The House of Representatives
16th Commonwealth Legislature
PO Box 500586
Saipan, MP 96950

August 8, 2008

Mr. Gil M. San Nicolas, Secretary of Labor
CNMI Department of Labor
Saipan, MP 96950

RE: INQUIRY ON DEPARTMENT OF LABOR POLICIES AND PROCEDURES

Dear Secretary San Nicolas,

As members of the House Standing Committee on Judiciary and Governmental Operations, Ad-Hoc Subcommittee on Labor and Immigration Issues, we hereby request clarification from the CNMI Department of Labor on certain policies and procedures that have been adopted, and official reports and statements issued, by the Department of Labor (herein "Department"). We would appreciate your timely and complete response to the following concerns and requests for supporting documents **within 10 business days from the date of this letter:**

1) <u>Income requirements under Section 4926 of Public Law 15-108</u>. It has come to our attention that the Department may be imposing the new income requirements under Section 4926 of Public Law 15-108 on the immediate relatives of foreign national workers, who (immediate relatives) are already present in the Commonwealth, in possible conflict with the U.S. District Court's decision in *Kin v. CNMI*, 3 N.M.I. 608 (D.N.M.I. 1992) and also with the legislative intent described in House Standing Committee Report 15-63, that Section 4926 shall have only *prospective* application. HCR 15-63, at 10. The Department may also be accepting "equivalent assurances" under the implementing regulations in lieu of Section 4926 requirements, in conflict with Public Law 15-108. We are further concerned that the Department may be applying Section 4926 inconsistently throughout the senatorial districts of Saipan, Tinian, and Rota.

   Please explain whether or not the Department is indeed considering "equivalent assurances" in reviewing applications for the entry of immediate relatives of foreign national workers, and, if so, by what standards. Please also clarify whether or not the Department is imposing Section 4926 requirements on immediate relatives who are already present in the Commonwealth, and if so, explain the procedures governing how the Department decides whether to impose Section 4926, or adopt other procedures for those immediate relatives already present in the Commonwealth. Please also provide data on the number of immediate relatives present in the Commonwealth on the date of enactment of U.S. Public Law 110-229.

Finally, please report on the efforts undertaken by the Department, if any, including training, program monitoring, and program evaluation, to ensure that policies are consistently enforced between Saipan, Tinian, and Rota.

2) Repatriation or denial of Temporary Work Authorizations despite pending labor cases. We are concerned that the Department's policy which permits the repatriation of foreign national workers or denial of Temporary Work Authorizations despite unpaid awards or pending EEOC, NLRB, U.S. Department of Labor, or CNMI Department of Labor cases, may constitute a denial of workers' due process rights. *Office of the Attorney General v. Rivera* 3 N.M.I. 436 (1993) held that "an order of deportation, while a valid claim is pending, must be stayed until, at the very least, the worker is provided a meaningful opportunity to a hearing." The Supreme Court cited its earlier decision in *Office of the Attorney General v. Deala,* 3 N.M.I. 110 (1992), wherein it said that "[i]n an administrative proceeding where a person's life, liberty, or property is at stake, Article I § 5 of the Commonwealth Constitution requires, at a minimum, that the person be accorded a meaningful notice and a meaningful opportunity to a hearing appropriate to the nature of the case." Id., at 116.

   In elaborating on what a "meaningful opportunity to a hearing" is, the Court in *Rivera* wrote:

   > "The property at stake for the workers in this case is each of their claims for unpaid wages. They must be allowed to have their wage claim heard. The opportunity to have their wage claim heard must be meaningful. In this particular case, it is not a meaningful opportunity to have a wage claim heard if it only means that a worker has to leave the island immediately and then return for brief visits, not to exceed a total of 90 days to pursue his or her claim. Due process cannot be satisfied in this case by placing a specified time limit on the opportunity for a hearing."

   Deala also makes it clear that the Administrative Hearing provided for by the Nonresident Workers Act is merely the beginning of a worker's meaningful opportunity for a hearing.

   Other statutory provisions provide adequate notice and opportunity for a hearing. An employee is given the right to file an employee grievance with the Chief of Labor (3 CMC § 4447 (b)). This is the start of the "opportunity to a hearing" that is provided the employee. Section 4447(b) then refers the employee to Section 4444 for the required hearings before the Chief of Labor. If the employee is dissatisfied with the actions of the Chief of Labor, the employee has an administrative appeal to the Director of the Department (3 CMC § 4445). If the employee is still dissatisfied with the review made by the Director, the employee has another opportunity before the Superior Court (3 CMC §4446).

Moreover, a claimant's right to remain in the Commonwealth and participate in his or her case would be meaningless without a corresponding right to work and support himself or herself while the case is pending. Several federal and local court decisions have affirmed this right. See, for example, Pathan v. American Pacific Textile, Inc., Order Granting Motion For Preliminary Injunction, Civil Action 01-0017 (NMI District Court, April 26, 2001) (CNMI Department of Labor ordered to provide plaintiff a memorandum to seek temporary employment, and subsequent temporary work authorization, while plaintiff's case was pending); Office of the Attorney General and Division of Immigration Service v. Yu Dong Mei, Order Granting Motion to Stay Deportation and Request For Injunctive Relief, Civil Action No. 98-01077B (NMI Superior Court, May 16, 2001) (Ms. Yu's due process right to remain in the Commonwealth pending the resolution of the District Court litigation would be rendered meaningless unless she were permitted to support herself during the pendency of her stay); and Sirilan v. Castro, Civil Action No. 82-237, Order Granting Preliminary Injunction (NMI Superior Court, Sept. 13, 1982).

Please provide the number of foreign national workers to date with unpaid labor awards and/or pending EEOC, NLRB, U.S. Department of Labor, or CNMI Department of Labor cases, and of that, the number of foreign national workers who have been repatriated, deported, and/or denied Temporary Work Authorizations.

3) Unpaid administrative orders. In correspondence from the Department's volunteer hearing officer Ms. Deanne Siemer to Representative Sablan dated February 29, 2008, Ms. Siemer wrote, "There are hardship provisions available with respect to repatriations so that persons who have outstanding unpaid judgments and wish to be repatriated can be paid from a government fund before they leave and allow the government to collect the unpaid judgments in their stead." We are concerned, however, that this may not in fact be the case, and that foreign national workers with outstanding judgments are being repatriated without being paid.

   In its Third Interim Progress Report on the Implementation of P.L. 15-108, dated April 23, 2008, the Department announced that it had revised its procedures for collecting fines levied by hearing officers to include denying employers with outstanding fines the ability to "post JVAs, submit applications, or transact other business with the Department until the fines are paid in full…" 3rd Interim Report, at 1. The same report stated that the Department had initiated a new collections procedure by which workers are instructed to report to the Department if money damages are not paid as ordered, and are then provided with instructions on how to use the Small Claims Court to collect on Department orders. With respect to outstanding judgments in older cases, the Department stated that it had initiated a program to resolve the problem, and would "go into files, now in storage for years since the labor cases have been completed, and dig out these orders…" Id., at 3.

Just two weeks later, however, in its Fourth Interim Progress Report, dated May 14, 2008, the Department announced that it had again changed its policies and practices with respect to collection of unpaid administrative orders, by directing all workers with unpaid judgments to go to Small Claims Court. 4th Interim Report, at 2. In a Letter to the Editor that appeared in the *Saipan Tribune* on May 26, 2008, the Deputy Secretary stated that the "Department is short-handed and does not have the staff to sort through years-old files that have been sent to storage." Meetings at the Garapan Roundhouse to assist workers with unpaid judgments were subsequently convened, presumably utilizing Department staff, and complainants were instructed to bring copies of their orders and then provided with instructions on how to file small claims in court.

In its Fifth Interim Progress Report, dated July 11, 2008, the Department announced that it had "finished the project to deal with unpaid administrative orders from prior administrations," and that employers who had failed to comply with administrative orders and who were still in business in the Commonwealth had been given 30 days in which to demonstrate that the outstanding administrative orders had been paid. After 30 days, noncompliant employers would be placed on a Barred List so that new applications would not be processed. 5th Interim Report, at 1. Presumably, workers still holding unpaid orders after the 30 day period would have no other option but to pursue their claims in court.

We are concerned that the Department's new policy of referring unpaid administrative orders to Small Claims Court appears to shift the burden of enforcement from the Department of Labor to the court and unduly burdens victims of labor abuse. Victims must now not only pay the small claims fee and fill out the necessary small claims forms, they must also serve their claims on the employer who has failed to pay them wages earned and/or failed to follow the orders issued by the Department of Labor. While the Department's Fourth Interim Progress Report stated that the Small Claims Court "is in a much better position than the Department to secure payment" of administrative orders, it did not explain why the Department of Labor is less capable than the Small Claims Court of enforcing Department of Labor orders.

Moreover, this new policy of referring workers with unpaid awards to Small Claims Court suggests that the Department is unable or unwilling to effectively enforce its own orders. In the same aforementioned Letter to the Editor, dated May 26, 2008, the Deputy Secretary of Labor stated, "[A]dministrative orders have remained unenforced for years, well beyond the six-year statute of limitations and are now, under Commonwealth law, unenforceable," but did not explain why the Department has failed for years to enforce its own orders. Moreover, the Department's Third Interim Progress Report, dated April 23, 2008, stated that "[resolving outstanding judgments] is not a priority, and will be completed as time and resources permit." 3rd Interim Report, at 3.

Please clarify the Department's policy and procedures with respect to unpaid administrative orders, and clarify whether or not the hardship provisions described by Ms. Deanne Siemer are in fact in effect, and if so, indicate the government fund workers out of which workers are receiving their awards before repatriation. Please also clarify whether or not the Department is actually implementing its policy of denying employers with outstanding fines the ability to transact business with the Department. If so, please provide the total number and names of employers with outstanding fines who have been denied the ability to transact business with the Department until the fines have been paid.

In addition, please provide an update as to the number of unpaid awards that are now beyond the statute of limitations, the number of unpaid awards that remain within the statute of limitations, and the total amounts for each. Please also provide an update as to the number of awards that have actually been paid by employers, and the total amounts, within the last six years, and also since the Department's new policy of referring workers to Small Claims Court has been adopted. Finally, please describe the new procedures that workers with unpaid orders must now follow in order to collect their awards, how these new procedures differ from the Department's previous practice, and why the Department believes the Small Claims Court is more capable than the Department of enforcing Department orders.

4) <u>Recordkeeping procedures at the Department.</u> We are concerned that Department files, particularly those pertaining to administrative orders, may have been misplaced, destroyed, stolen, allowed to deteriorate while in storage, or otherwise lost. In July 2008, during a legislative tour at the Department of Labor, we were informed by Department officials that files more than two years old were being stored in a termite-infested room on the third floor of the building presently occupied by the Department. When Representative Sablan requested the opportunity to visit this storage area, she was told that the room was locked and that only the building landlord had access to it.

   Please describe the procedures and resources used to maintain, update, and store records at the Department, where and under what conditions such records are being stored, and any efforts undertaken by the Department to salvage and preserve records that may have been damaged under inadequate storage conditions. Please also explain what has become of the Department's records of administrative awards issued over at least the past six years, and whether any of these documents have been misplaced, destroyed, stolen, allowed to deteriorate while in storage, or otherwise lost, and how, and why.

5) <u>Department practice of issuing notices by publication as a first resort.</u> We are concerned that the Department's practice of issuing notices by publication as a first resort, including hearing notices, notices of denied claims and appeals, and

overstaying notices, may constitute violations of the due process rights of workers and increase the likelihood of litigation against the CNMI government. With respect to the Department's notices to overstayers, we are concerned that the Department's recently published list may be flawed and inaccurate, and that publication in two newspapers of general circulation for only two successive weeks, as reported in the Department's Fourth Interim Progress Report, does not provide sufficient notice for individuals to appeal their placement on the list or to correct the record if they have been placed on the list erroneously. Moreover, although the report stated that there will be a period of time granted to correct the record before the record is certified and submitted to the Division of Immigration, the report does not indicate when the correction period expires, or how the Department is prepared to deal with workers who may attempt to appeal their overstayer classification after the record has been certified, on the grounds that they had not seen the notices on either of the two occasions of publication. 4th Interim Report, at 1-2.

Please provide data on the total number of hearing notices issued by personal delivery, mail, or publication since P.L. 15-108 went into effect, and of that, the number of hearings noticed by publication only. Of the number of hearings noticed by publication only, please provide the number of cases that have been closed as a result of workers failing to show up on their hearing date, the number of appeals filed after these cases were closed, and the number of cases reopened as a result of these appeals. Please also provide the expiration date for the correction period for workers who have been erroneously placed on the overstayer list, and describe how the Department plans to deal with workers who appeal their overstayer classification after the record has been certified.

6) Department practice of allowing appeals to be heard by the same hearing officer who denied the original case. We are concerned that the Department may be allowing appeals to be heard by the same hearing officer who denied the original case, which again raises concerns about potential violations of due process rights of workers, and increased likelihood of litigation against the CNMI government.

   Please verify whether or not the Department is allowing appeals to be heard by the same hearing officer who denied the original labor case. If so, please provide the names of the hearing officers involved, the number of appeals for which they have also heard the original cases in the last two years, the outcomes of each of those appeals, and the Department's justification for permitting this practice.

7) Public statements issued by Department officials indicate a strong prevailing bias against foreign national workers. For example, on page two of a memorandum to the JGO Committee dated April 28, 2008, the Deputy Secretary stated:

- "[M]any foreign workers of relatively long residence are found by hearing officers to be engaged in scams and frauds just to remain in the Commonwealth. They make false statements in hearings; disregard Department orders; and generally disrespect Commonwealth law."

- "Many foreign workers who have been in the Commonwealth for five years have records of continuous employment, but that employment is not real. It exists on paper alone and is, in fact, a fraud on the Commonwealth government."

- "Just because a person has not been apprehended in such a fraud does not mean that this person has added anything to the community."

In addition, in a Letter to the Editor dated May 26, 2008 in the *Saipan Tribune*, the Deputy Secretary made the following statements:

- "In fact, most workers who bring cases of any kind want only one thing – which is to be able to remain in the Commonwealth for as long as possible."

- "Because many cases are uncontested, it is not possible to determine how many cases of worker fraud exist. As you know, workers and their advocates understand that if an employer does not show up, there will be no one to contest their claims and they can make almost any untrue assertion without fear of contradiction."

The Deputy Secretary's statements imply that foreign national workers are generally and as a matter of course presumed guilty of fraud until proven innocent. Assuming that the sentiments of the Deputy Secretary reflect the official views of the Department, we are concerned that such obvious bias may seriously affect the ability of the Department to fairly and impartially adjudicate labor cases, and respect the due process rights of all workers.

Please clarify whether or not the Deputy Secretary's statements are representative of the official views of the Department, and indicate whether or not such statements affect the Department's ability to objectively adjudicate labor cases. Please also clarify the nature of the Deputy Secretary's role and responsibilities at the Department, and provide supporting documents including, but not limited to, the Deputy Secretary's official contract with the Department, position description, job qualifications, and curriculum vitae.

8) <u>Status of the "hardship provisions"</u>. In its briefing to the Legislature on February 27, 2008 on the implementation of P.L. 15-108, and in its Second Interim Progress Report, dated April 4, 2008, the Department stated that it was in the process of developing "hardship provisions" that would allow foreign national workers who no longer have ties with their countries of origin, or who can demonstrate other

circumstances of extreme or unusual hardship to petition for exemption from the periodic exit requirement or other requirements of P.L. 15-108. 2nd Interim Report, at 3-4.

We have received reports, for example, that foreign national workers with U.S. citizen children, including U.S. citizen children having documented physical and mental disabilities, are now being ordered to depart the CNMI, rather than being granted additional time to secure job transfers. We are concerned that repatriation orders despite circumstances of extreme or unusual hardship may lead to a greater public burden (i.e., children with disabilities becoming wards of the state) than if foreign national workers petitioning for hardship consideration were simply granted additional time to find new jobs.

Please clarify whether or not the Department is currently granting extensions of time to secure job transfers for foreign national workers experiencing extreme or unusual hardship, and if so, using what guidelines. Please also provide an update on the progress the Department has made toward drafting hardship provisions, including recommendations of the specific circumstances under which the Department might conclude that a foreign national worker should be granted hardship consideration.

9) <u>Continued entry of *new* foreign national workers into the Commonwealth, as long-term foreign national workers are being repatriated, and as U.S. citizens, permanent residents, and foreign nationals continue to seek employment in the declining economy.</u> In its Fifth Interim Progress Report, dated July 11, 2008, the Department stated that it was processing repatriations and publishing quarterly overstayer lists "in order to maintain our ability to accommodate needs for workers from off-island for construction and other new projects." 5th Interim Report, at 1. We are concerned that the Department is failing to implement policy that prioritizes U.S. citizens, permanent residents, and foreign national workers already present in the Commonwealth for employment, in favor of new foreign national workers who may have skills that are currently available in the local workforce.

Moreover, we are concerned that the emergency regulations which cap the number of foreign workers in the Commonwealth at 22,417 (pursuant to U.S. Public Law 110-229) and allow employers to reserve "slots" to bring in new foreign national workers to replace those who have been repatriated, and the Department's policy of repatriating workers with pending cases and unpaid awards, would together discourage workers from filing legitimate labor cases, and create an incentive for abusive employers to terminate or opt not to renew the contracts of workers who may have cause to file cases against them.

Please provide the total number of foreign national workers repatriated since P.L. 15-108 went into effect, and of that, the number of foreign national workers who had lived in the CNMI legally and continuously for at least five years prior to

repatriation, and those who had lived in the CNMI legally and continuously for at least ten years prior to repatriations. Please also provide the total number of <u>*new*</u> *foreign national workers permitted to enter the CNMI, and indicate for which industries and occupations, as well as data on the number of people seeking employment to date who have registered with the Division of Employment Service, and of that, the number of U.S. citizens, permanent residents, and foreign national workers, and for which industries and occupations. Of the number of people who have registered with the Division of Employment Services since the effective date of P.L. 15-108, please provide a breakdown of the number of U.S. citizens, permanent residents, and foreign national workers who have been successfully referred and placed for employment.*

Finally, please provide the LIIDS database printout referenced in the blank "Attachment B" of the Annual Report of the Department of Labor submitted to the Legislature on March 25, 2008. The printout was never officially transmitted to the House Clerk as indicated in the report.

10) <u>Termination of the Memorandum of Understanding with the Federal Ombudsman has resulted in significant loss of federal funds to the Department.</u> In the Annual Report of the Department of Labor, dated March 25, 2008, the Department stated that federal grant funds previously available to the Department for operations had been withheld due to the Governor's rejection of proposed conditions that had been attached to the funds. The report alleged that the proposed conditions "amounted to a serious conflict of interest or appearance of conflict," on the Ombudsman's part, and also indicated that local funding had been substituted for part of the withheld federal funds. Annual Report, at 4. The report did not elaborate on the nature of the grant conditions nor the Ombudsman's alleged conflict of interest, nor did it detail the amount of federal funds that had been lost as a result of the decision to reject those conditions.

    In its Second Interim Progress Report, dated April 4, 2008 the Department informed the Legislature that the Memorandum of Understanding with the Ombudsman had been terminated. The report only stated, by way of explanation, that, "We [the Department] were receiving regular letters from the ombudsman accusing the Department of 'violations' of the MOU when none had occurred, and the MOU was just not serving any useful purpose." 2nd Interim Report, at 5. The Department has never adequately explained, however, the nature of the disagreements that would justify such a severe and potentially harmful course of action. As a result of the terminated MOU, and the Department's refusal to enter into a new MOU with the Federal Ombudsman, the Department has apparently lost approximately $333,000 in federal grant dollars and has had to make up for the loss by utilizing increasingly scarce local funds.

    Please provide a copy of the terminated Memorandum of Understanding with the Federal Ombudsman, and all correspondence related to the termination. Please

also provide the confidential document with respect to the Ombudsman's Office, which was referenced in the blank "Attachment C" of the March 25, 2008 Annual Report of the Department of Labor, but never actually provided. Finally, please verify whether or not the Department of Labor has in fact lost any amount of federal funds as a result of the terminated MOU, and if so, what amount, and describe how the Department has had to compensate for those lost funds.

11) The nature and propriety of Ms. Deanne Siemer's services as a Department "volunteer." We have noted that although Ms. Deanne Siemer has acted in various capacities officially representing the Department, serving as a hearing officer, developing and implementing Department policy, handling confidential documents, and providing legal counsel, it is not clear what her actual and official duties and responsibilities might be, if any, and what potential liabilities the Department may assume for the decisions she makes on behalf of the Department. Moreover, Ms. Siemer has also been known to act as legal counsel for the Governor, and has assisted in the drafting of legislation for the Legislature, including the bill that would become P.L. 15-108.

    Please provide a description of Ms. Deanne Siemer's official duties and responsibilities at the Department of Labor, with supporting documents including, but not limited to any official contracts, position descriptions, required qualifications for hearing officers, documents related to services provided by Ms. Siemer for the Department, remuneration for services rendered, and curriculum vitae.

12) Standard operating procedures and comments on regulations implementing P.L. 15-108. At the briefing to the Legislature on February 27, 2008 the Department agreed to furnish to the Legislature for review the comments submitted on the regulations implementing P.L. 15-108 and the Department's responses to those comments. The Department also stated that it would post these records (comments and official responses) online on the Department's official website (www.marianaslabor.net) for general public viewing. As of this date, the Department has not submitted or posted the comments and responses. We therefore request copies of these comments and responses, and also copies of the Department's Standard Operating Procedures for review, pursuant to 1 CMC § 9917 (the Open Government Act) and Section 4961(b) of P.L. 15-108 (Regulations and legislative oversight)

    Please provide copies of the comments submitted to the Department on the regulations implementing P.L. 15-108, the Department's official responses to those comments, and the Department's Standard Operating Procedures with respect to implementing P.L. 15-108.

13) Legal opinions on P.L. 15-108 and the implementing regulations. We fully recognize the intensive legal review to which P.L. 15-108 and the implementing regulations have been subject, but continue to seek clarification on the constitutionality of some provisions of the new law and regulations, particularly with respect to the practice of issuing notices by publication as a first resort, and the practice of repatriating or denying Temporary Work Authorizations to workers with unpaid awards or pending claims. The legal opinions provided by a number of attorneys on P.L. 15-108 and the regulations would therefore be extremely helpful in addressing continuing constitutionality concerns.

    We hereby request that the Department waive, in writing, its attorney-client privileges and provide all legal opinions and comments, published or unpublished, in the Department's custody on P.L. 15-108 and the implementing regulations.

Thank you for your prompt attention to this matter. Please do not hesitate to contact Representative Salas at 664-8826 or Representative Sablan at 664-8931 should you have any questions.

Sincerely,

/s/ Rep. Edward Salas
Vice-Chair, JGO Committee
Chair, Ad Hoc Subcommittee on Labor and Immigration

/s/ Rep. Christina Sablan
Member, JGO Committee

Cc: House Speaker
Senate President
JGO Committee Chair
Members of the House and Senate
Governor
Washington Representative
Deputy Secretary of Labor
Director of Labor
Mayor of Rota
Resident Director of Labor on Rota
Mayor of Tinian
Resident Director of Labor on Tinian
Attorney General
Public Auditor
Presiding Judge, Commonwealth Superior Court
Chief Justice, Commonwealth Supreme Court
Federal Ombudsman
Mr. Tim Riera, U.S. Equal Employment Opportunity Commission
Mr. Thomas Cestare, National Labor Relations Board
Mr. John Glyder, U.S. Department of Labor
Mr. Mark Hanson, Attorney
Ms. Jane Mack, Micronesian Legal Services Corporation
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