

APR - 9 2003

For The Northern Mariana Islands
By [Signature]
(Deputy Clerk)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN MARIANA ISLANDS

BONIFACIO VITUG SAGANA,

Plaintiff,

v.

JOAQUIN A. TENORIO, et al.,

Defendants.

Civil Action No. 01-0003

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT¹ AND DISMISSING
CASE WITH PREJUDICE

Plaintiff Bonifacio Vitug Sagana (hereinafter "Sagana") moved the court for summary judgment regarding paragraph 52 of his complaint.

I. STATEMENT OF THE CASE

On December 20, 2000, Sagana, a nonresident worker, filed a complaint and petition for judicial review against Mark D. Zachares, Secretary of Department of Labor and Immigration,

¹

Sagana moved for a judgment as a matter of law pursuant to FED. R. CIV. P. 50(a)(1). However, the court had directed the parties to file cross motions for summary judgment pursuant to FED. R. CIV. P. 56. See Amend. Order After Renewed Pretrial Conf. ¶ 3 (Oct. 2, 2002) and Order Setting Settle. Agreement Deadlines, Pldg. Sched., Page Limits, and Taking Trial Off Calendar ¶ 2 (Oct. 3, 2002). Only Sagana filed a motion, which was not the proper motion. However, the court will treat his motion as a motion for summary judgment.

1 and the Commonwealth of the Northern Mariana Islands (hereinafter "CNMI") Department of
2 Labor and Immigration (hereinafter "DOLI") in the Superior Court for the Commonwealth of the
3 Northern Mariana Islands. In his complaint, Sagana sought declaratory relief, injunctive relief,
4 monetary damages, and attorney fees against defendant Zachares, in his personal capacity and
5 official capacity as Secretary of DOLI, pursuant to 42 U.S.C. §§ 1983 and 1988.² Sagana also
6 sought judicial review of agency action against DOLI pursuant to 3 N. MAR. I. CODE § 4446 and
7 1 N. MAR. I. CODE § 9112.

9 On January 16, 2001, this matter was removed from the CNMI Superior Court to this
10 court pursuant to 28 U.S.C. § 1441(a). A case management conference was held on February
11 23, 2001, where this matter was set for a bench trial on December 10, 2001. After subsequent
12 motions to modify the case management scheduling order, the court ordered a new trial date of
13 October 7, 2002.

15 On September 30, 2002, a renewed pretrial conference was held where the parties agreed
16 to settle various aspects of the case. *See* Amend. Order After Renewed Pretrial Conf. ¶¶ 1-2
17 (Oct. 2, 2002). On October 2, 2002, a settlement hearing was held where, in the presence of the
18 court, the parties reviewed and discussed all the terms of their settlement agreement. On October
19 3, 2002, the court issued an order directing defendants to prepare the settlement agreement,
20 incorporating all substantive terms agreed to by the parties at the settlement hearing. *See* Order
21 Setting Settle. Agreement Deadlines, Pldg. Sched., Page Limits, and Taking Trial Off Calendar ¶
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24 2

25 On October 2, 2002, the parties stipulated that Joaquin A. Tenorio shall be
26 substituted into the complaint, in his official capacity only, as the defendant to Sagana's
First Cause of Action. *See* Joint Stip. to Substitute Party and Order (Oct. 2, 2002).

1 (Oct. 3, 2002). The court further ordered that the issue of “whether the plaintiff has substantive
2 due process and equal protection rights to freely market his labor in the common occupations of
3 life to any prospective employer without restriction and on equal terms as any citizen for so long
4 a period as plaintiff is lawfully admitted to the CNMI as a nonresident worker” would be
5 submitted to the court in the form of Cross Motions for Summary Judgment. *Id.* at ¶ 2.
6

7 The parties’ settlement agreement and stipulated judgment dated November 25, 2002,
8 was filed with the court on December 3, 2002.

9 **A. The Settlement Agreement**

10 Pursuant to the Settlement Agreement, Sagana can pursue his claim against defendant
11 Tenorio, in his official capacity as Secretary of DOLI, for declaratory relief regarding the issue of
12 whether he has the right to freely market his labor. *See* Settle. Agreement ¶ 5 (Dec. 3, 2002).
13 This issue originally appeared in paragraph 52 of Sagana’s Complaint, which was part of
14 Sagana’s first cause of action. *See* Compl. ¶ 52 (Dec. 20, 2000). Paragraph 52 states:
15

16 Plaintiff claims [the] right to a declaration by this court that DOLI may not
17 restrict plaintiff’s substantive due process and equal protection rights to
18 freely market his labor in the common occupations of life to any prospective
19 employer without restriction and on the equal terms as any citizen for so
20 long a period as plaintiff is lawfully admitted to the CNMI as a nonresident
21 worker.

22 *Id.* Sagana’s first cause of action was against defendant Zachares, in his official capacity as
23 Secretary of DOLI, pursuant to 42 U.S.C. §§ 1983 and 1988 for declaratory relief, injunctive
24 relief, and attorney’s fees. *Id.*
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1 **II. STANDARD FOR SUMMARY JUDGMENT**

2 Rule 56 of the Federal Rules of Civil Procedure states, in part, that judgment "shall be
3 rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on
4 file, together with the affidavits, if any, show that there is no genuine issue as to any material fact
5 and that the moving party is entitled to judgment as a matter of law."

6
7 The party seeking summary judgment always bears the initial responsibility of informing
8 the court of the basis for its motion and identifying those portions of the matters on record which
9 it believes demonstrates the absence of a genuine issue of material fact. Celotex Corporation v.
10 Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553 (1986).

11
12 The non-moving party must set forth by affidavit or as otherwise provided in Rule 56
13 specific facts showing that there is a genuine issue of material fact for trial. Kaiser Cement Corp.
14 v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-1104 (9th Cir.), *cert. denied*, 107 S.Ct. 435
15 (1986).

16 **III. DISCUSSION**

17
18 The court finds this case suitable for decision without oral argument and relies on the
19 pleadings filed by both parties. *See* Local Rule 7.1.a. ("Oral argument is at the discretion of the
20 court....").

21 Sagana moved the court for summary judgment on ¶ 52 of his complaint. The narrow
22 issue presented to the court for resolution is whether or not DOLI may restrict Sagana's
23 substantive due process and equal protection rights to freely market his labor in the common
24 occupations of life to any prospective employer without restriction and on equal terms as any
25 citizen for so long a period as he is lawfully admitted to the CNMI as a nonresident worker.
26

1 Sagana claims this right under three independent grounds: (1) 42 U.S.C. § 1981; (2) the Equal
2 Protection Clause of the Fourteenth Amendment; and (3) the Substantive Due Process under the
3 Fourteenth Amendment.

4 Defendant Tenorio opposed Sagana's motion for five reasons: (1) Sagana's arguments
5 were not raised in his complaint and, therefore, he cannot raise them now;³ (2) the CNMI can
6 regulate aliens under the Nonresident Workers Act (hereinafter "NWA") because of its unique
7 authority to regulate its own immigration; (3) the proper standard of review for the CNMI's
8 immigration laws is a "rational basis" standard; (4) under the proper standard of review, the
9 CNMI has not committed a violation of the Equal Protection or Due Process Clauses of the
10 Fourteenth Amendment; and (5) significant policy reasons militate against Sagana's request.

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13 **A. 42 U.S.C. § 1981⁴**

14 Sagana argued that the CNMI lacks legitimate power to deny him the rights the United
15 States has provided under 42 U.S.C. § 1981. He argued that § 1981 preempts the CNMI's Non-
16

17 ³

18 Defendant Tenorio originally argued that Sagana did not properly raise alleged
19 violations of 42 U.S.C. § 1981 and the equal protection and due process clauses of the
20 Fourteenth Amendment. On February 13, 2003, Tenorio withdrew that argument, while
21 still maintaining his argument that Sagana did not properly raise his 42 U.S.C. § 1981
claim. *See* Mot. to Modify Def.'s Opposition to Pl.'s Mot. for Judm. as a Matter of Law
(Feb. 13, 2003).

22 ⁴

23 42 U.S.C. § 1981(a) states that:

24 All persons within the jurisdiction of the United States shall have the same
25 right in every State and Territory to make and enforce contracts, to sue, be
26 parties, give evidence, and to the full and equal benefit of all laws and
proceedings for the security of persons and property as is enjoyed by white
citizens, and shall be subject to like punishment, pains, penalties, taxes,
licenses, and exactions of every kind, and to no other.

1 Resident Workers Act because the Act, on its face, violates the rights of aliens under § 1981.
2 The NWA classifies on the basis of alienage by restricting the contract rights of nonresident
3 workers who are aliens, while U.S. citizens are generally free to contract and take any job(s) they
4 want.

5
6 Sagana further argued that the court should apply § 1981 to this case. He argued that the
7 Ninth Circuit “wrongly decided” Magana v. Commonwealth of the Northern Mariana Islands,
8 107 F.3d 1436, 1446-47 (9th Cir. 1997), when it held that § 1981 derives from the Civil Rights
9 Act of 1866 and only prohibits discrimination based on race. *See* Pl.’s Mot. for Judgment as a
10 Matter of Law p. 13:10 (Oct. 18, 2002). Sagana instead argued that § 1981 was enacted to
11 prohibit state-sponsored discrimination based on alienage. Sagana argued that the protections
12 offered by federal civil rights laws must be viewed against the events of the time, and that a
13 review of the historical events leading up to the enactment of § 1981 shows that this statute was
14 intended to prohibit state-sponsored discrimination based on alienage.

15
16 Tenorio argued that the only thing left to be litigated in this case is paragraph 52 of
17 Sagana’s complaint and that paragraph does not mention the § 1981 violations that Sagana now
18 alleges. Tenorio also argued that the Ninth Circuit in Magana held only that § 1981 bars racial
19 discrimination, which Sagana concedes, but Sagana states is a wrong decision. Tenorio argued
20 that § 1981 is inapplicable because Sagana does not and cannot claim that the NWA is racially
21 discriminatory.

22
23 Defendant Tenorio’s first argument is well taken, and the court need enquire no further.⁵
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26 The court concludes that no discussion is necessary regarding Sagana’s argument
(continued...)

1 Nowhere in the first cause of action does Sagana mention 42 U.S.C. § 1981. In fact, the first
2 cause of action was limited to 42 U.S.C. §§ 1983 and 1988. *See* Compl. ¶¶ 48-57. “A party need
3 not plead specific legal theories in the complaint, so long as the other side receives notice as to
4 what is at issue in the case.” American Timber & Trading v. First National Bank of Oregon, 690
5 F.2d 781, 786 (9th Cir. 1982). *See also* In re Acequia, Inc., 34 F.3d 800, 814 (9th Cir. 1994)
6 (stating that “the main purpose of the complaint is to provide notice of what plaintiff’s claim is
7 and the grounds upon which the claim rests.... [T]he plaintiff must at least set forth enough
8 details so as to provide defendant and the court with a fair idea of the basis of the complaint and
9 the legal grounds claimed for recovery.”). Sagana’s motion does raise an argument that was not
10 contemplated in the Settlement Agreement. Based on what was discussed at the renewed pretrial
11 conference and the settlement hearing and what was memorialized in the Settlement Agreement,
12 Sagana is only allowed to pursue his single claim against Dr. Tenorio, in his official capacity as
13 Secretary of DOLI, for declaratory relief regarding the issue of whether he has the right to freely
14 market his labor.
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17 It was not the understanding of the court that Sagana would be arguing that certain
18 sections of the NWA be declared void under 42 U.S.C. § 1981. More importantly, the single
19 issue left for adjudication, memorialized as ¶ 5 of the Settlement Agreement, does not provide
20 the defendant with any notice of the 42 U.S.C. § 1981 grounds upon which Sagana’s claim now
21 rests. The paragraph does not provide any hint that Sagana is alleging a violation of his civil
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25 ⁵(...continued)
26 that the Ninth Circuit “wrongly decided” Magana and that § 1981 was really intended to
prohibit state-sponsored discrimination based on alienage. The court is bound by *stare*
decisis and may not overrule the Ninth Circuit.

1 rights due to alleged CNMI-sponsored discrimination based on alienage.

2 Accordingly, Sagana's motion for summary judgment based on a violation of 42 U.S.C. § 1981 is
3 DENIED.

4 **B. The Equal Protection and Substantive Due Process Clauses of the Fourteenth**
5 **Amendment**

6 Sagana next argued that pursuant to § 501(a) of the Covenant to Establish a
7 Commonwealth of the Northern Mariana Islands in Political Union with the United States of
8 America (hereinafter "COVENANT"),⁶ the Equal Protection Clause of the Fourteenth Amendment
9 applies in the CNMI as if the CNMI were a State. Therefore, because the NWA discriminates
10 against some and favors others based on alienage, the Act is subject to "strict scrutiny."⁷ Sagana
11 argued that, under this standard, the NWA cannot withstand constitutional muster because the
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15 § 501(a) of the COVENANT states:

16 To the extent that they are not applicable of their own force, the following
17 provisions of the Constitution of the United States will be applicable within
18 the Northern Mariana Islands as if the Northern Mariana Islands were one
19 of the several States: ... Amendment Fourteen, Section 1;.... Other provisions
20 of or amendments to the Constitution of the United States, which do not apply
21 of their own force within the Northern Mariana Islands, will be applicable
22 within the Northern Mariana Islands only with the approval of the Government
23 of the Northern Mariana Islands and of the Government of the United States.

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

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24 A statute survives "strict scrutiny" review of its constitutionality if its application
25 results in disparate treatment of a suspect class, but there is a compelling government
26 interest and the law or regulation is narrowly tailored to achieve that interest. See Plyler v. Doe, 457 U.S. 202 (1987).

1 CNMI does not have a compelling interest in discriminating against aliens in any form of private
2 sector employment.

3 Sagana also argued that his substantive due process rights have been violated because the
4 Fourteenth Amendment protects the liberty of all persons, including aliens, to work unrestricted
5 and the NWA denies him this freedom.
6

7 Defendant Tenorio argued that the applicable standard for interpreting immigration laws
8 under the U.S. Constitution is a “rational basis” standard⁸ and that “strict scrutiny” only applies
9 to the States. This is so because the States, unlike the CNMI, have no authority to implement
10 their own immigration laws or to regulate the activities of aliens. This immigration power is
11 usually reserved for the federal government. However, because the CNMI’s authority over
12 immigration is analogous to that of the federal government, “rational basis,” or at the most,
13 “intermediate scrutiny,”⁹ should apply to challenges to the NWA. Tenorio argued that under
14 either the rational basis or intermediate standards of review, the NWA does not violate the Equal
15 Protection Clause because the provisions of the NWA are aimed at addressing legitimate CNMI
16 government interests.
17

18 Tenorio further argued that Sagana does not have a viable substantive due process claim
19 because the restraints DOLI places on Sagana’s right to contract are reasonable and survive
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22 ⁸

23 A statute survives “rational basis” review if there is a rational relationship between
24 the disparity of treatment and some legitimate government purpose. *See Pennel v. City of San Jose*, 485 U.S. 1 (1988).

25 ⁹

26 A statute survives “intermediate” scrutiny if its application results in disparate treatment to a semi-suspect class and the statute is substantially related to important governmental interests. *See Craig v. Boren*, 429 U.S. 190 (1976).

1 judicial scrutiny. Tenorio argued that the CNMI has important, legitimate interests in regulating
2 and tracking the activities of nonresident workers and in policing its borders.

3 The Ninth Circuit has held that “analysis of an equal protection claim alleging an
4 improper classification involves two steps.” McLean v. Crabtree, 173 F.3d 1176, 1185 (9th Cir.
5 1999). The plaintiff “must first show that the statute, either on its face or in the manner of its
6 enforcement, results in members of a certain group being treated differently from other persons
7 based on membership in that group. Proof of discriminatory intent is required to show that state
8 action having a disparate impact violates the Equal Protection Clause. Second, if it is
9 demonstrated that a cognizable class is treated differently, the court must analyze under the
10 appropriate level of scrutiny whether the distinction made between the groups is justified.” Id.
11 (internal quotations and citations omitted).

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14 The case at hand presents an additional analytical step. Before determining the
15 appropriate level of scrutiny for judicial review of the NWA, the court must first determine
16 whether the CNMI should be treated as a State when it comes to matters of immigration.
17 Clearly, it should not. Pursuant to § 503(a) of the COVENANT, the CNMI, unlike a State, is not
18 generally subject to the immigration laws of the United States.¹⁰ The CNMI has the unique status
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22 § 503 of the COVENANT states:

23 The following laws of the United States, presently not applicable to the Trust
24 Territory of the Pacific Islands, will not apply to the Northern Mariana Islands
25 except in the manner and to the extent made applicable to them by the Congress
after termination of the Trusteeship Agreement:

26 (a) except as otherwise provided in Section 506, the immigration and
naturalization laws of the United States;....

1 of controlling its immigration. This is a power generally reserved for the federal government.
2 See United States v. Lopez-Flores, 63 F.3d 1468, 1473 (9th Cir. 1995) (noting that Congress has
3 plenary power to regulate immigration and naturalization under Art. I, Section 8, Clause 4 of the
4 Constitution). Therefore, there are three issues before the court:

- 5 (1) Does the NWA, either on its face or in the manner of its enforcement, result in
6 alien workers being treated differently from non-alien workers based on
7 membership in that group?
- 8 (2) Is the CNMI treated as a State when it comes to matters of immigration?
- 9 (3) What is the appropriate level of judicial scrutiny to apply to the NWA?

10 First, Issue One is disposed of because the policy statement of the NWA itself states that
11 the NWA is discriminatory in nature. The policy statement, codified at 4 N. MAR. I. CODE §
12 4411 (1999), states:

14 (a) The legislature finds and declares that it is essential to a balanced and stable
15 economy in the Commonwealth that residents be given preference in
16 employment and that any necessary employment of nonresident workers in the
17 Commonwealth not impair the wages and working conditions of resident
18 workers.

19 ...[T]he employment of nonresident workers should be temporary and generally
20 limited to the duration of the specific job or employment for which the alien was
21 recruited.

22 (b) It is the intent of the amendments to the act to provide stricter enforcement,
23 control and regulation of nonresident workers. It is further the intent of this act
24 to require resident workers to be at least 10 percent of every employer's
25 management, ... to prohibit the transfer of nonresident workers from one
26 employer to another except as provided by law, to control the issuance of
temporary work permits, to increase the job referral services provided to resident
workers and to establish a four year maximum time period for nonresident
worker[s] to remain in the Commonwealth.

1 Next, it is undisputed that the Fourteenth Amendment applies to the CNMI. *See*
2 COVENANT § 501(a).

3 It is also undisputed that the CNMI is not generally subject to U.S. immigration laws. *See*
4 COVENANT § 503(a). What is disputed is the status of the CNMI when one of its statutes is
5 challenged for violation of the Fourteenth Amendment's Equal Protection Clause. Should the
6 CNMI be treated as a State or is its position in regards to immigration powers more akin to that
7 of the federal government?
8

9 Just as the United States Congress can control the entry of aliens into the U.S.,¹¹ the
10 CNMI legislature controls the entry and employment opportunities of aliens in the
11 Commonwealth. *See* COVENANT §§ 105 and 501-03. Therefore, in enacting and enforcing the
12 NWA, the CNMI essentially occupies the position of the federal government, in that it can enact
13 and enforce its own immigration laws.¹² Accordingly, a look at the federal immigration laws
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17 *See Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972) (noting that Congress has
18 plenary control over admission and exclusion of aliens) and *Oceanic Steam Navigation Co.*
19 *v. Stranahan*, 214 U.S. 320, 339 (1909) (stating that "over no conceivable subject is the
20 legislative power of Congress more complete than it is over the admission of aliens.").

21 ¹²

22 Analogizing the federal immigration laws and the NWA may be considered a
23 "stretch" in some courts. However, the Supreme Court and the Ninth Circuit has shown
24 great deference to the CNMI when it has faced challenges to the COVENANT. *See, e.g.,*
25 *Rayphand v. Sablan*, 95 F. Supp.2d 1133 (D.N. Mar. I. 1999), *aff'd sub nom. Torres v.*
26 *Sablan*, 528 U.S. 1110 (2000) (three-judge panel of the district court held that the CNMI's
malapportioned Senate did not violate equal protection because the "one person, one vote"
doctrine is not a fundamental constitutional right guaranteed to residents of unincorporated
territories); *Wabol v. Villacrusis*, 958 F.2d 1450, 1462 (9th Cir. 1992), *cert. denied*, 506
U.S. 1027 (1992) (holding that the land alienation restrictions of Article XII of the
Commonwealth Constitution are not subject to equal protection attack); and *CNMI v.*
Atalig, 723 F.2d 682, 690 (9th Cir. 1984), *cert. denied*, 467 U.S. 1244 (1984) (holding that
CNMI statutory provisions which state that trial by jury is not required in any civil action

(continued...)

1 pertaining to the granting of alien work visas provides some guidance to the court in determining
2 the constitutionality of those parts of the NWA implicated by this motion.¹³

3 For example, a nonresident worker in the CNMI can be analogized to an H2-B temporary
4 worker in the United States. The United States Bureau of Citizenship and Immigration Services
5 (hereinafter "BCIS"), created under the Department of Homeland Security,¹⁴ allows U.S.
6 employers to petition for skilled and unskilled alien workers to obtain visas to temporarily work
7 in the U.S. in positions for which qualified U.S. workers are not available. Bureau of Citizenship
8 and Immigration Services, *Employment Categories and Required Documentation*
9 <<http://www.immigration.gov/graphics/services/tempbenefits/ecrd.htm>> (accessed April 7,
10 2003). See also 8 U.S.C. § 1101(a)(15)(H)(ii)(b) (1997) (defining an H2-B temporary worker as
11 an alien having a "residence in a foreign country which he has no intention of abandoning who is
12 coming to the United States to perform other temporary service or labor if unemployed persons
13 performing such service or labor cannot be found in this country...."). The process of obtaining
14 an H2-B visa for a temporary alien worker is very similar to that of a nonresident worker under
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18 ¹²(...continued)

19 or criminal prosecution based on local law except when required by local law, do not
20 violate either the Sixth or Fourteenth Amendments).

21 ¹³

22 See Immigration and Nationality Act, 66 Stat. 163 (1952) (codified as amended at 8
23 U.S.C. § 1101 *et seq.* (1997)).

24 ¹⁴

25 U.S. Department of Homeland Security, *Citizenship and Immigration Services:
26 Serving Visitors and New Citizens* <<http://www.dhs.gov/dhspublic/display?theme=57>>
(accessed April 7, 2003) ("The Department of Homeland Security (DHS) will administer
the nation's immigration laws on March 1st when the Immigration and Naturalization
Service becomes part of DHS. Through the Bureau of Citizenship and Immigration
Services (BCIS), DHS will continue the tradition of welcoming immigrants into the
country by administering services such as ... work authorization and other permits....").

1 the CNMI's NWA. For example, the BCIS requires an H2-B petitioner to show that unemployed
2 persons capable of doing the job petitioned for cannot be found in the United States. *Id.* The
3 H2-B petitioner is also required to apply for a certification from the U.S. Department of Labor
4 certifying that "qualified persons in the United States are not available and that employment of
5 the beneficiary(ies) will not adversely affect wages and working conditions of workers in the
6 United States similarly employed...." 8 C.F.R. § 214.2(h)(3)(i) (2002).¹⁵ An employer who
7 needs foreign labor must first file an application for certification with the local public
8 employment office and include a copy of the job offer with the application.¹⁶ 20 C.F.R. §§
9 655.201(a)(1) and (b)(1) (2002). Upon receiving the application, the employment office refers to
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13 *See also* 8 C.F.R. §§ 214.2(h)(iii)-(v) (regulatory provisions for H2-B temporary
14 labor certification on Guam) and 20 C.F.R. §§ 655.200-655.215 (regulatory provisions for
15 H-2B temporary labor certification in nonagricultural occupations) (2002).

16 The Attorney General of the United States is charged with determining whether the
17 entry of foreign workers meets this standard. 8 U.S.C. § 1184(c) (1997). The Attorney
18 General has delegated this responsibility to the Commissioner of Immigration and
19 Naturalization (*see* 8 C.F.R. § 2.1 (2002)), who, in turn, relies on the Secretary of Labor for
20 the initial determinations. 8 C.F.R. § 214.2(h)(3) (2002). The Secretary of Labor relies
21 upon the employment referral system established under the Wagner-Peyser Act (48 Stat.
22 113 (1933) (codified at 29 U.S.C. § 49 *et seq.* (1997))). These are the current regulations,
23 although they may be amended due to the creation of the Department of Homeland
24 Security. *See, e.g.,* U.S. Department of Homeland Security, *DHS Organization*
25 <http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0086.xml> (accessed April 7,
26 2003) (stating that the Director of Citizenship and Immigration Services will report directly
to the Deputy Secretary of Homeland Security).

27 ¹⁶

28 *See also* 20 C.F.R. § 655.203(c) (2002) (stating that the employer must include
29 assurances that the job opportunity is open to all U.S. workers and that the employer will
30 continue to seek United States workers until the foreign workers have departed for the
31 employer's place of employment) and 20 C.F.R. § 655.202(a) (regulations require that
32 "each employer's job offer to U.S. workers must offer U.S. workers at least the same
33 benefits which the employer is offering, intends to offer, or will afford, to temporary
34 foreign workers.") (2002).

1 the employer any qualified U.S. workers who are registered in their system. 1 Immigr. Law and
2 Defense § 3:82 (Aug. 2002) (citing Department of Labor General Administration Letter No. 1-
3 95, *Procedures for H-2B Temporary Labor Certification in Nonagricultural Occupations*, 60
4 Fed. Reg. 7216-7219 (Feb. 7, 1995)). The employer is also required to advertise the job vacancy
5 in a newspaper of general circulation for at least three consecutive days or in a professional or
6 trade publication. Id. The employer submits to the public employment office in writing the
7 results of its recruitment efforts, identifying each U.S. applicant for the job, and explaining the
8 job-related reasons for not hiring each U.S. worker. Id. The office then sends the application,
9 results of recruitment, their prevailing wage rate findings, and other appropriate information to
10 the regional office of the Employment and Training Administration (hereinafter “ETA”). Id.
11 “The ETA regional office reviews the application and the results of recruitment to determine
12 whether U.S. workers are available for the job and whether employment of the alien will
13 adversely affect wages and working conditions of U.S. workers similarly employed, and decides
14 whether to grant or deny the application.” Id.

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17 Similarly, the NWA requires that residents be given preference in employment before a
18 job is open to a nonresident worker. 4 N. MAR. I. CODE § 4411 (1999). When an employer has a
19 job vacancy, she is required to notify DOLI of the vacancy so that DOLI can inform citizens of
20 the job opportunity. 4 N. MAR. I. CODE § 4431 (1999). If resident workers cannot be found to
21 fill the job, the job vacancy is then advertised in a public medium for 15 days. 4 N. MAR. I.
22 CODE § 4432 (1999). If there is still no resident worker to fill the job after the expiration of the
23 15 day publication period, the Secretary of DOLI determines under what conditions and for what
24 period of time the employer shall be permitted to use a nonresident worker to fill the vacancy. 4
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1 N. MAR. I. CODE § 4433 (1999).

2 The policy behind BCIS's requirements for an H2-B temporary worker visa is that BCIS
3 wants "to ensure that the admission of aliens to work [in the United States] on a temporary basis
4 will not adversely affect the job opportunities, wages, or working conditions of U.S. workers."

5 Bureau of Citizenship and Immigration Services, *Employment Categories and Required*
6 *Documentation* <<http://www.immigration.gov/graphics/services/tempbenefits/ecrd.htm>>
7

8 (accessed April 7, 2003). Likewise, the CNMI's policy concerning nonresidents is that the
9 employment of "nonresident workers in the Commonwealth not impair the wages and working
10 conditions of resident workers ... [and] should be temporary and generally limited to the duration
11 of the specific job or employment for which the alien was recruited." *See supra* 4 N. MAR. I.
12 CODE § 4411. Basically, the statutory and regulatory framework of both the Immigration and
13 Naturalization Act and the Nonresident Worker Act is to give preference to U.S. citizens over
14 foreign workers for jobs that become available within the U.S. and the CNMI.¹⁷
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18 Sagana argued that the NWA is a "labor" statute that should not be confused with
19 "immigration" laws. Sagana is correct that the CNMI's labor and immigration laws are
20 distinct and are codified separately in the N. MAR. I. CODE. *See* 3 N. MAR. I. CODE §§
21 4411-4452 (Labor Code) and 4301-4382 (Immigration Code). However, it is through and
22 because of its immigration power that the CNMI enacted the NWA and created the
23 Department of Labor and Immigration to enforce the Act. The CNMI's labor and
24 immigration laws are very much intertwined, such that one cannot stand without the other.
25 In fact, pursuant to Executive Order 94-3 (effective Aug. 23, 1994), the CNMI's executive
26 branch was reorganized, one result of which was that the Labor Division of the Department
of Commerce and Labor was separated and a new department, the Department of Labor
and Immigration, was created. *See* N. MAR. I. CODE § 4421 Commission Comment:
Executive Order 94-3, §§ 301(a) ("There is hereby established a Department of Labor and
Immigration which shall have at its head a Secretary of Labor and Immigration."), 301(b)
("The Division of Labor and the Division of Employment Services are transferred from the
Department of Commerce to the Department of Labor and Immigration.") and 301(c)(1)

(continued...)

1 Thus, based on the clear similarities between U.S. immigration policy, rules and
2 regulations regarding H2-B temporary alien workers and the similar provisions of the NWA, and
3 the fact that the CNMI holds a position analogous to the federal government when it comes to
4 matters of immigration, it follows that the appropriate level of judicial scrutiny to apply to the
5 NWA is a “rational basis” standard. See Mathews v. Diaz, 426 U.S. 67, 83-85 (1976) (upholding
6 federal legislation that restricted certain aliens’ eligibility for a medical insurance program
7 because it was not “wholly irrational” and noting that the standard of scrutiny applied to state
8 legislation does not govern judicial review of federal legislation involving alienage); Dillingham
9 v. Immigration and Naturalization Service, 267 F.3d 996, 1005 (9th Cir. 2001) (stating that
10 “because federal immigration matters is plenary, federal classifications differentiating between
11 groups of aliens are subject to relaxed scrutiny. Such classifications will be held valid unless
12 wholly irrational.”); Aleman v. Glickman, 217 F.3d 1191,1200 (9th Cir. 2000) (holding that
13 federal statutory classification among aliens in the distribution of welfare benefits is subject to
14 “rational basis” equal protection review); City of Chicago v. Shalala, 189 F.3d 598, 604-05 (7th
15 Cir. 1999) (holding that a “rational basis” level of scrutiny should be applied to Congressional
16 legislation of aliens’ welfare benefits); McLean, 173 F.3d at 1186 n.11 (noting that federal laws
17 that classify on the basis of alienage are subject to “rational basis” review because of the
18 government’s overriding national interests in immigration and foreign relations); and United
19 States v. Lopez-Flores, 63 F.3d 1468, 1473 (9th Cir. 1995) (stating that judicial scrutiny of federal
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25 ¹⁷(...continued)
26 (“The office of Immigration and Naturalization is redesignated the Immigration Service
and is transferred to the Department of Labor and Immigration as a division of that
department.”).

1 laws that classify on the basis of alienage receive “rational basis” review).

2 The challenged portion of the NWA survives “rational basis” review if there is a rational
3 relationship between the disparity of treatment between residents and aliens and some legitimate
4 government purpose. Aleman, 217 F.3d at 1200 (citing Heller v. Doe, 509 U.S. 312, 319-20
5 (1993)). “A statutory classification must be upheld against equal protection challenge if there is
6 any reasonably conceivable state of facts that could provide a rational basis for the
7 classification.” Aleman, 217 F.3d at 1201 (citation omitted).

9 Aliens allowed to enter the CNMI under the NWA enjoy a privilege, not a right. The
10 privilege granted by the CNMI is greater than that provided by the federal government. The
11 United States has an annual cap of 66,000 visas issued for H-2B workers (*see* 8 U.S.C. §
12 1184(g)(B) (1997)), whereas the CNMI has no cap on the number of alien workers allowed to
13 enter and work in the CNMI.¹⁸ In fact, in order to address the concern “that the number of
14 nonresident aliens in the CNMI has grown to the proportions of a political, economic, and social
15 crisis,”¹⁹ the CNMI Legislature passed Public Law 11-6, which, effective March 27, 1998, placed
16 a moratorium on the hiring of nonresident workers. 3 N. MAR. I CODE § 4601 (1999).
17 Permitting aliens who are in the CNMI under a valid work permit to obtain part-time and/or other
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21 The most recent figures compiled by the CNMI Department of Commerce indicate
22 that, as of 2001, there were more than 36,000 alien workers in the CNMI. *See* CENTRAL
23 STATISTICS DIVISION, DEPARTMENT OF COMMERCE, 2001 CNMI STATISTICAL YEARBOOK
24 p. 52 table 4.22 (2002) (indicating that a total of 36,320 work permits were issued to non-
25 U.S. citizens in calendar year 2001).

26 ¹⁹

27 3 N. MAR. I CODE § 4601 Commission Comment: Pub. L. No.11-6, Section 1
(1999) (stating also that “[t]he restricted labor pool created by this legislation is a departure
from the prior policy of the Commonwealth which allowed for very liberal importation of
alien labor.”).

1 jobs without restrictions will, in effect, take away jobs from U.S. citizens. This potential
2 outcome is contrary to the purpose and policy of the NWA.

3 The court finds that the CNMI has a rational basis for enforcing the NWA because its
4 provisions which give job preference to citizens (3 N. MAR. I CODE § 4413) and require aliens to
5 obtain DOLI approval for any new employment contract (3 N. MAR. I CODE §§ 4434 and 4437),
6 while effectively limiting the number of job positions open to nonresident workers, are rationally
7 related to the CNMI's interests in preserving employment opportunities for its citizens and
8 promoting economic self-sufficiency.²⁰

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10 Furthermore, the NWA does not completely prevent nonresident workers from "working
11 in the common occupations of life." Instead, it places reasonable limitations on nonresident
12 workers' ability to contract for employment while they are legally in the CNMI. *See, e.g.*, 3 N.
13 MAR. I. CODE § 4437(d) (1999) ("No employer or nonresident worker shall execute any contract,
14 make any other agreement, or change any existing contract,... regarding the employment of such
15 worker, without the approval of the chief...."). In fact, the Act does permit other employment
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20 In the United States, H-2B temporary workers are only allowed to work for the
21 employer who petitioned for their work visa. *See* 8 C.F.R. § 274a.12(b)(9) (2002) ("An
22 alien in [H-2B] status may be employed only by the petitioner through whom the status was
23 obtained.") and 8 C.F.R. § 214.1(e) (2002) ("A non-immigrant who is permitted to engage
24 in employment may engage only in such employment as has been authorized. Any
25 unauthorized employment by a non-immigrant constitutes a failure to maintain status
26 within the meaning of section 241(a)(1)(C)(i) of the Act."). However, the alien may obtain
a second job only after the second employer petitions for the alien, goes through the labor
certification process, and gets final approval on her petition. 8 C.F.R. § 214.2(h)(2)(C)
(2002) ("If the beneficiary will perform nonagricultural services for, or receive training
from, more than one employer, each employer must file a separate petition with the Service
Center that has jurisdiction over the area where the alien will perform services or receive
training....").

1 opportunities for nonresident workers. *See, e.g.,* 3 N. MAR. I. CODE §§ 4437(e),²¹ 4437(m),²² and
2 4602(a)-(c).²³ While these provisions do not grant Sagana the specific relief he requests – a
3 declaration that he can freely market his labor to any employer without restrictions and on equal
4 terms as any citizen for so long a period as he is lawfully in the CNMI as a nonresident worker –
5 they do provide alien workers with a means of obtaining other employment while they are legally
6 in the CNMI.
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8 The limitations placed on alien workers are reasonable and survive rational basis scrutiny
9 because the CNMI has legitimate interests in regulating and tracking the activities of its alien
10 workers. For instance, the CNMI government needs to know how many nonresident workers are
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13 A nonresident worker may, in certain circumstances, obtain sub-contract work with
14 another employer. 3 N. MAR. I. CODE § 4437(e) (1999):

15 A nonresident worker shall not be permitted to perform any services or
16 labor within the Commonwealth for any employer other than the employer
17 for whom the chief has approved an employment contract with such worker,
18 nor may a nonresident worker perform any services or labor on a subcontract
19 between the employer of record and any other employer, *except that the*
20 *chief may approve such a subcontract between the employer for a particular*
21 *job with a specified duration as part of the original employment contract....*

22 (Emphasis added).

23 22

24 A nonresident worker may, in certain circumstances, “...perform [] services or labor
25 outside the employee’s job classification; provided that such assignment is within the scope
26 of employer’s business, is not prohibited by statute, and it in the same occupational
category....” 3 N. MAR. I. CODE § 4437(m) (1999).

23

24 A nonresident worker may, in certain circumstances, transfer from one employer to
25 another during the contract period and after the initial contract period, provided that no
26 qualified resident worker is available to fill the position to be filled by the transferring
worker and all other requirements of the NWA have been satisfied. 3 N. MAR. I. CODE §
4602 (1999).

1 within its borders and how their numbers affect job opportunities for the resident workforce. The
2 government also has to be able to gauge the nonresident workers' positive effect on
3 Commonwealth society and the government tax base with the strain placed on medical, social,
4 public works, and law enforcement resources. In addition, the CNMI has a rational basis for
5 policing its borders, especially given the recent heightened security measures implemented in the
6 United States and its Territories as to the entry and exiting of aliens. The NWA is rationally
7 related to the CNMI's legitimate interest in maintaining accurate and timely documentation of all
8 alien workers and their employers to ensure both the workers and employers' compliance with
9 the Act. *See, e.g.*, 3 N. MAR. I. CODE §§ 4441-4446 (enforcement, hearing and review
10 procedures) and 4447 (remedies and penalties) (1999).

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13 The court concludes that the challenged provisions of the NWA are rationally related to
14 the CNMI's legitimate interests of protecting employment opportunities, wages, and working
15 conditions of United States citizens, promoting economic self-sufficiency, permitting
16 employment opportunities of nonresident workers while protecting their rights, ensuring worker
17 and employer compliance with the Act, and policing the borders of the CNMI. Accordingly,
18 Sagana's motion for summary judgment based on a violation of the Equal Protection and Due
19 Process Clauses of the Fourteenth Amendment is DENIED.

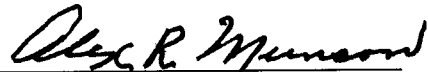
20 21 **C. Conclusion**

22 For the abovementioned reasons, plaintiff Sagana's motion for summary judgment is
23 DENIED. This disposes of the single issue left for the court to consider in the this case. Thus,
24 there being nothing further for the court to consider regarding this matter, the case is
25 DISMISSED with prejudice and JUDGMENT is entered in favor of defendant Tenorio.
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1 Pursuant to paragraph 7 of the Settlement Agreement, the court retains jurisdiction over
2 this case for the purpose of enforcing the terms of the Settlement Agreement and for Orders in
3 Aid of Judgment.

4 IT IS SO ORDERED.

5 DATED this 9th day of April, 2003.
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10 ALEX R. MUNSON
11 Judge
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