They are merely entitled to enter the Commonwealth without restriction, and to live and work here. The Compact does not authorize non-immigrants under the Compact to collect food stamp benefits under the Federal Food Stamp Program or nutrition assistance benefits under the CNMI Nutrition Assistance Block Grant Program.

As a policy matter, we do not wish to encourage non-immigrants under the Compact to establish habitual residence in the Commonwealth, absent employment, or absent an alternate means of self-support. As you might expect, an influx of non-working non-immigrants under the Compact not only places a burden on the Nutrition Assistance Program. It also places a burden on the Commonwealth's entire infrastructure (e.g. Public School System, Commonwealth Health Center, Department of Public Safety).

As an economic matter, we are also reluctant to accept the proposed waiver. As you may know, the Asian economic crisis has had a serious impact on the Commonwealth's economy. Between January, 1998 and May, 1998, the number of participating households increased from 802 to 921. The number of participating individuals increased from 2815 to 3181. Given the economic situation in the Commonwealth, we believe it would be inappropriate to provide limited block grant assistance benefits to individuals who are not legally entitled to such benefits.

These plaintiffs have not received NAP benefits since January 1, 1998.

Conclusions of Law

Summary judgment shall be granted where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56 (c).

The court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1343(a), and 42 U.S.C. §1983.

Venue is proper in this district under 28 U.S.C. § 1391(e) in that an agency of the United States is a defendant, at least one defendant resides in this district, and a substantial part of the events or omissions giving rise to the claim occurred here.

The PRWORA, including those portions which affected the right of aliens to receive federal welfare benefits, was a valid exercise of Congress' power. 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). Federal laws which discriminate on the basis of alienage will be upheld unless they are "wholly irrational." *See e.g.* Mathews v. Diaz, 426 U.S. 67, 83, 96 S.Ct. 1883, 1893 (1976) (recognizing that Congress has no constitutional duty to provide all aliens with the welfare benefits provided citizens, and upholding statutory distinctions between different classes of aliens as a valid function of the executive and legislative branches if such distinctions are not "wholly irrational").

Both the PRWORA and the Compact of Free Association are federal laws

which apply within and to the Commonwealth. Covenant § 105.[9] Title 8 U.S.C. § 1611(a) renders most aliens ineligible for certain federal welfare programs. Plaintiffs are not "qualifying aliens" for NAP benefits as that term is defined in the PRWORA; that is, plaintiffs here are not among those "qualified aliens" excepted by the Definitions section of § 1641(b) from the general prohibition in § 1611(a) against the providing of federal welfare benefits to non-qualified aliens. Thus, although plaintiffs are legally in the Commonwealth by virtue of the Compact, a federal law, because the

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[9] Section 105 of the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America," P.L. 94-241, 90 Stat. 263 (Mar. 24, 1976) ("Covenant"), provides in relevant part:

> The United States may enact legislation in accordance with its constitutional processes which will be applicable to the Northern Mariana Islands, but if such legislation cannot also be made applicable to the several States the Northern Mariana Islands must be specifically named therein for it to become effective in the Northern Mariana Islands.

Section 105 applies to federal laws enacted after January 9, 1978, the effective date of the Commonwealth's Constitution. United States ex rel. Richards v. de Leon Guerrero, 4 F.3d 749, 756 (9th Cir. 1993).

The Compact of Free Association between the United States and the Federated States of Micronesia is a federal law, "Compact of Free Association Act of 1985," P.L. 99-239 (Jan. 14, 1986), which became effective on November 3, 1986 (Pres. Procl. No. 5564, Nov. 3, 1986, 51 F.R. 40399). As a federal law passed after January 9, 1978, the Compact is a federal law "applicable to the several States" which automatically applies to the Commonwealth of the Northern Mariana Islands pursuant to the terms of Covenant § 105. Hillblom v. United States, 896 F.2d 426, 428 (9th Cir. 1990); U.S. ex rel. Richards v. de Leon Guerrero, 4 F.3d 749, 754 (9th Cir. 1993) (recognizing that Congress can pass legislation with respect to the Commonwealth that it could not pass with respect to the states).

PRWORA is a constitutional exercise by Congress of its power to legislate in regard to aliens and to establish the classes of aliens entitled to continue to receive federal welfare benefits, plaintiffs here, as in the HUD Basiente"[10] case recently decided in this court, are not eligible to continue receiving federal welfare benefits under the PRWORA because they are not "qualifying aliens" under § 1641(b). Accordingly, the court concludes as a matter of law that there is no genuine issue of material fact that plaintiffs here are not entitled to NAP benefits under federal law.

Because plaintiffs were not included in those classes of aliens excepted from the prohibitions of the PRWORA, their entitlement to relief, if any, must be found elsewhere.

After the enactment of the PRWORA, plaintiffs could only be eligible for NAP benefits in the Commonwealth if the Secretary of Agriculture exercised his Congressionally-authorized discretion under 48 U.S.C. § 1469d(c) by offering to waive or modify the restrictions contained in the PRWORA to again extend NAP benefits to plaintiffs. He indicated his willingness to do so in his March 6, 1998, letters to the congressional committees. A plain reading of 48 U.S.C. § 1469d is that the Secretary

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[10] *See e.g.* "Order Denying Motion to File Second Amended Complaint and Granting Motion to Dismiss First Amended Complaint," Basiente, et al. v. United States of America, et al. ("HUD Basiente"), Civil Action 97-0013 (D.N.M.I Mar. 4, 1999) (Department of Housing and Urban Development precluded from making federally-subsidized housing available to alien unless alien a lawful resident of the United States and included in one of six categories of immigrant aliens excluded from PRWORA in 42 U.S.C. 1436a(a)).

of Agriculture is required by statute to make known to Congress his *intention* to waive or modify provisions of USDA programs in order to extend them to territories or possessions. If Congress makes no objection, the Secretary is *then* free to make such waivers or modifications as he deems justified in an exercise of his discretion. That this reading is the correct one is supported by the precatory tone of the Secretary's letter, and in this language from Mr. Ng's letter to Governor Tenorio:

> If you wish to restore eligibility to currently ineligible aliens, please submit proposed modifications to the existing NAP Memorandum of Understanding identifying which legal aliens CNMI intends to make eligible for NAP benefits. Such proposed modifications should be submitted to the Western Regional Office of the Food and Nutrition Service as soon as possible so that we may review them in a timely manner. Should CNMI decide to reestablish the eligibility of some, or all, legal aliens, USDA will determine whether the proposed modifications fit within the limitations discussed above.

While it is true that the Secretary of Agriculture has the discretion to extend to U.S. territories and possessions benefits otherwise reduced or removed by the PRWORA, and while it is true that he expressed his intention to do so in regards to the Commonwealth, the decision to accept the modification or waiver was left to the Commonwealth, as evidenced in particular by Mr. Ng's letter. This conclusion is also supported by this language from Congress: "In approving the Compact, it is not the intent of the Congress to cause any adverse consequences for the United States territories and commonwealths or the State of Hawaii." Title 48 U.S.C. § 1904(e)(1). Thus, while the CNMI is bound by the terms of the Compact of Free Association in

that it must allow citizens of the FSM "to enter into, lawfully engage in occupations, and establish residence," it is not required to extend benefits to them which are not mandated by federal law.

In conclusion, the court finds that construction of two federal laws, the PRWORA and the Compact, compels the conclusion that Congress exercised its power to restrict federal welfare benefits to "qualifying aliens," that these FSM plaintiffs are not "qualifying aliens," and that, although plaintiffs' right to reside in the Commonwealth is unchallenged, they remain subject to the PRWORA's restrictions.[11] The court finds no support for the argument that the Commonwealth was required to accept the offer of the Secretary of Agriculture to waive or modify the PRWORA to again extend NAP benefits to plaintiffs.

FOR THE FOREGOING REASONS, plaintiffs' motion for summary judgment is denied and defendants' motion for summary judgment is granted.

DATED this 28th day of September, 1999.

Alex R. Munson

ALEX R. MUNSON
Judge

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[11] *See* Yang v. State of California Dept. of Social Services, 183 F.3d 953 (9th Cir. 1999), for a similar analysis and conclusion.