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DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Part 214

[INS No. 1811-96]

RIN 1115-AE61

Habitual Residence in the Territories and Possessions of the United States

AGENCY: Immigration and Naturalization Service, Justice.

ACTION: Final rule.

SUMMARY: This final rule amends the Immigration and Naturalization Service (Service) regulations relating to the rights and limitations of habitual residents in the territories and possessions of the United States under:

- The Compact of Free Association between the United States and the Government of the Republic of the Marshall Islands and the Government of the Federated States of Micronesia; and
- The Compact of Free Association between the United States and the Government of Palau.

This amendment defines the rights and limitations of nonimmigrant habitual residents of the territories and possessions of the United States, other than American Samoa and the Northern Mariana Islands, who were admitted to those territories or possessions pursuant to the provisions of those Compacts. The final rule establishes a policy that protects the rights of both habitual residents electing to reside in United States territories and possessions and the citizens of the territories and possessions.

DATES: This final rule is effective September 19, 2000.

FOR FURTHER INFORMATION CONTACT: Craig Howie, Headquarters Adjudications Officer, Business and Trade Services, Adjudications Division, Immigration and Naturalization Service,

425 I Street, NW., Room 3040, Washington, DC 20536, telephone (202) 353-8177.

SUPPLEMENTARY INFORMATION:

Background

Why Are We Issuing This Regulation?

Public Law 99-239 approved the Compact between the United States and the Government of the Republic of the Marshall Islands and the Government of the Federated States of Micronesia, and Public Law 99-658 approved the Compact between the United States and Palau (collectively, Compacts). Under the Compacts, the majority of citizens of these newly formed states (parts of the former Trust Territories of the Pacific Islands, now called the freely associated states (FAS)) became eligible to enter, live, work, and be educated in the United States and its territories and possessions without regard to sections 212(a)(5)(A) and 212(a)(7) (A) and (B) of the Immigration and Nationality Act (Act), formerly sections 212(a) (14), (20), and (26). Section 141(a) of the Compacts. Both Compacts, at section 141(b), provide that the right of citizens of the FAS, who were admitted to the territories or possessions of the United States pursuant to the provisions of the Compacts, to establish habitual residence in a territory or possession of the United States may be subject to nondiscriminatory limitations.

The Service interprets section 141(b) of the Compacts to the effect that citizens of the FAS who enter the territories and possessions of the United States pursuant to section 141(b) of the Compacts are subject to limitations not only at the time they establish their habitual residence but for the entire duration of their habitual residence. The negotiators of the Compacts realized that while the economy of the island territories was fragile, the vast majority of the FAS citizens would actively participate in and be beneficial to it. On the other hand, there would be some who would not be gainfully employed or who would even engage in welfare fraud and thus become a burden on the territorial economy. Section 141(b) is directed at such entrants from the FAS. It is immaterial for the territorial economy whether this burden exists at the time when the FAS citizen first established his or her habitual residence in the territory or whether it occurs at a later time. The Service cannot

attribute to the parties concluding the Compacts an intent that, once a citizen from the FAS first establishes his habitual residence in a territory or possession, he or she is immune from the future imposition of the limitations envisaged by section 141(b). The Service therefore reads the word "establishment" as necessarily including "maintenance," and uses that word accordingly in this rule.

Section 643 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Public Law 104-208, requires the Commissioner of the Immigration and Naturalization Service to issue regulations regarding the "rights of 'habitual residence' in the United States" under the terms of the Compacts.

What Is a "Habitual Resident"?

"Habitual resident" refers to an individual who is an FAS citizen who has been admitted to a territory or possession of the United States (except the Commonwealth of the Northern Mariana Islands or American Samoa as long as the Act has not been made applicable there) pursuant to section 141(a) of the Compacts, and who occupies in such territory or possession a habitual residence as that term is defined in section 461 of the Compacts, namely, a place of general abode or a principal, actual dwelling place of a continuing or lasting nature, including physical presence for a cumulative total of at least 365 days, and who is not a: (1) Full-time student under the Compact provisions; or a (2) dependent of a resident representative as described in section 152 of the Compacts. Since the term "habitual resident" requires that the person have entered the United States pursuant to section 141(a) of the Compacts, the term does not apply to FAS citizens whose presence in the territories or possessions is based on an authority other than section 141(a), such as members of the Armed Forces of the United States described in 8 CFR § 235.1(c), persons lawfully admitted for permanent residence in the United States, or persons having nonimmigrant status whose entry into the United States is based on provisions of the Compacts or the Act other than section 141(a) of the Compacts.

What Does This Regulation Accomplish?

This regulation is intended to define the rights of and limitations on habitual residence under the Compacts. In particular, the limitations relate to grounds for the possible removal of a habitual resident from the United States. The increasing presence of citizens of the FAS in the territories and possessions of the United States requires action to ensure that the benefits to the citizens of the FAS of employment and education in the territories and possessions, and the economic benefit to the territories and possessions of their presence are maintained, while simultaneously minimizing the impact on the territories and possessions resulting from granting unlimited access of such FAS citizens.

Where Does This Rule Apply?

This rule applies to habitual residents living in the territories and possessions of the United States to which the Act applies. These territories and possessions are at present Guam, the Commonwealth of Puerto Rico, and the American Virgin Islands.

This rule does not apply to FAS citizens residing in American Samoa or the Commonwealth of the Northern Mariana Islands, as long as the Act does not apply to them, or to FAS citizens residing in the fifty States or the District of Columbia.

Did the Service Publish a Rule Prior to Issuing This Final Rule?

On June 4, 1998, the Service published a proposed rule at 63 FR 30415. Written comments were to be submitted on or before August 3, 1998. The Service received three comments. The following is a discussion of the public comments and the Service's responses.

Discussion of Comments

All commenters expressed concern with the proposed definition of "dependents," in particular, limiting dependents to an unemployed spouse, parents and unmarried children under 21 years of age. In the opinion of one commenter, this ignores the realities of family life in the Pacific Islands. However, it would not be workable to include distant relatives and family friends in the definition of "dependents," as the writers advocated. In addition, the need to minimize any increase in social service expenditures by the territory and possession governments on behalf of habitual resident dependents renders the above-noted definition necessary.

One commenter recommended that the poverty guidelines established by the Department of Health and Human Services (HHS) that are required of the family unit be made applicable to the single individual with no family. Under the proposed rule, only 40 hours of "gainful employment" each week, regardless of his or her salary, were required of such an individual. Another commenter suggested striking altogether the requirement that the financial resources of the family unit meet or exceed 100 percent of these poverty guidelines. Another suggestion involved adjusting the HHS official poverty guideline standard to reflect the actual circumstances in Guam.

The Service lacks the needed expertise in matters relating to determining poverty guidelines to make meaningful adjustments to the HHS official poverty guidelines so as to reflect the actual circumstances in Guam, the territory most affected by this rulemaking. By incorporating the requirement that a habitual resident be "self-supporting," however, the standard becomes based on the ability to financially support oneself with regard to local conditions. Further, "self-supporting" is defined in the final rule as either: (a) Having a lawful occupation of a current and continuing nature which provides 40 hours of gainful employment each week, without regard to the actual income or size of the family (for part-time students in college or institutions of higher learning the 40-hour requirement is reduced by three hours for each college or graduate credit-hour of study); or (b) in the case of a person employed for less than 40 hours a week or not at all, having lawfully derived funds that meet or exceed 100 percent of the official poverty guidelines for Hawaii for a family unit of the appropriate size as published annually by HHS. This approach provides what the Service views as a simple, fair, and flexible standard consistent with the Compacts.

All commenters voiced concern over adequate enforcement procedures. The writers suggested implementation of a registration system financed from revenues collected from the Service operation on Guam. These commenters wrote that the Service collects more revenue via fees than it expends in fulfilling its statutory obligations on Guam. However, the Service notes that, with the exception of a \$6 Inspections user fee that all arriving persons pay upon entering Guam by air, immigration fees collected by the Service within Guam are not retained by the Service but are turned over to the Treasurer of Guam, pursuant to section 30 of the

Organic Act of Guam, 48 U.S.C. 1421(h). In addition, the Inspections user fee does not currently cover the Service's operational costs on Guam.

Appropriated funds are used to make up the difference. Therefore, there are no surplus funds from the Inspections user fee account that can be used to finance the enforcement efforts advocated by the commenters.

The Service is aware of the difficulties in enforcing the proposed rule in an *ad hoc* fashion. In order to address the concerns of the commenters and to be in compliance with our own obligation to enforce the nondiscriminatory limitations on habitual residence provided for by the Compacts and Congress, the Service intends to work with the Government of Guam and the United States Department of the Interior in order to establish methods to fairly enforce the nondiscriminatory limitations on habitual residence. (The term "nondiscriminatory" is discussed in the supplementary information portion of the proposed rule. Since the Service has made no changes in how the term is used, there is no need here for further discussion.)

The Service will enforce the existing requirement that all nonimmigrants, including FAS citizens entering a United States territory, complete Service Form I-94, Arrival-Departure Record, and turn it in, as required, upon departure. See 8 CFR 235.1(f) The Service may extract information from the I-94 for possible enforcement purposes and may share this information with the Government of Guam on an as-needed basis.

The final rule, therefore, establishes the rebuttable presumption that an FAS citizen is a habitual resident if the Service has reasons to believe that the FAS citizen was admitted to a United States territory more than a year ago but failed to turn in his or her I-94 upon departure, or failed to apply for a replacement arrival-departure record. Having the correct information, as gleaned from the I-94, on a particular FAS citizen's arrival and departure is important. Without such information the Service will now know how much time the FAS citizen has previously spent within the territory, and therefore may not know whether or not the FAS citizen is a habitual resident.

This presumption approach the Service intends to use is similar to the concept employed in a parking lot in order to determine the amount a driver must pay for parking. Upon entering the lot, the driver gets a ticket and then turns it in upon leaving to determine how much to pay. If the driver loses his or her ticket, the parking lot charges the

driver for the maximum amount of time, since the parking lot attendant is able to know only when the driver is leaving. The burden is always on the driver to prove the time of entry into the parking lot. In this example, the driver's entry is proven via the parking lot ticket.

The Service will apply the same concept to the situation at hand. If the Service only knows when the FAS citizen was previously admitted, the burden is on the FAS citizen to show when he or she departed. The form itself requires that it be surrendered upon departure. The presumption can be rebutted by evidence that the FAS citizen was not in the territory for a total of at least 365 days and has not established a continuing or lasting residence. If the FAS citizen can prove he or she made an entry elsewhere on a specific date, that will demonstrate that he or she was not in the territory between that date and the date of his or her next application for admission to the United States territory.

The Service notes that the definition of "habitual resident" has been modified in this context in order to conform more closely to the definition of "habitual residence" found in section 461 of the Compacts. In particular, the Service notes that for an FAS citizen to be considered a habitual resident, he or she must have a continuing or lasting residence in the United States territory after an admission, including physical presence for a cumulative total of at least 365 days. The fact that an FAS citizen may be a habitual resident does not necessarily render the FAS citizen inadmissible to the United States territory. For example, if the resident is self-supporting, he or she may not necessarily be inadmissible.

Finally, organization of the final rule is different from that of the proposed rule in order to comply with the plain-language requirements currently used by Executive Branch agencies in drafting regulations.

Regulatory Flexibility Act

The Commissioner of the Immigration and Naturalization Service, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule affects relatively small communities, primarily on Guam. Because the rule would require that the nonimmigrant be self-supporting in order to establish and maintain habitual residence in a territory or possession of the United States, the impact of the rule

on the local economies should be positive.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Act of 1996. This rule will not result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is not considered by the Department of Justice, Immigration and Naturalization Service to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, the Office of Management and Budget has waived its review process under section 6(a)(3)(A).

Executive Order 13132

The regulation proposed will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Summary Impact Statement.

Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 8 CFR Part 214

Administrative practice and procedures, Aliens, Employment, Foreign officials, Health professionals, Reporting and recordkeeping requirements, Students.

Accordingly, part 214 of chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 is revised to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; sec. 643, Pub. L. 104–208, 110 Stat. 3009–708; Section 141 of the Compacts of Free Association with the Federated States of Micronesia and the Republic of the Marshall Islands, and with the Government of Palau, 48 U.S.C. 1901, note, and 1931 note, respectively; 8 CFR part 2.

2. Section 214.7 is added to read as follows:

§ 214.7 What is habitual residence in the territories and possessions of the United States and what are the consequences thereof?

(a) *Definitions.* As used in this section, the term:

(1) *Compacts* means the agreements of free association between the United States and the governments of the Republic of the Marshall Islands, the Federated States of Micronesia, and Palau, approved by Public Law 99–239 with respect to the governments of the Republic of the Marshall Islands and the Federated States of Micronesia, and by Public Law 99–658, with respect to Palau.

(2) *Freely associated states (FAS)* means the following parts of the former Trust Territories of the Pacific Islands, namely, the Republic of the Marshall Islands, the Federated States of Micronesia, and Palau.

(3) *Territories and possessions of the United States* means all territories and possessions of the United States to which the Act applies, including those commonwealths of the United States that are not States. It does not include American Samoa and the Commonwealth of the Northern Mariana Islands, as long as the Act does not apply to them.

(4)(i) *Habitual resident* means a citizen of the FAS who has been admitted to a territory or possession of the United States (other than American Samoa or the Commonwealth of the Northern Mariana Islands, as long as the Act is not applicable to them) pursuant to section 141(a) of the Compacts and who occupies in such territory or possession a habitual residence as that term is defined in section 461 of the Compacts, namely a place of general abode or a principal, actual dwelling place of a continuing or lasting nature. The term "habitual resident" does not apply to:

(A) A person who has established a continuing residence in a territory or possession of the United States, but whose cumulative physical presence in the United States amounts to less than 365 days; or

(B) A dependent of a resident representative described in section 152 of the Compacts; or

(C) A person who entered the United States for the purpose of full-time studies as long as such person maintains that status.

(ii) Since the term "habitual" resident requires that the person have entered the United States pursuant to section 141(a) of the Compacts, the term does not apply to FAS citizens whose presence in the territories or possessions is based on an authority other than section 141(a), such as:

(A) Members of the Armed Forces of the United States described in 8 CFR § 235.1(c);

(B) Persons lawfully admitted for permanent residence in the United States; or

(C) Persons having nonimmigrant status whose entry into the United States is based on provisions of the Compacts or the Act other than section 141(a) of the Compacts.

(5) *Dependent* means a citizen of the FAS, as defined in section 141(a) of the Compacts, who:

(i) Is a habitual resident;

(ii) Resides with a principal habitual resident;

(iii) Relies for financial support on that principal habitual resident; and

(iv) Is either the parent, spouse, or unmarried child under the age of 21 of the principal habitual resident or the parent or child of the spouse of the principal habitual resident.

(6) *Principal habitual resident* means a habitual resident with whom one or more dependents reside and on whom dependent(s) rely for financial support.

(7) *Self-supporting* means:

(i) Having a lawful occupation of a current and continuing nature that provides 40 hours of gainful employment each week. A part-time student attending an accredited college or institution of higher learning in a territory or possession of the United States receives for each college or graduate credit-hour of study a three-hour credit toward the 40-hour requirement; or

(ii) If the person cannot meet the 40-hour employment requirement, having lawfully derived funds that meet or exceed 100 percent of the official poverty guidelines for Hawaii for a family unit of the appropriate size as published annually by the Department of Health and Human Services.

(8) *Receipt of unauthorized public benefits* means the acceptance of public benefits by fraud or willful misrepresentation in violation of section 401 or 411 of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, 110 Stat. 2261, 2268, as amended by sections 5561 and 5565 of the Balanced Budget Act of 1997, Public Law 105-33, 111 Stat. 638, 639.

(b) *Where do these rules regarding habitual residence apply?* The rules in this section apply to habitual residents living in a territory or possession of the United States to which the Act applies. Those territories and possessions are at present Guam, the Commonwealth of Puerto Rico, and the American Virgin Islands. These rules do not apply to habitual residents living in American Samoa or the Commonwealth of the Northern Mariana Islands, as long as the Act does not extend to them. These rules are not applicable to habitual residents living in the fifty States or the District of Columbia.

(c) *When is an arriving FAS citizen presumed to be a habitual resident?* (1) An arriving FAS citizen will be subject to the rebuttable presumption that he or she is a habitual resident if the Service has reason to believe that the arriving FAS citizen was previously admitted to the territory or possession more than one year ago; and

(2) That the arriving FAS citizen either:

(i) Failed to turn in his or her Form I-94 when he or she previously departed from the United States; or

(ii) Failed to apply for a replacement Form I-94.

(d) *What rights do habitual residents have?* Habitual residents have the right to enter, reside, study, and work in the United States, its territories or possessions, in nonimmigrant status without regard to the requirements of sections 212(a)(5)(A) and 212(a)(7)(A) and (B) of the Act.

(e) *What are the limitations on the rights of habitual residents?* (1) A habitual resident who is not a dependent is subject to removal if he or she:

(i) Is not and has not been self-supporting for a period exceeding 60 consecutive days for reasons other than a lawful strike or other labor dispute involving work stoppage; or

(ii) Has received unauthorized public benefits by fraud or willful misrepresentation; or

(iii) Is subject to removal pursuant to section 237 of the Act, or any other provision of the Act.

(2) Any dependent is removable from a territory or possession of the United States if:

(i) The principal habitual resident who financially supports him or her and with whom he or she resides, becomes subject to removal unless the dependent establishes that he or she has become a dependent of another habitual resident or becomes self-supporting; or

(ii) The dependent, as an individual, receives unauthorized public benefits by fraud or willful misrepresentation; or

(iii) The dependent, as an individual, is subject to removal pursuant to section 237 of the Act, or any other provision of the Act.

Dated: September 12, 2000.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 00-23788 Filed 9-18-00; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. 29334; Amendment No. 71-32]

Airspace Designations; Incorporation by Reference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends FAA regulations relating to airspace designations to reflect the approval by the Director of the Federal Register of the incorporation by reference of FAA Order 7400.9H, Airspace Designations and Reporting Points. This action also explains the procedures the FAA will use to amend the listings of Class A, Class B, Class C, Class D, and Class E airspace areas and reporting points incorporated by reference.

DATES: These regulations are effective September 16, 2000, through September 15, 2001. The incorporation by reference of FAA Order 7400.9H is approved by the Director of the Federal Register as of September 16, 2000, through September 15, 2001.

FOR FURTHER INFORMATION CONTACT: Brenda Brown, Janet Glivings, or Christine Graves, Airspace and Rules Division (ATA-400), Office of Air Traffic Airspace Management, Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591; telephone: (202) 267-8783.