

GREGORIO KILILI CAMACHO SABLAN
NORTHERN MARIANA ISLANDS

COMMITTEE ON NATURAL RESOURCES
RANKING MEMBER, SUBCOMMITTEE ON FISHERIES,
WILDLIFE, OCEANS AND INSULAR AFFAIRS
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Congress of the United States
House of Representatives
Washington, DC 20515

423 CANNON HOUSE OFFICE BUILDING
(202) 225-2646
TOLL FREE: 1 (877) 446-3465
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www.Sablan.house.gov
kilili@mail.house.gov

January 27, 2012

The Honorable Emily S. McMahon
Deputy Assistant Secretary
Office of Tax Policy - Internal Revenue Service
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Room 3120
Washington, DC 20224

Dear Deputy Assistant Secretary McMahon:

I write to express my concerns about the recent change in Internal Revenue Service policy regarding social security and Medicare taxation of Filipino workers in the Northern Mariana Islands, which I represent in Congress. This policy was published in the 2012 edition of IRS Publication 80 (Circular SS), Federal Tax Guide for Employers in the U.S. Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI). I would also appreciate the opportunity to meet with you to discuss these concerns directly now that Congress is back in session.

The 2012 Publication 80 states that Filipino residents admitted for work in the Northern Marianas are not exempt from social security and Medicare taxes (FICA) on the basis of holding a work permit under CNMI immigration law. This reflects a change to existing IRS policy. Since at least 1997, Filipino workers in the Northern Marianas, admitted under local immigration law, have been exempt from FICA. As of November 28, 2009, however, immigration has transitioned from local to federal control by action of U.S. Public Law 110-229. Publication 80 now advises that Filipino workers are only eligible for exemption based on "some other circumstances," such as working under a U.S. H-2 visa.

Publication 80 leaves Filipino workers and their employers, who are also subject to FICA, confused. It is unclear to many when their exemption ends and when the FICA tax liability will apply to them. Workers' previous, locally-issued work status expired on or before November 27, 2011. Yet few workers have been issued any new federal status, as the Department of Homeland Security is still processing a backlog of applications. In effect, workers continue to work based on their locally-issued status, which had been a basis for exemption from FICA. At some time undefined in Publication 80, however, that locally-issued status appears to have ceased to be a basis for exemption.

I understand that large employers in the Marianas have begun to deduct FICA from Filipino workers' wages and, presumably, to deposit these funds and the employer-share with the IRS. If their Filipino workers are not yet liable for FICA, if they never receive a federal status, or if they receive an H-2 visa or qualify for exemption under "some other circumstance," these employers will be able to obtain a credit against future liabilities to the IRS.¹ Their workers, however, are by-and-large employed at the federal minimum wage of \$5.05/hour. A deduction for FICA, currently 5.65 percent, represents a significant hardship for these low-wage workers, who in addition to providing for their own support often repatriate earnings to family members in their home country. Though there may be a possibility of a future refund of any FICA deduction, workers are still left with significantly reduced resources to meet present expenses. An analogous cash-flow problem arises for small employers in the Northern Marianas, where economic conditions already place many businesses on a knife-edge. Overpayment of the 7.65 percent employer-share of FICA, an unexpected and unbudgeted expense for these businesses, could easily lead to closures and a further exacerbation of macroeconomic problems in the islands, where GDP has dropped every year since 2004.

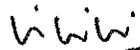
Public Law 110-229, from which the IRS decision that FICA taxes should generally apply to Filipino workers in the Northern Mariana Islands may arise, had among its stated congressional intentions "to minimize, to the greatest extent practicable, potential adverse economic and fiscal effects of phasing-out the Commonwealth's nonresident contract worker program and to maximize the Commonwealth's potential for future economic and business growth..." It would be consistent with this policy set by Congress, given the uncertainties I have briefly explained above, for the Department of the Treasury to set a date certain for the effectivity of the FICA tax liability for Filipino workers and their employers. Giving workers and employers time to budget for the unexpected FICA liability, allowing the Department of Homeland Security time to establish and inform workers and their employers of the visa status that each Filipino worker will have going forward, and providing time for the courts to adjudicate the question of whether this FICA liability is proper would be a reasonable exercise of the IRS responsibility to collect revenues and would be consistent with the congressional intent governing the transition to federal management of immigration in the Northern Mariana Islands. This would also reduce any unnecessary administrative burden to the IRS that might arise from multiple adjudications of refund requests by workers improperly charged.

¹ The recently filed complaint for declaratory relief from the imposition of FICA on Filipino and Korean workers filed by the Commonwealth of the Northern Mariana Islands against the Department of Treasury also raises the possibility that an overpayment could occur.

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Thank you for your consideration of these issues. I look forward to meeting with you to discuss them further.

Sincerely,

Handwritten signature of Gregorio Kilili Camacho Sablan, consisting of stylized initials 'kili' and a horizontal line.

GREGORIO KILILI CAMACHO SABLAN
Member of Congress

cc: The Honorable Douglas H. Shulman, Commissioner, Internal Revenue Service
Mr. William J. Wilkins, Chief Counsel, Internal Revenue Service
The Honorable Anthony M. Babauta, Assistant Secretary, Department of the Interior