No. _____

In The
Supreme Court of the United States

PETER CHIKA ECHE; PERRY PO-SHEUNG LO,

Petitioners,

v.

ERIC H. HOLDER, JR., Attorney General; JANET A. NAPOLITANO, Secretary, Department of Homeland Security; DAVID GULICK, USCIS District Director; WALTER L. HAITH, USCIS District 26 Field Office Director; SUSAN TERUYA, USCIS Immigration Officer,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL A. BRODSKY
Counsel of Record for Petitioners
201 Esplanade
Upper Suite
Capitola, CA 95010
831-469-3514
michael@brodskylaw.net

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The legislative act by which Congress governs the United States Territory of the Commonwealth of the Northern Mariana Islands includes provisions for naturalizing Commonwealth residents. The naturalization provisions are found at Pub. L. No. 94-241 § 506(c). Congress exempted section 506(c) from complying with the Naturalization Clause of the Constitution. Congress cited the Territory Clause, U.S. Constitution, Article IV, Section 3, Clause 2 as authorizing the exemption.

The questions presented are:

1) To what extent, if at all, can Congress exempt its legislative acts from complying with the Constitution by invoking the Territory Clause?

2) Did Congress exceed its authority when it exempted the rule of naturalization found at section 506(c) from complying with the Naturalization Clause?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

INDEX TO APPENDICES

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

PETITION FOR WRIT OF CERTIORARI

Petitioners Peter Chika Eche and Perry Po-Sheung Lo pray that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. 1-13) is reported at 694 F.3d 1026 (9th Cir. 2012).

The opinion of the United States District Court for the Northern Mariana Islands (App. 14-35) is reported at 742 F. Supp. 2d 1136 (D. N. Mar. I. 2010).

The administrative decisions of the United States Customs And Immigration Service are unreported and found at Appendix pages 36-53.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on September 11, 2012, and judgment was entered the same day. No petition for rehearing was filed. An extension of time to file the petition for a writ of certiorari was granted to and including January 24, 2013, on November 26, 2012 (Application 12A513). A second extension of time to file the petition for a writ of certiorari was granted

to and including February 8, 2013, on January 22, 2013 (Application 12A513).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Territory Clause, U.S. Constitution, Article IV, Section 3, Clause 2:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The Naturalization Clause, U.S. Constitution, Article I, Section 8, Clause 4, empowering Congress:

> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcy throughout the United States[.]

Other statutes and regulations set forth in the appendix: Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, Pub. L. No. 94-241 §§ 105, 501 and 506(c), 90 Stat. 263, 264-69 (codified as amended at 48 U.S.C. § 1801 note (2008)); Consolidated Natural Resources Act of 2008, Pub. L. No.

110-229 §§ 702(g), 702(j) and 705, 122 Stat. 754, 864-67 (codified at 48 U.S.C. § 1806 (2008)); 8 U.S.C. §§ 1421(c) and 1447(a); 8 C.F.R. § 103.5(a)(3); 8 C.F.R. §§ 336.2(c)(1)(i), 336.2(c)(2)(i) and 336.2(c)(ii).

STATEMENT OF THE CASE

Rule 14(g)(ii) Jurisdiction Statement.

The Ninth Circuit held that the district court had jurisdiction under "8 U.S.C. § 1447(a)." App. 5. Petitioners believe that the Ninth Circuit meant to say 8 U.S.C. § 1421(c), which provides for "Judicial review" of denied naturalization applications "before the United States district court." *See* App. 59. The district court held that it had jurisdiction under "the Administrative Procedure Act." App. 17. Jurisdiction for causes arising under the APA is founded on 28 U.S.C. § 1331. *Califano v. Sanders*, 430 U.S. 99, 107 (1977). Petitioners believe the district court meant to invoke § 1331. The district court had jurisdiction, under either 8 U.S.C. § 1421(c) or 28 U.S.C. § 1331.

I. Overview: The Constitutional Off-Switch.

The Ninth Circuit held that only those clauses of the Constitution that Congress had legislatively extended to the Commonwealth of the Northern Mariana Islands ("CNMI") were in force. As to the other clauses not legislatively extended, "the other clauses of the Constitution do not apply of their own force." App. 11; *but see Boumediene v. Bush*, 553 U.S.

723, 757, 765 (2008) (holding that Congress may not "switch the Constitution on or off at will [because] the Constitution has independent force in these territories, a force not contingent upon acts of legislative grace.") *Id*. at 757.

The concept of "switching off" the rest (or most of the rest) of the Constitution by invoking the Territory Clause stems from the "Insular Cases," which limit application of the Constitution in United States territories. Decided at the dawn of the twentieth century, the Insular Cases divided United States territories into two categories: "incorporated" and "unincorporated." The Insular Cases held that the Constitution applies in full *ex proprio vigore* in incorporated territories but only some rights guaranteed by the Constitution extend of their own force to unincorporated territories. *See generally Dorr v. U.S.*, 195 U.S. 138 (1904); *Downes v. Bidwell*, 182 U.S. 244 (1901). The doctrine of unincorporated territory was devised to address distant and exotic island territories newly captured in the Spanish-American war that were "wholly dissimilar" to any previously acquired territories. *Boumediene v. Bush*, 553 U.S. at 759.

On one view Congress need only observe the most basic rights because Congress "act[s] independently of the Constitution and upon territory which is not part of the United States within the meaning of the Constitution." *Downes,* 182 U.S. 244, 266 (1901) (opinion of Brown, J.). Therefore "fundamental limitations in favor of personal rights . . . would exist . . . by inference and the general spirit of the Constitution

[rather] than by any express and direct application of its provisions." *Id.* at 268. The Ninth Circuit adheres to the "fundamental rights" approach. *Commonwealth of the Northern Mariana Islands v. Atalig*, 723 F.2d 682, 690 (9th Cir. 1984) (holding that only "'those fundamental limitations in favor of personal rights' which are 'the basis of all free government'" apply in unincorporated territories) (quoting *Dorr,* 195 U.S. at 146).

The D.C. Circuit rejects the fundamental rights approach. *See King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). Territorial courts express confusion and the need for guidance. *See, e.g., In re Pangelinan*, No. CV-07-0015-OA, 2008 WL 2670073, at *21 & n.17 (N. Mar. I. June 27, 2008) (noting "the Supreme Court's lack of clear guidance" and noting that the question of "what constitutional provisions apply to unincorporated territories remain[s] confused and ambiguous").

Here, in the legislation by which it governs the United States territory of the Commonwealth of the Northern Mariana Islands, Congress sought to put specified legislative provisions beyond the reach of the Constitution. *See* Pub. L. No. 94-241, §§ 105, 501(a), 501(b), 506, 90 Stat. 263, 264, 267, 269 ("CNMI Covenant" or "Covenant") App. 54-58; *see also In re Pangelinan*, 2008 WL 2670073, at *21 ("Section 501(b) seeks to insulate essential Covenant provisions from constitutional infirmity regardless of whether the contrary constitutional requirement is applicable in the NMI as an enumerated provision or of its own

force."); H.R. Rep. No. 94-364 (1976) (explaining that "[n]othing . . . in the applicable portions of the U.S. Constitution or laws may interfere with these provisions.").

One of the provisions that section 501(b) seeks to insulate from constitutional scrutiny is the section of the Covenant dealing with naturalization. *See* Covenant §§ 501(b), 506(c). App. 55. Congress is empowered to establish "an uniform Rule of Naturalization . . . throughout the United States." U.S. Const., art. I, § 8, cl. 4. The naturalization rule prescribed by Covenant section 506(c) is at the center of this controversy. It is non-uniform, discriminating among naturalization candidates in ways not applicable elsewhere in the United States. In enacting section 506(c), Congress intended to disregard the uniformity requirement of the Naturalization Clause. *See* S. Rep. No. 94-433 at 79 (1975) (explaining that "[t]his provision is enacted under Article IV, Section 3, Clause 2 of the Constitution [the Territory Clause] and therefore need not comply with the uniformity requirement of Article I, Section 8, Clause 4 of the Constitution.").

In the court below, Petitioners argued that the Naturalization Clause applies of its own force and cannot be legislatively switched off. The Ninth Circuit did not agree and held that:

> The Covenant extends certain clauses of the United States Constitution to the CNMI, but the Naturalization Clause is not among them. *See* Covenant § 501, 90 Stat. at 267. The Covenant provides that the other clauses of

> the Constitution "do not apply of their own force," even though they may apply with the mutual consent of both governments. *Id.*

App. 11. In other words, Covenant section 501 exempts Congress from all provisions of the Constitution except those which the CNMI government and Congress have agreed to extend to the CNMI.[1]

Petitioners argued that Congress could not legislatively switch off the Constitution by way of section 501. The presumption is that the Constitution applies in the territories unless application of a particular provision would prove "impracticable and anomalous." Whether a particular provision applies:

> depends upon the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous.

Appellants' Replacement Opening Brief (hereafter "Appellants' Opening Br.") at 24 (quoting *Boumediene*, 553 U.S. at 759) (internal quotation marks and citation omitted). *Boumediene* was directly concerned

[1] The Covenant acknowledges that provisions of the Constitution, not legislatively extended to the CNMI, may apply of their own force. *See* Covenant § 501(a). However, as discussed above, courts interpret the intent of section 501(b) to put sections 203, 501, 506 and 805 beyond the reach of the Constitution, regardless of whether the Constitution would otherwise apply of its own force to those sections. App. 54-56.

with access to the writ of habeas corpus by detainees housed at a leased military base on foreign soil. However, *Boumediene*'s detailed discussion of territorial application of the Constitution was essential to its holding.

The Ninth Circuit declined to engage Petitioners' approach. Its published opinion mentions *Boumediene* only in passing for an unrelated proposition. Borrowing a century-old phrase, the Ninth Circuit held that the "Constitution did not follow the flag to the CNMI." App. 13.

II. The Facts And The Decisions Below.

A. The Facts.

At all relevant times Petitioners resided in the CNMI. The United States Customs and Immigration Service ("USCIS") denied Petitioners' applications to become naturalized United States citizens on the sole ground that Petitioners could not "count" their time in the CNMI toward the requirement that naturalization applicants must have resided in the United States for five years. USCIS stated that, at relevant times, pursuant to Covenant section 506(c), only applicants who had a United States citizen immediate relative permanently residing in the CNMI could count their own time in the CNMI toward the residency requirement ("must-live-with-citizen-relative rule"). App. 43-44. Petitioners did not have citizen immediate relatives who were permanently residing

in the CNMI. The parties do not dispute that Congress intended section 506(c) to have this effect.

In 2008, Congress amended the Covenant. *See* Consolidated Natural Resources Act, Pub. L. No. 110-229, 122 Stat. 754 (classified to scattered sections of the United States Code) ("CNRA"). Title VII of the CNRA applies United States immigration law in full to the CNMI after a transition period and classifies the CNMI as a "state" for immigration purposes. Pub. L. No. 110-229, § 702(j)(2) & (3), 122 Stat. 754, 866. App. 57. After the CNRA's effective date (November 28, 2009) time spent in the CNMI counts toward the residency requirement for naturalization for all United States lawful permanent residents ("LPR"). Thus Covenant § 506(c)'s must-live-with-citizen-relative rule was repealed and the CNMI is considered to be "the United States" for all immigration purposes going forward. On this much the parties agree.

They also agree that the CNRA makes presence in the CNMI retroactively count for some immigration purposes. But they disagree as to whether the retroactive scope of the CNRA includes allowing LPRs who did not meet the must-live-with-citizen-relative rule to retroactively count time in the CNMI toward the residency requirement.

B. Proceedings And Decision At The District Court.

At the district court "the parties' dispute center[ed] on the meaning of section 705(c) of the

CNRA." App. 30. Petitioners argued that Congress intended the words "presence in the Commonwealth before, on or after the date of enactment of this Act shall be considered to be presence in the United States" to include presence for purposes of meeting the naturalization residency requirement. Pub. L. No. 110-229, § 705(c), 122 Stat. 754, 867. App. 58.

The district court acknowledged that Petitioners' interpretation of section 705(c) was arguably correct:

> The CNRA provides that a lawful permanent resident is present in the United States by residing in the CNMI. Arguably, that same presence should satisfy the residency and physical presence requirements under the naturalization provisions.

App. 34.

However, the district court observed that the clause cited states only "that 'presence' in the Commonwealth before, on or after the date of enactment of this Act shall be considered to be 'presence' in the United States . . . [but the clause] omits the reference to 'residence,'" which the court considered to be intentional. App. 33.

Thus the district court concluded that the omission of the word "residence" tipped the balance in favor of the government. The district court finally concluded that "[t]o the extent the relationship between residency for maintaining lawful permanent residence status and residency for naturalization purposes creates some ambiguity in section 705(c)'s

meaning, in the absence of other guiding authority, the Court [holds that section 705(c) does not apply to naturalization]." App. 34.

Because Petitioners appeared pro se at the district court, the court did not have before it the legislative history that was presented to the Ninth Circuit. Appellants' Opening Br. at 36 (quoting *U.S. Relations With Guam And Marianas: Hearing Before the Subcomm. on Insular Affairs of the House Comm. on Energy and Natural Resources*, 111th Cong. 2009 WLNR 9599648 (2009)) (statement of Richard Barth, Acting Principal Dep. Asst. Sec., Dept. of Homeland Security) (explaining that "[section 705(c)] [s]pecifies that prior residence in the CNMI will count as residence in the United States for an alien lawfully admitted for permanent residence who may otherwise have been considered to have abandoned residence in the United States by residing in the CNMI").

The government also argued that Petitioners' attempts to have USCIS's decisions administratively reversed did not adequately exhaust their administrative remedies and therefore the district court did not have jurisdiction. The district court held that Petitioners did exhaust their administrative remedies. App. 22-23.

C. Proceedings And Decision At The Ninth Circuit.

The basic issue at the Ninth Circuit, which all the arguments revolved around, was whether the

non-uniform rule of naturalization was unconstitutional. Petitioners offered statutory construction arguments to show that section 705(c) could reasonably be read to confer retroactive presence for purposes of meeting the naturalization residence requirement. If read that way, it would cure the constitutional deficiency because the must-live-with-citizen rule would be retroactively abolished and all United States legal permanent residents (including Petitioners) would be treated the same. Petitioners believe that Congress had this intent.

Petitioners argued that section 705(c) should be read in light of the rule of construction that any statute that works a disability against an alien is generally to be construed in favor of the alien; Appellants' Reply Brief (hereafter "Appellants' Reply Br.") at 10 (citing *I.N.S. v. St. Cyr,* 533 U.S. 289, 320 (2001)); that section 705(c) is remedial in nature and remedial statutes "should be given a liberal interpretation and should be construed to give the terms used the most extensive meaning to which they are reasonably susceptible"; Appellants' Reply Br. at 9-10 (quoting Vol. 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes and Statutory Construction* § 41.9 (7th ed. 2007 & Supp. Dec. 2010)); that the legislative history supports Petitioners' position; Appellants' Reply Br. at 12-13; and that section 705(c) should be construed to avoid constitutional infirmity by way of the uniformity requirement. Appellants' Opening Br. at 7.

Petitioners further argued that the must-live-with-citizen-relative rule runs afoul of the constitutional uniformity requirement. Appellants' Opening Br. at 37-44 (citing *United States v. Rodiek*, 162 F. 469, 470 (9th Cir. 1908)) (examining a residency requirement that "applies only to residents of the territory of Hawaii" and explaining that "the Constitution requires that . . . a rule of naturalization . . . must be uniform throughout the United States. Any special procedure prescribed for any particular district or territory in the United States would be obnoxious to this provision of the Constitution"); *Morgan v. Virginia*, 328 U.S. 373, 389 (1946) (Frankfurter, J., concurring) (noting that the Naturalization Provision requires "geographic uniformity"); *The Federalist* No. 42 at 238 (C. Rossiter ed., 1999) (explaining that the uniformity requirement is aimed at geographic uniformity for residency requirements requisite to naturalization).

Petitioners presented the legislative history of the Naturalization Clause and presented acts of the first Congresses as well as other documents contemporaneous with the founding in an attempt to show that the original intent of the Naturalization Clause was that it extended to the territories.

Petitioners briefed at length the functional test articulated in *Boumediene* and argued that it had displaced earlier readings of the Insular Cases that might have allowed for the CNMI constitutional off-switch on the Congress-acts-outside-the-Constitution theory. Appellants' Reply Br. at 16-31.

The Ninth Circuit held those provisions of the Constitution legislatively extended to the CNMI by the mutual consent of Congress and the CNMI legislature are applicable but "[t]he Covenant provides that the other clauses of the Constitution do not apply of their own force, even though they may apply with the mutual consent of both governments." App. 11 (internal quotation marks omitted).

The Ninth Circuit's alternative constitutional rationales are discussed in the Reasons section of this petition.

The Ninth Circuit also upheld the district court's reading of section 705(c) to exclude naturalization, although on different reasoning.

The Ninth Circuit did not address the legislative history and rules of statutory construction presented by Petitioners in support of their construction of section 705(c). Because the court did not address these arguments, Petitioners have listed them above in order to preserve them for merits briefing and decision should the Court grant this petition and their consideration become important to the Court's decision.

The government also renewed its argument that Petitioners did not exhaust their administrative remedies. The Ninth Circuit noted that the exhaustion statute was not jurisdictional, and that the agency had considered Petitioners' requests, denied them, and told Petitioners not to file any further appeal. The Ninth Circuit held that Petitioners had

done all they could and any further efforts would have been futile. App. 5-6.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Holding Directly Conflicts With This Court's Decision In *Boumediene v. Bush*.

A. There Is No Constitutional Off-Switch.

The Ninth Circuit held that:

> The Covenant extends certain clauses of the United States Constitution to the CNMI, but the Naturalization Clause is not among them. *See* Covenant § 501, 90 Stat. at 267. The Covenant provides that the other clauses of the Constitution "do not apply of their own force," even though they may apply with the mutual consent of both governments. *Id.*

App. 11. The Ninth Circuit was quick to also offer alternative rationale that the Naturalization Clause does not apply of its own force in any event. However, this reading, that in enacting section 501 Congress put its legislative acts beyond the reach of the Constitution, regardless of whether they would otherwise apply of their own force, is supported by other decisions of the lower courts and the intent is confirmed by the legislative history. *See Richards v. De Leon Guerrero*, 4 F.3d 749, 754 (9th Cir. 1993) (holding that "[e]ven if the Territorial Clause provides the constitutional basis for Congress' legislative authority in the

Commonwealth, it is solely by the Covenant that we measure the limits of Congress' legislative power."); *Wabol v. Villacrusis*, 958 F.2d 1450, 1459 (9th Cir. 1992) ("section 501(b) [seeks] to excuse section 805 from federal constitutional restrictions"). The court adopted the government's litigating position: "Congress's power to pass legislation applicable to the CNMI is not limited by Constitutional provisions that otherwise might limit it, and that are not specified in section 501(a)." Appellees' Answering Br. at 13.

But entering into the Covenant most emphatically does not allow Congress to switch off constitutional provisions:

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. . . . To hold the political branches have the power to switch the Constitution on or off at will . . . would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is."

Boumediene, 553 U.S. at 765 (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)).

B. The Court Should Address The Recurring Errors, Confusion, And Conflicts In The Lower Courts.

The error committed by the Ninth Circuit in this case is emblematic of the poor understanding that the lower courts have of the Insular Cases. Other cases cited throughout this petition that also recognize a constitutional off-switch show that the problem is wide spread.

The lower courts find the Insular Case Doctrine to be "confused and ambiguous." The courts express the need for clear guidance from this Court:

> [T]he Supreme Court's lack of clear guidance made it difficult to predict which constitutional rights were beyond congress's ability to infringe. . . . Thus, for all that has been written, the incorporation doctrine and the resolution of the subsidiary question of what constitutional provisions apply to unincorporated territories remain confused and ambiguous.

In re Pangelinan, 2008 WL 2670073 at *21 (internal quotation marks and citation omitted); *see also King v. Morton*, 520 F.2d 1140, 1153 (D.C. Cir. 1975) (Tamm, J., dissenting) (quoting Charles E. Littlefield, *The Insular Cases*, 15 Harv. L. Rev. 169-70 (1901)) ("The Insular Cases, in the manner in which the results were reached, the incongruity of the results, and the variety of inconsistent views expressed by the different members of the court, are, I believe, without parallel in our judicial history"); Robert A. Katz,

Comment, *The Jurisprudence of Legitimacy: Applying the Constitution to U.S. Territories*, 59 U. Chi. L. Rev. 779 (1992) (attributing "inconsistent results" in the lower courts to "the disorder within the Supreme Court's own territorial jurisprudence").

Upon noting conflicting statements in the Insular Cases, the First Circuit frankly admitted that "[w]e really do not know for sure just what provisions of the Constitution of the United States became applicable ex proprio vigore in this unincorporated territory." *Figueroa v. People of Puerto Rico*, 232 F.2d 615, 619 (1st Cir. 1956). As described in the overview section above, the Ninth and D.C. Circuits are in conflict on this issue. *See Commonwealth of the Northern Mariana Islands*, 723 F.2d at 690; *King v. Morton*, 520 F.2d 1140, 1147 (D.C. Cir. 1975). Although ordinarily the use of different tests would not be a circuit split in the classic sense, here it portends fundamentally different understandings of the Constitution and should be resolved.

This Court has not yet applied *Boumediene* to congressional legislation aimed at the territories. Doing so here would allow the Court to clear up the confusion and provide uniform guidance to the lower courts.[2]

[2] How the Constitution would apply to acts of local legislatures is not before the Court. The Court may address that issue another day and decide that the Constitution applies differently

(Continued on following page)

II. The Ninth Circuit's Reliance On *Downes* To Say That The Territories Are Not Part Of "The United States" Is Erroneous.

Justice White's opinion in *Downes v. Bidwell,* 182 U.S. 244, 287-344 (1901), is the most important of the Insular Case holdings. It is relied on by this Court in support of the functional test. *See Boumediene,* 553 U.S. at 758 (quoting *Downes*, 182 U.S. at 293 (White, J., concurring)). Justice Brown wrote the lead opinion in *Downes* but he wrote only for himself. "The opinion of Mr. Justice White of the majority, in Downes v. Bidwell, has become the settled law of the court." *Balzac v. Porto Rico,* 258 U.S. 298, 346 (1922); *see also Kinsella v. Krueger,* 351 U.S. 470, 474 n.2 (1956) (quoting *Balzac*'s statement that Justice White's opinion is the law of the court with approval).

The precise holding of *Downes*, which the majority of justices concurred in, is that the term "the United States," as used in the Revenue Clause, U.S. Constitution, Article I, Section 8, Clause 4, did not include Puerto Rico as it was in 1901. *See Downes*, 182 U.S. at 287 (holding that Puerto Rico is "not a part of the United States within the revenue clauses of the Constitution").

Here, the Ninth Circuit reasoned by analogy that since "the United States" as used in the Revenue

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to acts of the territorial legislatures. It has done so in the past as between Congress and the several states.

Clause does not include the territories, then "the United States" as used in the Naturalization Clause also must not include the territories. App. 12. But the analogy is faulty. A careful reading of Justice White's opinion reveals that the reasoning and controlling principle of *Downes* would necessarily limit its application to the time, place and constitutional clause that were under consideration.

This is necessarily so because the Court has held that "the United States" as used in the Revenue Clause *does* include the territories:

> It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power then to lay and collect duties, imposts, and excises, may be exercised, and must be exercised throughout the United States. Does this term designate the whole, or any particular portion of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and territories.

Loughborough v. Blake, 18 U.S. 317, 318-19 (1820) (Marshall, C.J.) (construing the uniformity requirement of the Revenue Clause).

Justice Brown dismissed *Loughborough*'s constitutional holding with respect to the territories as dicta. However, Justice White's controlling opinion acknowledged that *Loughborough* had squarely held

that "throughout the United States" included the territories and that it was good law:

> To question the principle above stated on the assumption that the rulings on this subject of Mr. Chief Justice Marshall in *Loughborough v. Blake* were mere *dicta* seems to me to be entirely inadmissible. . . .
>
> From these conceded propositions it follows that Congress in legislating for Porto Rico was only empowered to act within the Constitution and subject to its applicable limitations, and that every provision of the Constitution which applied to a country situated as was that island was potential in Porto Rico. And the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States.

Downes, 182 U.S. at 292-93.

Justice White's controlling principle was that "the determination of what particular provision of the Constitution is applicable, generally speaking, in all cases, involves an inquiry into the situation of the territory and its relations to the United States." This principle is the basis for the functional approach adopted by this Court in *Boumediene. See Boumediene,* 553 U.S. at 758 (quoting the above language from *Downes*).

The Court struggled for some time to reach a consensus on the Insular Cases. *See, e.g., Reid v. Covert*, 354 U.S. 1, 75 (1957) (Harlan, J., concurring); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring). But a majority adopted the functional approach in *Boumediene*. *Boumediene* rejects the proposition that there is a "'rigid and abstract rule' for determining where constitutional guarantees extend." *Boumediene*, 553 U.S. at 759 (quoting *Reid*, 354 U.S. at 74). Rather, "[the question] turn[s] on objective factors and practical concerns, not formalism." *Boumediene*, 553 U.S. at 764. Therefore the territorial citizens of today are not forever circumscribed by an irretrievably truncated Constitution because "[i]t may well be that over time the ties between the United States and any of its unincorporated Territories strengthen in ways that are of constitutional significance." *Boumediene*, 553 U.S. at 758.

Gone is the presumption that only the most rudimentary of rights extend to the territories. Rather, the test adopted by *Boumediene* is that whether a particular constitutional provision applies:

> depends upon the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it and, in particular, whether judicial enforcement of the provision would be impracticable and anomalous.

Boumediene, 553 U.S. at 759 (internal quotation marks and citation omitted). *Boumediene* marked the

triumph of the functional approach and the demise of the fundamental rights approach.

"[T]he Insular Cases' (and later *Reid*'s) [approach is the] functional approach." *Boumediene*, 553 U.S. at 764; *see also id.* at 834 (Scalia, J., dissenting) (noting that "[t]he Court purports to derive from our precedents a 'functional' test"); David D. Cole, *Rights Over Borders: Transnational Constitutionalism and Guantanamo Bay*, 2008 Cato Sup. Ct. Rev. 47, 50 (2008) (describing *Boumediene*'s "contextual and pragmatic inquiry" with respect to "unincorporated territories" that "asks whether the application of a given constitutional right would be 'anomalous or impracticable' in light of the particular circumstances of the jurisdiction"); Christina Duffy Burnett, *A Convenient Constitution? Extraterritoriality After Boumediene*, 109 Colum. L. Rev. 973, 973 (2009) (noting that "the Court used the 'impracticable and anomalous' test, also known as the 'functional' approach. . . . The test first appeared in a concurring opinion over fifty years ago; in *Boumediene*, it garnered the votes of a majority."); Gerald L. Neuman, *The Extraterritorial Constitution After Boumediene v. Bush*, 82 S. Cal. L. Rev. 259, 290 (2009) (noting that "[t]he Boumediene decision has fundamental conceptual importance for U.S. constitutionalism. . . . [T]he direct articulation of the functional approach provides a normatively more defensible basis for the exercise of government power outside its borders.").

Rather than demonstrate that "the United States" excludes the territories, *Downes* – and later

Boumediene – demonstrate that whether "the United States" includes a particular territory, at a particular time, with respect to a particular clause depends on whether application of that clause would be "impracticable and anomalous." This was the inquiry that Petitioners proposed that the Ninth Circuit should conduct. The Ninth Circuit declined to do so.

III. The Ninth Circuit's Fourteenth Amendment Rationale For Holding That The Territories Are Not Included In "The United States" Is Erroneous.

For its alternative rationale, the Ninth Circuit reasoned, again by analogy, that "in the United States" as used in Section 1 of the Fourteenth Amendment was not intended to include the territories. Therefore "throughout the United States" as used in the Naturalization Clause also likely was not intended to include the territories. The Ninth Circuit relied on *Rabang v. I.N.S.*, 35 F.3d, 1449, 1451 (9th Cir. 1994) for this argument. App. 12.

The *Rabang* court observed that the Thirteenth Amendment prohibits slavery "within the United States *or* any place subject to the jurisdiction thereof." *Rabang*, 35 F.3d at 1452. This "demonstrates that there may be places within the jurisdiction of the United States that are not part of the Union." *Rabang*, 35 F.3d at 1453 (quoting *Downes*, 182 U.S. at 251 (opinion of Brown, J.)). But "the 14th Amendment, upon the subject of citizenship, declares only

that 'all persons born or naturalized *in the United States*, and subject to the jurisdiction thereof, are citizens of the United States, and of the *state* wherein they reside.'" *Downes*, 182 U.S. at 251 (opinion of Brown, J.) (quoting U.S. Const. amend. XIV, § 1). *Rabang* correctly understands Justice Brown's view that "it can nowhere be inferred that the territories were considered a part of the United States." *Id.*

But Justice Brown's textual analysis is erroneous:

> The second section is confined to the States; it does not embrace the Indians of the plains at all. . . . The second section refers to no person except those in the States of the Union; but the first section refers to persons everywhere, whether in the States *or in the Territories* or in the District of Columbia.

Cong. Globe, 39th Congress, 1st Sess. 2894 (1866) (remarks of Senate Judiciary Chairman Lyman Trumbull comparing the first and second sections of the Fourteenth Amendment) (emphasis added).

The decisions of this Court accord with Senator Trumbull's remarks. *See McDonald v. City of Chicago*, 130 S. Ct. 3020, 3041 (2010) ("[i]t is generally accepted that the Fourteenth Amendment was understood to provide a constitutional basis for protecting the rights set out in the Civil Rights Act of 1866"); Civil Rights Act of 1866, 16 Stat. 27 ("citizens, of every race and color . . . shall have the same right in every State and *Territory in the United States*")

(emphasis added); *Strauder v. West Virginia*, 100 U.S. 303, 311-12 (1879), *rev'd on other grounds* ("This act [Civil Rights Act of 1866] puts in the form of a statute what had been substantially ordained by the constitutional amendment" and it "partially enumerate[s] the rights and immunities intended to be guaranteed by the Constitution . . . *in every State and Territory*") (construing Section 1 of the Fourteenth Amendment) (emphasis added).

The Ninth Circuit's analysis of the Thirteenth and Fourteenth Amendments was mistaken and lends no support to the proposition that "the United States" doesn't include the territories.

IV. This Court Strictly Adheres To The Cross-Appeal Rule. The Government Has Irrevocably Waived Its Exhaustion Objections.

The government has waived its exhaustion objections by failing to file a notice of cross-appeal. The government is seeking to attack the district court judgment holding that Petitioners had in fact exhausted their administrative remedies. App. 22. "What he [the appellee] may not do in the absence of a cross-appeal is to attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. The rule is inveterate and certain." *Morley Constr. Co.*

v. Maryland Cas. Co., 300 U.S. 185, 191 (1937) (quotation marks and citation omitted) (Cardozo, J.).

"We have called the rule 'inveterate and certain.' [I]n more than two centuries of repeatedly endorsing the cross-appeal requirement, not a single one of our holdings has ever recognized an exception to the rule." *Greenlaw v. U.S.*, 554 U.S. 237, 244-45 (2008) (quoting *Morley Constr. Co. v. Maryland Cas. Co.,* 300 U.S. at 191). Court's have understood that the "time limit for cross-appeals in Rule 4(a)(3) was also jurisdictional." *Johnson v. Teamsters Local 559*, 102 F.3d 21, 29 (1st Cir. 1996) (relying on *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988)). Although what happens when two jurisdictional bars meet on the courthouse steps might be interesting, the issue is not presented here. The exhaustion provision at issue, 8 U.S.C. § 1421(c), is not jurisdictional. Section 1421(c) is set out in the Appendix at page 59.

In order to qualify as jurisdictional an exhaustion provision must contain language that is as "sweeping and direct" as stating "that no action shall be brought under § 1331, not merely that only those actions shall be brought in which administrative remedies have been exhausted." *Weinberger v. Salfi*, 422 U.S. 749, 757 (1975). Section 1421(c) contains no such sweeping and direct language. *See* App. 59. The Ninth Circuit characterized its language as "permissive, rather than mandatory." App. 5.

The government has waived the exhaustion issue.

V. Petitioners Complied With Agency Regulations: They Exhausted Their Administrative Remedies On The Undisputed Facts.

The steps Petitioners took and the agency's responses are undisputed. It is all in the record. The government disagrees with the lower courts' conclusions of law with regard to those facts.

The district court was correct in holding that Petitioners had exhausted their administrative remedies. The reasoning of the district court is found at App. 16-22. In addition, Eche's correspondence to the agency were titled "Re: Reconsideration for Citizenship Application." Appellants' Excepts of Record (on file at the Ninth Circuit) (hereafter "ER") at 109-13. 8 C.F.R. § 336.2(c)(2)(ii) provides that even if untimely, Petitioners' correspondence, if adequately pled, "must be treated as a motion to reconsider and a decision must be made on the merits." App. 60. Section 336.2(c)(2)(i) further provides that an improper request for relief "must be rejected as improperly filed." App. 60. However, when USCIS Director Walter Haith received Eche's motion he replied "I will review the case." ER 110.

Haith then considered Eche's motion for over a month and engaged in back and forth correspondence with him. ER 109-13. When he issued the denial letter, he stated that "I have reviewed your file" and do not accept your arguments. ER 187. The agency treated Eche's motion to reconsider as just that. Eche

exhausted his administrative remedies in compliance with the agency's regulations.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the decision of the Ninth Circuit.

Respectfully submitted,

MICHAEL A. BRODSKY
Counsel of Record
for Petitioners
201 Esplanade
Upper Suite
Capitola, CA 95010
831-469-3514

694 F.3d 1026

United States Court of Appeals,
Ninth Circuit.
Peter ECHE, Ph. D.; Perry Po-Sheung Lo,
Plaintiffs-Appellants,
v.
Eric H. HOLDER, Jr., Attorney General;
Janet A. Napolitano, Secretary, Department of Homeland Security; David Gulick, USCIS District Director; Walter L. Haith, USCIS District 26 Field Office Director; Susan Teruya, USCIS Immigration Officer, Defendants-Appellees.

No. 10-17652.
Argued and Submitted June 12, 2012.
Filed Sept. 11, 2012.

Michael A. Brodsky, Capitola, CA, for plaintiffs-appellants Peter Eche, et al.

Samuel P. Go, Washington, D.C., for defendants-appellees Eric H. Holder, Attorney General, et al.

Appeal from the United States District Court for the District of the Northern Mariana Islands, Philip M. Pro, District Judge, Presiding. D.C. No. 1:10-cv-00013.

Before: MARY M. SCHROEDER, CONSUELO M. CALLAHAN, and N. RANDY SMITH, Circuit Judges.

OPINION

SCHROEDER, Circuit Judge:

Lawful permanent residents of the United States (LPRs) who apply for naturalization as United States citizens must show, inter alia, that they have resided in the United States continuously for five years. *See* 8 U.S.C. § 1427(a)(1); 8 C.F.R. § 316.2(a)(3)-(4). Each of the two Plaintiffs-Appellants in this case had resided for several years in the Commonwealth of the Northern Mariana Islands (CNMI), a territory of the United States, when federal immigration law replaced CNMI immigration law there in 2009. The issue we must decide in this appeal is whether the time plaintiffs resided in the CNMI before the 2009 transition date counts toward the five-year residence requirement for naturalization. The district court held in a published decision that the time does not count. *Eche v. Holder*, 742 F.Supp.2d 1136, 1141-45 (D.N.M.I. 2011). That is the correct answer under the clear language of the controlling statute, and we affirm.

STATUTORY BACKGROUND

When Congress in 1976 approved the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States (Covenant), citizens of the CNMI became citizens of the United States. *See* Covenant, Pub.L. No. 94-241, § 301, 90 Stat. 263, 265-66. The CNMI government, however, retained nearly exclusive control over immigration to the territory. *See id.* § 503(a), 90 Stat. at

268. Over time, the CNMI government permitted a massive influx of temporary "guest workers" from Asia to work in the territory's factories, which were devoted principally to textile and clothing manufacture. *See Sagana v. Tenorio*, 384 F.3d 731, 734-35 (9th Cir.2004). While CNMI law authorized the guest workers' presence, United States law did not extend the workers any federal immigration status. *See id.* Thus LPRs of the United States could not count time spent living in the CNMI toward federal naturalization requirements unless they had a US-citizen immediate relative also living in the CNMI. *See* Covenant § 506(c), 90 Stat. at 269; *see also* General Counsel Opinion, No. 94-10, 1994 WL 1753115 at *4 (INS, Feb. 9, 1994).

In 2009 this situation changed when the Consolidated Natural Resources Act of 2008 (CNRA), Pub.L. No. 110-229, 122 Stat. 754 (2008), became effective. That statute and its implementing regulation made federal immigration law applicable to the CNMI beginning on November 28, 2009. *See* 48 U.S.C. § 1806(a)(1); Commonwealth of the Northern Mariana Island Transitional Worker Classification, 74 Fed.Reg. 55094 (Oct. 27, 2009). The CNRA divested territorial officials' authority to administer immigration law and policy, and gave the authority to officers of the United States government. *See* CNRA § 702, 122 Stat. at 854-55. The statute also made the CNMI part of the United States within the meaning of the Immigration and Nationality Act. *See id.*, 122 Stat. at 866; 8 U.S.C. § 1101(a)(36), (a)(38). LPRs of the

United States may therefore now count time they reside in the CNMI toward the residence requirement for naturalization as United States citizens. The plaintiffs in this case, however, wish to count time they lived in the CNMI before the transition.

PROCEDURAL BACKGROUND

The Plaintiffs-Appellants are Peter Eche and Perry Po-Sheung Lo. Each became a permanent resident of the United States and each later moved to the CNMI before the CNRA transition date. Eche, a Nigerian citizen, entered the United States at Seattle and was admitted as an LPR in September 2004 as the immediate family member of his United States citizen father. He moved to the CNMI in January 2005, and his father apparently remained in the continental United States. Lo, a Chinese citizen, was admitted as an LPR in February 1989 as the immediate family member of his United States citizen sister. He lived in the CNMI between October 2000 and 2009 with no citizen immediate family member.

Both Eche and Lo filed applications in the CNMI to naturalize as United States citizens and appeared for examination in late 2009. The United States Citizenship and Immigration Service (USCIS) rejected both applications on the ground that their pre-transition date residence did not count. The agency said that if the LPRs had no US-citizen immediate relative also living in the CNMI, the residence before the November 28, 2009 transition date "cannot be

counted as residence in the United States for naturalization purposes."

Eche and Lo together then filed this suit *pro se* in the District Court for the Northern Mariana Islands. The district court treated the action as one to review the agency's denial of plaintiffs' naturalization applications, so the court exercised jurisdiction pursuant to 8 U.S.C. § 1447(a). It held on the merits that CNRA did not permit the plaintiffs to count toward the requirements for naturalization the time they resided in the CNMI before CNRA's effective date. *See Eche*, 742 F.Supp.2d at 1141-45. The court therefore granted summary judgment for the government.

Eche and Lo filed this timely appeal, and this court appointed pro bono counsel. All parties agree there are no material issues of fact and the critical issue is one of statutory interpretation.

The district court also held that Eche and Lo had exhausted administrative remedies. Eche and Lo had explored the possibilities for review of the denials, but were discouraged from filing formal appeals. Assuming the district court's conclusion was incorrect, there is no jurisdictional bar to our considering their appeal on the merits. This is because the statutory provision for review of the agency's denial of naturalization applications is permissive, rather than mandatory. It provides a denied applicant "after a hearing before an immigration officer . . . may seek review of such denial before the United States district court." 8 U.S.C. § 1421(c). That section does not

contain the "sweeping and direct jurisdictional mandate" that the Supreme Court and we have required before concluding an exhaustion requirement is jurisdictional. *Maronyan v. Toyota Motor Sales, U.S.A., Inc.*, 658 F.3d 1038, 1040 (9th Cir.2011). The requirement is thus prudential, not jurisdictional. We exercise our discretion to decide Eche and Lo's appeal on the merits. Their case presents unusual circumstances: they were told repeatedly that they should not pursue an administrative appeal because it would be futile. The government is thus in no position to fault them for failing to appeal. *See Laing v. Ashcroft*, 370 F.3d 994, 1000-01 (9th Cir.2004) (failure to exhaust may be waived when "administrative appeal would be futile").

THE STATUTORY MEANING

The relevant language of the CNRA was intended to clarify the legal effect of residence and presence in the CNMI before the 2009 transition from CNMI immigration law to federal immigration law. Section 705 provides in pertinent part:

> (a) IN GENERAL. – Except as specifically provided in this section or otherwise in this subtitle, this subtitle and the amendments made by this subtitle shall take effect on the date of enactment of this Act.
>
> (b) AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT. – The amendments to the Immigration and Nationality Act made by this subtitle, and other

> provisions of this subtitle applying the immigration laws (as defined in section 101(a)(17) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(17))) to the Commonwealth, shall take effect on the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a) [of CNRA]), unless specifically provided otherwise in this subtitle.
>
> (c) CONSTRUCTION. – Nothing in this subtitle or the amendments made by this subtitle shall be construed to make any residence or presence in the Commonwealth before the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a) [of CNRA]) residence or presence in the United States, except that, for the purpose only of determining whether an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) has abandoned or lost such status by reason of absence from the United States, such alien's presence in the Commonwealth before, on, or after the date of enactment of this Act shall be considered to be presence in the United States.

CNRA § 705, 122 Stat. at 867 (codified at 48 U.S.C. § 1806 note). The district court interpreted subsection (c) to mean that an LPR of the United States may not count pre-transition time in the CNMI toward the naturalization requirements, except for the limited purpose of determining abandonment, i.e.,

whether an LPR "loses his status . . . by leaving the United States." *Eche*, 742 F.Supp.2d at 1145. An LPR who lived in the CNMI before the transition date would not have abandoned LPR status, but could not count the time in the CNMI toward citizenship qualification. The court thus concluded that under the controlling plain language, Eche and Lo did not qualify for naturalization.

Eche and Lo's principal argument on appeal is that the first and operative clause of CNRA § 705(c) was intended to prevent only temporary guest workers from counting their residence in the CNMI. The statute does not say that, however. It has blanket language. The statute says it should not be construed to make "any residence or presence" in the CNMI, before the effective date, "residence or presence in the United States." Section 705(c) thus does not distinguish between temporary guest workers and LPRs. All categories of aliens are encompassed.

There is one narrow exception. The exception in the second clause permits an alien to count presence in the CNMI as presence in the United States for the limited purpose of determining whether the alien has lost or abandoned LPR status. § 705(c). The exception addresses the status abandonment doctrine, under which an alien with LPR status may lose or abandon such status by traveling abroad for more than a temporary visit. *See Khodagholian v. Ashcroft*, 335 F.3d 1003, 1006 (9th Cir.2003); *Khoshfahm v. Holder*, 655 F.3d 1147, 1151-52 (9th Cir.2011). The exception therefore provides that an alien's time spent in the

CNMI "before, on, or after the transition date," is not a loss or abandonment of LPR status. Beyond this, residence or presence in the CNMI before the transition date cannot count toward the naturalization requirements.

Eche and Lo offer still another strained interpretation of § 705(c) to count their time in the CNMI before the transition date. They ask us to interpret the phrase "such status" in the second clause as referring to presence in the United States, rather than to immigration status. They then insist that by living in the CNMI they were not abandoning their "status" of being present in the United States. Continuity of presence is relevant for purposes of determining whether an alien retains LPR status, because prolonged absence from the United States can disrupt continuity of presence. *See* 8 C.F.R. § 316.5(c). The statutory antecedent to the phrase "such status," however, is the status of having been admitted to lawful permanent residence. *See* 8 U.S.C. § 1101(a)(20) (defining LPR status). Presence is not an immigration "status."

Congress thus clearly ensured that residence in the CNMI before United States immigration law became effective would not count toward the residence required for naturalization as a United States citizen. The reason for this is apparent. Before CNRA's effective date, the CNMI government controlled and administered its own immigration law, applicable only to the CNMI. The territory admitted temporary guest workers and other aliens who lacked

federal immigration status, and therefore were not eligible for adjustment of status under federal law. After CNRA's effective date, the Immigration and Nationality Act applied to the territory and the federal government took over administration of immigration law. *See* CNRA § 702. Congress thus provided, in § 705, that residence in the territory before federal immigration law applied was not residence in the United States.

Eche and Lo nevertheless contend that we should interpret CNRA § 705(c) in their favor to preserve uniformity and to avoid a constitutional question under the Naturalization Clause of the Constitution. That clause provides Congress shall have the power "[t]o establish a uniform Rule of Naturalization . . . throughout the United States." U.S. Const., Art. I, § 8, cl. 4. Eche and Lo contend it requires CNMI naturalization law to have been the same as that in the States at all times.

The only support Eche and Lo offer for their argument is a century-old decision of this court, *United States v. Rodiek*, 162 F. 469 (9th Cir.1908). The case involved a nowsuperceded requirement that applicants for naturalization declare intent to naturalize two years before applying to do so. The Organic Act for Hawaii, however, provided that an applicant who had lived in Hawaii for the prior five years could naturalize without having declared intent. *Id.* at 470; *see* Organic Act, April 30, 1900, c. 339, s. 100, 31 Stat. 141, 146. The same law had also organized Hawaii as an incorporated territory of the United

States, explicitly extending the Constitution to the territory. *See Friend v. Reno*, 172 F.3d 638, 646 (9th Cir.1999); Organic Act, s.5, 31 Stat. at 141. Congress later repealed the Hawaii declaration exception. We therefore held in *Rodiek* the district court should not have applied the special naturalization rule for Hawaii. 162 F. at 470-71. We observed in passing that the special territorial rule would have raised constitutional concerns had it not been repealed. *Id*. at 470.

Eche and Lo rely on this observation, but our decision in *Rodiek* did not turn on any constitutional issue. Moreover, because Hawaii was an incorporated territory, our observation about the Naturalization Clause must be read in that context. The CNMI is not an incorporated territory. While the Covenant is silent as to whether the CNMI is an unincorporated territory, and while we have observed that it may be some third category, the difference is not material here because the Constitution has "no greater" force in the CNMI "than in an unincorporated territory." *Comm. of Northern Mariana Islands v. Atalig*, 723 F.2d 682, 691 n. 28 (9th Cir.1984); *see Wabol v. Villacrusis*, 958 F.2d 1450, 1459 n. 18 (9th Cir.1990). The Covenant extends certain clauses of the United States Constitution to the CNMI, but the Naturalization Clause is not among them. *See* Covenant § 501, 90 Stat. at 267. The Covenant provides that the other clauses of the Constitution "do not apply of their own force," even though they may apply with the mutual consent of both governments. *Id.*

The Naturalization Clause does not apply of its own force and the governments have not consented to its applicability. The Naturalization Clause has a geographic limitation: it applies "throughout the United States." The federal courts have repeatedly construed similar and even identical language in other clauses to include states and incorporated territories, but not unincorporated territories. In *Downes v. Bidwell*, 182 U.S. 244, 21 S.Ct. 770, 45 L.Ed. 1088 (1901), one of the *Insular Cases*, the Supreme Court held that the Revenue Clause's identical explicit geographic limitation, "throughout the United States," did not include the unincorporated territory of Puerto Rico, which for purposes of that Clause was "not part of the United States." *Id.* at 287, 21 S.Ct. 770. The Court reached this sensible result because unincorporated territories are not on a path to statehood. *See Boumediene v. Bush*, 553 U.S. 723, 757-58, 128 S.Ct. 2229, 171 L.Ed.2d 41 (2008) (citing *Downes*, 182 U.S. at 293, 21 S.Ct. 770). In *Rabang v. I.N.S.*, 35 F.3d 1449 (9th Cir.1994), this court held that the Fourteenth Amendment's limitation of birthright citizenship to those "born . . . in the United States" did not extend citizenship to those born in the Philippines during the period when it was an unincorporated territory. U.S. Const., 14th Amend., cl. 1; *see Rabang*, 35 F.3d at 1451. Every court to have construed that clause's geographic limitation has agreed. *See Valmonte v. I.N.S.*, 136 F.3d 914, 920-21 (2d Cir.1998); *Lacap v. I.N.S.*, 138 F.3d 518, 519 (3d Cir.1998); *Licudine v. Winter*, 603 F.Supp.2d 129, 134 (D.D.C.2009).

Like the constitutional clauses at issue in *Rabang* and *Downes*, the Naturalization Clause is expressly limited to the "United States." This limitation "prevents its extension to every place over which the government exercises its sovereignty." *Rabang*, 35 F.3d at 1453. Because the Naturalization Clause did not follow the flag to the CNMI when Congress approved the Covenant, the Clause does not require us to apply federal immigration law to the CNMI prior to the CNRA's transition date.

The district court correctly granted summary judgment on the merits to the government Defendants. Eche and Lo may, of course, submit new applications for naturalization once they have satisfied the statutory requirements.

AFFIRMED.

742 F.Supp.2d 1136

District Court for the Northern Mariana Islands.
Peter Chika ECHE and Perry Po-Sheung Lo,
Plaintiffs,
v.
Eric HOLDER, Janet Napolitano, David Gulick,
Walter L. Haith, and Susan Teruya, Defendants.

Civil Case No. 010-00013.
Oct. 7, 2010.

Peter Chika Eche, Barrigada, GU, pro se.

Perry Po-Sheung Lo, Saipan, MP, pro se.

Mikel W. Schwab, United States Attorney's Office, Hagatna, GU, Samuel Go, Office of Immigration Litigation, U.S. Department of Justice, Washington, DC, Jessica F. Cruz, U.S. Attorney's Office, District of Guam, Hagatna, GU, for Defendant.

ORDER

PHILIP M. PRO, District Judge.

Presently before the Court is Plaintiffs' Motion for Summary Judgment (Doc. # 10), filed on June 28, 2010. Defendants filed a Motion to Dismiss Plaintiffs' First Amended Complaint, Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Doc. # 16) on August 2, 2010. Plaintiffs filed an Opposition to Defendants' Motion to Dismiss (Doc. # 20) on August 9, 2010. Defendants filed a Reply (Doc. # 22) on August 19, 2010. Plaintiffs filed a Reply (Doc. # 23) on August 20, 2010. The

Court held a hearing on these motions on September 30, 2010.

Plaintiffs Peter Eche ("Eche") and Perry Po-Sheung Lo ("Lo") are lawful permanent residents living in the Commonwealth for the Northern Mariana Islands ("CNMI") and bring this action pro se to petition the Court for a judicial hearing on their naturalization applications which the U.S. Citizenship and Immigration Services ("USCIS") denied. USCIS denied the applications based on its conclusion that Plaintiffs' residence in the CNMI did not count for the physical presence requirement for a lawful permanent resident to naturalize, and constituted absence from the United States which disrupted the continuous residence requirement to naturalize.

Plaintiffs now move for summary judgment, arguing that the Consolidated Natural Resources Act of 2008 ("CNRA") provides that residence in the CNMI, before and after enactment, counts as residence in the United States. Defendants move to dismiss, oppose summary judgment, and countermove for summary judgment. Defendants argue the Court lacks jurisdiction under the statute pursuant to which Plaintiffs invoke jurisdiction. Defendants also argue Plaintiffs failed to exhaust their administrative remedies because they did not appeal denial of their naturalization applications. On the merits, Defendants contend Plaintiffs misconstrue the CNRA. According to Defendants, the CNRA makes presence in the CNMI presence in the United States only for

the purpose of avoiding abandonment of lawful permanent residence status due to absence from the United States. Defendants contend the amendment does not alter the prior rule that presence in the CNMI does not constitute presence or residency in the United States for naturalization purposes.

I. JURISDICTION AND FAILURE TO EXHAUST ADMINISTRATIVE REMEDIES

In the First Amended Complaint, Plaintiffs identify 8 U.S.C. § 1447(b) as a basis for jurisdiction. Defendants challenge this basis for jurisdiction, arguing that section applies only if the USCIS has not rendered a decision on a naturalization petition within 120 days of the examination of the petitioner. Defendants rendered decisions on Plaintiffs' naturalization applications within the 120-day period, and Defendants thus contend the Court lacks jurisdiction under § 1447(b).

Title 8 U.S.C. § 1447(b) provides that if the USCIS fails to make a determination on a naturalization petition within 120 days after the date on which the examination is conducted, "the applicant may apply to the United States district court for the district in which the applicant resides for a hearing on the matter." The court to which application is made "has jurisdiction over the matter and may either determine the matter or remand the matter, with appropriate instructions, to the Service to determine the matter." 8 U.S.C. § 1447(b).

Here, Plaintiffs are not seeking court review where the USCIS has failed to make a determination of the matter within 120 days of their examinations. Rather, Plaintiffs are seeking review of issued naturalization decisions. Section 1447(b) does not apply, and does not provide jurisdiction in this matter.

However, as Defendants appear to concede in their reply brief, the Court has jurisdiction under the Administrative Procedures Act ("APA"), which Plaintiffs also cite in their First Amended Complaint as support for this Court's jurisdiction. (First Am. Compl. (Doc. # 9) at 5.) The APA provides for judicial review of agency actions causing legal wrongs or adversely affecting a person within the meaning of a relevant statute. 5 U.S.C. § 702. Under the APA, the reviewing court may compel agency action unlawfully withheld, and may set aside "agency action, findings, and conclusions" which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706.

Judicial review under the APA is limited to either review specifically authorized in a substantive statute, or "final agency action for which there is no other adequate remedy in a court." *Id.* § 704. The "form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action. . . ." *Id.* § 703.

The statutes related to naturalization provide for judicial review under specified procedures. *See* 8 U.S.C. § 1447(a), 1421(c). Thus, under the APA, those are the procedures which an aggrieved applicant must use to obtain judicial review. *See* 5 U.S.C. § 703; 8 U.S.C. § 1421(c) (providing that aggrieved naturalization applicant may seek judicial review "in accordance with chapter 7 of title 5").

Pursuant to 8 U.S.C. § 1447(a), if USCIS denies an application for naturalization, "the applicant may request a hearing before an immigration officer." If the applicant is dissatisfied with the hearing officer's determination, the applicant "may seek review of such denial before the United States district court for the district in which such person resides. . . ." 8 U.S.C. § 1421(c). The procedure set forth in the applicable statutes is the applicant's exclusive means of obtaining naturalization. *Id.* § 1421(d) ("A person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in this subchapter and not otherwise."). Consequently, an applicant must exhaust his administrative remedies as provided in the applicable statutory scheme prior to bringing suit. *See United States v. Hovsepian,* 359 F.3d 1144, 1162 n. 15 (9th Cir.2004) ("Unsuccessful applicants must first take an administrative appeal of the denial and complete the INS's administrative process before seeking judicial review.").

Under the applicable regulations, an applicant "may request a hearing on the denial of the applicant's application for naturalization by filing a request with the Service within thirty days after the applicant receives the notice of denial." 8 C.F.R. § 336.2(a). A reviewing officer then conducts a review within 180 days from the date the appeal is filed. *Id.* § 336.2(b). The USCIS will reject an untimely request for hearing unless it meets the requirements for a motion to reopen or to reconsider. *Id.* § 336.2(c)(2).

Here, neither Plaintiff formally appealed the initial denial of their naturalization applications to a hearing officer. (Defs.' Mem of P. & A. (Doc. # 17), Ex. A.) Plaintiffs contend they nevertheless exhausted their administrative remedies because USCIS employees dissuaded them from appealing. Additionally, Plaintiffs contend they communicated, either directly or indirectly, with USCIS officials about their cases, and those officials reviewed the decisions and affirmed them.

USCIS issued its decisions denying Plaintiffs' applications on December 11, 2009. (*Id.*) Both decisions informed Plaintiffs they had thirty days to appeal, and that if they did not appeal, the decisions would be final. (*Id.*)

Plaintiff Lo received the denial letter on approximately December 22, 2009, and asked a friend to assist him. (Pls.' Opp'n to Defs.' Mot. Dismiss (Doc. # 20), Decl. of Perry Po-Sheung Lo.) That friend electronically communicated with Defendant David

Gulick ("Gulick"), District Director of USCIS, in late December 2009. (*Id.* & Attach. 11.) Gulick confirmed the denial decision was correct. (*Id.*) On January 10, 2010, Lo's friend then asked Gulick whether the applicant (he did not identify Lo by name) should "formally appeal the decision, or just file at the earlier time?" (*Id.*) The next day, Gulick responded "[f]ile at the earlier time." (*Id.*)

Plaintiff Eche likewise received his denial letter around December 22, 2009. (Pls.' Opp'n to Defs.' Mot. Dismiss, Decl. of Peter Eche.) Eche avers that when he "got a clearer understanding of what the Law said," he appealed the denial to USCIS Field Office Director Walter Haith ("Haith") through electronic communications. (*Id.*) Eche's communications with Haith are dated April and May 2010. (*Id.,* Attachs. 6, 9, 10.)

In the April 2010 communications with Haith, Haith indicates that he "will review the case." (*Id.,* Attach. 6.) In further email communications in May 2010, Haith inquires of Eche:

> Can your [sic] provide me with an explanation as to why you did not file Form N-336 (Request for a hearing on a Decision in Naturalization Proceedings) within the allotted time frame (30 days)[?] This Form was sent with the denial. That would have been the proper way to appeal your denial.

(*Id.,* Attach. 10.) Eche responded he did not appeal because a USCIS employee told him the denial

decision was correct. (*Id.*) Haith sent Eche a formal letter on May 13, 2010, in which he states that he reviewed Eche's file, and that the "decision to deny your application for naturalization remains unchanged." (Pls.' Mot. Summ. J., Attach. 3.) Haith also noted that the –

> proper avenue for USCIS to reconsider the decision made on your application would have been for you to have timely filed Form N-336, Request for a Hearing on a Decision in Naturalization Proceedings (Under Section 336 of the INA), which was included with the denial notice. Since you did not timely file Form N-336, you may file a new Form N-400, Application for Naturalization, when you meet all the requirements.
>
> (*Id.*)

Plaintiffs did not follow the procedure outlined in the statutes and regulations. Plaintiff Lo did not formally appeal, and even his informal appeal through a friend did not mention Lo's name, at least not so far as the exhibits before the Court show. Eche did not timely appeal, as his informal communications with Haith did not commence until well after the thirty day period to appeal expired.

However, the purpose of requiring exhaustion of administrative remedies is "to allow the administrative agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding

unnecessary or premature judicial intervention into the administrative process." '*Ilio'ulaokalani Coalition v. Rumsfeld,* 464 F.3d 1083, 1107 (9th Cir.2006) *(quotation omitted). Lo had a friend contact the USCIS district director on his behalf within days of Lo receiving the denial letter. Gulick reviewed the merits of the denial decision and confirmed the denial was correct. When Lo's friend asked Gulick whether Lo should appeal, Gulick advised him not to do so, even though the time within which Lo could appeal had not expired.*

As to Eche, even if his electronic communications with Haith are considered an appeal, he did not initiate those communications until April 2010, well beyond the 30 day time limit for filing an appeal. However, Eche explains that he did not appeal earlier because a USCIS employee advised him not to do so. Further, Haith treated the communications as an appeal, issuing a formal denial letter in May 2010.

The USCIS advised Plaintiffs not to appeal, and then treated their informal communications, whether timely or not, as appeals and gave responses on the merits to those communications. While Plaintiffs did not technically comply with the statutory and regulatory requirements for appeal, they sought and obtained USCIS review of their denials on the merits. The USCIS thus had the opportunity to exercise its expertise and to correct any errors made in Plaintiffs' naturalization proceedings. The Court concludes Plaintiffs adequately have exhausted their administrative remedies. The Court therefore will deny

Defendants' motion to dismiss for lack of jurisdiction and for failure to exhaust administrative remedies.

II. MERITS

The parties' dispute centers around the residency, physical presence, and absence from the United States provisions in relation to the naturalization requirements as they apply to lawful permanent residents[1] residing in the CNMI. The Court reviews a naturalization denial de novo. *See* 8 U.S.C. § 1421(c).

Title 8 U.S.C. § 1427(a) sets forth the residency and presence requirements for naturalization:

> No person, except as otherwise provided in this subchapter, shall be naturalized unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United

[1] Lawful permanent residence means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C.A. § 1101(a)(20).

> States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Consequently, to qualify for naturalization, an applicant must establish, among other things, that he:

> . . .
>
> (2) Has been lawfully admitted as a permanent resident of the United States;
>
> (3) Has resided continuously within the United States, as defined under § 316.5, for a period of at least five years after having been lawfully admitted for permanent residence;
>
> (4) Has been physically present in the United States for at least 30 months of the five years preceding the date of filing the application;
>
> (5) Immediately preceding the filing of an application, or immediately preceding the examination on the application if the application was filed early pursuant to section 334(a) of the Act and the three month period falls within the required period of residence

> under section 316(a) or 319(a) of the Act, has resided, as defined under § 316.5, for at least three months in a State or Service district having jurisdiction over the applicant's actual place of residence, and in which the alien seeks to file the application; [and]
>
> (6) Has resided continuously within the United States from the date of application for naturalization up to the time of admission to citizenship. . . .

8 C.F.R. § 316.2. Pursuant to 8 U.S.C. § 1101(a)(33), an alien's residence is "the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." *See also* 8 C.F.R. § 316.5(a).

Section 1427(b) explains when an applicant's absence from the United States will break the continuous residency requirement in subsection (a):

> Absence from the United States of more than six months but less than one year during the period for which continuous residence is required for admission to citizenship, immediately preceding the date of filing the application for naturalization, or during the period between the date of filing the application and the date of any hearing under section 1447(a) of this title, shall break the continuity of such residence, unless the applicant shall establish to the satisfaction of the Attorney General that he did not in fact abandon his residence in the United States during such period.

> Absence from the United States for a continuous period of one year or more during the period for which continuous residence is required for admission to citizenship (whether preceding or subsequent to the filing of the application for naturalization) shall break the continuity of such residence, [except in certain circumstances not relevant here].

See also 8 C.F.R. § 316.5(c).

These usual rules for naturalization are impacted by the unique political arrangement between the United States and the CNMI. In 1975, the United States and the CNMI signed the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America ("Covenant"). *United States v. De Leon Guerrero,* 4 F.3d 749, 751 (9th Cir.1993); *see also* 48 U.S.C. § 1801 (setting forth the Covenant's text in the note thereto). "The Covenant has created a 'unique' relationship between the United States and the CNMI, and its provisions alone define the boundaries of those relations." *De Leon Guerrero,* 4 F.3d at 754.

Under section 503(a) of the Covenant as originally enacted, the United States' immigration and naturalization laws did not apply to the CNMI. However, section 506 of the Covenant set forth certain exceptions to this general rule and provided that for the specified purposes only, the CNMI "will be deemed to be a part of the United States under the Immigration and Nationality Act . . . and the said Act will apply to

the [CNMI] to the extent indicated in each of the following Subsections of this Section." Among the exceptions was one for aliens who are immediate relatives of United States citizens who are permanently residing in the CNMI. Pursuant to section 506(c), for aliens who are immediate relatives of a United States citizen who is permanently residing in the CNMI,

> all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this

> Section and who reside within their respective jurisdictions.[2]

Given the interplay between the immigration laws and the Covenant, the General Counsel's Office of the United States Department of Justice issued an opinion indicating that "[a]n alien who has been admitted to the United States as a lawful permanent resident, but who is not an immediate relative, may not accrue residence for purposes of naturalization by residing in the CNMI." Genco. Op. 94-10, 1994 WL 1753115 (Feb. 9, 1994) (citing Genco. Op. 89-48).

In 2008, Congress passed the Consolidated Natural Resources Act of 2008 ("CNRA"), which amended the Covenant. The CNRA deleted from the Covenant that portion of section 503(a) which made the United States' immigration laws inapplicable to the CNMI. Consolidated Natural Resources Act of 2008, Pub.L. 110-229 § 702, 122 Stat. 754, 854-855 (2008). To effectuate the change in the U.S. immigration laws

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[2] The Court thus rejects Plaintiffs' argument that the Covenant as originally enacted did not speak to the status of lawful permanent residents. Under section 503(a) of the Covenant, the default rule in the CNMI was that the United States' immigration laws, including provisions relating to lawful permanent residents, would not apply. Pursuant to section 506(a), the CNMI was part of the United States, and the United States' immigration laws applied, only for the specific purposes set forth in section 506, none of which provided for preserving lawful permanent resident status or residency for naturalization purposes for aliens in the CNMI absent immediate relative status.

becoming applicable to the CNMI, the CNRA created a transition period during which the Secretary of Homeland Security must establish, administer, and enforce a transition program to regulate immigration to the Commonwealth. *Id.* Following the CNRA's enactment, the immigration laws now define the terms "state" and "United States" to include the CNMI. 8 U.S.C. § 1101(a)(36), (a)(38).

The CNRA also contained the following provisions regarding the CNRA's effective date:

> (a) IN GENERAL. – Except as specifically provided in this section or otherwise in this subtitle, this subtitle and the amendments made by this subtitle shall take effect on the date of enactment of this Act.
>
> (b) AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT. – The amendments to the Immigration and Nationality Act made by this subtitle, and other provisions of this subtitle applying the immigration laws (as defined in section 101(a)(17) of Immigration and Nationality Act (8 U.S.C. 1101(a)(17))) to the Commonwealth, shall take effect on the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a)), unless specifically provided otherwise in this subtitle.
>
> (c) CONSTRUCTION. – Nothing in this subtitle or the amendments made by this subtitle shall be construed to make any residence or presence in the Commonwealth

> before the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a)) residence or presence in the United States, except that, for the purpose only of determining whether an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) has abandoned or lost such status by reason of absence from the United States, such alien's presence in the Commonwealth before, on, or after the date of enactment of this Act shall be considered to be presence in the United States.

Consolidated Natural Resources Act of 2008, Pub.L. 110-229 § 705, 122 Stat. 754, 867 (2008).

The parties' dispute centers on the meaning of section 705(c) of the CNRA. Plaintiffs contend that the language means that residence in the CNMI satisfies the naturalization residency requirements before, on, or after the date of enactment of the CNRA. Plaintiffs thus contend that because they lived in the CNMI for five years prior to their applications for naturalization, that residency counts as residency and presence in the United States for naturalization purposes. Plaintiffs contend that by considering residency in the CNMI only for purposes of absence from the United States, and not also for naturalization purposes, the USCIS is adding a requirement to naturalize not contained in any statute or regulation. *See Kazarian v. U.S. Citizenship & Immigration Servs.,* 596 F.3d 1115, 1121 (9th

Cir.2010) ("neither USCIS nor an AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in the applicable regulation]").

Defendants contend that the plain language of section 705(c) states that residence in CNMI counts before, on, or after enactment of the CNRA only for purposes of determining whether a lawful permanent resident abandoned or lost his lawful permanent resident status by reason of absence from the United States. However, the CNRA does not provide that a lawful permanent resident's residence in the CNMI satisfies the presence or residency requirements for naturalization.

"The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute." *Cooper v. F.A.A.,* 622 F.3d 1016, 1028 (9th Cir.2010) (quotation omitted). To determine congressional intent, the Court begins with statutory language's plain meaning. *Id.* "If the relevant language is plain and unambiguous, [the Court's] task is complete." *Id.* To determine plain meaning, the Court gives words "their ordinary, contemporary, common meaning." *Id.* (quotation omitted). If the statutory language is ambiguous, the Court examines the language "in its statutory context, looking to the language of the entire statute, its structure, and purpose." *Id.* at 1029. If the plain meaning and statutory context analyses do not provide guidance, the Court may consult "extrinsic materials, such as legislative history, for guidance in construing an

ambiguous statute." *Id.* at 1031. "When Congress includes a provision in one part of a statute but excludes it in another, [the Court] deem[s] the difference intentional and assign[s] meaning to the omission." *Solomon v. Interior Reg'l Housing Auth.,* 313 F.3d 1194, 1199 (9th Cir.2002).

The CNRA's plain language limits the provision that an alien's presence in the Commonwealth "before, on, or after" the Act's enactment counts as presence in the United States "for the purpose only of determining whether an alien lawfully admitted for permanent residence . . . has abandoned or lost such status by reason of absence from the United States."[3] The CNRA preserves the lawful permanent resident status of any such alien who resided in the CNMI before, on, or after enactment of the CNRA. Thus, Plaintiffs have not lost their lawful permanent resident status by living in the CNMI.

However, the CNRA limited the "before, on, or after" language to this purpose only. Thus, by its plain terms, the CNRA did not provide that residency in the CNMI counts as continuous residency in the

[3] A lawful permanent resident may lose his status as a lawful permanent resident if he leaves the United States for more than a temporary visit abroad. *See Khodagholian v. Ashcroft,* 335 F.3d 1003, 1006 (9th Cir.2003) ("Khodagholian sought to re-enter the United States as a returning resident alien. To qualify for such re-entry, he must be returning to an unrelinquished lawful permanent residence after a temporary visit abroad." (quotations omitted)).

United States or physical presence in the United States for purposes of the naturalization requirements. The CNRA does not refer to naturalization, it refers only to whether a lawful permanent resident loses his status as a lawful permanent resident by leaving the United States.

Congress's intent to limit the application of the "before, on, or after" provision to the specified purpose is demonstrated by the statutory language. The first part of the provision states that nothing in the Act shall be construed to make "residence or presence" in the CNMI "residence or presence" in the United States. The second part of the provision states that "presence" in the Commonwealth before, on, or after the date of enactment of this Act shall be considered to be "presence" in the United States. The second part omits the reference to "residence" contained in the first part of the provision. Had Congress intended the "before, on, or after" provision to apply to the residency requirements for naturalization, the second part of the provision would have stated that "residence or presence" in the CNMI would count as "residence or presence" in the United States. That the "before, on, or after" provision omits the word "residence" is intentional, and the Court must give it meaning. Consequently, section 705(c)'s plain language limits the application of the "before, on, or after" provision to determining whether a lawful permanent resident abandoned or lost his status as such, but does not apply to the naturalization residency requirements.

Plaintiffs' proposed interpretation of section 705(c) is not without force because the naturalization requirements are based in part on the residency and physical presence of a lawful permanent resident in the United States, and whether the lawful permanent resident has abandoned that status. The CNRA provides that a lawful permanent resident is present in the United States by residing in the CNMI. Arguably, that same presence should satisfy the residency and physical presence requirements under the naturalization provisions.

Nevertheless, the Court must reject Plaintiffs' interpretation. To the extent the relationship between residency for maintaining lawful permanent residence status and residency for naturalization purposes creates some ambiguity in section 705(c)'s meaning, in the absence of other guiding authority, the Court concludes the statute's plain language and structure control. Congress chose to narrowly confine for what purpose presence in the CNMI would count "before, on or after" the date of the CNRA's enactment. Congress limited the "before, on, or after" clause to a specified purpose only, and the Court finds no basis to conclude Congress meant anything other than what it said. Congress could have made it explicit that presence in the CNMI would count toward the residency and physical presence requirements for naturalization, but it did not do so. The Court therefore will deny Plaintiffs' motion for summary judgment and will grant Defendants' motion for summary judgment.

III. CONCLUSION

IT IS THEREFORE ORDERED that Plaintiffs' Motion for Summary Judgment (Doc. # 10) is hereby DENIED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss Plaintiffs' First Amended Complaint, Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion for Summary Judgment (Doc. # 16) is hereby GRANTED in part and DENIED in part. The motion to dismiss is denied. The motion for summary judgment is granted.

IT IS FURTHER ORDERED that Judgment is hereby entered in favor of Defendants and against Plaintiffs.

D.N.Mariana Islands,2010.

[SEAL] **U.S. Citizenship and Immigration Services**

Direct all responses by mail to the office listed below:
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
108 Hernan Cortez Ave # Sirena Plaza Suite 100
Hagatna GU 96910
(671) 472-7206

Chikaodili Ogueri PeterEche
c/o DR PETER ECHE
PO BOX 505695
Saipan MP 96950

Refer to this file:
NBC*000385855
Alien Number:
A 056 561 469
Date: DEC 11 2009

CV 10-0013

DECISION

On October 26, 2009, you appeared for an examination of your application for naturalization, which was filed in accordance with Section 316(a) of the Immigration and Nationality Act.

Pursuant to the investigation and examination of your application it is determined that you are ineligible for naturalization for the following reason(s):

See Attachment(s)

If you desire to request a review hearing on this decision pursuant to Section 336(a) of the Act, **you must file a request for a hearing *within 30 Days* of the date of this notice**. If no request for hearing is filed within the time allowed, this decision is final.

A request for hearing may be made to the District Director, with the Immigration and Naturalization office which made the decision, on Form N-336, **Request for Hearing on a Decision in Naturalization Proceedings under Section 336 of the Act, together with a *fee of $605***. A brief or other written statement in support of your request may be submitted with the Request for Hearing.

Sincerely,

/s/ David G. Gulick
David G. Gulick
District Director

Attachment(s) to Form N-335

Applicant: Chikaodili Ogueri Peter Eche
Application for Naturalization, Form N-400
Alien Number: A056561469
Application ID: NBC*000385855

PROCEDURAL HISTORY

You are a citizen of Nigeria, and a lawful permanent resident of the United States. On July 28, 2009, you filed Form N-400, Application for Naturalization pursuant to Section 316(a) of the Immigration and Nationality Act.

APPLICABLE LAW AND DISCUSSION

Section 316(a) of the Immigration and Nationality Act states in part:

(a) No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Title 8, Code of Federal Regulations, Part 316.2 states in part:

(a) General. Except as otherwise provided in this chapter, to be eligible for naturalization, an alien must establish that he or she:

(1) Is at least 18 years of age;

(2) Has been lawfully admitted as a permanent resident of the United States;

(3) Has resided continuously within the United States, as defined under § 316.5, for a period of at least five years after having been lawfully admitted for permanent residence; (Revised 2/3/95; 60 FR 6647)

(4) Has been physically present in the United States for at least 30 months of the five years preceding the date of filing the application;

(5) Immediately preceding the filing of an application, or immediately preceding the examination on the application if the application was filed early pursuant to Section 334(a) of the Act and the three month period falls within the required period of residence under Section 316(a) or 319(a) of the Act, has resided, as defined under Sec.316.5, for at least three months in a State or Service district having jurisdiction over the applicant's actual place of residence, and in which the alien seeks to file the application;

(6) Has resided continuously within the United States from the date of application for naturalization up to the time of admission to citizenship;

Title 8, Code of Federal Regulations, Part 316.5(c)(1)(ii) states in part:

(c) *Disruption of continuity of residence*

(1) *Absence from the United States.*

(ii) For period in excess of one year. Unless an applicant applies for benefits in accordance with Section 316.5(d), absences from the United States for a continuous period of one (1) year or more during the period for which continuous residence is required under Section 316.2(a)(3) and (a)(5) shall disrupt the continuity of the applicant's residence. An applicant described in this paragraph who must satisfy a five-year statutory residence period may file an application for naturalization four years and one day following the date of the applicant's return to the United States to resume permanent residence. An applicant described in this paragraph who must satisfy a three-year statutory residence period may file an application for naturalization two years and one day following the date of the applicant's return to the United States to resume permanent residence.

Section 101(a)(38) of the Immigration and Nationality Act states in part:

The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, 23/ the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

Section 506 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America states in part:

(a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the Northern Mariana Islands to the extent indicated in each of the following Subsections of this Section.

(c) With respect to aliens who are "immediate relatives" (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize

persons who become eligible under this Section and who reside within their respective jurisdictions.

Prior to November 28, 2009, the Commonwealth of Northern Mariana Islands (CNMI) was not a part of the United States as defined in Section 101(a)(38) of the Immigration and Nationality Act and was considered a "state" and part of the United States for the specific and limited purpose of providing immigration and naturalization benefits to aliens residing in the CNMI who are immediate relatives of United States citizens permanently residing in the CNMI. The term "immediate relative" is defined in Section 201(b) of the Immigration and Nationality Act as, "children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age."

Congress limited the application of Section 506(c) of the CNMI Covenant to immediate relatives and that lawful permanent resident aliens who are not Section 506(c) immediate relatives may not satisfy the residence requirements for naturalization by residing in the CNMI. Genco Opinion 89-48, *1989 Legal Opinions of the Office of the General Counsel* 197. Residence in the CNMI was not considered residence in the United States if the permanent resident alien did not have a United States citizen immediate relative residing permanently in the CNMI.

Your Service records reflect that you immigrated to the United States on September 02, 2004 as F-11, based on an approved petition filed in your behalf by

your United States citizen father. You entered the United States at Seattle, Washington and resided in Texas until you moved to the Commonwealth of Northern Mariana Islands, specifically, the island of Saipan in 2005. You have been residing in Saipan since January 07, 2005. You relocated to Saipan by accepting a teaching position at Marianas High School with the Public School System of the Commonwealth of Northern Mariana Islands. You are currently employed with the Office of the Governor of the Commonwealth as the Special Advisor for Training.

Your residence in Saipan without a United States citizen immediate relative present, cannot be counted as residence in the United States for naturalization purposes. As stated in Section 506(c) of the CNMI Covenant, without a United States citizen immediate relative who permanently resides in CNMI, the Immigration and Nationality Act cannot be extended to the permanent resident alien to meet the requirements for residence and physical presence in the United States for naturalization.

CONCLUSION

During the five years immediately preceding the filing of your application, you were absent from the United States for approximately 4 years and 10 months by residing in Saipan without Section 506(c) immediate relative status. Therefore, you were physically present in the United States for only 4 months

since you immigrated to the United States on September 02, 2004. A minimum of 30 months physical presence in the United States is required to establish eligibility for naturalization under Section 316(a) of the Immigration and Nationality Act.

Your residence in Saipan prior to November 28, 2009 is also considered as a period of absence from the United States. Your absence from the United States for a period in excess of 1 year disrupted the continuity of residence that is required for naturalization. An applicant who must satisfy a five year statutory residence period may file an application for naturalization four years and one day following the date of the applicant's return to the United States to resume permanent residence. In your case, the date you returned to the United States was November 28, 2009, at which time the Commonwealth came under United States immigration law pursuant to Public Law 110-229.

In view of the foregoing, you failed to satisfy the physical presence and continuous residence requirements for naturalization under Section 316(a) of the Immigration and Nationality Act, and have not established eligibility under any other section of law. Therefore, your Application for Naturalization, Form N-400 must be, and is hereby, denied.

[SEAL]	U.S. Citizenship and Immigration Services	Direct all responses by mail to the office listed below: U.S. CITIZENSHIP AND IMMIGRATION SERVICES 108 Hernan Cortez Ave # Sirena Plaza Suite 100 Hagatna GU 96910 (671) 472-7206

Perry Po Sheung Lo
PMB 999G P O Box 10012
Saipan MP 96950

Refer to this file:
LIN*001290413
Alien Number:
A 041 971 459
Date: DEC 11 2009

DECISION

On November 05, 2009, you appeared for an examination of your application for naturalization, which was filed in accordance with Section 316(a) of the Immigration and Nationality Act.

Pursuant to the investigation and examination of your application it is determined that you are ineligible for naturalization for the following reason(s):

See Attachment(s)

If you desire to request a review hearing on this decision pursuant to Section 336(a) of the Act, **you must file a request for a hearing *within 30 Days* of the date of this notice**. If no request for hearing is filed within the time allowed, this decision is final.

A request for hearing may be made to the District Director, with the Immigration and Naturalization office which made the decision, on Form N-336, **Request for Hearing on a Decision in Naturalization Proceedings under Section 336 of the Act, together with a *fee of $605***. A brief or other written statement in support of your request may be submitted with the Request for Hearing.

Sincerely,

/s/ David G. Gulick
David G. Gulick
District Director

Attachment(s) to Form N-335

Applicant: Perry Po Sheung Lo
Application for Naturalization, Form N-400
Alien Number: A041971459
Application ID: LIN*001290413

PROCEDURAL HISTORY

You were born in China and immigrated to the United States on February 09, 1989. On October 17, 2008, you filed Form N-400, Application for Naturalization pursuant to Section 316(a) of the Immigration and Nationality Act.

APPLICABLE LAW AND DISCUSSION

Section 316(a) of the Immigration and Nationality Act states in part:

(a) No person, except as otherwise provided in this title, shall be naturalized, unless such applicant, (1) immediately preceding the date of filing his application for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his application has been physically present therein for periods totaling at least half of that time, and who has resided within the State or within the district of the Service in the United States in which the applicant filed the application for at least three months, (2) has resided continuously within the United States from the date of the application up to the time of admission to citizenship, (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.

Title 8, Code of Federal Regulations, Part 316.2 states in part:

(a) General. Except as otherwise provided in this chapter, to be eligible for naturalization, an alien must establish that he or she:

(1) Is at least 18 years of age;

(2) Has been lawfully admitted as a permanent resident of the United States;

(3) Has resided continuously within the United States, as defined under § 316.5, for a period of at least five years after having been lawfully admitted for permanent residence; (Revised 2/3/95; 60 FR 6647)

(4) Has been physically present in the United States for at least 30 months of the five years preceding the date of filing the application;

(5) Immediately preceding the filing of an application, or immediately preceding the examination on the application if the application was filed early pursuant to Section 334(a) of the Act and the three month period falls within the required period of residence under Section 316(a) or 319(a) of the Act, has resided, as defined under Sec.316.5, for at least three months in a State or Service district having jurisdiction over the applicant's actual place of residence, and in which the alien seeks to file the application;

(6) Has resided continuously within the United States from the date of application for naturalization up to the time of admission to citizenship;

Title 8, Code of Federal Regulations, Part 316.5(c)(1)(ii) states in part:

(c) *Disruption of continuity of residence*

(1) *Absence from the United States.*

(ii) For period in excess of one year. Unless an applicant applies for benefits in accordance with Section 316.5(d), absences from the United States for a continuous period of one (1) year or more during the period for which continuous residence is required under Section 316.2(a)(3) and (a)(5) shall disrupt the continuity of the applicant's residence. An applicant described in this paragraph who must satisfy a five-year statutory residence period may file an application for naturalization four years and one day following the date of the applicant's return to the United States to resume permanent residence. An applicant described in this paragraph who must satisfy a three-year statutory residence period may file an application for naturalization two years and one day following the date of the applicant's return to the United States to resume permanent residence.

Section 101(a)(38) of the Immigration and Nationality Act states in part:

The term "United States", except as otherwise specifically herein provided, when used in a geographical sense, means the continental United States, Alaska, Hawaii, Puerto Rico, Guam, 23/ the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands.

Section 506 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America states in part:

(a) Notwithstanding the provisions of Subsection 503(a), upon the effective date of this Section the Northern Mariana Islands will be deemed to be a part of the United States under the Immigration and Nationality Act, as amended for the following purposes only, and the said Act will apply to the Northern Mariana Islands to the extent indicated in each of the following Subsections of this Section.

(c) With respect to aliens who are "immediate relatives" (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to "immediate relative" status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the "immediate relative" relationship denoted herein on the effective date of this Section will be presumed to have been admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize

persons who become eligible under this Section and who reside within their respective jurisdictions.

Prior to November 28, 2009, the Commonwealth of Northern Mariana Islands (CNMI) was not a part of the United States as defined in Section 101(a)(38) of the Immigration and Nationality Act and was considered a "state" and part of the United States for the specific and limited purpose of providing immigration and naturalization benefits to aliens residing in the CNMI who were immediate relatives of United States citizens permanently residing in the CNMI. The term "immediate relative" is defined in Section 201(b) of the Immigration and Nationality Act as, "children, spouses, and parents of a citizen of the United States, except that, in the case of parents, such citizens shall be at least 21 years of age."

Congress limited the application of Section 506(c) of the CNMI Covenant to immediate relatives and that lawful permanent resident aliens who are not Section 506(c) immediate relatives may not satisfy the residence requirements for naturalization by residing in the CNMI. Genco Opinion 89-48, *1989 Legal Opinions of the Office of the General Counsel* 197. Residence in the CNMI was not considered residence in the United States if the permanent resident alien did not have a United States citizen immediate relative residing permanently in the CNMI.

Your Service records reflect that you immigrated to the United States on February 09, 1989 as the sibling of a United States citizen. Service records also reflect

that you have been living on the island of Saipan in the Commonwealth of the Northern Mariana Islands, without the presence of a United States citizen immediate relative since October 01, 2000 until April 02, 2008. You moved to Provo, Utah and resided in Utah from April 03, 2008 until December 16, 2008 when you returned to Saipan.

Your residence in Saipan prior to November 28, 2009 without a United States citizen immediate relative permanently residing in Saipan, cannot be counted as residence in the United States for naturalization purposes. As stated in Section 506(c) of the CNMI Covenant, without a United States citizen immediate relative who permanently resides in CNMI, the Immigration and Nationality Act cannot be extended to the alien to meet the requirements for naturalization.

CONCLUSION

During the five years immediately preceding the filing of your application for naturalization on October 17, 2008, you were present in the United States from April 03, 2008 while you were residing in Provo, Utah. Prior to April 03, 2008, you were residing in Saipan without the presence of a United States citizen immediate relative. Your residence in Saipan is considered a period of absence from the United States. Your absence from the United States for a period in excess of 1 year disrupted the continuity of residence that is required for naturalization. An

applicant who must satisfy a five year statutory residence period may file an application for naturalization four years and one day following the date of the applicant's return to the United States to resume permanent residence.

In view of the foregoing, you failed to satisfy the physical presence and continuous residence requirements for naturalization under Section 316(a) of the Immigration and Nationality Act, and have not established eligibility under any other section of law. Therefore, your Application for Naturalization, Form N-400 must be, and is hereby, denied. You may be eligible to apply for naturalization 4 years and 1 day from November 28, 2009 at which time the CNMI came under United States immigration law and your residence in Saipan counts as residence in the United States for naturalization purposes.

PUBLIC LAW 94-241 § 105

"SECTION 105. 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. In order to respect the right of self-government guaranteed by this Covenant the United States agrees to limit the exercise of that authority so that the fundamental provisions of this Covenant, namely Articles I, II and III and Sections 501 and 805, may be modified only with the consent of the Government of the United States and the Government of the Northern Mariana Islands.

PUBLIC LAW 94-241 § 501

"SECTION 501. (a) To the extent that they are not applicable of their own force, the following provisions of the Constitution of the United States will be applicable within the Northern Mariana Islands as if the Northern Mariana Islands were one of the several States: Article I, Section 9, Clauses 2, 3, and 8; Article I, Section 10, Clauses 1 and 3; Article IV, Section 1 and Section 2, Clauses 1 and 2; Amendments 1 through 9, inclusive; Amendment 13; Amendment 14, Section 1; Amendment 15; Amendment 19; and Amendment 26; provided, however, that neither trial by jury nor indictment by grand jury shall be required in any civil

action or criminal prosecution based on local law, except where required by local law. Other provisions of or amendments to the Constitution of the United States, which do not apply of their own force within the Northern Mariana Islands, will be applicable within the Northern Mariana Islands only with approval of the Government of the Northern Mariana Islands and of the Government of the United States.

"(b) The applicability of certain provisions of the Constitution of the United States to the Northern Mariana Islands will be without prejudice to the validity of and the power of the Congress of the United States to consent to Sections 203, 506 and 805 and the proviso in Subsection (a) of this Section.

PUBLIC LAW 94-241 § 506

* * *

"(c) With respect to aliens who are 'immediate relatives' (as defined in Subsection 201(b) of the said Act) of United States citizens who are permanently residing in the Northern Mariana Islands all the provisions of the said Act will apply, commencing when a claim is made to entitlement to 'immediate relative' status. A person who is certified by the Government of the Northern Mariana Islands both to have been a lawful permanent resident of the Northern Mariana Islands and to have had the 'immediate relative' relationship denoted herein on the effective date of this Section will be presumed to have been

admitted to the United States for lawful permanent residence as of that date without the requirement of any of the usual procedures set forth in the said Act. For the purpose of the requirements of judicial naturalization, the Northern Mariana Islands will be deemed to constitute a State as defined in Subsection 101(a) paragraph (36) of the said Act. The Courts of record of the Northern Mariana Islands and the District Court for the Northern Mariana Islands will be included among the courts specified in Subsection 310(a) of the said Act and will have jurisdiction to naturalize persons who become eligible under this Section and who reside within their respective jurisdictions.

* * *

Public Law 110-229 § 702

* * *

(g) CONFORMING AMENDMENTS TO PUBLIC LAW 94-241. –

(1) AMENDMENTS. – Public Law 94-241 is amended as follows:

(A) In section 503 of the covenant set forth in section 1, by striking subsection (a) and redesignating subsections (b) and (c) as subsections (a) and (b), respectively.

(B) By striking section 506 of the covenant set forth in section 1.

* * *

Public Law 110-229 § 702

* * *

(j) CONFORMING AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT. – The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended –

(1) in section 101(a)(15)(D)(ii), by inserting "or the Commonwealth of the Northern Mariana Islands" after "Guam" each time such term appears;

(2) in section 101(a)(36), by striking "and the Virgin Islands of the United States" and inserting "the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands";

(3) in section 101(a)(38), by striking "and the Virgin Islands of the United States" and inserting "the Virgin Islands of the United States, and the Commonwealth of the Northern Mariana Islands";

* * *

Public Law 110-229 § 705

SEC. 705. EFFECTIVE DATE.

(a) IN GENERAL. – Except as specifically provided in this section or otherwise in this subtitle, this subtitle and the amendments made by this subtitle shall take effect on the date of enactment of this Act.

(b) AMENDMENTS TO THE IMMIGRATION AND NATIONALITY ACT. – The amendments to the Immigration and Nationality Act made by this subtitle, and other provisions of this subtitle applying the immigration laws (as defined in section 101(a)(17) of Immigration and Nationality Act (8 U.S.C. 1101(a)(17))) to the Commonwealth, shall take effect on the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a)), unless specifically provided otherwise in this subtitle.

(c) CONSTRUCTION. – Nothing in this subtitle or the amendments made by this subtitle shall be construed to make any residence or presence in the Commonwealth before the transition program effective date described in section 6 of Public Law 94-241 (as added by section 702(a)) residence or presence in the United States, except that, for the purpose only of determining whether an alien lawfully admitted for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(20))) has abandoned or lost such status by reason of absence from the United States, such alien's

presence in the Commonwealth before, on, or after the date of enactment of this Act shall be considered to be presence in the United States.

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8 U.S.C. § 1421(c)

(c) Judicial review

A person whose application for naturalization under this subchapter is denied, after a hearing before an immigration officer under section 1447(a) of this Title, may seek review of such denial before the United States district court for the district in which such person resides in accordance with chapter 7 of title 5. Such review shall be de novo, and the court shall make its own findings of fact and conclusions of law and shall, at the request of the petitioner, conduct a hearing de novo on the application.

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8 U.S.C. § 1447(a)

(a) Request for hearing before immigration officer

If, after an examination under section 1446 of this title, an application for naturalization is denied, the applicant may request a hearing before an immigration officer.

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8 CFR § 336.2(c(1))(i)

(c) Improperly filed request for hearing.

(1) Request for hearing filed by a person or entity not entitled to file.

(i) Rejection without refund of filing fee. A request for hearing filed by a person or entity who is not entitled to file such a request must be rejected as improperly filed. In such a case, any filing fee will not be refunded.

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8 CFR § 336.2(c)(2)(i) & (ii)

* * *

(2) Untimely request for hearing.

(i) Rejection without refund of filing fee. A request for hearing which is not filed within the time period allowed must be rejected as improperly filed. In such a case, any filing fee will not be refunded.

(ii) Untimely request for hearing treated as motion. If an untimely request for hearing meets the requirements of a motion to reopen as described in 8 CFR 103.5(a)(2) or a motion to reconsider as described in 8 CFR 103.5(a)(3), the request for hearing must be treated as a motion and a decision must be made on the merits of the case.

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8 CFR § 103.5(a)(3)

* * *

(3) Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.